Neutral Citation: [2015] IEHC 722

THE HIGH COURT

[2013 No. 2812 S.]

BETWEEN

ACC LOAN MANAGEMENT LTD.

PLAINTIFF

AND

SEAN BROWNE AND GERALD BROWNE

DEFENDANTS

JUDGMENT of Ms. Justice Baker delivered on the 10th day of November, 2015

1. The plaintiff, ACC Loan Management Ltd. (the "Bank"), seeks summary judgment against the defendants in the sum of €103,997.51, together with continuing interest on the principal sum of €100,424.57, stated to be owed by the defendants, jointly and severally, by virtue of a loan agreement entered into between the parties under the terms of the facility letter dated the 9th April, 2008.

2. The defendants assert that the loan is unenforceable as certain provisions of the Consumer Credit Act, 1995 (the "Act of 1995") were not complied with. The plaintiff denies that the defendants or either of them were consumers within the meaning of that legislation.

3. As a separate matter, the plaintiff asserts that were the defendants to be classed as consumers for the purposes of the Act of 1995, that the loan was a housing loan and as such does not fall within the Act of 1995.

4. The defendants also raise a number of other defences. In the case of the second defendant, it is asserted that the loan was unconscionable, and that the relevant documentation was not executed such that a plea of *non est factum* arises. Both the defendants and the plaintiff argue that an estoppel by conduct and/or representation arises.

5. I will deal with the individual elements of the subject transaction which are relevant to the defences raised in the course of the judgment and as they arise for consideration.

Background

6. The defendants are brothers. The first defendant works for a taxi company and lives in Bandon, Co. Cork. The second defendant is a retired member of the Irish Defence Forces and lives at Suncroft in Co. Kildare.

7. The facility letter which gives rise to the claim in these proceedings is dated the 9th April, 2008 and contained an offer on the part of the Bank to advance the sum of €100,000 over a period of nine years at an identified interest rate. The loan was made to the two defendants jointly and severally, and the purpose of the loan was stated as follows:

> "… to refinance existing ACC loan reference 10039193; and to release equity on lands at Meenreagh, Killygordon, Co. Donegal to finance renovations to Borrowers' primary dwelling-house."

8. The loan was to be repaid by monthly instalments over a period of nine years in accordance with the schedule attached to the facility letter. The loan offer was accepted by the signature on the memorandum of acceptance by both borrowers on the 22nd April, 2008. The two borrowers, by their signature, also waived their right to a ten-day cooling-off period.

9. The defendants do not deny that the monies were advanced on the 23rd May, 2008, nor that they defaulted in the monthly repayments, nor that the plaintiff made demand for repayment by letters of demand, the first of which was dated the 18th April, 2012. The first default is stated to have occurred in the monthly payment due in December 2008.

10. The defendants provided security for the loan by the creation of a charge over 13 hectares of lands at Meenreagh, Killygordon, Co. Donegal, comprised in folio 2324F Co. Donegal, and the Bank, by a deed of appointment of the 4th May, 2012, appointed a receiver to those lands pursuant to the power contained in the charge. The lands were sold and the net proceeds of €28,619.40 were credited to the loan account of the defendants on the 15th May, 2013. While the defendants initially argued that the Bank had agreed to accept the net proceeds of the sale of the lands in Co. Donegal in full discharge of the liabilities due under the loan, that argument is no longer being made by either of them.

Transactions prior to the 2008 facility

11. The two defendants borrowed the sum of €40,000 from the plaintiff in or around the year 1999 for the purpose of purchasing the lands in Co. Donegal, which had been owned by their grandfather. They say that it was not their intention to develop the lands and that they bought them for "sentimental purposes only". At that time Sean Browne, the first defendant, was involved in a number of business ventures, and one of his business associates introduced him to the Bank and, as a result he came to develop a relationship with the Bank. The evidence is that the first defendant, Sean Browne made all, or almost all, of the repayments on the 1999 facility, and that Gerald Browne, the second defendant, encountered financial difficulties almost immediately after the 1999 facility was drawn down.

12. The 1999 facility was repaid in full.

13. Separately, Sean Browne borrowed in his own name the sum of €30,000 from the Bank in 2006 for the purposes of a deposit of a premises which in the events became his primary residence at 19 Allen Square, Bandon, Co. Cork. The purchase of that property was primarily financed by a secured loan from First Active PLC, and the 2006 facility from the Bank was sought in respect of the deposit. One issue that arises for consideration in this judgment is whether the 2006 loan facility to Sean Browne was in respect of his principal private residence or, as is stated in the loan facility letter itself, for the purchase of a residential investment property. The

security for that loan was to be a first legal charge over the lands in Co. Donegal, and this charge was registered on the folio and ranks in priority to the second charge registered as security for the 2008 facility, the subject matter of these proceedings.

14. The second defendant Gerald Browne provided a guarantee in respect of the 2006 loan facility for his brother Sean Browne, and that guarantee was agreed to be limited in recourse to the security provided by the charge over the lands in Co. Donegal. The guarantee executed by Gerald Browne did not in fact contain this limitation but the Bank has accepted that the terms of the guarantee were agreed to being so limited in recourse.

15. The 2006 loan facility was rolled over into the 2008 facility and, as set out above, the 2008 loan facility was, in part, to refinance the 2006 loan in the sole name of Sean Browne.

Consumer Credit Act: Were the defendants consumers?
16. The first defence raised by the defendants is that the loan was a consumer loan within the meaning of the Act of 1995, and the plaintiff denies that this is so. Both counsel agree that the case law establishes unequivocally that whether a loan is a consumer credit loan is a matter to be determined objectively and irrespective of the characterisation that the parties themselves may have applied to the loan. Thus the fact that certain internal documentation of the Bank identifies one or both of the defendants as a consumer is not determinative of the issue.

17. Counsel also agree that whether a loan is a consumer loan for the purposes of the legislation is a matter which is determined by reference to the purpose of the loan and not the trade or profession of the borrower. Thus all natural persons are consumers except when they are acting inside their business and for the purposes of his or her trade or profession. This is clear from the definition of "consumer" in s. 2(1) of the Act of 1995 as amended by Schedule 3 Part 12 of the Central Bank and Financial Services Authorities of Ireland Act 2004 which defines a consumer as:

> *"(a) a natural person acting outside the person's business, or*
>
> *(b) any person, or person of a class, declared to be a consumer in an order made under subsection(9);".*

A "business" for the purposes of the Act is defined as including a trade or profession.

17. Two leading judgments of the High Court on the meaning of a consumer credit agreement were relied upon by both counsel and both accept the dicta of O'Malley J. in *Allied Irish Bank Plc v. Fahy* [2014] IEHC 244 at para.65 that in assessing whether a person is a consumer:

> *"The primary issue for determination is the position of the defendant in entering into the loan agreement, having regard to the nature and aims of that agreement."*

18. A similar approach has been taken by Kelly J. in *Allied Irish Bank Plc v. Higgins & Ors.* [2010] IEHC 219, and both Kelly J. and O'Malley J. identified the principle as that found in a decision of the Court of Justice of the European Union (CJEU) in *Benincasa v. Dentalkit* (Case C-269/95) [1997] ECR I-3767 where the Court pointed out that reference *"must be made to the position of the person concerned in a particular contract, having regard to the nature and aim of that contract".*

19. It is clear from the case law that a person may be a consumer in relation to certain transactions and an economical operator or a non-consumer in relation to others. It is the purpose of the contract and whether it satisfies an individual's own needs that comes for consideration. As identified by the CJEU in *Benincasa v. Dentalkit*:-

> *"Consequently, only contracts concluded for the purpose of satisfying an individual's own needs in terms of private consumption come under the provisions designed to protect the consumer as the party deemed to be the weaker party economically."*

20. The approach of the Court in determining whether a particular loan was a consumer loan is to consider the purpose of the loan and whether that purpose was to satisfy an individual need of a private person for his or her private consumption and not for commercial benefit or gain, and not where he or she was acting as a commercial operator.

21. That it is the contract which is classified and not the person can of course have the consequence that a person who has considerable experience in business matters, and who has from time to time entered into credit agreements for the purposes of his or her business, may still be a consumer for certain credit contracts provided that the purpose is private and not commercial.

22. This is particularly significant when security is given for a loan over commercial property as was the case in *Evans v. Cherry Tree Finance Ltd.* [2008] EWCA Civ. 331 and also in *Allied Irish Bank Plc v. Fahy*. In each of these cases the security for the loan was given over property that was partly private residential and partly commercial or investment property and the Court held in each case that the test of whether the loan transaction was itself a commercial or a consumer loan turned on the purpose of the loan and not the nature of the property over which security was given.

23. Thus the first question that falls to be determined is whether the purpose of the 2008 loan was commercial. Having regard to the fact that the application comes before me as an application for summary judgment, the question I must determine is whether the defendants have made out an arguable case that the loan was a consumer and not a commercial loan, and bearing in mind the low threshold the defendant must meet in resisting a claim for summary judgment.

Discussion
24. As stated above the 2008 loan was identified as being for two stated purposes, namely to refinance the existing bank loan, and to finance renovations on the borrowers' primary dwelling house.

25. The reference to the dwelling house was to the dwelling house of both borrowers, although it is common case that the brothers at no time shared a residence.

26. The first purpose stated was to discharge the existing loan facility. While some confusion is to be noted with respect to the 1999 and 2006 loans, the Bank identifies the repayment as relating to the 2006 loan, the purpose of which was to pay part of the purchase price of the premises at Allen Square, Bandon, County Cork then described as a "residential investment property". The sum of €33,930 outstanding on that loan facility was discharged on the 23rd May, 2008 from the loan proceeds of €100,000 advanced by the 2008 facility.

27. Thus approximately one third of the 2008 facility was to repay an existing loan facility. It seems, prima facia at least, that the 2008 facility was advanced partly for the purposes of renovations of the principal private residence of the first defendant Sean Browne, and partly to refinance the loan advanced to the that defendant in 2006. In that context it is necessary to consider the purpose of the 2006 loan as the Bank asserts that the loan is commercial in purpose and that this element of the 2008 loan has the effect that the 2008 loan cannot itself be treated as a consumer transaction.

28. I turn now to examine how the 2006 facility is to be characterised

The 2006 Loan Facility
29. The plaintiff asserts that the 2006 loan facility was unequivocally a commercial facility, not merely because the loan was identified as being to part fund the purchase of a residential investment property, but also because at the time the first defendant was residing in another premises, and while he later came to reside, and still resides, in the premises at Allen Square, Bandon he did not take up residence in that premises as his principle private residence until November 2007, almost exactly one year after the 2006 facility was drawn down. At the time of the 2006 loan the first defendant was residing at Ealga, Kilbrogan Hill, Bandon, County Cork.

30. The 2006 facility was stated in certain bank documentation to be commercial and the first defendant did expressly in writing warrant and represent that he was not acting as consumer in respect of the facility. The first defendant asserts that he sought the facility in 2006 to enable himself and his partner to jointly purchase the premises at 19 Allen Square, Bandon which is now their primary residence and into which they moved on the 19th November, 2007. They had obtained a mortgage from First Active for the bulk of the purchase price and the monies advanced on foot of the 2006 facility were in respect of the balance of the purchase monies, most of the initial deposit for that purchase. The first defendant says that Allen Square was in no way connected with his business and that he did not run his office from that premises nor did he at any time rent or intend to rent that premises for gain. He says he was not involved "in property development" but that he was a director of Spacecabins Limited, a company which provided cabins, chemical toilets and portable accommodation to industrial and business sectors. That business has now closed and none of the loans related to that business.

31. It seems to be the case that one consideration had by the Bank, in the advance of the 2006 facility was the capacity of the first defendant to repay that facility and the internal bank credit application assessed the financial profile of the first defendant in the context of what was then a reasonably profitable company. There is some confusion in the documentation however, and the internal bank credit documentation does identify the property at Allen Square as intended to be used by the first defendant as his "PDH". However, the loan sanction letter of the 6th November, 2006 which forms the basis of the contract described the property as "residential investment property" and the warranty of the first defendant that he was not acting as a consumer and was acting in the course of his business is part of this loan sanction document and the terms thereof were formally accepted on the 7th November, 2006 by both defendants as is evident from their signature.

32. As the law is clear that the task of whether a loan is a consumer or a commercial transaction is an objective one having regard to the purpose of the loan, the characterisation that each of the parties put on the loan is not sufficient to determine how it may properly be characterised from a legal point of view. The Bank in its internal documentation did characterise the loan as a consumer loan as related to the purchase of the primary residence of the first defendant. The final loan offer identifies the loan as been for commercial properties.

33. I cannot decide any conflict of evidence at this stage on a motion for summary judgment, but for the purposes of the present argument I consider that the evidence is sufficient to raise the arguable defence that the loan was a consumer loan linked to the purchase of the principal private residence of the first defendant. One matter that strikes me as curious is that the first defendant asserts that the property was to be purchased by him and his partner, and he described them as joint purchasers and that they obtained a joint mortgage from First Active for the bulk of the purchase price, that fact and that the property was to be jointly owned is not identified in the loan documentation. It does not seem that the Bank was informed of this fact and this is a matter that, as a matter of probability, would have required the Bank to consider the position of the co-owner of the property. However, it should be noted in that context, and this may explain that difference, that the 2006 loan facility was intended to be short term and to be a facility for twelve months only and no security over the property to be purchased was agreed to be provided.

The 2008 loan facility
34. I turn now to consider the 2008 facility having regard to the fact that its agreed purpose was to discharge the 2006 facility and to renovate the private residence of the first defendant. In that context I consider first whether the 2008 facility may be divided such that even if it is arguable that part of the 2008 facility was for non consumer purposes whether that part advanced for the purposes of refurbishment of a private dwelling could be separately treated as a consumer loan.

35. The CJEU in the decision of *Gruber v. Bay Wa A.G.* (Case C-464/01) [2005] ECR I-439 was considering a reference regarding the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the "Convention") from the Austrian Supreme Court. Mr Gruber was domiciled in Austria and the defendant company was incorporated under German law. Proceedings were commenced in Austria by Mr. Gruber on account of an alleged defective performance of a contract between him and the German company. The question for the Court was whether the contract was a consumer contract. The Court took the view that the contract was partly for business purposes, namely the purchase of tiles by a farmer to tile the roof of his farm building, but noted also that the tiles were to be used to roof the private residence of the borrower. The Court noted that the seller had no reason to believe that Mr. Gruber would use the tiles exclusively or principally for private purposes and noted also that the large quantity of tiles purchased did suggest at least that their use was for business purposes or at least partly for business purposes.

36. The Austrian Court referred a number of questions to the Court of Justice for preliminary ruling as follows:

> (a) Where the purposes of a contract are partly private, does the status of the contracting party as a consumer for the purposes of Article 13 of the Convention depended on whether the private or the trade or professional purposes is predominant, and what criteria are to be applied in determining which purpose predominates?
>
> (b) Whether the purpose and circumstances had to be objectively ascertained by the other party to the contract?
>
> (c) Where there is doubt, is a contract which may be attributed both to private and to trade or professional activity to be regarded as a consumer contract?

37. Certain other questions regarding jurisdiction are not relevant to my judgment in this case. The Court considered the first three questions, namely those as to the characterisation of the contract, as one question and adopted the view expressed in the Opinion of the Advocate General that the special protection afforded to consumers arises from the view that a consumer is not on *"equal*

footing" with the other party to a contract, and accordingly the purpose of designating a party as a consumer is to afford that person special protection which can be justified by virtue of the absence of equality of bargaining or negotiating power. It was also relevant to the Court's consideration that under Article 13 of the Convention a consumer contract is defined in what the Court described as *"clearly restrictive terms",* namely a contract *"concluded for the purpose... outside [the] trade or profession"* of the contracting party. The Court also noted that the definition of a contract concluded by a consumer must be strictly interpreted as it constituted a derogation from the basic rule of jurisdiction in the Convention itself.

38. Bearing that in mind the Court noted that a contract with dual purposes, partly professional and partly personal, may be treated either as a commercial or as a consumer contract. The Court held at para. 39 as follows:

> *"In that regard, it is already clearly apparent from the purpose of Articles 13 to 15 of the Brussels Convention, namely to properly protect the person who is presumed to be in a weaker position than the other party to the contract, that the benefit of those provisions cannot, as a matter of principle, be relied on by a person who concludes a contract for a purpose which is partly concerned with his trade or profession and is therefore only partly outside it. It would be otherwise only if the link between the contract and the trade or profession of the person concerned was so slight as to be marginal and, therefore, had only a negligible role in the context of the supply in respect of which the contract was concluded, considered in its entirety".*

39. Thus the Court regarded that the contract had to be considered in its entirety, and that the correct approach was not to seek to subdivide the contract into constituent contracts or elements or separate contracts one commercial and the other consumer in nature. Further it was only if the professional element of the contract is *"negligible"*, and where the private use is "predominant", that that the contract would be treated as one which had a private purpose. The Court took the view then that when a contract had a dual purpose it was not necessary that the professional purpose be predominant, and if there was a professional or business element, and unless that professional business element was negligible, its characterisation would determine the characterisation of the contract taken as a whole.

40. The judgment of the Court in *Gruber v. Bay Wa A.G* was referred to and followed by O'Malley J. in *Allied Irish Bank Plc v. Fahy.*

41. The decision in *Gruber v. Bay Wa A.G* also draws from a number of first principles, namely that there be legal certainty, and that the avoidance of the multiplication of the basis of jurisdiction as regards contractual relationships requires that a contract not be capable of being classified in such a way that the contract was divisible into two classes of contracts, such that one part of the contract came to be considered in the light of different principles to another part.

42. The judgment in *Gruber v. Bay Wa A.G* is strong authority for the proposition that, for the purpose of assessing whether a contract is a consumer or a professional contract, a court should not engage in the exercise of dividing the contract such as to generate two or more different contracts and two or more different legal tests or indeed jurisdictions. The parties in *Allied Irish Bank Plc v. Fahy* conceded that the contract was not divisible in this way and there was undoubtedly in that case an element of the borrowing that related to the borrowers private residence.

43. Thus I consider that the proper approach for the purposes of assessing whether the 2008 facility was a consumer or professional contract is that I must consider the predominant purpose of that contract, or take the contract as a whole, and if there is a commercial element that is not negligible, that fact will be determinative of the commercial nature of the contract as a whole.

44. It seems to me that it is undoubtedly also the case that one cannot characterise the different elements or purposes of a loan merely by reference to quantum. In this case, even if the 2006 loan were a commercial loan the repayment of that loan accounted for approximately one third of the 2008 facility. It is not a question of assessing whether the majority, or most, of the 2008 loan was a consumer loan, but whether the loan taken as a whole could be characterised as such in regard to its purpose, again looking at purpose as a whole.

45. It seems to me the question may relatively easily be answered in this case for a number of reasons. The 2006 facility was for twelve months. If it was a loan to cover the deposit required for the purposes of acquiring residential investment property, and if that made it a commercial loan, the commercial element of the loan was intended to be short term, namely for twelve months and as a classic bridging loan. By the time the 2008 loan came to be negotiated the first defendant had come to live in the premises at 19 Allen Square, Bandon. One of the stated purposes of the 2008 loan was the renovation of this as his private dwelling house. I regard it as significant also that no warranty was given by either of the borrowers for the purposes of the 2008 facility that they were not acting as consumers. The documentation provided by the Bank contained a separate schedule setting out reasons why the product identified as a "consumer loan" was considered to be suitable by the Bank. A certain element of confusion is apparent in the documentation in that the general terms and conditions which were incorporated into the loan by virtue of clause 4 of the letter of sanction were commercial and not private consumer general conditions, but the balance of the letter and the facility letter actually signed by the borrowers makes reference to and identifies the loan as a consumer loan.

46. It seems to me not to matter at the stage of an application for summary judgment whether counsel for the defendants is correct that an overly restrictive interpretation of the notion of consumer is not intended by the Directive, or by the Act of 1995 of that insofar as the judgments in *Benincasa v. Dentalkit* and in *Gruber v. Bay Wa A.G* dealt with the question in the context of the Convention where possibly different considerations might be in play. The question for the present comes down to whether the defendants have shown arguably that they were consumers and whether they in those circumstances have defences available to them that might be available to a consumer. In that context of course the test is a test of whether the defendants have made out an arguable defence as explained by the Supreme Court in *Aer Rianta c.p.t. v. Ryanair Ltd.* [2001] 4 I.R. 607, or as explained in *Harrisrange Ltd. v. Durkan* [2003] 4 I.R. 1, whether the defendant can show a reasonable probability of having a real or bona fide defence.

47. In that context too I am aware that the courts have found in a number of cases that the determination of a legal question may be made at the stage of summary judgment.

48. Accordingly, and bearing in mind the relatively low threshold that the defendants have to meet, and bearing in mind also that documentation does in my view point to the 2008 facility being a consumer loan or private contract, I am of the view that the first defendant has made out an arguable case that he is a consumer for the purposes of the Act of 1995.

Position of the second defendant

49. The position of the second defendant is more complex. He is not involved at all in the 2006 facility. He was a borrower in the 1999 facility but no argument is made that the facility was for commercial purposes, and it is not seriously contended that the loan was for

other than the purchase of the Donegal lands which contained a derelict house, and thirty-two acres of land or thereabouts, of which only about eight were capable of agricultural use. Neither defendant was a farmer, neither had shown any intention of engaging in farming activities, and while both of them had a "vague idea" that they might develop the disused house as holiday home, that particular plan never came to have any reality, no money was ever sought to refurbish the house, and the derelict building on the land remained derelict and entirely uninhabitable even when the lands came to be sold.

50. Thus the question is whether the second defendant could be described as a consumer for the purposes of the 2008 loan when part of that loan was to discharge an earlier loan of his brother from the 2006 facility. The 2008 loan was not used nor intended to be used to further any private purposes of the second defendant, but I turn now to consider whether that of itself makes it a business or professional loan to the second defendant.

51. The second defendant, Gerald Browne, asserts that he had agreed with his brother the first defendant that Sean Browne would be wholly responsible for repaying the 2008 facility. This agreement was made between the two borrowers themselves and does not bind the Bank. However, it is equally clear that the loan, whatever its purpose, was from the point of view of the second defendant not one obtained by him for any purpose relating to his business. The second defendant is retired from the Irish Army and the 2008 facility did not and could not have been said to have furthered any business of the second defendant, he not being engaged in any trade or profession in respect of which he required or sought loan finance.

52. I consider that the legislation is such that a person is a consumer unless it can be shown that the person is acting inside the person's business. I accept the argument of counsel for the defendant that the legislation is drafted such that in a sense the default position is that all natural persons are consumers unless it can be shown they are acting inside or for the purpose of the business in entering into a credit agreement. While it could be said that the 2008 facility did not satisfy any needs "in terms of private consumption" of the second defendant, to use the terminology of Kelly J. in *Allied Irish Bank Plc v Higgins*, following *Benincasa v. Dentalkit*, the needs of the second defendant, insofar as they related to this loan, were allied to the needs of the first defendant, and the second defendant was a borrower primarily if not entirely because he was a co-owner of the property in Donegal which was to be the security for the 2008 loan. While it would have been possible to provide the security even were Gerald Browne not to be a borrower, the Bank may have considered it more efficient to identify both Browne brothers as borrowers and mortgagors.

Conclusion on whether the contract was a consumer contract
53. I conclude that both borrowers have made out an arguable and bona fide case and they were consumers for the purpose of the 2008 loan.

54. I later consider what if any consequences this may have for the enforceability of the loan but will first deal with the argument of the plaintiff that the loan was a housing loan.

Was the 2008 Facility a Housing Loan?
55. Counsel for the Bank argues that, even if the defendants, or either of them, may properly be characterised as consumers for the purposes of the Act of 1995, that the loan was a housing loan and that as a result the borrower does not have the specific protection available to consumers under that Act.

56. A housing loan is defined in s. 2(1) of the Act of 1995, as amended as:

> *"(a) an agreement for the provision of credit to a person on the security of a mortgage of a freehold or leasehold estate or interest in land—*
>
> *(i) for the purpose of enabling the person to have a house constructed on the land as the principal residence of that person or that person's dependants, or*
>
> *(ii) for the purpose of enabling the person to improve a house that is already used as the principal residence of that person or that person's dependants, or*
>
> *(iii) for the purpose of enabling the person to buy a house that is already constructed on the land for use as the principal residence of that person or that person's dependants,*
>
> *or*
>
> *(b) an agreement for refinancing credit provided to a person for a purpose specified in paragraph (a)(i), (ii) or (iii),*
>
> *or*
>
> *(c) an agreement for the provision of credit to a person on the security of a mortgage of a freehold or leasehold estate or interest in land on which a house is constructed where the house is to be used, or to continue to be used, as the principal residence of the person or the person's dependants,*
>
> *or*
>
> *(d) an agreement for the provision of credit to a person on the security of a mortgage of a freehold or leasehold estate or interest in land on which a house is, or is to be, constructed where the person to whom the credit is provided is a consumer;".*

57. The definition is cumbersome, but certain factors are clear: a housing loan for the purposes of (a), (b) and (c) is a loan granted on the security of a mortgage of an interest in land. Land for that purpose is land on which a house is intended to be constructed, or land on which a house is already constructed, provided that house is already or is to be the principal residence of a person or that person's dependants. Thus, a housing loan is a loan which a person enters into to buy a house as his or her principal residence, or to buy land on which to construct a house where none already exists on the land, or to improve a house already used by that person or his or her dependants as a principal residence.

58. Counsel for the Bank argues that the 2008 loan was a housing loan because it was secured against the Donegal lands. There was an old ruin on the Donegal lands, which was not, at the time of the loan, the principal residence of either of the defendants, or of any of their dependants, or intended to be such. Thus the loan cannot be a housing loan within the meaning of s. 2(1)(a), (b), or (c). Counsel for the Bank, however, argues that the loan comes within subcategory (d) of the sub-section, namely that the loan was to a

consumer granted on the security of a mortgage of land on which a house was, or was to be, constructed. The interpretation of the subsection is devoid of authority, and accordingly I turn to consider the terms of the Act.

59. The 2008 loan was for two purposes: the re-financing of the 2006 loan, and the refurbishment of the premises at Allen Square, Bandon. However, the loan was not granted on the security of any interest in that land. Thus, it can only be the Donegal land over which security was agreed to be, and was in fact given, which might make the 2008 loan a housing loan.

60. The evidence is that there was a ruin on the Donegal lands. The defendants say that since at least 1999 the house was fully derelict, and had no roof, the walls had collapsed, and what remained was an outline of approximately three blocks in height where they once stood. The Bank offered no contrary evidence and the credit memorandum, one of the Bank's internal documents, described the house as "remains of an old stone house", and also refers to it in another place as a "ruin".

61. There is no evidence that the 2008 loan was obtained for the purpose of enabling either of the borrowers to improve the ruin on the Donegal lands.

62. Thus, it falls to be considered whether the 2008 loan could be said to be secured on land on which a house was, or was to be, constructed. There being no evidence that a house was to be constructed on the Donegal lands, the question is confined to whether the security for the 2008 loan was in respect of land on which there was a house.

63. Counsel for the Bank argues that the ruins, albeit that it was in poor condition, was still a house within the meaning of the Act of 1995. A house is defined in s. 2 as including:

> *"any building or part of a building used or suitable for use as a dwelling and any outoffice, yard, garden or other land appurtenant thereto or usually enjoyed therewith".*

64. Counsel for the Bank argues that the condition of a building does not, of itself, determine whether a building is a house. He argues that a "house" within the meaning of the Act of 1995 does not need to be habitable. However, this argument ignores that fact that the statutory definition requires the building to be "suitable" for use as a dwelling. It may in fact be more correct to identify a house as building which is not, or not likely to be, an office, a factory, or another commercial building.

65. Because there was no evidence before me of an intention on the part of the defendants to improve the ruin with a view to making it suitable for habitation, I will leave for decision in a suitable case the question of whether the definition includes a house which may be made suitable for use as a dwelling, because it seems to me that counsel for the defendants is correct that at the least a house has to be a building. She argues that the ruin in its present form is not even a building.

66. A building, in its widest sense, can include any form of structure including the example given by counsel for the defendants: the Spire on O'Connell Street or a coffee kiosk or pod on a public street. While in certain circumstances one could consider that a caravan or mobile home is a building used as a dwelling, I consider for the purposes of the legislation that a house must have at least some structures which would provide shelter including, at least, some walls, windows or window opes, and a roof, even if that roof was not watertight. Thus, I consider that a house, for the purposes of the Act of 1995, given that the definition includes an element of suitability for use as a dwelling, must be a building which offers some degree of enclosure or shelter. There was nothing on the Donegal land that could have even conceivably offered shelter in which any person might have dwelled, even uncomfortably and without modern conveniences. A degree of shelter, protection from the elements, is in my view a necessary element.

67. I also consider that there must be at least some degree of enclosure, a chamber or room in which a person could dwell or which could be inhabited. Bovill C.J. in *Thompson v. Ward, Ellis v. Burch,* (1871) LR 6 CP 327, at 358, cites the definition of house from Lord Cooke in relation to burglary:

> *"A chamber or room, be it upper or lower, wherein any person doth inhabit or dwell, is domus mansionalis in law"*

The old derelict structure on the Donegal lands offers no enclosure. The structure was a ruin and not a building.

68. I consider then that the Bank is not correct in its argument that the 2008 loan was a housing loan because the ruin or structure on the Donegal lands was not a building, and no evidence has been shown of any intention to construct a house on that land.

69. Therefore, I conclude that the loan was not a housing loan, and that therefore the provisions protective of the borrowers as consumers do apply.

The alleged breaches of the Consumer Credit Act 1995

70. It is accepted by both parties that if the 2008 credit agreement was a consumer loan that certain conditions precedent to the enforcement of that loan are established by the legislation, and that a loan facility in respect of which there has been a breach of the Act is not enforceable by the bank. Section 30 imposes certain mandatory obligations on a credit institution and that these are mandatory is clear from the judgment of Kelly J. in *Allied Irish Bank Plc v Higgins*, and was accepted and noted by O'Malley J. in *Allied Irish Bank Plc v Fahy*. The defendants have raised three specific matters in respect of which a failure is alleged.

The first alleged breach: the address in the facility letter:

71. Section 30(3) of the Act of 1995 requires a consumer credit agreement to contain a statement of:

Section 30(3) of the Act of 1995 requires a consumer credit agreement to contain a statement of:

> *"(a) the names and address of all the parties to the agreement, and*
>
> *(b) any costs or penalties to which the consumer may become liable for any failure by the consumer to comply with the terms of the agreement."*

72. The defendants allege that the credit agreement did not contain the address of each or all of the parties to the agreement. The facility letter of the 10th April, 2008 was addressed to both defendants at the address at Eagla, Kilbrogan Hill, Bandon, Co. Cork. The evidence is that the first defendant, Sean Browne, had by November 2007 taken up residence at the property 19 Allen Square, Bandon, Co. Cork. The second defendant at all times resided at an address in Co. Kildare. The precise residential addresses of the defendants are not denied by the plaintiff, but the plaintiff says that on a true construction of the legislation the test is met by the

fact that all letters addressed to the defendants at the Eagla address were in fact received by them. The plaintiff asserts that the Eagla address is an address of the first defendant, and that the relevant legal test is whether the address be one at which post would be received by a borrower. In that context the plaintiff says that a person may have a number of addresses and the furnishing of documentation to one working postal address at which post is in fact received is sufficient for the purposes of compliance with the legislation. While the plaintiff formally denies that the first defendant did in fact reside at the premises at Allen Square, Bandon, Co. Cork in April, 2008, it is accepted that the second defendant was at all material times resident at Suncroft, Co. Kildare, although it states that the Bank was never "formally advised" of this address by either defendant. The Kildare address does not appear anywhere on the facility letter or on any other documentation.

73. With regard to the second defendant, the plaintiff asserts that in the case of joint borrowers it is sufficient for the purposes of compliance with the Act of 1995 that the documentation be sent to an address for one of them, and that that is particularly so in the case where one of those borrowers was what the bank describes as being an "organiser of the loan facility", which it is argued is the position of Sean Browne, for whom the loan was primarily intended.

74. I do not consider that the plaintiff is correct in this assertion and the Act of 1995 is clear that the loan agreement must contain a statement of the names and address of all parties to the agreement, not just of one of the parties. I consider that the legislation does not envisage a situation were one borrower may act on behalf of other borrowers for the purposes of compliance with the mandatory requirements, and the legislation property interpreted contemplates that the addresses of each and all parties to the agreement must be identified. It seems to me that this so whether the agreement is for joint or several liability, as the purpose for which the address of the individual borrower or borrowers is required is for the purposes of ensuring that each and all of them obtain a copy of the loan agreement for the purpose of the cooling-off period requirements which I would consider below. The bank requires information in order to comply with certain other obligations in the Act of 1995 and the provision of an address for each of the borrowers on the credit agreement is the means by which the legislator has ensured that a credit institution has information by which it can meet those requirements.

75. Thus I consider that the defendants are correct that the credit agreement did not contain the names and addresses of each and all of the borrowers. It did not contain the address of Mr. Gerald Browne at all. It contained the incorrect address of Mr. Sean Browne, however, I consider that the address for Sean Browne was adequate to meet the requirements of the Act of 1995 and that counsel for the plaintiff is correct that an address for Sean Browne was provided in the credit agreement, namely the address at Ealga. That is an address at which he had resided, and at which he continued to have sufficient contact through his daughter and son in law who took up residence in the house when he surrendered his tenancy. A credit institution would not comply with this requirement under the Act of 1995 if it addresses a credit agreement to an old address of a borrower, but the evidence points in my view to Sean Browne, had sufficient ongoing contact with the address at Eagla for that to be an acceptable and current address for him for the purposes of correspondence.

76. However, I consider that the loan documentation is faulty in that it does not contain the address of Gerald Browne. Because the loan was joint and several I consider that Gerald Browne can be characterised as having made a separate promise to the Bank, and accordingly the conditions of the Act of 1995 with regard to him taken as a separate person must be met, he having entered into a separate and individual contract with the Bank to repay the loan.

The second alleged breach:
77. The second alleged failure is that the Bank failed under s. 30(1)(a) to provide a copy of the agreement to the borrowers. That subsection provides as follows:

> *"30.—(1) A credit agreement and any contract of guarantee relating thereto shall be made in writing and signed by the consumer and by or on behalf of all other parties to the agreement, and—*
>
> *(a) a copy of the agreement shall be—*
>
> *(i) handed personally to the consumer upon the making of the agreement, or*
>
> *(ii) delivered or sent to the consumer by the creditor within 10 days of the making of the agreement,".*

78. It is not argued by the Bank that a copy of the agreement was handed personally to either or both of the defendants upon the making of the agreement, but it is asserted that it was delivered or sent to each of them within ten days of the making of the agreement by the letter of the 10th April, 2008 to which was attached the loan offer of the 9th April, 2008 to the borrowers. That cover note was addressed to both Sean and Gerald Browne at 19 Allen Square, Bandon, Co. Cork although the address on the loan offer itself was the address at Eagla.

79. The evidence is that a copy of the facility letter was also sent to Messrs. Casey & Co. Solicitors said by the Bank to be the solicitors for both defendants but in respect of which firm the second defendant denies any involvement. It cannot be denied that Messrs. Casey had some involvement with the transaction in that that firm were required to give an undertaking to complete the security and deal with certain other formal matters required before drawdown, and the monies were drawn down through the office of that firm. Thus it seems to me that the firm of Casey & Co. did act for both defendants, albeit the second defendant asserts, and this is not denied, that the fees of Messrs. Casey & Co. were discharged by the first defendant only, and this fact does not have the effect that Messrs. Casey & Co. did not act for both defendants. Having regard to the arrangement made between the brothers that the first defendant was to discharge the loan it was perfectly reasonable for them to agree that he too would discharge the legal fees attendant upon the putting in place the security for the loan.

80. The evidence is that a copy of the agreement was not sent to the second defendant at any address which could be characterised as an address for him. I do not believe that the legislation may be interpreted as meaning that correspondence sent to a solicitor or other agent is sufficient for the purpose of compliance with the Act of 1995. If that is what the legislation intended then it would have been stated in such a way as to make service of the loan agreement on an agent sufficient for the practice of compliance. The Act did not so provide.

81. Furthermore, it seems to me that at this stage where the question I am considering is whether the defendants have made out a *bona fide* case that the loan agreement was not provided to them at their addresses, the second defendant has made out a bona fide defence that the documentation was not properly served.

82. With regard to the first defendant, however, it seems to me that the cover letter under which the loan sanction letter was sent was addressed to him at the address he identifies as then being his residential address, namely at 19 Allen Square, Bandon. Having

regard to the purpose of the legislation, being that documentation be received by a borrower for the purpose of the ten day cooling-off period, I am satisfied that the first defendant has not made out an arguable case that there was a failure under s. 30(1)(a)(ii) with regard to him.

Third alleged failure: breach of s. 54

83. The third alleged failure on the part of the plaintiff is that the Bank failed to serve a notice under s. 54 of the Act of 1995. Section 54 creates a limitation on the right of enforcement of a credit agreement and inter alia provides for service of a ten-day warning letter by a credit institution before any enforcement action is taken. Section 54(1)(c) requires certain matters to be specified in a warning notice, the relevant ones being:

> *"(iii) the name and address of the consumer;*
>
> *(iv) the term of the agreement to be enforced;"*

84. Breach of s. 54 does not make a credit agreement unenforceable but merely makes the notice of enforcement ineffective. Section 54(4) provides that a creditor may apply to a court of competent jurisdiction to have the provisions of s. 54 dispensed with where the court is satisfied that it would be just and equitable to do so. Thus breach of s. 54 can call on the discretion of the court.

85. The defendants allege that the notice served by the Bank breaches s. 54 in that it failed to identify the names and addresses of the consumers. This matter has been dealt with above. However, there is an additional plea made, namely that there was a breach of s. 54(2) of the Act of 1995 which requires a ten-day notice period before any action, such notice to identify the nature of the alleged breach. Two arguments are raised with regard to the warning letter sent. The first is that the warning letter of the 8th March, 2015 was insufficient to meet the requirements of the Act of 1995. In particular it is asserted that the creditor must give 21 days to the debtor to repay a loan or remedy a breach of a loan agreement. The notice was served on both by registered post on the 28th March, 2012, on the second defendant to his address at Suncroft, Co. Kildare and on the first defendant at Allen Square, Bandon. Counsel for the defendants asserts that the figure stated in the notice, in respect of the total arrears and total surcharge interest, was wrongly calculated as was the amount of the overdue instalments. Counsel for the plaintiff asserts that that error, if there be an error, is not one of sufficient gravity to void the notice itself and I accept what he says. The legislation requires that the default and the nature of the alleged breach be identified as must the sum, if any, required to be paid as "compensation for the breach". The error identified by the defendants is an error in the calculation, but the letters adequately in my view identify the nature of the alleged breach as being a failure to meet payments when they fell due, such failure being one that is not denied by either defendant. It is a breach capable of remedy in that the defendants could have, but did not, offer to pay the arrears. Neither of them was in a position to pay the arrears at the time of demand in 2012, and that inability did not in any way occur because of the minor miscalculation made by the Bank in its calculation of the outstanding amount and the correct amount in respect of which credit ought to have been given.

86. Furthermore, I accept the argument of the plaintiff that a large number of demand letters were sent to the defendants since the 13th January, 2009, and letters in standard form were sent every month until 3rd February, 2010 after which different form letters were sent. I note the letters were sent to the old address of the first defendant, i.e. to his address at Riverview Estate which he had left in 2003, but equally it must be noted that some of the letters were sent to Mr. Sean Brown at his address at Allen Square, the earliest of which was sent on the 18th April, 2011. The position with regard to Gerald Brown is somewhat different in that the correspondence of the 23rd August, 2011, and the 19th September, 2011, is addressed to him at Riverview Estate, at no time an address at which he resided or which was a postal address for either him or indeed for the first defendant since 2003.

87. However, it must be noted in this regard that a reply was received to the demand letters from Sean Brown on the 11th March, 2010 where he identified a firm of solicitors that would act for him, a different firm of solicitors but also a firm in Bandon, County Cork, and by which he asked the Bank to "defer matters" for six months to see if he could "get to grips with things". In this letter he sought the indulgence of the Bank having regard to the collapse of the Spacecab business and the fact that he was in significant arrears with seven identified creditors, including the plaintiff, and that he was suffering from very poor health.

88. More crucially however, the defendants argue, that the letter of the 28th March, 2012 and the final letter of demand pre-proceedings of the 18th April, 2012 in each case failed to identify the arrears. In the letter of the 28th March, 2012, the arrears were identified as €116,043.51, and at the 18th April, 2012 as €116,678.31. These are not the arrears figures at the relevant dates but the full redemption amount, and while that sum is correctly identified in the letter of the 18th April, 2012 as the full redemption figure, it is incorrectly identified as the total arrears in the first of the two letters of the 28th March, 2012. The legislation requires a 21-day warning letter to identify the means by which a borrower may remedy a defect, and in the case of a loan payable by instalments, the requirement is that the arrears of instalments to the relevant date be identified. These were not identified in the letter of the 28th March, 2012, and that leads me to conclude that the Bank's warning letter of the 28th March, 2012, did not meet the test at s. 54. Furthermore the letter also contains what must be regarded, at least at this stage in the proceedings where the Bank claims summary judgment, as a relevant and important error, namely that the warning letter of the 28th March, 2012, seeks payment of the total sum within 21 days of the date of the letter, rather than as the legislation requires within 21 days of service of the notice.

89. This has two consequences in this case. The letter sought payment of the full redemption amount, when it should have identified the arrears of instalments and not the full amount owed, and insufficient notice was given. The notice did identify the date when the account fell into arrears, the number of payments missed in respect of the loan facility, but the warning letter is problematic in that it identified the means by which the breach may be remedied as the payment of an identified amount which is far in excess of the 36 unpaid instalments.

90. While I accept that the requirements of s. 54 do not make a loan unenforceable, nor totally avoid an enforcement process commenced by a bank, and that the Court has a discretion to dispense with the provisions of the section when it is satisfied that it is just and equitable to do so, I do not consider it is appropriate for me in a motion for summary judgment to consider the justice or equity of the matter, or to dispense with the notice requirements under s. 54 at this stage, having regard to the significant error in the Bank's demand letter in that it incorrectly conflated the arrears amount with the full redemption figures. Thus any dispensing with the requirements of s. 54 ought to await a full trial. Further, when taken with some of the other breaches of the Act of 1995, this error is in my view sufficient at this stage to refuse the plaintiff summary judgment.

91. I conclude therefore that Gerald Browne has established a prima facie case that the 2008 facility was a consumer loan, and the Bank did not meet the requirements under s. 30 and/or s. 54, and that, accordingly, he has made out a sufficient case to avoid summary judgment being entered against him.

92. With regard Sean Browne, I consider that Sean Browne has established sufficient argument that the loan to him is a consumer

loan but I am not satisfied he has made out a sufficient case that there has been a breach of s.30. There has, however, been a breach of s. 54, in that the warning letter did not identify the amount of arrears, and instead identified the amount then outstanding on the loan as a whole. That error is one which may be forgiven by a court in due course, but one which to my mind is sufficient to enable this defendant to resist an application for summary judgment against him. This is so notwithstanding the argument made by the plaintiff that neither defendant has said on affidavit that either or both of them would have been in a position to meet the arrears had the arrears been adequately identified. The stark fact of the case is that both defendants are of very limited financial means and the loan fell into arrears because of Sean Browne's unanticipated financial and health crisis. I do not consider that the legislation may be interpreted as allowing a credit institution to avoid the provisions of the Act of 1995 merely on account of the fact that a borrower can be shown to have been incapable of meeting his or her contractual liabilities because of financial difficulties, and the purpose of the legislation is to protect consumers at the inception of the loan to redress an imbalance in negotiating powers between bank and customer. Further, I do not consider that the legislation envisages a credit institution avoiding compliance with the Act of 1995 merely on account of the fact that, at the time the facility is called in, a defendant would be, were all of the requirements of the Act complied with, not in a financial position to discharge the loan. The test of compliance with s. 30 must be made at the time the loan is advanced, and compliance with s. 54 must be tested at the time of the notice and in the context of that notice. The purpose of the legislation was to redress an imbalance in bargaining power at inception, and to fail to recognise that imbalance in the context of a financial inability of one party to pay, would be to allow the stronger party to take advantage of a financial inability which might make repayment impossible or difficult.

Other grounds of argument
93. Notwithstanding that my determination above means that summary judgment will not be awarded, and because several other grounds were advanced by the parties, and, I turn now to deal with those.

Estoppel
94. Counsel for the Bank asserts that even if it is established by the defendants or either of them that they were consumers, and if either or both of them establish a *prima facie* argument that there has been a breach of the legislation with regard the loan and/or the enforcement procedures adopted by the Bank, that the defendants and each of them are estopped from denying the validity and/or enforceability of the credit agreement. It is asserted in particular that the Bank used the same addresses for the second defendant Gerald Browne in all documentation relating to the 1999 and 2008 facility, and as the second defendant did not deny either the validity or enforceability of the 1999 agreement, he is estopped from denying the validity and enforceability of the later agreement where similar or identical procedures and addresses were used, and where the first defendant was used as the "lead borrower". I do not consider that an estoppel can arise against either defendant by virtue of a course of dealings between the parties for the following reasons.

95. The provisions of the Act of 1995 are in many cases mandatory, and the specific requirements of s. 30 are mandatory in all cases. Thus a credit institution may not raise a defence of estoppel against a customer pleading that non-compliance with s. 30 has rendered a loan unenforceable. The principles of estoppel have no place in the case of mandatory statutory requirements such as these. This view is enforced by the fact that the court does have discretion to consider the effect of a breach of s. 54 of the Act, but no discretion is available to the court arising from a breach of s. 30. While the elements of estoppel and the exercise of the court's discretion arise from different legal principles, both the law on estoppel and the elements that might influence the exercise of discretion by a court arise from broadly similar considerations of a need to ameliorate the strictness of certain requirements or the results of the application of strict law. I do not consider that the Oireachtas intended, in the case of s. 30, to allow a court to, in effect, exercise and apply discretionary and equitable principles to forgive a breach of that section. Section 30 is mandatory and is provided to be such by legislation. Compliance with s. 54 may be dispensed with if the justice of the case so demands. I consider the juxtaposition of the two sections and the different approaches available to the courts in regards to a breach of each means that the Oireachtas did not intend that circumstances could arise where a credit institution might indirectly avoid compliance with s. 30 by establishing an estoppel.

96. Even if I am wrong in this, it seems to me that the Bank has not sufficiently established facts to found an estoppel against Sean Browne. I have already taken the view that the address used for the first defendant was, for all relevant purposes, a postal address at which he could be contacted, and that the loan documentation was sent to him at his then current residential address. The position is quite different with regard to Gerald Browne and his address was not identified in the correspondence or in the loan documentation itself. The Bank has not sought to argue that it would not have advanced the loan to Gerald Browne had it known that he had a different address, or that any representations were made by Gerald Browne that encouraged or influenced the Bank in its decision to advance credit to him and his brother. The Bank's decision to advance the 2008 credit facility is adequately identified in the documentation, namely it considered that there was sufficient loan-to-value ratio between the security offered over the Donegal lands and the amount advanced, and Sean Browne who was regarded as the "lead borrower" was identified as having sufficient income and assets to discharge the loan, and had a sufficiently long relationship with the Bank. The inclusion of Gerald Browne was most likely made for the purposes of closing off any argument with regard to the security over the Donegal lands, as these lands were held in joint names.

97. Thus I do not consider that the Bank may argue that either or both of the defendants are estopped from relying on s. 30. I have expressed my view with regard to the justice or equity in dispensing with the requirements of s. 54.

98. However, both defendants themselves also argue that the Bank is estopped from seeking to enforce the loan. This estoppel is alleged to arise from the fact that the loan documentation for 2008 identified the credit facility as being a consumer credit facility and that accordingly the Bank is estopped from now seeking to argue that the loan may be otherwise characterised.

99. The case law is clear that the test of whether a loan is a consumer or a commercial loan is one that must be objectively made and does not depend on the characterisation that the parties, or either of them, gives to the credit agreement. This much is clear from *Allied Irish Bank Plc v. Higgins and Allied Irish Bank Plc v. Fahy*, and was also identified by the European Court of Justice in *Benincasa v. Dentalkit*. For that reason, it seems to me that the question of estoppel does not arise as the Bank's characterisation of the loan is not determinative of its true legal status, nor I do not accept the argument by counsel for defendants that the Bank's characterisation, by virtue of the conditions contained in the 2008 loan agreement which was drafted with both the Act of 1995 and the Consumer Protection Code in mind, amounts to a representation to the borrowers that the loan was a consumer loan which would not be enforced other than in accordance with the statutory requirement. I do not accept that such a representation is either express or implicit in the language used in the 2008 agreement, but more especially I do not consider that an estoppel by representation can arise because the Bank's characterisation of the loan, and the way in which it described it, whether in the documentation itself or in the affidavit evidence, does not determine the matter which must be determined by the court on an objective basis.

Conclusion

100. Thus, I consider that neither the plaintiff nor the defendant may be said to have raised an arguable estoppel against the other.

Specific defence of second defendant: non est factum
101. Gerald Browne also argues that the loan against him was void as not being his document, and that he entered into the 2008 agreement with the Bank on the mistaken agreement as to the legal import of that agreement.

102. His evidence is that he believed he was signing over his share in the Donegal lands to his brother, and that that was the purpose of the 2008 loan sanction agreed by him. The evidence is that the two brothers did discuss the transfer to the Donegal property to Sean Browne in consideration of the taking over by Sean Browne of the outstanding loan on that property, and other consideration not then agreed between them. In his affidavit sworn on the 13th January, 2015 the second defendant makes the following averment:

> "…at all times I believed that I was only signing over my share in the Donegal Lands to him; I did not know that I was accepting a letter of loan offer."

103. He says that his brother was in the grip of particularly serious health problems at the time at the time the 2006 facility was negotiated and that he knew nothing of this facility and he was not a party. He was aware, however, that in 2008, his brother required money to renovate the premises at 19 Allen Square which he says was always to become his primary dwelling house. He says he did not instruct Messrs. Casey & Co. Solicitors to represent him regarding the 2008 facility. He explains the signing of the documents as having arisen following a phone call from his brother in Cork city, during which his brother asked him to attend at his solicitor's office to sign the documents which were "put in front of me by Sean's solicitor". He says did not receive any of the monies advanced in the 2008 facility, and that the Bank intended to contract with Sean Browne only. He says that this is apparent from the internal credit analysis documentation of the Bank.

104. I find it credible that the second defendant might have considered it desirable or helpful to his brother to sign over the lands in Donegal to him for the purposes of dealing with certain financial and other difficulties that he had at the time, and for the purposes of obtaining a loan to renovate his premises at Allen Square. However, I do not consider it credible that Gerald Browne could have mistaken the document executed by him in 2008 as a deed of transfer. This is for a number of reasons. Gerald Browne had purchased the property in Donegal in 1999 with his brother and he also owns the dwelling house in which he now resides, which he co-owned with his wife who is now deceased. He cannot for that reason be wholly unfamiliar with contract or title documentation. Furthermore, the documentation that he signed contains a number of elements which quite clearly identify that it is a loan offer, including, in particular in the first page thereof, details in bold print, and set out in seven numbered paragraphs, the amount of credit advanced, the period of the agreement, the number of instalments, the amount of each instalment, the total amount repayable, the APR and the total cost of credit. The document that was executed by the two brothers runs to 18 pages, to which was annexed the page containing reasons why the product is considered suitable, and a memorandum of acceptance executed by both brothers on the same date, the 22nd April, 2008, as well as another appendix containing a waiver of the ten-day cooling off period. Clause 2, under the heading "purpose", identifies one of the purposes of the loan as being to release equity on the Donegal lands to finance renovations of Sean Browne's primary dwelling. Accordingly, I do not consider it credible that Gerald Browne did not know that there was, at the very least, a bank involved, and the amount of money described in the first page of the loan was far in excess of the amount outstanding on the security of the Donegal premises. I do not accept that the second defendant has made an arguable case that he signed the loan offer in the mistaken belief that he was transferring the lands in Donegal to his brother, and I also consider that it is appropriate and proper for me in an application for summary judgment to consider whether the averments in the affidavit of Gerald Browne are credible so that they raise a prima facie defence. In particular, I consider that a court, in hearing a motion for summary judgment, is entitled to weigh and test the evidence adduced in the affidavits and to apply a degree of judgement and common sense in this exercise.

105. In that regard the court is entitled to make a judgment as to the credibility of a particular proposition or factual matrix alleged by a defendant. While the second defendant, in one of his affidavits, did assert that his brother was beneficially entitled to the Donegal lands having regard to the fact that he made all the payments on that loan, he later resiled from that position and I regard that as significant. In that regard, I consider that, having regard to the fact that the Donegal lands were acquired by the brothers in 1999 for "sentimental" reasons, that neither of them developed it and neither of them approached it with any particular unique proprietorial focus, that the loan repayments, while they were channelled through the account of one brother, seemed to have been met, at least informally, by both of them from their individual resources, that the averment on the part of the second defendant, that he believed he was executing a document to transfer the Donegal lands to his brother is not credible. The document that he signed manifestly does not do this, and the particular layout of the document is a matter of some significance in that context, in that even a cursory glance at the document would identify some of its features as being suggestive of a loan. Furthermore, in the absence of a credible reason why Gerald Browne might have transferred his entire legal and beneficial interest in the Donegal lands to his brother, I consider it unlikely that he might have considered in April 2008 that that is precisely what he was doing.

106. Furthermore, I must in the context of the plea of non est factum, have regard to the fact that, while signature of itself may not be sufficient to bind a party to the full terms of a document that was signed, the law is established that a party may not be excused merely on account of not having read a document. In *ACC Bank PLC v. Kelly* [2011] IEHC 7, Clarke J. pointed to the fact that if a person signs a document without reading it, then *"they must accept the consequences".* If a person signs a document without fully understanding it, that person must equally accept the consequences, and, as he put it:

> *"After all, those are the terms on which the borrower gets the money. The borrower has taken the money. The borrower cannot then turn around and say that the terms were not properly understood unless the relevant financial institution has been guilty of legal wrongdoing in the way in which the contract came to be signed such as by misrepresenting its contents or the like."*

107. Gerald Browne did not assert that the Bank misrepresented the form of the document, or that even had he read it, he would not have understood it having regard to any misrepresentation or mischaracterisation contained in the document itself. He could not reasonably have made such an argument as the document is relatively clear and does not contain any unusual or particularly opaque terms.

108. Thus I consider that Gerald Browne has not made out even an arguable case that the document he signed was not his document, and that he executed the loan document as a result of a fundamental mistake as to its character, meaning or effect.

No Element of a Valid Contract
109. Counsel for Gerald Browne also argues, following the direction of Charleton J. in *Friends First Finance Ltd. v. Lavelle* [2013] IEHC 201, there was *"never any meeting of mind, never mind any meeting in person, whereby that individual could truly be called a borrower as a matter of contract."* Ms. Lavelle, the borrower, was sued for judgment in the sum of approximately €2.25 million

advanced for the purposes of an equity investment. The facility was in fact intended to be taken by Ms. Lavelle's husband, but for "tax planning reasons" was taken by her in her sole name. The evidence was that Ms. Lavelle never met the bank, or any representative of the bank, and the bank wrote to Mr. Lavelle and not to his wife, and the documentation was signed in the agency of Mr. Lavelle himself. Charleton J. concluded that Ms. Lavelle was entitled to the defence of *non est factum* but went on to say, albeit obiter, that:

> *"I would regard it as repellent that a financial institution could hold someone to a bargain in the borrowing of a huge amount of money when there was never any meeting of mind, never mind any meeting in person, whereby that individual could truly be called a borrower as a matter of contract."*

110. Charleton J. seemed to accept in this dicta that the absence of a meeting in person was indicative of an absence of a meeting in mind, and therefore indicative of an absence of the consensus ad idem of a necessary element in a valid contract

111. Having regard to the view I take, that Gerald Browne has not made out even an arguable case that he believes he signed a document for the purpose of transferring the property in Donegal to his brother, I cannot conclude that there was an absence of consensus ad idem with regard to the purpose of the loan. However counsel argues that, in addition, the judgment of Charleton J. must be seen as one where the *"mutuality of understanding as to their obligations"* is necessary as between the parties.

112. I consider that the second defendant cannot succeed in this argument and that the element of lack of consensus is intrinsically bound up with his assertion, which I find not to be credible, that he believes he was signing a document for the purpose of transferring the Donegal lands, and not executing a loan document. For that reason, I do not believe that Gerald Browne has made out even an arguable case that he never intended to contract with the Bank.

113. For similar, albeit somehow different, reasons I do not accept the argument of counsel that there has been a total failure of consideration in regard to Gerald Browne. Even if it is accepted by a court that Gerald Browne was added to the transaction for "simplicity's sake", and because he was a co-owner of the lands in Donegal intended to be offered as a security, and that the monies were to be advanced for the sole, individual and separate purposes of Sean Browne, Gerald Browne did obtain consideration albeit that the consideration was the advance by the Bank, at his request and with his knowledge, of monies for the benefit of his brother. Consideration does not have to be consideration that passes directly to each contracting party, and a party may get consideration for a promise if that party requests a loan for the benefit or purpose of a third party. The mere fact that Gerald Browne might have been added to the documentation for simplicity's sake does not make him a straw man for the purposes of the contract, albeit it might be said that the consideration he received was small or non-existent in monetary terms, and the consequence for him in relation to the loss of the lands in Donegal were significant and far-reaching.

Unconscionable Bargain

114. Gerald Browne also argues that the contract of loan, if such was found, was an unconscionable bargain with regard to him. An inadequacy of consideration is one factor that may lead a court to take the view that a bargain is unconscionable as is explained by Laffoy J. in *Secured Property Loans Ltd. v. Floyd* [2011] 2 I.R. 652. Consideration in the form of an advancement of money to a third party may indeed be inadequate in certain circumstances but when the parties are brothers, and when one desires by his actions, to support the other, the consideration will not be inadequate. What is inadequate consideration in the context of perhaps two persons of unequal bargaining power depends on the relationship between those persons and the extent to which, if any, it might be considered reasonable or proper for one of them to support the other through a difficult time.

115. Gerald Browne did some work, albeit on a relatively casual basis, for the company part owned by his brother Sean. Both brothers equally owned the property in Donegal and there is no suggestion that there was any element of inequality or absence of bargaining power as between the two brothers. The adding of Gerald Browne's name "for simplicity's sake" was to facilitate the provision of security for the loan, but neither defendant can argue that the loan would have been advanced without that security, and it seems unlikely that an unsecured loan would have been advanced to Sean Browne. One must bear in mind also in that context that Sean Browne had a fairly significant loan with another financial institution to acquire the property in Allen Square, Bandon and that the only available security was the Donegal property. Thus the availability of the Donegal property as security strengthened the hand of the Browne brothers when they came to negotiate with the Bank and, in that context, it seems to me not to be credible that Gerald Browne was thereby disadvantaged, or placed in a position where the agreement was unconscionable to him. I consider that Gerald Browne cannot show that he received no consideration for the loan, as he himself was aware of his brother's difficulties and appears to have been happy or indeed anxious to assist him, and his care for his brother in his financial and other difficulties was perhaps the guiding force in his decision to assume the 2008 borrowing. It must be remembered also at the time that the borrowing was advanced in April 2008, neither the borrowers nor the Bank itself, could have been aware of the impending financial crash, and each of the parties assumed that Sean Browne would be in a position to pay the instalments on what was, at that time, a relatively small repayment amount.

116. Furthermore, I am not persuaded that the loan was unconscionable, also for the reason that Gerald Browne did give a personal guarantee for the loan in addition to the provision of security over his share in the Donegal lands, and that contract of guarantee was agreed on a non-recourse basis. The fact that Gerald Browne had negotiated a non-recourse guarantee, by which he achieved a significant advantage not always available to guarantors, also points to the fact that there was no absence of consideration, and nothing unconscionable in the agreement, albeit in the circumstances which later evolved and which had more to do with the financial crash than with any individual action or inaction on the part of either borrower, which led to the loan now becoming a significant and burdensome obligation for these two borrowers.

Decision

117. For the reasons stated in the first part of this judgment I refuse summary judgment.