THE HIGH COURT

[Record No. 2014/1125S]

[2024] IEHC 252

Between

EVERYDAY FINANCE DESIGNATED ACTIVITY COMPANY

Plaintiff

-and-

JOAN FLOOD

Defendant

JUDGMENT of Ms. Justice Stack delivered on the 26th day of April, 2024.

Introduction

1. This is an application brought by the plaintiff ("Everyday") for liberty to enter judgment against the defendant in the sum of €11,637,422.35. The sum is claimed on foot of two Guarantees executed on 25 May, 2007 by the late John Joseph (also known as "John J." or "J.J.") Flood, deceased ("the Deceased"). The first guarantee was in the sum of €1.5m and provided security for an Overdraft in the amount of €1.5m to be afforded to the Deceased's three sons, David, Tom and Alec (who engaged in property development as the Flood

Partnership), and the second was in the sum of €10m and related to a loan in the amount of €12,715,000 in favour of Tom and Alec Flood.

2. The Deceased had previously, on 2 May, 2007, executed an *"all sums due"* Deed of Charge in favour of Allied Irish Banks ("the Bank") which is registered as a burden on Folio 5536F, County Meath. On 2 May, 2007, the Deceased had also executed a Letter of Guarantee in favour of the Bank, but this guarantee was, for reasons set out below, replaced by the two Guarantees dated 25 May, 2007, on which the plaintiff sues in these proceedings.

3. The defendant is the widow of the Deceased and is sued in her capacity as his legal personal representative. The proceedings were originally issued on 24 April, 2014, against an administrator *ad litem* appointed for the purposes of allowing Everyday to sue the estate but, as a Grant of Probate had issued to the defendant on 29 October, 2014, by Order made 14 July, 2015, the widow of the Deceased was substituted as defendant. The defendant is the sole executrix and sole beneficiary named in the Will of the Deceased.

Factual background

4. The Deceased for many years, until his retirement in 1994, operated a successful quarrying business from lands at The Murrens, Oldcastle, County Meath. He lived with his wife, the defendant, for many years in their family home which was adjacent to the factory. The existing quarry consists of approximately 59 acres of quarry lands which have been exploited for their reserves for many years. However, there are a further 12 acres of agricultural lands containing unexploited reserves. All of these lands, together with a substantial dwelling house which was, up to the death of the Deceased, the family home of the Deceased and the defendant are comprised in Folio 5536F, County Meath.

5. The family home lies to the north of the exploited lands and to the south of the unexploited lands and its entrance is obviously visible as one approaches the entrance to the existing quarry by means of the bye-road running off the R135 Oldcastle to Castlepollard Road.

6. The Deceased became the sole registered owner of the lands comprised in the Folio in 1970, when he apparently inherited the lands from his father. As so frequently happens in that situation, the family home was not put into joint names with his wife. When the charge was executed on 2 May, 2007, it does not appear to have been appreciated by the Bank, the Deceased, or the solicitor whom the Deceased attended for the purposes of obtaining independent legal advice in connection with the execution of the Deed of Charge, that the family home was comprised in the lands registered in that Folio. There are references in the documentation emanating from the Bank in connection with the loans advanced to the Flood Partnership and to Tom and Alec Flood to *"quarry lands"* and it seems to have been assumed that the Folio did not include the dwelling house. I refer to this further below in the context of considering the adequacy of the legal advice furnished to the Deceased on 2 May, 2007.

7. As a result, the Charge was executed and was registered as a burden on the Folio without ever obtaining the prior written consent of the Deceased's wife, the defendant herein, as required by s. 3 of the Family Home Protection Act, 1976. This will no doubt be a central issue in possession proceedings which are pending in Meath Circuit Court. Everyday has confirmed it is not seeking possession of the family home, to include one acre of curtilage thereof and any required access.

8. While there is a Counterclaim seeking that the Charge would be declared void for failure to obtain the consent of the defendant to its creation, it was not disputed in oral submissions by counsel for the defendant that this was a matter for the Circuit Court. I will not therefore make any finding about the validity of the Charge.

9. While it is true that the Family Home Protection Act, 1976, is not material to these proceedings as the application before this Court does not depend on the validity of any *"conveyance"* of the family home, the question of how the Deceased came to consent to the charging of the entire of the lands in the Folio is bound up, as a matter of fact, with his consent to give the Guarantees upon which the plaintiff relies in these proceedings and therefore the circumstances surrounding the signing of the Deed of Charge dated 2 May, 2007, are considered in some detail in this judgment.

10. The quarry was originally run by the Deceased but he retired in 1994 and the quarry was taken over by his son, David Flood, who incorporated JJ Flood & Sons (Manufacturing) Ltd. ("the Company"), of which he is 99% shareholder. By Lease made 8 November, 1996, between the Deceased of the one part and the Company of the other part ("the Lease"), the Deceased demised that part of the lands comprised in Folio 5536 as are outlined in red on the map attached to the Lease for the term of 7 years from 1 November, 1996. It appears that the Company overheld and thereafter held as monthly tenant pursuant to Clause 3 (c).

11. The evidence was that the Company paid rent to the Deceased and this appears to have been his and his wife's principal source of income. While the lands were never signed over by the Deceased to David Flood, David Flood apparently still runs the Company on the working quarry lands comprised in the Folio and presumably his income is dependent on the plaintiff failing to obtain possession of those lands or to register judgment against the estate on foot of any judgment obtained in these proceedings.

12. It is not clear from the black and white copy furnished to me which part of the Folio is outlined in red and, specifically, whether it applies to the 59 acres currently being worked as a quarry or to the entire 71 acres excluding the Deceased's family home, though David Flood suggested in his evidence that it was the existing quarry of 59 acres. In any event, the Lease is very explicit that only part of the Folio is being leased. Unfortunately, however, he seems to

have equated the leased lands with the entire Folio, and this resulted in the Bank being told that the entire Folio could be offered as security. This is not entirely clear from the evidence but this seems to have been the reason that the *"quarry lands"* were equated from the beginning with the entire Folio.

13. The background to the provision of the Guarantees is that David, Tom and Alec had formed the Flood Partnership in or about 2002 and initially conducted a successful business in the course of which they bought, refurbished, and sold on several *"pre-'63s"* (that is, older houses divided into flats and bedsits) in Dublin 6. These investments had been financed by Bank of Scotland Ireland ("BOSI").

14. In early 2007, they spotted what they believed to be a good investment opportunity in the form of a development site for sale on Railway Avenue, Sutton ("the Sutton Site"), which was being sold by Dublin City Council and which comprised 1.97 acres of development lands.

15. David and Alec viewed the Site on 9 February, 2007. In order to finance the acquisition of the Sutton Site, the Flood Partnership had to borrow all of the purchase price, together with the funds required for stamp duty and legal fees. BOSI were willing to advance the necessary loan but, while David and Alec were inspecting the Sutton Site, they got an unsolicited call from Ms. Christine Meade, the Relationship Manager at the Navan Branch of the Bank, and who had dealt with the Company and David Flood from about 2002 or 2003.

16. Ms. Meade was keen to procure the business on behalf of the Bank and offered a preferential lending rate and a substantially reduced arrangement fee. However, she did not have authority herself to offer a loan of this size. In a conversation with Ms. Meade on 23 February, 2007, David Flood suggested to Ms. Meade that the quarry lands leased by the Company from his father could be offered as security.

17. A sum of €250,000 was advanced by the Company on 28 February, 2007, for the purposes of paying a deposit on the Sutton Site, the Flood Partnership submitted final tender

documents on 1 March 2007 and a draft of a further sum of €500,000 was drawn from the Partnership Account held with the Bank in its Navan Branch on the same date, again for the purpose of covering the *"preliminary deposit"* on the Sutton Site. The Flood Partnership's bid of €11,600,000 was accepted by the Vendor, Dublin City Council on 7 March, 2007.

18. In the interim, the Bank issued Heads of Terms on 28 February, 2008, in favour of the Flood Partnership. This indicated that two loan facilities would be made available. The first was a prime rate loan for €13,700,000 for the purpose of assisting with the purchase of the Sutton Site, and the second was an overdraft facility in the amount of €1,500,000 for the purpose of working capital. It also indicated that the following securities were to be provided prior to or in tandem with drawdown:

a. An all sums charge to be executed by David Flood of lands comprising 11 acres, 0 roods and 20 perches, comprised in Folio 5853, County Meath and registered in his sole name;
b. An all sums charge over the Sutton Site, to be vested in the names of the Flood Partnership;
c. A letter of guarantee for €10,000,000 to be executed by the Deceased in favour of the Bank for the obligations of the Flood Partnership, which was in turn to be supported by the following charge;
d. An all sums charge executed by the Deceased over lands comprising 71 acres, 3 roods and 20 perches, comprised in Folio 5536 and registered in the sole name of the Deceased.

19. The first letter of sanction issued from the Bank on 13 April, 2007. This offered two facilities, an overdraft facility of €1,500,000 for the purposes of working capital, and a loan in the total amount of €12,715,000. All three brothers were named as borrowers. One of the conditions attached to the facilities offered in this letter of sanction was that the Deceased would, having obtained independent legal advice, provide a letter of guarantee in the sum of

€10,000,000. This was to be supported by a security to be specified in a letter issuing directly to the Deceased.

20. The copy letter of sanction of 13 April 2007 put in evidence in the proceedings was never accepted by the Flood Partnership or any member of it and remains unsigned. It was subsequently replaced by separate letters of sanction relating to the overdraft (9 May, 2007) and the loan (21 May, 2007).

21. However, in the interim, on 2 May, 2007, the Deceased had already provided a guarantee in the amount of €10,000,000, as required by the first letter of sanction, and had also executed a Charge over the entire of Folio 5536F in favour of the Bank. This was effective to charge the land with, *inter alia*, *"all amounts, liabilities, obligations (either actual or contingent) which the [Deceased] may owe to [the Bank] now or at any time in the future in whatever currency and in any manner whatsoever under any guarantee indemnity or other contract of surety…."* This Charge was subsequently registered as a burden on the Folio and remains in place. This guarantee and the Charge were executed by the Deceased having taken legal advice from Mr. Martin Cosgrove of A.B. O'Reilly, Dolan & Co., Solicitors.

22. In cross examination of Ms. Meade, a position paper prepared by the Bank recording a meeting between Christine Meade and the Flood Partnership which appears to have taken place at the Navan Branch of the Bank on 2 May, 2007, was put in evidence. This records that the 11 acres to be offered as security by David Flood would not be available as he was in the process of separating from his wife and it was said that she would not sign the requisite Family Home Protection Act declaration.

23. The Flood Partnership were also telling the Bank that David's name could not appear on the title to the Sutton Site, as otherwise it would form part of his assets for the purposes of the divorce proceedings. It had therefore been agreed between them that only Alec and Tom's names would appear on the title.

24. At this point, it was still proposed that all three members of the Flood Partnership would be named as borrowers in the loan agreement. The primary purpose of position paper drawn up by Ms. Meade and her colleague appears to have been to recommend the sanctioning of the loan, notwithstanding the non-availability of David Flood's 11 acres as security, on the basis that the required loan to value ratios could still be achieved. The amendments to the loan offer were approved by a more senior official within the Bank, Mr. Murphy, on 8 May, 2007.

25. A letter of sanction in relation to the Overdraft Facility then issued on 9 May, 2007, from the Bank to the Flood Partnership. This stated that the Overdraft Facility was to be secured by an all sums legal charge over the Sutton Site which was to vest in the joint names of Tom and Alec Flood. The Overdraft Facility was also to be supported by a Letter of Guarantee from the Deceased in the amount of €1,500,000. This Guarantee was in turn to be supported and the required security was to be specified in a separate letter to the Deceased. It was a special condition of the loan offer that the Deceased would obtain independent legal advice prior to providing the guarantee.

26. On 15 May, 2007, Ms. Meade's assistant contacted Mr. Murphy by email, advising that David Flood had informed the Navan Branch that his name should be removed from the loan also, although the overdraft should remain in all three names. Ms. Meade's assistant advised Mr. Murphy that, in order to ensure that the further amendment did not affect the Bank's security, it was proposed that the bank would seek a letter of guarantee from David Flood for the full amount. This letter of guarantee would not be supported by any security. However, it was also proposed that the guarantee of 2 May, 2007, would be replaced with two separate Guarantees to be provided by the Deceased: one in the amount of €1.5m guaranteeing the liabilities of David, Tom and Alec in respect of the overdraft, and another in the amount of €10m in respect of the loan facility to Tom and Alec. These amendments were approved by Mr. Murphy on 21 May, 2007.

27. A letter of sanction in relation to the loan facility then issued to Alec and Tom on 21 May, 2007. This offered a loan in the amount of €12,715,000 to fund the purchase of the Sutton Site together with associated stamp duty and legal fees. There were several special conditions. These included:

a. a condition that an independent professional valuation would be carried out on the security being offered,

b. that the land survey being carried out by RJD Surveys Ltd was to be provided to the Bank *"on quarry lands being offered as security".* This condition added that the Bank would then appoint an independent valuer to carry out valuations on the said lands.

c. that the Deceased would obtain independent legal advice prior to providing a letter of guarantee for €10,000,000.

28. This letter of sanction stated that the following security was required:

a. An all sums legal Charge on the Sutton Site;

b. A letter of guarantee from the Deceased €10,000,000 to be executed for the obligations of Tom and Alec which was to be supported. It was indicated that a separate letter to the Deceased would issue confirming the security required to support the guarantee; and

c. A letter of guarantee from David Flood for €12,715,000.

29. As a result of the amendments made to the letter of sanction of 13 April, 2007, the guarantee executed by the Deceased on 2 May, 2007, which named David, Tom and Alec as the relevant customers, no longer met the requirements of the Bank. Accordingly, Ms. Meade wrote to Mr. Cosgrove by letter which was received in the offices of A.B. O'Reilly, Dolan & Co. on 21 May, 2007. This letter advised that fresh Letters of Guarantee were required: one in the amount of €10,000,000 in respect of Tom and Alec's liabilities, and one in the sum of €1,500,000 in respect of the overdraft afforded to David, Tom and Alec. It also stated that the

Bank would continue to rely on the all sums legal charge over *"Land Certificate Folio 5536"* vesting in the name of the Deceased, in support of the Guarantees.

30. Accordingly, on the following Friday, 25 May, 2007, the Deceased attended again at the offices of A.B. O'Reilly, Dolan & Co. for the purpose of executing fresh Letters of Guarantee. This time, he met Mr. Niall Dolan, solicitor, who is now deceased.

31. Ultimately, the entire property development scheme failed. The Sutton Site was eventually sold by the Bank in for far less than the purchase price, meaning that the security is being called in to repay the loan, and judgment has been entered against David and Alec on foot of the relevant loans and David's guarantee. For the purposes of these proceedings, it should be noted that a letter of demand was sent to the Deceased on 15 July, 2010. The Deceased had by then been diagnosed with Alzheimer's and was living in a nursing home. His son, David Flood, says that he collected his father's post as normal and never told him of the letter. He died on 29 April, 2012, just a few weeks prior to his 83rd birthday. According to David, he never discovered that the Bank was moving against him to enforce the Guarantees.

Legal Issues

32. These proceedings were originally commenced by summary summons but were remitted to plenary hearing after affidavits were exchanged. These included an affidavit of 27 January, 2016, sworn by David Flood, which contain very significant assertions of fact, and which will be referred to further below. While they are not admissible as evidence at this stage of the proceedings, they were properly put to witnesses as earlier statements by them on oath, for the purpose of exploring credibility. Pleadings were exchanged and there are a number of defences pleaded in respect of the Guarantees:

a. That the Deceased lacked capacity on the date of execution of the Guarantees and that the Bank knew or ought to have known of his lack of capacity, such that the Guarantees are voidable against the Bank's successor-in-title, Everyday;
b. That the Deceased was subjected to undue influence by his son, David Flood, and that the Bank had actual and/or constructive notice of this;
c. That the provision of the Guarantees constituted an unconscionable bargain and/or an improvident transaction;
d. That the Deceased did not obtain any or adequate independent legal advice; and
e. That the Bank breached an alleged contract with the Deceased and/or its duty of care to the Deceased in misrepresenting to the Deceased the true value of the quarry lands which the Deceased was to offer as security for loans advanced to his sons. This is said to be a breach of s. 41 of the Consumer Credit Act, 2007, and ss. 30 and 38 of the Consumer Credit Act, 1995.

33. These defences can, essentially, be grouped into three: first, whether the Bank knew or ought to have known that the Deceased was suffering from incapacity to provide the relevant Charge and Guarantees such that they are voidable as against the Bank's successor, Everyday; secondly, whether the Charge and Guarantees are liable to be set aside as being procured by the undue influence of David Flood and/or on the basis that they constituted an unconscionable bargain or improvident transaction; and thirdly, whether the estate has any defence by reason of the Deceased's alleged status as *"consumer"*.

34. The defendant in her written submissions relied upon s. 41 of the Consumer Protection Act, 2007, (which commenced on 1 May, 2007: see S.I. 178 of 2007). In response to the pleaded case, the plaintiff cited *Allied Irish Banks v. O'Callaghan* [2020] IECA 318 for the proposition that, given the nature of the loans, the Deceased could not be regarded as a *"consumer"* within the meaning of the 2007 Act.

35. However, the written submissions do not set out how s. 41 might be said to have been breached and no oral submissions were made on this point. As a result, this does not add anything to the defendant's case and I do not need to consider it further.

36. The first two issues involve disputes of fact surrounding the alleged incapacity of the Deceased and whether the Deceased received adequate, independent legal advice prior to executing the Guarantees.

37. As the alleged incapacity of the Deceased is not only an issue in its own right but is also material to whether or not it can be said that the Deceased executed the Guarantees by reason of the undue influence of David Flood, and to whether the transactions in question could be said to be improvident or unconscionable, it is convenient to deal with the issue of capacity first.

I. Capacity

38. It was pleaded by the defendant that her husband lacked capacity at the time he executed the Guarantees and that they were therefore void and cannot not be relied upon by Everyday.

39. The law in this area is that a contract made by a person who lacks capacity is valid unless the other party to the contract knew or ought to have known of the incapacity, in which case it is voidable: see *Imperial Loan Co. v. Stone* [1892] 1 Q.B. 599. This was recently restated by the United Kingdom Supreme Court in *Dunhill v. Burgin (Nos. 1 and 2)* [2014] 1 W.L.R. 933, at para. 1, as a correct statement of the law in England and Wales on this point.

40. The plaintiff has referred me to *Hart v. O'Connor* [1985] A.C. 1000, a Privy Council decision in an appeal from the New Zealand Court of Appeal, in which the rule was restated and it was noted that it was consistent with the position in Australian law as determined by the

High Court of Australia in *McLaughlin v. Daily Telegraph Newspaper Co. Ltd. (No. 2)* (1904) 1 C.L.R. 243.

41. The rule in *Imperial Loan Co. v. Stone* therefore appears to be well-established but, most importantly for the purposes of this judgment, was settled law prior to independence and I have not been directed to any Irish authority which questions it.

42. In this case, that actually resolves the issues between the parties because the only evidence put forward by the defendant as a basis for the proposition that the Bank knew of the Deceased's incapacity was the evidence of David Flood that Ms. Meade met the Deceased at a meeting in the Navan branch on 16 April, 2007 and that she should therefore have been aware of the Deceased's lack of capacity. He also says that he told Ms. Meade on 23 February, 2007, that his father was unwell. Ms. Meade completely disputes this and says that she never met the Deceased at any time and that David Flood never told her that his father was unwell.

43. I have no hesitation in accepting Ms. Meade's evidence in preference to that of David Flood.

44. It is convenient to deal first with the allegation that the Ms. Meade met the Deceased and David Flood at a meeting in the Navan branch on 16 April, 2007, as there is documentary evidence which is of assistance in resolving the very significant conflict of fact in the evidence on this point.

45. Mr. Flood said in his affidavit of 27 January, 2016, that the Deceased did not meet any representative of the Bank at any time prior to the issue of the Letter of Sanction of 13 April, 2007. It was only after this that Mr. Flood asked his father to provide the guarantee and he further averred that *"in or around the 18 April 2007"* he drove his father to the Bank's Navan Branch to meet with Ms. Meade. Among other things, he said that Mr. Meade produced a letter from the Bank addressed to the Deceased setting out the terms of the guarantee which he had agreed to provide and requesting authorisation to forward title documents for the proposed

security to O'Reilly Dolan, Solicitors. He says that the Deceased signed that authorisation in the presence of himself and Ms. Meade, and that Ms. Meade gave David Flood a copy of the authorisation and retained a copy of her files but did not provide a copy of the paperwork to the Deceased.

46. Most of that evidence was repeated at oral hearing, save that Mr. Flood said that the meeting actually took place on 16 April, 2007. This may be because, in the course of the trial, he located two diaries, the entries in which for April and May, 2007, were put in evidence.

47. One diary is an office diary of the Company, maintained by David Flood's secretary, whom he says he has been unable to contact and who therefore did not give evidence. This diary consists, therefore, of hearsay. The other is David Flood's *"diesel diary"* which recorded his travel for the purposes of claiming mileage expenses.

48. The *"diesel diary"* has an entry for a drive to AIB, Navan, on 16 April. 2007, but the entries for 18 April, 2007, are for trips to Kells and Tullamore. Mr. Flood relied heavily on the fact that, in his affidavit, he said he brought his father to meet Ms. Meade *"in or around"* 18 April, 2007, which is a drafting device often used by counsel when the precise date is uncertain but which is perhaps not appropriate when the date is both material and is said to be specifically recollected. In this instance, it was exploited by the witness to argue during his oral evidence that the meeting took place on 16 April, 2007, did not conflict with his affidavit.

49. I am satisfied that the Deceased was not present at the meeting with Ms. Meade on 16 April, 2007. I think it is most probable because the letter of authorisation is not itself dated, that Mr. Flood on reviewing the documentation thought it had not been posted out. However, this was an error on his part as Ms. Meade's letter of 18 April, 2007, refers to the letter of authorisation as an enclosure. If the Deceased had in fact attended with David Flood in Ms. Meade's office on 16 April, 2007 (or indeed on 18 April, 2007, or any earlier date), then there would been no need to post out the letter of authorisation. As Ms. Meade said in her evidence,

if the Deceased had attended with her, she would have got him to sign it there and then as this would have allowed her to send the Land Certificate which was held in the Navan Branch.

50. In that event, also, there would have been no need for her to write to Mr. Niall Dolan by letter dated 19 April, 2007, informing him that she had written to the Deceased and that, once she had the Deceased's authorisation, she would send on the Land Certificate. The original Land Certificate was only sent to A.B. O'Reilly Dolan & Co. by letter dated 27 April, 2007, indicating that the Deceased returned the signed authorisation in the interim.

51. In my view, the contemporaneous documentation quite clearly supports Ms. Meade's version of events. Furthermore, as Ms. Meade said in her evidence, there was no need for her to meet the Deceased as he was going to get independent legal advice.

52. I am satisfied to a high degree of probability that David Flood originally referred to 18 April, 2007, both in giving instructions for replies to particulars (para. 2 (c) iii.) and in his affidavit of January, 2016, because he had seen that that was the date of the letter from Ms. Meade to the Deceased. He had no specific recollection of any such meeting, despite swearing an affidavit which sought to give that impression. It was only when he consulted his diesel diary on the first evening of trial that he realised that he had in fact met Ms. Meade in the Navan Branch on 16 April, 2007. He then sought to rely on the slight equivocation in the drafting of the affidavit so as to suggest that his affidavit did not conflict with his diary, but I do not think this is plausible. Mr. Flood gave every impression in his replying affidavit that he had a specific recollection of bringing his father to meet Ms. Meade and he sought to bolster this by reference to a specific date, 18 April, which he deduced, from Ms. Meade's first letter to his father, had been the same day as the meeting. This deduction was based on the erroneous assumption that Ms. Meade would have written on the same day as the meeting when in fact she had not done so for two days.

53. Ms. Meade also referred to the meeting as being on 18 April, 2007, but the critical difference between her evidence and that of Mr. Flood was that she did not pretend to remember the meeting specifically, whereas Mr. Flood did. I am satisfied that he decided that he pretended that he specifically remembered the meeting when in fact he was fabricating his evidence and using the date of the letter as a lynchpin for the date. It was only when he consulted his diesel diary on the first day of the trial that he realised that the meeting with Ms. Meade had in fact been two days earlier than he had said. He then pounced on the drafting style of counsel as a way out of it, but forgot that he had given very specific instructions on the date for the purpose of the Replies to Particulars.

54. The fact that Mr. Flood met Ms. Meade on 16 April is not inconsistent with the specific averment in his affidavit that he had asked his father on 17 April, 2007 to *"sign some papers"*. Mr. Flood had already suggested to Ms. Meade at a meeting on 23 February, 2007, that his father would provide security for the loan. He appears to have been happy to make this suggestion before even speaking to his father.

55. The fact that Mr. Flood had his first conversation with his father about the possibility of providing security for the loans to be advanced to the Flood Partnership on 17 April, 2007, is consistent with him meeting Ms. Meade on his own on 16 April, 2007, satisfying himself that the Bank would accept his father's guarantee and Charge, and then running it past his father in a very general way by telling him he needed him to sign some papers.

56. Ms. Meade wrote to the Deceased on 18 April, 2007, confirming that he was to execute a guarantee which would be supported by a charge to be executed by him in relation to the entire Folio, and wrote on the following day to the firm whom she had been told would represent the Deceased. She wrote to them again on 27 April, 2007, enclosing, by registered post, the original land certificate Folio 5536, having received the signed authority back from the Deceased in the interim. No evidence was given by David Flood as to how this came to be

signed, even though, on his account, he would have opened the post and then presumably would have had some kind of conversation with his father about the need for the authorisation.

57. In addition, Mr. Flood erroneously stated in his affidavit of 17 January, 2016, that he actually heard Ms. Meade tell the Deceased on 18 April, 2007, that his consent was being sought to provide two Guarantees in the amounts of €10,000,000 and €1,500,000, respectively. In fact, the two Guarantees were not sought until after David Flood told Ms. Meade at a meeting in the Navan Branch on 2 May, 2007 that he could not be party to the loan or offer security as he was in the midst of divorce proceedings and his wife would not agree to his undertaking of any further liabilities. I am satisfied that David Flood was therefore prepared to make untrue allegations on affidavit on the basis of his reading of the contemporaneous documentation. Unfortunately, he misconstrued some of the documentation or at least its ramifications and this has exposed those averments as untrue. As a result, I am satisfied that David Flood was prepared to give untrue evidence and, where they conflict, I prefer Ms. Meade's evidence.

58. I accept Ms. Meade's evidence that she met David Flood alone although it was on 16 April, 2007, and not on 18 April, 2007. She took David Flood's word for it that A.B. O'Reilly Dolan & Co. were the Deceased's solicitors. She had never met the Deceased and he had not had a bank account in the Navan branch of the Bank since he had retired in 1994, long before she went to work there. She was not aware that Nooney Dowdall, Solicitors usually acted for the Deceased.

59. Turning to the evidence of David Flood that he told Ms. Meade that his father was in poor health, this evidence appears first in Mr. Flood's replying affidavit of 27 January, 2016, in which he says that he told Ms. Meade that his father was 76 years old and suffering from ill health. It is unclear from that affidavit when precisely he said this but it appears from replies to particulars at para. 2(f)i. that it is said to be on 23 February, 2007.

60. David Flood's oral evidence on this point was in fact so confused as to be incoherent. In reply to Question 91 on Day 5, for example, he stated:

> *"I'd have told [Ms. Meade] that he wouldn't have been in great health and he was suffering a little bit of memory loss and that."*

He then, in the same answer, said:

"Even though I was at home ... in the family, I didn't know at the time that [the Deceased] was getting treated for memory problems. I knew he was suffering from memory loss and a bit of cuckoo land but I didn't put it down to as serious as it was."

61. He continued, albeit in somewhat confused fashion, that *"[E]ven if I did know, I'd have probably ... kept quiet about it, but I didn't know, because I needed to get this [deal] over the line."*

62. That answer was, with respect, a prime example of a witness seeking to have it both ways. On one interpretation, he was saying that he was not aware of his father's incapacity, even though he was handling his post and working in the quarry next to his parents' house every day, as well as arranging for the payment of their bills from monies due by the Company in respect of rent on the lands. If that is so, then is it difficult to see how the Bank, in the person of Ms. Meade, could have known even if she had met him briefly as alleged (which she did not).

63. Alternatively, it could be interpreted as saying that, had David Flood realised his father was lacking in capacity, he would not have said anything because he was anxious to *"get the deal over the line"*, that is, to draw down the monies for the purchase of the Sutton Site and he was willing to do whatever it took to achieve that, even if it meant concealing relevant information from the Bank or taking advantage of his vulnerable father.

64. I also accept Ms. Meade's evidence that if she had been told that the proposed surety was in poor health, she would have refused to accept his guarantee and the charge as security

for the lands. However, she was not told by David Flood that the Deceased was unwell and, as I have already found, she never met the Deceased in person.

65. I am therefore satisfied that neither Ms. Meade nor anyone acting on behalf of the Bank was ever given any information which would suggest that the Deceased was unwell or that he was not capable of furnishing the security sought, by which I mean both the Charge and the Guarantees. On the contrary, I am satisfied that the Flood Partnership at all times sought to persuade the Bank that adequate security for the loan was being offered and indeed appeared at times to have been annoyed that drawdown was being delayed because the Bank was taking steps to comply with its own lending requirements as determined by the Commercial Lending Department.

66. As a result, the Bank had no actual or constructive notice of any alleged incapacity on the part of the Deceased. The principle in *Imperial Loan Co. v. Stone* applies, therefore, and even if it were the case that the Deceased did not have capacity to execute the Charge and Guarantees in May, 2007, these would not be voidable as against the Bank or its successor-in-title, Everyday.

67. That is sufficient to dispose of the legal argument that the Guarantees are voidable as against the Bank because the Deceased lacked capacity.

68. However, in view of the fact that mental infirmity short of incapacity is material to the arguments based on alleged undue influence and to the allegation that the Guarantees should be set aside as part of an unconscionable bargain or improvident transaction, I will in any event consider the evidence relating to the alleged incapacity for the purposes of ascertaining whether the Deceased was suffering from least some mental frailty which would be material to the issues of alleged undue influence and unconscionable bargain or improvident transaction.

Evidence of fact as to alleged incapacity

69. The evidence falls into three categories: medical evidence, knowledge of the family of the alleged incapacity, and knowledge of others (including the Bank's officials and the solicitors who provided the independent legal advice).

i. Medical evidence

70. As regards the medical evidence, Professor Declan McLoughlin, who is both a Research Professor of Psychiatry in Trinity College, Dublin, and a Consultant in Old Age Psychiatry in St. Patrick's Mental Health Services in Dublin, gave evidence on behalf of Everyday. He reviewed the Deceased's medical reports which had been provided on discovery and was of the view that the Deceased had capacity as of May, 2007, to execute the Charge and Guarantees.

71. The defendant's claim that the Deceased was suffering from incapacity was based, in substantial part, on the claim that the Deceased had from 21 December, 2004, been continuously prescribed Aricept, which is the trade name for Donepezil, a drug licensed for treating Alzheimer's disease. There was a dispute between the parties as to whether this was correct, and Everyday contended that the Deceased had only been prescribed Aricept on a continuous basis from December, 2006. I will consider this issue before turning to more general issues arising from the evidence of Professor McLaughlin and of Dr. Kerins, the Deceased's GP.

- *from when was the Deceased prescribed Aricept*

72. There was a significant dispute between the parties has to when the Deceased had first been prescribed Aricept, with the defendant claiming it was from December, 2004, and the plaintiff saying that it was not until December, 2006. While some of the evidence for the defendant on this was unsatisfactory – in particular the absence of any formal diagnosis of Alzheimer's by an appropriate consultant such as to justify this prescription and the fact that the pharmacy records (unlike the GP's notes) identified December, 2006 as the time when the Deceased was first prescribed this - I do not think it is necessary to resolve this issue.

73. The key point is that the Deceased was prescribed Aricept at a dose of 5 mg and Professor McLaughlin gave clear evidence that the prescribed dose should increase to 10 mg after about a month if it was to be effective. Nevertheless, it was not increased to 10 mg until 2010 and there are references to 5 mg doses in the GP's notes in October, 2009, and December, 2009. Given that it appears to have been accepted by February, 2009, that the Deceased was suffering from dementia and he had been on Aricept since at least December, 2006, this seems strange.

74. However, what is clear from the evidence is that, as of May, 2007, the Deceased was on Aricept on a 5 mg quarterly repeat prescription but without a formal diagnosis of Alzheimer's and without any increase to a 10 mg dose which would be required for effectiveness. It was also undisputed that the Deceased was not formally diagnosed with Alzheimer's or any form of dementia until 2009.

75. The prescription of Aricept, whether from December, 2004, or December, 2006, does not therefore in my view support a finding of lack of capacity on the part of the Deceased.

- *Diagnosis of cognitive decline and/or Alzheimer's*

76. The first reference in the Deceased's medical records to Alzheimer's was in a referral letter (the addressee of which is not identified) dated 7 March, 2008, in which Dr. Kerins stated that the Deceased had *"mild Alzheimer's disease"*. He said that he was not qualified to give a formal diagnosis of Alzheimer's as this could only be done by a consultant. His evidence on this issue was somewhat confused and unsatisfactory but he appears to have stated that he expected that the unnamed consultant who first apparently prescribed 5 mg Aricept would eventually diagnose the Deceased as having Alzheimer's. In any event, this letter postdates the relevant events by approximately 10 months.

77. The next documents which refer to either cognitive difficulties or Alzheimer's are the medical notes relating to the admission of the Deceased to Our Lady's Hospital, Navan, on 15 January, 2009. He presented to the Emergency Department having shown signs of confusion and disorientation, and from this point, there was a formal diagnosis of senile dementia. The plaintiff accepted that the Deceased had serious cognitive deficiencies from this point, but of course, this was approximately 20 months after the execution of the Charge and Letters of Guarantee.

78. By contrast, a Consultant Urologist in Mullingar Hospital wrote to Dr. Kerins on 8 May, 2007, and again on 21 May, 2007, the day before the execution of the two Guarantees in issue in these proceedings. These letters relate to a procedure undertaken on 17 May, 2007, and there were no comments by the Consultant on the Deceased's mental state. This is obviously significant because this letter was written approximately a week before the signing of the Guarantees and only 15 days after the execution of the Charge. Nevertheless, the consultant noted no mental health difficulties.

79. The plaintiff relied on an undated letter from Dr. Moroney, a Consultant Neurologist, to a Consultant Physician in Navan Hospital, and cc'd to Dr. Kerins, which records that the Neurologist had met with the Deceased and his son, John Flood, on 7 April, 2009, and that John Flood had told him that the family had *"not really been aware of any memory problems up until January 15th, 2009, when he became very confused in the setting of a UTI."* John Flood apparently told the Consultant Neurologist that, in retrospect, he thought that his father's memory had been slipping a little, as he had been involved in a number of car accidents related to episodes of sudden collapse and loss of consciousness in the months preceding his January, 2009, presentation. This seems to be a reference to 2008, rather than car crashes that undoubtedly occurred in 2007, including one between the consultations of 2 May, 2007, and 22 May, 2007, though it is difficult to come to any conclusion on this as the author of the document did not give evidence and therefore their note of what was said is hearsay. Dr. Kerins' notes show that the Deceased had stopped driving in May, 2008, so the dateline in the letter may not be very precise, and it is not possible to say whether that was due to an error by the author or by inaccurate information given by John Flood.

80. (I should add that the letter from Ms. Moroney was put in evidence on the basis that the family member to whom she was speaking was not identified. In fact, in the heading of the letter, the family member is identified as "John R" and a mobile number is given. John Flood gave evidence and he was not cross examined on this letter.)

81. In any event, Professor McLaughlin also stated that the reference to the Deceased having car accidents and losing consciousness (in the family history in April, 2009) was related not to dementia but to bradycardia, so I do not think the references to road traffic accidents – even the one which allegedly occurred on 20 May, 2007 – are indicative of a lack of capacity, though they indicate that the Deceased was becoming increasingly frail.

82. There was also a report dated 27 January, 2009, from Mr. Osman, a Registrar of Neurosurgery in Beaumont Hospital, a *"one year history of dementia with episodes of loss of consciousness".* A Senior House Officer also recorded in January, 2009, that the Deceased had *"a background of deteriorating memory function, intermittent episodes of disorientation"*. These reports, although hearsay, are consistent with Dr. Kerins' letter of 7 March, 2008, in my view, as locating the first suggestions of cognitive impairment in early 2008.

83. On 20 January, 2009, while in hospital, the Deceased scored 25/30 on the Mini Mental State Examination, indicating that he was in normal range. A score below 24 would indicate mild cognitive impairment of a clinically relevant degree. Professor McLaughlin said that Alzheimer's was progressive and that, typically, a patient would drop three points on the MMSE test each year, indicating that in January, 2008, the Deceased would have scored 28/30. In essence, his evidence was that this score meant that the Deceased did not have any relevant cognitive impairment in May, 2007.

84. Professor McLaughlin accepted that, by April, 2009, the medical records discovered showed a clear description of impairment in multiple domains of cognitive function which was consistent with the diagnosis of dementia.

85. It seems, therefore, that while there was no formal diagnosis of dementia until 2009, the Deceased's medical records show some evidence of cognitive decline from 2008 onwards. However, they do not support a finding of incapacity or cognitive decline in May, 2007.

– Other aspects of the medical evidence

86. Dr. Kerins gave evidence that, if he had been asked to comment on the Deceased's capacity around the time of the guarantee, he would not have confirmed capacity without having the Deceased examined by a geriatrician or a psychiatrist. I understood that this was

because the Deceased was 78 years of age and was on 5 mg of Aricept. He did not give evidence that he himself had formed even a preliminary view that the Deceased lacked capacity in May, 2007. His evidence was that he had a busy practice, people came in without appointments, and the Deceased would have been with him for 15 minutes or less as he was under pressure to deal with each patient so that he could deal with the people waiting. He was surprised that the Deceased was allowed to sign a guarantee but he seems to have said this based on the Deceased's age, rather than because of a specific concern about the Deceased's capacity.

87. The plaintiff also relied on the fact that the Deceased continued to drive throughout 2007, only stopping in May, 2008, but Professor McLoughlin did not go so far as to say that this was inconsistent with having Alzheimer's. He was of the view that someone in the very early stages of Alzheimer's could drive but would need to get a formal driving assessment done and inform their insurers.

Conclusions on medical evidence

88. In essence, the medical evidence establishes that the Deceased was on 5 mg of Aricept as of May, 2007, but that there was no formal diagnosis of Alzheimer's prior to 2009. However, the repeat prescription for Aricept at a 5 mg dose was not in itself useful or significant and did not indicate a formal diagnosis of Alzheimer's. Neither was there any evidence that this level of dosage in itself indicated a loss of capacity.

89. Indeed, the Aricept prescription is something of a red herring, as, from January, 2009, the medical notes contain multiple references to confusion and cognitive difficulties and yet Aricept was not prescribed at the effective dose of 10 mg until June, 2010.

90. It is accepted that from January, 2009, the Deceased was suffering from significant cognitive impairment, even if he had not been formally diagnosed with Alzheimer's. The net

issue then becomes whether, even without a formal diagnosis of Alzheimer's, it can be said that the Deceased lacked capacity in May, 2007.

91. In my view, the medical evidence does not support a finding of lack of capacity at that time. First, the Deceased was neither referred to a neurologist nor a geriatrician until 2009 and it was only then that a formal diagnosis of Alzheimer's was made. Dr. Kerins' confirmed that the reference to *"mild Alzheimer's"* in his letter of 7 March, 2008, was not based on any formal diagnosis, which could only be done by a consultant. Secondly, the Deceassed was on a 5 mg dose of Aricept in May, 2007, which did not indicate he had Alzheimer's and the effectiveness of which appears questionable. Thirdly, he scored 25/30 on the MMSE test in January, 2009, which, for the reasons explained by Professor McLaughlin, indicates that the Deceased did not lack capacity in May, 2007. Fourthly, the Deceased attended hospital on 17 May, 2007, a highly material date as it was shortly after execution of the charge and shortly before execution of the relevant Letters of Guarantee, and there is no note of any cognitive difficulty. Fifthly, Dr. Kerins did not mention Alzheimer's in any written document or note prior to a letter of 7 March, 2008.

92. In the circumstances, the first written note of a kind which records cognitive decline is the letter of 7 March, 2008. The addressee of this letter is unidentified, and its purpose is unclear. However, it is broadly consistent with the letter dated 23 January, 2009, from a Registrar in Beaumont Hospital to Our Lady's Hospital Navan, which refers to a *"one year history of dementia"*.

93. It is difficult to square that timeline with the statement in Dr. Moroney's letter recording the review of the Deceased in the presence of his son, John Flood, in April, 2009, that the family had not really noticed any memory difficulties until January, 2009. However, for the reasons already stated, I do not think I can rely on that letter and it is quite possibly inaccurate as to the relevant timeline.

94. I find, on the balance of probabilities, that the medical evidence establishes that the Deceased did not have significant cognitive difficulties prior to 2008, and, therefore, was not suffering from an incapacity in May, 2007.

ii. Evidence from family members of the Deceased

95. There was evidence, which I accept, that the Deceased's finances were largely handled by David Flood. As the Company paid rent to the Deceased in respect of the lands the subject of the Lease, David Flood would pay the Deceased's outgoings and deduct that from the rent. I also accept the evidence that the Deceased did not drive long distances but would collect the post in Oldcastle, bring it home, and give it to David Flood to deal with. It is not disputed that the Deceased did not have a bank account, having closed it on retirement in 1994, and that he thereafter had only a post office account. His wife ensured he was always well dressed, and his son dealt with his post and managed his bills. The Deceased seems to have done some shopping but did not undertake any significant financial transactions. Although these matters are relevant to the possibility of undue influence, they do not amount to a lack of capacity.

96. There was evidence on this issue also from another of the Deceased's sons, John Flood, who began staying with his parents during the first week of November, 2006, when he began to have marital difficulties. He only stayed the odd night at first but by Christmas, 2006, he was staying with them permanently.

97. He said that as soon as he began to stay, and certainly from Christmas, 2006, he became aware of cognitive difficulties suffered by the Deceased. He was surprised as he had not known this was happening. He said his father would get confused dressing himself, would get lost coming back from the bathroom at night and would not be able to find his own room. He said it was not obvious to others because he could speak perfectly normally for a short time, possibly

for ten minutes or so, but then would start repeating himself. So other people would be commenting that he was well and in great form but that was because they did not speak to him for long enough.

98. He gave evidence of a specific incident on St. Patrick's Day, 2007, when the Deceased sat into John Flood's car instead of his own and got agitated because his key would not work. He did not realise he was in the wrong car. He would only drive to Millbrook, two miles away, or Oldcastle, four miles away. The Deceased had numerous road incidents (which I understood to be minor) and they would laugh because he always had a different excuse for them. He thought the sat nav they got around that time was wonderful because he told his son he had difficulty finding his way home from places. He gave evidence that the Deceased stopped driving some time around 2009 or 2010, but this is inconsistent with Dr. Kerins' notes that the Deceased stopped driving in 2008. Once this document was put, it confused the witness and he was not as sure of his evidence. I do not think this witness was reliable as to dates and timelines.

99. A nursing note from 16 January, 2009, was referred to in evidence by Professor McLaughlin. This records that: *"Recently family noticed his gait was shuffling and he was becoming more confused daily and he went missing in the house…."* This strongly suggests that the Deceased's difficulties in finding his way around his own home date to Christmas, 2008, and not to Christmas, 2006, as testified by John Flood. However, once again, the document itself is hearsay.

100. Dr. Kerins gave evidence that he knew nothing of these occasional lapses in memory from Christmas, 2006, onwards, although he admitted he would only meet the Deceased for short consultations.

101. It was accepted that the Deceased was still driving in May, 2007, but reliance was placed on the fact that the Deceased did not drive long distances. It was also said that he was having car accidents but Professor McLaughlin said these seem to have been caused by

blackouts resulting from low blood pressure rather than from cognitive difficulties. Dr. Kerins confirmed in his evidence that his notes show that the deceased reported to him on 20 May, 2008, that he had stopped driving after a road traffic accident two weeks earlier. As already stated, this demonstrates that the Deceased was possibly susceptible to undue influence but does not demonstrate a lack of capacity.

102. Finally, the defendant herself never gave evidence. She was present in court on two of the six days for which the case ran but I was told that she was not in a position to give evidence due to a car accident which occurred approximately four months before the hearing. It was accepted that the defendant had been injured in a car accident but her injuries were never specified, let alone the subject of a medical certificate and, while I of course accept that giving evidence in a case such as this would be an extremely stressful experience, I am not convinced that there was any real explanation as to why the defendant did not give evidence.

103. Her evidence would have been critical, in my opinion, to establishing the behaviour of the Deceased at the relevant time and whether it amounted to evidence of incapacity on the part of the Deceased. It would also have been critical in establishing whether the Deceased's behaviour was such that it ought to have been obvious to any third party that he did not have capacity. The fact that she did not give evidence suggests she was not in a position to testify that her husband was suffering from confusion and signs of dementia from late 2006.

iii. Observations of independent solicitor

104. Mr. Martin Cosgrove, the solicitor with whom the Deceased attended on 2 May, 2007, gave evidence that, when he met the Deceased for the first time on that day, he had no doubts or concerns about his capacity. The Deceased was in his 70s but he looked sprightly, was well dressed, and seemed alert. Mr. Dolan's father, who was in his 80s, was actually still practicing

in the office so his age alone gave no cause for concern. Mr. Cosgrove wrote to Ms. Meade by letter dated 2 May, 2007, stating that he was satisfied that the Deceased fully understood the nature of the Charge and the Guarantee that he had signed on 2 May, 2007. The attendance of Mr. Dolan of 25 May, 2007, is to similar effect.

105. While the solicitors each met the Deceased for a relatively short time, the evidence of Mr. Cosgrove and the attendance of Mr. Dolan both suggest that the Deceased was not suffering from an incapacity in May, 2007.

Conclusion on capacity

106. The principal evidence as to the Deceased's incapacity was given by his son, John. I have significant doubts about the veracity of that evidence. First, it has to be treated with caution as his close family members, including his mother, stand to benefit from his evidence. Secondly, he gave evidence that he had not heard about the proceedings until the night before he gave evidence and I find this very difficult to believe. Even if he had not heard the detail of them, given that he ultimately agreed to give evidence, it seems very improbable that he had not heard of the case until the night before he gave his testimony. Thirdly, such evidence as he gave which could be tested against statements in the medical records tended to contradict his evidence and in particular to point to him as being unreliable as to dates and timelines. If the Deceased was suffering from the degree of confusion described by him as occurring from December, 2006, one would expect some mention of it in the medical reports. His description tallies with the medical notes from January, 2009, but not before. I am satisfied that the events he described did not take place in late December, 2006 and early to mid 2007, as he said, but took place some time after that, probably from 2008 onwards.

107. I am satisfied as a fact that the Deceased was not suffering from dementia or a lack of capacity in May, 2007, and was at that time capable of understanding the nature of the Guarantees and Charge which he executed.

108. However, questions arise on the evidence as to whether he did in fact understand the full nature and extent of the transactions, and I discuss this matter more fully in the context of the arguments relevant to the assertion that the Deceased entered into the Guarantees and executed the Deed of Charge as a result of the undue influence exerted on him by David Flood, to which I now turn.

II. Undue influence

109. It is perhaps unusual for the person who claims that a transaction is liable to be set aside by reason of the undue influence exercised over a vulnerable person to be one and the same as the individual who is said to have exercised the undue influence, but that is what has occurred in this case.

110. David Flood says that the Guarantees executed by his late father cannot be enforced because he pressurised his father to such an extent that his father did not exercise his own independent will and judgment in relation to the Guarantees.

111. The foundation of the law on undue influence is *Allcard v. Skinner* (1887) 36 Ch. D. 145, where Cotton L.J. stated (at p. 171):

> *"Does the case fall within the principles laid down by the decisions of the Court of Chancery in setting aside voluntary gifts executed by parties who at the time were under such influence as, in the opinion of the Court, enabled the donor afterwards to set the gift aside? These decisions may be divided into two classes - First, where the Court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose; second, where the relations between the donor and donee have at or*

shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor. In such a case the Court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justifies the Court in holding that the gift was the result of a free exercise of the donor's will. The first class of cases may be considered as depending on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of cases the Court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused."

112. The defendant pleaded both classes of influence referred to in that passage, that is, both actual undue influence and presumed undue influence, in her Defence and therefore both of these have to be considered.

Actual undue influence

113. To amount to actual undue influence, the defendant has to show on the balance of probabilities that David Flood engaged in wrongful conduct by pressurising his father into providing the Guarantees.

114. The only evidence tendered to support this plea was the evidence of David Flood that he attended at the consultations between his father and Mr. Cosgrove on 2 May, 2007, and between his father and Mr. Dolan on 25 May, 2007.

115. He said that he was in the relevant solicitor's office on both occasions and, in effect, spoke for the Deceased and was of the view that the Deceased did not understand what was going on. On the first day, he says that Mr. Cosgrove asked if the Folio comprised the family home and that it was he who replied, saying: *"How would there be a family home in the middle of a quarry?"* He also says that, on both occasions, his father said: *"I agree with whatever David wants."* It is notable that he also swore an affidavit saying that his father said this at a meeting with Ms. Meade in April, 2007, but as I am satisfied that his father never met Ms. Meade, I am also satisfied that he never made this statement to her. This undermines the credibility of Mr. Flood's account of his presence at the relevant consultations in May, 2007.

116. If this evidence is accepted, it would mean that David Flood engaged in overbearing behaviour in the consultations and this would amount to undue influence. Mr. Flood did not give evidence of exercising any undue influence on another occasion, although he did say that on 17 April, 2007, he told his father that he would have to attend a solicitor's office to *"sign some papers"*. I think it is also clear that he chose the solicitors whom his father would attend, nominating solicitors that generally handled the affairs of the Company rather than his father's usual solicitors, and that it was David Flood who made the appointment for 11 a.m. on 2 May, 2007. However, these matters do not, in my view, amount to evidence of the type of wrongful act that would amount to actual undue influence.

117. The only evidence of actual undue influence being, therefore, the evidence relating to Mr. Flood's attendance at the consultations with Mr. Cosgrove and Mr. Dolan on 2 and 25 May, 2007, it is important to note that this is strongly denied by the plaintiff. Mr. Cosgrove gave evidence in the course of which he vigorously denied that he had allowed David Flood to attend the consultation with his father. The plaintiff also produced the contemporaneous attendance of Mr. Dolan, who is now deceased, which explicitly states that Mr. Dolan saw the Deceased alone. I now consider the evidence relating to the attendance at those consultations.

- *Whether David Flood drove his father to the two consultations*

118. Mr. Flood gave evidence that he drove his father to both consultations, though at one point he expressed doubt as to whether he had been there *"on the second day"*.

119. As part of his allegation that he in fact attended the consultation in Ms. Cosgrove's office on 2 May, 2007, David Flood asserted that he had driven his father to the offices of A.B. O'Reilly, Dolan & Co. Mr. Cosgrave did not dispute that this might have occurred but said if David Flood was in reception, he did not see him and that he did not come into Mr. Cosgrove's office with his father.

120. On the issue of fact as to whether David Flood drove the Deceased to the solicitors' offices on 2 and 22 May, 2007, I find, notwithstanding my very significant doubts about David Flood's general credibility, that he was probably telling the truth about this.

121. The office diaries of the Company were produced. These were written up by David Flood's then secretary, who was said to be retired and now uncontactable, and therefore unavailable to give evidence. As a result, the office diaries were hearsay, though they were produced to witnesses, notably Mr. Cosgrove and Mr. Flood, in the course of the evidence.

122. The entry for Wednesday 2 May, 2007 is *"11am Sols – Cootehill"*. The next two items relate to 9 a.m. and 10.25 a.m., respectively and appear to be orders of loads of aggregate. It was suggested by the plaintiff that the entry in relation to the 11 a.m. meeting in the offices of A.B. O'Reilly, Dolan & Co., had been retrospectively entered as it appeared before the items with an earlier time that day.

123. However, there is therefore nothing untoward about the 11 a.m. coming before the 9 a.m. entry. One can see a similar use of the page for Tuesday 17 April, 2007, where a note of an appointment at 12 noon appears near the top of the entry and further down are entries for

10.30 a.m., 11.30 a.m. and 11.35 a.m. as various people phone looking for deliveries of sand and aggregate. Also, Thursday 17 May, 2007, where the first line is a reminder for David and then the next line simply states: *"Court – Virginia 10.30."* After a note that David's car is for service, there is then a note of a call made by David at 8.47 a.m. In my view, therefore, it does not follow from the fact that entries towards the top of the page are not in sequence as to time that the office diary has been manipulated.

124. The first entry for Monday, 30 April, 2007, was *"David to ph. Sol."*, which could of course have been BCM Hanby Wallace, who were acting in the acquisition of the Sutton Site. The diary is not so much a record of appointments as a record of phone calls throughout the day, identifying orders being placed over the phone for sand and gravel. The entry for that Monday also shows that entries were sometimes made retrospectively as one of the earliest items is *"Friday 27th 11.30 Christine Meade phoned for David I gave her B.M.W. number."* Tuesday 1 May, 2007, is headed: *"Remind David to call Niall Dolan"*. The fourth item in the left column is *"12 p.m. Martin Cosgrove phoned for David I gave him ~~your~~ both mobile no."*

125. The entry for 25 May, 2007, has a note at the top, (before notes of the various calls during the day): *"David: 10.30 Meeting at Solicitors in Cootehill".*

126. I accept David Flood's evidence that his secretary maintained the diary by putting appointments for the day at the beginning, probably written in advance, and then the page for each day was filled up with various messages and reminders as the day went on. These diaries tend to show that David Flood drove the Deceased to both consultations.

127. However, even if the diaries are inadmissible as hearsay, I accept on the balance of probabilities that the Deceased was not a confident driver at this time and that he most likely would have to be driven to the solicitor's offices which were some distance away.

128. Furthermore, Mr. Flood put in evidence his own *"diesel diary"*, which was approximately A5 sized and in which he marked journeys for which he claimed mileage. Entries consisted of a time, a destination and miles involved in the round trip.

129. On Wednesday, 2 May, 2007, he has entered *11.00 am Solicitors Coothill (sic) 68 miles ref o/weight.* (This seems to indicate that he was putting the item down as relating to a District Court prosecution of the Company or relating to the Company's business.) Friday 25 May, 2007, has an entry: *10.30 Solicitors Coothill (sic) 65 miles*.

130. I am satisfied that the diaries support the allegation that David Flood made the appointments for his father and indeed drove his father to the solicitors' offices on both occasions. This would be consistent with the evidence that the Deceased tended to black out and had car accidents, the fact that David Flood ensured that his father did not go to his regular solicitor, who would have known him well (and may well have been more alive to cognitive issues at that stage), and the eagerness of David Flood and his brothers to comply with the Bank's conditions in order to secure the loan.

131. I therefore accept that David Flood drove his father to the offices of A.B. O'Reilly, Dolan & Co. on both 2 and 25 May, 2007. (This is notwithstanding the fact that David Flood seems not only to have played golf in Mullingar at 4 p.m. that day but appears also to have attended the Navan Branch of AIB for a meeting with Ms. Meade, as reflected in the position paper drawn up by her which reflects a meeting on that date.)

132. As I have said, this was not in fact denied by Mr. Cosgrove. But critically, the mere fact that David Flood drove his father to the offices does not mean that he actually attended the consultations. As David Flood's evidence of pressurising his father is alleged to consist of his actions during those consultations, it is that, rather than whether he drove his father, which is critical to an assessment of whether there was actual undue influence.

- *Attendance of David Flood at consultations between Deceased and solicitors*

133. David Flood says that he attended both consultations. In the first consultation, on 2 May, 2007, he says that his father simply repeated *"I will do whatever David wants"*, and that he spoke over his father who did not really know what was going on. For a number of reasons, I do not believe this happened.

134. The Deceased attended twice at the offices of A.B. Dolan O'Reilly & Co. in Cootehill, County Cavan. David Flood had given the name of Niall Dolan to Ms. Meade, as Mr. Dolan did the litigation for the Company in the District Court. However, Mr. Dolan passed it to Mr. Martin Cosgrove, solicitor, as it was Mr. Cosgrove who dealt with conveyancing and guarantees on a more regular basis, as well as wills and probate.

135. Mr. Cosgrove wrote to the Deceased by letter dated 26 April, 2007. This advised the Deceased that the guarantee was up to €10 million, supported by a charge over Folio 5536 which extended to over 76 acres. An appointment was made for the Deceased to attend with Mr. Cosgrove in his office at 11 a.m. on 2 May, 2007.

136. Mr. Cosgrove's office was downstairs, because he did wills and probate work, and it was considered in the office that it was more suitable for his clients not to have to take the stairs. As such, his office was just off the reception area. Although Mr. David Flood gave evidence that the went into Mr. Cosgrove's office and attended the meeting between Mr. Cosgrove and the Deceased, Mr. Cosgrove strenuously denied this, saying the whole point of the meeting was to give independent legal advice and that could not be done if the person benefitting from the guarantee was present.

137. Mr. Cosgrove says that he had received the Land Registry from the Navan branch together with two copies of what was then a single guarantee. Both copies were signed and one was returned to the Bank, in Navan, and the other was a counterpart and given to the Deceased.

While the old folio had been received from the Bank, Mr. Cosgrove had printed off a new copy of the Folio and, using the Folio number, he called up the map onscreen. Mr. Cosgrove's evidence was that it would have been better to have had a hard copy map that you could look at on the desk but that it would have taken four to six weeks at the time to get that, the implication being that the Guarantee was required before the hard copy map would be available.

138. He therefore simply called the map up on the screen and showed it to the Deceased. The extent of the lands contained in the Folio were coloured pink and the Deceased was shown this and asked if there was a family home on it. The Deceased said there was not. As a result, Mr. Cosgrove asked the Deceased to sign a declaration that the property being charged was not a family home or part of the curtilage of a family home and this was ultimately sent to the Bank.

139. As regards the Deceased's understanding of the transaction, Mr. Cosgrove's clear evidence was that the Deceased was not worried about losing the quarry lands as that was *"for the boys"* anyway. As far as he was concerned, he already did not own it and it was for them to do as they wished.

140. On the issue of whether Mr. David Flood was present in the room at this consultation, I prefer the evidence of Mr. Cosgrove for the following reasons.

141. Mr. David Flood explicitly said in his affidavit of 27 January, 2016, in response to the grounding affidavit seeking to enter judgment summarily, that he heard Mr. Cosgrove explain to his father *"that the Bank was asking my father to provide two guarantees for €10,000,000 and €1,500,000 on loans been (sic) provided by the Plaintiff to his sons, David, Tom and Alec."*

142. However, as of 2 May, 2007, the Bank was only requiring one guarantee from the Deceased in the amount of €10,000,000 and only one guarantee was actually signed by the Deceased on 2 May, 2007. Although Mr. David Flood attempted to explain this on the basis

that the Deceased signed two documents on the day, that is actually incorrect also, as the Deceased signed the original and counterpart guarantee, the Deed of Charge, the Family Home Protection Act Declaration, and an authority in connection with Mr. Cosgrove's undertaking to the Bank, which is five documents.

143. I digress here to say that there was a dispute between Mr. Cosgrove and Mr. David Flood as to whether or not the Declaration was signed in Mr. Cosgrove's office, as Mr. David Flood claimed, or in the offices of a neighbouring solicitor who witnessed the signing of the Family Home Protection Act Declaration as Commissioner for Oaths, as Mr. Cosgrove stated.

144. On this point, I'm afraid that I do not accept Mr. Cosgrove's evidence: I think it is highly improbable that, within 30 minutes, an elderly man would come in, engage in preliminary conversation, have transactions to the value of €10,000,000 explained to him, walk out to the other office, meet the other solicitor, sign the declaration, come back, and complete the transactions. I think it is much more probable that the Deceased signed all five documents together in Mr. Cosgrove's office.

145. The material point is that David Flood's explanation under cross examination as to why he thought there were two guarantees is inconsistent with the admitted evidence that the Deceased signed five documents on the day, not two. (And even if I accepted that the Declaration was signed in the office of the Commissioner for Oaths, which I do not, he still signed four). Indeed, Mr. Flood refers separately in his affidavit to the Deceased signing the consent to the registration of the charge.

146. I am satisfied that Mr. Flood swore his affidavit not, as he purported to do, from his own recollection, but from a reconstruction of the events of the day based on documentation and, more particularly, on an inaccurate understanding of the documentation which has resulted in errors in his evidence. Those errors make it clear that he does not in fact remember his father

signing anything in Mr. Cosgrove's office. I am satisfied that the reason he does not remember his father signing anything in Mr. Cosgrove's office is because he wasn't there.

147. Mr. Cosgrove was cross examined on why he had no attendance of the meeting and he said this was because he was inputting details into his computer and typing up documents as he was taking instructions. I think it would have been best practice to do an attendance also, not least because that would have set out the time of the meeting and, in particular, who was present, both of which are matters which were the subject of evidence in the case and the identity of the persons present being a significant issue.

148. Nevertheless, I am satisfied that Mr. Cosgrove was acutely aware that he could not purport to give independent legal advice to a client who was proposing to guarantee a family member's debts and then allow a close family member who stood to benefit from the provision of the guarantee into the meeting. I am satisfied that he did his duty to his client insofar as he was careful to meet the Deceased on his own.

149. Similarly, in relation to the consultation between the Deceased and Mr. Dolan on 25 May, 2007, Mr. Dolan's contemporaneous attendance quite clearly states that Mr. Dolan met the Deceased alone. To accept David Flood's evidence would also mean accepting that Mr. Dolan, who is now deceased himself and cannot defend himself from an allegation that he failed to meet basic professional standards in relation to an elderly client, deliberately drew up a false account of his meeting with the Deceased.

150. On any version of events, a solicitor like Mr. Dolan would know that, in giving independent legal advice, it was imperative to meet the Deceased alone (or at least in the absence of the person benefitting from the transaction being discussed). While Mr. Dolan had acted for the Company in various matters over the years, notably District Court prosecutions for regulatory offences, he was not acting for Mr. Flood or any other member of the Flood

Partnership in connection with the purchase of the Sutton Site. The Flood Partnership had retained BCM Hanby Wallace for that purpose.

151. Mr. Dolan was acting only for the Deceased and, as an experienced solicitor, would have known the importance of ensuring that attendances were truthfully and accurately drawn up. It is not clear why Mr. Dolan would have any motivation to assist Mr. David Flood and to fail to meet his duty to his named client, and I find it highly improbable that he would have compromised his reputation in this manner. I am perfectly satisfied that Mr. David Flood's evidence that he attended with the Deceased in Mr. Dolan's office on 25 May, 2007, is untruthful.

152. The plaintiff suggested that David Flood gave false evidence when he said that Niall Dolan said to the deceased on 25 May that there had been a mistake with the guarantee – but it is highly improbable that Mr. Dolan said that as there had been no mistake. Rather, the Bank had changed its requirements arising out of the fact that David Flood's own lands would not be available for security, and he was no longer going to be named as a borrower on the loan.

153. I should add that, in respect of both consultations, Mr. Flood purported to contradict some of the factual detail of Mr. Cosgrove's evidence and Mr. Dolan's attendance, saying it was implausible. However, in both cases, Mr. Flood's attempt to undermine the relevant detail consisted of little more than *non sequiters*. In the case of Mr. Cosgrove, he claimed that when he was present in the room, Mr. Cosgrove discussed the price of cattle. Mr. Cosgrove denied this, saying he would have no knowledge of the topic. Mr. Flood says that this was unlikely because Cootehill had a mart. However, just because there is a court room in a town and the farmers coming to the mart know that the courts are busy and that personal injury claims are being heard does not mean that those farmers would know the value of a personal injury claim. I am sure it is the same in reverse and it is probably a brave solicitor who would attempt to engage in a conversation about the price of cattle with a farmer client. I am satisfied that Mr.

Flood contrived this evidence in order to attempt to portray a recollection of a meeting at which he was not in fact present.

154. Similarly, Mr. Dolan's attendance records that he discussed with the Deceased the election which had taken place the previous day, including the prospects for Sinn Féin. This seems highly plausible, not least because the count was ongoing on 25 May, 2007, so it is possibly the day of most public interest in an election. Mr. Flood tried to undermine this by saying that his father supported Fianna Fáil and that the Sinn Féin candidate in his father's constituency did not have much chance of being elected. Again, this does not follow. Once the Deceased had any interest in politics, it seems likely that he would have had an interest in overall trends. It is no surprise that, on a trip to a border county for a meeting, he might end up discussing the prospects of Sinn Féin in the Cavan constituency and nationally. Also, there is no explanation offered as to why Mr. Dolan would have believed, in doing up his attendance, that there would be litigation many years later and he had better fabricate some of all of his account of the meeting. I do not accept Mr. Flood's evidence on this point and again think it has been concocted to try to undermine the reliability of the attendance, as its contents so clearly contradict Mr. Flood's evidence.

155. I am satisfied for all of those reasons that David Flood drove his father to the two consultations but was not in the room for either of them. As a result, I am satisfied that the acts of undue influence described by David Flood in his evidence never occurred.

- *Conclusions on evidence of alleged actual undue influence*

156. I am satisfied to a very high degree of probability, however, that the Deceased was not accompanied into either Mr. Cosgrave's office on 2 May, 2007, or Mr. Dolan's office on 25 May, 2007, by David Flood and that David Flood remained in reception or outside the offices

at all times. As a result, I am satisfied that the events described by David Flood as taking place in Mr. Cosgrave's ground floor office on 2 May, 2007, never took place.

157. Therefore, there is no evidence of any actual undue influence exercised by David Flood on the Deceased to get him to sign the Guarantees and execute the Charge.

158. As a result, it is necessary to consider whether the nature of the relationship between the Deceased and David Flood was such as to give rise to undue influence and, if so, whether that presumption has been rebutted. If it is not, then I will have to consider the consequences of that for Everyday.

Presumed undue influence

159. The defendant says that the nature of the relationship between David Flood and his father was such as to raise the presumption that the Deceased was subject to undue influence from David Flood and that Everyday, who seek to rely on the Guarantees which are a product of that undue influence, cannot demonstrate that the provision of the Guarantees (and the Charge) were executed as *"the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justifies the Court in holding that the gift was the result of a free exercise of the donor's will"*: *per* Cotton L.J. in *Allcard v. Skinner* at p. 171.

160. The plaintiff says that there is no evidence of any undue influence and that this is sufficient to rebut any presumption but that, in any event, the Deceased had independent legal advice which is sufficient to rebut it. In addition, they say that, even if the legal advice received was in some way inadequate to rebut the presumption, the Bank was not on notice of any such inadequacy and that, therefore, the Guarantees cannot be set aside as against the plaintiff.

Evidence giving rise to a presumption of undue influence

161. A presumption of undue influence can arise in relation to certain categories of relationship and can also arise if the evidence establishes that a relationship exists where a vulnerable person reposes trust and confidence in another and where the nature of the gift is such as to justify a conclusion that it was procured by the undue influence of the done. Keane suggests that this requires that there must be evidence that the other derived a "*substantial benefit*" from the transaction. (See Keane, *Equity and the Law of Trusts in Ireland*, 3rd ed., (Bloomsbury Professional, 2017), para. 28.04-05 for a general discussion of the two ways in which the presumption can arise.) However, we are concerned, not with an outright gift but with a guarantee, which involves different considerations. A guarantee will frequently provide a benefit to the guarantor, such as where it facilitates the financing of the activities of a corporate body and those activities are intended to provide the guarantor with an income or other financial benefit. But it may also be in the nature of a gift, such as where a well to do retired father decides to help his sons obtain finance for an investment opportunity, which is essentially the case here.

162. However, as demonstrated by the facts here, if the guarantee in question is one which allows the lending institution to have recourse to the entire assets of the guarantor, putting his or her income and way of life at risk, then that is a transaction which calls for explanation as it was so disadvantageous from the point of view of the Deceased. A guarantee limited to the value of a small portion of a guarantor's assets would not be sufficiently disadvantageous to attract the presumption but this is not what occurred here.

163. It should be noted also that undue influence can be exerted by a third party on behalf of another who derives that benefit: see *Gregg v. Kidd* [1956] I.R. 183 where it was the sister of

the donor who exerted significant influence on him so as to procure the execution by him of a voluntary conveyance of farmland in favour of her son.

164. That is the type of situation which arose here as, first, David Flood, along with his brothers Tom and Alec, derived a substantial benefit from the provision of the Guarantee of the overdraft in favour of the Flood Partnership, of which he was a member. Secondly, he procured a substantial benefit for his brothers, Tom and Alec, the remaining members of the Flood Partnership, in ensuring that the conditions of the facility letter relating to the loan were met and allowing the drawdown of significant sums for the purchase of a development site which they believed to be very valuable and to present a good investment opportunity. Furthermore, the extent of the guarantee provided on 2 May, 2007, and *a fortiori* the guarantees provided on 25 May, 2007, were not only such as to greatly exceed the value of the lands intended to be charged and to threaten possible the entire assets of the Deceased, but any loss of the lands themselves would threaten the Deceased's income.

165. The nature of the transaction, therefore, was such as to justify the raising of a presumption that it was procured by the undue influence of David Flood on behalf of himself and the Flood Partnership.

166. It is therefore necessary to consider whether the relationship between the Deceased and David Flood fell within the type of relationship described by Budd J. in *Gregg v. Kidd* (at p. 195) where he stated:

> *"The influence may arise or be acquired in many ways, such as though disparity of age or the mental or physical incapacity of the donor or, indeed, out of a mere dependence upon the kindness and assistance of another. To bring the principle into play it must be shown that the opportunity for the exercise of the influence or ascendancy on the donor existed, as where the parties reside together or meet frequently. While close family relationship creates a situation where influence is readily acquired, mere blood*

relationship is not sufficient of itself to call the principle into play; it must be shown that the actual relations between the parties give rise to a presumption of influence."

167. *Gregg v. Kidd* concerned the relationship between adult siblings of advanced age and also the relationship between uncle and nephew, and of course the leading Supreme Court authority on undue influence, *Carroll v. Carroll* [1999] 4 IR 241, concerned an adult son and his elderly and infirm father. Although the father in that case was not lacking in capacity, he was nevertheless vulnerable due to physical frailty and had been devastated by the premature death of his wife.

168. While — as discussed elsewhere in this judgment — I reject some very significant aspects of David Flood's evidence, I accept that he worked the quarry lands near the Deceased's house, that he dealt with the Deceased's post, and that he managed the Deceased's household bills. It is very clear that the Deceased trusted his sons, including David Flood, and this is reflected to some degree in the manner in which he approached the whole transaction. He does not seem at any point to have regarded himself as doing anything other than helping his sons, and it is notable that he did not ask for additional time to consider everything or confer with his wife, nor did he take it upon himself to go to a solicitor of his own choosing or even make the appointment for the consultation on 2 May, 2007.

169. Furthermore, the Deceased's physical health was declining and he no longer drove long distances, going only as far as Millbrook and Oldcastle, which were only two and four miles away, respectively. While he was not as infirm or as vulnerable as the father in *Carroll v. Carroll*, whose hearing and eyesight were both declining, and who had been devastated by the premature loss of his wife, it is nevertheless the case that the medical evidence was that the Deceased had had to have a cancerous lesion on his face removed in 2006 and was attending a Consultant Urologist in May, 2007. He was not, at this point, overly frail or feeble but he had commenced the physical decline associated with old age.

170. I am therefore of the view that, while the Deceased was not mentally infirm and was not significantly physically incapacitated, he did rely on *"the kindness and assistance"* of David Flood. The circumstances in which David Flood managed the Deceased's bills, financial affairs and post, in particular is such as to give rise to a presumption that David Flood had influence over the Deceased. In addition, the timeline surrounding the giving of the Guarantees and the execution of the Charge is such as to lead to the conclusion that David Flood controlled the sequence of events by which the Deceased came to sign these very important documents.

171. The possibility of the Deceased giving security for a very significant loan was suggested to the Bank as early as 23 February, 2024. However, the first mention of it to the Deceased appears to have been on 17 April, 2007, and he took no advice on it until 2 May, 2007. The tender had been accepted approximately two months before the Deceased met with Mr. Cosgrove, apparently on the basis of a loan approval from BOSI, but once the more favourable terms from the Bank were made available, there appears to have been some time pressure on the three Flood brothers to comply with the loan conditions and draw down funds.

172. The very fact that the Deceased agreed to go to a solicitor — who had not acted for him previously — and to agree to everything in such a short time, supports the inference that he reposed trust in David Flood and was willing to *"sign some papers"* as were suggested to him without applying his own mind to the desirability of what he was doing or considering his own interests. Had the Deceased exercised his own independent will in relation to the entire matter, I think it is much more likely that he would have taken more time to consider what was involved and almost certainly would have required a second consultation before signing anything.

173. Furthermore, if he was really was freely engaged in a spontaneous act to help his sons, as opposed to being guided by what had suggested to him, there must also be significant doubt as to whether he would have been willing to go to a solicitor whom he had not instructed before, instead of his usual solicitor. These are not the actions of a man who is taking care to inform

himself of what he is getting involved in and what the risk might be to himself (and, by extension, his wife).

174. In those circumstances, the presumption applies and therefore the onus is on Everyday, as the person relying on the Guarantees, to establish either that the presumption is rebutted**.**

Rebuttal of the presumption

175. As stated above, the plaintiff suggests two ways in which the presumption may be rebutted.

176. First, it is well established that the presumption can be rebutted by the provision of independent legal advice or independent advice from another suitably qualified person: it does not have to be a lawyer and the qualifications of the person giving advice may depend on the nature of the transaction. In this instance, while the execution of the Charge and Guarantees would always have required a lawyer, it would have been open to the Deceased to take advice on the financial risks and consequences from an accountant or financial advisor and then to attend a solicitor for the execution of the necessary documents.

177. However, proof of independent advice is not the only means in which the presumption can be rebutted and it can also be rebutted by evidence that the gift was *"the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justifies the Court in holding that the gift was the result of a free exercise of the donor's will"*, as stated by Cotton L.J. in *Allcard v. Skinner* at p. 171.

178. The presumption is, as Bridge L.J. said in *In re Brocklehurst's Estate* [1977] 3 W.L.R. 696, 718, in a passage cited with approval by Barron J. at p. 264 of his judgment on this point in *Carroll v. Carroll*, *"a tool of the lawyer's trade whose function it is to enable him to arrive at a just result by bridging a gap in the evidence at a point where, in the nature of the case,*

evidence is difficult or impossible to come by". It can therefore be rebutted when (*per* Barron J. at p. 264) *"all the facts are known surrounding the execution of the impugned document and these show that the donee exercised no influence over the donor then there is no ground to set the deed aside"*.

179. The plaintiff argued that the facts were known in this case and were sufficient to displace the presumption and it is convenient to consider that issue first as, if the plaintiff is correct, it will then not be necessary to consider the adequacy of the legal advice as an alternative method of rebutting the presumption which arises.

- *Whether there is evidence that the actions of the Deceased were not as a result of undue influence on him*

180. The question of how the presumption is rebutted in circumstances where there is no direct evidence of actual undue influence was an issue in *Carroll v. Carroll* and is addressed in the judgments of both Denham J. and Barron J.

181. In that case, the daughters of the donor made what is I think accurately described in Keane, *Equity and the Law of Trusts in Ireland,* at para. 28.10 as a *"surprising"* concession that their brother had not acted improperly in procuring the voluntary transfer from their father of his principal assets without reserving anything more than a right of residence for life. Given that concession, one of the grounds of appeal to the Supreme Court against the decision of this Court was that it was not necessary to demonstrate that the father had received independent legal advice as the facts were known and the presumption was rebutted on the evidence. Reliance was placed on *Regina (Proctor) v. Hutton* [1978] N.I. 139, in which the evidence showed that an elderly aunt had spontaneously decided to open a joint account with her niece and that she had done this of her own volition. It was not an impediment to the rebuttal of the

presumption that the evidence came from the niece: while it is possible that such evidence could be self-serving, the niece in that case was found by the court to be credible. Having accepted her evidence, the court then went on to find that the presumption had been rebutted even in the absence of independent advice from a suitably qualified person.

182. There is no requirement in law, therefore, that a gift will be set aside unless it can be shown that independent advice has been given, but it is of course best practice to require it in order to preclude the possibility that a transaction will be set aside.

183. In *Carroll v Carroll*, it was therefore argued that the concession on the part of the plaintiff daughters – which appears to have been given in the witness box as opposed to formally, in pleadings –was such as to remove the need to rebut the presumption by evidence.

184. First of all, that concession was that the witnesses' brother had not done anything improper. However, as pointed out by Barron J. (at 265), this in itself was insufficient as *"the evidence does not show clearly why the donor did what he did, that he knew what he was doing, and that it was the free exercise of his will."*

185. *Carroll v. Carroll* was applied recently in *Re Cox deceased* [2023] IEHC 100 and this Court (McDonald J.) held that he could not find the presumption rebutted on the basis set out in *Reg. (Proctor) v. Hutton* unless he could be satisfied that he knew all of the relevant facts.

186. That is, in my view, the case here also. I do not accept that David Flood was ever in the consultation room with the Deceased and I do not accept that he put direct pressure on the Deceased to sign the documents. However, I do accept that the Deceased placed trust and confidence in his son and was ready to go along with anything that was suggested to him by David. It is simply inexplicable why an elderly man would agree to guarantee loans in the amount of €11.5m and the evidence – such as it is in the absence of any attendance of the consultation of 2 May, 2007 – demonstrates that the Deceased understood, incorrectly, that the

Bank would only have recourse to the quarry lands and not to his other assets (which in fact included also his family home).

187. I am satisfied on the evidence that the Deceased intended to assist his sons, and for that purpose, in effect, to gift them the quarry lands by giving the Bank recourse to those lands as security for the loans they were about to draw down. But there is no evidence that he intended to place his family home or any other assets he may have had on the line for their loans.

188. There is also no evidence that the Deceased ever turned his mind to the value of the quarry lands in 2007 and therefore there is no evidence that the Deceased decided, spontaneously and of his own free will, to guarantee loans to the extent of the 2007 value of those lands. The evidence of the Deceased's intentions and wishes is that he understood it would only affect the quarry lands. There is therefore no clear evidence that he decided to give a guarantee that would have separate effect from the charge, which he believed (incorrectly) extended only to the quarry lands.

189. In those circumstances, unless the presumption can be rebutted by proof of the provision to the Deceased of adequate independent advice by an appropriately qualified person, it will follow that the Guarantees must be regarded as having been procured by undue influence. I am satisfied that a solicitor was an appropriately qualified person as the execution of the Charge in particular would require the involvement of a solicitor.

190. The next question which falls for determination is whether the advice was truly *"independent"* and whether it was adequate for the purposes of demonstrating that the Guarantees were executed as a spontaneous act of the Deceased and the result of a free exercise of the Deceased's will.

- *Whether advice was "independent"*

191. While much was made by David Flood on behalf of the defendant of the fact that A.B. O'Reilly, Dolan & Co. were the solicitors who usually acted for the Company and that the Flood Partnership had paid the fees for the advice given by that firm to the Deceased, I do not think these matters affected the independence of the advice given to the Deceased. A.B. O'Reilly, Dolan & Co. were not acting for the Flood Partnership in connection with the acquisition of the Sutton Site, and the Flood Partnership had in fact retained BCM Hanby Wallace. I am satisfied that A.B. O'Reilly, Dolan & Co. were not conflicted in any way and that they acted solely for the Deceased. While David Flood gave evidence that he chose them because they would get the deal *"over the line"*, and they proceeded to do that, I am satisfied that both solicitors regarded themselves as acting solely for the Deceased.

192. As discussed further below, when considering the adequacy of the advice given, regrettably I think they fell short in their advice to the Deceased. But there is nothing whatsoever to suggest that either solicitor ever acted in the interests of David or any other remember of the Flood Partnership.

193. For example, I am quite satisfied that had either solicitor believed that the Deceased was lacking in capacity or otherwise failed to understand the nature of the transactions being entered into, they would not have let him sign the documents and they certainly would not have written to the Bank in the terms in which Mr. Cosgrove wrote to the Bank, confirming that he had explained fully the conditions and nature of the Letter of Guarantee to the Deceased and that he *"fully understood the consequences of signing same"*.

194. The classic modern authority on rebuttal of the presumption of undue influence is *Carroll v. Carroll* where there was, at best, complete uncertainty as to the identity of the client for whom the solicitor in that case was acting. While at one point it appears to have been

mooted that the solicitor acted for the elderly father before then moving to act for the adult son who was to take ownership of the father's principal asset by means of a voluntary transfer which reserved only a life estate but no right of maintenance and support or power of revocation, it was ultimately accepted that the solicitor was acting as a family solicitor, that is, for both father and son. The evidence also suggested that the son was, at the very least, the principal client, as documented by the solicitor's file.

195. In this case, while the defendant attempted to assert that, because he had chosen the solicitors in question and the Partnership paid their fee, the solicitor was not in fact independent, in my view this is incorrect. These factors on their own would be insufficient to undermine the independence of a solicitor. The key issue of fact, upon which the defendant relied in order to assert that neither Mr. Cosgrove nor Mr. Dolan acted solely for the Deceased, was that Mr. David Flood was in the consultation room with the Deceased on both occasions and, in effect, spoke for the Deceased and prevented any independent advice being given. However, I am satisfied that that never happened, that both Mr. Cosgrove and Mr. Dolan believed themselves to be acting solely for the deceased and believed that they had discharged their duty to advise him.

196. However, even though the advice was, in my view, independent, the adequacy of the advice was the subject of significant criticism at hearing and I now turn to consider that issue.

- *Whether the independent legal advice was adequate*

197. It is perhaps a feature of the Celtic Tiger era, in which the events giving rise to this case occurred, that it did not seem remarkable to anyone that an elderly man would, on the basis of a single consultation (with a solicitor he had not previously met and lasting no more than 30 minutes) proceed not only to guarantee his sons' debts to the tune of €10 million, but also

execute a charge over land in excess of 71 acres. Neither does it appear to have alarmed anyone that, just 23 days later, the same elderly pensioner increased that guarantee to €11.5m.

198. I do not think that it is a question of unfairly applying hindsight to a situation which made sense at the time, but rather a question of asking how this possibly could have happened had anyone taken the time to look at the reality of the very significant transactions being undertaken within a very short space of time by a 78 year old who did not even have a bank account himself, let alone engage in significant commercial transactions of the kind undertaken by him in May, 2007.

199. The Irish authorities have been clear since at least *Gregg v. Kidd*, approximately 40 years before the events in question, that where independent legal advice is sought, the duty of the solicitor is to *advise* on whether the transaction is in the client's interests (which necessarily includes an assessment of his interests and therefore his financial position) and not just to *explain*, for example, that a guarantee allows the bank to pursue the guarantor for the amount specified.

200. I do not see how the requisite advice could have been given without a full understanding of the Deceased's assets on the part of the solicitor purporting to advise, and I note that McDonald J. took a similar view in *Re Cox deceased*, where he stated (at para. 155):

> *"[I]t is the duty of the independent advisor to consider whether it is right and proper, in all of the circumstances, for the donor to make the gift in issue."*

201. In his evidence, Mr. Cosgrove freely accepted that he did not know the value of the lands being charged, and simply assumed that they were worth at least €10m as that was the amount of the guarantee sought by the bank. There is, of course, no evidence from Mr. Dolan, but his contemporaneous attendance does not evidence any consideration of the implications of what was a significant increase in the level of guarantee being sought and whether this occasioned any additional risks for the Deceased.

202. There was no evidence of whether the Deceased had assets other than the lands comprised in the Folio, but it was certainly suggested in cross-examination that the rent from the lands comprised the sole income of the Deceased and his wife. If that were so, then the loss of those lands would represent also the loss of their income. The Deceased does not appear to have understood this and Mr. Cosgrove did not purport to examine this issue at all.

203. Indeed, Mr. Cosgrove in his evidence said that: *"all he was at risk of losing was the quarry"*. However, this was factually inaccurate and, unfortunately, discloses a misunderstanding by Mr. Cosgrove of the nature of the transaction being undertaken. Not only were the quarry lands valued at approximately €8m, rather than €10m, but the nature of the guarantee was to give recourse to the bank to *any* of the Deceased's assets up to the value of €10m, such value to be assessed at the time the Bank called on the guarantee. Sadly, this misunderstanding seems to have been shared by the Deceased. It was not corrected by the advice and may even have resulted from it.

204. Mr. Cosgrove did not inquire of the Deceased as to whether he had any other assets or source of income. He believed the Deceased was independently wealthy but did not make any specific enquiries as to the extent of that wealth. Mr. Cosgrove did not engage in any assessment of the Deceased's assets and whether he could potentially be rendered destitute if the Guarantee were called in or whether his assets were comfortably above the extent of the surety being provided. He did not identify any other real property owned by the Deceased and, in particular, he did not take up the Deceased's title documents from the Deceased's usual solicitors with a view to ascertaining where the Deceased lived and whether the deeds or a copy Folio for it were available.

205. Mr. Cosgrove gave evidence that he looked at a new version of the Folio on the screen on 2 May, 2007, when he met the Deceased. However, no copy of this version was produced in evidence. Reliance was placed by the defendant on the cancelled burdens appearing on an

old copy of the Folio – and which appears to have been kept with the Land Certificate in the Bank's safe at its branch in Navan – which related to rights of residence for the Deceased's aunts and therefore would have indicated that the Folio included the family home of the Deceased. That would have put Mr. Cosgrove on enquiry as to the nature of the buildings in the Folio and whether it might not be the family home of the Deceased and his wife also. However, as they were cancelled, I am not certain that they would have appeared on a later version of the Folio and a version from 2014 which was produced during the trial does not disclosed these cancelled burdens.

206. However, I am satisfied that this is not material on the facts, as it was in any event Mr. Cosgrove's duty to establish the nature and extent of the assets owned by the Deceased in order to advise him of the risks inherent in executing the Charge and giving the first guarantee and it is clear that this was not done. It would have been almost inevitable, if those instructions were taken, that it would have come to light that this was the only land owned by the Deceased and that therefore the family home was on it.

207. I am satisfied that Mr. Cosgrove explained to the Deceased that he could be liable up to the sum of €10m on the guarantee. However, he did not explain that assets other than the existing quarry could be made available to the Bank to recover that sum, and he did not engage in any comparison of the value of the lands with the amount secured by the first guarantee. In my view, Mr. Cosgrove should have explained that all of the Deceased's assets could be made available to meet a claim on the guarantee of €10m (which was subsequently increased to €11.5m) and the Deceased should have been advised that it was not just a question of risking the quarry, as the Deceased seemed to understand, but a question of risking all of his other assets necessary to meet the terms of the guarantee.

208. It seems that this was not made clear to the Deceased and that he believed that, not only was the family home not affected by the Charge or the Guarantees, but he did not understand

that the Bank could have recourse to his assets other than the quarry lands in order to satisfy the Guarantees. Given that the Bank appointed valuers had the quarry lands at €8,041,000, on the face of it, the assets which would be required over and above the proceeds of sale of the quarry lands were considerable and - even in the case of a person regarded as independently wealthy - could serve to undermine their entire way of life. I am satisfied that the advice given to the Deceased was not adequate to highlight this danger and that the Deceased did not in fact understand the extent of the potential liabilities that he was undertaking or that he could, in effect, lose almost everything by signing the Guarantees.

209. In saying this, I note that the Supreme Court in *Carroll v. Carroll* stressed the solicitor's failure to inform himself as to the relevant circumstances of the father prior to purporting to advise him. At p. 255, Denham J. (as she then was) stated:

> *"[The solicitor] did not know that the asset being transferred was practically the sole asset of [the father] and so could not advise him fully or explain the consequences of his action. Nor did he know of the family, the relationships with the daughters, and so could not advise on this matter either. In light of the absence of this information he could not advise [the father] appropriately."*

210. Similarly, Barron J. approved the judgment of this Court (Budd J.) in *Gregg v. Kidd*, at 201-202, where the judgment of Farwell J. in *Powell v. Powell* [1900] 1 Ch. 243 was largely approved. (While Budd J. did not adopt the statements of Farwell J. that the independent advice would not be sufficient if the client refused to take it, or that the solicitor should refuse to act further if his advice was not taken, but these reservations are not material here as they do not arise on the facts.)

211. Critically, however, Budd J. (at p. 202) expressly approved the statements of Farwell J. that a solicitor giving independent advice does not discharge his duty merely by satisfying himself that the donor understands and wishes to carry out the particular transaction; he must

satisfy himself that the transaction is one that it is right and proper for the client to enter into in all the circumstances. In giving the advice, the solicitor must appraise himself of all of the material facts and circumstances and the advice must be such as would be given by a competent solicitor acting solely in the interests of the donor.

212. In *Gregg v. Kidd*, the transaction was an improvident one in which a vulnerable, elderly man, acting under the undue influence of his sister and her son, was to sign over all of his substantial assets by way of a voluntary transfer to his nephew, retaining a life estate for himself (which, given his age and poor health, was not a valuable interest) but containing no covenant that he would be maintained for his lifetime and no power of revocation. Budd J. made it clear that the obligation of the solicitor, having informed himself of the donor's health and the extent of his assets, was not merely to *explain* the nature of the transaction but to *advise*. He was of the view that the solicitor, who was a new solicitor brought in by the donor's sister and her family to act when the donor's usual solicitor refused to take instructions on the basis of lack of capacity, should have fully appraised himself of the donor's state of health, his relationship with her sister and his family, and should have advised the donor that the transaction did not benefit him. In particular, he should have advised the donor in that case that he should not sign the deed without inserting a power of revocation.

213. Similarly, in *Carroll v. Carroll*, the solicitor who acted for both father and son in the execution of a voluntary conveyance, which retained a right of residence but not a right of maintenance and support, did not take instructions on the full extent of the father's assets (which would have led to the discovery that the property, the subject of the voluntary transfer, was in fact the father's principal asset and source of income). Denham J. in her judgment specifically pointed to the need for a solicitor who is advising in a situation of presumed undue influence to appraise themselves of the full facts and circumstances which would be material

to a decision by the donor so that they can not just *explain* the nature of the transaction but put themselves in a position where they can *advise* that person on the advisability of the transaction.

214. Barron J., whose judgment is directed specifically to what is required to rebut a presumption of undue influence, stated very clearly (at pp. 256-266) that, even had the solicitor been acting solely for the donor in that case, the advice would have been inadequate because:

(1) The solicitor did not have knowledge of all of the relevant circumstances; and

(2) He did not give advice, he merely set out to carry out the donor's intentions.

215. The same could be said of the advice here which, though qualifying as independent advice, was not given on the basis of knowledge of all of the relevant circumstances nor is there any evidence that either solicitor gave advice. They merely explained the nature of the transactions, but they did not advise the Deceased as to whether or not this was a prudent or desirable step for him to take. There was no evidence whatsoever as to the Deceased's assets but, given that the quarry lands (including the unexploited reserves in the 11 acres, but excluding any buildings and therefore excluding the family home) had been valued at €8m, it was the case that the Deceased would in any event be liable to the tune of a further €3.5m at least from his other assets. No consideration at all of the ramifications for this for the Deceased appears to have been given by the either solicitor, nor is there any record or any evidence that the Deceased was advised that this was the effect of the transactions or of what risks would follow for the Deceased. Indeed, it seems clear that no consideration of the overall assets of the Deceased was undertaken by either solicitor and, consequently, no advice as to the potential risks was even possible.

216. In short, the two solicitors who advised the Deceased confined themselves to explaining the nature of the charge and guarantees but, first, they did not advise the Deceased on the likely consequences and possible risks of entering into the transaction and, secondly, Mr. Cosgrove appears to have wrongly advised the Deceased that the lands the subject of the charge would

be the only asset to which the Bank could have recourse if it sought to enforce the guarantee. This wrong advice most likely carried over into what was, in reality, a supplemental consultation with Mr. Dolan some weeks later, which it appears from the terms of the attendance and the circumstances in which that consultation became necessary, that the only issue discussed was the fact that there were two guarantees which now made the Deceased liable for a total sum of €11.5m.

217. In those circumstances, I think it is quite clear that the advice given was not sufficient to rebut the presumption.

218. It should be noted that *Gregg v. Kidd* and *Carroll v. Carroll* approached the issue in the same manner as the House of Lords in *Inche Noriah v. Shaik Allie Bin Omar* [1929] A.C. 127 where the Privy Council also pointed to the need for a solicitor to actually advise the client of the desirability of entering into the transaction and, for that purpose, to fully appraise themselves of a donor's assets and personal circumstances.

219. Applied to the circumstances of this case, this means that the obligations of Mr. Cosgrove and Mr. Dolan went beyond simply explaining that the Guarantees would leave the Deceased liable to the Bank in a particular amount: it seems almost inevitable that they should have advised him against it.

220. Indeed, the facts of this case and of *Gregg v. Kidd* highlight the risks that come from a solicitor purporting to give independent legal advice in connection with a significant transaction when they have had no prior dealings with the client to whom they are giving advice. Where this occurs, one short consultation is almost inevitably going to be inadequate to appraise the solicitor of the facts and circumstances of which he or she would need to be aware in order to give meaningful advice. These include not only a full account of the assets of the person who is about to enter into the transaction but also some general knowledge as to

their family relationships, personal circumstances, and general health, as these are all material to the advisability of a major transaction of this kind.

221. One of the issues which troubled me about the manner in which the Deceased came to attend with Mr. Cosgrove on 2 May, 2007, is that Mr. Cosgrove confirmed that the Deceased never contacted him to make the appointment. Mr. Cosgrove said that the Deceased came in on 2 May, 2007, but when asked how the appointment was made, he assumed it was made through reception.

222. The office diary was put to him and this recorded that, on 1 May, 2007, David Flood's secretary had a note to remind him to ring Niall Dolan. There was also a record that Mr. Cosgrove rang at noon on 1 May, 2007, and that Mr. Flood's secretary gave him both of David Flood's mobile numbers. This would certainly suggest that Mr. Cosgrove's evidence that he did not speak to David Flood on the phone on 1 May, 2007, is incorrect. However, the diary is hearsay and no argument was made by reference to s. 14 of the Civil Law (Miscellaneous Provisions) Act, 2020, presumably because Mr. Flood only supplied the diaries after the trial had commences and therefore compliance with s. 15 of the 2020 Act was not possible.

223. Even if the diary is inadmissible as hearsay, the fact of the matter is that Mr. Cosgrove met the Deceased without ever having taken any phone call or received any written instruction from him. An appointment was made but, even if it as made through reception, it could only be done after Mr. Cosgrove indicated that he was willing to act and available. Yet, Mr. Cosgrove did not give any specific evidence of how that consultation was arranged.

224. I accept that he did not know David Flood previously as David Flood generally dealt with Niall Dolan, who handled the Company's affairs. However, I think the most probable way that the appointment was made was by David Flood ringing either Mr. Cosgrove or reception. It was not made by the Deceased. This is consistent with David Flood choosing the solicitors' firm and driving his father to the two appointments ultimately made. I am satisfied that David

Flood took the lead in the entire process and therefore most likely made the appointments on behalf of his father.

225. Unfortunately, also, Mr. Cosgrove kept no written attendance of his meeting with Mr. Flood. The brief letter sent to the Bank does not, as he suggested, suffice as an attendance. In this respect, the case has regrettable parallels with *Carroll v. Carroll*, *Gregg v. Kidd* and *Re Cox deceased*.

226. It was submitted by the plaintiff that *Carroll v. Carroll* and *Gregg v. Kidd* were not applicable as they concerned voluntary conveyances, and that the relevant test was set out in *Royal Bank of Scotland v. Etridge (No. 2)* [2001] 3 WL.R. 1021 (*"Etridge"*) and that Mr. Cosgrove's evidence met the minimum requirements which were set out by Lord Nicholls (at para. 65) in the following terms:

> *"(1) He will need to explain the nature of the documents and the practical consequences these will have for the wife if she signs them. She could lose her home if her husband's business does not prosper. Her home may be her only substantial asset, as well as the family's home. She could be made bankrupt. (2) He will need to point out the seriousness of the risks involved. The wife should be told the purpose of the proposed new facility, the amount and principal terms of the new facility, and that the bank might increase the amount of the facility, or change its terms, or grant a new facility, without reference to her. She should be told the amount of her liability under her guarantee. The solicitor should discuss the wife's financial means, including her understanding of the value of the property being charged. The solicitor should discuss whether the wife or her husband has any other assets out of which repayment could be made if the husband's business should fail. These matters are relevant to the seriousness of the risks involved. (3) The solicitor will need to state clearly that the wife has a choice. The decision is hers and hers alone. Explanation of the choice facing the wife will call for*

some discussion of the present financial position, including the amount of the husband's present indebtedness, and the amount of his current overdraft facility. (4) The solicitor should check whether the wife wishes to proceed. She should be asked whether she is content that the solicitor should write to the bank confirming he has explained to her the nature of the documents and the practical implications they may have for her, or whether, for instance, she would prefer him to negotiate with the bank on the terms of the transaction. Matters for negotiation could include the sequence in which the various securities will be called upon or a specific or lower limit to her liabilities. The solicitor should not give any confirmation to the bank without the wife's authority."

227. For a number of reasons, I do not agree that *Carroll v. Carroll* and *Gregg v. Kidd* do not apply in the case of guarantees.

228. First, I do not see at the level of principle that the provision of legal advice to rebut a presumption of undue influence differs depending on whether the substantial benefit gained from it arises through the mechanism of a voluntary conveyance or a guarantee. The purpose of the advice is to ensure that the more vulnerable person is giving the benefit (whatever it may be) of his or her own free will, and with full knowledge and understanding of all relevant facts. In either case, the requirement is to explain not only the effect of the transaction but to advise the vulnerable person of the risks and disadvantages involved for them.

229. Secondly, in *Etridge*, the decision of Farwell L.J. in *Powell v. Powell*, on which Budd J. relied for his judgment in *Gregg v. Kidd*, is discussed. While, like Budd J., Lord Nicholls did not agree with Farwell J. that a solicitor should decline to act if the advice were not taken, he did not say the case was irrelevant where the result of the undue influence was the giving of a guarantee.

230. It is true that, in *Ulster Bank v. Roche* [2012] 1 IR 765, Clarke J. (as he then was) indicated that *Etridge* might not be approved in full as the law in this jurisdiction, but he was

referring to the circumstances identified in *Etridge* as placing a bank on inquiry. He was not suggesting that the core minimum required for independent advice sufficient to rebut a presumption of undue influence was in any material way different from our law. Furthermore, while McDonald J. did not refer to *Etridge* in *Re Cox deceased*, this would seem to be for the very good reason that our own Supreme Court in *Carroll v. Carroll* has set out what is required by way of independent advice and there was therefore simply no need to refer to *Etridge*, which I in any event read as being substantially to the same effect as *Carroll v. Carroll* on the issue of the type of advice which is required to be given by the independent solicitor.

231. The type of independent advice which is required to rebut a presumption of undue influence does not differ depending on whether the transaction in question is a voluntary conveyance or a guarantee. Both, in essence, make available assets of the donor or guarantor for the benefit of the donee or debtor without receiving anything in return. Either way, the donee or debtor gets a *"substantial benefit"*. Furthermore, in either case, if the gift transfers or the guarantee puts at risk substantially all of the assets of the vulnerable person, then it will be to his or her substantial disadvantage. It is well established that the presumption of undue influence is designed on the grounds of the public policy in preventing abuse, as explained in *Allcard v. Skinner* itself. I do not see why this public policy would not operate to protect an elderly and increasingly frail parent who is thinking of putting their entire assets at risk so as to allow an adult child or children to engage in speculative investments.

232. The two types of transactions are just two examples of the purposes for which undue influence may be brought to bear on the more vulnerable person. The essential elements of the advice required will differ somewhat depending on the nature of the transaction which is in issue, but in either case, the solicitor will be required to advise the client of the potential risks of proceeding, and this can only be done after full instructions are taken from the client of their

assets, income, and any aspect of the client's personal circumstances which might be relevant to a consideration of the downside risk or consequences from proceeding with the transaction.

233. In any event, Mr. Cosgrove's evidence establishes that the advice given did not meet the *"core minimum"* set out by Lord Nicholls. He did not give the type of advice described other than that at (1). Mr. Dolan's attendance, similarly, does not record advice beyond the essential nature of a guarantee as potentially imposing liability on the Deceased and the fact that the combined exposure was now fact that the combined exposure was now €11.5m. Therefore, even if I accepted that the type of advice required to rebut a presumption of undue influence differs depending on the type of transaction involved, I would still not be satisfied that the advice provided in this instance was adequate.

234. However, it does not follow from the inadequacies in the advice given to the Deceased that the plaintiff is now precluded from enforcing the Guarantees. Before turning to consider that issue, I will refer to a subsidiary argument made by the defendant, to the effect that the Deceased, by providing the Guarantees and Charge, engaged in an improvident transaction.

III. Whether the provision of the guarantees constitutes an improvident or unconscionable transaction

235. As I understand the plaintiff's arguments, it was suggested that the very nature of a guarantee was such that it could not be regarded as an improvident or unconscionable transactions. As already stated in the context of considering whether the presumption of undue influence can arise, a guarantee for a loan, while always part of a tripartite agreement which puts at risk the assets of the guarantor without any corresponding benefit, can be given in a variety of circumstances. In the same way that a voluntary conveyance of transfer of lands which form only part of the considerable assets of the donor must be viewed entirely differently

from a gift of all of the donor's assets, similarly a guarantee which risks only a portion of the guarantor's assets, and which would never threaten his income, his home, or his entire way of life, would not be regarded as improvident whereas a guarantee in an amount which is equal to or perhaps even exceeds the guarantor's entire assets would be viewed very differently. Each case must be considered on its facts and, unfortunately, despite the lack of direct evidence as to the precise assets of the Deceased in 2007 or indeed of the estate at the present time, it is certainly the case that the quarry lands were, even in May, 2007, valued at €3.5m *less* than the combined amount of the Guarantees. It is also the case that the Deceased – and, it would appear, Mr. Cosgrove - believed that the bank could have recourse only to the quarry lands.

236. In those circumstances, the provision of the Guarantees by the Deceased was in my view an improvident transaction and, given my findings as to his increasing physical frailty, the fact that he depended on David Flood to manage all of his affairs, including his post, and the fact that he did not understand that the Bank had recourse to assets other than the quarry lands, the case falls within the passage in *Grealish v. Murphy* [1946] I.R. 35 as applied by the Supreme Court in *Carroll v. Carroll*. As such, it is liable to be set aside.

237. The effect of this on a bank who may not have been aware of the factors which rendered the Guarantees liable to be avoided as an improvident transaction does not appear to have been considered specifically in any of the cases concerning transactions procured by means of undue influence. However, I cannot see that there would be any difference in principle for treating an improvident transaction in a manner differently from one which is presumed to have been procured by undue influence. Whether or not Everyday as successor of the Bank are now precluded from relying on the Guarantees is decided by reference to the same principles whether the Guarantees are liable to be set aside by undue influence or as an improvident transaction.

IV. Whether any infirmity in the independent legal advice affects the validity of the Guarantees

238. There are two aspects to this: first, as set out by this Court (Clarke J.) in *Ulster Bank v. Roche*, a bank may be put on enquiry where a guarantee is given to support a loan. The circumstances of that case were different to this but, as pointed out by the defendant's senior counsel in her very able submissions, they are not significantly so. That was an abusive relationship between a couple, where the woman – a person of modest means - was already undergoing counselling but was nevertheless persuaded to guarantee the debts of a company in which she had been named as a director but where her abusive partner was the sole shareholder.

239. Clarke J. stated (at para 5.13):

> *"[I]n circumstances where a person who is required to offer security is not a shareholder and where there is no evidence to suggest that the bank was aware of any active involvement of that party in the business, then it seems to me that the personal relationship between the parties emerges as a much more significant factor."*

At para. 5.14, he stated:

> *"A regime which places no obligation on a bank to take any steps to ascertain whether, in the presence of circumstances suggesting a non-commercial aspect to a guarantee, the party offering the guarantee may not be fully and freely entering into same, gives insufficient protection to potentially vulnerable sureties. While not necessarily accepting that the precise parameters, identified in* Etridge, *are those which give rise to an obligation on the bank to inquire, and thus represent the law in this jurisdiction, I am satisfied that the general principle, which underlies* Etridge, *is to the effect that a bank is placed on inquiry where it is aware of facts which suggest, or ought to suggest, that there may be a non-commercial element to a guarantee."*

240. In my view, the Bank were similarly on enquiry here. They were advancing a very large loan for the purposes of acquiring a development site (which must be regarded as a speculative investment involving risk) to the sons of the guarantor rather than, for example, a company partly owned by the guarantor. The Bank knew the Deceased was not a member of the Flood Partnership, as he was not named as a beneficiary of the Overdraft Facility. Neither was he ever named as a borrower in the various facility letters relating to the loan. He had no involvement in securing any of the loans involved but was being asked to make available very considerable assets for the purposes of securing those loans.

241. Furthermore, while Ms. Meade never met the Deceased, she knew he was David Flood's father and therefore, of necessity, of advanced age. There was no conceivable benefit to the Deceased from the giving of the Charge, the first guarantee of 2 May, 2007, or the Guarantees of 25 May, 2007, and the level of risk being undertaken was very high. The Bank had no dealings whatsoever with him and had no direct contact with him, other than the letter of 18 April, 2007, in which Ms. Meade wrote to him directly, seeking his authority to release the Land Certificate to his solicitor. However, it must be recalled that this letter stresses the need for him to take independent legal advice.

242. All of these matters in my view, put the Bank on enquiry and they were obliged to take reasonable steps to satisfy themselves that the Charge and Guarantees being provided to them were the product of a full and free, informed consent, by the person giving them. I did not understand this to be seriously disputed by Everyday.

243. However, they did take reasonable steps, by at all times requiring that the Deceased would have the benefit of independent legal advice. The question then resolves itself into the issue of whether the Bank took sufficient steps to inform themselves that that advice had been obtained, or whether it was on notice that the advice was inadequate and that the Guarantees

should be presumed to have been procured by undue influence or to constitute an improvident transaction.

244. The leading case on this jurisdiction is that of Laffoy J. in *Tynan v. Kilkenny County Registrar & Anor* [2011] IEHC 250 that a bank takes reasonable steps to enquire into the potential for undue influence if it satisfies itself that the surety has received independent legal advice and that the independent solicitor is satisfied that the deceased gave a free and informed consent to the giving of the guarantee.

245. Laffoy J. explicitly approved the statement of Lord Nicholls in *Royal Bank of Scotland plc v. Etridge (No. 2)* [2001] 3 W.L.R. 1021, at para. 78:

> *"In the ordinary case … deficiencies in the advice given are a matter between the wife and her solicitor. The bank is entitled to proceed on the assumption that a solicitor advising the wife [that is, the potentially vulnerable surety] has done his job properly."*

246. Laffoy J. also approved the statement of Lord Hobhouse at para. 122 that the bank must get a statement from the solicitor or it will not have reasonable grounds for being satisfied that the wife's agreement has been properly obtained. However, that was done in this case.

247. Finally, she also approved, as good law in this jurisdiction, the statement of Lord Scott at para. 171 that:

> *"A bank, proposing to take a security from a surety wife for whom a solicitor is acting, requires, first, confirmation that the solicitor's instructions do extend to advising her about the nature and effect of the transaction. Subject to that confirmation, however, the bank is, in my opinion, entitled reasonably to believe that the solicitor will have advised her on the matters to which I have referred and, accordingly, that she has had an adequate explanation and has an adequate understanding of the transaction."*

248. In *Tynan*, the relevant letter (set out at para. 2.7 of the judgment) merely confirmed that the plaintiff had attended the independent solicitor's offices *"for the purposes of obtaining*

independent legal advice for a Deed of Confirmation in your favour … I confirm that I explained the contents of the Deed of Confirmation to [the plaintiff] and am satisfied that the understood same and was happy to execute the said Deed."

249. Ms. Meade got the name of the Deceased's solicitor from David Flood, not from the Deceased himself, but she then wrote to the Deceased directly, reminding him that he had to get independent legal advice prior to signing the required Letter of Guarantee. She also said she was sending the Letter directly to the Deceased's solicitor and that his solicitor would give him advice about it. She also said that the *"charge pack"* would go out directly to Mr. Dolan from the Bank's Central Securities department.

250. Subsequently, as in Tynan, the Bank were advised by Messrs. A.B. O'Reilly Dolan & Co. that they had provided independent legal advice to the Deceased prior to his execution of the charge and signing of the relevant Guarantees. This occurred primarily through the letter of Mr. Cosgrove dated 2 May, 2007, in which he stated:

> *"I confirm that I explained fully the conditions and nature of [the Letter of Guarantee dated 2 May, 2007] to [the Deceased] and <u>that he fully understood the consequences of signing same.</u>"* [Emphasis added.]

251. However, on 2 May, 2007, David Flood had told Ms. Meade that, actually, he could not be named as a borrower on the loan facility and it had been decided to replace the first guarantee with two separate Guarantees, now totalling €11.5m, an increase of €1.5m from the level of surety sought just three weeks previously. Having attended this time with Mr. Dolan, the Deceased provided those Guarantees. The letter from Mr. Dolan of 29 May, 2007, merely stated that the two new letters of guarantee duly executed by the Deceased, were enclosed, and sought acknowledgement of safe receipt.

252. Had the letter from Mr. Dolan been the only letter received by the Bank, I would have to consider if the Bank could be satisfied, simply from the fact of receipt of independent legal

advice alone but without any specific confirmation or representation that the guarantor understood that advice, that the Deceased had given a full, free and informed consent to the giving of the Letters of Guarantee. I think it is most likely that that would be the case as, in my view, a Bank is entitled to assume that a solicitor has given the type of advice which he or she was retained to give.

253. However, it cannot be read in isolation from the letter from Mr. Cosgrove of 2 May, 2007, to the effect that the Deceased not only had the first guarantee explained to him but that he *"fully understood the consequences of signing same"*. While in monetary terms, obviously the increase of €1.5m was very significant, and there was now an additional guarantee, there was no fundamental change in the nature of the documents being executed or in the underlying transaction. Furthermore, even the level of guarantee signed on 2 May, 2007, was greater than the value of the lands. The essential position of the Deceased was not materially altered by the execution of the replacement Guarantees. If he understood the consequences of giving a guarantee for €10m in favour of all three of his sons, then it would almost certainly follow that the would understand the consequences of increasing the level of the overall amount guaranteed, and altering the beneficiaries.

254. On the facts of this case, I am satisfied that the Bank had been assured by an independent firm of solicitors, who did not act for the borrowers or the Flood Partnership, that the Deceased had received appropriate advice and that he understood what he was doing.

255. Having been told that, the Bank could reasonably be satisfied that the Deceased was not acting under the undue influence of the Flood Partnership or indeed any of his sons. The Bank was also told (by the provision of a Family Home Protection Declaration) that the lands charged did not comprise in whole or in part a family home and the Deceased provided a statutory declaration to that effect.

256. Ms. Meade also gave evidence, in effect, that she not consider any issues relating to advisability of the Deceased providing such an extensive guarantee as because Head Office had imposed a condition that there was to be independent legal advice and it was not a matter for her as these were all issues for the independent solicitor.

257. It was also contended that Ms. Meade should have realised the significance of certain burdens relating to rights of residence for the Deceased's aunts which had previously been registered and were still evidence on the old copy Folio held by the Navan Branch, Ms. Meade's view was that none of this was her concern as the Deceased was going to get independent legal advice.

258. I agree. Ms. Meade was not a lawyer and in my view the perusal of legal documents to ascertain their significant is a matter for a solicitor. I do not see that it would be evident to a non-lawyer that rights of residence had previously been registered as a burden, though a thorough and experienced conveyancing solicitor might certainly realise from those burdens that the Folio included the family home inherited by the Deceased in 1970. (It should be noted, however, that the Folio also records that a small portion of the lands originally comprised in it were transferred in 1996 and it is not clear to what this relates.)

259. She did say that, had she been aware that there was a family home on the Folio, she would have required it to be severed from the Folio at that point before the Charge was accepted as security, but she was not in fact so aware. I accept the evidence of Ms. Meade that the Land Certificate was in a locked safe in the Navan branch and that she would never have looked at it or read it in detail. I accept that she believed that Mr. Dolan, as the Deceased's independent solicitor, would advise the Deceased about it. This was, moreover, a reasonable view. Land Certificates, copy Folios, and leases are all legal documents, the effect of which is best understood and explained by lawyers.

260. And, given that she knew that the Deceased would have his own solicitor advising him, she was not obliged to scrutinise the old copy of the Folio which was held in the safe in the Navan branch because she assumed that the independent solicitor would attend to that. That was, in my view, a reasonable assumption.

261. The Bank in this case took reasonable steps to satisfy itself that the Deceased had had full and adequate legal advice as it only advanced the funds and accepted the Guarantees in satisfaction of the conditions attached to the loan offer after receiving confirmation that the Deceased had been advised by a firm of solicitors who were not acting for the Flood Partnership, or any of its individual members, in the course of the purchase of the Sutton Site.

262. The facts relevant to the Bank's state of knowledge as to any inadequacies in the advices are as follows: Ms. Meade had been told by David Flood on 16 April, 2007, that Niall Dolan of Messrs. A.B. O'Reilly, Dolan & Co. would act for the Deceased in connection with giving the required advice. That firm had no involvement in the purchase of the Sutton Site or the arrangement of the relevant loan and overdraft with the Bank. Ms. Meade wrote to the Deceased and to Niall Dolan directly, and there is no suggestion she could possibly have known that the Deceased's post was opened and dealt with by David Flood. Neither is there any evidence that she was aware that A.B. O'Reilly, Dolan & Co. had not previously acted for the Deceased.

263. Furthermore, although the timescale within which instructions were received by A.B. O'Reilly, Dolan & Co. and the Charge and first guarantee for €10m were executed is worrying from the point of view of the Deceased as a person vulnerable to undue influence from his son, this does not affect Everyday's position. In any event, Ms. Meade had been told as early as 23 February, 2007, that the Deceased would provide this security. She could not have known that the Deceased was first told that he was needed to *"sign some papers"* on 17 April, 2007, just under two weeks before providing the security.

264. Ms. Meade was quite clear in saying that she did not consider whether or not the lands included a family home, but there was no obligation on the Bank, acting through its employees, to consider these matters. The Bank insisted on independent legal advice for the Deceased. It did this not in discharge of any obligation to the Deceased, but to protect itself by ensuring that the security requested would ultimately be enforceable.

265. On receipt of the confirmation of 2 May, 2007, from Mr. Cosgrove, and on being forwarded the fresh Guarantees by another independent solicitor under cover of the letter of 29 May, 2007, it was reasonable for the Bank to assume that the Deceased had given a free and fully informed consent to the furnishing of the Guarantees and the execution of the Charge. Everyday, as the Bank's successor, is therefore entitled to rely on the Guarantees.

V. Counterclaim

266. As well as seeking declarations that the Guarantees were void by reason of lack of capacity and the undue influence of David Flood, which reliefs will have to be refused for the reasons stated above, the Counterclaim seeks a declaration that the Charge is void by reason of the failure to obtain the consent of the Deceased pursuant to s. 3 of the 1976 Act.

267. However, I understood counsel for the defendant to acknowledge that this is properly a matter for the Circuit Court proceedings. I think this is correct as the Statement of Claim does not seek any relief based on the Charge and, accordingly, it is not necessary to consider whether Everyday are correct in concluding that the Charge is severable so as to be void only so far as the family home and one acre of curtilage (together with any necessary access and egress) is concerned.

268. It is also claimed in the Counterclaim that the Deceased was induced to give the Guarantees by reason of the misrepresentation by the Bank of the value of the lands. Damages are claimed for negligence, breach of duty, breach of statutory duty and breach of contract.

269. This claims fails for a number of reasons. First, there is no evidence that the valuation of the quarry lands at just over €8m was in any way negligent. There was an attempt to contrast this with the much lower valuation for probate purposes, but given that the Deceased died when property values were at their nadir but more particularly given the absence of any evidence of negligence by the valuer retained by the Bank, this claim cannot succeed.

270. Furthermore, there can be no cause of action in misrepresentation, as this valuation was not supplied to the Deceased or his solicitor. Indeed, Mr. Cosgrove gave evidence that he did not know the value of the lands being charged. The valuation report was obtained by the Bank for its own benefit, to confirm the loan to value ratio, and not for the benefit of the Deceased. It was for the Deceased and his solicitor to ascertain the value of the charged lands themselves, for the purposes of considering whether or not to give the Guarantees and Charge.

271. The defendant is therefore not entitled to any relief on the Counterclaim.

Conclusions

272. I am satisfied that the presumption of capacity has not been rebutted and that the Deceased was capable, as of May, 2007, of entering into transactions of the kind undertaken by him, namely, the creation of a Charge over the entire of his lands and the provision of very extensive Guarantees.

273. However, the relationship between the Deceased and his son, David Flood, was such as to raise a presumption of undue influence. This presumption has not been rebutted as, although the Deceased received independent legal advice, it was in fact inadequate as it seems

to have been a brief explanation of the nature of the transactions entered and it seems from the Deceased's reaction in both consultations – that the quarry was for *"the boys"* – that he did not understand that he would be personally liable for significant sums which were greatly in excess of the value of the quarry at the time, that the charge in fact extended to his family home, or that all of his other assets were at risk if the value of the charged lands proved insufficient to meet his liabilities under the Guarantees. There is no evidence that the Deceased called to mind the extent of his assets and the risk to him and his wife should the Guarantees relied upon in these proceedings be relied upon.

274. I am satisfied that the full extent of the consequences were not in fact explained to the Deceased at either consultation and this is evident from the Deceased's misunderstanding that any recourse would be limited to the quarry lands (and what precisely he understood by this is not clear either).

275. Furthermore, the provision of the Guarantees was an improvident transaction in circumstances where the Deceased was not aware of the value of the quarry, was not aware that the Folio comprised not only the quarry but also his family home, and did not seem to appreciate that if the Bank repossessed the quarry, he would have no income. He seems to have given no thought to the relationship between his liability on the Guarantees and his overall assets or ability to pay.

276. However, the Bank had no notice of this inadequacy or the resulting misunderstanding of the Deceased. It was clear that the Deceased had attended independent solicitors and the Bank for the purposes of receiving such advice and – while even the letter of Mr. Cosgrove is not expansive, and that of Mr. Dolan even less so – the Bank was entitled to assume that they had given full and adequate advice.

277. That being the case, the Guarantees are enforceable by Everyday, as successor of the Bank. As a result, I will enter judgment for the plaintiff against the defendant and I will hear the parties on the precise Order which should be made.

278. **Postscript**: At the hearing on 3 May, 2024, convened for the purpose of making final Orders in the proceedings, it was confirmed to the Court that Everyday was waiving any interest from the date of demand (15 July, 2010) and, accordingly, judgment was entered in the sum of €10,782,867.58 (the sum mentioned at the outset of the judgment being that originally claimed and which included interest from 15 July, 2010).