

**THE HIGH COURT**

**[Record No. 2012/4744P]**

**BETWEEN/**

**MICHAEL McATEER AND (BY ORDER OF LAFFOY J. OF 15TH  
NOVEMBER 2012) BANK OF IRELAND MORTGAGE BANK**

**PLAINTIFFS**

**-and-**

**FRANK SHEAHAN (OTHERWISE FRANKIE SHEAHAN)**

**DEFENDANT**

**AND**

**[Record No. 2012/12130P]**

**BETWEEN/**

**FRANK SHEAHAN, JOSEPH SHEAHAN AND MYMORTGAGES LIMITED**

**PLAINTIFFS**

**-and-**

**THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND, BANK  
OF IRELAND MORTGAGE BANK AND MICHAEL McATEER**

**DEFENDANTS**

**AND**

**[Record No. 2013/5089P]**

**BETWEEN/**

**MICHAEL McATEER**

**PLAINTIFF**

**-and-**

**JOSEPH SHEAHAN**

**DEFENDANT**

**AND**

**[Record No. 2012/724Sp]**

**BETWEEN/**

**BANK OF IRELAND MORTGAGE BANK**

**PLAINTIFF**

**-and-**

**FRANK SHEAHAN**

**DEFENDANT**

**JUDGMENT of Ms Justice Iseult O'Malley delivered the 19th day of June, 2015**

**Introduction**

1. These proceedings have a somewhat complex history. However, due to the fruitful efforts of the parties in the case management process, the issues were streamlined and dealt with simultaneously. Without prejudice to the onus of proof in any given case, Mr. McAteer ("the receiver") and/or Bank of Ireland Mortgage Bank ("the bank", or "BOIMB")) and/or the Governor and Company of the Bank of Ireland ("GovCo") acted as the moving party throughout the hearing.

2. All of the cases relate to borrowings by Joseph Sheahan and his brother Frank Sheahan Junior. It is accepted by the Sheahans that they entered into the various agreements and drew down monies on foot thereof. It is also accepted that letters of demand in relation to each of the loans were issued on the 1st November, 2011, (although the validity of the demands is in issue).

3. In the first case (the "receiver proceedings"), the receiver seeks, primarily, an order for possession of certain properties on the basis of his appointment as receiver by the bank. The defendant disputes the validity of the appointment and counterclaims that the bank has acted in breach of various agreements with him. He seeks, in the counterclaim, an order for specific performance of the agreements and/or damages for breach of contract; a declaration that the loans are unenforceable and the securities pertaining to them are void, and an order directing the sale of the properties.

4. In the second case, (the "Sheahan plaintiff" proceedings) the plaintiffs (not including Mymortgages Limited, which has served a notice of discontinuance) seek various orders restraining the defendants from interfering with the properties and a declaration that the appointment of the receiver was unlawful.

5. The parties are agreed that there is no necessity for the court to consider the evidence relating to allegations made by each side as to unlawful conduct after the appointment of the receiver, since the determination of the validity or otherwise of the appointment will determine which side has acted correctly.

6. In the third case (the "Beechgrove" proceedings), the receiver seeks an order as against Joseph Sheahan for possession of a property known as Beechgrove and also orders restraining the defendant from interfering with the exercise of his functions. The defendant relies on the claims made by him in the Sheahan Plaintiff case.

7. In the fourth case, the bank seeks an order for possession of a property known as Site No. 134, Leslie's Arch, Old Quarter, Ballincollig. These proceedings were instituted for the particular purpose of setting up a special case in relation to the effects of certain provisions of the Land and Conveyancing Law Reform Act, 2009. One of the issues in the special case, in which I gave judgment on the 13th September, 2013 (*McAteer & anor v Sheahan* [2013] IEHC 417), was whether the bank had an entitlement to seek possession under the repealed provisions of the Registration of Title Act, 1964. That issue was determined against the bank. However, I also held that the bank's power to appoint a receiver was unaffected by the change in the legislation.

8. A fifth case (the "guarantor" proceedings) relates to guarantees alleged to have been given by Frank Sheahan Senior and has, by agreement, been held over. The parties to those proceedings have however also agreed that the determination of a particular question by this court will bind the parties in those proceedings, the question being whether two specified loan accounts in the name of Joseph Sheahan were in arrears as of the date of demand.

#### **Background facts**

9. The Sheahans are a well-known family from Cork. Frank Sheahan Senior is a successful businessman with substantial experience in the world of property investment. His son Joseph, or Joey, was originally an auctioneer before setting up Mymortgages, a mortgage brokerage. Frank Sheahan Junior, or Frankie, was a well-known professional rugby player and retired from the sport in 2009.

10. For the avoidance of confusion, and not out of any disrespect, I will for the most part refer to Joseph and Frankie by these names and to their father as Mr. Frank Sheahan.

11. The loans in question were offered between the years 2005 and 2008 inclusive. It is common case that nearly all related to buy-to-let investment properties. However, separate considerations arise in respect of a loan drawn down by Joseph in 2006 for the purchase of Beechgrove. He subsequently moved into the house and there is a dispute as to the circumstances and consequences of that.

12. Each of the loans provided for an initial period, varying from 5 to 10 years, during which interest only was payable. The written agreements all stipulate that at the end of that period the repayment instalments would include capital. Joseph and Frankie maintain, however, that the bank staff with whom they dealt assured them at all times that this was only a formality, required by internal bank policy, and that the interest-only periods would be renewed as a matter of course.

13. Each loan agreement specifies as security the property to be purchased (or in some cases renovated) with the loan. In addition, most specify other properties owned by the borrower including those already securing other loans.

14. Five of the loans are guaranteed by Mr. Frank Sheahan. There are other loans where a guarantee was required in the written agreement but never actually given or called for. Joseph and Frankie say that they were at all times assured that the guarantees would not be called upon save in a "worst case scenario", meaning if the properties had to be sold and there was a shortfall. They contend that all the properties were part of a "loan pool" agreement, such that if a property, the subject of an unguaranteed loan, had to be sold the proceeds would be applied in the first instance to repayment of the guaranteed loans. The "loan pool" arrangement is said to arise on foot of an express or implied term, and/or as a result of a course of dealing.

15. The bank denies the existence of any such "loan pool" agreement and says that each mortgage was an "all sums due" mortgage – that is, that in each case the secured monies included any sums due either then or in the future on foot of secured lending.

16. While the guarantees are in issue in the fifth set of proceedings, in which the bank makes claims against Mr. Sheahan, Joseph and Frankie say that by calling on the guarantees the bank has acted in breach of its contract with them. The bank argues that the validity of its actions *vis a vis* the guarantor is irrelevant to the liability of Joseph and Frankie.

17. The loans were called in on the 1st November, 2011. The receiver was appointed in respect of various properties on various dates between November 2011 and September 2012.

18. The Beechgrove property, as noted above, has to some extent to be treated separately arising from the fact that Joseph moved into it as his family home. The original agreement in respect of this house provided, as did all the other agreements, for an initial interest free period. However, when Joseph informed the bank in July 2007 (for the purpose of changing his correspondence address) that he had moved in, the bank reacted by redesignating the loan on the basis that it now related to a family home and should not, therefore, be interest free. For a period of months capital payments were taken in respect of the loan account, until the bank agreed to provide a further interest free period. Refunds were subsequently made to the account for this reason.

19. Joseph maintains that the bank was at all times aware that he wanted the house as his family home, but that the bank official with whom he dealt told him that he would not get approval for the loan on that basis and that the proposal should be "packaged" as

an investment property loan. He says, on this basis, that he is entitled to the benefit of the agreement, asserted in respect of this and all of the loans, that the interest free period would be renewed. Joseph further maintains that the effect of wrongfully taking the capital payments in respect of this loan put his cash-flow under pressure to the extent that he began to fall into arrears on other accounts.

20. It was originally contended that, if full credit was given for the wrongful taking of the capital payments, proper adjustments to the account would show that it was not in arrears as of the date of the bank's demand. However, both sides having called expert witnesses on this issue, it was conceded in closing submissions that on any version of the figures the account was in fact in arrears on the relevant date. The argument then became one as to the significance of the arrears.

21. Finally, an issue arises as to the effect of certain letters written by Joseph and Frankie, after the appointment of the receiver and the institution of proceedings, to various members of the bank staff. The letters were in response to demands for payment of arrears on specific accounts, and purported to offer cheques in settlement of the litigation in so far as those accounts were concerned. Some of these cheques were lodged by the bank, and it is contended that the bank thereby bound itself to the terms of the letters.

### **The mortgage and loan documents**

22. The mortgages are all in standard form. In the general conditions of each one, it is stipulated in clause 1(b) that the waiver by the bank of any breach of any condition shall not prevent the subsequent enforcement of that condition and shall not be deemed a waiver of any subsequent breach.

23. Clause 4(b) provides that in the event of any repayment not being paid on the due date, or of any breach of the conditions of the loan, the bank may demand an early repayment of the principal and accrued interest. Clause 4(d) empowers the bank, at its absolute discretion, and with the consent of the borrower, to vary any payment of principal, interest or other amounts payable in respect of the loan.

24. In the documents the term "secured monies" is defined as including

*"(a) the balance or balances which are or shall be for the time being be or become due or owing by the mortgagor to the mortgagee on foot of any secured loan whether present or future;*

*(b) all interest, liabilities and obligations; and*

*(c) the expenses and all other monies which the mortgagor covenants to pay to the mortgagee."*

25. A "secured loan" is defined as

*"any loan or other facility made to the mortgagor whether a loan or jointly with any other person or persons by the mortgagee, where it expressly provides in the offer letter or credit agreement signed by the mortgagor or any amendment or variation thereto accepted in writing by the mortgagor or any substitute or replacement offer letter or other credit agreement, such loan or other facility is secured or is to be secured by the mortgaged property."*

26. The "mortgaged property" is the property being charged by the deed.

27. Clause 1 of the mortgages contains the borrower's covenant to pay on demand the secured moneys. Clause 1.03 provides in relevant part as follows:

*"The demand herein referred to shall mean a demand for payment of the secured moneys made by the Mortgagee or on behalf of the Mortgagee by any law agent or solicitor, secretary, manager or other officer of the Mortgagee or other person authorised to make such a demand upon the Mortgagor..."*

28. Clauses 6 and 7 deal with the power to appoint a receiver. By clause 7.01 the bank agrees not to appoint a receiver unless (*inter alia*) default is made in payment of any monthly or other periodic payment or in payment of any other of the secured monies.

### **Summary of loan account details**

29. In all cases the date of demand was 1st November, 2011.

1. Mortgage Account Number: 23682147

Borrower: Joseph Sheahan

Date of Offer: 07/06/2005

Amount: €300,000

Repayments: 60 instalments of interest only, 240 instalments of capital and interest

Purpose: Purchase of 69 Seana Mhuileann

Security:

- 69 Seana Mhuileann, Ladyswell, Co. Cork

Arrears: The last payment made on this account was on the 18th

July, 2011. As of that date the arrears were €6,225.52. No further payments were made in this account. The last transaction entry into the account before the 1st November, 2011, was on the

15th October, 2011. As of that date the arrears were €10, 815.37. The arrears balance as of 1st October, 2014, was €60,381.30.

2. Mortgage Account Number: 23682059

Borrower: Frankie Sheahan

Date of Offer: 09/06/2005

Amount: €280,000

Repayments: 60 instalments of interest only, 240 instalments of capital and interest

Purpose: Purchase of 67 Seana Mhuileann

Security:

- 67 Seana Mhuileann, Ladyswell, Co. Cork

Arrears: This account began to go into arrears in March, 2011. The last payment made was on the 3rd August, 2011, on which date the arrears were €5,113.64. The last transaction entry is the 5th October, 2011. As of the date of the demand the arrears were €9,399.14. As of the 1st October, 2014, the arrears balance stood at €55,799.94.

3. Mortgage Account Number: 13037187

Borrower: Frankie Sheahan

Date of Offer: 09/09/2005

Amount: €304,000

Repayments: 60 interest-only instalments, 240 capital & interest.

Purpose: Purchase of 29 Ard Patrick

Security:

- 29 Ard Patrick, Limerick

- 8 Hunters Vale, Maryborough Woods

- 67 Seana Mhuileann, Ladyswell, Co. Cork

Arrears: This account began to go into arrears in May, 2011. The last payment made was the 13th July, 2011, on which date the arrears were €3,585.72. As of the date of demand the arrears were €9,096.24. The arrears balance as of the 1st October,

2014, was €61,857.43

4. Mortgage Account Number: 23738331

Borrower: Joseph Sheahan

Date of Offer: 22/09/2005

Amount: €304,000

Repayments: 60 instalments interest only, 240 instalments capital plus interest

Purpose: Purchase of 25 Ard Patrick

Security:

- 25 Ard Patrick, Limerick

- Guarantee of Mr. Frank Sheahan

Arrears: From April to July, 2011 the payments made on this account were less than the due amounts. No payments were made after the 15th July, on which date the arrears stood at €4,879.11. The last transaction entry was the 15th October, 2011. The amount of arrears as of the date of demand was €9,555.09. As of the 1st

October, 2014, the arrears balance was €60,079.87.

5. Mortgage Account Number: 16543587

Borrower: Joseph Sheahan

Date of Offer: 21/10/2005

Amount: €220,000

Repayments: 120 interest only, 120 capital + interest

Purpose: purchase of 25A Brook Square

Security:

- 25A Brook Square, South Terrace, Cork
- 69 Seana Mhuileann, Ladyswell, Cork
- 25 Ard Patrick, Ladyswell, Cork
- Personal Guarantee of Mr. Frank Sheahan in the amount of €304,000

Arrears: There were some underpayments in early to mid-2011. No payments were made after 20th July, 2011, at which point the arrears were €173.89. As of the date of demand the arrears were €1,713.13. As of the 1st October, 2014, the arrears balance was €9,416.49.

6. This is what is referred to as the main Beechgrove account, which relates to the house purchased by Joseph and into which he subsequently moved.

Mortgage Account Number: 20547919

Borrower: Joseph Sheahan

Date of Offer: 25/11/2005

Amount: €616,000

Repayments: 120 instalments interest only, 120 capital plus interest

Purpose: Purchase of Beechgrove

Security:

- Beechgrove, Maryborough Hill, Douglas, Cork
- 69 Seana Mhuileann, Ladyswell, Cork
- 25 Ard Patrick, Ladyswell, Cork
- Personal Guarantee from Mr. Frank Sheahan guaranteeing the borrower's liabilities in the amount of €616,000 and €304,000 in respect of principal together with interest and costs accrued thereon.
- Assignment to the Bank of a Level Term Life Policy on the life of Joey Sheahan for a minimum amount of €616,000.

Arrears: The bank statements show that until June, 2007 the account was being charged interest only. In July, August and September significantly higher sums were applied, reflecting the redesignation of the loan. From October, 2007 the bank agreed to an interest only period.

The first instalment at the higher rate (including capital repayments) was paid in November, 2010 but thereafter the arrears began to mount, notwithstanding that some payments were met.

By letter date the 28th April, 2011, the bank stated that, while not obliged to do so, it was prepared to reinstate interest only payments in respect of this and the associated loan (account no. 43376454).

In the case of the Beechgrove account, this period was to be extended to December, 2015 and the case of the associated account to October, 2013.

However, despite this, and despite certain sums refunded to the account, arrears continued to accrue in 2011. As of the date of demand the arrears were, according to the bank's evidence, €4,821.88.

This figure then increased over the following months. However, on the 8th October, 2012, a lodgement of €15,000 was made which significantly reduced the arrears. Some further payments were made until November, 2013. As of the 1st October, 2014, the arrears balance stood at €4,627.17.

7. Mortgage Account Number: 24737621

Borrower: Frank Sheahan

Date of Offer: 20/01/2006

Amount: €1,690,000

Repayments: 120 instalments interest only, 180 capital plus interest.

Purpose: purchase of 26 The Courtyard, 134 Leslies Arch, 155 Leslies Arch and No.11, Block A, Maryborough Woods.

Security:

- 8 Hunters Vale, Maryborough, Douglas, Cork
- 29 Ard Patrick, Ladyswell, Cork
- 67 Seana Mhuileann, Ladyswell, Cork
- 26 The Courtyard, Fota, Cork

- 134 Leslies Arch, Old Quarter, Ballincollig
- 155 Leslies Arch, Old Quarter, Ballincollig
- Apartment 11, Block A, Maryborough Woods, Douglas, Cork

Arrears: No payments were made on this account from July 2011.

As of the date of demand the arrears stood at €8,709.84. As of the 1st October, 2014, the arrears balance was €60,018.20.

8. Mortgage Account Number: 25255405

Borrower: Joseph Sheahan

Date of Offer: 24/01/2006

Amount: €254,000

Repayments: 120 interest only, 120 capital plus interest

Purpose: to clear another loan account

Security:

- 69 Seana Mhuileann, Ladyswell, Cork
- 25 Ard Patrick, Ladyswell, Cork
- 15A Brook Square, South Terrace, Cork
- Beechgrove, Maryborough Hill, Douglas
- 154 Curragh, Woods, Cork
- Personal Guarantee of Frank Sheahan Senior

Arrears: The last payment in this account was in July, 2011. As of the date of demand the arrears were €2,145.57. As of the 1st October, 2014, the arrears balance was €5,960.37.

9. Mortgage Account Number: 39707433

Borrower: Joseph Sheahan

Date of Offer: 12/05/2006

Amount: €285,000

Repayments: 84 instalments interest only, 156 capital and interest

Purpose: purchase of 39A Brook square

Security:

- 39A Brook square, South Terrace, Cork
- 29 Seana Mhuileann, Ladyswell, Cork
- 29 Ard Patrick, Limerick
- 25A Brook Square, South Terrace, Cork
- Beechgrove, Maryborough Hill, Douglas,
- 154 Curragh Woods, Frankfield, Cork
- Letter of Guarantee from Frank Sheahan Senior
- Letter of Guarantee from Frank Sheahan Senior

Arrears: There were no payments between 22nd July, 2011, and the

8th October, 2012. As of the date of demand the arrears were €2,240.03. On the 8th October, 2012, a lodgement of €10,000 was made. Three further lodgements were made in the course of 2013. As of the 1st October, 2014, the arrears balance stood at €18,886.19.

10. This account is associated with the main Beechgrove account and the two loans were treated in the same way.

Mortgage Account Number: 43376454

Borrower: Joseph Sheahan

Date of Offer: 04/07/2006

Amount: €138,000

Repayments: 84 interest only, 216 capital and interest

Purpose: Equity release to purchase 0.2 of an acre to the rear of Beechgrove

Security:

- 0.2 Acre to the rear of Beechgrove, Maryborough Hill, Douglas Hill, Cork
- 69 Seana Mhuileann, Ladyswell, Cork
- 25 Ard Patrick, Ladyswell, Cork
- 154 Curragh Woods, Frankfield, Co. Cork
- Beechgrove, Maryborough Hill, Douglas
- Letter of Guarantee from Frank Sheahan Senior

Arrears: The last payment made on the account was 25th July,

2011. As of the date of demand the arrears were €994.01. As of the 1st October, 2014, the arrears balance stood at €12,582.45

11. Mortgage Account Number: 46857384

Borrower: Frankie Sheahan & Norma Murphy

Date of Offer: 23/08/2006

Amount: €315,000

Repayments: 84 interest only, 216 capital and interest

Purpose: This appears to be to purchase 220 The Kestrel.

Security:

- 220 The Kestrel, Jacobs Island, Ballinure, Cork
- 8 Hunters Vale, Maryborough, Cork
- 29 Ard Patrick, Limerick
- 26 The Courtyard, Fota, Cork
- 134 Leslie's Arch, Old Quarter, Ballingcollig
- 155 Leslie's Arch, Old Quarter Ballingcollig
- 11 Block A, Maryborough, Cork
- 67 Seana Mhuileann, Ladyswell, Cork

Arrears: The last repayment was on the 13th July, 2011, at which point the arrears stood at €799.15. As of the date of demand the figure was €3,005.71. As of the 1st October, 2014, the arrears balance stood at €28,714.51

12. Mortgage Account Number: 47741770

Borrower: Frankie Sheahan

Date of Offer: 31/08/2006

Amount: €208,795

Repayments: 191 capital plus interest

Purpose: Purchase of 8 Hunters Vale

Security:

- 8 Hunters Vale, Maryborough, Cork
- 29 Ard Patrick, Ladyswell, Cork
- 26 The Courtyard, Fota, Cork

- 134 Leslie's Arch, Old Quarter, Ballincollig
- 155 Leslie's Arch, Old Quarter Ballincollig
- 11 Block A, Maryborough Woods, Cork
- 67 Sean A Mhuileann, Ladyswell, Cork

Arrears: The last payment made was in October, 2011. The arrears on the date of demand were €6,281.61. As of the 1st October, 2014, the arrears balance stood at €47,217.04.

13. Mortgage Account Number: 70737067

Borrower: Joseph Sheahan & Vincent Clinch

Date of Offer: 28/05/2007

Amount: €140,000

Repayments: 84 interest only, 216 capital and interest.

Purpose: To renovate 35 Mount Sion Road

Security:

- 35 Mount Sion Road, Greenmount, Cork

Arrears: The last payment was in July, 2011. As of the date of demand the arrears figure was €851.58. As of the 1st October, 2014, the arrears balance stood at €5,841.69.

14. Mortgage Account Number: 75560862

Borrower: Joseph Sheahan

Date of Offer: 16/07/2007

Amount: €260,000

Repayments: 84 interest only, 216 capital and interest

Purpose: Purchase of 24A Brook Square

Security:

- 24A Brook Square, South Terrace, Cork
- 25A Brook Square, South Terrace, Cork
- 154 Curragh Woods, Frankfield
- 25 Ard Patrick, Limerick,
- 69 Seana Mhuileann, Ladyswell
- 39A Brook Square, South Terrace

Arrears: The last payment made was in July, 2011. The arrears as of the date of demand stood at €2,225.36. As of the 1st October, 2014, the arrears balance stood at €11,208.25.

15. Mortgage Account Number: 24183112

Borrower: Joseph Sheahan

Date of Offer: 06/11/2007

Amount: €169,000

Repayments: 24 interest only, 336 capital and interest

Purpose: This account is associated with the main Beechgrove account.

Security:

- Beechgrove, Maryborough Hill, Douglas, Co. Cork

Arrears: There are a number of reduced or missed payments in 2010 and 2011. As of the date of demand on the bank's figures the arrears stood at €4,227.72. As of the 1st October, 2014, the arrears stood at €32,737.51.

16. Mortgage Account Number: 81030235

Borrower: Joseph Sheahan & Vincent Clinch



Date of Offer: 06/11/2007

Amount: €260,000

Repayments: 84 interest only, 216 capital and interest

Purpose: purchase of 15 Glean Bui

Security:

- 15 Glean Bui, Ballymacoda, Cork
- 35/35A Mount Sion, Greenmount, Cork

Arrears: As of the date of demand the arrears stood at €2,123.43. As of the 1st October, 2014, the arrears balance stood at €11,285.53.

17. Mortgage Account Number: 81680270

Borrower: Frank & Joseph Sheahan

Date of Offer: 07/11/2007

Amount: €254,000

Repayments: 84 interest only, 216 capital and interest

Purpose: To restructure existing facilities

Security:

- 9 Melbourne Court, Model Farm Road, Cork
- Letter of Guarantee from Frank Sheahan Senior dated 11th December, 2007

Arrears: This account fell into arrears in July, 2011. Arrears as of the date of demand were €2,802.10. On the 8th October, 2012, a lodgement of €8,000 was made and some further small lodgements were made in the course of 2013. As of the 1st October, 2014, the arrears balance stood at €1,877.08

18. Mortgage Account Number: 55334542

Borrower: Joseph Sheahan & Vincent Clinch

Date of Offer: 15/11/2007

Amount: €410,000

Repayments: 84 interest only, 216 capital and interest

Purpose: Purchase and renovation of 35 Mount Sion Road

Security:

- 35 Mount Sion Road, Greenmount, Cork

Arrears: This account fell into arrears in July, 2011. As of the date of demand the figure was €3,312.60. As of the 1st October, 2014, the arrears balance stood at €27,718.82.

19. Mortgage Account Number: 79569165

Borrower: Frank Sheahan

Date of Offer: 19/11/2007

Amount: €2,340,000

Repayments: 84 capital only, 216 capital and interest

Security:

- 61 Dewberry, Mount Oval Village, Cork
- 10 & 261 Charlesland Wood, Greystones, Co. Wicklow
- 15 Deerpark Court, Cork
- 215 The Willows, Boreenamanna Rd, Cork
- 8 Hunters Vale, Maryborough Woods, Cork
- 29 Ard Patrick, Ladyswell, Cork

- 26 The Courtyard, Fota, Cork
- 134 & 155 Leslies Arch Ballincollig, Cork
- Apartment 11, Block A, Maryborough Woods, Cork
- 67 Seana Mhuileann, Ladyswell, Cork
- 19 Fern Drive, Carragaline, Cork, Cork
- Letter of Guarantee from Frank Sheahan Senior dated 29th January 2008

Arrears: As of the date of demand the arrears were €8,044.11. On the 8th October, 2012, there was a lodgement of €32,000. Three further small lodgements were made in the course of 2013. A number of lodgements were made in 2014, leaving a closing arrears figure as of the 26th September, 2014 of €2,502.31

20. Mortgage Account Number: 93349921

Borrower: Joseph Sheahan & Vincent Clinch

Date of Offer: 02/07/2008

Amount: €35,000

Repayments: 60 interest only, 240 capital and interest

Purpose: Equity release

Security:

- 35 Mount Sion, Greenmount, Cork
- 35 A Mount Sion, Greenmount, Cork

Arrears: Arrears as of the date of demand stood at €286.51.

### **The issues**

30. After the completion of the oral evidence the following matters appear to be in issue:

- i) Whether the bank's demands for repayment of the loans were validly made.
- ii) Whether the deeds of appointment of the receiver were validly executed.
- iii) Whether promises had been made to extend the interest only terms of the loans, giving rise to a collateral contract or an estoppel.
- iv) Whether the bank had promised to apply the funds from the sale of the properties to repayment of the guaranteed loans, before calling on the guarantor (the alleged "loan pool" agreement). The argument here is that, although the court is not in these proceedings dealing with the case against the guarantor, the Sheahans have sought in their counter claim an order for the sale of the properties in accordance with the alleged loan pool agreement.
- v) The effect of the cashing by the bank of the cheques offered by the Sheahans (the alleged "recent agreements" issue).
- vi) The extent of the arrears at the time of the demands. It is argued that the figures could be regarded as being less than the amounts set out in the letters of demand, and therefore that the bank misdirected itself in the exercise of its discretion and thereby acted in breach of an implied term of the contract.

### **The letters of demand**

#### *Evidence*

31. Mr. Gavin Kelly said that he was director of consumer banking in GovCo and was also managing director of ICS Building Society and an executive director of Bank of Ireland Mortgage Bank ("BOIMB"). His responsibility in the latter entity was to manage a number of aspects of the mortgage business including pricing and credit policy.

32. Mr. Kelly said that BOIMB outsourced a number of its activities to GovCo and that most of the members of the credit committee were employees of GovCo.

33. Mr. Ronan Gately said that he was an employee of GovCo, and had been for about 27 years. In the summer and autumn of 2011 he was the head of mortgage underwriting and was, as such, authorised to deal with mortgages for both Bank of Ireland Mortgage Bank and ICS.

34. Mr. Gately said that he was based in the credit department and as such had a role in the supervision of arrears or defaulting mortgage accounts. Asked how such supervision was carried out, he said that the case managers (who dealt with the customers) would submit a review sheet to the credit department. There would then be a meeting of what he described as a forum – the Challenged Cases Review Forum (also colloquially known as the credit committee or the collections committee). He was one of four people entitled to chair it. The purpose of the forum was for the case manager and the underwriter to air issues arising from the files

sent by the case managers, and to discuss questions as to forbearance and enforcement. The files included cases from both BOIMB and ICS. His authority to chair the forum came from his line manager, the head of Mortgage and Consumer Credit. As chair, the decision on any action to be taken was his.

35. Mr. Gately was referred to documentation relating to a meeting of the forum, chaired by him, which was held on the 22nd September, 2011. The Sheahans' borrowings were reviewed at this meeting. The case manager was identified as Mr. Stephen P. Healy, who attended the meeting by teleconference. Ms. Colette Finneran, a mortgage underwriter, was also present.

36. For the purposes of the review the documentation included two "high risk" summary sheets presented by the case management team, outlining the details of the accounts in questions. Various developments in relation to the arrears were noted. The income of the borrowers, in so far as it was known to the bank, was set out, as were the total amounts owed in each case and the total exposure of the bank.

37. The documents recorded Mr. Gately's agreement with the recommendation that, in relation to Mr. Frankie Sheahan's investment properties (not his dwelling house), the debts in default should be called in, a receiver appointed and proceedings for judgment initiated.

38. In relation to Mr. Joey Sheahan's investment properties, Mr. Gately's decision was to accept the recommendations to draft a warning letter to the guarantor; call the debt in once default occurred; call in the guarantee when the debt expired; appoint a receiver and initiate judgment proceedings. Mr. Gately identified as his a handwritten note on the document which read

*"Unsustainable, Agree with recommendation above – agree provision €935k – keep under review depending on worth of guarantees."*

39. He also identified his signature on the decisions.

40. Mr. Gately said that after the conclusion of the forum it was for the case manager, in this case Mr. Healy, to act on the decisions taken.

41. Mr. Gately was cross-examined as to the source of his authority. In relation to his evidence that, although an employee of GovCo, he was entitled to make decisions on behalf of BOIMB, he said that he would have been given a discretion letter a couple of months after joining the mortgage side of the Group around the end of October or the start of November, 2010. The letter would have been provided by his immediate superior, a Ms. Lynda Carragher, the head of Mortgage and Consumer Credit. Asked if she was employed by GovCo, he said he believed so but was not privy to her contract.

42. The witness did not have the letter in court but said that he believed he could get it. He said that the letter

*"would have given discretion on both new and existing business and it would have spoken about authority to make demand, to call in -- to appoint receivers and the like."*

43. He confirmed that the discretion in question would have extended to mortgages in BOIMB and ICS.

44. Mr. Gately was asked what he had meant by the word "unsustainable" in the handwritten note. He said that it could mean that the customer did not have sufficient income coming in to meet the payments as they fell due. Asked whether or not the bank had in other cases restructured loans to make them sustainable, he said that might happen if there was some short term issue but that it would be very unusual to offer forbearance to someone whose loans were unsustainable. He said that the full facts of the case would be evaluated. In this case the arrears amounted to €32,000 across the accounts, were increasing, and there was no proposal from the borrowers as to how to deal with this.

45. In re-examination Mr. Gately said that he and three other persons, including his manager Ms. Carragher, were the people who fulfilled this supervisory function for BOIMB. No other person did.

46. Mr. Stephen Healy said that he was a portfolio manager employed by the Bank of Ireland Group (GovCo). He began dealing with two of Joseph Sheahan's accounts around March, 2011, and with Frankie's a few months later. He recalled participating, by teleconference, in the forum meeting of the 22nd September, 2011. He remembered the recommendations made in relation to enforcement action and the appointment of a receiver. It was his job to carry out the instructions approved by Mr. Gately and issue the letters of demand, and he did so.

47. In cross-examination Mr. Healy said that his line manager was Mr. Robert Lynch. He did not know whether Mr. Lynch's contract was also with GovCo, stating that it was none of his business. The line manager might or might not participate in the forum process, depending on the case.

#### *The validity of the demands – submissions on behalf of the Sheahans*

48. It is submitted that the validity of the demands depends on their being made by a person coming within the categories set out in clause 1.03 of the mortgages. Where the person is not a professional acting on the bank's instructions, or an officer of the bank within the meaning of the Companies Acts, there must be evidence that he or she was "authorised" to make the demand. It is contended that this phrase must be strictly interpreted so as to include only persons who have been positively authorised by the bank to make demands.

49. Reference is made to the Articles of Association of the bank and to the various provisions pursuant to which the directors may authorise the exercise of their powers by others, which include the granting of powers of attorney, the delegation of powers to committees and the appointment of managers and agents for managing any of the affairs of the company (including the power of the directors to grant powers to such persons to delegate their powers, authorities and discretions).

50. On the evidence in the case, it is submitted that there was no evidence that Mr. Healy was a person authorised to make a demand. He was an employee of GovCo, not of the bank. There was no evidence that he had been given authority by the directors, or by a person to whom the directors had delegated that power. Mr. Gately, similarly, was not an employee of the bank and did not give any evidence as to how his authority to instruct Mr. Healy could be traced back to the directors of the bank. Even if he had produced the "alleged" letter of discretion from his line manager, Ms. Carragher, she herself had not been proved to be an employee of the bank.

51. Mr. Maguire says that, since the bank has been put on proof in these proceedings, it is necessary for it to prove the chain of authority back to the board of directors. It is not sufficient for the witnesses to give evidence that they were authorised, and the court should not draw an inference that they were so authorised. The mortgagors are entitled, pursuant to their contractual rights, to proof that the person who made demands upon them was specifically authorised to do so. If there is no such proof, the appointment of the receiver must be seen as invalid having regard to the requirement of strict adherence to the conditions for his appointment. Reliance is placed on the decision of Gilligan J. in *In Re Belohn Ltd (The Merrow Ltd -v- Bank of Scotland Plc & Anor )* [2013] IEHC 130, where it was held that that an appointment was invalid because it had not been made in accordance with the terms of the debenture.

*The validity of the demands – submissions on behalf of the bank parties*

52. Mr. Murphy accepts that in appointing a receiver, the bank is bound by the terms of the loan agreement. However, he submits that the requirement that the person making the demand should be authorised to do so does not require proof of authority in any particular form. The evidence of Mr. Kelly and Mr. Gately clearly established that the bank outsourced this aspect to GovCo. Mr. Gately's evidence was that BOIMB did not have any system for supervising defaulting mortgage accounts other than the process described by him. The authority in question was the authority for such day-to-day banking acts as the making of demands and the calling in of accounts.

### **The appointment of the receiver**

#### *Evidence*

53. It was established in evidence that the person who sealed the deeds, Ms. Marie Somers, and the two persons who signed the documents as witnesses (Ms. Nicola Coyle and Ms. Maureen Carolan) were authorised to carry out these roles by resolution of the board.

54. In relation to the nine deeds of appointment dated the 17th November, 2011, Mr. Healy said that after the demand letters were sent, deeds of appointment for the receiver were prepared by the bank's solicitors. When he received these he sent them to the company secretary's office (in Mespil Road) for execution and they were couriered back to him on the same day. They had been sealed and signed. There was then a meeting arranged with Mr. McAteer and Mr. Damien Murran (of the receiver's firm) in the bank's offices at Grand Canal Quay. The deeds of appointment were executed by Mr. McAteer and witnessed by Mr. Murran.

55. A slightly different procedure was followed for the six deeds dated March, 2012. He received them back from the company secretary's office signed and sealed. On the 22nd March he posted them to Mr. McAteer, because he had been having trouble organising an appointment with him.

56. Mr. Healy said in relation to the four deeds dated the 25th September, 2012, that he had made an appointment to call over to Mr. McAteer's office with the documents, where Mr. McAteer executed and Mr. Murran witnessed them. The deeds of the 8th October were dealt with similarly, by his bringing them to Mr. McAteer's office on that date.

57. Mr. Michael McAteer identified his signature on the deeds of appointment and said that each of them had been sealed by the bank before they came to him.

58. In cross-examination Mr. McAteer said that the deeds of November, 2011 had been signed at the bank's office because he had been at a training session there that morning. The seal had been affixed and the signature of Ms. Nicola Coyle was present. The date on the documents was in his handwriting, as was the time.

59. Mr. Maguire SC referred the witness to the words

*"signed and delivered as a deed by the said Michael McAteer in the presence of Damien Murran"*

and asked him whether he had delivered the document as a deed. Mr. McAteer was uncertain as to the meaning of the word "delivery" but said that he had, having taken a copy of it, handed it back to the bank. Originally he said that he did not keep the originals, but later in his evidence he said that he thought that the originals were kept in his office and copies sent to his solicitor and to the borrowers.

60. Mr. McAteer did not recollect the deeds of the 23rd March, 2012, being posted to him. He thought that Mr. Healy would have walked up to his office with them. He had written the words "23rd March 11.20" but thought that Mr. Murran might have written "11.15". Ms. Coyle had not been present in his office. He said that on occasion deeds would come to him without having been properly completed. They would always be checked in his office and the time would be filled in to reflect the fact that the deed had been sealed before he signed it. He agreed that it was correct that the seal had not been affixed at 11.15. It was also correct that, if the deeds had been posted, the seal had not been affixed on the 23rd March, 2012.

61. In relation to the deeds of the 25th September, 2012, Mr. McAteer said that the words "25th September" and the times of 10 o'clock am and 10.20 am had been written in by him. He denied having "made up" the time of 10 o'clock, saying that it was put in to reflect the fact that it had been done before the deeds arrived in his office.

62. On the deeds of the 8th October, 2012, Mr. McAteer wrote in the words "8th October 2012" and "2 pm" and "2.15 pm". Again, he said that this reflected the fact that the deeds were executed before they arrived and he signed them.

63. Mr. McAteer accepted that it was correct to say that he did not know whether or not the bank had executed the deeds on the dates that he inserted.

*The appointment of the receiver – submissions on behalf of the Sheahans*

64. The first argument here is, again, that the appointment must be considered invalid if the demands for repayment were invalid.

65. It is accepted that the seal was attested by persons authorised by the board, and that there was no need for a counter-signature. However, it is submitted that two of the statutory requirements set out in s.64 of the Land and Conveyancing Law Reform Act, 2009 have not been met – the deeds were not executed under the seal of the bank in accordance with its articles of association, and were not delivered as deeds by the bank or a person authorised on its behalf.

66. On the first of these issues, reference is made to Article 105 of the bank's articles of association, which provides that the company seal

*"shall only be used by the authority of the directors or of a committee of directors authorised by the directors in that behalf and every instrument to which the seal shall be affixed shall be signed by a director or some other person appointed by the directors for that purpose."*

67. There is a further provision that every such instrument shall be countersigned by the Secretary or by a second director or by some other person appointed by that purpose, provided that the directors may by resolution dispense with the necessity to countersign certain instruments.

68. The point here is that the seal may only be used with the authority of the directors or a committee of the directors. Mr. Maguire's contention is that the evidence establishes only that Mr. Healy did as he was told by Mr. Gately, and that Ms. Somers did as she was requested by Mr. Healy. It is submitted that none of these persons are in the position of the board of directors or an authorised committee thereof, and Mr. Gately and Mr. Healy were not even employees of the bank. On this basis it is argued that there was no evidence that the board or an authorised committee authorised the use of the seal in respect of these deeds. They were not, therefore, executed in accordance with the articles of association.

69. As a separate issue, counsel refers to s. 64(2)(c) of the Conveyancing Act, 2009 which provides that a company's deed must be "delivered as a deed" by the person executing it or by a person authorised to do so on that person's behalf. The argument is that there is no evidence that the board authorised Mr. Healy to deliver the deeds to Mr. McAteer, either by hand or by post. It is also submitted that the deeds are flawed in so far as they imply that Mr. McAteer delivered them.

70. It is further submitted that the deeds are flawed in that they were not executed on behalf of the bank at the time, and possibly not on the date, subsequently endorsed on them by Mr. McAteer.

#### *The appointment of the receiver – submissions of the bank parties*

71. The bank parties say that the evidence demonstrates that Ms. Coyle and Ms. Carolan were authorised by resolution of the board to authenticate the fixing of its seal to documents of this nature. They have confirmed their own signatures as witnesses to the affixing of the seal. Mr. McAteer has confirmed that he signed the deeds by way of acceptance of the appointments and further has confirmed that the documents had, in each case, been sealed by the bank prior to his own signature.

72. Mr. Murphy submits that Mr. Maguire's argument as to the seal depends upon a disjunctive reading of Article 105. It should, rather, be read as a whole. The requirement is that an instrument to which the seal is affixed must be signed by a director, or by some other person appointed by the directors for the purpose, because the signature authenticates their authority to use the seal. There is no separate requirement for authority to affix the seal to any given instrument.

73. On the question of delivery, the definition from Norton on Deeds (1st ed., 1906) is relied upon:

*"Delivery may be effected by words alone or without words by the acts or conduct of the party from which it can be inferred that he intended to deliver the deed as an instrument binding on him."*

74. What is required is evidence of an intention, on the part of the person whose deed it is, to treat the deed as effective. Whether the deeds were handed to Mr. McAteer in person or sent to him by post for his acceptance, it was clearly intended by the bank that they should be treated as effective. The act of Mr. McAteer in signing it was simply the execution of his acceptance of the appointment, which as a matter of law did not require to be done by deed.

75. Relying on passages from the 13th edition of *Chitty on Contracts* and the 1906 edition of *Norton on Deeds*, it is submitted that, notwithstanding the endorsement of a date upon a deed; or the absence of a date; or a mistaken endorsement of a date, the operative date is the date on which it is delivered. It is accepted that the practice of the receiver of filling in the dates and times at which the seal was affixed was "unsound", since it could be misleading from the point of view of third parties, but it is submitted that no issue of this sort arises in this case.

#### **The terms on which the loans were agreed**

##### *Evidence*

76. Mr. Ronan Kett said that between May, 2004 and May, 2008 he had had dealings with the Sheahans in his capacity as the Business Manager in the South Mall branch of the bank. He recalled dealing with Frankie and Joey Sheahan in relation to the approval of credit proposals for the purchase of investment properties. They were customers in good standing and all credit proposals submitted during his time were approved. He also had some dealings with Mr. Frank Sheahan senior, who was, likewise, a customer in good standing.

77. Mr. Kett said that he dealt with the loan in November 2005 of €616,000 to Joey Sheahan for the purchase of Beechgrove, and that at the time of drawdown it was confirmed by Joey that he was buying it as an investment property. He said that at a much later stage, Joey intimated to him that he was thinking of changing it to his private domestic dwelling. Mr. Kett said that he would need to come back to him for that purpose, but he did not return.

78. The terms of this loan agreement provided that there would be an interest only period of 10 years covering 120 payments, followed by 120 payments of capital and interest.

79. Asked whether there had been any question of this being an interest only loan in perpetuity, Mr. Kett said that there could not have been. He said that Joey's strategy was, as it was with all his investment properties, to enjoy the anticipated capital appreciation and to sell if necessary to redeem borrowings.

80. Mr. Kett was referred to the fact that the property was in the sole name of Joseph Sheahan. He said that if it had been intended as a family home it was unlikely that the bank would have accepted one person's security given the requirements of the Family Home Protection legislation. There was also security over three other properties owned by Joey, which he knew to be investment properties. There was to be a letter of guarantee from Mr. Sheahan Senior. Mr. Kett said that the guarantee was required by the bank because this was a "tight" proposal in terms of credit assessment. Finally, there was an assignment to the bank of a life policy on the life of Joey for a minimum amount of €616,000. This was because the income from Joey's business was very much reliant on

Joey himself and his personal contacts.

81. Mr. Kett said that he rang Mr. Sheahan Senior to advise him of the requirement for the letter of guarantee. Mr. Sheahan had said that he was happy to support Joey in growing his property portfolio. Prior to the execution of the guarantee, Mr. Sheahan rang to ask that the document be forwarded to his solicitor for inspection.

82. The witness was asked if there had been any agreement or understanding that the guarantee would only be resorted to if the properties were sold and a shortfall remained. He said that there was no such agreement with him. He had no communication with Mr. Sheahan's solicitor (who witnessed Mr. Sheahan's signature on the document).

83. Asked to comment on the suggestion that it had been agreed with the Sheahans that the interest only borrowings would be the subject of renewals into the future, Mr. Kett said that he would not have said or intimated that in any fashion. He might have referred to the option of redeeming the loans from asset disposal.

84. It was put to Mr. Kett that at the material time the market was very competitive, and that one of the bank's direct competitors was offering mortgages on residential investment properties on an interest only basis to term. He said that he had heard of it anecdotally but did not know the specifics of the products being offered. Whatever might have happened elsewhere in the market, Bank of Ireland did not give loans that were interest only in perpetuity.

85. Mr. Kett denied that there had been any "loan pool" agreement.

86. Ms. Noreen O'Leary said that in 2007 she was the senior business manager in business banking in the South Mall branch.

87. In July, 2007 Joseph's account in respect of Beechgrove was reclassified from a residential investment loan to a primary dwelling and mortgage loan. She said that on the 24th July she received an internal email to the effect that Joseph had requested that the term of the loan be changed to 30 years. It was noted that

*"this was a situation where a [residential investment property] has now become a customer's family home. The loan was on interest only but has now been converted to repayment as it is a [principal dwelling house]. Customer has now requested that we change the term to 30 years for now, the rationale being that he is 28 years of age and, in normal circumstances, if he came to the bank to purchase his PDH today he would qualify for a 30 year term.*

*Customer is managed at mid-corporate level, is a mortgage broker to BOI and comes from a very large and valuable BOI connection."*

88. The same alteration was requested in relation to the associated account 43376454.

89. Ms. O'Leary was asked what the bank's policy in relation to interest-only arrangements in respect of dwelling houses as opposed to investment properties. She said:

*"The bank didn't sanction interest only loans for primary dwelling houses...I think in my 35 years in the bank, I might have seen one case where that was done and the payback was from a pension. It would have been to, maybe, a lawyer or a doctor who would be paying a lot of money into a pension and the lump sum from the pension would pay back the mortgage."*

90. She said that Joseph did not claim at the time that he had a right to the interest-free arrangement notwithstanding that he had moved into the house. He applied, rather, for a two-year period interest free.

91. Ms. O'Leary was asked about the claim made by the Sheahans that she had been one of the officials who had agreed to treat the accounts on an aggregated basis – the so-called loan pool arrangement. She denied it. She also denied telling them that the interest only periods specified in the loan agreements would be renewed automatically on expiry, saying

*"Absolutely not. The loan had to be paid back at some stage so, you know, most of the loans were either 25 year loans or 20 year loans with a 10-year interest only and then capital and interest only after that. So repayment had to be made either from sale of the property or from capital and interest repayments and they were set out in the letter of offer, those terms."*

92. She also denied having said that the properties would be sold before the guarantees would be called on.

93. In cross-examination Ms. O'Leary agreed that the market in Cork had been very competitive at the time but stated that the Bank of Ireland had

*"a very strict and stringent credit policy".*

94. She accepted that the feeling at the time was that all would be well with lending of this nature, and that she had a target amount to lend. Like Mr. Kett, she said that she had heard "anecdotally" that Bank of Scotland was offering interest only for the period of a residential investment loan but said she saw no evidence of it. Frankie had never told her that he had been offered such an arrangement and Joseph never mentioned it either. The "huge competitive issue" was the rate of interest being offered and Bank of Ireland was very competitive in that respect. She denied that there had been any discussion about renewal of interest free periods being automatic.

95. In relation to the guarantees, Ms. O'Leary denied having told Frankie that a guarantee was needed to "tick a box for Dublin" and said that that would not be the kind of language she would use. She recalled that Frankie had moved some of his business from other banks to Bank of Ireland, but that was not on foot of any assurance being given to him about either the interest free period or the guarantees.

96. Ms. O'Leary agreed that it was the bank's position that, because of the cross-securities in the various loan agreements, it could sell properties, the loans for which were guaranteed, to clear unguaranteed loans and then rely on the guarantees to clear the guaranteed loans. She denied that Frankie and Joseph had been given any assurance to the contrary.

97. An email from the witness to the head of the business banking unit, dated the 11th October, 2007, was put in evidence. This

related to two residential investment loans sought by Joseph. In respect of one of them it was noted that

*"The residential investment loan cover is .85 (capital and interest) and 1.09 interest – all borrowings on an interest only basis. This is based on just stress testing by 1% instead of 2%."*

98. Ms. O'Leary confirmed that this meant that, having regard to the borrower's income versus the projected repayments, there would not be sufficient income to pay interest and capital, but would be more than sufficient if it was interest only. She said that while stress testing by reference to 2% was the policy at the time, interest rates were not, at the time, expected to rise by 2% and she used 1% for pragmatic reasons.

99. In relation to the second loan dealt with in the email, Ms. O'Leary had stated that the loan to value ratio was 84%, and that cover on the basis of interest only would be .96 – again, stress testing by reference to a 1% increase in interest rates. It was noted that this was outside the applicable guidelines. Ms. O'Leary had said:

*"The situation here is much the same as in the case of Frankie and I know [Group Credit] will be looking for your support."*

100. Ms. O'Leary explained that in marginal cases Group Credit would look for the support of the regional manager. She was recommending the loans because of the strength of the relationship between the Sheahans and the bank. The borrower's strategy was property investment and everyone anticipated capital growth and the sale of the properties to discharge the loans before they expired.

101. It was put to Ms. O'Leary that

*"the Sheahans are, in fact, property people and their father was before them and they understand how this works and so they had sought and obtained confirmation from you that interest only would be continued as of course, if necessary, the point being that these loans could never be amortised and you knew that and the bank knew that and it was a box ticking exercise in order to get the loans made."*

102. Ms. O'Leary responded:

*"Absolutely not. There was never a commitment that interest only would be continued."*

103. In response to the proposition that Frankie's rugby career was going to come to an end, and that he had no long-term employment prospect, she said that it was always anticipated that he or Joseph, or both of them would take over their father's business. He was one of the highest net worth individuals in Cork city.

104. Ms. Tracy Marshall said that she recalled dealing with Joseph in his capacity as a mortgage broker, when she was working in South Mall. She dealt with him in relation to an application for one investment loan in 2005. She said that she would not have had authority to approve indefinite interest-only renewals, and that nobody could predict how things would be going five years into the future. Asked about the loan pool, she said *"I wouldn't have had that conversation"*. She said that she would never have given them the assurance alleged in respect of the guarantees, or said that it would be a last resort. She added that the guarantee would have been *"taken under legal advice"* so she presumed that Mr. Frank Sheahan knew what he was signing. Her role was really just to process applications, as a sort of middleman between the customer and the underwriters.

105. Mr. Joseph Sheahan described setting up his business as a mortgage broker in 2004. (Prior to this he had been an auctioneer). Initially he was an agent for Bank of Ireland only, and after he got agencies with other banks it continued to account for about three-quarters of his business. Prior to the transactions in question he had, maybe, three investment properties of his own.

106. Joseph said that his business involved constant contact with the bank. He said that he might be at a meeting about a client and would mention to the bank that he wanted to buy a property himself and wanted to borrow the maximum available.

*"They would go off and check with Dublin, or wherever in terms of approval, and they would come back and say: we will give you the money on this basis. There would be various security requirements then as part of that."*

107. Joseph said that in 2005 four letters of offer were issued to him. He remembered Ms. Tracy Marshall saying to him, in relation to the Ard Patrick loan, that Dublin wanted the property as security but also wanted a guarantee from his father. He told her that he would prefer not to, because he wanted to be independent, but she told him not to worry because the guarantee would only ever be called in after the property was sold in a worst case scenario.

108. Joseph also said that he brought it to Ms. Marshall's attention that other banks were offering interest-only loans. He said that she checked with Dublin and told him that as a matter of internal policy the bank could not issue letters of offer for more than a specified term, but that as a matter of course they would roll it over at the end.

109. He had a meeting with Mr. Kett about the Beechgrove loan on the 17th September, 2005, and told him that he paid a booking deposit.

*"And I explained to him, I was engaged at the time, that it was to be my family home and he said that I wouldn't qualify to get a loan. So he said that it would be better to package it for Dublin as an investment property so we could factor the rental income in."*

*He also said that I would need a guarantee but that it would only ever be called in after the properties were sold...we also discussed about the interest only, that it would be continued as previous loans were. And I went away and spoke to my father and told him that a guarantee would be required because he was aware that I was purchasing the property, but that it would only ever be called in after the properties were sold and also about the interest only agreement."*

110. Joseph said that the residential properties he had been buying as investments were mostly apartments or smaller houses around the city centre, while Beechgrove was a four-bedroom family home type property with a garden.

111. The loan was drawn down in early 2006 and he moved in with his family in July, 2007. One of the security requirements in this offer had been a mortgage protection policy, which he believed would not have been an enforceable requirement other than for a

family home.

112. Joseph was asked about his thoughts when he saw that the letter of offer provided an interest-only period, followed by capital payments. He said that he and his father had a great relationship with the bank and that he knew that his father had loans where one thing would be said in the letter of offer but there would be a verbal agreement that "interest would be rolled out", or rolled over, "as a matter of course".

113. Asked who, specifically, had said this to him, Joseph replied that Ronan Kett, Noreen O'Leary and Tracey Marshall had said it. Mr. Kett had said it at the meeting referred to, Ms. Marshall had said it well before the letter of offer issued because she was going on maternity leave. On every other occasion it would have been "in a matter of days and weeks" before the issue of the letter of offer.

114. He said that he had never asked them to put it in writing.

*"But they said that they couldn't put it in writing because Dublin or their own policy, they just couldn't issue a letter of offer for the term, interest only for the term, like other banks."*

115. He believed that the interest-only periods would be extended until the loans expired, at which point the properties would be sold and the loans repaid in full.

116. Joseph said that the verbal agreements were relevant to his decision to enter into the loan agreements. He intimated that he would have gone to a different bank. Bank of Scotland was offering interest only for the term of a loan, as well as self-certification of income without the need for a guarantor.

117. He said that he did not have available to him sufficient income to repay the capital as well as the interest on the loans, and that, in fact, he was not sure that he had sufficient income to pay the interest on all of them. An agreement to pay capital interest after five or seven years was not sustainable, even on the assumption that his business and income continued to grow.

118. In relation to the guarantees, Joseph said that in each case

*"the loan person or the bank staff that we were dealing with would have made enquiries with Dublin and Dublin would have come back and said to them, you know, the repayments, you don't qualify on repayments or whatever."*

*"So we needed a guarantor in order to get this loan sanctioned. So when we obviously—we didn't want to give a guarantor as borrowers and my father didn't want to give himself as guarantor. So when we queried it and said that we didn't want to do it they made further enquiries and they would have said that it was only after the property was sold that it would be called in, if there was a shortfall."*

119. Joseph also noted that in some instances, a guarantee had been required by the letter of offer but never actually looked for or given. He believed that, if it came to the necessity to sell properties, the guaranteed loans would be prioritised with the proceeds of sale. A property used to secure an unguaranteed loan would be sold, and the proceeds applied to a guaranteed loan. This was so even if it meant that the unguaranteed accounts were left without security. The guarantor would only be called upon if there was a shortfall on the guaranteed loans at the end of the process.

120. He confirmed that this evidence applied to each of the five guaranteed accounts.

121. Joseph said that he carried out most of the negotiations in relation to Frankie's loans, and that there was the same agreement as with his own loans. With particular reference to one loan he said that he and Frankie met with Noreen O'Leary, the senior business manager, and her assistant. The bulk of these borrowings was to refinance a loan with AIB, which was not guaranteed. Joseph said that Ulster Bank was vying for this loan. Ms. O'Leary told them that the bank would use all of Frankie's properties as security for this loan but that they would also need a guarantee. He said that they were told, again, that the guarantor would only be called on in the worst case scenario if the properties had to be sold and there was a shortfall. He thought that Ms. O'Leary had described the guarantee as "a box ticking exercise for Dublin".

122. In relation to the Beechgrove loan, Joseph said that when he moved in he informed the bank and asked them to change his correspondence address.

*"And they said because now it is your family home we can't give you interest only as policy."*

123. The bank thereupon commenced charging capital payments on the account. Joseph's response to this was to say that he would move the loan to another lender, whereupon Ms. O'Leary told him that the bank would agree to a two-year interest only period. Ultimately he was refunded the capital that had, over the course of three months in 2007, been charged to the account. He moved out of the house some time in late 2009 because he could not sustain the payments and needed rental income to service the loan.

124. Two 2005 loans, in relation to Ard Patrick and Seana Mhuileann, came up for review in 2010. Joseph requested that the interest only period be extended but the bank refused. Since he was now being charged capital payments on four of his accounts his current account exceeded the overdraft limit and other loan accounts began to go into arrears. Because of this situation he failed to get an agency from another specified lender.

125. At a meeting with Mr. Kett in December, 2010, Joseph said, he explained to him that the interest only terms should have been extended and that his cash-flow situation was being badly affected. Mr. Kett said that he could see where he was coming from but that he was dealing with Dublin and it was like banging his head off a brick wall.

126. He received Mr. Healy's letters of demand, and subsequently the deeds relating to the appointment of the receiver, in November, 2011.

127. Mr. Frank Sheahan said that he was first asked to give a guarantee in 2005, in relation to the Ard Patrick loan. At that time he had been doing business with the bank for about 30 years. He knew that the bank was anxious to keep up the connection with his family, and he himself got on "extremely well" with the personnel there.

*"If they said something verbally they would always honour it."*



128. He recalled having taken out a loan in 1998 with a five year interest only term. The bank rolled over this period until he decided to pay off the loan in 2006. Another loan taken out in 2001 was rolled over on a similar basis until 2010.

129. Asked about the frequency of oral agreements, Mr. Sheahan said that in any business environment it would be difficult to transact business efficiently if one could not depend on a verbal agreement.

130. Mr. Sheahan said that his understanding, when he gave the guarantees, was that it was a "box ticking exercise" required by the bank. Joey had explained to him that he would have a liability only if Joey got into difficulties, the properties were sold and there was a shortfall. It had not been suggested that the properties in question could be used to pay off loans other than the guaranteed loans, leaving him exposed on the latter.

131. It was put to Mr. Sheahan that Joey had been told by the bank that he could not get the loans in question without the guarantees and that therefore this must have been seen by the bank as being important. He said that he presumed that the bank wanted some form of security in the event of a shortfall after the sale of the properties or in case, for example, his son decided to leave the country.

132. Frankie Sheahan said Joey dealt with the bank on his behalf in relation to the loan offer of the 22nd September, 2005, for €304,000, the offer of the 30th January, 2006, in the amount of €1.69 million, the offer of 23rd August, 2006, of €208,000 and the offer of 7th November, 2007, for €254,000.

133. He and Joey dealt together with Noreen O'Leary in relation to the offer of €2.34 million of the 19th November, 2007. He recalled that at the time Ulster Bank was offering him a tracker rate of 0.5 above ECB, interest-only for the term of the loan, with no requirement for a guarantee. He was considering moving all of his business to that bank, and Bank of Ireland asked him for a meeting to, as he believes, rescue the business.

134. Frankie said that there were three things for discussion at the meeting with Ms. O'Leary – the interest term, the guarantee and the rate of the tracker.

*"On the interest we were told 100% that the interest would be, despite what the paperwork would say, that this would go forward for the term of the loan as a matter of course. It had to be like that for me, it absolutely had to be like that because I was out of contract in 18 months time..."*

*I was 100% adamant that I did not want any involvement with a guarantee. I had come to a stage in my life where I wanted to stand on my own two feet and I wanted to be independent of other people. On this Noreen O'Leary assured me that if in the event of any problems arising at any point, any default, or anything like that, that each one of the properties would be sold first and the funds allocated to that account and because of that there wouldn't be a downside for the guarantor... They didn't match the tracker, we actually still went with them at the 0.6 ..."*

135. Frankie said that the terms were very important to him because he would be going out of contract 18 months later, when his income would drop from "a large six figure sum" to zero. The interest-only payments were €8,970 per month, which was covered by the revenue from the properties. Asked if he could have afforded €15,000 per month, he said

*"There isn't an absolute chance of it and I would be mad to sign up for something like that, I couldn't possibly sign up for something like that."*

136. In relation to the guarantee, he said that

*"It was done in a way that there was no downside for the guarantor, it was to tick a box for Dublin and if you ask me it was a clever way of doing it because it ticked a box for Dublin, there was no downside for the guarantee, we were able to stay with Bank of Ireland and they were begging for our business at the time."*

137. Frankie was asked in cross-examination what he meant by "ticking a box". He said that it was Ms. O'Leary's phrase and that he thought that *"she needed to get a few things over the line and this is what she was proposing to do"*, because the bank was desperate for the business.

138. He was asked several times why he thought Dublin would want a guarantee in order to grant the loan, to which his response was, in summary, that he was not sure but it was something that Ms. O'Leary needed for Dublin. He was satisfied that there was a verbal agreement.

139. It was put to Frankie that in many of his loans the properties listed as security were also securities for other loans and he agreed. It was then put that the arrangement he was contending for would have meant that the bank was agreeing that, in the event of a collapse in property prices, the loans became potentially unsecured in order to protect his father's position as guarantor. Frankie said that they were different times and the bank wanted the business.

140. On the issue of the promised roll-over of the interest only periods, Frankie repeated that he could not have signed up to repay the loans otherwise, given that there was only 18 months left on his rugby contract. It was put to him that the interest-only period in the loan agreement signed by him was for seven years, and that he had been hoping that prices would continue to rise so that he could sell at a profit, to which he responded that

*"if it wasn't for the banking crash we wouldn't be here."*

*The terms on which the loans were made - submissions on behalf of the Sheahans*

141. Mr. Maguire stresses the fact that the Sheahans insist that the rolling over of the interest free periods was part of the agreement they had with the bank, and that they would not have entered into the loans without such assurances. He urges two matters as supporting their credibility – they could have obtained loans elsewhere that were interest only for the term of the loan, and they could not afford the loans on any other basis. Accepting that it is a matter of fact for the court, he says that if the court finds that the assurances were given, they are capable of forming part of the contract.

142. While maintaining that this was the case – that the assurances contended for are to be seen as contractual terms – Mr. Maguire accepts that the terms of the written agreements are an obstacle to such a finding by the court. However, he says that there are

other potential legal consequences if it is found that the assurances were made.

143. The case of *Allied Irish Banks v Murnane & Anor* [1988] IEHC 10 is cited as an example of a case where assurances were given to a borrower (in that instance, that he would be given a loan if he got IDA approval for his project). Finding that the borrower had relied upon the assurance, Barron J. found that the bank employee who gave the assurance had been negligent.

144. It is also submitted that the circumstances of the case give rise to an estoppel, such as was discussed by Charleton J. in *National Asset Loan Management Ltd v Downes* [2014] IEHC 71. The bank in the instant case made an oral promise intended to affect the legal relations between the parties, or reasonably understood by the borrowers to have that effect. It was acted upon by the borrowers, to their detriment, and it would be inequitable to permit the bank to act inconsistently with the assurance given.

145. On the question of the legal consequences were the court to find that specific assurances were given in respect of the guarantees, it is pointed out that the defendants' counterclaim includes a claim for an order, whether under s.94 of the Land and Conveyancing Law Reform Act, 2009 or otherwise, for the sale of the properties in accordance with the alleged loan pool agreement.

*The terms of the agreements – submissions on behalf of the bank parties*

146. Mr. Murphy submits that in making findings of fact as to the alleged variations in the terms of the contracts, the court should have regard to the relative experience of Joseph Sheahan in this field and to the contrast between what is proposed and the express terms of the twenty written agreements.

147. It is submitted that, if any representations were found to have been made, they could only be held to be legally effective if the court made the further finding that they were intended to be relied upon. There would have to have been, objectively speaking, a reasonable understanding that they were made with contractual animus.

148. Mr. Murphy relies upon the parol evidence rule and the authorities thereon for the proposition that the intention of the parties may be ascertained only from the documents concluded by them. In the circumstances, the Sheahans can succeed only if they establish the existence of a collateral contract. On the latter issue he relies upon the following principles set out by Lightman J. in *Intreprenur Pub Co. Ltd v East Crown Ltd* [2000] 2 Lloyd's Rep. 611 (at p. 615):

*"(1) A pre-contractual statement will only be treated as having a contractual effect if the evidence shows that parties intended this to be the case. Intention is a question of fact to be decided by looking at the totality of the evidence;*

*(2) The test is the ordinary objective test for the formation of a contract: what is relevant is not the subjective thought of one party but what a reasonable outside observer would infer from all the circumstances;*

*(3) In deciding the question of intention, one important consideration will be whether the statement is followed by further negotiations and a written contract not containing any term corresponding to the statement. In such a case, it will be harder to infer that the statement was intended to have a contractual effect because the prima facie assumption will be that the written contract includes all the terms the parties wanted to be binding between them;*

*(4) A further important factor will be the lapse of time between the statement and the making of a formal contract. The longer the interval, the greater the presumption must be that the parties did not intend the statement to have contractual effect in relation to a subsequent deal; and*

*(5) A representation of fact is much more likely intended to have contractual effect than a statement of future fact or future forecast."*

149. On the estoppel and negligent misstatement arguments, it is submitted that the key element in both is reason to believe that the statement is intended to be relied upon. Having regard to the evidence as to the bank's decision-making structures and the need to satisfy the persons making decisions on the loans, it is argued that if any representations of the kind were made, they could not have been taken as intended to amount to a legal commitment.

150. Mr. Murphy maintains that the guarantee issue is not before the court and Mr. Sheahan's evidence in relation to the issue was, at his own request, truncated because he was not legally represented in these proceedings. The court should not, therefore, address the application made by the Sheahans under s. 94 of the Conveyancing Act.

**The alleged "recent agreements"**

151. Joseph said that on occasions (after the institution of proceedings) he received a letter from the bank demanding payment of the arrears on a specified account. He would write back to the person who had signed the letter, enclosing a cheque for the amount requested, and stating that he was making the payment on the basis that it would bring the account fully up to date and that the account should therefore be withdrawn from all litigation against the Sheahans (including the guarantor) and from the receivership. Each letter stipulated that if this was not to happen, the cheque should be returned uncashed. Some of the cheques had been cashed but in more recent months they had been returned uncashed.

152. The following letter, written on the 7th August, 2013, is agreed to be a typical example. This was a response to a letter from a Mr. Albert Diggin on the 30th July, stating that the Beechgrove account was €547.90 in arrears and demanding payment of that amount. In his letter Joseph responded:

*"The default on this account when the bank demanded payment on 1st November was caused by the bank as they wrongly overcharged me capital on this and other accounts between 2007 and 2011 and did not extend the interest payments (all of my accounts at application stage were stress tested on an interest repayment basis) as promised on other accounts when they came up for review. Please see report enclosed from BANKCheck regarding the overcharging of capital on this account.*

*Please be advised that I have also been overcharged on other accounts, including accounts 43376454 and 24183112 and would appreciate it if you would arrange for refunds to be issued on all three of the accounts mentioned. The bank wrongly appointed a receiver over my property on 17th November 2011, which has gravely affected my financial situation. Please discharge the receiver and have him lodge all rents collected to the appropriate accounts, as this is pushing other accounts into default now. I would not be in arrears on any of the accounts mentioned if I had not been overcharged and rents collected by the receiver had been credited to my accounts.*

*You say in your letter that you are committed to assisting and supporting your customers through any repayment difficulties they are experiencing. I am pleased to hear this and I now ask that you accept the four offers which total €630,000 to sell four properties as presented by me on 9th April 2013 (copies enclosed) which will clear this account in full. If you are unwilling to accept these offers as presented, I will be forced to apply to the court to seek an order forcing the sales.*

*In the interim please find enclosed cheque in the amount of 574.90 to discharge the alleged arrears which I am paying on the strict understanding that once accepted by the bank [the Beechgrove accounts] are fully in order and will be withdrawn from all legal proceedings. If this is not the case, please return the cheques."*

153. It was Joseph's view that, on this basis, four of the guaranteed accounts were now up to date. The first was 20547919 (Beechgrove), which was brought up to date in October, 2012. He said that the loan was then serviced until December, 2013 at which point the bank stopped accepting payments. He had been making payments on it every one to three months, directly to the bank rather than to the receiver.

154. The second was 39707433 (39a Brook Square), which was also brought up to date in October, 2012. Again, payments were made until the bank stopped accepting them in December, 2013. The third and fourth were 81680270 and one of Frankie's accounts, 79569165.

155. Joseph said that it was his understanding that once the bank accepted these payments the account would be discharged from receivership and he (or Frankie) would continue paying the monthly amount.

156. On the 4th December, 2013, Mr. Lorcan McCluskey, the head of case management, wrote to Joseph in relation to the letters he had been sending. He said, *inter alia*, that the letters had failed to acknowledge the fact that the receiver had been appointed over all the properties concerned and that therefore his proposals to sell or to voluntarily surrender the properties failed to take into account the fact that the bank had already exercised its enforcement rights. In relation to the cheques he said:

*"Finally, while we note that you have proffered sums to discharge arrears, please note that the entire loans are due and payable following the bank calling in the loan. In recent letters sent by you to the bank, you appear to be seeking to rely on correspondence generated by the Bank's automated arrears service, to argue that your accounts are in order. Please note that since the Bank called in the loans, the entire sums, calculated pursuant to the terms and conditions of the various letters of loan offer, must be paid in full. Therefore, while the Bank shall continue to accept payments made by you to part discharge liabilities, until such time as the entire debt is paid (or proposals satisfactory to the Bank are made to regularise the position) it would be incorrect to say that your accounts are in order."*

157. Despite this communication (and another in similar terms from Mr. Healy) Joseph continued to send cheques accompanied by letters in the same terms.

158. It was put to him in cross-examination that the letters he received about arrears on the accounts, in response to which he sent the cheques, all post-dated the commencement of litigation. They were, it was said, obviously standard form, computer generated letters in identical terms and he could not possibly have thought that they represented an opportunity to settle the cases. He said that he got the letters and responded to them. He had seen the letter sent by his father to the bank in October, 2012 clearing the arrears on a number of accounts on the basis that they would be back up to date. The question whether he thought that the letters were offers to resolve the proceedings was asked a number of times and he responded that as far as he was concerned the accounts had been in order since October, 2012.

159. He said that what he was trying to do was to get the bank to accept the offers on the properties, resolve the litigation and keep the accounts in order in the interim. Asked whether he was trying to settle the case, and to get the bank to bind itself not to proceed with it, he said that the purpose was to resolve all differences between himself and the bank as well as to keep the accounts in order. He was asked why he had not written to Mr. Healy, to the receiver or to the bank's solicitors and replied that he was responding to letters that he received.

160. He denied that he was trying to trick the bank.

#### *The "recent agreements" issue – submissions on behalf of the Sheahans*

161. It is submitted that the cheques were cashed by the bank, that this constituted an act of acceptance and that the terms of the agreements created by the letters speak for themselves. The court should apply an objective test – if the parties have, in outward appearance, agreed in the same terms on the same subject-matter, then neither can, generally speaking, rely on some unexpressed qualification or reservation to show that he had not in fact agreed to the terms. An offer can be accepted by conduct (citing *Brennan v Lockyer & Ors.* [1932] 1 I.R. 100).

#### *The recent agreements issue – submissions on behalf of the bank parties*

162. Mr. Murphy submits that the question on this issue is whether, applying an objective test to the circumstances of the case, there had been a meeting of minds. If the bank is to be bound by having processed the cheques, it must be on the basis that that act communicated an intention to be bound. It is submitted that a reasonable, objective interpretation of the act would be that the part of the bank that was aware of what was going on did not intend to be so bound.

163. Reliance is placed on the judgement of Laffoy J. in *Ross v W.C.* [2008] IEHC 103. Having regard to the principles set out in that case, Mr. Murphy argues that the circumstances of the instant case were that the parties were in a major dispute in relation to all of the accounts and that it had been made clear, in writing, where the bank stood on the matter. The evidence could not support the proposition that the parties were *ad idem* or that the act of the bank in lodging the cheques could be construed as settlement of the litigation in relation to the accounts in question. It is accepted that the court has no evidence as to the state of knowledge of the staff who lodged the cheques. However it is submitted that the court cannot conclude that those members of staff made a conscious, knowing decision to accept the cheques on the terms of Joseph Sheahan's letters, in the light of the unequivocal responses from persons who certainly did have knowledge of the full circumstances (i.e. Mr. McCluskey and Mr. Healy).

164. *Ross v W.C.* related to a cheque proffered to a Revenue official in the course of negotiations. The evidence in the case was that the official made it clear that he would have to refer the proposal to his superiors. However the cheque was presented for payment.

165. Laffoy J. referred to a passage from the 6th edition of Fosskett on *The Law and Practice of Compromise*, in relation to cases where a cheque sent "in full and final settlement" had been presented for payment. Fosskett states that the initial issue is whether an accord has been reached in the circumstances of the case. The following passage from the judgment of Scrutton L.J. in *British Russian Gazette Limited v Associated Newspapers* [1933] 2 K.B. 616 (at p. 643) is referred to as the classic definition of "accord and satisfaction":

*"Accord and satisfaction is the purchase of a release from an obligation, whether arising under contract or tort, or by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative."*

166. Laffoy J. continued:

*"Whether an 'accord' has been reached depends on whether, construed objectively, the actions of the recipient of the cheque constitute acceptance of the offer reflected in the sending of the cheque..."*

*In addressing how the issue as to whether an accord has been reached is determined, Fosskett considers first whether it is a question of fact or law. The authorities cited support the view that it is a question of fact, subject to one qualification. In Day v McLea (1889) 22 Q.B.D. 610 Bowen L.J. put the matter as follows:*

*"If a person sends a sum of money on the terms that it is to be taken, if at all, in satisfaction of a larger claim; and if the money is kept, it is a question of fact as to the terms upon which it is so kept. Accord and satisfaction imply an agreement to take the money in satisfaction of the claim in respect of which it is sent. If accord is a question of agreement, there must be either two minds agreeing or one of the two persons acting in such a way as to induce the other to think that the money is taken in satisfaction of the claim, and to cause him to act upon that view. In either case it is a question of fact."*

167. Laffoy J. noted that the qualification in the authorities cited by Fosskett was that, if the negotiations are conducted in writing, the construction of the correspondence is always a question of law.

*"As to how the issue of fact is resolved, Fosskett states that the starting point for addressing the analysis of facts in any case where the issue falls for consideration is that an objective construction must be placed on the material terms (para 3-36). Fosskett illustrates that point by reference to a number of authorities and draws certain conclusions from them. For instance, the presentation for payment of a cheque tendered 'in full and final settlement' of a dispute, without demur or qualification, will be taken as an objective manifestation of an intention to accept the offer of settlement thus made. The examples given by Fosskett illustrate that where there was a clearly definable and not insignificant delay between the receipt of and/or the payment in of the cheque and the subsequent manifestation of intention not to accept the proceeds of the cheque other than as part payment the inference to be drawn is that there was accord."*

168. The judgment cites the following passage from *Stour Valley Builders v. Stuart* (1992) C.A.T. 1281:

*"Cashing the cheque is always strong evidence of acceptance, especially if it is not accompanied by immediate rejection of the offer. Retention of the cheque without rejection is also strong evidence of acceptance depending on the length of the delay. But neither of these factors are conclusive; and it would...be artificial to draw a hard and fast line between cases where the payment is accompanied by immediate rejection of the offer and cases where objection comes within a day or a few days."*

169. Laffoy J. noted that the only Irish authority to which she had been referred was *Mespil v Capaldi* [1986] ILRM 373, where Henchy J. said (in the context of a dispute as to the terms of a settlement of a High Court action):

*"It is of the essence of an enforceable simple contract that there be a consensus ad idem, expressed in an offer and an acceptance. Such a consensus cannot be said to exist unless there is a correspondence between the offer and the acceptance. If the offer made is accepted in a fundamentally different sense from that in which it was tendered by the offeror, and the circumstances are objectively such as to justify such an acceptance, there cannot be said to be the meeting of minds which is essential for an enforceable contract. In such circumstances the alleged contract is a nullity."*

#### **Whether or not the accounts were in arrears as of the date of demand**

170. It had originally been contended on behalf of Joseph Sheahan that the Beechgrove accounts had not in fact been in arrears on the date of the demand. This argument largely centred on the fact that capital payments had been applied to the main Beechgrove account for a period of time. Although these were later refunded and an interest only period was subsequently offered by the bank and certain refunds were made in respect of the capital payments, the case made was that the deduction of these monies (and other small, identified overcharges) had a financial cost to him. If this had been properly taken into consideration it would have been seen that the account was operating within its limits.

171. Both sides called expert witnesses on this issue. I do not propose to summarise their evidence because in closing submissions it was accepted by Mr. Maguire, having regard to the cross-examination of his witness, that on any version of the figures there had been default by November, 2011. However, it is important to note that for the purposes of the argument on this issue, the figures presented on behalf of the bank parties were calculated on the assumption that Joseph Sheahan was correct in asserting that the Beechgrove accounts should have been interest only throughout.

172. Certain submissions were made as follows.

*The amount of arrears – submissions on behalf of Joseph Sheahan*

173. Mr. Maguire submits that the bank's figure in relation to Beechgrove (approximately €4,600) could be reduced to €1,500, or perhaps less. He did not commit himself to a figure, but says that if this is correct, the reliance on an incorrect amount by the bank "interfered with the proper contractual arrangement between the parties." He accepts that an incorrect figure is not a defence to a claim, given the authority of *Bank of Baroda v Panessar & Ors* [1987] 2 W.L.R. 208. However he says that, in this case, when the bank decided to call in the loan it made a fundamental mistake as to the arrears, misdirecting itself as to the true position. It thereby acted in breach of contract, on the basis that it must be an implied term of the contract that, in determining whether or not to call in

a loan, it would have regard to all relevant factors.

*The amount of arrears – submissions on behalf of the bank parties*

174. Mr. Murphy points out that all of the calculations of the arrears on the Beechgrove accounts were done, for the sake of the debate on the issue, on the basis that Joseph Sheahan's argument (that the account should have been interest only throughout) was correct. If capital payments were properly charged there could never have been any argument as to the fact of arrears.

**Discussion and conclusions**

175. In my view the case made that there was either a variation of the contracts or a series of collateral contracts cannot succeed.

176. Firstly, the assertion of an agreed variation in respect of the interest only periods is inconsistent with the written terms signed by the borrowers in relation to each of the twenty loans. This, as counsel accepts, presents a high hurdle.

177. Secondly, it seems to me that the most striking aspect of the Sheahans' evidence, on this matter, is that they knew that "Dublin" – that is, the people in the bank who had the power to grant the loans – would not do so on the terms now contended for. The notion that the Sheahans and the bank staff in Cork thought that they were engaged in a mere "box ticking" exercise to satisfy those people might not in itself be considered inherently implausible, but it is entirely inconsistent with any proposition that "the bank" intended any representations made in these circumstances to bind it. The fact that the decision makers would not agree to the terms in writing could not be seen as indicating anything other than a refusal to contract on those terms and be legally bound by them.

178. I am satisfied that both Joseph and Frankie must have been aware of that, especially in the light of Joseph's professional experience. In those circumstances the conclusion must be that the bank intended to be bound only by the written terms and that the borrowers knew it. The case made thus fails to meet the first of the tests set out in *Inntrepreneur*.

179. It might well have been that, if the expectations on all sides as to the continued rise of the property market had been borne out, the issue would never have come to a head. The properties would either have been disposed of for a profit enabling the loans to be paid off, or the bank might have agreed to an extension of the interest only payments on the basis that its security was continuing to appreciate in value. The undoubted fact that neither Joseph or Frankie had, at the time of being given the loans, the income to support capital repayments on all their loans supports the view that everyone concerned assumed that something of this sort would happen. It may well be that some of the staff made predictions to this effect. However, having regard to the applicable legal principles the court must find that the contracts actually entered into were not founded on those assumptions.

180. The same considerations apply to the Beechgrove loan. Again, it is clear that Joseph knew that his income was insufficient to get loan approval for this property if it was to be his family home. If it was acquired as an investment, with the prospect of rental income, the situation would be different. Whether it was his own decision, or one made jointly with Mr. Kett, to "package" the application to Dublin as being for a residential investment property, I am satisfied that he was aware that the persons with authority to approve the loan did not approve it on the basis that it would be his dwelling.

181. On the evidence, having particular regard to the lapse of time between the purchase and the taking up of residence, to the internal bank documents, to the redesignation of the loan in 2007 and to Joseph's application for a 30-year term, I find as a fact that the bank staff in Cork did not know that he intended its use as such until he moved into it. The subsequent offer of an interest free period, to my mind, reflects a successful negotiation by Joseph rather than an acceptance of the proposition that he had a contractual right to interest free terms.

182. The same considerations prevent any finding of either negligence or estoppel. *Allied Irish Banks v. Murnane* is not of assistance, since there was a finding of fact in that case that the branch manager of the bank had given an assurance that was within his ostensible authority.

183. The question of the alleged "loan pool" agreement has also given rise to a conflict of evidence. Looking at the surrounding circumstances, I find the version of the bank witnesses to be more persuasive.

184. Again, it was probably assumed by all concerned that the guarantees would not have to be called upon since, in a rising market, the loans could if necessary be repaid by the sale of properties at a profit. However, where a guarantee was required as a condition of the loan, I do not find it possible to accept that the persons giving approval on the basis of that condition intended that it should a) be largely ineffective and b) have the consequence of withdrawing security from other, unguaranteed loans with the same bank. I consider it possible that the Sheahans have to some extent persuaded themselves that this was what was intended, but even in a competitive market there would simply be no commercial sense to it.

185. I note also the uncontradicted evidence that the guarantee was sent to Mr. Frank Sheahan's solicitor for checking before he signed it. It seems to me to be unlikely that a legal advisor would have upheld the view that, in the circumstances, there could be "no downside" for the guarantor in the absence of something in writing as to the alleged agreement.

186. I make this finding on the basis of the evidence put before the court, conscious of the fact that that evidence was cut short because of Mr. Frank Sheahan Sr.'s reluctance to go into greater detail, given the still pending proceedings relating to the guarantees. It is however necessary to make a finding, since Joseph and Frankie have pressed their claim for an order for the sale of the properties in accordance with the agreement contended for.

187. On the question of authority to issue the letters of demand, I have had regard to all of the evidence outlined above. I accept that, since it is a prerequisite to the appointment of a receiver, it is necessary for the bank to show that the demand was made in accordance with the terms of the contract. That entails proving that it was made by an authorised person.

188. There is no term of the contract, statutory rule or provision in the articles of association requiring the authority to make a demand to be evidenced in any particular form. There is no reason, therefore, why the court should not act on the oral evidence before it.

189. Mr. Kelly, who is a director of the bank, gave evidence that the credit committee function of the bank was largely dealt with by GovCo employees.

190. Mr. Gately is in the credit department of GovCo. He said that he was one of four people with the authority to supervise and make decisions in relation to defaulting mortgage accounts for BOIMB. There was no other supervisory process for that bank. His

authority in this role came from his line manager, Ms. Carragher. He said that his discretion in this regard was set out in a letter given by her to him and included decisions to call in loans and appoint receivers. When he made his decision on the recommendations in this case, it was Mr. Healy's task, as case manager, to implement the terms of that decision. That included sending the letters of demand.

191. Mr. Maguire says that this is insufficient, and that because Mr. Gately and, possibly, Ms. Carragher were not employees of the bank there should be evidence, traceable to the board of the bank, of their authority.

192. I see no reason not to accept the oral evidence of Mr. Gately as to his authority. There is nothing to indicate either falsehood or mistake in that evidence, and it is clear from it and from Mr. Kelly's evidence that the bank intended this aspect of its business to be dealt with through the process described by Mr. Gately. There is, further, nothing to suggest that he was not entitled to instruct Mr. Healy to make the actual demands.

193. I therefore conclude that Mr. Healy was authorised, within the meaning of the agreements, to send the letters of demand.

194. In relation to the appointment of the receiver, I have come to the conclusion that the submissions on behalf of the Sheahans are misconceived. The decision to call in the loans and to appoint a receiver in the event of non-payment was made by an appropriately authorised person – Mr. Gately. It then became necessary to make the appointment by way of a deed and for that purpose the company seal had to be affixed to the deeds by a person authorised in that respect. There was no requirement for a separate authorisation in respect of the deeds.

195. The authority of Ms. Somers has been established by production of the relevant board resolutions.

196. I cannot see that Mr. Healy required any further authorisation to receive the deeds back and give them to Mr. McAteer. Proof of "delivery" of the deeds simply requires evidence of words or conduct on the part of the bank showing an intention to treat the deeds as legally effective and in the circumstances there cannot be any doubt of that.

197. It is, in my view, undoubtedly bad practice for the bank to leave blank the parts of the deed recording the date and time of the sealing of the document and for this to be filled in, in a rather speculative way, by the receiver. However, having regard to the applicable legal principles and to the fact that no issue arises in this case as to the precise time or date of the creation of the receiver's powers, it is not a matter that affects the validity of the appointment.

198. The submission has been made that if the bank's calculations of the arrears on the Beechgrove account are erroneous, the true figure as of the date of demand might have been as low as €1,500, that the bank therefore "misdirected" itself in deciding to call in the loan and in so doing acted in breach of contract.

199. This submission seems to me to be inconsistent with the principles, accepted as correct, that the validity of a demand does not depend on an exact statement of the sums due and that it is not bad by reason of demanding more than is actually due. It is not appropriate to approach the issue in a quasi-judicial review fashion, whereby the court might scrutinise the reasoning of the bank and ask whether it had taken irrelevant considerations into account in exercising its discretion to enforce or to forbear. In any event, the court has the evidence of the information put before Mr. Gately at the meeting in September, 2011. It is clear therefrom that all of the accounts were in difficulty, and had been for some time. The total exposure for the bank, as shown by the list of loans above, was significant. Income from the rental properties and from Joseph's brokerage was noted by the bank to be declining. Having regard to such details of their incomes as was available, the decision was that the borrowings were unsustainable. It is not the function of the court in proceedings of this nature to second guess the decision to call in the loans.

200. Finally, there is the issue of the so-called recent agreements, which Mr. Maguire says constitute new contracts.

201. Having regard to the legal principles applicable, as set out in *Ross v W.C.* and the passage cited therein from *Mespil v Capaldi*, it seems to me that it cannot be said that there was in this case a consensus ad idem between the parties. The offer must be considered to have come from Joseph, since the letters to which he was responding were demands for arrears. While it is clear from the authorities that lodgement of a cheque can constitute acceptance, it is necessary to see whether in the circumstances the acceptance of the cheques was on the same basis as the offer made by Joseph. In my view it clearly was not, but was, rather, acceptance on the fundamentally different basis of the bank's demand for the arrears. There was no meeting of minds, and no contract.

202. In the circumstances I find for the bank parties.