THE HIGH COURT

[2013 No. 4369 P]

BETWEEN

BANK OF IRELAND MORTGAGE BANK

PLAINTIFF

AND

BRIAN MURRAY

AND

ATTRACTA MURRAY

DEFENDANTS

JUDGMENT of Ms. Justice Baker delivered on the 12th day of April, 2019

1. This judgment concerns a claim for debt in which there is significant evidential dispute regarding the execution of standard loan documentation.

2. Proceedings were commenced by plenary summons on 30 April 2013, by which the plaintiff bank ("the Bank") seeks judgment against the defendants jointly and severally for €194,433.53, and interest. The claim is made in respect of a loan agreement alleged to have been entered into by the plaintiff and the defendants on 8 May 2007 ("the 2007 Loan").

3. In the alternative, the Bank's claim is for damages for breach of contract, or for monies had and received by the defendants, or for conversion.

4. The first named defendant, Mr Murray, entered an appearance on 6 June 2013 and served a defence on 11 May 2015 in which he pleaded that he had not signed the documents proffered by the Bank for the 2007 Loan nor an earlier loan agreement in 2003 ("the 2003 Loan"), and pleads that the Bank failed to comply with the mandatory statutory provisions of the Consumer Credit Act 1995, as amended ("the Consumer Credit Act"), as a result of which it is argued the loan is void and unenforceable. He has counterclaimed for damages for negligence.

5. The evidence of Mr Murray is that his wife affixed his signature on the relevant documents, and that she did so without his authority. Mrs Murray did not give evidence. The Bank makes no argument of agency.

6. Neither party adduced handwriting evidence.

7. The second named defendant, Mrs Murray, entered an appearance on 4 June 2013.

She served a defence dated 15 May 2015 which contained a general traverse of the Bank's claim. She represented herself at the hearing, and did not offer any evidence in support of her defence, nor did she cross-examine any of the Bank's witnesses. At the closing of the evidence, she stated that she did not propose to make any submissions.

8. I propose dealing with the position of Mrs Murray later in this judgment, as her husband has made an argument that impacts upon her position.

9. Orders were made by Costello J. in relation, *inter alia*, to discovery and that the Bank be permitted to deliver interrogatories in writing for the examination of the first named defendant.

10. Evidence was heard over four days from witnesses on behalf of the Bank and on behalf of the first named defendant who himself gave evidence.

11. Written and oral legal submissions were later adduced by the Bank and Mr Murray.

Factual background

12. Mr Murray is a 60-year-old commercial fisherman who has been fishing since he was 15 years old, and who still spends a significant amount of time at sea. He is, and was at the material times, the sole breadwinner for his family.

13. Mrs Murray is 59 years of age and used to carry on occasional part-time work but has not worked outside the home for at least 10 years before the matters now in contention. By agreement between the couple, Mrs Murray managed all aspects of family finance until the events later described in this judgment.

14. The couple were married in 1979, their principal private residence is in Killybegs, and they are registered as full owners of the property comprised in Folio 34490F, County Donegal. The Bank is owner of a charge registered on the Folio on 19 September 2003. The present claim is for debt only. The security documentation is relevant in regard to the nature of the loans, and to the credibility of the evidence.

15. The couple have three children, two of whom are working full time and one of whom is a full time student.

16. The amounts advanced and the current balance are not in contention. Transactions on the account were proved and are not controverted. The primary defence offered by Mr Murray is that he did not sign the documentation to create the borrowings or the security. The 2003 Loan has been fully repaid. Monies borrowed and drawn down between June 2007 and November 2009 remain mostly unpaid, and the last monthly instalments was paid in July 2012.

Disputed facts

17. The issues of fact that need to be addressed can be summarised as follows:

a) whether the plaintiff and the defendants did enter into a loan agreement secured on their principal private residence on foot of the letter of offer issued on 31 July 2003 or otherwise,

b) whether the plaintiff and the defendants did enter into a loan agreement on foot of the letter of offer issued on 2 May 2007 or otherwise, secured by the existing charge on the Murrays' principal private residence.

The management of family finances

18. The agreement between the couple as to the management of their family finances forms part of the backdrop to the events in the relevant years and I turn now to outline the evidence regarding these arrangements which is largely uncontroverted.

19. Mr Murray gave evidence of how his household has been operating since he and his wife married in 1979. Mrs Murray runs the household and all family finances since Mr Murray "was always at sea for the five working days" and "if there was any business to be done anywhere [Mrs Murray] had to do it" (Transcripts, day 3, p 10). He said this is how most households in Killybegs are organised, as most of the men are fishing at sea.

20. Mr Murray gave a description of his average day at sea as a skipper on the vessel "Catherine R". The boat normally lands between 6 and 9 in the morning and, at best, gets back by 5 or 6 in the evenings. He said after coming back from a fishing trip "you'd be mentally and physically just wrecked" (Transcripts, day 3, p. 18). The fishing trips can involve the vessel being at sea for up to a week at a time.

21. He gave a detailed explanation of how the catch might be valued and the division of the income between the owner of the vessel and the crew (Transcripts, day 3, pp. 10 *et seq.*).

22. His evidence is that Mrs Murray pays the bills, and gives him personal money as he needs it from time to time (Transcripts day 3, p. 14). He has a personal credit card which "was just lying down in my drawer" (Transcripts, day 3, p. 26). In cross-examination, Mr Murray admitted he has his own account with Ulster Bank (Transcript day 4, p. 5, line 7).

23. Mr Murray said that the "big decisions" were made jointly with his wife including the decision to buy an apartment in Spain in 2003, and the decision to pay their daughter €30,000 in 2007 to acquire the site adjoining the family home in Roshine, Killybegs. Mr Murray's evidence is that, at a certain stage of their married life, Mrs Murray expressed her desire to live closer to town and she therefore arranged the construction of their new house in Killybegs. He said he "went out fishing one day" and that he "came back in and went into the house in Killybegs and that was it" (Transcripts day 3, p. 7).

24. Mr Murray said that he knew his wife had an addiction to alcohol for about six years before her admission to a rehabilitation centre in 2012 (Transcripts day 3, p. 50).

The 2003 Loan

25. Up until the year 2002, Mr Murray owned his own fishing vessel "The Boy Conor", which he had bought in France from a broker with the benefit of a now fully repaid loan from AIB. The vessel was sold in 2002 through Messrs DP Barry & Co., solicitors in Killybegs. Mr Murray then became skipper of the fishing vessel "Catherine R". After expenses, approximately €40,000 remained from the sale of "The Boy Conor" and in 2003, the Murrays jointly decided to apply that money to the purchase of a €80,000 holiday apartment in Torrevieja, Spain, and to borrow the remaining €40,000.

26. Mrs Murray made the arrangements to borrow the €40,000 to purchase the apartment in Spain and Mr Murray's evidence is that he did not expect or intend that the loan would be secured on their family home (Transcripts, day 3, p. 28). He says he would not have agreed to the creation of a mortgage (Transcripts, day 3, page 28 and day 4, page 24), and that he did not sign any documents for the purpose of creating a charge on his family home (Transcripts, day 3, p. 28).

27. He said he first became aware of the existence of the mortgage in July 2012, on the day he met Catriona Dorian at the Bank of Ireland branch in Killybegs (Transcripts, day 3, p. 58). After he spoke with Ms Dorian, Mr Murray attended at the office of DP Barry to find out more in relation to the mortgage, where he met an unidentified employee of the firm and inspected the mortgage files.

28. Mr Murray accepted in cross-examination that he had obtained the benefit of the loan (Transcripts, day 3, p. 113).

29. The relevant documents for the purpose of the 2003 Loan are:

1) mortgage loan application (the "Declaration of Authorisation and Consent") signed and dated 29 July 2003;

2) letter and mortgage loan offer letter dated 31 July 2003 (the "2003 Offer Letter"), with acceptance endorsed on 7 August 2003;

3) solicitor's copy of the 2003 Offer Letter dated 10 September 2003;

4) solicitor's undertaking ("Solicitor's Undertaking") dated 10 September 2003;

5) family home declaration ("Family Home Declaration") dated 10 September 2003;

6) assignment of life policy dated 12 September 2003;

7) deed of charge ("Deed of Charge") dated 16 September 2003;

8) cheque requisition ("Cheque Requisition") dated 10 September 2003;

30. Mr Murray denies that he executed any of the documents generated for the purposes of the borrowings, or for the creation of the security, although the relevant documents contain what appears to be his signature, and the affixing of his signature is authenticated by a witness in each case.

31. That the signature on so many witnessed documents could have been falsified is improbable and borders on the incredible but the evidence shows that the authentication is problematic.

32. I propose therefore examining in some detail the documents on which the Bank relies and the surrounding evidence of authentication.

The 2003 Declaration of Authorisation and Consent
33. A mortgage loan application dated 29 July 2003 for a loan of €40,000 repayable over 10 years to be secured by equity release, called "Declaration of Authorisation and Consent", had come to Mr and Mrs Murray by post directly to their home address. The application, in which the Murrays gave their consent under the Consumer Credit Act and relevant Data Protection legislation for the purposes of the loan, appears to have been signed by both of them.

34. In his interrogatories sworn on 19 February 2018, Mr Murray averred that he did sign the Declaration of Authorisation and Consent dated 29 July 2003. This is in contrast with his position stated in his replies to particulars dated 27 June 2016, which read as follows:

> "For the avoidance of doubt, in circumstances in which the first named defendant had no dealings with the Bank in relation to the [2003] loan and signed no documentation in relation to the said loan, the first named defendant at all times understood the loan to be a personal loan by the Bank to the second named defendant."

35. In his amended interrogatories sworn on 3 April 2018, Mr Murray again changed his version of the facts, saying that he did not sign the Declaration of Authorisation and Consent:

> "I had mistakenly averred within my replies to interrogatories […] that I did sign same on the sole basis that, when asked, I understood that the signature resembled my own. For the avoidance of doubt, at no time did I ever explicitly recall signing the document. Furthermore, since delivering the said answer, my wife (the second named defendant herein) has admitted and confirmed to me that she forged my signature on that particular document".

36. Mr Murray gave uncontroverted evidence that he was at sea from 29 July 2003 at 4:00 PM until 5 August 2003, at 9:00 AM (Transcripts, day 3, p. 37).

37. The Declaration of Authorisation and Consent was merely a preliminary application and nothing much turns on whether it was signed as it was followed by a formal letter of loan offer from the Bank. However, it is clear that Mr Murray was at sea on the day the document was purportedly signed. Whilst, as will appear later in this judgment, the dates on the documents do not always reflect the exact date of execution, the date on this document was not inserted for any reasons of convenience, was not inserted by the Bank or any lawyers acting in the transaction, and as matter of probability was signed on the date appearing on the face of the document, as it was sent by post and returned dated and signed during a time when Mr Murray was at sea.

38. In those circumstances, and in the light of the approach to the evidence that I will discuss more fully below, I find as a matter of probability that this document was not executed by Mr Murray.

39. The letter must have been returned to the Bank as the letter was followed by a formal letter of offer some days later.

The 2003 Loan Offer and acceptance
40. A formal letter of loan offer dated 31 July 2003 from Governor and Company of the Bank of Ireland ("GOVCO") offered the defendants the sum of €40,000 repayable over 10 years "to assist purchase of a holiday home abroad" to be secured by way of equity release on their family home. The document shows signed acceptance by both Mr and Mrs Murray on 7 August 2003.

41. In his interrogatories sworn on 18 February 2018 Mr. Murray had admitted that he did sign the 2003 Mortgage Loan Offer. This is consistent with his replies to particulars dated 27 June 2016. But in his amended replies to interrogatories sworn on 3 April 2018, Mr Murray changed his evidence and deposed as follows:

> "[…] I had mistakenly averred […] that I did sign same on the sole basis that, when asked, I understood that the signature resembled my own. For the avoidance of doubt, at no time did I ever explicitly recall signing the document. Furthermore, since delivering the said answer (1) I have become aware that I was in fact at sea on the Catherine R EI6304 vessel from 5th August 2003 until 8th August 2003 and (2) my wife (the second named defendant herein) has admitted and confirmed to me that she forged my signature on that particular document."

42. Mr Murray gave uncontested evidence that he was at sea from 5 August 2003 at 2:00 PM, to 8 August 2003, at 6:00 AM (Transcript Day 3, pp. 38-39 and Day 5, p. 13), and therefore he was at sea on 7 August 2003, the date of his presumed signature to the acceptance of the loan offer.

43. In cross-examination, he could not remember giving instructions to his solicitors in relation to the replies to particulars of 27 June 2016 (Transcript day 3, p. 97) and he was unable to explain the contradictions in his interrogatories (Transcript day 3, p. 101).

44. He gave no answer to the question as to why he believed that the signature on the 2003 Loan Offer is not his signature, but made a bare denial (Transcript day 3, p. 103). In cross-examination, he could not recollect the date when Mrs Murray told him that she had forged his signature (Transcript day 3, p. 100, line 21), although he agreed that it was a tough conversation and that "you wouldn't want to be there" (Transcript day 3, p. 100, line 19). Mrs Murray did not give evidence of the forgery, if such it was.

45. He did not concede that such conversation must have happened between February and April 2018, as suggested by counsel for the plaintiff (Transcripts, day 3, p. 100, lines 22-24), and that it was the conversation with his wife that made him change his version of events.

46. The signatures are not witnessed.

47. I accept the evidence of Mr Murray that he did not sign the 2003 Loan Offer and that is because the date on the letter suggest that it was signed when Mr Murray was at sea. The letter must have been signed and returned to the Bank before 12 August 2003, the date the Murrays were invited to attend at the office of their nominated solicitor. The evidence is that Mr Murray was at sea until 8 August 2003. As a matter of probability, the document was returned to the Bank before he returned, as by 12 August the solicitors had the mortgage pack from the Bank, and that left a window of just four days to have the letter retuned to the Bank processed and the solicitors instructed. It is unlikely therefore, that the letter was signed and returned later than August 7.

48. Mr Murray's evidence regarding the correct replies to interrogatories and particulars is of course difficult to reconcile, and I am not persuaded by his explanations for the changes in his evidence and assertions. But I accept that it was not until February or April 2018

that he became aware that his wife had forged his signature. That explanation is consistent with his general approach to family finances where he left all financial dealings to his wife.

49. A separate solicitor's copy of the letter of offer was sent by the Bank to the solicitors representing Mr and Mrs Murray and the signature of both of them is shown and dated 10 September 2003. That document must have been signed after the Murrays, or one of them, attended at the solicitor's office after 7 August 2003. The signatures are not witnessed but are part of the mortgage and loan pack processed by DP Barry on 10 September 2003 on foot of which the loan monies were advanced.

Visits to solicitor's office

50. Throughout the process of drawing down the funds and putting the security in place for the 2003 Loan, the Murrays were represented by DP Barry solicitors. By letter from that firm dated 12 August 2003, the Murrays were invited "to see our Dominic Brennan" to discuss the "mortgage pack from the Bank of Ireland". A further letter to them dated 15 August 2003 refers to a "recent visit to our office" to discuss the mortgage application. That letter described the role of DP Barry as "to investigate Title on behalf of Bank of Ireland and thus to provide them with a Certificate of Good Marketable Title" in order to enable the drawdown of the loan funds. The letter expressly advised that the mortgage would secure "not just the amount of the Loan you are taking together with interest thereon but all present and future liabilities you may have with the Bank, howsoever incurred".

51. Mr Murray says he did not make any visits to the office of the solicitors at the material times. He denied having had any dealings with Messrs DP Barry concerning the 2003 Loan and security, but admitted the firm was involved when he sold the vessel "Boy Conor", although he also said he could not remember whether they had actually acted on his behalf on that occasion (Transcripts day 3 p. 85). He said he had never met Mr Brennan and had "never laid eyes on him before this court" (Transcripts day 4, page 24). He denied attending the meeting referred to in Mr Brennan's letter of 15 August 2003.

52. Mr Brennan, who gave evidence for the plaintiff, is a qualified solicitor and now a partner in Gallagher & Brennan, solicitors in Letterkenny, Co. Donegal. At the relevant times, he was an assistant solicitor at DP Barry & Co., solicitors in Killybegs, and managed the paperwork for the 2003 Loan. He admitted having a very bad memory and that such memory he had was largely refreshed by notes he had of the Murrays' files as "milestones along the way".

53. He agreed in cross-examination with the proposition that a lot of his clients are fishermen who spend time fishing offshore and that, to a large extent, the person he deals with would be the wife or partner. It appears from his file that the point of contact with the Murrays was the second named defendant. He also confirmed in cross-examination he did not know Mr Murray, and that he could not say whether he had ever met him or that attended at his office (Transcripts, day 2, page 51). He also did not know until the day he attended court that Mr Murray was known as "Barney".

54. His evidence was equivocal as to whether he had met Mr Murray.

55. In relation to the practice of witnessing documents, Mr Brennan gave evidence of the process as follows:

> "Once the clients have signed the document you would witness it but you wouldn't witness it without having seen them sign it. Either collectively or individually" (Transcripts, day 2, page 40).

56. The meeting at the office must have happened between August 12 and 15 as that date is consistent with the date of the letter from DP Barry inviting the visit and the letter three days later confirming the visit. The letter of 15 August refers in general to a "recent meeting" at the office. It does not expressly refer to the fact that both addressees attended, but that would not be unusual. From the point of view of the present dispute however, it does create a difficulty as Mr Brennan is relying on the correspondence to fill the gaps in his poor recollections.

57. Mr Murray was not at sea during those days.

58. There was some correspondence thereafter relating to planning permission and the execution of declarations for the purpose of family law legislation. The memoranda of attendance contain reference to Mrs Murray only, and she was clearly the point of contact.

59. Two undated memoranda of attendances written by Mr Brennan suggest his personal dealings might have been with Mrs Murray alone. One, probably created in or about 22 August 2003, reads as follows:

> "I have sent out two family home declarations to Attracta to sign".

60. This is consistent with the evidence regarding those declarations which I deal with below.

61. The other memorandum, probably created in or about 27 August 2003, reads as follows:

> "[…] there was no planning documents among the documents received from Attracta. She may have omitted to give us the planning permission and architects cert […]".

62. The planning documentation is acknowledged to have been received by the letter from DP Barry of 4 September 2003, through the firm of architects acting for the Murrays whose compliment slip is dated 3 September 2003. There is no evidence of a meeting at the offices at or around that time.

63. I accept that the transaction was wholly routine and that Mr Brennan may in the circumstances be forgiven for not remembering a meeting with Mr Murray. But he did not recognise him in court, did not know the name by which he is commonly called. His memory was singularly poor. Mr Murray is a man of small stature and I would expect Mr Brennan to, at least, have been able to say that Mr Murray looked somewhat familiar, but he could not go even that far.

64. In the light of the poor recollection of Mr Brennan of the transaction, and because he was unable to confirm in the course of the oral hearing that he recognised Mr Murray in court, I am satisfied that Mr Murray's evidence is to be preferred and the Bank has not satisfied me that Mr Murray did attend at the offices of DP Barry for the purposes of putting the mortgage or loan documentation in place. Mr Brennan described the transaction as routine, and such it must have been. But in the absence of evidence from Mr Brennan or circumstantial evidence that might support the proposition of the Bank, I must conclude on the balance of probabilities that there is no evidence that Mr Murray did attend at the solicitor's offices.

Family law declaration

65. The Family Home Declaration has the appearance of having been witnessed by Francis Murphy, a Commissioner for Oaths (Transcripts, day 3, p. 46).

66. A letter to the Murrays dated 22 August 2003 from DP Barry enclosed two blank declarations for the purposes of family law legislation in standard form, "which we would ask you to sign where we have marked and return" and no mention was made as to the requirement that the declarations be made in front of a commissioner for oaths or solicitor. By letter dated 27 August 2003, DP Barry acknowledged receipt "of the two family home declarations duly signed".

67. Because of his poor memory, Mr Brennan made assumptions that the letters from DP Barry are accurate in reflecting the events they narrate. He said that it was the practice of the firm to write to clients they had actually met. If this is his evidence, and the letter of 22 August 2003 therefore reflects the facts accurately, the two family home declarations were sent by post to the Murrays for them to sign on 22 August 2003. A letter of 27 August from Mr Brennan confirms receipt of the "duly signed" declarations.

68. Mr Murray has given credible and uncontroverted evidence that from 19 August 2003 until 29 August 2003 (Transcripts, day 3, p. 108), which includes the timeframe between 22 August and 27 August 2003, during which it seems from Mr Brennan's correspondence the Family Home Declaration was sent to the Murrays to be signed and returned to the solicitors. The declarations were sent out and returned signed before Mr Murray returned from sea.

69. The declarations bear the attesting signature of Mr Murphy, who gave evidence that the attestation clauses do bear his signature, but that he had no recollection of the circumstances surrounding their execution, or if they were actually declared by Mr or Mrs Murray in his presence. He said, in evidence that causes me considerable disquiet, that "sometimes people will be there, and sometimes they won't" and that it was therefore "quite possible" that Mr Murray was not present when the document was signed. Mr Murphy gave evidence that he did on occasion affix his signature to declarations as Commissioner for Oaths when he had not witnessed the affixing of the signature by the declarant. Mr Murphy described the practice sometimes engaged by the branch of Bank of Ireland in Killybegs and the office of DP Barry Solicitors, was that depending on the demands of the solicitors, he "goes down" to the office and "sign whoever is there. Sometimes people will be there, sometimes they won't" (Transcripts, day 4, p. 40).

70. He said the date on the Family Home Declaration is not in his handwriting and that it might also be the case that the date does not correspond to the actual day on which he affixed his signature as attesting witness to the Declaration.

71. Mr Murray's evidence is that he never met Mr Murphy and that, most importantly, he has never signed anything in front of him.

72. Mr Brennan accepted in cross-examination that it was possible that the Family Home Declaration was sent back by post to him already signed by the Murrays, and not showing that the signatures had been witnessed by the Commissioner for Oaths.

73. The fact that the declaration purports to have been made in the presence of Mr Murphy cannot lead to a presumption or a finding that it was so executed. I am satisfied having regard to the evidence of Mr Murphy and of Mr Murray, the concession made by Mr Brennan, in the light of the clear evidence that Mr Murray was at sea, the evidence from the dates of the correspondence, that the declarations were not made before Mr Murphy, and that, as a matter of probability, the signature on the Family Home Declaration is not the signature of Mr Murray.

Deed of Charge

74. A Deed of Charge dated 16 September 2003 appears to have been signed by the Murrays and witnessed by Mr Brennan, and secured the loan on the Murrays' family home by way of charge for present and future secured moneys. The original charge was lodged with the Land Registry on 16 September 2003, and was registered as burden on Folio DL34490F on 19 September 2003 and a certificate of charge issued under rule 156 of the Land Registration Rules 1972, S.I. No. 230/1972.

75. Mr Murray denies having executed the Charge. In his replies to interrogatories sworn on 19 February 2018, Mr Murray swore that he did not sign the Deed of Charge, and confirmed this in his amended replies to interrogatories sworn on 3 April 2018 and in oral evidence (Transcripts, day 3).

76. Mr Murray was at sea until early morning on the date shown on the Deed, 16 September 2003, but the date on the deed probably does not reflect the date it was signed.

77. Mr Brennan's evidence is that his usual practice was to go through and explain documentation, and have the documents signed on a first meeting with a client, and to date the documents when he was ready to submit the request for funds. That goes some way to explaining the date of 10 September 2003 on the Solicitor's Undertaking, the Family Home Declaration, and the Cheque Requisition form. If that date reflects correctly the date of execution and witnessing, Mr Murray was at sea.

78. It also explains the date on the Deed of Charge. The practice of Messrs DP Barry was to insert in conveyancing documents not the date a document was actually executed but "the date in which you get the money" because:

> "If you put the date today that you actually signed the documents on the Deed of Charge and send it into the Land Registry, the Land Registry will reject it straight away and say you didn't own this property until May/June how you are creating a charge in the middle of April".

79. Mr Brennan's evidence is that the date of 16 September is not necessarily, or indeed likely, to be the date on which the Deed of Charge was executed. It was more probably executed sometime earlier, most likely at the time the other security and ancillary documents were executed. These documents show the date of 10 September 2003. Mr Murray was at sea on 10 September 2003, and that fact is objectively verified by the formal vessel logs which show he was at sea from 8 September 2003, when he left at 11:00 PM, until 7:30 AM on 16 September 2003 the date shown on the Deed of Charge. Because of Mr Brennan's evidence it is unlikely the Deed was executed on 16 September 2003, as that date was after he had put in place the documents to draw down the loan and as his evidence is that he would, in all cases, have the suite of documents ready before drawdown.

80. As with the other elements of the transaction, Mr Brennan has no direct recollection of the execution of the Deed, nor is there any contemporaneous evidence from memoranda or correspondence that might assist. There is no memorandum of any meeting with either Mr or Mrs Murray, other than regarding the meeting between 12 and 15 August 2003.

81. I consider that, as he states in his amended replies to interrogatories, the fact that Mr Murray became aware from a review of the fishing logs that he was at sea on the relevant dates and the fact that Mrs Murray confessed to him she had forged his signature have influenced Mr Murray's versions of events in relation to the signing of the 2003 Loan documentation. There is therefore, in my

view, an element in the evidence of what counsel for the plaintiff described as a "retrofit", and that Mr Murray has tailored his evidence to reflect objectively verifiable facts such as the fishing logs. However, I note that his evidence that he did not sign the Deed of Charge has always been consistent, since his replies to particulars in June 2016, as well as his version in relation to the other documents which bear the date of 10 September 2003. Moreover, Mr Murray gave uncontroverted evidence that he was at sea on the relevant dates.

82. It is also possible, in the light of the agreed arrangements between the couple regarding finances, that Mr Murray has signed documents he did not look at or understood completely. This would be consistent with the description given by him of the management of the household.

83. The Bank practice of dating documents back in 2003 is based on a reasonable view of conveyancing requirements. Because of the practice of dating documents at DP Barry, the dates on the documents of the "Mortgage Pack" might not reflect the date of actual signature.

84. In the circumstances, and having regard to Mr Brennan's evidence as to his usual practice, I am drawn to the conclusion that the security and ancillary documentation was signed at or near the time of the meeting in mid-August 2003.

85. The meeting of Mr Brennan with the Murrays must have occurred between 12 and 15 August 2003, and Mr Murray could have attended, since he was not at sea, but no memorandum or note summarising or referring to that meeting is available, and this is contrary to what appears to have been the practice of the firm.

Conclusion on the evidence of signatures for 2003 Loan
86. The suite of mortgage and loan documentation was enclosed in a letter dated 10 September 2003 from DP Barry to the Bank which contained other documents, all dated 10 September 2003: Solicitor's Undertaking, which appears *prima facie* to have been signed by the Murrays and witnessed by Mr Brennan, and the Cheque Requisition form, which appears *prima facie* to have been signed by the Murrays and witnessed by Mr Brennan. For the reasons stated above, the dates on these document are not a reliable indicator of when they were executed, or whether they were in fact authenticated by the signature of a witness.

87. I am therefore satisfied that the Bank has not shown on the balance of probabilities that Mr Murray did sign the solicitor's copy of the 2003 Loan Offer, the Solicitor's Undertaking, the Cheque Requisition form, all dated 10 September 2010, or the Deed of Charge, dated 16 September 2003, the said documents constituting the bundle of documents for the Murrays' 2003 Loan.

88. I cannot ascertain how the signature of Mr Murray came to be affixed to the documents, but in the absence of some elucidation, and as the evidence is to be tested on the balance of probabilities, and as the Bank witnesses have not persuaded me that the documents were executed by Mr Murray, and as, for the reasons explained, the attesting signatures are not a reliable indicator that the documents were duly authenticated or the affixing of the signatures witnessed, I conclude that the evidence of Mr Murray must be preferred.

89. I must conclude that the deeds and other documents could not have been executed by Mr Murray on either the 10 or 16 September 2003.

90. I will deal more fully below with the argument from *Browne v. Dunn* (1894) 6 R 67 advanced by counsel for Mr Murray.

Family Home (Protection) Act 1976
91. I turn now to the consequence of my finding that the Family Home Declaration was not signed by the first defendant, and as to how this impacts the validity of the creation of a security interest in the Murrays' family home in the light of my conclusion that he did not execute the Deed of Charge.

92. Section 3 of the Family Home Protection Act 1976, as amended by the Family Law Act 1995, (the "1976 Act") makes provision in relation to the alienation of any interest in a family home, defined in s. 2(1) of the 1976 Act as "a dwelling in which a married couple ordinarily reside". The Roshine property is a family home for the purposes of the 1976 Act.

93. Section 3(1) of the 1976 Act reads as follows:

> "Where a spouse, without the prior consent in writing of the other spouse, purports to convey any interest in the family home to any person except the other spouse, then […] the purported conveyance shall be void".

94. Mrs Murray must be assumed to have executed the charge, having regard to the fact that she did not proffer any evidence to the contrary. Indeed, her husband's evidence, while it does not positively assert that Mrs Murray executed the charge, is consistent with a view that she did. Furthermore, Mr Brennan's correspondence is supportive of his evidence that he probably did meet Mrs Murray and engage with her for the purposes of meeting the Bank's requirement for the security.

95. While the 1976 Act was enacted primarily with the view to providing protection for a non-owning spouse, its remit is broader. Henchy J. explained the purpose of s. 3 of the 1976 Act in his seminal judgment in *Nestor v. Murphy* [1979] IR 326 at 328 as follows:

> "The basic purpose of the sub-section is to protect the family home by giving a right of avoidance to the spouse who was not a party to the transaction. It ensures that protection by requiring, for the validity of the contract to dispose and of the actual disposition, that the non-disposing spouse should have given a prior consent in writing. The point and purpose of imposing the sanction of voidness is to enforce the right of the non-disposing spouse to veto the disposition by the other spouse of an interest in the family home. The sub-section cannot have been intended by Parliament to apply when both spouses join in the "conveyance." In such event no protection is needed for one spouse against an unfair and unnotified alienation by the other of an interest in the family home. The provisions of s. 3, sub-s. 1, are directed against unilateral alienation by one spouse. When both spouses join in the "conveyance," the evil at which the sub-section is directed does not exist."

96. Hedigan J., in *Irish Nationwide Building Society v. Raftery* [2012] IEHC 352, followed that statement of the law in a case where he found that both defendants had signed the deed of mortgage.

97. In the case of jointly held property where, as a matter of fact, only one spouse executes a deed of mortgage of charge, s. 3 of the 1976 Act has the effect of voiding the deed.

98. In the light of my conclusion that Mr Murray did not sign the Family Home Declaration and that he did not execute the Deed of Charge, the security interest purported to be created by the Charge is void and of no effect on account of s. 3 of the 1976 Act.

99. The finding of fact that the Family Home Declaration is not valid is, therefore, relevant only to the argument regarding the validity of the Charge. The claim is for debt, and the validity of the Change is not strictly in issue in these proceedings, but the fact that the 2003 Loan cannot be validly said to be one secured on the principal private residence of the defendants has a consequence in regard to the argument from the Consumer Credit Act which I will deal with later in this judgment. In essence, the loan is to be treated as unsecured in regard to both defendants.

The transaction closes

100. Monies were drawn down by DP Barry and the balance of the loan amount less their costs and outlays was enclosed in a letter dated 16 September 2003 addressed to the Murrays. A lodgement of €39,081 was made to the Murrays' joint account with GOVCO on the following day. The sum was applied to the purchase of the apartment in Spain which remains in the ownership of the defendants.

101. A letter dated 9 August 2004 from Bank of Ireland to the Murrays encloses a copy of the Charge for the purposes of section 130 of the Consumer Credit Act.

102. In or about July 2004, a reorganisation of Bank of Ireland Group led to some mortgage loans being transferred from GOVCO to the entity known as Bank of Ireland Mortgage Bank, the plaintiff in these proceedings.

103. On 9 November 2005 a letter from Bank of Ireland to DP Barry released the firm from the undertaking with regard to the 2003 Loan.

104. The 2003 Loan was repaid by the agreed instalments and fully repaid by the balancing payment from the advance under the 2007 Loan.

The 2007 Loan

105. In his evidence-in-chief (Transcripts, day 3, p. 31) and in cross-examination (Transcripts, day 3, p. 119), Mr Murray denied that he approached the Bank branch in Killibegs "in relation to mortgage facilities to construct new house next door to their family home", as appears on a facsimile of 14 March 2007 from Colm Campbell, then branch manager of Bank of Ireland to Paul McDevitt, the Murrays' accountant, some weeks before the apparent signed acceptance of the loan offer, in which Mr Campbell requested Mr McDevitt to provide the Bank with details of income and tax returns. That information was sent directly to the Bank by Mr McDevitt.

106. The early correspondence from the Bank is addressed to Mrs Murray only. Mr Campbell requested additional financial information by further letter dated 23 March 2007 addressed to Mrs Murray only in relation to a car loan in the names of herself and their son. There is no clear indication in that letter that the application was a joint application of Mr and Mrs Murray, but the income being assessed was that of Mr Murray and the Bank memos show that an application was in the joint names of Brian and Attracta Murray. That fact is not determinative as the existing accounts were joint accounts.

107. A first letter of offer addressed to both Mr and Mrs Murray issued on 27 April 2007 and was replaced by a later offer dated 2 May 2007 setting out the terms of a loan offer of €200,000 repayable over 20 years "to build an investment property" to be secured by way of a further equity release, and where the Bank expressly said it would rely on its existing first legal charge to secure the aggregate of the existing borrowings and the new advance.

108. The terms of the offer letter appear to have been signed by both Mr and Mrs Murray on 8 May 2007. No solicitors or third parties were involved, apart from a request to DP Barry directly from the Bank in order to check the deeds etc. Mr Murray went to sea at 3:00 AM on 8 May 2007 (Transcripts, day 3, p. 40).

109. Mr Murray's evidence is that he did not sign any documents for the purpose of the 2007 Loan. He says he and his wife agreed to acquire from their daughter the site adjoining the family home for a consideration of €30,000. Mr Murray's evidence was that he did not agree to secure any loan to raise this money, and that he and his wife agreed to borrow €30,000 and not €200,000 (Transcripts, day 3, p. 31).

110. The evidence shows advances totalling €200,000 over two years through the Murrays' joint current account and monthly repayments made by direct debit up until 18 June 2012.

111. On 26 April 2013, letters of demand called in the second loan facility.

112. Possession proceedings in the Circuit Court were threatened by letter dated 10 July 2014, after the commencement of these proceedings, but were never instituted.

Documents relevant to 2007 Loan

113. The following documents are relevant to the 2007 Loan:

> 1) amended mortgage loan offer letter and acceptance dated 2 May 2007 (the "2007 Loan Offer") and shown executed by both Mr and Mrs Murry on 8 May 2007, but not witnessed;
>
> 2) equity release application form dated 10 May 2007 (the "Equity Release Application") written in Mr Campbell's handwriting, with apparent signatures of Mr and Mrs Murray, each signature witnessed by that of the other. Mr Campbell has no recollection of this document;
>
> 3) confirmation of marital status dated 10 May 2007 (the "Confirmation of Marital Status") with apparent signatures of Mr and Mrs Murray, each signature witnessed by Mr Campbell who has no recollection of having witnessed it. Mr Murray was at sea from 8 to 18 May;
>
> 4) fishing questionnaire for life insurance purposes dated 18 May 2007 (the "Fishing Questionnaire"), apparently signed by Mr Murray. Mr Murray had returned from a fishing trip at noon;
>
> 5) life insurance proposal form dated 11 May 2007 (the "Life Insurance Proposal") showing apparent signatures of both Mr and Mrs Murray. The date is pre-printed. Attesting witness did not give evidence. Mr Murray was at sea;

6) undated notice of interest in fire policy showing apparent signature of Mr and Mrs Murray, not witnessed.

114. Mr Campbell was employed in Bank of Ireland since 1971 and was the branch manager in Killybegs during the relevant period of the 2007 Loan. He was not in Killybegs in 2003. He said he generally has a very poor memory, which is further hampered by the time which has elapsed since the relevant happenings and because he says his focus has changed since he retired in 2008.

115. He was not able to remember any transaction the Murrays had with the Bank (Transcripts, day 1, p.109) or any detail in relation to the 2007 Loan application (Transcripts, day 1, p. 113). In particular, he could not remember issuing the 2007 Loan Offer and confirmed he was not familiar with Mr Murray's signatures appearing there and dated 8 May 2007. He confirmed in cross-examination that he "just did not recall anything" (Transcripts, day 1 p. 126, line 18), that he did not recall meeting either Mr or Mrs Murray (Transcripts, day 1 p. 126, lines 17 and 27) and that he did not disagree with Mr Murray's contention that they had never met (Transcripts, day 1, p. 138).

116. He gave evidence that the handwriting in the Equity Release Application dated 10 May 2007 and the Confirmation of Marital Status dated 10 May 2007 is his handwriting (Transcripts, day 1, p. 118), but said he could not remember witnessing the signing of the documents by the Murrays (Transcripts, day 1, p. 119). He could not recollect who was present at a meeting on 7 March 2007 but the handwritten notes of the meeting were his (Transcripts, day 1, p. 139).

117. Mr Campbell could not explain why the Equity Release Application was dated after the acceptance of the 2007 Loan Offer letter (Transcripts, day 1, p. 129).

118. Mr Campbell said that because a large proportion of the male population of the town work in the fishing industry, in Killybegs it often took a month or even two months to complete the formalities for an ordinary loan or mortgage, and that it was "practice to process a loan or mortgage application on the instruction of one party" (Transcripts, day 1, p. 120). The branch staff would be instructed to inform him if a fisherman client was in the branch if documentation needed to be executed. Mr Campbell said his practice was that in the case of joint borrowings the two parties to a transaction could come individually to the branch (Transcripts, day 1, p. 144).

119. Mr Murray exhibited the fishing books logs for the relevant times in 2007 and the log shows that he was at sea from very early morning on 8 May 2007 until noon on 18 May 2007. Therefore, he was at sea on 8 May 2007, the date shown on the signed acceptance of the 2007 Loan Offer, and on 10 May 2007, the date on the Equity Release Application. It was Mr Murray's firm contention in his evidence-in-chief that he had not signed his acceptance of the 2007 Loan Offer (Transcripts, day 3 p. 47).

120. The attesting witness was unable to offer any evidence to counter Mr Murray's assertion that he did not sign any of the documentation. There was no explanation that might suggest the date was added after the documents were signed, or were deliberately inserted at a later date. In the light of Mr Campbell's evidence regarding his usual practice, it is likely that the negotiations were had through Mrs Murray alone.

121. The evidence of Mr Murray regarding the circumstances in which he discovered the extent and nature of the 2007 Loan and security support his position.

Mr Murray finds out about the 2007 Loan

122. Mr Murray said that he first discovered the gravity of his financial situation when, in June or July 2011, not mid-2010, as stated in his reply to particulars of 27 June 2016, he applied for a loan to buy a €6000 quad bike at Kees of Laghy and had, for that purpose, to confirm if he had debts of more than €50,000. He said that when investigation had been carried out by the proposed lender his application was rejected and on the advice of Kees, he had called the finance company which confirmed that he had borrowings with Bank of Ireland for approximately €190,000 (Transcripts, day 3, p. 51, day 4, p. 15).

123. Mr Murray described a tense unhappy conversation with his wife after he discovered the extent of the borrowings and where he asked her to explain how she had come to borrow the money and for what purpose. She was very upset and he said it was very hard to actually find out what had happened.

124. However, Mr Murray did not go to the Bank at that stage, but he started, as he put it in his evidence, "for the first time ever" "to take an interest in the actual running of the house" in order to try to "figure it out" (Transcripts, day 3, page 53). He decided to go to the Bank only when he received a bill for his credit card, which he said he had never used, showing a significant outstanding balance. He then arranged a loan though Ms Dorian to clear the outstanding balance (Transcripts, day 3, p. 59).

125. Mr Murray gave evidence of how he discovered that the loan was secured by a mortgage on the family home only around July 2012, a year or so after he became aware of the extent of the borrowings when he visited the Bank of Ireland branch of Killybegs (Transcripts, day 3, pp. 57-58) and asked Ms Dorian how it had been possible the Bank had advanced Mrs Murray monies (Transcripts, Day 4, page 32).

126. Ms Dorian, the acting manager of the Bank of Ireland branch in Killybegs during a short period of time in 2012, gave evidence for the plaintiff in relation to her dealings with Mr Murray in July 2012. She said that Mr Murray's mother-in-law arranged the first appointment and that Mr Murray was quite upset because he had found at home correspondence related to the borrowings, and Ms Dorian gave him copies of the cheques showing the movement of monies in the account.

127. She confirmed in cross-examination that Mr Murray appeared to be "very surprised" that there was a mortgage on his family home and as to the extent of the borrowings. This is consistent with Mr Murray's evidence he believed they had then taken an unsecured loan of €30,000 only. But it is not consistent with his evidence that he knew after he had been refused loan finance to buy a quad bike in mid-2011 that the borrowings were close to €200,000. He knew then the general level of the borrowings and his approach to the financial difficulty he found himself in was to take control of financial matters within the household, and not to seek clarification or comfort from the Bank or assert that there was an error.

128. This is consistent with the assertions in a letter addressed to the manager of the Killybegs branch of Bank of Ireland dated 2 November 2012, from Messrs Gallagher McCartney, solicitors then acting on behalf of Mr Murray, that "he was unaware of the existence of [the 2007 Loan] and did not authorise the application or accept any such loan" and that he "signed no applications in relation to the loan, did not sign loan acceptance or any other documentation in relation to the loan approval and subsequent draw down of funds", and that Mr Murray "only became aware that there was an issue in respect of his finances when he applied for a loan in late 2011 in order to purchase a quad bike". The letter also demanded that the Bank release "from this unauthorised charge" on Mr Murray's family home.

129. The evidence is, therefore, that before the commencement of proceedings, Mr Murray actively denied having executed the loan documentation and Charge and took steps to make this clear to the Bank in correspondence from his solicitors, but that he knew of the extent of the 2007 Loan in 2011.

130. Whilst he did change his evidence between the first and second replies to interrogatories, the actions he took and assertions he made in 2012 before the loan was called in and the proceedings issued are consistent with his denial of having executed the documentation.

131. Equally, the evidence of Ms Dorian seems to me to bear out that Mr Murray was surprised that the borrowings were secured by mortgage.

132. I am not persuaded, however, that Mr Murray was surprised and shocked as he claims when he ascertained the level of borrowings, nor am I persuaded that he discovered that the loan was secured in July 2012 at the meeting with Ms Dorian.

Conclusion on the evidence of signatures for 2007 Loan
133. The Bank has not satisfied me that the signature of Mr Murray as it appears on the 2007 Loan Offer, the Confirmation of Marital Status, and the Life Assurance Application, is his signature. I am also satisfied from his evidence, supported by Ms Dorian's, that Mr Murray only became aware of the actual amount of money due on foot of the 2007 Loan in late 2011, and of the actual existence of a mortgage on his family home in July 2012.

Argument regarding the nature of evidence
134. Mr Murray's counsel objected to the cross-examination of Mr Murray regarding his assertion that the signature on the acceptance to the 2003 Loan Offer was not his signature as there had been no evidence from the plaintiff in respect of the signatures. A ruling was made that counsel could cross-examine the witness as to the basis of his contention that he had not signed those documents (Transcripts, day 3, p. 111).

135. Mr Murray was asked in cross-examination whether the basis of his contention that he had not signed the 2003 or 2007 documentation was the nature of the document, the date of the document, or the signature on the document, and, in each case, his answer was that the actual signature was not his. Counsel had pointed out to Mr Murray that his signature seems to "change dramatically" on the fishing logs, but Mr Murray firmly said that that was still his signature (Transcripts, day 3, p. 109).

136. In his oral and written submissions, counsel for Mr Murray argued that the absence of direct evidence from the plaintiff that Mr Murray had signed the relevant documentation and the fact that, in cross-examination, it was not directly put to Mr Murray that he did sign the documents, means that Mr Murray's evidence is to be treated as uncontroverted.

137. Reliance was placed on recent case-law, including my judgment in *DPP v. Burke* [2014] IEHC 483, [2014] 2 IR 651, O'Malley J.'s in *A. C. v. Judge O'Brien* [2015] IEHC 25, both considered by Hogan J. in *McDonagh v. Sunday Newspapers Ltd*. [2015] IECA 225, at paras 53-54, as to the evidential status of evidence which, by deliberate choice of counsel, is not cross-examined: The rule in *Browne v. Dunne*.

138. It is for the Bank to establish that the signatures on the documents are those of Mr Murray and that whilst, as counsel for the Bank argues, Mr Murray's denials that the signatures are his signatures, notwithstanding that in each case the signature is shown to have been witnessed by Mr Brennan, Mr Murphy, or Mr Campbell, may not be credible, the evidence convinces me that witnessing of the documents is not a reliable indicator that they were signed in the presence of the witness. Mr Murray has changed twice his version in relation to the signatures appearing on the Declaration of Authorisation and Consent and on the 2003 Loan Offer but I am, for the reasons stated in my analysis of the documents, satisfied that he did not sign the documents.

139. The matter, then, is one of weight and credibility and, for the reasons stated, I prefer the evidence of Mr Murray and the Bank's witnesses showed a remarkable absence of recall of any of the events in issue.

140. In the light of that conclusion, I turn to examine some recent authorities regarding defects in loan documentation.

Defects in loan documentation
141. Whether there exists a contract of loan between the first named defendant and the plaintiff must be assessed according to ordinary contract law principles, as stated in Breslin, *Banking Law* (3rd ed., Round Hall, 2013) at para. 4-13. There is no requirement that a contract of loan be evidenced in writing. It is counsel's contention that Mr Murray's evidence supports an agreement to borrow €30,000 and no more in 2007.

142. In *ACC Bank v. Deacon* [2013] IEHC 427 Ryan J. summarised the essence of poof of a contact to lend at p. 30 of his judgment:

> "This case is about the proof of a series of loan agreements, not whether the bank has proved a particular, individual document. Documents are evidence of the agreements and their terms. But it is a misunderstanding to think that the case is about proof of a document and not proof of an agreement. It is about loan agreements and their terms and whether they were breached. Has the bank proved that it lent the money to Mr. Deacon on the terms stated in the facility letters? The bank can prove the agreement by oral evidence and copy documents to show what was agreed between the parties."

143. In that case the plaintiff bank sought judgment on foot of, *inter alia*, a joint and several loan. The bank had sent out a facility letter, with its general terms and conditions attached, to one borrower only. The other addressee, the first defendant, did not formally admit that he entered into the transactions and resisted the claim for summary judgment but implicitly acknowledged that he did actually get the benefit of the money advanced on foot of the facility letter. A handwriting expert gave evidence that his signature on the relevant documents was not genuine and of other irregularities in the documents supplied by the bank. The defence was rejected and Ryan J. accepted the oral evidence proffered in regard to the contract for loan.

144. McDermott, in *Contract Law* (2nd ed., Bloomsbury, 2017), at para. 2.153, noted that "courts will strive to uphold contracts particularly where the parties have begun to perform". This proposition is reflected in recent jurisprudence relied on in argument. In *ACC Bank v. Deacon*, Ryan J. regarded the fact that the first defendant had used the money to buy land as "substantial confirmation of the claim" in the light of the stated purpose of the loans.

145. In *ACC Bank v. Fahey* [2010] IEHC 41, the defendants obtained a bridging term loan from the plaintiff to assist in the purchase of real property. The loan offer letter signed by a senior manager of the bank's branch was inaccurate in describing the property and

erroneously stated that planning permission to build on the site had been granted. The defendants had executed a form of acceptance. A fresh letter of sanction correcting the mistakes was subsequently issued by the bank, but not signed, and a request to draw down the funds was received by the bank. The defendant pleaded the loan instrument relied upon by the bank in support of its claim had never been furnished to them, was never signed by them and, specifically, that they had also never received the bank's general terms and conditions applicable to commercial credit facilities. The bank was not in a position to call evidence that the defendants signed the second letter of loan sanction. Furthermore, an independent handwriting expert engaged by the bank came to the conclusion that the signatures on the document were not those of the defendants. The defendants accepted they received the monies.

146. The plaintiff bank confined its claim for the recovery of the principal sum advanced as money payable to the bank for money lent by it to the defendants as a simple contract debt. Kelly J. quoted Beale, *Chitty on Contracts* (29th ed., Sweet & Maxwell, 2004) in relation to the *prima facie* obligation to repay the money in case of an advancement:

> "If money is proved, or admitted, to have been paid by A to B, then in the absence of any circumstances suggesting a presumption of advancement, there is *prima facie* an obligation to repay the money; accordingly, if B claims that the money was intended as a gift, the onus is on him to prove this fact."

147. Kelly J. went on to say, at p. 21 of his judgment, that:

> "there is neither a presumption of advancement nor any suggestion of a gift. This was a commercial loan made by the bank to the defendants and the defendants admit that they received it. They also accepted […] that they have an obligation to repay. The statement of claim is drafted in such a way as to encompass such a claim. It follows, therefore, that the bank is entitled to recover judgment".

148. The Bank in the present case argues that the claim may be dealt with in a similar manner and in that context, I turn to consider the argument that it is entitled to judgement against Mr Murray by way of restitution, or for repayment of money had and received. As will be seen, the test is not a simple one of whether a borrower has received an advance of money, but whether the elements of a more nuanced test are met.

Money had and received

149. One of the earliest and much quoted formulations of the principle that money received at the expense of another is to be repaid created "by the ties of natural justice and equity" is that of Mansfield L.J. in *Moses v. MacFerlan* (1760) 2 Burrow 1005, where he described the cause of action as being one "to recover back money, which not ought in justice to be kept", and as an action in equity that acted upon the conscience of a person who wrongly receives money at the expense of another.

150. The action is now seen also as a claim in common law, and Goff L.J. described the action for monies had and received in *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1996] AC 669, at p. 683, as a personal claim in restitution at common law, founded on the principle of unjust enrichment.

151. The judgment of the House of Lords in *Lipkin Gorman v. Karpnale* [1991] 2 AC 548 is instructive as it firmly roots the claim in unjust enrichment where Lord Goff set out the matter, at p. 572:

> "[I]t appears that in these cases the action for money had and received is not usually founded upon any wrong by the third party, such as conversion; nor is it said to be a case of waiver of tort. It is founded simply on the fact that, as Lord Mansfield said, the third party cannot in conscience retain the money - or, as we say nowadays, for the third party to retain the money would result in his unjust enrichment at the expense of the owner of the money."

152. *Moses v. Macferlan* was expressly approved by the Supreme Court in *East Cork Foods Ltd. v. O'Dwyer Steel Co. Ltd.* [1978] 1 IR 103 and re-affirmed in *Murphy v. Attorney General* [1982] IR 241 where Henchy J. explained the source of the action, at p. 316:

> "In *Moses v. Macferlan* at p. 1012 of the report, Lord Mansfield held that 'the gist of this kind of action [an action for monies had and received] is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.' Thus, he put the claim on the footing of equity, or unjust enrichment, rather than under the fiction of an implied promise to repay money had and received."

153. Henchy J. also expressed the proposition that it may not always matter that the claim is to be regarded as sounding in equity or at law:

> "Whether the action be framed at common law for money had and received or (as here) in equity for an account of money held as a constructive trustee for the plaintiffs, I would hold that, in the absence of countervailing circumstances (to which I shall presently refer), such money may be recovered".

154. It does not matter for the purpose of the present case whether the action is one in equity or at common law as the defendants do not raise any equitable principles in defence of the claim and, as there is no question of priority, it is not necessary to consider the question in the context of any proprietary claim.

155. What is to be ascertained is whether the elements of the cause of action in unjust enrichment are met.

Unjust enrichment

156. Mitchell *et. al. (ed.), Goff & Jones' The Law of Unjust Enrichment* (9th ed., Sweet & Maxwell, 2016), at para. 4.64, refer to the cases in which payment is made into a joint bank account as an example of joint and several enrichment. They state that, in such cases, "the law generally holds that all the defendants are jointly and severally enriched, with the result that a claim for the whole amount of the enrichment may lie as against any or all of them."

157. The principle against unjust enrichment has been recognised by the Irish courts as far back as *Rochford v. Earl of Belvidere* 1770 (1766–1791) Wallis by Lyne 45, as cited by Budd J. in *The Right Honourable The Lord Mayor, Aldermen and Burgesses of the City of Dublin v. The Ancient Guild of Incorporated Brick and Stone* (Unreported, High Court, 6 March 1996), p. 20.

158. Keane J. giving judgment for the Supreme Court in *Corporation of Dublin v. Building and Allied Trade Union* [1996] 1 IR 468, at p. 493, considered the following preconditions must be fulfilled by a plaintiff who claims for unjust enrichment:

(i) the enrichment of the defendant;

(ii) at the plaintiff's expense;

(iii) in circumstances in which the law requires restitution (the "unjustness" of the enrichment); and

(iv) the absence of defences or other policies to deny restitution.

Application to the facts: Did Mr Murray receive the benefit of the monies?

159. In the light of the clear and uncontroverted evidence that the money advanced in four separate tranches between 2007 and 2009 were paid directly into a joint current account which was utilised for various day-to-day purposes and other purposes by Mr and Mrs Murray, I am satisfied that the defendants have each been shown to have had the benefit of the monies advanced by the Bank. I am satisfied in particular of the following facts:

160. Bank statements show drawdowns into the Murrays' joint current account with Bank of Ireland of €200,000 in total in five separate tranches, three of €50,000 each, one in the amount of €30,000 and one of €20,000, between 27 June 2007 and 5 November 2009. This was the account used by the Murrays as their day-to-day living account. The drawdowns appear to have been made at the request of the defendants, with no architect's certificates showing stages of development were provided. The house proposed to be built on the site was not built.

161. Immediately prior to the first drawdown of €50,000 on 27 June 2007, the joint account was overdrawn in the sum of €438.98. On 29 June 2007, two days later, a cheque for €15,000 was made out to one of the Murrays' children. Between 27 June 2007 and 9 August 2007 there were four payments of Mr Murray's wages into the joint account totalling €6,237.88. On 9 August 2007, a cheque for €13,314 was made payable to the Collector General to discharge Mr Murray's tax bill.

162. Immediately prior to the second drawdown of €50,000 on 22 August 2007, the joint account was overdrawn in the sum of €2,237.69. Between 22 August 2007 and 12 October 2007 there were four payments of wages received into the account totalling €8,435.94. On 12 October 2007, another cheque for €15,000 was made out to one of the Murrays' children. Between 12 October 2007 and 29 October 2007 there were two payments to the current account totalling €3,252.32. On 29 October 2007, a cheque for €4,498 was paid to the Collector General.

163. Immediately prior to the third drawdown of €50,000 on 14 October 2008, the account balance was €650.39. The lodgement brought the balance on the account up to €50,296.89. There were two debits on that day, totalling €353.50. Between 14 October 2008 and 20 October 2008, there was a single payment of wages to the joint account in the sum of €1,399.25. On 20 October 2008, the sum of €22,070.50 was transferred from the joint account to the 2003 loan account (no. 242763), clearing it. Between 20 and 29 October 2008, there was a single payment of wages to the joint account in the sum of €1,008.99. On 29 October 2008, a cheque for €5,091 was paid to the Collector General.

164. Immediately prior to the fourth drawdown of €30,000 on 17 June 2009, the account was in credit in the sum of €2,430.80.

165. Immediately prior to the fifth and final drawdown of €20,000 on 5 November 2009, the account was in credit in the sum of €8,965.38. Between 5 November 2009 and 3 December 2009 there were three payments of Mr Murray's wages into the joint account, totalling €2,699.43. On 12 November 2009, a cheque for €1,302.40 was paid to the Department of Family and Social Affairs in relation to a scheme for the benefit of professional fishermen. On 1 December 2009, a cheque for €12,000 was paid to Moya O'Donnell Solicitors, leaving a balance of €13,736.59 in the account on 3 December 2009.

166. Mr Murray acknowledged that the money borrowed was lodged to his bank account (Transcripts, day 3, p. 126) and that he did accordingly benefit from the monies. He acknowledged, for example, that some of the 2007 monies were used to pay-off the balance of the 2003 Loan to his benefit (Transcripts, day 3, p. 129), that the cheque of 12 November 2009 for €1,302.40 to the Department of Family and Social Affairs was payment to a department scheme for his benefit as a professional fishermen (Transcripts, day 3, p. 143), and that the €12,000 cheque to Moya O'Donnell Solicitors was for the purchase of a field by him at the time (Transcripts, day 4, p. 4).

167. The evidence, therefore, is that monies entered the joint account and, to borrow the example from *Goff & Jones' The Law of Unjust Enrichment*, at para. 4.28, on multiple occasions, cheques would not have cleared if the sums related to the 2007 Loan had not been drawn down into the account.

168. I am satisfied that Mr and Mrs Murray received the benefit of the total sum of €200.000 from the 2007 Loan at the expense of the Bank. The first two tests in *Corporation of Dublin v. Building and Allied Trade Union* are satisfied.

169. Mr Murray's evidence is that, at the relevant times, he had been earning approximately €50,000 per year and that his income is transferred directly, usually every Friday, by direct debit to his bank account without any tax deduction, as he is self-employed. He says that he never looked at bank statements but was able to guess his monthly/weekly income from the amount of the catch. He could offer no explanation as to how various exceptional expenses were met, especially expensive refurbishments of the family home and the purchase of two sites. Mr Murray showed some degree of financial acumen and I do not believe he was wholly ignorant of the fact that the couple had on occasion made exceptional purchases which might not readily have been met from current income.

170. I now turn to consider the defences that would deny a restitutionary remedy.

Possible defence: Change of position

171. Whilst the action may be seen as one at law and not just an equitable claim, a defendant may defeat the claim if he or she can show a change of position such as might raise a form of estoppel against the true owner. The formula adopted in *Corporation of Dublin v. Building and Allied Trade Union* is to weigh the "unjustness" of the enrichment.

172. The authors of *Goff and Jones' The Law of Unjust Enrichment* suggest, at para 27.08, that the defence of change of position, whilst it might appear to be a rule about the type of detriment a party must have suffered to defend a claim in undue enrichment on account of a change of position defence, is really a test of causation. For the present case, that proposition is helpful and I consider that a defendant does not need to show that he spent the money on something out of character or in a way he had never spent money before, but that he entered a transaction he would not have entered but for the enrichment, and that the balance of fairness

means that the money is not to be restored.

173. I am not satisfied that Mr Murray can show that he changed his position or engaged in expenditure which would make it unfair to him, in all the circumstances, to require him to make restitution in whole or in part. The expenditure may have been exceptional but the evidence is that the decision to purchase the sites was a mutual one, as was the expenditure on refurbishments. I am satisfied that it would be unjust to deny the enrichment, and that the balance of fairness demands restitution.

Possible defence: No knowing receipt

174. It is argued by counsel for Mr Murray that he has not been shown to have known of the drawdown of the 2007 Loan until all the monies were expended and that it would be unfair in the circumstances to require restitution.

175. Reliance is placed on the judgment of the High Court for England and Wales later affirmed by the Court of Appeal in *Primlake Ltd. (in Liquidation) v. Matthews* [2006] EWHC 1227 (Ch), where Collins J. considered the position of monies which had entered a joint account of a husband and wife without the knowledge of the wife, a joint account owner, and where she was held to be liable to repay only the monies which remained in the account. That decision was based, *inter alia*, on the fact that there was no evidential basis for an argument of dishonest assistance or knowing receipt. Collins J. held that the overwhelming evidence was that Mr Matthews was allowed by Primlake Ltd.'s managing director to perform relevant management functions of the company and that he had taken all effective decisions. Mrs Matthews "did nothing of any substance in the practice, and only shared in the profits in the sense that she had no income of her own and had the benefit of Mr Matthews' income", at para. 330. Collins J. held that "the mere receipt by her of the money into the joint accounts does not impose an obligation to repay" and, at para. 336, that:

> "she would be liable, as a volunteer, to make a restitution of the money still in her control. But […] she would not be liable for money which went through the joint accounts, but no longer held by her, except on the basis of dishonest assistance or knowing receipt. But there is no evidential basis for such claims, and no suggestion was put to her in cross-examination which might have provided a basis for a claim in dishonest assistance or knowing receipt".

176. Counsel also relies on *Stanbridge v. Advanced Industrial Technology Corporation Ltd*. [2012] EWHC 1009 (Ch), the facts of which bear at least a superficial resemblance to those in the present case. Mr and Mrs Stanbridge, a married couple, nominally operated a joint bank account. Mr Stanbridge was in control of the household finance, and did not readily share information with his wife. Property registered in joint name was let and the rent was paid directly into the joint account. Mrs Stanbridge gave evidence that, although the account had been opened jointly, she had never used it and that she had seen no statements during the relevant time, that her husband had concealed matters from her, and had forged her signatures on a facility letter containing the terms of a loan agreement with the defendant lender. Mr Stanbridge had also forged her signature on a charge registered as a burden over the property. Monies were drawn down and transferred into the joint account and, four days later, paid out to the benefit of a creditor of Mr Stanbridge. Mrs Stanbridge sought a declaration that the charge and facility were void, and that they be set aside. Mr Stanbridge did not play an active part in the proceedings, but he did deliver a defence and produced three witness statements. In his defence, he admitted he purported to act on behalf of his wife in executing the charge and the facility letter but denied he was authorised to do so. Judge Dight found that Mr Stanbridge "was on a frolic on his own", that Mrs Stanbridge neither knew of or was party to the arrangement. But it is critical that Judge Dight found that Mrs Stanbridge had received no benefit from the sum transferred into the joint account. At para. 86, he held as follows:

> "The positions taken by the court and the reasoning of the judges in the Euroactividade *case [Euroactividade Ag v. Moeller* (Unreported, Court of Appeal for England and Wales, Simon Brown L.J., 1 February 1995)], the *OEM* case [*OEM plc. v. The Estate of Brian Schneider (deceased)* [2005] EWHC 1072 (Ch)] and the *Primlake* case persuade me that, as a matter of principle, the court may refuse to order restitution by a joint account holder of monies siphoned through her account where she has not benefitted from them as a matter of fact and had no knowledge that her account was being used as a conduit by the other party".

177. I do not accept the contention of counsel for the Bank that *Primlake Ltd. v. Matthews* is not on point because, in the present case, no fiduciary obligation nor any of the circumstances that might give rise to a constructive trust are asserted. Whilst the concept of "knowing receipt" requires a degree of *bona fide* in relation to the general state of affairs of the relevant joint account, the principles of unjust enrichment and, at least at common law, the doctrine of restitution, do not require an argument from trust law or the existence of a fiduciary relationship. The elements are those identified by the Supreme Court in *Corporation of Dublin v. Building and Allied Trade Union*.

178. In my view, *Primlake Ltd. v. Matthews* and *Stanbridge v. Advanced Industrial Technology Corporation Ltd*. can readily be distinguished because, unlike Mrs Matthews, Mr Murray *did* benefit from the monies advanced as a matter of fact, and did have knowledge of the manner in which Mrs Murray used the account, albeit it could not be said that he knew the exact amount of the drawings. Mr Murray was "enriched" by the monies in a real sense: He did receive a benefit and he was aware of the general use to which the monies were put, and it seems to me sufficient that Mr Murray knew and agreed with his wife that they would borrow in 2003 for one purpose and in 2007 for another, and that, in those circumstances, the precise amount of the borrowings is not relevant. Once he had ceded control of the family finances to Mrs Murray and once it was agreed that she would borrow money for those stated purposes, Mr Murray is a "knowing" recipient of the monies both because he received a benefit from the money, and because he was, in general, aware of the way in which the account was being used, and accepted that it was used for the benefit of the family and the couple in a general way.

179. The management of household finances was, firmly and by agreement, in the hands of Mrs Murray and Mr Murray did receive a benefit from the monies and he expressly confirmed this in the course of his oral evidence. He also gave evidence that he was aware, without looking at bank statements, of the amount of his weekly takings form the fishing vessel.

180. He must therefore have been aware that the current account was used to make the payments to his pension fund, to carry out refurbishment works to the principal private residence, and to purchase the holiday home in 2007 and the other lands in December 2009.

181. I am satisfied for these reasons that the necessary elements of the test are met and that Mr Murray has been unjustly enriched by the money advanced by the Bank, and subject to the further arguments raised in defence the money is to be repaid.

The Consumer Credit Act

182. Counsel for the first named defendant argues that the principles of unjust enrichment and the claim in restitution may not be used as a means to circumvent the statutory protection for consumers which imposes mandatory requirements non-compliance with which may render a contract void.

183. It is argued that the loan, if such be found to exist, is one to which the provisions of the Consumer Credit Act apply, and that the mandatory requirements contained in s. 38 of that Act have not been complied with by the Bank.

184. It is argued that the loan cannot be characterised as a "housing loan" as defined in s. 1 of the Consumer Credit Act, as amended by the Central Bank and Financial Services Authority of Ireland Act 2004 by which the definition of a "housing loan" now includes refinancing credit, *inter alia*, an agreement for the provision of credit to a person on the security of a mortgage of a freeholder leasehold estate or interest in land on which a house is constructed where the house is to be used, or continues to be used, as the principal residence of the person or the person's dependents.

185. Having regard to the fact that the evidence supports the proposition advanced on behalf of Mr Murray that he never created a mortgage on his principal private residence, the 2007 Loan is not a housing loan, and therefore, the provisions of ss. 30 and 38 of the Consumer Credit Act are in play.

186. Section 3(1) of the Consumer Credit Act contains provisions related to the scope of the Act, and reads as follows:

> "Subject to this Act, this Act shall apply to all credit agreements, hire-purchase agreements and consumer-hire agreements to which a consumer is a party".

187. The loans to Mr and Mrs Murray were consumer loans.

188. No evidence or argument is advanced to suggest that the requirements of s. 30 of the Consumer Credit Act have been met. Counsel for the Bank, however, argues that the failure to meet the statutory notice or cooling-off periods is not fatal. That argument requires an analysis of s. 38 of the Consumer Credit Act which provides as follows:

> "A creditor shall not be entitled to enforce a credit agreement or any contract of guarantee relating thereto, and no security given by the consumer in respect of money payable under the credit agreement or given by a guarantor in respect of money payable under such contract of guarantee as aforesaid shall be enforceable against the consumer or guarantor by any holder thereof, unless the requirements specified in this Part have been complied with:
>
> Provided that if a court is satisfied in any action that a failure to comply with any of the aforesaid requirements, other than section 30, was not deliberate and has not prejudiced the consumer, and that it would be just and equitable to dispense with the requirement, the court may, subject to any conditions that it sees fit to impose, decide that the agreement shall be enforceable."

Saver provisions in s. 38 of the Consumer Credit Act

189. Counsel for the Bank relies on the saver provisions in s. 38 of the Consumer Credit Act and argued that, insofar as the provisions of that section have not been met, the evidence suggests that the failure was not deliberate, does not prejudice the defendants, and that it would be just and equitable to dispense with the requirements and hold the loan is enforceable.

190. Section 38 of the Consumer Credit Act and the saver provision contained therein does not apply to any failure on the part of a provider of credit to meet the cooling-off period and notification requirements relating to the contents of credit agreement contained in s. 30 of the Consumer Credit Act. No evidence was adduced that the Bank did meet the requirements of s. 30 of the Consumer Credit Act, in particular, no evidence that a copy of the agreement was sent to the defendants within ten days of the making of the agreement, no evidence that the agreement contained a statement in respect of the cooling-off period or any costs or penalties for failure to comply.

191. I note, however, that s. 30(4) of the Consumer Credit Act expressly provides that the requirements of s. 30 do not apply to credit in the form of advances on a current account. The 2003 Loan was fully paid-off and this litigation concerns the 2007 Loan. Having regard to the view that I take that the loan documentation was not executed, and that no security was created, it seems to me that the loan ultimately came to take the form of a series of advances on the joint current account of Mr and Mrs Murray. While the 2007 Loan was intended on its express terms to provide development funding for the site adjoining the principal private residence of the defendants, the loan was not drawn down on that basis and was drawn down in a series of advances on the Murrays' current account.

192. Therefore, I am satisfied that s. 38 of the Consumer Credit Act may be relied on by the Bank.

193. Counsel for Mr Murray argues that the principles of unjust enrichment may not be used to enforce an otherwise invalid contact, and I turn now to examine the argument.

The indirect enforcement of an invalid contract

194. In *Haugesund Kommune v. Depfa ACS Bank* [2010] EWCA Civ 579, [2012] QB 549, the Court of Appeal for England and Wales held that a claim in unjust enrichment could not indirectly enforce an otherwise invalid contract. Mr Murray's counsel contends that I should not allow "back door provisions" to displace mandatory statutory provisions. I must also note, in passing, that, in *Haugesund Kommune v. Depfa ACS Bank*, a claim in unjust enrichment was deemed to be defeasible if recovery were found to be inconsistent with the policy of the statute rendering the parties' contract void as cited in *Goff & Jones' The Law of Unjust Enrichment*, at para. 3.04.

195. I am not persuaded that this argument has any force because of the express provisions of s. 38 of the Consumer Credit Act allow for recovery if it would be just and equitable to dispense with the requirement. Having regard to the view that I take that the justice of the case requires that Mr Murray be held liable in restitution and for money had and received, I am satisfied that it is just and equitable to dispense with the mandatory statutory requirements. On the level of principle, I agree with the general proposition that the doctrines of restitution may not be used as a means of enforcing an otherwise unlawful or unenforceable contract of loan. But having regard to the case-law and the analysis in this judgment, I am satisfied that Mr Murray must be held liable for any capital advanced to him. The claim for interest is not allowed, as I am not satisfied that the Bank has established a basis for this claim or how the applicable rate is to be assessed. That result is also one that may be made in the light of the discretion of the court conferred by the saver provisions of s. 38 of the Consumer Credit Act.

The case against the second named defendant

196. There is evidence of a valid loan facility in respect of Mrs Murray.

197. Mrs Murray did not defend her case, she chose not to give any evidence in these proceedings, and I have no option but to enter judgment against her in the full amount outstanding.

Conclusion
198. In relation to the first defendant, I propose entering judgment for the sum claimed less the amount of interest claimed by the Bank.

199. I propose to enter judgment against the second defendant in the full amount claimed.

200. I will hear the parties on how to deal with the first defendant's counterclaim and in regard to the precise amount of the judgment to be entered against him.