

THE HIGH COURT

[2015/1741 S]

BETWEEN

BANK OF IRELAND MORTGAGE BANK

PLAINTIFF

AND

**ETHEL DALY (AS LEGAL PERSONAL REPRESENTATIVE OF THE LATE MARCUS JOHN
ALBERT DALY, DECEASED)**

DEFENDANT

AND

[2018/1505 S]

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Judgment of Mr. Justice Heslin delivered on the 10th day of December 2020

Introduction

1. The plaintiff, Bank of Ireland Mortgage Bank (hereinafter "the Bank") seeks summary judgment against the defendant in respect of two sets of proceedings. The defendant is the widow and the legal personal representative of the late Marcus John Albert Daly (hereinafter "Marcus Daly Snr.", or "MDS") who died on 18 July 2016.
2. The first in time of the two sets of related proceedings were commenced by means of a summary summons which was issued on 09 September 2015 (High Court Record Number 2015/1741S). These proceedings relate to a guarantee which was executed by MDS on 05 August 2010 in favour of the bank whereby, in consideration of the bank making or continuing banking facilities to Marcus F. Daly (hereinafter referred to as "Marcus Daly Jr." or "MDJ") and his wife, Patricia Daly (hereinafter, collectively, "the borrowers"), MDS guaranteed to pay to the plaintiff, on demand, all monies owing to the bank in respect of facilities granted by the bank to the Borrowers on loan account no. 13129997. It is not in dispute that the guarantee in favour of the plaintiff bank was limited to a principal sum of €300,000, plus interest. It is not in dispute that on or about 01 November 2010 the bank advanced the sum of €1.65 million to the Borrowers through loan account number 13129997. It is also common case that on 03 February 2014 a demand was made on the borrowers for repayment of the said loan facility and that, on the same date, the bank made a demand of MDS for payment of the sum of €300,000 on foot of the guarantee. No payment having been made by MDS in response the said demand, the plaintiff issued the summary summons to which I have referred on 09 September 2015 bearing High Court Record Number 2015/1741S (the "guarantee proceedings"). Following the passing of MDS, on 18 July 2016, and the issuing, on 16 March 2017, of a grant of probate to Mrs. Ethel Daly, as his legal personal representative, the defendant was substituted into the guarantee proceedings as defendant, in her capacity as executrix of the estate of MDS.

3. The second set of proceedings commenced by means of a summary summons which issued on 19 November 2018, bearing High Court Record Number 2018/1505S (the "loan proceedings"). These concern a loan facility provided by the plaintiff to MDS on foot of a letter of loan offer, dated 30 October 2009, which MDS accepted on the same date, pursuant to which the bank agreed to provide a loan facility of €350,000 to MDS (hereinafter "the Galway loan facility") for a term of five years. It is not in dispute that MDS agreed to repay the foregoing by means of monthly repayments which would be "interest only" for the first five years, repayment being secured by means of a mortgage on property at Kirwan's Lane, Galway, owned by MDS. It is also common case that in December 2015 the term of the facility was extended, by agreement between MDS and the plaintiff bank. It is not in dispute that the bank advanced the sum of €350,000 to MDS, through loan account number 41326787. All repayments required under the aforesaid loan facility were made to the bank, by MDS, from drawdown of the said loan, in late October 2010, until his death, on 18 July 2016. It is not in dispute that on 07 August 2018 a demand was made on the estate of MDS seeking repayment of the aforesaid loan. In circumstances where repayment was not made, the plaintiff bank issued the loan proceedings against the estate of MDS, the defendant being named as legal personal representative in the summary summons which issued on 19 November 2018.
4. On 17 December 2018 the plaintiff issued motions for judgment in both the guarantee proceedings and the loan proceedings. In an affidavit sworn by Mr. Emmet Pullan on behalf of the bank on 14 December 2018, grounding the application for judgment in the guarantee proceedings, it was averred that, in addition to the principal of €300,000.00, interest from 04 February 2014 to 21 November 2018 had accrued in the sum of €65,224.76 and the plaintiff sought judgment for €365,224.76 together with further interest on the principal sum of €300,000 from 22 November 2018. In an affidavit sworn by Mr. Pullan on 04 December 2018 to ground the application for summary judgment in the loan proceedings, it was averred that the principal owing was €291,918.62 and that interest on the principal from 22 September 2018 to 26 November 2018 amounted to €2,533.70 and the plaintiff bank sought judgment in the sum of €294,452.32 together with further interest on the principal sum of €291,918.62 from 27 November 2018.
5. In opposing both of the plaintiff's applications for summary judgment, Mrs. Ethel Daly swore two affidavits, in the guarantee proceedings, being affidavits sworn by the defendant on 25 February 2019 and 14 November 2019, respectively. The defendant also swore one affidavit on 25 February 2019 in opposition to the plaintiff's motion for judgment in the loan proceedings. In the latter affidavit the defendant alleges that the plaintiff's claim in the proceedings under record number 2018/1505 S is statute barred. It is important to note that, at the commencement of the hearing of this matter on 10 November 2020, senior counsel for the defendant made it clear that the defendant was no longer seeking to rely on any statute of limitations arguments.
6. It is fair to say that there is a great deal of commonality as between the two replying affidavits which were sworn by the defendant on 25 February 2019 and it is also fair to say that the basis upon which the defendant opposes both of the plaintiff's claims is what

the defendant characterises as the plaintiff's waiver of compliance with certain pre – conditions which were set out in a loan offer to the borrowers dated 19 February 2010. It is the defendant's case that these pre – conditions, which related to the financial position of MDJ were pre – conditions which inured, not only the benefit of the plaintiff bank, but also for the benefit of MDS. The defendant argues that the bank waived compliance with these pre – conditions and that the waiver of compliance was not communicated to MDS before he executed the guarantee or before he drew down the €350,000 loan facility. It is the defendant's case that if, what it describes as the true factual position regarding non – compliance with the said pre – conditions had been made known to MDS at the relevant time, he would not have executed the guarantee and would not have drawn down the €350,000. In short, the same grounds of defence are advanced by the defendant in relation to both applications and this can be seen from the averments made by the defendant in both sets of proceedings.

The defendant's 25 February 2019 Affidavit in the guarantee proceedings

7. Mrs. Daly makes, inter alia, the following averments in her 25 February 2019 affidavit (in respect of the guarantee proceedings under record no. 1741 S: -

- *"The plaintiff had a longstanding banking relationship with my husband, Marcus Sr. and the plaintiff agreed to lend Marcus Sr. €350,000 to enable Marcus Sr. to lend the money to Marcus Jr., so as to help Marcus Jr. to reduce his indebtedness . . .". (Para 9);*
- *"The loan offer to Marcus Jr. had a number of pre – conditions, one of which was the reduction in the debt. Subsequently, the plaintiff required Marcus Sr. to sign a guarantee in its favour (Guarantee) as a condition of the loan facility to Marcus Jr. for €300,000. The guarantee for €300,000 was in addition to the payment of €350,000 which he was being asked to make to the plaintiff to reduce the sums due on foot of the 2006 Facilities. In other words, the plaintiff was improving its own financial position to the tune of €650,000 at the expense of its loyal customer, Marcus Sr.". (Para.10);*
- *I am advised that the February 2010 pre – conditions were not only for the benefit of the plaintiff, but also for the benefit of the guarantor, namely Marcus Sr., who was entitled to assume that the plaintiff would not advance a customer (Marcus Jr.), monies that he was being asked to guarantee without first ensuring that the February 2010 pre – conditions were properly satisfied". (Para. 14);*
- *"Marcus Sr. would not in reality have assisted our son by paying the plaintiff €650,000, as he was (absent a very significant positive change in his financial position) not going to be able to repay the loan advanced to refinance the 2006 facilities. This information was not made clear to Marcus Sr. in 2009 by the plaintiff but I now believe the plaintiff was fully aware of this position in 2009 and it took advantage of Marcus Sr.'s relationship with his son" (Para 22);*

The defendant asserts that none of what she describes as pre-conditions in the February 2010 Loan Offer to MDJ were satisfied and, in paragraphs 15 – 28, she sets out why she takes that view. In respect of the element of the pre-condition which related to audited or certified accounts for the prior two years confirming MDJ's capacity to earn a personal income in a specific sum, the defendant avers that no audited or certified accounts were provided and the statement of income and expenditure account which was provided related to 2009 only and did not verify that MDJ had the capacity to derive a personal income of the amount specified. Regarding the part of the precondition which referred to management figures to be provided for the current financial year supported by the last six months bank statements to confirm MDJ's current turnover level, the defendant avers that the evidence purporting to satisfy this precondition is in the form of fee notes issued rather than evidence of income. Another element of the preconditions in the February 2010 loan offer letter referred to Accountant's written confirmation that MDJ's tax affairs were up to date. Commenting on a letter provided by Deloitte and Touche to the bank which stated, inter alia: "*We confirm that all relevant tax returns have been submitted to revenue and, as is confirmed by the tax clearance certificate dated 17/02/2010, Mr. Daly's tax affairs are in order*", the defendant makes the following averment: -

- "*The statement provided by Deloitte and Touche does everything but confirm that Marcus Jr.'s 'tax affairs are up to date'. Again this pre – condition was waived unilaterally by the plaintiff to unjustly enrich itself and without bringing it to the attention of the guarantor, who was as exposed as the plaintiff. The difference was that the plaintiff clearly knew of its exposure and refused, failed or neglected to bring the exposure to the attention of Marcus Sr.*". (para. 25).

The defendant makes further averments to the effect that the only loan offer letter which MDS ever saw was that of February 2010, asserting that her late husband never saw the May 2010 loan offer letter and the plaintiff bank is accused of acting in an underhand manner:

- "*In what, I am advised, can only be described as a perverse attempt to cleanse the fact that Marcus Sr. had never received a copy of the May 2010 facility, the plaintiff wrote to Marcus Sr. on 16th August 2010 referencing the May 2010 facility which Marcus Sr. never received. The reality is that Marcus Sr. never received a copy of the May 2010 facility*". (Para. 29);
- "*When Graham Richards of Matheson provided advice on foot of the guarantee on 5th August 2010, the only facility available to him was the February 2010 facility. The plaintiff on 16th August 2010 (presumably realising this error) wrote to Marcus Sr. in relation to a side letter and it appears surreptitiously referred to the May 2010 facility but did not provide Marcus Sr. with a copy of it. Marcus Sr., in response to this letter, refers to the May 2010 facility (as the plaintiff correctly pointed out) but clearly does so because the plaintiff has referred to it in its letter of 16th August 2010. I do not believe Marcus Sr. had ever seen it as he was careful*

in managing his affairs and he would have provided it to Graham Richards". (Para. 31);

- *"I am advised that the plaintiff was under an obligation if the February 2010 pre – conditions were not satisfied (which they were clearly not) or if the plaintiff was waiving or abandoning them (which it clearly must have done) to put Marcus Sr. in an informed position to enable him to decide whether he wanted to continue to provide the guarantee and the €350,000 to the plaintiff on foot of the October 2009 facility. The plaintiff never did this. The reason why it did not do this is clear. If it had, Marcus Sr. would not have provided the lump sum financed by the mortgage of his property in Galway nor would he have provided the guarantee the subject matter of these proceedings". (Para. 35).*
- *"I say and believe that Marcus Sr. would never have drawn down the loan to pay the plaintiff if he had been properly informed (as he was entitled to be) that the February 2010 pre – conditions were being waived or abandoned. Similarly, he would not have provided the guarantee if he had been properly informed that the February 2010 pre – conditions were being waived or abandoned. In reality, the plaintiff was seriously exposed under the 2006 facility. It had no security. It was now hopelessly conflicted and rather than calling in the loans, and proceeding to judgment against Marcus Jr., it sought in an act of self-interest to enrich itself to the detriment of a long standing and loyal customer. It is quite clear that if the guarantee had not been provided, the refinance would not have proceeded and Marcus Sr. would not have borrowed €350,000 to pay down part of the 2006 facilities to the plaintiff". (Para. 36).*

8. I have carefully considered the entirety of the averments made by the defendant in all affidavits sworn by her, the foregoing being extracts from the defendant's 25 February 2019 affidavit in the guarantee proceedings which point to the grounds of defence raised by the defendant.

The defendant's 14 November 2019 Affidavit in the guarantee proceedings

9. It is fair to say that the second affidavit sworn by the defendant on 14 November 2019 does not contain any new assertions by the defendant. Whereas, in para. 7 of a supplemental affidavit sworn by Mr. Pullan on behalf of the bank on 03 July 2019, the latter points out that the defendant does not offer an explanation as to how she is able to assert that the deceased had not received a copy of the 11 May 2010 loan offer letter, the defendant makes the following averment in para. 5 of her 14 November 2019 affidavit: -

"My late husband, Marcus Sr., was a careful and meticulous barrister. He kept files on everything of importance and this matter was no exception. I can say that all correspondence furnished was filed on his file which he maintained in his home office and copies were provided to Matheson Ormsby Prentice for the purpose of taking legal advice. Furthermore, I am advised by my lawyers that despite requests the plaintiff has not furnished any evidence that the mortgage loan offer of 11 May 2010 was furnished to my husband. Given his filing system I therefore can only

conclude that no such letter was sent to Marcus Sr. Furthermore, I have checked with Matheson who has confirmed to me that Marcus Sr. did not provide Matheson with a revised letter of loan offer" (Para. 19 of defendant's 14 Nov 2019 Affidavit).

10. In para. 8 of Mr. Pullan's affidavit sworn on 03 July 2019 he states that the defendant does not offer any evidence or explanation of how she is able to assert what the deceased had seen or what information was available to Mr. Richards when he provided advices to the deceased. In para. 6 of her 14 November 2019 affidavit, the defendant states the following in response: -

"I simply repeat what I set out at para. 5 above. All the correspondence on this matter was on my husband's file in his home office. I fail to see any reason why Marcus Sr. would not have copied this letter for Matheson and filed the original as he did with all the other letters other than it never existed".

11. The final paragraph in the defendant's 14 November 2019 affidavit is in the following terms: -

"As I understand the position, the bank has not furnished any evidence by cover letter or otherwise as to whether the May 2010 Facility was provided to my late husband and seeks to rely upon a reference in a letter to the date of the facility letter. I can say that by August 2010 my husband had executed the guarantee and drawn down the funds. Any further correspondence appears to be (at best) housekeeping and (at worst) an attempt by the bank to mend its hand. My late husband and I would not have checked that the reference to the date of the loan offer to our son was accurate. Marcus Sr. was not the borrower and in providing a guarantee we relied upon the bank to send us the correct document. From my lawyers and my review of my husband's file and the Matheson file there is simply no evidence of the plaintiff sending the amended loan offer to my husband and the bank has never furnished evidence that it was so provided".

12. The verbatim extracts from the defendant's affidavits which I have quoted above indicate the basis upon which judgment is opposed. A fair summary of the defendant's grounds of defence is as follows. The defendant asserts that the "conditions precedent" in the bank's 19 February 2010 loan offer to the borrowers were preconditions which were for the benefit, not only of the plaintiff bank, but also for the benefit of MDS, as guarantor of his son's liabilities. The defendant asserts that the bank waived compliance with these preconditions. The defendant also asserts that what is described as a waiver of compliance with these preconditions was not communicated to MDS before he executed the guarantee of 05 August 2010 or before he drew down the loan of €350,000 at the end of October 2010. The defendant asserts that if the position regarding what the defendant describes as non-compliance with these preconditions had been made known to MDS at the relevant time, he would neither have executed the guarantee, nor would he have drawn down the €350,000 loan.

13. Whether these assertions have any basis in evidence, or can fairly be considered to be no more than bare or mere assertions as to a given situation, requires an analysis of the evidence before the court, in particular, a careful review of the documentation which has been exhibited. Before undertaking that exercise, it is important to keep in mind certain relevant legal principles.

Relevant legal principles

14. The jurisprudence insofar as the appropriate approach to an application for summary judgment is well known and the following are the principles which I must apply in respect of the motions before this court which the defendant opposes.
15. *In A.C.C. Plc v. Elio Malocco* HC U.R. 7/ 2/2000 Miss Justice Laffoy made it clear that "The Court has to look at the whole situation to see whether the defendant had satisfied the Court that there is a fair or reasonable probability of his having a real or bona fide defence, or, whether what the defendant said is credible. In my view, looking at the whole situation must involve an assessment of the cogency of the evidence adduced by the Plaintiff in relation to the given situation which is to be the basis of the defence".
16. In the oft-cited analysis of the correct approach which a Court should take to an application for summary judgment, Mr Justice McKechnie stated the following in *Harrisrange Ltd. V. Duncan* [2003] 4 IR 1:

"From these cases it seems to me that the following is a summary of the present position: -

- (i) The power to grant summary judgment should be exercised with discernible caution,*
- (ii) In deciding upon this issue the Court should look at the entirety of the situation and consider the particular facts of each individual case, there being several ways in which this may best be done,*
- (iii) In so doing the Court should assess not only the Defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the Plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting Affidavit evidence,*
- (iv) Where truly, there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use,*
- (v) Where however, there are issues of fact which in themselves are material to success or failure, then their resolution is unsuitable for this procedure,*
- (vi) Where there are issues of law, this summary process may be appropriate but only so, if it is clear that fuller argument and greater thought, is evidently not required for a better determination of such issues,*

- (vii) *The test to be applied, as now formulated is whether the Defendant has satisfied the Court that he has a fair or reasonable probability of having a real or bona fide defence; or as it is sometimes put, "is what the Defendant says credible?"; - which latter phrase I would take as having as against the former an equivalence of both meaning and result,*
- (viii) *This test is not the same as and should be not elevated into a threshold of a Defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence,*
- (ix) *Leave to defend should be granted unless it is very clear that there is no defence,*
- (x) *Leave to defend should not be refused only because the Court has reason to doubt the bona fides of the Defendant or has reason to doubt whether he has a genuine cause of action,*
- (xi) *Leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally,*
- (xii) *The overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter Judgment or leave to defend, as the case may be."*

17. In the judgment of Baker J. in *ACC Loan Management Ltd. v. Dolan & Ors* [2016] IEHC 69, the learned judge took the view that in what was a summary judgment application, she could not resolve a dispute of facts but the court: -

" . . . may assess the evidence including the exhibited correspondence and come to a determination whether the defendants have made out an arguable or bona fide or credible defence on this basis" (para. 51).

In determining whether assertions were credible, Baker J. referred to the judgment of Charleton J. in *NAMA v. Barden* [2013] 2 IR 28, wherein he said the following at para. 5:
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"The mere assertion on affidavit of a defence is insufficient. A defence must, if the matter is to be remitted to plenary hearing, have some reasonable foundation. An assertion, for instance, that a cheque was paid in discharge of a debt means little if no bank statements are produced to show the provenance of the funds or when, how or to whom money was remitted. Often, arguments are advanced as to collateral contracts or representations that are claimed to override the express terms of a written contract. It is for each such allegation to be analysed in the context of whatever claim the plaintiff may make in response, bearing in mind that the summary judgment procedure does not involve the weighing of competing facts but rather requires an analysis as to whether a defence that might reasonably be

an answer to the plaintiff's claim has been made out. If it is very clear that the defendant has no defence, the court should proceed to enter summary judgment".

18. Baker J. went on in the ACC Loan Management case to refer, at para.62 of her judgement, another decision by Charleton J., namely in *NAMA v. Barker & Ors* [2014] IEHC. In the latter decision, the learned judge made clear that *"If an assertion of fact is made which is in the teeth of a written contract, then a particular scrutiny will be made of that fact and how it is alleged to fit within the matrix that amounted to the contract between the plaintiff and the defendant"*.
19. In a very recent decision by the Court of Appeal delivered by Collins J. on 30 July 2020, in *Allied Irish Bank plc. v. Cuddy* [2020] IECA 211, Collins J. stated the following: -
 - "27. *This is an application for summary judgment pursuant to O. 37. In a short concurring judgment in Promontoria (Aran) Ltd. v. Burns* [2020] IECA 87, I stated that: -
 - '1. *Within its proper parameters – as to which see, for instance, the helpful synthesis of the jurisprudence in Harrisrange Ltd. v. Duncan* [2003] 4 IR 1, at pp. 7- 8 – O. 37 of the Rules of the Superior Courts is intended to provide a relatively expeditious and inexpensive mechanism for recovering judgment for debts or liquidated demands which are clearly due and owing.
 2. *It is obviously in the public interest, as well as the interests of creditors, that there should be such a mechanism and that it should operate effectively. It is not in the interests of the public – or in the interest of the parties – that straightforward claims for debt or liquidated demand should require to be determined by plenary hearing, with the additional delays and cost that such a hearing involves and the additional burden thereby placed on the resources of the justice system.*
28. *The 'proper parameters' of the O. 37 procedure provide the critical guardrails for the appropriate resolution of this appeal. A defendant against whom summary judgment is granted is thereby deprived of a full hearing on the merits. Ordinarily, they will not have an opportunity to cross – examine the deponent(s) for the plaintiff, will not be able to compel third parties to give evidence by way of subpoena and will have no opportunity to seek discovery or avail of any of the other litigation tools available to parties in plenary proceedings. That is justified and proportionate where - and only where – 'it is very clear that there is no defence': Harrisrange, para. 9(ix). That summary judgment should not be granted where there is any arguable defence – there being no requirement to show a prima facie defence, less still a defence that will probably succeed at trial – has been emphasised by a long line of authorities, many of them analysed by McKechnie J. in Harrisrange. The decision of the Supreme Court in Irish Bank Resolution Corporation (in special liquidation) v. McCaughey [2014] IESC 44, [2014] 1 IR 749 reaffirms the continuing validity of these authorities, as well as emphasising the*

very limited role of the court at summary judgment stage in making any qualitative assessment of the credibility of a defence.

29. *As regards issue of law, while such issues may in principle be resolved on an application for summary judgment, a court should only do so 'where the issues which arise are relatively straightforward and where there is no real risk of an injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment': Per Clarke J. (as he then was) in McGrath v. O'Driscoll [2006] IEHC 195, [2007] 1 ILRM 203 (at p. 210), cited with approval by the Supreme Court (Denham J.) in Danske Bank t/a National Irish Bank v. Durcan New Homes [2010] IESC 22".*
20. The relevant test which the court should apply when summary judgment is sought has been expressed in a variety of ways in the authorities, with Mr. Justice Hardiman pointing out, at p.623 of his judgment in *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 IR 607:
- "...the fundamental question to be posed on an application such as this remains: is it 'very clear' that the defendant has no case; is there either no issue to be tried or only issues which are simple and easily determined; do the defendant's affidavits fail to disclose even an arguable defence?"*
21. In approaching the determination of the plaintiff's motions, the foregoing principles have been applied. This Court is acutely aware that for the plaintiff to succeed at the summary stage the court must be satisfied that it is very clear the defendant has no case. If, on a careful examination of the totality of the material before this Court, it is clear that a potential conflict arises, be that a conflict of fact the resolution of which is material to success or failure, or a question of law which is other than straightforward or relatively so, it would not be appropriate to find for the plaintiff at the summary stage and leave to defend at a plenary hearing should be granted. In short, if it is clear that such a potential conflict arises, the resolution of which is material to the outcome of the case, that conflict should be determined at a plenary trial, regardless of what reservations a court may have as to the strength of the defence disclosed.
22. To avoid summary judgment a defendant must satisfy the court that they have a fair and reasonable probability of having a real or bona fide defence. That does not mean a defence which will probably succeed or the success of which is not improbable, but it does mean that the court must be satisfied that what the defendant says is credible.
23. I now turn to an examination of the evidence before the court in the form of the averments made, as well as the contents of documents which are before the court and, for the sake of convenience, I propose to do so in chronological order, employing appropriate headings. It is against this evidence that it is appropriate to decide whether, what the defendant says by way of grounds of defence, is credible, or not.

24. It is not in dispute that MDJ and his wife agreed to purchase a home at 129 Stillorgan Road, Dublin 4 and that the said purchase was financed, inter alia, by two bridging loans provided by the Governor & Company of the Bank of Ireland on foot of letters of offer date 07 March 2006 and 29 June, 2006 in the total sum of €1.9 million (hereinafter "the 2006 Facilities"). It is common case that the 2006 Facilities were for a period of four months each. It is not in dispute that the aforesaid borrowers were not in a position to refinance the 2006 facilities into a home loan due to financial difficulties experienced by them.

14 August 2008 – High Court proceedings against the borrowers (2008/2135 S)

25. On 14 August 2008, the Governor & Company of the Bank of Ireland issued proceedings against the borrowers bearing High Court record number 2008 2135 S in respect of the bridging facilities.

11 June 2009 – motion for judgment against the borrowers

26. On 11 June 2009, a motion for judgment in respect of the aforesaid proceedings against the borrowers was returnable before the Master of the High Court and was adjourned to 08 October 2009 and, thereafter from time to time in the manner explained later in this judgment.

29 October 2009 – letter from Crowley Millar Solicitors to the bank

27. In para. 6 of the affidavit sworn by Mr. Pullan on behalf of the bank on 03 July 2019, it is positively averred that ". . . the plaintiff's records indicate that it was Marcus Daly Sr. (the deceased) who first proposed financially assisting the borrowers and this is also confirmed in a letter issued to Bank of Ireland by Crowley Millar Solicitors, dated 29th October 2009 . . .". A copy of the said letter comprises Exhibit "I" to Mr. Pullan's 03 July 2019 affidavit. It is appropriate to set out, verbatim, the contents of this letter which I now do as follows: -

" Attention: Mr. William Peters

Group Credit 5

Bank of Ireland,

Lower Baggot Street

Dublin 2

By Hand

Re: The Bank of Ireland v. Marcus Daly and Patricia Daly

Dear Mr. Peters,

I refer to the above and to your telephone conversation with Marcus Daly Sr. on Monday last. Arising from that conversation and your telephone message of

yesterday to Mr. Daly Snr., Mr. Daly Snr. has asked me to write to you to confirm the agreement reached with you.

As Mr. Daly Snr understands the matter, the agreement reached with you is as follows;

1. Mr. Daly Snr will make a payment of €360,000.00 to the Bank at the time of drawdown of the home loan referred to at point 2 below.
2. The balance due from Marcus Daly and Patricia Daly (which we understand is a figure of €1.65 million approximately) will be advanced by the bank to Marcus and Patricia Daly by means of a Home Loan secured on the premises 129 Stillorgan Road.
3. The bank will issue a letter of Home Loan offer on standard terms and conditions to Marcus and Patricia Daly as soon as possible and they will accept that Home Loan without delay. The loan will be an interest only loan for the first three years at current market rates.
4. Marcus Daly Jnr will furnish the following to the bank as quickly as possible and in any event in advance of drawdown;
 - 4.1 An up to date tax clearance certificate.
 - 4.2 His accounts of the 31st December 2008.
 - 4.3 A Certificate of his gross income to the end of June 2009 or, if required and if available, to the end of October 2009.
5. I understand you have instructed Arthur Cox that the legal proceedings will be adjourned for a period of four weeks from the 5th of November to enable these arrangements to be put in place.
6. If I have misunderstood any aspect of the agreement entered into between you and Mr. Daly Snr., you might please let me know or in the alternative contact Mr. Daly Snr directly.
7. I don't know whether or not it's necessary but assuming I have correctly recorded the details of the agreement in this letter, if you wish me to send a letter to Arthur Cox confirming the agreement in these terms I would be happy to do so.
8. Thank you for your assistance in resolving this matter.
9. Yours truly

Hugh J. Millar

Crowley Millar".

28. There is no evidence before the court to the effect that Crowley Millar did other than correctly reflect the instructions given by MDS in their 29 October 2009 letter. A number of things can be said in relation to the foregoing letter. It does not prove who instigated contact between the bank and MDS and the letter is silent about who first proposed financially assisting the borrowers. It does, however, indicate that a telephone conversation took place the previous Monday between MDS and the bank's representative, Mr. Peters. That conversation was plainly in relation to the then proceedings by the bank against the borrowers, which legal proceedings are specifically referenced on the title of the letter. In addition, Mr. Peters is said to have left a telephone message with MDS on 28 November 2009. Arising from this, according to the terms of this letter, MDS instructed a firm of solicitors to write to the bank to confirm an agreement which he had reached with the bank in respect of the bank's proceedings against his son and daughter in law. The letter is specific about the fact that MDS is agreeable to making a payment of €360,000 to the plaintiff and it is plain that this was something that MDS was prepared to do in order to assist his son and daughter in law at a time when MDS was plainly aware that the borrowers' financial situation was poor. That could hardly be in dispute, given the existence of the High Court proceedings by the bank against the borrower which are referred to in the title of the letter.
29. It will be recalled that, in her affidavit sworn on 25 February 2019 the defendant asserted inter alia that the plaintiff ". . . took advantage of Marcus Sr.'s relationship with his son" and the suggestion was made by the defendant that the bank was "*improving its own financial position*" and that this was done "at the expense of its loyal customer, Marcus Sr.". The contents of this letter offer no support for the defendant's averment that the plaintiff took advantage of MDS. The contents of this letter, taken at face value, are consistent with MDS knowing about the legal proceedings against his son and daughter in law and, against that background, engaging in direct communication with a representative of the bank and coming to an agreement, an element of which was the deceased's willingness to make a substantial payment to the bank in order to assist the borrowers with what were then serious financial difficulties. There is no evidence to support any suggestion that MDS was pressurised into having discussions with the bank or that he was taken advantage of by reaching the agreement which Crowley Millar Solicitors were instructed to set out in writing by means of the 29 October 2009 letter. It is also not in dispute that MDS was an experienced lawyer and an eminent Senior Counsel. In the manner explained later in this judgment, MDS subsequently received independent legal advice and this is particularly relevant in circumstances where MDS ultimately provided a guarantee to the bank, no guarantee being referred to in the 29 October 2009 letter.
30. If it was the position of MDS that he would not pay the bank the €360,000 unless the bank was to require specific information concerning the historic and then earnings of his son as well as information relating to compliance with revenue requirements on the part of MDJ as per the pre-conditions in the bank's February 2010 Loan offer to the borrowers, this is certainly not reflected in the 29 October 2009 letter, which was sent by Crowley

Millar to the bank on the instructions of MDS some four months prior to the February 2010 Loan Offer.

31. The defendant's claim is that specific requirements for information in respect of the earnings of MDJ, and compliance with revenue requirements by MDJ, was fundamental to the deceased's willingness to execute a guarantee and to pay money to the bank (which money, it is not in dispute, was financed by a loan taken out by MDS from the bank - the relevant loan offer being accepted by MDS on 30 October 2009, being the very day after this 29 October 2009 letter). It has to be said, however, that the contents of this letter do not support that proposition. This letter is, on its face, evidence that MDS confirmed his willing to make a payment of €360,000 to the bank in a letter which does not specify *any* of the pre-conditions which the defendant relies upon in opposing the plaintiff's claims. It is fair to say that the pre - conditions in the February 2010 letter went very considerably further and are materially different to the items specified at items 4.1, 4.2 and 4.3 in the 29 October 2009 letter. Let me emphasise at this juncture, that it is not the function of this court, on the hearing of motions such as these, to make findings of fact in relation to any dispute between the parties on a material issue. Having made the foregoing clear, and also being satisfied that nothing turns on the following insofar as the decision which this court has to make is concerned, I would simply observe that the evidence before this court does indicate that there was material compliance with the conditions in para. 4 of the Crowley Millar 29 October 2009 letter. It is certainly the case that there is not a scintilla of evidence before this court to suggest that MDS, or any solicitors acting for him, took the view that what was suggested to be done, at para. 4.1 to 4.2 of the 29 October 2009 letter, was not done satisfactorily.
32. It is a matter of fact that the agreement reached between MDS and the bank, which is referred to by Crowley Millar solicitors in the 29 October 2009 letter, does not make the payment of €360,000 by MDS to the bank, conditional on MDJ demonstrating income or earning potential of any particular amount. No amount is specified in para. no. 4. Nor is the agreement of MDS to pay €360,000 to the bank expressed to be conditional on MDJ furnishing "audited" or "certified" accounts, the 29 October letter merely referring to "accounts". The essence of the grounds of defence advanced by the defendant in respect of both claims are that it was of critical importance to MDS that MDJ comply with all conditions precedent in the 19 February 2010 loan offer letter from the bank to MDJ. It has to be said, however, that the contents of the 29 October 2009 offer no support for that proposition. The 29 October 2009 letter was plainly written months *before* the February 2010 loan offer, yet, insofar as reference is made in para. 4 of the 29 October 2009 letter to an up to date tax clearance certificate, accounts as of 31 December 2008 and a certificate of gross income to the end of June 2009, or, if required and available, to the end of October 2009, it is explicitly stated that this is documentation which MDJ will furnish "*to the bank as quickly as possible and in any event in advance of drawdown*". The letter written at the behest of MDS plainly does not say that MDS required a copy of the documentation itemised at 4.1, 4.2 and 4.3. Rather, it was to be furnished "*to the bank*" in advance of drawdown. Nor does the letter say that MDS would be unwilling to make the payment of €360,000 to the bank or objected to an advance being made by the bank to

MDJ if the bank altered or waived the requirement for the documentation itemised at para. 4. Taken at face value, the letter does not say or suggest that MDS had to be satisfied with the contents of the documentation itemised at para. 4 as a condition of doing anything. It is not in dispute that the payment referred to at para. 1 of the 29 October 2009 letter was a payment which would be financed by a loan from the bank to MDS. Indeed, the relevant loan offer was issued by the bank the very next day and was accepted by MDS on 30 October 2009. It is a matter of fact that MDS accepted the bank's loan offer on 30 October 2009 and MDS did so without specifying any requirements to be satisfied in relation to the earnings position or potential of his son, or regarding MDJ's revenue position. It has to be said that, taken together, the foregoing does not in any way support the asserted grounds of defence advanced in this case.

33. It is also appropriate to observe that the defendant in these proceedings was neither a guarantor, nor a borrower and it is common case that the defendant did not deal directly with the plaintiff bank in any capacity, nor did she enter into any agreement with the bank. That being so, it is uncontroversial to say that Mrs. Daly is making arguments in opposition to the plaintiff's claims and doing so with reference, inter alia, to the contents of correspondence and documents which she was not a party to. It is understandable why she would wish to oppose the plaintiff's claims, but it has to be said that this letter offers no support for the contentions made by the defendant including the defendant's assertion that the plaintiff *"took advantage of Marcus Sr.'s relationship with his son"*.

30 October 2009 – loan offer to MDS

34. It is not in dispute that the very day after Crowley Millar's 20 October 2009 letter to the bank, the plaintiff issued a letter of loan offer to MDS wherein it offered to provide a loan facility in the sum of €350,000, repayable monthly over a five-year term, to be secured by way of a mortgage over 28 Kirwan Court, Kirwan's Lane Galway (hereinafter "Kirwan Court"). A copy of the foregoing comprises "Exhibit A" to the affidavit sworn by Mr. Pullan on 04 December 2018 in the loan proceedings under record number 2018/1505 S. This loan offer is explicitly stated to be between the plaintiff, as lender, and MDS, as borrower. The amount of credit is specified to be €350,000, with the number of repayment instalments specified to be 60 at a fixed interest rate of 5.100%, the amount of each instalment being specified in the sum of €1,481.22. The APR is stated to be 5.2%. The total amount repayable is specified to be €438,873.20 and the cost of credit is clearly stated in the sum of €88,873.20. Kirwan Court is specified to be the property to be mortgaged and a valuation for mortgage purposes is given at the foot of the first page of the loan offer as being €500,000. The second page of the document contains three "conditions precedent". The first of these concerns a valuation, including a photograph, of the property for mortgage purposes, showing a valuation of not less than €500,000. The second condition precedent refers to original audited or certified accounts for the two previous years confirming capacity on the part of MDS to derive a personal income of at least €229,980.00 after business expenses excluding rental income as well as management figures to be provided for the current financial year supported by six months of bank statements to confirm turnover. It is also stated that all documentation must be to the satisfaction of the lender. The third condition precedent is that written confirmation

is provided by accountants that the tax affairs of MDS are up to date. It is not suggested that any of these conditions precedent were not complied with by MDS.

35. The foregoing is followed by eight "special conditions" after which the bank's "general conditions" are set out. It is a matter of fact that nowhere in the conditions precedent, special conditions or general conditions is any reference made to any conditions in any other loan offer between the bank and any third party. At the bottom of the second page of the 30 October 2009 loan offer letter to MDS, the following statement appears in bold:

"This is an important legal document. You are strongly recommended to seek independent legal advice before signing it. This Offer Letter is regulated by the Consumer Credit Act, 1995 and your attention is drawn to the notices set out on the last page of this Offer Letter".

36. Internal p. 13 of the letter of offer is entitled "Section C: Regulatory and Consumer Credit Act notices". This sets out, inter alia, a number of warnings as to risks arising if the borrower does not keep up payments on a mortgage or loan. Among other things, details are given in relation to interest charged on unpaid amounts. It is appropriate to observe that no argument is made by the defendant with reference to the Consumer Credit Act.

37. Internal p. 6 of the loan offer includes a section entitled "Borrower's acceptance and consents". This was signed by MDS and dated 30 October 2009. Of the six numbered items which MDS consented to, Item 5 appears as follows: -

"5. I acknowledge, accept and understand that all fees, costs, expenses, tax, duties, and outlays of any nature whatsoever and howsoever arising including, without limitation, enforcement and realisation (except costs associated with the lender's legal investigation of title for the purposes of its mortgage or charge) in connection with the Loan and the purchase or refinance of the property taken as security or any security held for the loan or otherwise are my sole responsibility and I hereby agree to pay on demand and authorise the Lender to debit any account(s) with the lender or with any other financial institution in my name (or if there are more than one of us, our sole or joint names) with all and any of the foregoing amounts as and when and if they arise from time to time at any time".

38. Following acceptance by MDS, on 30 October 2009, of the bank's loan offer, the plaintiff advanced €350,000 to MDS, through loan account no. 4132 – 6787, being the "application number" specified at the top of the first page of the loan offer. In para. 5 of Mr. Pullan's 04 December 2018 affidavit in the loan proceedings under record no. 2018/1505S, he positively avers this to be the case. The defendant does not deny that the said sum was in fact advanced. Nor is it denied that for the remainder of his life, MDS honoured his obligations under the loan agreement until his death on 18 July 2016. This is positively averred in para. 7 of Mr. Pullan's 04 December 2018 affidavit, in which Mr. Pullan also avers that one further and final scheduled payment was made into the relevant loan account on 31 July 2016, two weeks after the deceased's death. Mr. Pullan exhibits a statement on the loan account showing the times and amounts of all regular

monthly payments from 2010 onwards. The first of those payments was made on 31 November 2010, as appears in the statement of account. As will be explained later in this judgment, drawdown of the €350,000 did not take place until approximately one year after MDS accepted the loan offer on 30 October 2009. It is also appropriate to point out that there is no conflict of fact, whatsoever, in relation to the foregoing. Indeed, in para. 12 of the defendant's 25 February 2019 affidavit in the loan proceedings under record no. 2018/1505S, she makes the following averment: -

"12. I say and believe that Marcus Sr. did indeed make instalment payments in respect of the October 2009 facility until his death on 18th July 2016. I say and believe that the payment on 31st July 2016 was simply due to the relevant standing order erroneously not being stopped by the bank upon my late husband's death. All standing orders and direct debits should have ceased immediately upon his death".

39. The fact that MDS accepted a loan offer in 2009, drew down the sum of €350,000.00 in 2010, and made each and every one of the required monthly repayments for a period of almost eight years until his death is incontrovertible. There is no evidence whatsoever that at any stage during those eight years, MDS ever made the argument which the defendant now advances in opposition to the plaintiff's claim in respect of this loan which MDS availed of. It has to be said that the undoubted compliance by MDS with his obligations under the relevant loan, right up to his passing, provides no support whatsoever for the assertions made by the defendant in opposition to the plaintiff's claim.

07 December 2009 valuation report by Gunne Residential

40. In para. 27 of the defendant's affidavit sworn 25 February 2019, she exhibits a valuation report prepared by Gunne Residential in relation to the borrowers' property at 129 Stillorgan Road, Donnybrook, Dublin 4. This values the said property at €1,500,000, as is clear from s. 14(h).

loan offer letters to the borrowers

41. It is not in dispute that on 19 February 2010, the plaintiff bank issued a letter of loan offer to the borrowers, wherein the bank offered to provide a loan facility of €1.65 million, repayable over 23 years, to be secured by a mortgage over the Stillorgan property. In para. 18 of his 14 December 2018 affidavit in the guarantee proceedings (record number 2015/1741S), Mr. Pullen avers that there were a number of versions of the loan offer, namely a first version which issued on 15 February 2010, a second version which issued on 17 February 2010, a third version, being the 19 February loan offer letter, and Mr. Pullan also makes the following averment at para. 18 d.: - *"finally, on 11th May 2010, the last and operative version of the loan offer of the facility which issued to the borrower herein, was accepted by them and was the one on foot of which the advance proceeded".*
42. In the manner explained in this judgment, it cannot be disputed that it was, as a matter of fact, the 11 May 2010 loan offer which the borrowers accepted and on foot of which the bank made the relevant loan to them. It is common case that the borrowers did not accept any of the three earlier versions of the loan offer letter to which Mr. Pullen refers. Despite the fact that the borrowers did not accept the 19 February 2010 loan offer, the

defendant places very significant reliance on its contents, in the context of her opposition to the plaintiff's claim and it is appropriate to look closely at this document which is exhibited by Mr. Pullan in his 14 December 2018 affidavit.

19 February Loan Offer Letter to the borrowers

43. The first observation to make is that the 19 February 2010 mortgage loan offer letter is very clear as to the fact that it is made between two named parties, being the plaintiff bank, as lender and Mr. Marcus Daly (being MDJ) and Mrs. Patricia Daly, as borrowers. It is not directed to any other party. The amount of credit is specified to be €1,650,000.00, with the period of agreement stated to be 23 years. The interest rate is specified at 2.550% variable. 24 repayment instalments of €3,498.83 are specified, with a further 252 instalments of €8,458.85. Internal p. 2 of the document contains, inter alia, "Part 3 – conditions precedent" and it is appropriate to set out Part 3 verbatim, as follows: -

"The following conditions (the "Conditions Precedent") must be complied with in full to the lender's satisfaction before the loan can proceed.

(a) *The following conditions precedent apply to Mr. Marcus Daly:*

(i) *Original audited or certified accounts for the previous two years to confirm your capacity to derive a personal income of at least EUR 430,134.00 after all business expenses and excluding rental income. In addition, management figures to be provided for the current financial year supported by the last six months' bank statements to confirm your current turnover levels. All documentation must be to the satisfaction of the Lender.*

(ii) *Accountant's written confirmation that your tax affairs are up to date.*

(b) *The following conditions precedent apply to the loan: -*

(i) *A valuation (including a photograph) of the Property for mortgage purposes (see Clause 2(c) of Part 5 – The General Conditions) showing the valuation in an amount of not less than EUR 1,500,000 and which must be on terms acceptable to the Lender. A final inspection will be required for properties under construction/undergoing significant repair. The lender may raise further conditions after receipt of the valuation. The valuation report MUST be completed by a member of our Valuers panel on our current report form. (a list of Valuers is available from your Mortgage Advisor)." (emphasis added).*

44. As can be seen from the foregoing, it is a matter of fact that on no less than three occasions, the wording in the conditions precedent make it clear that compliance was required to the satisfaction of "the Lender", being the bank. It is a matter of fact that nowhere in the conditions precedent, or in the special conditions or general conditions which follow, is it stated that the conditions precedent must be complied with to the satisfaction of any other party. It is also indisputable that the giving, or not, of the loan of €1.65 million was something which was exclusively within the control of the plaintiff bank.

It is also incontrovertible that the wording of the conditions precedent makes it clear that compliance is required to the lender's satisfaction "*before the loan can proceed*" and it is incontrovertible that reference to the loan was reference to the €1.65 million. Nothing on the face of this document offers any support for the defendant's assertions in opposition to the plaintiff's motions.

45. On internal p. 6, one can see inter alia a section entitled "Borrower's acceptance and consent" which begins with the following statement: - "*Acceptance of this Offer Letter must reach the lender within 30 days of the date of this Offer Letter or the offer will lapse . . .*". It is not in dispute that the said offer letter was not accepted within 30 days. It was never claimed by the borrowers, or by the defendant, that an accepted letter of offer reached the lender within 30 days of 19 February 2010. Indeed, the signatures which appear on this letter of offer are dated 11 May 2010. Thus, according to the explicit terms of the 19 February 2010 offer letter, it lapsed as of 20 March 2010.
46. On behalf of the bank, Mr. Pullan has positively averred that it was on 11 May 2010 that "*the last and operative version of the loan offer for the facility which issued to the borrower herein, was accepted by them and was the one on foot of which the advance proceeded*". That averment is entirely supported by the evidence and, in fairness to the defendant, it is not controverted. There is not even an assertion made by the borrowers or indeed by the defendant to the effect that the 19 February 2010 loan offer had not lapsed in accordance with its own terms. The foregoing situation can be contrasted with the 30 October 2009 loan offer which was made to MDS and which contained a similar provision stating that "*acceptance of this Offer Letter must reach the lender within 30 days of the date of this offer letter or the offer will lapse*", but the fact is that MDS signed it on 30 October 2009, well within the relevant 30 – day period.
47. Having carefully considered the evidence, there is no controversy about the following facts in relation to the 19 February 2010 letter of loan offer to the borrowers: -
 - (i) It was explicitly stated to lapse if acceptance did not reach the lender within 30 days;
 - (ii) It was not accepted within 30 days;
 - (iii) The borrowers do not even assert that they accepted this letter of offer within 30 days;
 - (iv) Nowhere do the borrowers assert that the plaintiff bank agreed to extend the time for acceptance of this 19 February 2010 letter of offer;
 - (v) A positive averment is made by Mr. Pullan on behalf of the bank to the effect that the only operative loan offer which was accepted by the borrowers was a loan offer of 11 May 2010 and the foregoing averment is uncontroverted.

In light of the evidence, it is undoubtedly the case that the 19 February 2010 letter of loan offer lapsed after 30 days, namely by 20 March 2010. That finding of fact is entirely

safe to make, there being no conflict on the affidavits with respect to the facts on which that finding is made. Therefore, as of 20 March 2010, the 19 February 2010 letter of loan offer had lapsed, as was clear to anyone who read it. Despite the fact that the 19 February 2010 loan offer lapsed, it is clear from the evidence before the court that the borrowers, in particular, MDJ, did provide certain information to the bank in relation to both his income and tax affairs and it is to this I now turn.

07 May 2010 – letter from Deloitte – Tax Clearance Certificate etc

48. It is not in dispute that a letter was prepared by Deloitte & Touche, a well – known accountancy firm, and this letter dated 07 May 2010 was furnished to the plaintiff bank. It stated the following: -

"TO WHOM IT MAY CONCERN

Re: Marcus F. Daly Senior Counsel

We act as accountants and taxation agents to Marcus F. Daly.

We confirm that all relevant tax returns have been submitted to Revenue and, as is confirmed by the tax clearance certificate dated 17/02/2010, Mr. Daly's tax affairs are in order.

We further confirm that all current taxes are being discharged as they fall due and all previous issues are being dealt with to the satisfaction of Revenue.

Deloitte & Touche".

49. Given the fact that, by 07 May 2010, the bank's loan offer dated 19 February 2010 had undoubtedly lapsed, the defendant argues that the bank was still under an obligation to ensure compliance with the conditions precedent in the 19 February 2010 letter of offer and the defendant also argues that those pre – conditions were for the benefit of the deceased, in addition to being for the benefit of the bank. The defendant also argues that the plaintiff bank did not ensure proper compliance with the conditions precedent in the 19 February 2010 letter. Rather, the defendant argues that the plaintiff waived compliance with same and that this alleged waiver was not communicated to MDS before he executed a guarantee in the plaintiff's favour and drew down his loan of €350,000.
50. It will be recalled that the 19 February 2010 loan offer was, according to its terms, directed to the borrowers alone. There is no evidence adduced by the defendant that the plaintiff bank ever agreed to show the 19 February 2010 loan offer letter to anyone other than the borrowers named therein. It is entirely uncontroversial to say that there is no evidence whatsoever that the deceased was, or was ever intended to be, a party to the 19 February 2010 loan offer letter. It also has to be said that there is no evidence whatsoever before the court to the effect that the conditions precedent in Part 3 of the 19 February 2010 loan offer letter were ever furnished by the plaintiff bank to MDS. It was, without doubt, a loan offer letter which was directed to the borrowers, not to MD and the terms of the 19 February 2010 letter were self – evidently aimed at the borrowers, not at

someone else and expressed to require compliance to the bank's satisfaction, not to the satisfaction of anyone else. This Court cannot be certain of whether or not MDS ever read the 19 February 2010 loan offer letter but, for the reasons detailed in this judgment, nothing whatsoever turns on this for the purposes of the decision this court must make on the present motions.

51. Leaving aside the fact that, by 07 May 2010, the 19 February 2010 loan offer had undoubtedly lapsed, the defendant has adduced no evidence to the effect that the contents of the 07 May 2010 letter from Deloitte & Touche were not to the plaintiff's satisfaction. Nor has the defendant adduced any evidence to the effect that MDS ever called upon the bank, or upon MDJ, to provide MDS with any documentation, information or assurances to the effect that the conditions precedent in the 19 February 2010 loan offer letter had been complied with (be that to the lender's or his own satisfaction).
52. Even though nothing turns on the following for the purposes of this court's decision on the plaintiff's motions, if one looks at the contents of the 07 May 2010 letter from Deloitte & Touche - which was undoubtedly furnished on behalf of MDJ to the plaintiff at the time - it is difficult to view its contents as other than constituting material compliance with condition precedent (a)(ii) in the 19 February 2010 loan offer letter (which referred to "*accountant's written confirmation that your tax affairs are up to date*"). As I say, nothing turns on this for the purposes of deciding the present motions, but I believe it is a fair observation to make on the material before the court. Again, although nothing turns on it for the purposes of this court's judgment, it also seems to me that the contents of the 07 May 2010 letter from Deloitte & Touche comply with para. 4.1 of the Crowley Millar letter, dated 29 October 2010, which was sent to the bank at the behest of MDS (which stated that MDJ would furnish to the bank: "*4.1 An up to date Tax Clearance Certificate*")

Income and Expenditure Account – MDJ – Deloitte & Touche

53. It is not in dispute that Deloitte & Touche also produced for the plaintiff bank a document entitled "*Marcus F. Daly Senior Counsel – Income and Expenditure Account for year ended 31 December 2009*". This document set out fees received, itemised expenditure and showed a net profit for the year which, although a 6-figure sum, is less than the sum referred to in condition (i) of the 19 February 2010 Loan Offer. The "*Income and Expense Account*" provided by Deloitte & Touche in respect of MDJ concluded with the statement "*We have prepared, without carrying out an audit, the Income and Expenditure Account from the books and records and information provided to us by Marcus F. Daly and confirmed that it is correctly drawn up in accordance therewith*". It is also common case that the plaintiff bank was also furnished with a nine – page document entitled "*Schedule of Receipts 1st January 2009 to 30th April 2010*". This document detailed fees received for each month, beginning January 2009, up to and including April 2010. Fees received were itemised on a month – by – month basis, with the relevant solicitors being named as well as the relevant reference, the date of receipt and the amount received inclusive of VAT at 21%. In addition to this analysis with reference to "*Fees Received*", this was followed by a further six pages setting out a breakdown of "*Fee Notes Issued*" beginning with the month of October 2009 and continuing each month up to and including April

2010. The monthly breakdown specified the relevant firm of solicitors as well as the fee note number, the relevant reference, the date of issue of each relevant fee note and the relevant amount.

54. A number of comments can fairly be made in relation to the foregoing. First, it will be recalled that the defendant argues, in opposition to both of the plaintiff's claims that her late husband ". . . was entitled to assume that the plaintiff would not advance a customer (Marcus Jr.) monies that he was being asked to guarantee without first ensuring that the February 2010 pre - conditions were properly satisfied". The defendant has not, however, adduced any evidence that MDS ever called on the bank, at any time, to ensure such compliance. The defendant has no first-hand knowledge of relevant events and cannot be criticised for that, but the defendant does not adduce any correspondence from MDS in which MDS, or any solicitor acting for him, points out that the willingness of MDS to take a loan from the bank, or to provide a guarantee in the bank's favour with regard to borrowings by his son, was dependent on the February 2010 pre - conditions being satisfied.
55. Furthermore, the defendant adduces no evidence whatsoever to the effect that the bank was not, in fact, satisfied with the (1) "*Income and Expenditure account for the year ended 31 December 2009*" as prepared by Deloitte & Touche and (2) the schedule of fees received from January 2009 to April 2010 as well as (3) the schedule of fee notes issued from October 2009 to April 2010, inclusive. Although nothing turns on it for the purposes of this court's decision, the foregoing documentation, taken together, appears to comply in a material sense with the contents of paragraphs 4.2 and 4.3 of the 29 October 2009 letter sent by Crowley Millar solicitors to the bank at the behest of MDS which, it will be recalled, specified no figure in relation to earnings for MDJ but, rather, simply stated that MDJ would furnish the following to the bank: "*4.2 His accounts of the 31st December 2008, 4.3 A Certificate of his gross income to end of June 2009 or, if required and if available, to the end of October 2009*".
56. The third of the pre - conditions contained in Part 3 of the 19 February 2010 loan offer letter related to a valuation of the Stillorgan Road property of not less than €1.5 million, acceptable to the lender. It is not disputed that there was, in fact, such a valuation and earlier in this decision I referred to the 07 December 2009 valuation provided by Gunne Residential. In para 28 of the defendant's affidavit sworn on 25 February 2019, this valuation is described as having "*no basis in reality*" and the defendant avers inter alia that she is advised that ". . . it defies credulity that any valuer could value the property at €1,500,000 in 2009 . . .". Para. 28 concludes with the defendant making the following averment: "*I am advised that the only plausible explanation for accepting the valuation is that the plaintiff wanted a deal at any cost to reduce its own financial exposure to Marcus Jr., who was in all likelihood insolvent, and did so (without bringing the valuation to the attention of Marcus Sr.) with a view to extracting funds from Marcus Sr. to the tune of €650,000 and thereby unjustly enriching itself*". The assertion that the plaintiff bank was attempting to take advantage of MDS and sought to enrich itself to the detriment of MDS are assertions which the defendant continues to maintain. For the purposes of the hearing

I was given to understand that the defendant is no longer raising any issue with respect to the valuation.

Compliance with all pre-conditions to the satisfaction of the bank

57. Thus, at the heart of the defendant's opposition to both of the claims brought by the plaintiff is that pre – conditions (a)(i) and (a)(ii) were not complied with and if this had been made known to MDS, he would not have executed the guarantee and he would not have drawn down €350,000. At this juncture, it is appropriate to point out that, even on the defendant's case, the aforesaid preconditions were undoubtedly for the benefit of the bank. Although the defendant asserts that the preconditions were also for the benefit of her late husband, nowhere does the defendant dispute that the preconditions were for the benefit of the plaintiff bank. Furthermore, there is no evidence whatsoever adduced by the defendant to the effect that the plaintiff bank was not satisfied with the information furnished by Deloitte & Touche and by MDJ in respect of the relevant preconditions, including conditions (a)(i) and (a)(ii). On the contrary, there is uncontroverted evidence from the plaintiff to the effect that the pre – conditions in the 19 February 2010 offer letter were satisfied. This is clear from para. 19 of Mr. Pullan's affidavit sworn on 14 December 2018 wherein he makes, inter alia, the following averments: -

"The superseded 19th February 2010 version of the loan offer letter contained conditions precedent relating to the income and repayment capacity of the first named borrower, Mr. Marcus F. Daly. However, during the interval between 19th February 2010, and 11th May 2010, details of Mr. Marcus F. Daly's fee income and of his outstanding fee notes were furnished along with a certificate from Deloitte & Touche that his Tax Affairs were all in order and that previous issues were being dealt with to Revenue's satisfaction . . . The submissions made satisfied the plaintiff in relation to the preconditions in the February, 2010, edition of the Offer Letter and accordingly, the final, operative, Loan Offer Letter of 11th May 2010, was issued without those conditions precedent".

58. I am bound to accept the foregoing uncontested averments. It will be recalled that the letter from Deloitte & Touche concerning MDJ's tax affairs was dated 07 May 2010 and it is not in dispute that the Income and Expenditure account prepared by Deloitte & Touche, as well as the schedule of fees received and fee notes issued by MDJ, were also furnished to the bank at or about the same time. Nor is it in dispute that a revised letter of loan offer was issued by the plaintiff bank to the borrowers on 11 May 2010 and it is appropriate to examine its contents, which I will do presently. Before doing so, it will be recalled that, in their very terms, the preconditions in the February 2010 letter (which, by May 2010 had long since lapsed) make it explicit that the preconditions must be complied with "to the Lender's satisfaction". Thus, even if the plaintiff was correct in her assertion that they were also for the benefit of MDS as well as the bank, it does not alter the fact that the preconditions say what they say and make it perfectly clear, inter alia, that "All documentation must be to the satisfaction of the Lender", whereas the uncontroverted evidence before this court is that the documentation supplied in relation to MDJ was, as a matter of fact, to the lender's satisfaction.

11 May 2010 letter of loan offer

59. The bank's loan offer letter dated 11 May 2010 named the plaintiff as Lender and MDJ and his wife, as Borrower. The offer was directed to no other party. The amount of credit was specified to be €1,650,000.00, repayable over a 23 – year period, to be secured by way of a mortgage over the Stillorgan Road property. A valuation for mortgage purposes was specified to be €1,500,000.00 (entirely consistent with the valuation provided by Gunne Residential). The first page of the offer letter specified 24 repayment instalments, each of €4,784.86 at a fixed rate of 3.490% followed by 252 instalments of €8,909.94 at a variable interest rate of 3.100%. The total amount repayable and the total cost of credit were also specified, with the APR stated to be 3.2%. It is a matter of fact that there were no conditions specified in "Part 3 – Conditions precedent".

60. Part 4 set out the "Special Conditions". Special Condition (b)(i) began as follows: -

"The guarantee(s) of Marcus Daly Sr. (the "Guarantor"), in the lender's standard form (enclosed) is required. The Guarantor's liability to the lender on foot of the Guarantee is limited to EUR 3,000,000 plus any interest, costs and expenses as set out in the Lender's Form of Guarantee & Indemnity. The lender requires that the guarantor obtains independent legal advice prior to completing the Form of Guarantee & Indemnity. The Guarantor must complete the certificate contained in the standard Form of Guarantee & Indemnity, confirming that they (sic) received independent legal advice. Note that the Guarantor assumes a primary liability for the debt to the limit outlined above. . ."

61. Special Condition (b)(vii) stated that: - *"Prior to cheque issue borrowers existing term loans with Bank of Ireland Mainguard St. to be reduced by the sum of EUR 360,000 by Marcus Daly Sr."*. It is not in dispute that MDS obtained a loan from the plaintiff bank, secured on property owned by MDS in Galway, the proceeds of which loan, MDS agreed to pay to the bank, thereby reducing the liability of the borrowers to the bank. It will also be recalled that in the letter sent by Crowley Millar to the bank on 29 October 2009 at the request of MDS, the first of the four numbered points in the letter was that MDS agreed to make a payment of €360,000.00 to the bank. It is not in dispute that the loan offer which enabled MDS to make the aforesaid payment to the bank, to reduce the borrowers' liability, was the loan offer accepted by MDS on 30 October 2009.

"Supersedes all earlier versions"

62. Part 5 of the 11 May 2010 offer letter sets out the "General Conditions". Section 1(a) of the general conditions begins as follows: - *"In this Offer Letter the term 'Conditions' means all the terms, conditions and provisions set out in parts 1 to 5 inclusive; 'Lender' means Bank of Ireland Mortgage Bank trading as Bank of Ireland Mortgages, having its principle (sic) office at New Century House, Mayor Street Lower, IFSC, Dublin 1 . . .; any reference to 'Borrower' means the person or persons named as the borrower on the front page of this offer letter . . .; 'Loan' means the mortgage loan described in this Mortgage Loan Offer Letter ('Offer Letter') the details of which are set out in parts 1 to 5 inclusive"*. It is not in dispute that MDJ and his wife were the borrower as defined in the loan offer. It is not in dispute that the relevant conditions in the loan offer comprised those set out in

parts 1 to 5 inclusive. It is not in dispute that there were no pre – conditions specified in part 3 of this offer letter. Section 1(d) comprises a single sentence which clearly states the following: - "*(d) This Offer Letter replaces and supersedes all earlier versions of this Offer Letter*". Neither the borrowers, who were party to the 11 May 2010 loan offer which they accepted, nor the defendant who was not a party to same have ever asserted, much less adduced any evidence, to the effect that the 11 May 2010 loan offer did not replace and supercede all earlier versions. Thus, not only was the 19 February 2010 offer letter explicit about the fact that it lapsed as of 20 March 2010, the 11 May 2010 loan offer was explicit about the fact that it replaced all prior versions of which the February loan offer was unquestionably one.

63. The meaning of the foregoing General Condition (d) is plain and unambiguous. Thus, the position, as of 11 May 2010, included the following: -
- (1) There were no pre – conditions in the 11 May 2010 Loan Offer;
 - (2) The 11 May 2010 Loan Offer replaced and superseded all earlier versions;
 - (3) An earlier version, being that of 19 February 2010 included preconditions which had, in fact, been complied with to the bank's satisfaction;
 - (4) The 19 February 2010 version of the offer letter had long since lapsed (ie as of 20 March 2010, the offer not having been accepted within 30 days);
 - (5) No version of any offer letter was directed to anyone other than the 'Borrower' named therein, being MDJ and his wife, be that the February 2010 lapsed offer or the May 2010 offer which the borrowers accepted;
 - (6) There was no term anywhere in the 19 February 2010 Offer Letter from the plaintiff bank to the borrowers which required or provided that a copy of the said offer letter would be furnished to MDS;
 - (7) The same is true in relation to the 11 May 2010 Offer Letter, in that nowhere is there a requirement that MDS be provided with a copy of same.
64. A feature of the defendant's opposition to the plaintiff's claim is the assertion that her late husband never had sight of the 11 May 2010 letter of loan offer. This is an issue I will return to later in this judgment but, for present purposes, two points deserve emphasis. Firstly, there is nothing in the 11 May 2010 loan offer letter which requires that MDS be furnished with a copy. Secondly, there is no evidence before the court that MDS ever asked for a copy of same.
65. It can fairly be said that there is nothing particularly unusual about the 11 May 2010 loan offer. It is uncontroversial to say and requires no expert evidence for this court to know, that it is commonplace for banks to offer to lend money to be secured by way of a mortgage over a property owned by borrowers and it is not unusual or uncommon that additional security, in the form of a personal guarantee from a third party, may be

required. One does not need to be a banking expert to understand the essential terms of the offer letter which comprised an offer to lend €1.65 million over a 23 – year period, secured on property which was then valued at €1.5 million. Neither the term, nor the APR are at all unusual. Nor is it unusual that repayments would be on the basis of a “fixed” interest rate for the first two years, followed by repayments being on a “variable” interest rate. In short, I do not believe it could fairly be said that there is anything particularly unusual about either the general or the special conditions set out in the 11 May 2010 loan offer and it is a matter of fact that there were no conditions precedent.

66. Internal p. 6 of the May 2010 loan offer, under the heading “Borrower’s acceptance and consents” begins with the words “*Acceptance of this offer letter must reach the Lender within 30 days of the date of this offer letter or the offer will lapse . . .*”. This is, of course, the very same wording which appeared in the 30 October 2009 Loan Offer to MDS (which he accepted that very day) and in the 19 February 2010 loan offer (which the borrowers did not accept prior to same lapsing). The first of the six numbered confirmations and consents appears in the following terms in the 11 May 2010 offer letter: -

“1. *I confirm that I have read and fully understand the Consumer Credit Act notices, set out above, and the terms and conditions contained in this Offer Letter and I confirm that I accept this Offer Letter on such terms and conditions*”.

It is not in dispute that both MDJ and his wife signed the offer letter by way of acceptance on 12 May 2010. Neither MDJ nor his wife swore affidavits in the context of the present proceedings. That is not a criticism but it is a fact. Whether either of them provided MDS with a copy of the 19 February 2010 offer letter or a copy of the 11 May 2010 loan offer, which they accepted on 12 May 2010, is unknown.

19 May 2010 letter from the bank to the borrowers’ solicitors

67. In para. 9 of Mr. Pullan’s 03 July 2019 affidavit he avers, *inter alia*, “on 19th May, 2010, the plaintiff wrote to the firm of Crowley Miller, Solicitors for the borrowers sending them a ‘solicitor’s copy only’ of the by-then accepted loan offer letter of 11th May, 2010”. There is no evidence before the court to contradict that averment. Mr. Pullan exhibits a copy of the bank’s letter to Crowley Miller and this letter includes “*please find enclosed a copy of the most recent Offer Letter issued which is for information purposes only.*” The defendant has exhibited a loan offer letter dated 19 May 2010, the top left-hand corner of which is described as “*mortgage loan offer letter – SOLICITOR’S COPY ONLY*”. It is an unsigned document, page six of six concluding with the words “*SOLICITOR’S COPY ONLY*”. No assertion is made that the 19 May 2010 document constituted a binding offer which was accepted. It is common case that the only loan agreement accepted by the borrowers is comprised in the 11 May 2010 offer which the borrowers accepted the following day. It is fair to say that the contents of the 19 May 2010 solicitor’s copy mortgage loan offer letter reflects the contents of the 11 May 2010 loan offer, save for the fact that item no. 15 in “*Part 2 – the additional loan details*” gives a “*valuation for mortgage purposes*” of €1,650,000. With regard to any differences between the unsigned “*solicitor’s copy only*” loan offer later dated 19 May 2010 and the 11 May 2010 loan offer which the borrowers accepted on 12 May, it is appropriate to recite the averments made

by Mr. Pullan in para. 11 of his affidavit sworn on 03 July 2019, which averments are not contradicted by the defendant: -

"11. As appears therefrom, the 'Solicitor's Copy Only' Loan Offer letter dated 19th May, 2010, is the same as the signed operative mortgage loan offer letter of 11th May, 2010, save in two respects: -

(a) Firstly, the signed Mortgage Loan Offer Letter of 11th May, 2010, referred at paragraph (15) in part 2 on its front page to a valuation for mortgage purposes 'of €1,500,000.00, while the 'solicitor's copy' referred to a 'valuation for mortgage purposes' of €1,650,000.00, which would appear to have been a clerical error, and

(b) In 'PART 4 – The Special Conditions', a paragraph concerning property insurance, to wit:

'The Property Policy required pursuant to general condition 3(b) of the Offer Letter must be effected in the name of the borrower with interest of the Lender noted thereon'

has been moved from (b)(ix) in the operative Mortgage Loan Offer Letter of the 11th May, 2010, to (c)(i) in a new section (c) of the 'Solicitor's copy only' copy of the loan offer letter, after the words:

'(c) The following Special Conditions that have already been complied with, continue to apply to the Loan'.

the change between the two simply reflecting that by the 19th May, 2010, that Special Condition had already been complied with."

19 May 2010 letter from the bank to the borrowers

68. It is not in dispute that, on 19 May 2010, the plaintiff bank also wrote to the borrowers.

The defendant exhibits a copy of that letter which begins as follows:

"Dear Mr. Marcus Daly and Mrs. Patricia Daly, I am pleased to confirm that all the conditions precedent in the offer letter for this loan have been fully complied with. The bank has today written to your solicitor confirming this. If you have not already done so, you should now arrange to make an appointment with your solicitor to complete the legal documents necessary to obtain your mortgage funds..."

The contents of the bank's letter to the borrowers dated 19th May, 2010 are entirely consistent with the contents of the bank's letter to their solicitors, Messrs Crowley Miller, of the same date. With regard to the inclusion in both letter of confirmation by the bank that all conditions precedent had been fully complied with, Mr. Pullan makes the following averment in para. 12 of his 13 July 2019 affidavit, which averment is not contested by the defendant: -

"...it can be seen from both the signed mortgage offer letter of the 11th May, 2010, and the 'solicitor's copy only' letter of the 19th May, 2010, that in both cases 'Part 3 – Conditions Precedent' is blank – in other words, there were no Conditions Precedent to the signed mortgage loan offer letter of 11th May, 2010. The queried letter to the borrowers of the 19th May, 2010, was a standard form of letter issued at the time to borrowers to confirm to them that a Solicitor's Pack had issued to their solicitor (which wouldn't have happened had there been any outstanding pre-conditions) and that they should make contact with their solicitors to progress matters."

69. It should be pointed out at this juncture that it is not contended by the defendant that any difference between the contents of the signed letter of loan offer dated 11 May 2010 and the unsigned 'solicitor's copy' loan offer dated 19 May 2010 constitutes a defence to the plaintiff's claim.

31 May 2010 – Crowley Millar solicitor's letter

70. It will be recalled that on 29 October 2009 Mr. Hugh Millar of Messrs Crowley Millar solicitors wrote to the plaintiff bank on behalf of and at the request of MDS and the contents of that letter have been examined earlier in this decision. On 31 May 2010, Crowley Millar wrote to the bank: -

"Re: Our client: Marcus Daly."

The foregoing does not make clear whether this is a reference to MDS or MDJ. I am, however, satisfied that nothing turns on this, in circumstances where the relevant portion of the letter, insofar as a guarantee is concerned, states the following: - *"I await receipt of the draft Guarantee; this was not included in the loan pack furnished. The draft Guarantee should be in accordance with special conditions (b)(i) and (v) of the loan offer"*. The only person from whom the bank wanted to obtain a guarantee was MDS. Thus, Crowley Millar was asking the bank to furnish a draft guarantee and Crowley Millar correctly referred to the relevant special conditions which appear in the 11 May 2010 loan offer letter, as accepted by MDJ and his wife on 12 May 2010. It cannot be disputed that this letter comprises a request from Crowley Millar to ensure that the guarantee was prepared to reflect the terms in the May 2010 loan offer which the borrowers had accepted. It is uncontroversial to say that this was for the benefit of MDS.

28 June 2010 Crowley Miller letter to Arthur Cox

71. It is not in dispute that on 28 June 2010 Crowley Miller Solicitors wrote to Messrs Arthur Cox solicitors and it is appropriate to set out, verbatim, the contents of that letter which were as follows: -

"RE: The Bank of Ireland v. Marcus and Patricia Daly

Dear Sirs,

We refer to the above.

We would be greatly obliged if you could please send us on the specific form of guarantee which the bank require for Marcus Daly Snr.

As you will be aware, the bank requested a specific form of guarantee from Mr. Daly Snr. but in fact a generic form of guarantee was sent to us which did not actually reflect the proposed guarantee which Mr. Daly Snr. was asked to give to the bank. While we are unsure as to whether or not Mr. Daly Snr. will execute any guarantee in favour of the bank, we would like him to have an opportunity of considering the limited form of guarantee in consultation with his own solicitors, Matheson Ormsby Prentice.

We look forward to hearing from you in this regard as soon as possible. We know that our client wrote directly to Mr. Quane of the bank in this respect last week.

Yours truly"

72. Nothing turns on whether the 28 June 2010 letter was written at the behest of MDS. It is uncontroversial to say that it can only have been for his benefit, regardless of who caused the letter to be sent. It also evidences the fact – something not in dispute - that, as of 28 June 2010, MDS had his own solicitors, namely Matheson Ormsby Prentice. It is not disputed that MDS did, in fact, avail of independent legal representation and it is appropriate to observe that the guarantee in question in the plaintiff's claim was not executed by MDS until 05 August 2010, some five weeks after the 28 June 2010 letter from Crowley Miller.

08 July 2010 Crowley Miller letter to the bank.

73. It is not in dispute that on 08 July 2010 Crowley Miller Solicitors wrote to the bank, for the attention of Mr. Ollie Quane, who was described as a senior business manager with the plaintiff. That letter stated the following: -

"Re: The Bank of Ireland and Marcus and Patricia Daly

Dear Mr. Quane,

Thank you for your correspondence in the above.

The solicitors representing Marcus Daly Snr. in advising him on the proposed Guarantee in favour of the Bank have requested us to clarify one issue with you. They would like to know the time span involved if Mr. Daly Snr. was to execute the guarantee as proposed and Marcus and Patricia Daly were to make the repayments in accordance with the loan approval currently issued to them. In other words, for how long would it be expected the guarantee would remain in situ assuming all of the relevant repayments are made in accordance with the current loan approval?

I would be greatly obliged for an early reply to this letter. Thank you in anticipation of same.

Yours truly"

74. A number of things are apparent from the contents of this letter. A firm of solicitors was representing MDS. They were advising him on what was then a proposed guarantee in favour of the bank. The solicitors for MDS had a query which they wanted the bank to address. They raised that query via Crowley Miller Solicitors, who were acting for the borrowers in what were ongoing High Court proceedings by the bank against MDJ and Patricia Daly. The query related to the duration of the guarantee on the assumption that the borrowers were to make all repayments "*in accordance with the loan approval currently issued to them*". There was only one loan approval issued to the borrowers, being the loan offer accepted by the borrowers on 12 May 2010 comprised in the 11 May 2010 loan offer letter.
75. It is not for this court to resolve factual disputes in the context of a motion for summary judgment. That would be inappropriate but it is entirely appropriate that this Court conduct an assessment of the evidence including the documentation and correspondence exhibited, in order to determine whether the defendant has made out a credible defence. Part of this Court's function must be to consider whether the assertions made by the defendant are credible in the circumstances and those circumstances must include an analysis of whether assertions have some reasonable foundation. Having said the foregoing and without determining any facts in dispute, it can fairly be said that the contents of this 08 July 2010 letter are entirely consistent with the solicitors for MDS being aware of the '*loan approval currently issued to 'the borrowers'*' which, it is common case, specify the requirement for a guarantee. It is true that the 19 February 2020 loan offer letter also specified a guarantee from MDS, but the 19 February 2010 loan offer letter could not fairly be described as a "*loan approval*" not least because it was explicit as to the fact that, if not accepted within 30 days, it lapsed (a condition which was also specified in the bank's loan offer which was made to MDS on 30 October 2009).

09 July 2010 letter from the plaintiff to Crowley Miller Solicitors

76. On 09 July 2010 the bank wrote to Crowley Miller Solicitors in response to their 08 July letter and it is appropriate to quote its contents verbatim as follows: -

"RE: THE BANK OF IRELAND and MARCUS & PATRICIA DALY

Dear Sir,

Your letter dated 08/07/2010 refers.

Based on the expectation that Marcus & Patricia Daly were to make repayments in accordance with the current loan approval issued it is anticipated that the capital balance would have reduced by €300,000.00 within 97 months of loan drawdown.

Trusting this answers your query.

Yours faithfully"

77. It is clear that the information which the bank gave to Crowley Miller in the aforesaid 09 July 2010 letter made its way to the solicitors who were advising MDS. That is wholly

apparent from the contents of a letter dated 16 July 2010 which was sent by MDJ to the bank which, among other things, refers to concerns arising from the anticipated duration of the guarantee, of 97 months, having regard to MDS's age. I now turn to the contents of the 16 July 2010 letter from MDJ to the bank.

16 July 2010 letter from MDJ to the plaintiff.

78. On 16 July 2010, MDJ wrote to the plaintiff bank setting out a proposal in 6 numbered paragraphs, item 5 of which was a proposal that the High Court proceedings against MDJ and his wife be adjourned on certain terms. The third paragraph on the second page of the letter is of particular relevance and it is appropriate to set it out verbatim as follows: -

"I regret that I am not in a position to furnish the Guarantee from my father as originally envisaged. He has received independent legal advice, as directed and required by the Bank, to the effect that he should not enter into the Guarantee. I have not been a party to the discussions between my father and his own solicitors, Matheson, Ormsby Prentice. However, I think that my father's age is a particular factor for concern given that if he was to execute the Guarantees [sic] requested by the bank it would remain in situ for a period exceeding 97 months from drawdown and he would then be 82 years of age."

79. The foregoing constitutes a very clear statement as to the then attitude of MDS to the giving of a guarantee. In short, as of 16 July 2010, MDS was, according to his son, unwilling to provide a guarantee to the plaintiff. The foregoing extract from the 16 July 2010 letter also indicates that, at this time, there was significant engagement as to the obligations which MDS would, or would not, take on and the reason for same. It is also appropriate to observe that, despite being an eminent Senior Counsel himself, and despite being independently advised by a most reputable firm of solicitors, there was never any query raised with the bank, either (1) by MDS, or (2) by Matheson Ormsby Prentice, or (3) by Messrs Crowley Miller at the request of MDS about whether the conditions precedent which had appeared in the 19 February 2010 loan offer letter had, or had not, been complied with. It cannot be disputed that MDS and those advising him had every opportunity to ask the bank about those conditions precedent if, that is, the preconditions in the February 2010 by-now-lapsed loan offer were of any concern to MDS. It is a matter of fact that a query was made of the bank via Crowley Miller Solicitors, but this query related exclusively to the anticipated duration of a proposed guarantee and to nothing else. It will be recalled that the essence of the grounds of defence advanced in the present proceedings hinge on compliance with the conditions precedent in the 19 February 2010 loan offer, yet it is an undisputed matter of fact that neither MDS nor anyone else on his behalf, ever asked the bank about compliance with those conditions precedent. As the correspondence dated 8 July, 9 July and 16 July 2010 plainly evidences, the query raised was about the duration of the proposed guarantee, not about conditions precedent, yet as of 16 July 2010, MDS had neither provided a guarantee to the bank, nor had he drawn down any monies on foot of the loan offer which he had accepted on 30 October 2009 – both steps being, according to the assertions made by the

defendant, something which compliance with the preconditions in the 19 February 2010 offer letter was fundamental to.

80. Notwithstanding the significance which the defendant places on the conditions precedent in the 19 February 2010 loan offer letter, it also must be said that there is no evidence before the court that MDS ever asked his son to provide him with any information or documentation in relation to MDJ's accounts, historic earnings, earning capacity, or tax affairs at any point. Nor is there any evidence before this Court that the solicitors who provided independent advice to MDS ever put any such request to MDJ or to the solicitors acting for him. Furthermore, there is no evidence before the court that, at any stage, MDJ indicated a refusal to provide to MDS any information concerning his earnings or tax affairs. A careful consideration of the totality of the evidence before the court reveals that the issue was simply never raised by MDS at any point in time, be that prior to the 19 February 2010 loan offer letter issuing, or subsequent to its issue. MDS ultimately agreed to give a guarantee to the bank without ever asking for any information concerning MDJ's past earnings, earning potential, or tax affairs and the same is true when MDS ultimately drew down his loan from the plaintiff bank in 2010. The foregoing are not disputed facts. They are incontrovertible, having regard to a consideration of the evidence before the court.

81. Among other things, the defendant avers in para, 4 of her affidavit sworn on 14 November 2019 that: "*I was fully aware of the circumstances in which our son came to us looking for assistance*". The foregoing is plainly a reference to MDJ being in financial difficulties. Nowhere does the defendant aver that she asked MDJ for any information concerning his tax affairs, historic earnings or earning potential, despite the fact that the defendant makes averments consistent with being aware, at the time, MDJ was in significant financial difficulty and that the defendant was fully involved in the decision-making whereby her late husband would provide assistance. This is clear from the final averments in para. 4 of the defendant's affidavit sworn 14 November 2019 as follows: -

"Given my son's credit rating, it was clear to everyone that the only person who could fill that gap was my late husband. I am a housewife and did not have independent means to assist my son. That said, my late husband and I were a partnership and I was fully involved in the decision making".

04 August 2010 email from Crowley Millar to Bank of Ireland (17:27) referring to 11 May 2010 loan offer

82. On 04 August 2010, Mr. Colm Fahy of Crowley Millar Solicitors sent an email at 17:27 to Mr. Ollie Quane. It is not in dispute that Mr. Quane is a representative of the plaintiff bank. In this email, Crowley Millar Solicitors furnished the bank with the text of what was described as a "Side Letter" which, it is not in dispute, the bank subsequently issued to MDS and I will presently refer to the said letter issued by the bank which is dated 16 August 2010. Returning to the 04 August 2010 email, it begins by Mr. Fahy of Crowley Millar Solicitors noting the correct date of the loan offer, namely 11 May 2010, following which he sets out the wording of the Side Letter which the bank was to issue. The contents of the 04 August 2010 email are as follows: -

"Ollie,

I note the correct date of the loan offer is 11th May 2010 see below amended accordingly.

'This Side Letter is executed by Bank of Ireland Mortgage Bank ('the Bank') in conjunction with the guarantee and indemnity in the Bank's standard form dated this day of 2010 ('the Guarantee') executed by Marcus Daly Sr. (the Guarantor).

Whereas: -

- 1. the Bank is providing facilities to Marcus F. Daly and Patricia Daly in accordance with the loan offer of 11th May 2010 ('the loan offer') and,*
- 2. a condition of the said facilities is the provision of the Guarantee by the Guarantor.*

It is now hereby agreed that in consideration of the Guarantor entering into the Guarantee, the Bank hereby confirms that the Guarantee is strictly subject to the terms and conditions set out at Part 4(b) of the special conditions attaching to the loan offer and for the avoidance of doubt, the said Guarantee is limited in particular to the sum specified in Clause 4(b)(i) and shall be released by the Bank on the earlier of the occurrence of (a) the payment of €300,000.00 off the capital balance or (b) when a valuation supporting an LTV of maximum 90% is obtained from an independent valuation by a valuer on the Bank's prime panel.

Signed for Bank of Ireland Mortgage Bank'''.

83. It will be recalled that among the assertions made by the defendant is that the plaintiff, on 16 August 2010, presumably after realising an error on the part of the bank, wrote to MDS in relation to a Side Letter ". . . and it appears surreptitiously referred to the May 2010 facility but did not provide Marcus Sr. with a copy of it". (para. 31 of the defendant's 25 February 2019 affidavit in the guarantee proceedings). It has to be said that the contents of the 04 August 2010 email sent by Crowley Millar to the Bank offer no support whatsoever for the averments made by the defendant. Far from the Side Letter being a surreptitious attempt by the bank to do anything, it is incontrovertible that the very wording of the Side Letter was furnished to the bank by Crowley Millar Solicitors, almost a fortnight before the side letter was sent by the bank to MDS. It cannot be disputed that, as of 04 August 2010, the operative loan offer letter was that of 11 May 2010, being the loan offer which the borrowers accepted on 12 May 2010. The reference by Mr. Fahy of Crowley Millar Solicitors to the loan offer of 11 May 2010 reflected precisely the loan offer accepted by the borrowers. It can also be said that the Side Letter addresses one issue and one issue only, namely providing clarity as to when the Guarantee would be released. There is no evidence before the court that MDS had any other issue which he wanted the

bank to address, or that any firm of solicitors, be that his own solicitors or the solicitors representing the borrowers, raised any issue with the bank which was said to be of relevance to MDS (such as preconditions in a February 2010 offer letter).

04 August 2010 - Bank of Ireland email (18:13)

84. On 04 August 2010, Mr. Ollie Quane of Bank of Ireland sent an email to a Mr. Ken Davis concerning the mortgage application in respect of MDJ, in which email Mr. Quane stated inter alia: -

"Marcus Snr. is providing gtee and Billy Peters has acceded to request to provide Side Letter outlining position whereby gtee will be released – as outlined in offer letter to Marcus F. Below is suggested wording from solicitor which Billy Peters has separately agreed to. This is required on BOIMB headed paper and signed by appropriate BOIMB signatory. Can you advise who to refer this to and also confirm that same is acceptable to BOIMB? . . ."

85. Mr. Peters clearly seems to be another representative within the plaintiff bank. This email offers no support whatsoever for the defendant's assertion of surreptitious activity on the part of the plaintiff and again confirms that the wording for the Side Letter was provided to the bank, not by the bank. I will presently refer to the Side Letter which issued on 16 August 2010 and which used the wording supplied in this 04 August email.

Guarantee by MDS to the plaintiff bank – dated 05 August 2010

86. It is not in dispute that MDS, with the benefit of independent legal advice, executed a guarantee in favour of the plaintiff bank, dated 05 August 2010. Mr. Pullan has exhibited a copy, comprising exhibit "B" referred to in his 14 December 2018 Affidavit. It is explicitly described as a "Guarantee and Indemnity" and it cannot be disputed that, on the face of this document, it is a "stand-alone" guarantee agreement of an "all sums due" type, which creates stand-alone obligations which MDS accepted in accordance with the terms set out in the document itself. Insofar as the liability of MDS is concerned, the guarantee does not express itself to be subject to the terms in any other agreement.

87. MDS is named as the guarantor and he covenanted to pay the bank as is clear from clause 2.0 which states that *"...In consideration of the Bank making or continuing banking facilities to..." the borrowers... "the Guarantors hereby guarantee as a continuing obligation on demand to pay to the Bank all moneys and discharge all obligations and liabilities (together hereinafter called the "ultimate balance") now or at any time hereafter due, owing or incurred to the Bank by the Borrower in respect of the facility (the "Facility") granted or to be granted by the Bank to the Borrower on the account detailed below (and any account opened from time to time in substitution therefor) together with interest (after as well as before any demand or judgment) to the date of payment at such rates and upon such terms as may from time to time be payable by the Borrower (or which would have been so payable but for the death, bankruptcy, insanity or other incapacity fo the Borrower) and all commission, fees and charges and all legal and other costs and expenses incurred by the Bank in relation to the Facility of this Guarantee on a full indemnity basis. The account referred to herein is Account Number: 13129997"*

88. It is worth observing that nowhere in this Guarantee and Indemnity is any reference made to the 19 February 2010 loan offer by the bank to the borrowers. The terms of the guarantee are clear and unambiguous as to the obligations which MDS accepted. The only limits on the obligations of MDS are found in the guarantee itself and in the Side Letter, the text of which was sent, the very day before, by Crowley Millar solicitors to the bank, which Side Letter was issued by the bank to MDS on 16 August. It is uncontroversial to say that it is neither relevant, nor necessary, to imply any other or different terms into this guarantee to give it business efficacy. It makes sense on its own terms and clearly obliges MDS to pay on demand the sum guaranteed with reference (not to the terms in any loan offer letter) but to an account number which, it is not in dispute, was the account number in relation to the bank's loan to the borrowers of €1.65 million.
89. Clause 2.3 makes it clear that *"The total amount recoverable under this Guarantee shall be limited to the principal sum of €300,000.00 (THREE HUNDRED THOUSAND euro) together with interest..."* and this is what the plaintiff is seeking judgment for in its motion before this court in the guarantee proceedings.
90. It is perfectly clear from the guarantor's covenants at Clause 2.0 that MDS agreed to guarantee, subject to the €300,000.00 plus interest limit, all monies which had, up to that point been, or which would thereafter be, advanced to the borrowers and nowhere in the guarantee is this very broad obligation narrowed with reference to any reliance by MDS on any preconditions in any loan offer. The fact that the bank was fully entitled to vary the terms upon which made loan facilities available to the borrowers is also made explicit in the guarantee and presents, in my view, insurmountable difficulties for the defendant's asserted grounds of defence when the entire situation is looked at. As to the explicit wording in clause 4.0 of the guarantee, it is appropriate to set it out verbatim as follows:
- "4.1 The liabilities of the Guarantors shall not be affected nor shall this Guarantee be discharged or diminished by reason of:*
- (a) the Bank compounding with, discharging, releasing or varying the liability of or granting any time, indulgence or concession to the Borrower or any other person or issuing, confirming or renewing, determining, varying or increasing any bill, promissory note or other negotiable instrument, accommodation, facility or transaction in any manner whatsoever or concurring in, accepting or varying any compromise, arrangement or settlement or omitting to claim or enforce payment from the Borrower or any other person; or*
 - (b) any act, omission, neglect, event or matter which would not have discharged or affected the liability of the Guarantors, had the Guaranteors been principal debtor instead of guarantor ro by anything done or omitted which but for this provision might operate to exonerate the Guarantors (wholly or in part) or which would have afforded the Guarantors any legal or equitable defence; or*
 - (c) any failure, defect, illegality, disability, incapacity or unenforceability in respect of the Facility or any security held therefor and such liabilities and*

obligations shall be recoverable from the Guarantors as primary obligors by way of a full indemnity..." (*emphasis added*)

It cannot be disputed that the foregoing is what the guarantee says. Nor can it be disputed that MDS had the benefit of independent legal advice when he gave a guarantee in the foregoing terms. The explicit wording of the guarantee, as can be seen from clause 2.0, is that the guarantee and indemnity give by MDS related to monies "...now or at any time hereafter due...", plainly covering both past and future facilities availed of by the borrowers. Indeed, the consideration which is explicitly referred to in the guarantee refers to "...the Bank making or continuing banking facilities to..." the borrowers. Furthermore, the provisions in clause 4.0 give an extremely wide discretion to the bank, including the right, without reference to MDS to vary facilities. It cannot be in doubt that the explicit wording in the guarantee anticipates the possibility of an obligation on the borrowers failing or being defective or unenforceable, yet even in that scenario, MDS has agreed that his obligations to the bank on foot of the guarantee remain. It need hardly be pointed out that nowhere is the case made that MDS did not understand the nature and effect of the guarantee, nor is it asserted that he ever received defective advice in respect of it. Even if that were the position, and it is not, it would not provide the basis for a bona fide defence.

The guarantee was executed on the 4th page of the 4-page document immediately under the following warning which appeared in large font and in bold:

"Warning; As a guarantor of this loan, you will have to pay off the loan, the interest and all associated charges if the borrower does not. Before you sign the guarantee you should get independent legal advice"

The signature of MDS is witnessed by a solicitor and the very final words of the guarantee comprise a printed statement which says: "CERTIFICATE CONCERNING INDEPENDENT LEGAL ADVICE", immediately below which MDS has written "I have received Independent legal advice." Before signing his name for a second time.

16 August 2010 – Side letter from the bank to MDS referring to the loan offer of 11 May 2010

91. On 16 August 2010 the plaintiff wrote to MDS at his home and it is not in dispute that this was a "side letter", the text of which Crowley Miller Solicitors provided to the bank on 04 August 2010. It is not necessary to set out, again, the contents of the side letter. In all material respects it reflects the wording Crowley Miller Solicitors provided to the bank and the title of the side letter is as follows: -

"Re: Letter of guarantee €300,000 in respect of mortgage account 13129997 in the names of Marcus F. Daly and Patricia Daly".

Of particular note is that it includes, inter alia, the following: -

"Whereas 1. the Bank is providing facilities to Marcus F. Daly and Patricia Daly in accordance with the loan offer of 11th May, 2010 ('the loan offer') and 2. a

condition of the said facilities is the provision of the Guarantee by the Guarantor, it is now hereby agreed that in consideration of the guarantor entering into the guarantee, the bank hereby confirms..."

It is beyond doubt that this side letter very clearly specifies the "11th May 2010" loan offer from the bank to the borrowers and it cannot be disputed on the evidence before this Court that the 11 May 2010 loan offer is the operative loan offer which was accepted by the borrowers on 12 May 2010 and which contains no conditions precedent. It will be recalled that the defendant makes averments to the effect that MDS never received, never saw and never had available to him the bank's May 2010 facility. It is positively asserted by the defendant that, when MDS was provided with advice in relation to his guarantee, the only facility letter available to MDS was that of 19 February 2010. The defendant's averments are very difficult to reconcile with the contents of the 04 August 2010 exchanges between Crowley Miller solicitors and the bank and even more difficult to reconcile with the contents of the bank's 16 August 2010 side letter which was, it is accepted, sent to MDS. The side letter is not a long document. It refers to only one set of banking facilities which the bank was providing to MDJ and his wife, being the 11 May 2010 facilities. There is no evidence before the court that, in response to the side letter dated 16 August 2010, MDS contacted the bank to query the fact that the side letter did not refer to the 19 February 2010 loan offer to the borrowers. On the evidence before this court, MDS neither wrote to the bank, nor phoned the bank, despite having dealt with the bank directly as evidenced by the 29 October 2009 letter sent by Crowley Miller at his behest. There is no evidence that any solicitor acting for MDS raised any query with the bank in respect of the February 2010 loan offer or its conditions precedent. In fairness to the defendant, she does not make any averment to the effect that MDS raised the issue, even privately with her, on receipt of the side letter or at any other time. It is also a matter of fact that, although MDS executed the guarantee in favour of the bank on 05 August 2010, the position as of 16 August 2010 was that the guarantee had not yet been sent to the bank. Furthermore, there is no evidence that MDS informed his solicitors or the bank or any other party that, unless any query he had relating to the February 2010 loan offer was dealt with, he was unwilling for the guarantee to be sent to the bank. In the sad circumstances which pertain, the court is deprived of the benefit of evidence from MDS, but in the context of assessing the credibility of the grounds of defence advanced by the defendant, it is appropriate and in my view necessary to look at the contemporaneous evidence and, indeed, at the conduct of MDS at relevant points in time. It has to be said that, when this is done, it undermines the credibility of the assertions made by the defendant. For present purposes, it is sufficient to say that the 16 August 2010 side letter and its genesis, is wholly inconsistent with the proposition advanced by the defendant that MDS was taken advantage of or was unaware of the operative loan agreement as between the bank and the borrowers, being that of 11 May 2010. It is also appropriate to point out that there was a gap of well over a month between the side letter to MDS and the return of the guarantee, executed by MDS, in favour of the bank. The bank was sent the guarantee on 22 September 2010 under cover of a letter from Crowley Miller.

22 September 2010 Crowley Miller Solicitor's letter to the bank.

92. On 22 September 2010 Crowley Miller Solicitors wrote to the plaintiff bank in relation to "Marcus F. Daly and the Bank of Ireland" to request the loan cheque in the sum of €1,650,000.00. The 22 September 2010 letter enclosed 5 numbered items, the first of which was described as follows: -

"(1) Original Guarantee of Marcus Daly Snr. with copy supplementary side letter of Bank of Ireland with Original letter of Matheson Ormsby Prentice Solicitors re independent legal advice".

The remaining items comprised the borrowers' family home declaration, deed of mortgage in duplicate, undertaking as to the application of the loan funds per special conditions and a copy of a letter to the bank regarding payment of €400,000. Although nothing turns on it, it will be recalled that the same sum of €400,000 was referred to in the letter from MDJ for the bank of 16 July 2010. Bearing in mind that MDS was sent the side letter on 16 August 2010, over 5 weeks had elapsed before his 05 August 2010 guarantee was furnished to the bank. It cannot be disputed that this was ample time within which to raise any query in relation to the preconditions in the February 2010 loan offer to the borrowers and/or the fact that the side letter confirmed that the bank was providing facilities to the borrowers in accordance with the 11 May 2010 offer. There is no evidence of any such query being raised during that period or at any time thereafter.

22 September 2010 email from Crowley Miller to the plaintiff bank

93. On 22 September 2010 Mr. Colm Fahy of Crowley Miller Solicitors sent an email to Mr. Ollie Quane of the plaintiff bank. The fifth paragraph of that email referred to the guarantee and it is appropriate to quote that paragraph verbatim, as follows: -

"I am at a loss to know of what relevance it is to the bank that Marcus Daly Snr. confirms he got a copy of the guarantee. This is quite unnecessary. The bank has the original of which he signed and to which is appended the original letter of MOP Solicitors confirming they advised him in relation to it. There is no necessity for the bank to make any further enquiry in this regard as it is effectively going beyond Mr. Daly's independent advice which I am sure the bank do not intend. You might kindly confirm there is no necessity for the confirmation of Mr. Daly Snr. as sought. As you will appreciate [] has been a long effort to get to this point of practical completion and any unnecessary []..."

It cannot be disputed that MDS did, as a matter of fact, receive independent legal advice from a most reputable and experienced firm of solicitors with regard to the guarantee he executed on 05 August 2010. This fact cannot be in doubt having regard to the evidence before this Court which has been examined in this judgment so far. It is also stated in the very clearest of terms by MDS himself, by means of a 27 September 2010 letter which was sent by MDS to the bank and I will look at that letter presently. Before doing so, it will be recalled that the defendant asserts that her late husband never received a copy of the May 2010 offer letter and the basis for this assertion is that no copy of same was found on the "...file which he maintained in his home office..." in relation to all

important correspondence. The basis for the assertion that MDJ never had, or saw, or was aware of the May 2010 offer letter is put as follows by the defendant "*Given his filing system I therefore can only conclude that no such letter was sent to Marcus Sr.*" The defendant also avers that she "...checked with Matheson who has confirmed to me that Marcus Sr. did not provide Matheson with a revised letter of loan offer". The foregoing does not, it has to be said, prove that MDS never saw, or was never aware of, the contents of the May 2010 offer letter. It merely confirms that no copy was found in the foregoing places. It also has to be said that no affidavit was sworn by anyone from Crowley Millar solicitors, despite the involvement of that firm which is clear from the correspondence examined in this judgment. Nor was any affidavit sworn by either of the defendants. These averments by the defendant, even taken at their height, do not in my view provide any prospect of a bona fide or stateable defence to the plaintiff's claims. Furthermore, they are averments which must be looked at in the context of the overall evidence before this court and that includes an explicit reference by MDS to the May 2010 loan offer, in his 27 September 2010 letter to the bank, to which letter I now turn.

27 September 2010 letter MDS to the plaintiff referring to the May 2010 loan offer

94. On 27 September 2010 MDS wrote to the bank and it is appropriate to quote the contents of that letter verbatim as follows: -

"Marcus Daly, S.C.

158/159 Church Street, Dublin 7

Your Ref: 13112997

27th September, 2010

Bank of Ireland Mortgage Bank

Completions Section

New Century House

IFSC

Mayor Street Lower

Dublin 1.

COURIER

Re: Marcus F. Daly and the Bank of Ireland

YOUR REF:

Dear Sirs,

I refer to the Deed of Guarantee and indemnity executed by me in respect of the Bank of Ireland loan offer to Marcus F. Daly and Patricia Daly of May 2010 and I hereby confirm in accordance with the requirements of the said loan offer that as

well as having obtained independent advice opinion to the executed [sic] of same, I am also in possession of a copy of the executed said Guarantee and Indemnity (a further copy of which is attached hereto).

Yours faithfully,

Marcus Daly, Senior Counsel."

95. In the foregoing letter MDS makes explicit reference to one and only one loan offer to the borrowers, namely that of "May 2010". He plainly does not say that he understood the loan offer to be that of February 2010. He does not raise any query in relation to the conditions precedent in the February 2010 loan offer. He does not ask whether, or not, they were satisfied. He does not ask for any copy of any documentation which may have been furnished by his son to the bank in respect of MDJ's earnings or tax affairs or, for that matter, in relation to any valuation of the borrower's Stillorgan Road property. It is beyond doubt that the operative and binding loan offer as between the bank and the borrowers was, on the evidence before this Court, that of May 2010. It is not in dispute that there are no preconditions contained in the contents of the May 2010 loan offer. There is no evidence in this letter that MDS was under the misapprehension that the conditions governing the bank's loan to the borrowers were those set out in a February 2010 loan offer. It cannot be controversial to say that the contents of this 27 September 2010 letter by MDS evidenced his awareness that lending by the bank to the borrowers was on foot of the May 2010 loan offer. It has to be said that the contents of this letter undermine the credibility of the grounds of defence advanced by the defendant.

The defendant's assertions in relation to the 27 September letter 2010 sent by MDS

96. The defendant's attempt to explain the reference by MDS, in the 27 September 2010 letter, to the "May 2010" facilities is to aver, in para. 31 of her 25 February 2019 affidavit, that he "...clearly does so because the plaintiff has referred to it in its letter of 16 August 2010". With the greatest of respect to the defendant, this averment is simply not credible in my view and can fairly be characterised as no more than an assertion which is not underpinned by any evidence proffered by the defendant and which is undermined by evidence before this court. On more than one occasion the defendant emphasised how careful MDS was in terms of managing his affairs, averring inter alia: "*my late husband, Marcus Snr., was a careful and meticulous barrister*" (Paragraph 5, defendant's affidavit sworn 14 November 2019) and also averring that MDS "...was careful in managing his affairs..." (para. 31 of the defendant's 25 February 2019 affidavit). The defendant's averment, to the effect that her late husband referred to the May 2010 loan facilities simply because they had been referred to in the side letter which was sent to MDS, is impossible to reconcile with the defendant's averments as to her late husband's meticulousness and the care with which he managed his affairs.
97. In the final paragraph of the defendant's 14 November 2019 affidavit, she makes the following averment with reference to MDS's 27 September 2010 letter: -

"My late husband and I would not have checked that the reference to the date of the loan offer to our son was accurate. Marcus Snr. was not the borrower and in providing a guarantee we relied upon the bank to send us the correct document."

The foregoing averment is simply not credible by way of explaining why MDS referred, in his 27 September 2010 letter, to the bank's loan offer to the defendants of May 2010 and to no other loan offer. Not only is the foregoing averment impossible to square with the careful and meticulous approach to his affairs taken by MDS, which the defendant has averred to, the defendant's case hinges on the proposition that the February 2010 loan offer and adequate compliance with its preconditions were of fundamental importance to MDS. If that was so and if, as the defendant asserts, the one and only loan offer which MDS had available to him was the February 2010 loan offer, the explanation proffered by the defendant as to why her late husband referred to the May 2010 loan offer, and only to that loan offer, is not an explanation which is credible. It also must be said that, although this Court does not for a moment doubt the *bona fides* of the defendant, the contents of contemporaneous documentary evidence, such as recently discussed, undermine the credibility of the grounds of defence advanced in opposition to the plaintiff's claims.

06 October 2010 letter from Crowley Miller to the plaintiff bank.

98. On 06 October 2010 Crowley Miller Solicitors wrote to the plaintiff bank inclosing *inter alia*: -

"1.) Letter of Marcus Daly Snr. of 27 September 2010 with copy guarantee noting that Mr. Daly has a copy of the said guarantee in his possession."

The letter from Crowley Miller also enclosed a cheque requisition regarding an anticipated drawdown date of 28 October 2010 and stated that an approved form of Undertaking would be provided prior to drawdown once that firm were in receipt of title documentation and had reviewed same. It cannot be disputed, in light of the foregoing, that the letter to the bank by MDS, dated 27 September 2010, first made its way from MDS to Crowley Miller Solicitors. It will be recalled that Crowley Miller Solicitors acted for the borrowers (MDJ and his wife) who were, since 14 August 2008, being sued by the bank in High Court proceedings under record number 2008/2135S. There is no evidence before this court that, in the context of sending his 27 September 2010 letter to Crowley Miller Solicitors, for onward transmission by Crowley Miller to the bank, MDS raised any query in relation to the February 2010 loan offer or with regard to any compliance with conditions precedent therein, nor is there any evidence that MDS asked for any documentation from Crowley Miller with regard to his son's earnings history or capacity or tax affairs or, for that matter, concerning the valuation of the borrowers' property. It is important to recall the status quo at that point as per the contents of documents which are before this court and which are not in dispute. By 27 September 2010 when MDS wrote his letter, the guarantee had very recently been sent by Crowley Miller to the bank (on 22 September 2010) but the confirmation which the bank required from MDS (to the effect that he had received independent advice regarding the guarantee and that he had a copy of same) were clearly outstanding matters which the bank wanted him to address. Furthermore, there had not yet been any drawdown by MDS of the loan facilities which he had accepted

on 30 September 2009, an issue to which I now turn. Despite the foregoing being the position, MDS made no mention of any preconditions and sought no information in relation to their satisfaction or otherwise. The issue was simply not raised by MDS in his correspondence to the bank which he plainly caused or permitted to be provided to Crowley Millar, given the fact that it was Crowley Millar who forwarded the letter of 27 September 2010 to the bank.

29 October 2010 – drawdown by MDS of loan.

99. It is not in dispute that on or about 29 October 2010 MDS drew down the loan facility which was provided to him by the plaintiff bank on foot of the loan offer which MDS accepted almost a year earlier, on 30 October 2009. There is no evidence whatsoever that, in advance of drawing down that loan, MDS raised any query of any party in relation to the February 2010 loan offer or in relation to his son's earnings or tax affairs or with regard to the value of the borrowers' Stillorgan Road property. There is simply no evidence that MDS ever raised any preconditions with anyone.

Loan repayments by MDS

100. Exhibit "C" to Mr. Pullan's 04 December 2018 affidavit in the loan proceedings comprises a 5-page statement of account in relation to the funds drawn down by MDS and this statement records every mortgage repayment made as and from 30 November 2010 onwards, the relevant account number being 41326787. It is not in dispute that MDS made each and every one of the required loan repayments from 30 November 2010 throughout the next six years up to his death on 18 July 2016. There is no evidence that at any stage during any of those years, MDS ever raised a query with any party concerning the February 2010 loan offer to the borrowers or with regard to compliance with any conditions precedent in same.

01 November 2010 – advance of €1.65m to the borrowers.

101. It is not in dispute that on 01 November 2010, the plaintiff advanced the sum of €1.65m to the borrowers pursuant to the bank's letter of loan offer of 11 May 2010 which the borrowers accepted on 12 May 2010. It is appropriate to observe that this advance was, in fact, made over a month *after* the letter from MDS to the bank, dated 27 September 2010, in which MDS referred to the guarantee executed by him "*...in respect of the Bank of Ireland loan offer to Marcus F. Daly and Patricia Daly of May 2010...*". There is no evidence before the court that, at any time between 27 September 2010 and 01 November 2010, MDS contacted the bank to suggest that funds which he was guaranteeing, should not be advanced to the borrowers unless he received assurances as to compliance with, or information concerning, any conditions in a February 2010 loan offer by the bank to the borrowers.

18 November 2010 – bank's motion struck out.

102. On 18 November 2010 a motion for judgment which the bank had issued against the borrowers in the proceedings under record number 2008/2135S was struck out.

03 February 2014 – demand made on the borrowers

103. As averred in para. 6 of Mr. Pullan's 14 December 2018 affidavit, the borrowers defaulted in respect of the loan of €1.65 million and a formal demand was made on 03 February 2014. It is not in dispute that the borrowers failed to pay the sums demanded.

03 February 2014 demand made on MDS on foot of the guarantee

104. It is not in dispute that on 03 February 2014, the plaintiff bank wrote to MDS calling on him to pay the sum of €300,000 pursuant to the guarantee. An uncontroverted averment to this effect is contained in para. 7 of Mr. Pullan's 14 December 2018 affidavit wherein he exhibits the letter of demand dated 03 February 2014 which was served on MDS. It is appropriate to point out that no issue is taken with the validity of the letter of demand itself. It is a matter of fact that it was addressed to MDS, referred to the 05 August 2010 guarantee, enclosed a copy of the said guarantee, referred to the borrower's failure to pay under their mortgage loan and called for the payment, by MDS, of €300,000 within 21 days with legal proceedings being threatened in default. The letter expressed the hope that this course of action would not become necessary and included inter alia the following: - "*We strongly recommend that you do not ignore this demand letter and that you take appropriate legal advice in relation to it*". It is common case that MDS did not respond to this letter. It is appropriate to point out that, despite being served with this 03 February 2014 demand, MDS never raised with the bank any of the arguments which are now canvassed by the defendant. Furthermore, notwithstanding the fact that the letter of demand explicitly recommended that MDS take appropriate legal advice, no solicitor raised any query on his behalf, be that in relation to any conditions in the February 2010 loan offer or otherwise.

05 January 2015 a further demand on the borrowers

105. The bank made a further demand of the borrowers, on 05 January 2015, for repayment of their loan facility. As averred by Mr. Pullan in para. 6 of his 14 December 2018 affidavit, despite these two demands, the borrowers did not pay the bank the sums demanded.

09 September 2015 – legal proceedings on foot of the MDS guarantee.

106. On 09 September 2015 the plaintiff issued proceedings under record number 2015/1741S seeking, *inter alia*, judgment against MDS in the sum of €300,000 on foot of the guarantee dated 05 August 2010. Although not on affidavit, there was no dispute between the parties in relation to the sequence of events as regards service of the bank's proceedings in respect of the guarantee, specifically being that, after discussions between the relevant firms of solicitors, on 27 May 2016 solicitors representing MDS confirmed authority to accept service. On 31 May 2016, Messrs Whitney Moore Solicitors served the said proceedings on Messrs Kirwan McKeown James Solicitors who had authority to accept service on behalf of MDS. Thus, I am entitled to accept that as matter of fact the proceedings in respect of the guarantee were served as of 31 May 2016 although, in the manner explained above, MDS had been served, well over two years earlier, with a demand for payment of the €300,000 on foot of the guarantee, dated 03 February 2014. Some six weeks after 31 May 2016, Whitney Moore Solicitors requested that the original summary summons be returned and this was done the following day with service endorsed thereon. Sadly, MDS passed away on 18 July 2016.

107. It is appropriate to say that, despite the fact that service of legal proceedings in respect of the guarantee was effected during his lifetime, the solicitors acting for MDS did not raise on his behalf any of the grounds now canvassed by the defendant in opposition to the plaintiff's motions. It is also appropriate to observe that, despite the demand having been made in respect of the guarantee (on 03 February 2014) and despite legal proceedings having been served in respect of the guarantee, MDS continued to make, without interruption, monthly repayments on foot of his loan agreement with the plaintiff bank and did so throughout 2014 and 2015 and right until his death in July 2016.

04 November 2015 – agreement to amend loan to MDS.

108. On 04 November 2015 the plaintiff issued an "Agreement to Amend Mortgage Loan Offer Letter" in relation to the loan agreement which MDS entered into on 30 October 2009. This was to extend the maturity date in respect of the loan by three years. It will be recalled that as originally offered and accepted, the loan was repayable after a five-year period. It is not in dispute, that on 07 December 2015, MDS accepted the extension of his loan by 36 months. This created a new maturity date of 31 October 2018 and the repayments were adjusted accordingly, all the foregoing being averred by Mr. Pullan at para. 6 of his 04 December 2018 affidavit in the loan proceedings, wherein he exhibits a copy of the "Agreement to Amend Mortgage Loan Offer Letter". This comprises a 21-page document, upon which the signature of MDS appears on internal p.17 under the heading "legal advice" and again on p.21 where MDS signed in his capacity as "Borrower".

109. The defendant also signed this form and her signature appears on internal p.15 wherein she is described as the borrower's spouse and her signature is given in the context of consent for the purposes of s.3 of the Family Home Protection Act 1976. The defendant's signature appears immediately after the sentence "I confirm that I have taken or have been afforded the opportunity to take independent legal advice prior to signing this document." It is beyond doubt that MDS as named as the "Borrower" in this agreement, which makes clear the alternative repayment arrangement which has been reached. The contents of this agreement are consistent with and only consistent with MDS acknowledging his liability to the plaintiff on 07 December 2015. No other interpretation is possible, having regard to the contents of the form which are explicit about *inter alia*, the total amount which MDS owed and which was specified to be €348,304.34. By means of this agreement to amend the existing loan offer letter, MDS, as Borrower, explicitly agreed *inter alia*, as follows: -

"1.1.1 the Borrower will pay an amount of €1883.00 towards repayment of the principal (capital) amount of the Loan in addition to the interest due for payment (the 'Regular Fixed Payment') in regular instalments for 36 months ('the Agreed Period') as calculated by the Lender. The Lender estimates that the Regular Fixed Payment amount will be €3,000.00 each month. If the interest rate on the Loan changes, the Regular Fixed Payment amount will vary." (internal page 3)

It will be recalled that Mr. Pullan exhibited the relevant bank statement in relation to this loan. The said statement shows *inter alia*, that, having made monthly repayments of €1,481.22 from November 2010 until the end of 2015, MDS commenced making monthly

repayments of €2,997.39 as and from 31 January 2016. This is entirely consistent with the obligations on MDS, as borrower, pursuant to the 30 October 2009 loan agreement as amended by his acceptance, on 07 December 2015, of the Agreement to Amend his mortgage loan offer letter. It simply cannot be disputed that, on the face of the document which he signed on 07 December 2015, MDS acknowledged his liabilities to the bank on foot of mortgage loan account no. 41326787 and that he owed, at that point in time, €348,304.34. The timing of the foregoing is of considerable significance. By 07 December 2015, MDS had already received a demand from the bank for payment of €300,000 on foot of the guarantee which he had executed on 05 August 2010. That demand had been served on MDS on 03 February 2014. The grounds which the defendant advances in opposition to the claim on foot of the guarantee are the self-same grounds she advances to suggest that MDS had, and his estate has, no liability in respect of the mortgage loan. Despite this, it is incontrovertible that, full in the knowledge that the bank was demanding payment from him on foot of the guarantee and had threatened legal proceedings in default of payment of €300,000, MDS made no reference whatsoever to the grounds of defence which the defendant now canvasses. Rather, MDS explicitly acknowledged his liability to the bank, as borrower, and did so in writing on 07 December 2015, having been advised to take legal advice. It has to be said that this action by MDS is inconsistent with MDS having the grounds of defence to the plaintiff's motions which the now defendant asserts. Internal p. 17 of the aforesaid Agreement to Amend Mortgage Loan Offer contains the following statement immediately above the signature of MDS and opposite a box which has "been ticked": -

"I did not get independent legal advice on this Form because I understand it and I am satisfied to sign it without such advice. I will never raise the lack of advice as a reason to question this Form".

At no stage prior to executing the 07 December 2015 agreement to amend mortgage loan offer letter, did MDS suggest to the bank that he had no liability under mortgage loan account no. 41326787 or that he was not obliged to repay, in full, the borrowings advanced to him by reason of anything said to relate to the February 2010 loan offer to the borrowers. It also has to be said that the defendant did not do so either. This is despite the fact that she executed the document on 07 December 2015 after confirming that she had taken or had been afforded the opportunity to take independent legal advice. In my view, the foregoing undermines the credibility of the grounds of defence canvassed by the defendant, being the same grounds of defence advanced in opposition to the plaintiff's claims on foot of the loan agreement and guarantee, respectively. In short, as of December 2015 the borrowers had defaulted, the guarantee given by MDS had been called in and, far from suggesting that the monies repayable under the guarantee were not validly due by reason of conditions in a February 2010 loan offer to the borrowers, the defendant and her late husband signed an agreement whereby MDS confirmed, for a second time, his obligations to the bank, as borrower, in the context of extending the period to repay the monies which had been advanced to him on foot of the relevant loan agreement which he entered into on 30 October 2009 and drew down a year later at the end of October 2010.

July 2016

110. Very sadly, MDS passed away on 18 July 2016 and the court could have nothing but sympathy for the defendant in respect of her loss. Nothing turns on the fact that the defendant contends that a payment on the deceased's loan was made in error following his death. It is not in dispute that the deceased complied fully with his repayment obligations under the loan, including as per the agreement reached in December 2015 to extend the term of same and the loan was fully performing until MDS died.

March 2017 - judgment against one of the borrowers

111. On 13 March 2017 the plaintiff obtained judgment against Patricia Daly in the sum of €1,878,078.23 in respect of loan facilities advanced on foot of the 11 May 2010 loan offer which the borrowers accepted on 12 May 2010. This is clear from the averments in para. 6 of Mr. Pullan's 14 December 2018 affidavit and is not in dispute. A grant of probate issued to the defendant in respect of the estate of MDS on 16 March 2017 and Mr. Pullan exhibits a copy of same at para. 9 of his 14 December 2018 affidavit.

07 August 2018 demand made on the estate of MDS in respect of loan

112. It is not in dispute that on 07 August 2018 a demand was made on the estate of MDS calling on the defendant, as personal representative of the deceased, to discharge all sums then due to the plaintiff bank on foot of the relevant loan account, within ten business days, and Mr. Pullan exhibits a copy of that letter of demand in para. 9 of his affidavit sworn on 04 December 2018. No issue was taken in relation to the fact of, or terms of, the 07 August 2018 letter of demand which specified the relevant mortgage account number (being 41326787) and identified then current arrears of €19,382.52, with the amount still owing specified to be €288,429.05. It is not in dispute that repayment was not made.

05 November 2018 – substitution of defendant in guarantee proceedings.

113. It is not in dispute that on 05 November 2018 the defendant was substituted into the proceedings concerning the guarantee given by MDS, in her capacity as executrix of the estate of her late husband.

19 November 2018 – loan proceedings issue.

114. On 19 November 2018 the plaintiff issued legal proceedings against the estate of the deceased under record number 2018/1505S, with the defendant named in her capacity as personal representative of MDS.

17 December 2018 – motions.

115. The motions which are before this Court were both issued on behalf of the plaintiff on 17 December 2018.

Grounds of defence which are "credible".

116. Earlier in this judgment, I referred to the relevant principles which this Court must apply when deciding the motions before it, in particular the test outlined by Mr Justice McKechnie in *Harrisrange* which remains the touchstone as regards the proper approach for this court to take when met with a summary judgment application which a defendant seeks to resist.

117. In order to decide whether or not it is “very clear” that the defendant has no defence, it is necessary for this Court to look at the whole situation and to make a determination as to whether what the defendant says is credible. The meaning of that term in the context of a summary judgment application was described in the following terms in the judgment of Mr. Justice Clarke (as he then was) delivered on 11 July 2014 in the Supreme Court’s decision in *Irish Bank Resolution Corporation v. McCaughey* [2014] IESC 44:

“5.2 It is also important, as Finlay Geoghegan J. pointed out in Bank of Ireland v. Walsh [2009] IEHC 220, to keep clearly in mind that the use of the term ‘credible’ in relation to a defence has, for the reasons also addressed by Hardiman J. in Aer Rianta v. Ryanair, a very narrow meaning. The issues of credibility, which had formed the basis of a conclusion that a defendant had not put forward an arguable defence, in cases such as National Westminster Bank v. Daniel [1993] 1 WLR 153, Banque de Paris v. de Naray [1984] 1 Lloyds Rep. 21 and First National Commercial Bank v. Anglin [1996] 1 IR 75, arose, as Hardiman J. put it, ‘rather starkly’. In Daniel, the defence affidavits were mutually contradictory. In de Naray, there was clear evidence, not challenged, from a private detective, which flatly contradicted the plaintiff’s case. In Anglin, the chronology asserted was entirely inconsistent with commercial documentation which was not, in itself, disputed.

5.3 Denham J., speaking for this Court in Danske Bank v. Durkan New Homes [2010], also approved a passage from a judgment which I delivered in the High Court in McGrath v. O’Driscoll [2007] ILRM 203, where, at p. 210, I said the following:-

‘So far as questions of law or construction are concerned the court can, on a motion for summary judgment, resolve such questions (including, where appropriate, questions of the construction of documents), but should only do so where the issues which arise are relatively straightforward and where there is no real risk of an injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment.’

Hardiman J. had expressed a similar view in his judgment in Aer Rianta, in the passage already cited, where he made reference to issues which were simple and easily determined.

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

The defendant's reliance in IBRC v. Cambourne

118. In skilled submissions by Senior Counsel for the defendant, particular reliance was placed on a High Court decision delivered by Mr. Justice Charleton in *Irish Bank Resolution Corporation Limited v. Cambourne Investments Incorporated* [2014] 4 IR 54 and it is appropriate to look in some detail at that decision, given how heavily it features in submissions. In *IBRC v. Cambourne*, the plaintiff (hereinafter 'IBRC') sought repayment of loan facilities granted to Cambourne Investments Incorporated (hereinafter 'Cambourne'), which facilities were guaranteed by a company, entitled Century City Limited (hereinafter 'CCL') and an individual, a Mr. Peter Curistan (hereinafter 'PC'). IBRC issued a facility letter dated 04 February 2009 which was amended on 05 February 2009, with the guarantees of CCL and PC attached as an appendix to the amended facility letter. At this juncture it is appropriate to point out that the factual position in the present case is very different. At no stage was any proposed guarantee attached as an appendix to any loan offer letter issued by the plaintiff bank in the present case. Furthermore, in *IBRC v. Cambourne*, the guarantee was an appendix to the operative facility letter and, unlike the position in the present case, the defendant(s) did not seek to rely on the contents of a prior facility letter which, according to its own terms, had lapsed, before any agreement to lend money to the borrowers was entered into.
119. Returning to the facts in *IBRC v. Cambourne*, separate standalone "all sums due" guarantees were provided by CCL and by PC, separate to the guarantees which were appended to the facility letter. The amended facility letter of 05 February 2009 required an updated written valuation to support a minimum combined value of units in the Parnell Centre of €17,120,000.00 as a condition precedent to drawdown. A further condition precedent required the loan-to-value ratio to remain at least at 80%. IBRC decided to waive these conditions precedent and it subsequently transpired that the realistic value of the relevant property was much lower. At this juncture it is appropriate to point out that, unlike the position in *IBRC v. Cambourne*, the factual position in the present case is that, at all material times, MDS knew that his son was in financial difficulties. I have already examined the sequence of events in some detail earlier in this judgment and it is common case that, on 14 August 2008, the Governor and Company of the Bank of Ireland issued High Court proceedings under record number 2008/2135S against MDJ and his wife and that a motion for judgment in those proceedings was first returnable before the Master of the High Court on 11 June 2009. It is not in dispute that the foregoing legal proceedings, which were a matter of public record, were known to MDS. It will also be recalled that Messrs Crowley Miller Solicitors wrote a letter at the behest of MDS and this letter, dated 29 October 2009, makes explicit reference to the said legal proceedings and contains *inter alia*, reference to the willingness of MDS to make a payment of €360,000 to the bank at the time of drawdown of a proposed home loan by the bank to the borrowers of €1.65m. All the foregoing took place long before any facility letter issued by the plaintiff in these proceedings to the borrowers. Unlike the position in *IBRC v. Cambourne*, when a letter was sent at the behest of MDS, prior to any facility letter issuing, no reference was made to any valuation of the Stillorgan Road property being required, much less required by MDS and still less for any specific amount. Furthermore, unlike the factual position in *IBRC v. Cambourne*, a valuation of the Stillorgan Road property was, in fact, carried out

by third party professionals and I have previously referred to the 07 December 2009 valuation of the property furnished by Messrs Gunne Residential in the sum of €1.5m. It is also appropriate to say that, although the defendant has made averments casting doubt on the accuracy of that valuation, this is an argument she no longer proceeds with.

120. Returning to the facts in *IBRC v. Cambourne*, PC claimed in that case that the conditions precedent were not just for the benefit of the bank, but were also for his benefit as guarantor and he claimed they could not be waived or severed. IBRC claimed that the conditions precedent was for the exclusive benefit of the bank and that IBRC was entitled to waive same unilaterally and without notice to either the borrower or to the guarantor. The argument made by PC in that case was referred to in the following terms by Mr. Justice Charleton of para. 35 of the judgment:

"Peter Curistan argues that, since the loan to value ratio in the facility letters was never met and that the value of the property borrowed against was not achieved, these conditions precedent operate to prevent the facility letters ever crystallising as a contract of loan. These clauses, he claims, were not just for the benefit of the bank, they were for his benefit as well and thus cannot either be waived or be severed."

The foregoing certainly appears to be an argument advanced by PC, qua guarantor. Later in his judgment, Mr. Justice Charleton stated (at para. 45) that: -

"If on a proper construction of a contract, a term is exclusively for the benefit of a particular party by whom it is waived, that term may be rendered inoperative by that waiver. In Maloney v. Elf Investments [1979] ILRM 253 a term supporting a contract for the sale of land required that there be the grant of planning permission before a particular date. On that date passing without planning permission, the vendor sought a declaration that the contract had terminated. The purchaser argued that since the term was for his benefit he was entitled to waive it. The planning permission, however, would not simply benefit the purchaser as his interest was in developing other houses on contiguous sites and the services that these would require. On an analysis of the relevant authorities McWilliam J. stated at p.255 that:

'the principle with regard to waiver appearing from these decisions is that a condition inserted exclusively for the benefit of one party can be waived by that party'.

Thus, the issue becomes whether a term is for the exclusive benefit of one party alone or may also benefit the other. For instance, in a contract for the sale of land the vendor must show title but if that requirement is waived by the purchaser, such waiver is lawful since the title to the land benefits the purchaser".

121. Later still, (at para. 46), Mr. Charleton went on to state that: -

"The test to be applied for determining whether a contract term is for the exclusive benefit of one party was considered by Blackburne J. in Irwin v. Wilson [2011] EWHC 326 (Ch), [2011] 2 EGLR 61 where, at para. 23, he quoted with approval the decision of Brightman J. in Heron Garage Ltd v. Moss [1974] 1 WLR 148 at p.153:

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

[47] *Blackburne J. also cited with approval at para.24 the following passage from the New Zealand Court of Appeal in Hawker v. Vickers [1991] 1 N.Z.L.R. 399 at pp. 402 and 403: -*

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

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

122. At this point it is appropriate to observe that the only contract pursuant to which the plaintiff bank lent money to the borrowers in the present case was the bank's 11 May 2010 loan offer, which the borrowers accepted on 12 May 2010. It is uncontroversial to say that the only parties to that loan agreement were the bank and the borrowers. Neither of the borrowers have sworn affidavits in the present proceedings and neither of them assert that the loan offer which they accepted on 12 May 2010 was not the valid,

operative and only loan offer they accepted in respect of the loan of €1.65m. Indeed, on foot of that loan agreement, the bank has already obtained judgment against one of the borrowers. It is a matter of fact that the aforesaid loan offer of May 2010 contained no conditions precedent. This is, again, different to the position in *IBRC v. Cambourne* in which Mr. Justice Charleton said the following at para. 49, with regard to the valuation precondition and which party, or parties, benefit from same.

"The valuation precondition to the operation of a contract in the facility letters is claimed by Anglo to be for the benefit of Anglo in that it provided comfort as to the level of security being provided by the borrower against the facilities through the units. However, the borrower also offered to procure a guarantee as a further element to the security proffered for the facilities. As such, it may be claimed that it is difficult to see how the borrower took any benefit from the precondition except insofar as satisfaction of same was a precursor to the release of the funds. However, from the point of view of the ordinary borrower seeking funds on the basis of a valuation conducted by a bank, such a condition offers comfort as to the security of the bargain. It is not unreasonable on entering the matrix of fact within which such loans take place for the potential borrower also to rely on a valuation conducted independently of the aspiration of the borrower. Reliance on such a valuation cannot be excluded from the terms of a clause drafted in the manner in issue here."

123. It is appropriate to note that Mr. Justice Charleton made specific reference to the point view of the "ordinary borrower" seeking funds and opined that it was not unreasonable for such a condition to enter the matrix of fact within which such loans take place for the potential "borrower" also to rely on a valuation carried out independent of the aspirations of the "borrower". Mr. Justice Charleton did *not* hold that the valuation precondition was for the benefit of a guarantor. PC may have made an argument *qua* guarantor but in in the foregoing decision, Charleton J. made no reference to "guarantor". Rather, he referred to the position of the "borrower" and the learned judge continued, in para. 49, to state the following:

"My view is that the conditions precedent as to loan to value ratio and value of the property were for the benefit of both sides. The nature of the contract is also such that these conditions cannot be severed."

Insofar as Mr. Justice Charleton made reference to the relevant preconditions being for the benefit of "both sides", it seems very clear that "both" meant the bank and the borrower, not the bank and a guarantor. Charleton J. continued at para. 50 to state:

"The effect of a condition precedent for the benefit of both parties not being met is that the contract of loan on the two facility letters, which includes the guarantee on the facility letters made by Peter Curistan and Century City, does not come into operation."

In other words, the relevant guarantees did not come into operation because they constituted part of the facility letters (being appended thereto), and these guarantees fall away, in circumstances where the facilities' letters themselves did not come into operation, having regard to the waiver of the preconditions.

At this juncture, it is again appropriate to point out that the factual position in the present case is entirely different. The preconditions upon which the defendant seeks to rely are preconditions contained in the bank's 19 February 2020 loan offer. In the manner examined earlier in this judgment, the 19 February 2010 loan offer contains an explicit provision to the effect that it lapsed if not accepted within 30 days. It was not accepted within 30 days and there is no evidence whatsoever before the court that the bank extended the period for the acceptance of the February loan offer. The defendant, who was not a party to any loan agreement, does not assert that the February 2010 loan offer did not lapse and offers no evidence whatsoever to suggest that the February 2010 loan offer was not lapsed, as of 20 March 2010. Those who were party to the loan agreement with the bank, namely the borrowers, have never asserted that the February 2010 loan offer did not lapse, as of 20 March 2010. It is just over a decade since the borrowers entered into a loan agreement with the bank in May 2010. Even if the operative loan agreement was that of February 2010 (and it is plainly not) and even if the argument was by now statute barred (and it plainly is) the borrowers who were in privity with the bank do not make the case, indeed have never made the case, that any conditions in the February 2010 loan offer were other than for the bank's benefit. I have already pointed to a number of crucial differences between the factual position in the present case and that in the *IBRC v. Cambourne* decision, upon which the defendant relies. Furthermore, in *IBRC v. Cambourne*, all the relevant parties had a contractual relationship with each other. In the present case, MDS was a guarantor, only, and he was not drawing down, either personally or as a director of a company, any loan facilities in respect of which his guarantee was required. The position in *IBRC v. Cambourne* was entirely different as made clear by the fact that, notwithstanding that the facility letters did not come into operation, CCL remained liable to repay the money lent to it and the two stand-alone guarantees were still enforceable against CCL and PC. Commenting on the stand-alone "all sums due guarantees", Mr. Justice Charleton stated the following from para. 54 onwards of his decision: "*The court must give effect to the terms of that written bargain. Liability to repay is established on the face of the document. The first question is whether the wording of the guarantee separate to the facility letters binds Peter Curistan through that contract to repay the loan. In my view the wording is unambiguous.*" The guarantee executed by MDS in the present case, being one he gave after having the benefit of independent legal advice, can fairly be called a "stand alone" and "all sums due" guarantee, subject only to a specified limit and stated to remain in force on specific terms, as clarified in the Side Letter. The liability of MDS to the bank on foot of this guarantee is unambiguous and clear from its terms. In light of the undisputed facts in the present case, the decision in *IBRC v. Cambourne* does not, in my view, provide any possibility of the defendant having a *bona fide* or stateable defence.

Discussion and decision

124. Applying the principles set out in this judgment and looking carefully at the whole situation, I am satisfied that what the defendant asserts by way of a defence to both claims is not credible. Looking at facts which are not in dispute, as I have done in this judgment to date, it is very clear to me that the defendant has no defence. Regardless of the undoubted skill with which submissions were made on behalf of the defendant, what the defendant says in opposition to the plaintiff's claims can fairly be described as mere, or bare, assertions which are wholly unsupported by evidence, and fatally undermined by facts which are not in dispute. I am satisfied that the legal arguments which the defendant seeks to make have no grounding whatsoever in evidence and it is very clear that the defendant has not demonstrated that there is a possibility, still less a fair and reasonable probability, of the defendant having a real or bona fide defence.
125. On behalf of the defendant it was submitted that there were preconditions incorporated into the May 2010 loan agreement which were for the benefit of MDS as much as they were for the benefit of the plaintiff and the defendant argues that it follows that their waiver by the plaintiff avoids the guarantee and avoids the contract of loan as between the plaintiff and MDS. The defendant acknowledges the fact that MDS did draw down €350,000 and submits that there should be *restitutio in integrum* whereby the plaintiff bank is entitled to receive its €350,000 less all principal and interest paid by MDS which, on the defendant's calculation leaves a net balance payable to the plaintiff of €162,663.85. The evidence before this Court throws up insurmountable obstacles in the defendant's aforesaid argument. These flow from the evidence which is before this court and which I have examined in detail earlier in this judgment. It is not necessary to repeat the entirety of that analysis but facts which cannot be disputed include the following. The only place the preconditions appear is in a 19 February 2010 loan offer, being an offer made by the bank to the borrowers. The explicit terms of the February 2010 loan offer make it clear that it lapsed after 30 days, unless accepted, and it was not accepted within that period. Nor do the borrowers or, for that matter, the defendant, argue that it was accepted. As such, the loan offer, according to its very terms, was redundant from 20 March 2010 as would have been clear to anyone who would have read same. The defendant does not even claim that the plaintiff bank ever made verbal or written representations to her late husband, or to her, as regards the preconditions in the February 2010 loan offer. Rather, her asserted defence is based exclusively on the contents of the 19 February 2010 loan offer letter itself. The defendant does not even contend that the plaintiff bank sent a copy to MDS. She asserts that it was "*available*" to him, but she does not even claim that the bank sent it to MDS. The following is what the defendant avers on the matter: "*When Graham Richards of Matheson provided advice on foot of the guarantee on 5th August 2010, the only facility available to him was the February 2010 facility.*" (para. 31 of the defendant's 25 February 2019 Affidavit). As regards the May 2010 loan offer letter, the defendant avers that plaintiff bank "*...wrote to Marcus Senior in relation to a side letter and it appears surreptitiously referred to the May 2010 Facility but did not provide Marcus Senior with a copy of it...I do not believe Marcus Senior had ever seen it as he was careful in managing his affairs and he would have provided it to Graham Richards*" (para. 31 of the defendant's 25 February 2019 affidavit). The foregoing are, in my view, no more than assertions and, regardless of the sincerity

with which they are made, they are assertions unsupported by evidence. Furthermore, nothing turns, for the purposes of the decision which this court must make, on whether MDS did or did not see the February and or May 2010 offer letters. I say this given the very wording of same which I have examined in this judgment and given what cannot be in dispute when one looks at the whole situation and considers the entirety of the documentary evidence which is before the court.

126. Taken at their height, the defendant's averments are to the effect that MDS had the February 2010 loan offer available to him but had no other loan offer available to him. In other words, the defendant contends that her late husband never saw a copy of and was never of the contents of the May 2010 loan offer, being the only operative and binding loan offer on foot of which the bank advanced a loan of €1.65m to the borrowers. Even taking the foregoing at its height, it is not an assertion that any identified or identifiable party representing the plaintiff ever stated in writing or orally that any preconditions in the February 2010 loan offer would, for example (a) bind the bank henceforth, regardless of any superseding of the loan offer in which they were contained or (b) that notwithstanding their inclusion in an offer letter to named borrowers, MDS could rely on same or (c) that even though the explicit terms of the preconditions made clear that compliance was a matter for the "satisfaction of the bank", a different standard – one determined, subjectively, by MDS or by some other party's objective standard – would apply. In short, leaving aside other insurmountable difficulties facing the defendant, there is no evidence of any representations to MDS ever having been made by the plaintiff bank, with reference to the preconditions in the February 2010 loan offer.
127. It cannot be disputed that neither the February, nor the May 2010 loan offer letters were offers to MDS. They were offers made to the borrowers named therein. Nor can it be disputed that what became the only operative loan agreement between the bank and the borrowers, was the offer made on 11 May 2010, which was accepted by the borrowers on 12 May 2010, which offer contains no preconditions. Although success or failure of the grounds of defence do not depend on whether, or not, MDS saw or was aware of the contents of the May 2010 loan offer, it also must be said that the May 2010 loan offer was explicitly referred to in (a) a Side Letter which was sent to MDS on 16 August 2010 and (b) in a letter which was sent by MDS to the bank on 27 September 2010 as well as (c) in an email sent by Crowley Millar solicitors to the bank on 04 August 2010, containing the text of the aforesaid Side Letter.
128. I have carefully examined the decision by Mr. Justice Charleton in *IBRC v. Cambourne* and I am satisfied that it is not authority for the proposition that a waiver by the bank of preconditions in a loan offer to its borrowers avoids the guarantee given by MDS. The guarantee itself is explicit as to the bank's ability to vary terms as between the bank and the borrowers. It will be recalled that Mr. Justice Charleton was clearly of the view that, where a guarantor agrees to an alteration in the creditor debtor relationship, the guarantor is excluded from any entitlement in equity to be discharged from their guarantee. Such is the position here. That is not for a moment to say that the evidence demonstrates that the bank waived conditions. In the manner examined earlier in this

judgment, there is no doubt about the fact that the preconditions were complied with to the bank's satisfaction. A positive averment to that effect is made and this averment is not controverted. It will be recalled that in *IBRC v. Cambourne*, PC argued that a guarantee given by him was not operative because it depended on the contents of facility letters which contained conditions precedent (as to loan to value ratio and property value) which had not been met. It is clear from Mr. Justice Charleton's judgment that the stand alone guarantees were held to be enforceable and the reason was made clear at paras. 54 and 55 of Charleton J's decision, as follows:

"[54] The court must give effect to the terms of that written bargain. Liability to repay is established on the face of the document. The first question is whether the wording of the guarantee separate to the facility letters binds Peter Curistan through that contract to repay the loan. In my view the wording is unambiguous. It refers to current and future liabilities and it embraces borrowings made by Cambourne...

*[55] The second question is whether Peter Curistan may be relieved from his obligation under the guarantee. Circumstances may put a bank on notice, or at least on inquiry, that undue influence may arise as between a debtor and the surety guaranteeing that debt where the relationship between them is non-commercial. If undue influence by the debtor has brought about the guarantee, the surety may be relieved of liability: *Ulster Bank (Ireland) Ltd. v. Roche* [2012] IEHC 166, [2012] 1 IR 765. That defence is not available here. Apart from undue influence, the principles under which a guarantor is entitled to be discharged from liability as a surety arise in equity... A guarantor will often have the relevant rights and obligations defined under a separate contract. Divorced from involvement in any change that the debtor and creditor may make to their arrangements, but depending upon what is known and assented to by the guarantor as to the recourse for the loan, a substantial alteration without the assent of the guarantor in the position in which the guarantor agreed to act as surety may result in inequity. Not every alteration in the debtor and creditor contract is sufficient to require, as a matter of fairness, that the surety be released. The courts will not act on alterations which are insubstantial in the sense that they do not prejudice the surety. The result of an alteration un-assented to by the guarantor is that the creditor puts the enforcement of the guarantee at risk... a guarantor who agrees to such an alteration in the creditor debtor relationship is excluded from any entitlement in equity to discharge of the agreement to guarantee as against him."*

129. In the present case there is a standalone "all sums due" guarantee, being that guarantee executed by MDS on 05 August 2010. It is also beyond doubt that MDS had the benefit of legal advice prior to giving the guarantee in favour of the plaintiff bank. Liability to repay is established on the face of that document and the obligation to pay the plaintiff is unambiguous when one looks at clause 2.0 of the guarantee, entitled "Covenant to Pay". As is clear from the wording in clause 2.1 of the guarantee, MDS took on the obligation to pay on demand to the bank all liabilities then or at any time thereafter due to the bank by the borrower in respect of the facility granted or to be granted by the bank to the

borrower on the account detailed in the guarantee. The account referred to was specified to be account no. 13129997. It is beyond doubt that this is the account number of the loan which was advanced by the bank to the borrower (the latter being MDJ and his wife) of €1.65M, which sum was advanced on 01 November 2010, the borrower having accepted, on 12 May 2010, the bank's 11 May loan offer letter to them. There is no allegation made by the defendant that undue influence arose as between debtor and surety, nor is there a scintilla of evidence in that regard. Thus, it cannot be said that the bank was on notice or on inquiry in respect of that issue and, even if I am entirely wrong in that view, the contemporaneous documentation more than discharges any duty which may have applied to the bank. By that I mean, the bank received a letter dated 29 October 2009 from a very reputable firm of solicitors, written at the behest of MDS, confirming his willingness to make a substantial payment to the bank to reduce his son's liabilities and it is not in dispute that the said sum was to be provided by means of a loan. Indeed, the very next day on 30 October 2009, MDS accepted the bank's loan offer. Moreover, MDS had independent legal advice in respect of the giving of his guarantee. Furthermore, in the 27 September 2010 letter in which MDS confirmed the fact of having obtained independent advice, MDS explicitly stated that his guarantee was executed "*in respect of the Bank of Ireland loan offer to Marcus F. Daly and Patricia Daly of May 2010*". In addition, MDS entered into, on 07 December, 2015, an Agreement to amend mortgage loan offer letter. By doing so, MDS re-confirmed his obligations to the bank in respect of the loan which the bank made to him on foot of the loan offer which MDS accepted on 30 October 2009, which funds he drew down at the end of October 2010. Indeed, MDS reconfirmed his liabilities to the plaintiff on foot of the loan, having acknowledged that he did not get independent legal advice because he understood the agreement he was entering into and was satisfied to sign without such advice and he would never raise the lack of advice as a reason to question same. Moreover, the defendant in these proceedings gave her consent in writing, in the context of section 3 of the Family Home Protection Act, 1976 and signed on 07 December 2015 having confirmed that she had taken or had been afforded the opportunity to take independent legal advice prior to signing the document. It is also a fact that this re-confirmation by MDS, with the knowledge of the defendant, of the former's liabilities to the bank on foot of his loan, was given a full 19 months after demand was made on MDS for payment of the sum of €300,000 on foot of his guarantee, a demand made of MDS by reason of the default by the borrowers in respect of their obligations to the bank.

130. It is also the case that the very terms of the guarantee itself specifically provide that the guarantor agrees to an alteration relationship between the creditor and debtor and, thus, is excluded from an entitlement in equity to discharge the guarantee as against him. If one looks at clause 4.0 in the guarantee given by MDS, entitled "Protective Clauses" one can see that it includes inter alia that: "*The liabilities of the guarantors shall not be affected nor shall this guarantee be discharged or diminished by reason of: (a) the Bank... varying the liability of ... the borrower or ... varying ... any ... facility or transaction in any manner whatsoever*".

Furthermore, clause 4.0(b) makes it clear that the liability of the guarantor shall not be affected by reason of “*any act, omission, neglect, event or matter which would not have discharged or affected the liability of the guarantors had the guarantors been principal debtor...*”. It cannot be argued that the omission of conditions precedent from the facility letter which the borrowers accepted on 12 May 2010 affected the liability of the borrowers in respect of the loan facilities which they availed of. Indeed, it is a matter of fact that the bank obtained judgment against Patricia Daly on 13 March 2017 in the sum of €1,878,078.23 in respect of the loan facilities advanced under the loan agreement which the borrowers accepted on 12 May 2010. In short, the presence or absence from the loan agreement as between the bank and the borrowers, of the pre-conditions which are at the heart of the purported defence to the present proceedings, is something wholly irrelevant to the liability of the borrowers to the bank on foot of the loan facilities advanced to them. That being so, the explicit wording of the guarantee excludes any entitlement in equity for MDS to be discharged from the guarantee. Clause 4.0 of the guarantee goes on to make it clear that the liabilities of the guarantor shall not be affected or discharged by reason of:

“(c) any failure, defect, illegality, disability, incapacity or unenforceability of or in any of the borrower’s liabilities or obligations in respect of the Facility or any security held therefore and such liabilities and obligations shall be recoverable from the Guarantors as primary obligors by way of a full indemnity.”

Thus, it is beyond doubt that the wording of the guarantee explicitly and unambiguously binds MDS to repay to the bank the sum guaranteed and that, having regard to the explicit wording of the guarantee itself, there is no entitlement in equity to discharge the guarantee.

131. It is also true to say that, on the facts of this case, there is no question of the surety having been prejudiced. The documentary evidence before this court demonstrates, beyond doubt, that MDS knew, as of October 2009, that the financial position of the borrowers was very poor. This was known at all material times thereafter. It was known in February 2010 when the bank issued a loan offer to the borrowers which the defendant claims was available to MDS (without specifying who made a copy or its details available). Nothing turns on the foregoing, in circumstances where MDS undoubtedly knew that the borrowers’ financial position was very serious then and continued to be. MDS knew this in May 2010 when the bank issued the 11 May loan offer which the borrowers accepted on 12 May. Nothing turns on whether he had access to either or to both or to none of the loan offers sent by the bank to the borrowers. He knew at all times that the borrowers’ financial position was parlous. He knew that in July 2010 in the run up to the giving of the guarantee. He knew this as of 05 August 2010 when, with the benefit of independent legal advice, he gave a guarantee in favour of the bank. He knew this in September 2010 when MDS confirmed that he had received independent legal advice in respect of his guarantee which, he also confirmed, was given in respect of the May 2010 loan offer letter to the borrowers. MDS knew the borrowers were in financial difficulty when he drew down, at the end of October 2010, his loan from the bank in order to pay to the

bank the sum of €350,000 in part discharge of his son's liabilities, reflecting the agreement MDS negotiated with the bank as evidenced by the October 2009 letter sent by Crowley Millar to the bank at his behest. Furthermore, MDS knew that the borrowers were in severe financial difficulty when he re-confirmed his obligations to the bank on foot of the 30 October 2010 loan agreement when, on 07 December 2015, he entered into an agreement to amend mortgage loan offer letter, an agreement which the defendant also executed having been advised to obtain independent legal advice.

132. In skilled and sophisticated summations made on behalf of the defendant, reliance was placed, *inter alia*, on the following passage from Mr. Justice Charleton's decision in *IBRC v. Cambourne*, wherein the learned Judge stated at para. 58:

"The fact is that when Peter Curistan became aware of the valuation in March, 2009 he did so both in his capacity as guarantor and also as agent for the first defendant. As such, knowledge of the purported waiver or breach of the precondition in the facility letters was communicated to both the corporation and the natural person simultaneously to both the corporation and the person guaranteeing the corporation. Had he, as the guarantor, objected at that point to the advance of facilities and the maintenance of his guarantee in those circumstances, then it was entirely within his power, as agent for Cambourne, to refrain from the drawdown of facilities and instead to make a formal objection to the bank. That he did not do so makes any remedy in equity inapplicable."

133. For the reasons explained earlier in this decision, the very wording of the standalone all sums due which was entered into by MDS excludes any entitlement in equity to discharge of the guarantee as against MDS. That presents an insurmountable problem in respect of the purported defence to the present proceedings. Furthermore, and in the manner analysed when the documentary evidence was looked at in chronological order, it is a fact that, as of 16 August, 2010, the plaintiff bank wrote to MDS and made it perfectly clear that the bank was providing facilities to MDJ and his wife in accordance with the loan offer of 11 May 2010. It is a matter of fact that MDS made no objection at that point to the advance of facilities or to the maintenance of his guarantee in those circumstances. It should be remembered that the loan facilities were not drawn down by the borrowers until three months *after* the bank's 16 August 2010 letter. Furthermore, it was entirely within the power of MDS not to draw down his loan but, instead, to object, knowing that it was the 11 May 2010 loan offer which governed the relationship between the bank and borrowers. The proposition advanced by the defendant to the effect that, despite receiving a letter from the bank which referred to the May 2010 loan offer and despite sending a letter to the bank which also referred to the May 2010 loan offer, MDS did not know it was the May 2010 loan offer that governed the bank's lending to the borrowers, is simply not credible. It is a fact that MDS made no objection and proceeded, over two months *after* the bank's 16 August 2010 letter, to draw down his loan, being the loan offer he accepted on 30 October 2009. Moreover, far from objecting to the borrower's being advanced a loan on foot of the 11 May 2010 loan offer, MDS wrote on 27 September 2010 confirming that fact. That letter was sent before MDS had drawn down

his loan and it also sent before the borrowers had been advanced funds from the bank. Finally, it is appropriate to point out that, on the evidence before the court, MDJ and his wife simply could not obtain facilities from the bank until such time as MDS drew down his loan and paid the €350,000 to the bank. That is clear from the contents of both the February 2010 loan agreement which lapsed and the contents of the 11 May 2010 loan offer accepted by the borrowers on 12 May. In other words, even if the defendant is entirely correct and even if MDS had access to, and only access to the February 2010 loan offer, he knew that this gave him control as to whether the bank would advance funds to the borrowers. Despite this knowledge and this control, it is indisputable that MDS neither objected nor did he decide to refrain from drawing down his personal loan but, instead, proceeded to do so in late October 2010, paid a substantial sum to the bank and, as a consequence, this facilitated the bank advancing €1.65M to the borrowers.

134. It was submitted on behalf of the defendant that MDS did not get an opportunity to object to the drawdown of the funds by MDJ and his wife. Despite the skill with which this submission is made, it is wholly undermined by the facts. On behalf of the defendant it is also submitted that MDS was denied the opportunity to refrain from drawing down his personal loan and, again, this submission is simply unsupported by and wholly undermined by the facts
135. The defendant may feel that what the bank regarded as satisfactory compliance does not constitute compliance to an objective standard as she sees it, or to a standard which she requires or which she believes her late husband would have required. However, the very wording of the preconditions is explicit that compliance was referable to the "*satisfaction of the bank*", not to the satisfaction of any other party. Moreover, the evidence demonstrates conclusively that the bank advanced funds and the borrowers availed of same on foot of the 11 May 2010 loan offer which they accepted on 12 May, the 19 February 2010 offer having, according to its own terms, lapsed by 20 March 2010.
136. Various authorities have addressed the question of conditions precedent in loan agreements. In *Nama v. McNulty* [2013] IEHC 369, Mr. Justice McGovern stated [at 29]:

"The defendants' arguments on the failure to ensure that conditions precedent to the granting of the loan were met, is, in my view, without merit. Insofar as there were a number of conditions precedent which may not have been met, they were all for the benefit of the bank and to protect the bank. They were to ensure that the facility would not be available for drawdown unless the conditions precedent set out in the General Conditions were satisfied. It was within the bank's discretion to waive those conditions or not to insist on them."

I am satisfied that an argument that the conditions in the February 2010 Loan Offer were also for the benefit of MDS as well as for the benefit of the bank is no more than an assertion which is not based on any credible evidence. Furthermore, it is not an argument which is supported by the authorities. In addition, it is an argument which, with respect, can take the defendant no further than the explicit terms of the "conditions precedent" themselves, and these were explicit about the fact that compliance was to the satisfaction

of the bank. It simply cannot be disputed that the bank was, in fact, satisfied as to compliance. Although I am entirely satisfied that nothing turns on the resolution of the issue for the purposes of the decision which this court has to make on the motions before it, taking the wording used in same at face value, the preconditions appear to me to be for the exclusive benefit of the bank and no other party, given that they appear in an offer by the bank to named borrowers and on no less than 3 occasions make it clear that it is a matter for the bank to be satisfied as to compliance with same. It will also be recalled that MDS instructed solicitors to write to the bank on 29 October 2009 in a letter which confirmed, *inter alia*, his commitment to make a very substantial payment to the bank of €360,000 and it is common case that that payment was to be financed via a loan (which MDS accepted the following day) from the bank. The commitment to make the said payment to the bank is set out in a letter written at the behest of MDS which makes no reference to a particular valuation for the borrowers' Stillorgan Road property, nor does the letter refer to audited accounts or make any reference to his son demonstrating earnings or earning potential of a particular value, nor does the letter specify any requirements in relation to Revenue compliance. If one compares the contents of Clause 4 in the October 2009 letter sent by Crowley Miller Solicitors, with the contents of the preconditions in the February 2011 loan offer, one can see that the latter go very considerably further than the former. There is no evidence whatsoever to suggest that MDS was responsible for "setting the bar higher" with regard to information and documentation to be supplied by his son and there is simply no evidence to suggest that it was MDS who was responsible for drafting the conditions precedent which appeared in the bank's February 2010 offer letter. The context in which both the 29 October 2009 letter and the February 2010 offer arose was, of course, that the borrowers' financial position was a very serious one – something MDS was very well aware of. It is in this factual matrix that the preconditions arose and, although it is not necessary for this matter to be resolved - either for the purposes of the present application or, for that matter, at a trial which the defendant contends for (because, no matter how that issue were to be determined, it provides no prospect of any defence to the defendant) - the contents of the preconditions appear to be for the bank's exclusive benefit.

137. In *Zurich Bank v. McConnon* [2011] IEHC 75, Mr. Justice Birmingham stated [at 44]: -

"For my part I can see no basis whatever for the suggestion that clause 18.1 is one on which the borrower can rely. If there was ever any doubt about that and I do not believe there was, any such doubt would be entirely removed by Clause 18.2 which says 'the bank has the right to waive any and all of the conditions precedent'. I regard the suggestion that the defendant is entitled to rely on an alleged failure on the part of the bank to subject the valuations to scrutiny as fanciful."

138. For the reasons detailed in this judgment, I also regard the defendant's assertion that the preconditions in the February 2010 loan provides any prospect whatsoever of a bona fide defence as fanciful. Indeed, it might also be pointed out that the very wording in the February 2010 offer letter anticipated a situation whereby a borrower might breach conditions in the loan offer itself. Part five the "General Conditions" which comprise part

of the 19 February 2010 loan offer set out the General Condition 1(b) and these contain, *inter alia*, the following explicit statement: -

"The waiver by the Lender of any breach of any condition hereof shall not prevent the subsequent enforcement of that condition and shall not be deemed a waiver of any subsequent breach. If at any time any provision hereof is or becomes illegal, invalid or unenforceable, the legality, validity and enforceability of the remaining provisions shall not be affected or impaired."

Thus, the very terms of the February 2010 offer letter, explicitly referred to "*breach of any condition*" and the consequences of "*waiver by the Lender*", making it clear that the enforceability of the remaining provisions in the loan offer would not be affected by any provision being unenforceable. These terms, in my view, create another insurmountable difficulty for the defendant, quite apart from the range of other issues, factual and legal, which entirely undermine the contended for defence.

139. In Breslin & Corcoran's text on "*Banking Law*" (4th Edition 2009) the learned authors say (at 14-219) *inter alia*, the following: -

"Aside from cases of potential undue influence, a lender is under no general obligation to ensure that a guarantor obtains independent legal advice or takes steps to ensure that he or she fully understands the nature of the guarantee being given. It has been held by the Canadian Courts that the bank has no duty to advise a guarantor of the principal debtor's financial circumstances: The mere fact that the bank is seeking a guarantee should make it clear that the principal debtor is a doubtful credit risk. However, if a lender assumes the duty to advise it must do so with reasonable care, otherwise it could be held liable in damages for negligence."

There is no evidence whatsoever before this Court to the effect that the lender took upon itself a duty to advise the guarantor, other than clear evidence that the bank advised MDS to obtain independent legal advice and incontrovertible evidence that MDS did, in fact, obtain independent legal advice. Furthermore, not only was it clear to MDS that the borrowers were a doubtful credit risk by reason of the bank requiring a guarantee from MDS, he and the defendant plainly had additional information to hand, prior to the giving of the guarantee and prior to MDS obtaining a loan from the bank, that the borrowers were in a very difficult financial position. One needs to look no further than the fact of High Court proceedings under record number 2008/2135S which the Governor and Company of Bank of Ireland issued against the borrowers on 14 August 2008 and a motion for judgment which was issued in those proceedings on 11 June 2009. It is beyond doubt that MDS knew about those proceedings as of October 2009, as the Crowley Miller Solicitor's letter written at his behest makes explicit reference to those proceedings and to direct negotiations which had taken place between MDS and the bank against the background of those proceedings and the letter sets out specific terms said to have been agreed by MDS and the bank including the adjournment of those proceedings. In short, not only was it known to MDS at all material times from October 2009 onwards that the borrowers were a doubtful credit risk, he was very clear that the financial

situation was such that they had failed to meet mortgage repayments resulting in legal proceedings. It is against the foregoing background that, as the evidence before this court makes clear, MDS took independent legal advice, as the bank had suggested. Furthermore, this independent legal advice clearly predates the execution of the guarantee by MDS and, in the manner explained in this judgment, it plainly involved engagement as between the borrowers' solicitors and the firm of solicitors providing independent advice to MDS. Andrews & Millett in the "*Law of Guarantees*" (7th Ed. 2015) say, at 15-05 *inter alia*, the following: -

"The creditor is generally under no duty to disclose material facts to the surety. This is because a contract of guarantee, unlike a contract of insurance, is not to be treated as a contract uberrimae fidei (of utmost good faith) ...as a general rule, therefore, the creditor is not obliged to disclose anything he knows which affects the principal's credit, or of any circumstances unconnected with the transaction in which he is about to engage, which renders his position more hazardous, unless the surety makes specific inquiry. The surety bears the primary obligation to inquire into, and determine, all the relevant facts. The policy underlying this general rule, which is that a surety is expected to look after himself, was encapsulated in this further passage from the judgment of Romer LJ in Seaton v. Heath [1899] 1 QB 782 at 793: -

'In general, the creditor does not himself go to the surety, or represent, or explain to the surety, the risk to be run. The surety often takes the position from motives of friendship to the debtor, and generally not as the result of any direct bargaining between him and the creditor, or in consideration of any remuneration passing to him from the creditor. The risk undertaken is generally known to the surety, and the circumstances generally point to the view that as between the creditor and the surety it was contemplated and intended that the surety should take upon himself to ascertain exactly what risk he was taking upon himself.'

Thus, the creditor is generally entitled to assume that the prospective surety will acquaint himself with the extent of the principal's indebtedness, his current financial position and his past track record so that he can fairly assess the risk that he is undertaking. If he could be expected to find out the material facts by exercising due diligence, then as a general rule he will not be able to complain that the creditor did not tell them what they were: Wason v. Wearing 918520 15 Beav. 151."

140. It is uncontroversial to say that MDS agreed to provide the guarantee out of a desire to support his son and daughter-in-law and, in so doing, he was aware that he was taking on risk. The evidence is also consistent with MDS and the defendant being fully aware of their son's financial difficulties in that the defendant positively avers in para. 4 of her 14 November 2019 affidavit, *inter alia*, that: "*I was fully aware of the circumstances in which our son came to us looking for assistance. My late husband and I made our decisions*

jointly and I personally attended with my late husband at meetings in Matheson Ormsby Prentice (as it was then known)."

141. Although there is no general duty on a creditor to advise or disclose information to a guarantor, there is a limited duty: "...to disclose any unusual feature of the contract between the creditor and the debtor which makes it materially different in a potentially disadvantageous respect from what the guarantor might naturally expect", per Irvine J. (as she then was) in *SRI Apparel Limited v. Revolution Workwear* [2017] IECA 226 at para. 24. In that case a guarantor complained that his fellow director and fellow guarantor was also a director of the creditor which was suing on foot of the relevant guarantee. The court found nothing unusual in this scenario. I am entirely satisfied that no unusual feature can be identified in the present case insofar as the contract between the bank and the borrowers was concerned. In *Northshore Ventures Limited v. Anstead Holdings Limited* [2012] CH 31, the Court of Appeal decided that there is no duty to disclose facts or matters which are not unusual features of the contractual relationship between the creditor and the debtor or between the creditor and other creditors of the debtor. Sir Andrew Morritt C. discussed the decision of *Hamilton v. Watson* [1845] 12 CL & F 109 and held that the following propositions of law were established in that case (at para. 14): -

"(1) the creditor is obliged to disclose to the surety any contract or other dealing between creditor and debtor so as to change the position of the debtor from what the surety might naturally expect but (2) the creditor is not obliged to disclose to the surety other matters relating to the debtor which might be material for the surety to know. This is consistent with the fact that a contract of guarantee is not ordinarily a contract uberrimae fidei, such as insurance, where under the insured is required to disclose all facts material to the risk."

In the present case, there was no question of any dealing between the bank and the borrowers which changed the borrowers' position from what MDS might naturally expect.

142. In *Bank of Scotland v. Bennett* (a case considered in *Royal Bank of Scotland v. Etridge* (No. 2 [2002] AC 773, from 871 to 878) Ms. Bennett sought to avoid a guarantee in favour of the bank over the debts of her husband's company. The bank had a valuation of the property charged by the Bennetts to secure the guarantee and a ranking agreement postponing the bank's charge to a charge given to another creditor. This meant that Ms. Bennett's right of subrogation to the position of the bank, in the event that she was called upon to meet the guarantee, were subject to a ranking agreement. Crucially, this was about her knowledge. It was held by Lord Scott of Foscote:

"346. In my opinion, the ranking agreement between the company, the bank and SWIFT falls within the general proposition expressed by Vaughan Williams LJ in London General Omnibus Co. Ltd v. Holloway [1912] 2 KB 72, 79 (see para. 187 above). A surety who pays off the creditor is entitled to be subrogated to the rights of the creditor in respect of the debt in question. And if the creditor in order to discharge the debt, has recourse to security provided by the surety, the same applies. So, in

the present case, if Mrs. Bennett had paid the bank the £150,000 or if the bank had obtained payment by realising its security over 15 Elthiron Road, Mrs. Bennett would have been entitled to the benefit of the bank's rights against the company in respect of the £150,000. These rights would have included the bank's rights under its fixed and floating charges. But those rights were subject to the ranking agreement.

347. Moreover the ranking agreement reduced the amount of the company's assets that would be available for the payment of the company's debts to the bank and correspondingly increased the likelihood that the bank would make a call on Mr. Bennett or Mrs. Bennett, or both, under the guarantee and would enforce its security over 15 Elthiron Road. The ranking agreement did affect the rights of Mrs. Bennett as surety.

348. In my opinion, the bank ought to have disclosed to Mrs. Bennett, or to the solicitor acting for her, the existence of the ranking agreement.

349. The deputy judge thought that the facts regarding the valuation of the factory premises should also have been disclosed to the bank. Here, I do not agree. It is, I think, up to an intending surety to satisfy himself about the value of the principal debtor's assets or the principal debtor's credit worthiness."

143. The present case involved no ranking agreement or any other unusual feature which reduced the amount of the borrowers' assets that would be available for the payment of the borrowers' debts to the bank and correspondingly increased the likelihood that the bank would make a call on MDS under the guarantee. There was no unusual feature in the present case which changed the position of the borrowers from what MDS, as guarantor, might naturally expect. An unusual feature cannot merely be an exposure to liability. That is a "given" for any guarantor who provides a guarantee and, knowing that the financial position of his son and his daughter-in-law was plainly a poor one, MDS could only have known that giving a guarantee involved a risk that the guarantee might be called upon. Indeed, it is an uncontroverted fact that, during his lifetime, the guarantee was called on and, in response, MDS never asserted that it was not valid and binding or that it could be set aside by reason of the grounds advanced by the defendant in opposition to the plaintiff's motions. For something to constitute an unusual feature, so as to give rise to an obligation on the bank to disclose it to a surety, must surely be something which interferes with the rights of a guarantor, qua guarantor. There is nothing of that sort in the present case.

144. Taking the defendant's averments at their height, it is nowhere claimed that MDS relied on the preconditions in the February 2010 loan offer when MDS, with the knowledge of the defendant, entered into the Agreement to Amend Mortgage Loan Offer Letter which MDS accepted on 7 December 2015. This presents another insurmountable problem for the defendant, insofar as opposing the plaintiff's claim with regard to the obligations of MDS under the loan he availed of. There is no suggestion that the bank represented, much less misrepresented, anything whatsoever to MDS, in 2015, as regards his son's

earnings, earning capacity, revenue situation or with regard to the value of the Stillorgan property. The contents of the "Agreement to Amend Mortgage Loan Offer Letter", which comprised the bank's 04 November 2015 offer, which offer MDS accepted on 07 December 2015, are clear and unambiguous. They are consistent, and only consistent with MDS acknowledging and re-confirming his liability to the bank on foot of his loan and availing of an extension of the relevant term by 36 months on the basis that he was liable for the entire sum due and that his monthly liability in terms of loan repayments would increase. It did, in fact, increase and MDS did, in fact, make all increased loan payments on a monthly basis until his passing.

145. Earlier in this decision, I referred to the recent judgment of the Court of Appeal in *AIB v. Cuddy*. One of the grounds of defence advanced by Mr. Cuddy was that the defendant was induced to enter into a guarantee in favour of the plaintiff bank by means of a representation to the effect that his liability under that guarantee would be limited to recourse to the defendant's warehouse in Oranmore, Co. Galway, thus giving rise to a collateral contract to that effect. As Collins J. explained, there was an affidavit before the court from Mr. Cuddy to the effect that identified officers of the plaintiff bank assured him that recourse on foot of the guarantee would be limited to the defendant's Oranmore warehouse "*and nothing else*". Collins J. went on to say that: -

"Significantly, the essential thrust of that evidence is supported on affidavit by Mr. Comerford, the person who was acting as Mr. Cuddy's financial advisor at the relevant time. Mr. Comerford also swears that when he queried the reference in the sanction letter issued by the Company to a guarantee being required from Mr. Cuddy, he was told by Mr. Byrne that the bank's lending department had requested that the deal would be set up in that way and that the paperwork relating to the guarantee would be limited to the warehouse and that AIB would have no further recourse against Mr. Cuddy. As a matter of fact, of course the guarantees subsequently executed by Mr. Cuddy were not limited to the Oranmore warehouse but Mr. Cuddy avers that he believed that those documents reflected the discussions he had with the bank. Those averments are not directly denied but both AIB officers averred that they did not have authority to offer any assurance to Mr. Cuddy and invite the court to infer that they did not do so".

I think it is appropriate to contrast the evidence before this Court with the evidence referred to in *AIB v. Cuddy*. In the present case there is not even an averment that any named individual on behalf of the bank ever represented to MDS, or to the defendant, that it would only offer loan facilities to MDJ on the basis of compliance with the conditions precedent in the February 2010 offer letter. The defendant does not even aver that the February 2010 offer letter was sent by the bank to MDS. The furthest she goes is to aver that the February 2010 offer letter was "*available to*" MDS (without saying who made it available to him) and that the February 2010 loan offer was the only loan offer available to MDS when he gave a guarantee in favour of the plaintiff bank. In addition, the explicit wording of the February 2010 loan offer to the borrowers is that it would lapse after 30 days and it is incontrovertible that the loan offer on foot of which the bank

advanced €1.65 million to the borrowers was that of 11 May 2010, as accepted by the borrowers on 12 May 2010. Moreover, the very terms of the conditions precedent in the February 2010 loan offer make it clear that satisfaction with same was a matter for the bank, not MDS. Nowhere does the defendant claim that there was ever a representation to MDS, or to her, that even if the bank regarded the conditions as having been complied with to its satisfaction (and the uncontroverted evidence in the present case is that the bank was satisfied), the bank's satisfaction as to compliance on the part of the borrowers was subject to the views of or standards to be determined by MDS. Nowhere does the defendant assert that the bank ever agreed that it would not issue a further loan offer to the defendants if the February 2010 loan offer lapsed without having been accepted. Nowhere does the defendant claim that the bank ever agreed that it would never make an offer of loan facilities to the borrowers which did not contain the pre – conditions set out in part 3 of the February 2010 loan offer. In *AIB v. Cuddy*, not only did the defendant identify officers of the plaintiff bank who were said to have given the assurances which Mr. Cuddy sought to rely upon, it was of obvious significance to the Court of Appeal that a second deponent, a Mr. Comerford, corroborated the defendant's assertions. The defendant is the only person who has sworn affidavits in opposition to either of the plaintiff's claims in the present proceedings. At para. 64 of his judgment, Collins J. stated that: -

"Where parties have entered into a written agreement that, prima facie, governs their legal relationship, it is reasonable to assume that such agreement is binding and enforceable in accordance with its terms. Significantly more than a bare statement to the contrary is required to displace that assumption".

146. In my view, this court has been presented with what can fairly be described as no more than bare statements which assert that carefully drafted documents which, in their own terms, are explicit about the importance of legal advice being taken before they are entered into and which, on their face, are binding and enforceable, are not so. No credible evidence has been put forward in support of the assertions made by the defendant. In *AIB v. Cuddy*, the learned judge in went on to emphasise that the threshold for a defendant seeking to avoid summary judgment is, of course a low one and does not require the defendant to produce "cogent evidence", but it is beyond doubt that the relevant authorities stress the requirement for "credible evidence" in the sense indicated in those authorities in order for this Court to be satisfied that the defendant had cleared the relatively low bar of establishing an arguable defence, namely a fair and reasonable probability of having a real or bona fide defence. In light of the evidence before the court in *AIB v. Cuddy*, Collins J. took the view that it was not clear that Mr. Cuddy had no defence but he went on, in para, 75: -

". . . to observe that (i) The details of what is said by Mr. Cuddy and Mr. Comerford;

- (ii) The availability of the evidence of Mr. Comerford (a factor which, in itself, is of very significant weight in my view) and (iii) The fact that the sole security sought*

by AIB in connection with the guarantee was in respect of the warehouse led me to conclude – with some hesitation – that the evidence here is more than mere assertion and, exceptionally, is sufficient to warrant leave to defend being given on the limited recourse ground, even in the absence of supporting documentary material”.

147. The facts in the present case are entirely different and, in my view, taking the entirety of the defendant’s averments at their height, they fall well short of what could fairly be considered to be credible evidence before the court, in the sense indicated in the authorities, as would entitle the defendant to leave to defend. In my view, the defendant has done no more than made assertions, unsupported by evidence and, in the manner examined in this judgment, are contradictory and inconsistent with uncontested facts and the contents of uncontested contemporaneous documentation. It is these assertions which the defendant tenders as the basis for the defence she seeks to put forward. That, in light of the authorities, is insufficient. Having very carefully looked at the entirety of the situation I am satisfied that the defendant has not even established the possibility, much less the probability, of having a real or bona fide defence.
148. Costello J. delivered a separate judgment in *Allied Irish Bank v. Cuddy*, agreeing with the judgment of Collins J. and endorsing the principles to which he referred. In a very succinct but no less useful summary of the jurisprudence, the learned judge stated, with regard to the proper approach at the summary judgment stage, that: - “*. . . it must be very clear that the defendant does not have an arguable case*”. That is a view I have come to in the present proceedings for the reasons detailed in this judgment.
149. In para. 4 of her judgment, Costello J. stated inter alia that: -
- “ . . . if the sole evidence before the court was that of the appellant, the totality of the evidence in support of this defence would amount to “mere assertions” which would be incapable of satisfying the low threshold to be met in order that a case be remitted to plenary hearing. However, I am persuaded that the evidence of Mr. Comerford’s affidavit, as set out in the judgment of Collins J., when taken with that of the appellant, just about satisfies the low threshold necessary to remit the proceedings to plenary hearing”.*
150. In the present case there is a stand alone guarantee, dated 05 August 2010, on the face of which MDS was, and his estate is, liable to repay the sum guaranteed. There is also a loan agreement which MDS entered into on 30 October 2009, pursuant to which the bank advanced him monies the following year and on the face of which agreement MDS was, and his estate is, liable to repay the outstanding sums. Furthermore, MDS re-confirmed his liabilities to the plaintiff bank in 2015 when he, by agreement with the plaintiff, extended the term for repayment of the loan by 36 months and took on an increased obligation insofar as monthly repayments were concerned, making each and every payment due in relation his loan until his death. The defendant also signed the 2015 agreement. The averments made by the defendant, it is fair to say, fly in the face of the explicit contents of all the foregoing documents and, indeed are inconsistent with the

contents of all the contemporaneous written evidence. It is also the case that there is not even an averment made, first hand, by anyone said to have received a representation from the plaintiff bank, be it written or oral of the type the defendant contends for and her grounds of defence are based, it is fair to say, exclusively on what is contained in the a 19 February 2010 loan offer letter to the borrowers which was not accepted, is not the operative loan agreement and which, on its face, lapsed as of 20 March 2010. It is fully accepted that the bank issued a February 2010 loan offer letter, but the defendant does not even aver that the bank furnished it to her late husband, only that it was "available to him". On its terms, it is a loan offer directed, not to MDS, but to the borrowers. Nor is any claim made that there were any oral representations which were relied on, much less any affidavit from any second deponent who asserts that any representation was made.

Given that nearly 2 ½ years elapsed between the plaintiff making a call on MDS, on 03 February 2016, to pay the sum guaranteed, and the death of MDS on 04 November 2016, there was plainly adequate time for MDS to raise – but he never did raise - the grounds which the defendant in the present proceedings contends amount to a defence to both the guarantee claim and the claim on foot of her late husband's loan.

151. Taking into consideration the totality of the evidence, I am satisfied that what the defendant asserts by way of grounds of defence does not meet the low threshold necessary to remit either motion to plenary hearing. There are no disputes of fact, the resolution of which are material to success or failure. Nor are there issues of law which require to be determined at a plenary hearing. The cases are, in reality, straightforward and, despite the great skill and commitment with which Senior Counsel for the defendant urges that a plenary trial is required, I am satisfied that it is very clear the defendant has no defence. Having applied the Harrisrange principles, (i) to (xii), a just result is achieved by granting acceding to the plaintiff's applications and refusing leave to defend.

Conclusion

152. It is uncontroversial to say that, from 2008 onwards, a global financial crisis adversely impacted on countless individuals. It is equally true to say that, regardless of how hardworking, professional and eminent one may be, these qualities will not necessarily prove to be a "reliable vaccine" against potential financial difficulties. Market forces and outside events can and sadly do adversely affect borrowers, regardless of their talents, and the court could have nothing but sympathy and respect for those in such circumstances, including those who have featured in these proceedings.
153. On a human level, it may well be understandable that a defendant would wish to oppose a plaintiff's claim but, for the reasons explained in this judgment, I am satisfied that the assertions made by the defendant are no more than that. They can fairly be described as bare or mere assertions which are unsupported by evidence and, when the whole situation is looked at, the asserted grounds of defence are fatally undermined but the evidence before this court. The defendant has not satisfied this Court that there is a fair or reasonable probability of the defendant having a real or bona fide defence. It is very clear that the defendant has no defence to the plaintiff's claims. That is not for a moment to suggest that the defendant has acted other than bona fide. The defendant may well

believe that her late husband was taken advantage of by the plaintiff bank and that a valid defence exists. The sincerity which such a view is held is not, however, the test which this Court must apply on the present applications. Regardless of how sincerely the defendant holds her views and makes her averments, the evidence wholly undermines the grounds of defence contended for and it also must be said that the evidence before the court wholly undermines the assertion that the bank acted in an unfair or untoward manner towards the defendant's late husband.

154. The strength of feeling on the part of the defendant is clear from her affidavits and from the contents of a letter sent by her solicitors, Messrs Vincent and Beatty, on 05 October 2017 which suggested, inter alia, that the bank sought to improve its financial position and to ensure it did not suffer a loss as a result of what is described as "*imprudent lending*" to the borrowers, with the claim being made that the bank's action to minimise its losses was taken "*at the sole expense of one of its other customers Marcus Snr.*". An assertion was also made that pressure was brought to bear on MDJ to have a family member, specifically his father, provide financial support and it is also asserted, on behalf of the defendant, that the plaintiff bank "*demand[ed] the guarantee from Marcus Snr.*" The letter from the defendant's solicitors also referred to what it described as "*...the unorthodox steps taken by the bank which were grossly unfair, misrepresentative, misleading and in breach of its duty of care to Marcus Snr.*" The foregoing are very serious allegations and, in fairness to the plaintiff, it has to be said that there is no evidence whatsoever before this Court which supports any of the foregoing assertions which were made on behalf of the defendant.
155. For the reasons detailed in this judgment, I find in favour of the plaintiff in respect of both related applications, satisfied that a careful consideration of the totality of the averments and material before this Court reveals that it is very clear the defendant has no defence to the proceedings. I am satisfied, also, that notwithstanding the cautious approach to be taken by a court to summary judgment applications, it would be unjust to refuse either application, having carefully considered the matter in light of the relevant authorities. It will be recalled that the final of the 12 principles outlined by McKechnie J. in *Harrisrange* was as follows: "*(xii) The overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter Judgment or leave to defend, as the case may be.*" I am entirely satisfied that a just result in the present case is to grant the relief sought by the plaintiff in both motions.
156. I also want to say that it would be no kindness to the defendant if this Court were to refuse the present applications for summary judgment and to permit cases, where it is very clear that no defence exists, to proceed to plenary hearing with all the additional demands of time, effort, and costs which that would entail for the defendant, as well as for the plaintiff, to say nothing of the additional demands which this would place on the scarce resources of the court system.

157. In conclusion, for the reasons given in this decision, the plaintiff is entitled to judgment in both motions and I will hear counsel in respect of the specific terms of the relevant orders.
158. As to the quantum in respect of the judgment to which the plaintiff is entitled, it is averred in para. 22 of Mr. Pullan's 03 July 2019 affidavit in the loan proceedings, that the sum of €302,552.46 was due and owing to the plaintiff from the defendant on the loan account over and above all just credits and allowances, as of 25 June 2019, with further interest accruing from 26 June 2019 at the daily rate of €38.39. In the circumstances it is appropriate to grant judgment in favour of the plaintiff in the sum of €302,552.46 together with further interest, at the daily rate of €38.39, from 26 June 2019 up to the date of judgment in respect of the plaintiff's proceedings under record number 2018/1505S.
159. As regards the plaintiff's claim in the guarantee proceedings, it is averred at para. 14 of Mr. Pullan's 03 July 2019 affidavit that the sum of €373,213.80 was due and owing to the plaintiff from the defendant under the guarantee over and above all just credits and allowances, as of 25 June 2019, and remains so due and owing as of the date of the swearing of that affidavit, with further interest accruing, from 26 June 2019 at the daily rate of €36.99. Thus, it is appropriate to grant judgment in favour of the plaintiff for the sum of €373,213.80, together with interest, at the daily rate of €36.99, from 26 June 2019 up to the date of judgment, in respect of the plaintiff's proceedings under record number 2015/1741S.