THE COURT OF APPEAL

CIVIL

[unapproved]
Neutral Citation No: [2025] IECA 8
[2024 No. 146]
[2014 No. 1125 S]

Costello P.
Binchy J.
Pilkington J.

BETWEEN

EVERYDAY FINANCE DAC

PLAINTIFF/RESPONDENT

AND

JOAN FLOOD

DEFENDANT/APPELLANT

JUDGMENT of Ms Justice Costello delivered on the 23rd day of January, 2025

1. The issue for resolution in this appeal is whether Everyday Finance DAC ('Everyday'), the successor in title to Allied Irish Banks plc ('the Bank') is entitled to rely on two guarantees executed on 25 May 2007 by the late John Joseph 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 Flood, 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. The defendant/appellant ('the appellant') is the widow of the Deceased and she is sued in her capacity as his legal personal

representative. She is the sole executrix and sole beneficiary named in the will of the Deceased.

Background

2. In 1970, the Deceased was registered as the sole owner of approximately 71 acres of land comprised in Folio 5536F, County Meath. The lands comprised an existing quarry of approximately 59 acres, 12 acres of agricultural land and the family home where the Deceased and the appellant resided for many years. Prior to his retirement in 1994, for many years the Deceased had operated a successful quarry on the lands. When he retired, his son, David Flood, incorporated a company (JJ Flood & Sons Manufacturing Ltd) to carry on the business of the quarry. The company took a lease of a portion of the lands, initially for a term of years, and thereafter as a monthly tenant. The rent paid by the company to the Deceased under the lease was the Deceased and appellant's sole source of income post his retirement.

3. The Deceased and the appellant's three sons, David, Tom and Alec Flood, formed a partnership in or about 2002 known as the Flood Partnership. The business of the partnership consisted of buying, refurbishing and selling older houses subdivided into flats and bedsits in Dublin 6. In early 2007, a site on Railway Avenue, Sutton, County Dublin, comprising 1.97 acres, became available. The partners believed that the opportunity to develop the Sutton site was a suitable investment opportunity. To avail of this opportunity, the Flood Partnership required to borrow all of the purchase price, together with the monies necessary to discharge stamp duty and legal fees. At the time of the events giving rise to these proceedings the partnership comprised the three sons of the Deceased.

4. The Flood Partnership's bank, Bank of Scotland Ireland Ltd ('BOSI'), was prepared to fund the transaction. The company's bank was AIB. The relationship manager at the Navan branch of AIB, Ms Meade, made an unsolicited offer to fund the transaction. The

terms offered by AIB were more favourable than those offered by BOSI. On 23 February 2007, David Flood volunteered to Ms Meade that the quarry lands leased by the company from his father (the Deceased) could be offered as security for the loan.

5. On 28 February 2007, in Heads of Terms in favour of The Flood Partnership, the Bank offered two loan facilities, one in the sum of €13,700,000 for the purpose of assisting with the purchase of the Sutton site, and the second, an overdraft facility for the partnership, in the amount of €1.5m for the purposes of working capital. Five securities were to be provided to support the two loans prior to or in tandem with drawdown:

(i) An all sums charge to be executed by David Flood over lands comprising 11 acres, 0 roods and 20 perches, comprised in Folio 5853, County Meath, and registered in his sole name.

(ii) An all sums charge over the Sutton site to be vested in the names of the Flood Partnership.

(iii) A letter of guarantee for €10m 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 a charge.

(iv) 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.

6. In order to purchase the Sutton site the Flood Partnership needed to submit tender documents by 1 March 2007, and to pay a preliminary deposit of €750,000. Finance for the entire project was not in place on 28 February 2007, so the company advanced €250,000 to the Flood Partnership and the balance was drawn down from the Flood Partnership's own account.

7. On 7 March 2007, the Flood Partnership's bid of €11,600,000 for the Sutton site was accepted by the vendor.

8. On 13 April 2007, the Bank issued a letter of sanction. It offered David, Tom and Alec Flood, the Flood Partnership two facilities. One was an overdraft facility of €1.5m to meet working capital needs. The second facility was a loan in the amount of €12,715,000 to fund the purchase of the Sutton site, including stamp duty and legal fees. The security for the two facilities was as set out in the Heads of Terms of 28 February 2007. Special condition 5 of the letter of sanction provided:

> "*[The Deceased] to obtain independent legal advice prior [to] the providing of Letter of Guarantee for €10,000,000."*

9. David Flood informed Ms Meade that Niall Dolan of O'Reilly Dolan & Co Solicitors would act for his father. These solicitors had not previously acted for the Deceased and were unfamiliar with his affairs.

10. Before the partnership accepted the offer of 13 April 2007 for the two facilities, steps were taken in relation to the security to be provided by the Deceased in anticipation that the offer would be accepted. On 18 April 2007, Ms Meade wrote to the Deceased as follows:

> *"Re:- Letter of Guarantee for €10,000,000 in support of Loan Facility in the names of David, Tom & Alec Flood.*
>
> *Dear Mr Flood,*
>
> *I refer to formal letter of sanction which has issued to David, Tom and Alec Flood and wish to advise that the Letter of Guarantee which you have offered to sign in the sum of €10,000,000 for the obligations of the above named is to be*

supported by the following security, to be obtained prior to / in tandem with drawdown of this facility.

- *All Sums Legal Charge to be executed by John J Flood over Land Certificate Folio 5536 Co Meath comprising 71A 3R 20P at Moylagh, Co Meath and vesting in your sole name.*

It is a condition of sanction that prior to the signing of the above guarantee that you obtain independent legal advice. In this regard, I confirm that I am forwarding Letter of Guarantee for completion to your Solicitor Niall Dolan, of O'Reilly Dolan Solicitors, Cootehill, Co Cavan who will advise you prior to the signing of same. I also confirm that the charge pack will issue direct to your Solicitor. As we hold Land Certificate Folio 5536 Co Meath at the branch I would appreciate if you would sign the attached letter and return to me authorising us to forward the said land certificate to your Solicitor.

If you have any queries in relation to any of the above please do not hesitate to contact me."

11. Ms Meade explicitly stated it was a condition of sanction that prior to the signing of the guarantee the Deceased obtained independent legal advice in relation to the transaction. She set out the name of the solicitor the Bank had been informed would act on his behalf. She confirmed that his solicitor would be sent a letter of guarantee for completion and a charge pack. She asked the Deceased to sign a letter authorising her to forward the land certificate, which was held by the Bank, to his solicitor to facilitate the charging of the lands. The letter clearly set out that the guarantee was to be in the sum of €10m to support the loan to be offered to David, Tom and Alec Flood. The security was to be a charge over the lands comprised in the folio.

12. The following day, 19 April 2007, Ms Meade wrote to Mr Dolan, solicitor, in his capacity as adviser as the Deceased's solicitor:

> "*Dear Mr Dolan,*
>
> *I refer to your above named client and to his proposed Letter of Guarantee in the sum of €10,000,000 (ten million euro) for the obligations of David, Tom and Alec Flood which is to be supported by an AIB Bank All Sums charge over Land Certificate Folio 5536 Co Meath vesting in Mr John J Flood's sole name.*
>
> *In this regard, I enclose copy of letter to Mr John J Flood which is self explanatory. I attach original letter of guarantee for signing by Mr Flood together with a copy of same for his records. I will forward original land certificate folio 5536 Co Meath to you upon receipt of written authority from Mr Flood and I confirm that the charge pack will issue direct from our Central Securities Department in Dublin."*

13. Ms Meade was writing to Mr Dolan in his capacity as the Deceased's solicitor and explained the transaction to him and enclosed or agreed to forward to him all the necessary documentation. He was expressly invited to contact her if he had any queries in relation to the above.

14. The Deceased signed the letter authorising the Bank to forward the original Land Certificate to Messrs O'Reilly Dolan & Co some time prior to 27 April 2007.

15. The solicitor in O'Reilly Dolan & Co, who actually acted for the Deceased, was Mr Martin Cosgrove, as he was the member of the firm who specialised in this area of practice. On 26 April 2007, he wrote to the Deceased in relation to the letter of guarantee. He set out the essentials of the transaction to be entered into by the Deceased and confirmed that under the terms of the guarantee, he could discontinue the guarantee by giving six months calendar notice in writing to the Bank, but that he must then pay within seven days of the expiration of the six months any money which is then outstanding on

foot of the guarantee. He invited the Deceased, when "*he was ready to proceed*" in this matter to contact him.

16. On 27 April 2007, Ms Meade wrote to Mr Dolan by registered post, enclosing the original Land Certificate Folio 5536 County Meath "*in order for you to proceed with registration of the Banks (*sic*) charge*".

17. The letter of sanction of 13 April 2007 was not accepted by the borrowers. Nonetheless, David Flood brought the Deceased to the offices of O'Reilly Dolan & Co Solicitors for the purposes of obtaining independent legal advice on the provision by the Deceased of a guarantee of the facilities to be offered by the Bank and of a first legal charge over the Deceased's lands comprised in Folio 5536F County Meath, as specified in the letter of 13 April 2007. On 2 May 2007, David Flood drove the Deceased to the offices of O'Reilly Dolan & Co where the matter was handled by Martin Cosgrove. The Deceased executed a guarantee in favour of the Bank in the sum of €10m and a charge over the entire folio in favour of the Bank. The charge was subsequently registered as a burden on the folio and remains in place.

18. The same day, 2 May 2007, Mr Cosgrove wrote to the Bank:

> "*Re: John J. Flood, The Murrens. Oldcastle. Co. Meath.*
>
> *Dear Sirs,*
>
> *We refer to the above matter and now return herewith Letter of Guarantee duly executed by John J. Flood.*
>
> *I confirm that I explained fully the conditions and nature of same to him and that he fully understood the consequences of signing same. I gave him a full completed copy of same for his records.*
>
> *Please acknowledge safe receipt."*

19. In addition to executing the letter of guarantee, the Deceased also executed a first legal charge, a family law declaration declaring, *inter alia*, that the lands comprised in the folio did not comprise his family home, and a solicitor's undertaking signed by Mr Cosgrove on behalf of the firm to arrange for the registration of the legal charge. The undertaking was endorsed by the Deceased:

"*I hereby authorise you to give the within undertaking to AIB Bank 2.5'07".*

20. In the meantime, the structure of the transaction was altered due to complications arising from the fact that at that time David Flood was engaged in divorce proceedings. David Flood was no longer to be a party to the loan for €10m or to be on the title to the Sutton site. This was to be held in the sole names of Tom and Alec Flood. This was to ensure that the site would not form part of David Flood's assets for the purposes of his impending divorce. Secondly, the lands which David Flood was to provide as security were no longer available. Instead, he agreed to provide an unsupported guarantee for the full amount of the loan. Further, the Deceased's guarantee was to be replaced by two guarantees, one guaranteeing the loan to Tom and Alec Flood of €10m in respect of the Sutton site, and the second guaranteeing the overdraft facility to the partnership of €1.5m. Thus, the Deceased's overall exposure was significantly increased. The letter of sanction of 13 April 2007, which was never accepted by the Flood Partnership, was replaced by two letters of offer from the Bank, one being the overdraft facility to the Flood Partnership, and the second being the loan to Tom and Alec Flood, but not to David Flood, in relation to the Sutton site. The letter of sanction in relation to the overdraft facility issued on 9 May 2007 and required the Deceased to provide a guarantee in the amount of €1.5m, to be supported by a first legal charge over the lands comprised in Folio 5536F County Meath. It was a special condition of the loan offer that the Deceased would obtain independent legal advice prior to providing the guarantee.

21. The second letter of sanction in relation to the loan facility issued on 21 May 2007, offering a total amount of €12,715,000. The special conditions included:

(i) A condition that an independent professional valuation would be carried out on the security being offered.

(ii) 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. The condition added that the Bank would then appoint an independent valuer to carry out valuations on the lands.

(iii) That the Deceased would obtain independent legal advice prior to providing a Letter of Guarantee for €10 million.

22. The security required in respect of this loan comprised an all sums legal charge on the Sutton site, a letter of guarantee from the Deceased to be executed for the obligations of Tom and Alec Flood which was to be supported, and third, there was to be a letter of guarantee from David Flood for €12,715,000.

23. Because the structure of the transaction had been altered, Ms Meade wrote to Mr Cosgrove by a letter which was received by O'Reilly Dolan & Co on 21 May 2007. She advised that fresh letters of guarantee were required: one in the amount of €10m in respect of Tom and Alec's liabilities, and one in the sum of €1.5m in respect of the overdraft afforded to David, Tom and Alec Flood. Ms Meade confirmed:

"[*W]e are still relying upon the all sums legal charge over Land Certificate Folio 5536 Co Meath vesting in the name of John J Flood, in support of the above guarantees. I am writing to Mr Flood today advising him that the guarantees have been forwarded to you for signing.*

Many thanks for your assistance in this matter."

24. Accordingly, on 25 May 2007, the Deceased attended again at the offices of O'Reilly Dolan & Co for the purpose of executing fresh letters of guarantee. This time, he met Mr Niall Dolan. On 29 May 2007, O'Reilly Dolan & Co wrote to the Bank:

> "*Dear Sirs,*
>
> *We refer to the above matter and now enclose herewith two new letters of guarantee duly executed by John J. Flood.*
>
> *Perhaps you would acknowledge safe receipt.*
>
> *We look forward to hearing from you."*

25. Ms Meade replied on 5 June 2007, in a letter addressed to the firm:

> "*Dear Sirs,*
>
> *I wish to acknowledge receipt of your letter dated 29th May last enclosing two new letters of guarantee, duly executed by Mr. John J Flood."*

26. On 11 June 2007, Martin Cosgrove, as a partner in the firm of O'Reilly Dolan & Co, certified that the Deceased had created a legal mortgage over the property in favour of the Bank, that it was valid and subsisting and that it was duly registered as a burden on the folio. He enclosed a certified copy of the folio showing the mortgage duly registered.

27. The monies were duly advanced to Tom and Alec Flood and to the Flood Partnership and the Sutton site was acquired. Unfortunately, the property development scheme failed, and eventually, the Sutton site was sold by the Bank at a significant shortfall. Judgment was entered in favour of the Bank against David and Alec Flood on foot of the loans and David's guarantee. The Bank issued a letter of demand on foot of the Deceased's guarantees on 15 July 2010. By that time, the Deceased had been diagnosed with Alzheimer's disease and was living in a nursing home. He died on 29 April 2012. Proceedings were commenced on 24 April 2014 against an administrator *ad litem* appointed for the purposes of allowing Everyday (as successor in title to the Bank) to sue

the Deceased's estate and before the claim became statute-barred. However, as a grant of probate issued to the appellant on 29 October 2014, by order of 14 July 2015, the appellant, as the personal representative of the Deceased, was substituted as defendant in the proceedings.

28. In addition, Everyday issued proceedings in the Circuit Court, seeking possession of the lands comprised in Folio 5536, excluding the family home and a curtilage of one acre of land. It was agreed between the parties that the issue of the validity of the charge was to be resolved in those proceedings and was not an issue to be determined in these proceedings.

Judgment of the High Court

29. While the proceedings commenced as summary proceedings, they had been remitted to plenary hearing. Stack J. summarised the defences at para. 32 of her judgment as follows:

> "*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."

30. The High Court determined, on the balance of probabilities, that:

(i) The Deceased had capacity in May 2007;

(ii) The Bank was not on actual or constructive notice of any alleged incapacity;

(iii) The Deceased was not subject to actual undue influence from David Flood when he executed the guarantees on either 2 May or 25 May 2007; and

(iv) The provision of the guarantees constituted 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.

31. At paras. 273 to 275, the trial judge summarised her conclusions as follows:

"*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."

32. Stack J. then held that the Bank had no notice of the inadequacy of the advices given to the Deceased or the resulting misunderstanding of the Deceased. She held that the Deceased had attended independent solicitors for the purposes of receiving advice in relation to the transaction and that, while the two letters were "*not expansive*", the Bank was entitled to assume that the solicitors had given full and adequate advice to the Deceased. That being so, the successor in title to the Bank, Everyday, was entitled to enforce the guarantees. She therefore granted judgment in favour of Everyday against the Deceased's estate in the sum of €10,782,867.58.

The Appeal

33. The Notice of Appeal set out 20 somewhat overlapping grounds of appeal. Ultimately, the appeal reduced to the question whether the presumption of undue influence had been rebutted by Everyday such that it was entitled to enforce the guarantees against

the estate of the Deceased, notwithstanding the presumption that the guarantees had been procured by the undue influence of David Flood, that the transaction was an improvident transaction from the perspective of the Deceased, and that the independent legal advice afforded to the Deceased prior to signing the guarantees (and granting the charge) was inadequate. This essentially was ground 7 of the Notice of Appeal.

34. The appellant pleaded that the High Court erred in determining that Everyday, a successor in title to the Bank, was not on notice of the inadequacy of the legal advice, or the resulting misunderstanding of the Deceased on three bases:

> "*(a) The learned High Court judge was correct in finding that the Bank was on enquiry* [sic] *by virtue of the considerations in paragraph 240 of the judgment. The Court held that the Bank was 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.*
>
> *(b) It is submitted that the learned High Court judge erred in law and/or in fact in determining that the letters of Mr Dolan and Mr Cosgrove were sufficient in nature to allow the Bank to satisfy the criteria in* Tynan v Kilkenny County Registrar & Anor *[2011] IEHC 250, and*, Royal Bank of Scotland PLC v Etridge *(No.2) [2001] WLR 1021, at para. 78.*
>
> *(c) The learned High Court judge erred in law and/or in fact in determining that the signing of two guarantees on 25th May 2007 for a total of €11.5 million did not constitute a fundamental change in the nature of the documents being executed or in the underlying transaction from the sole guarantee for €10 million executed on the 2nd May 2007 and/or that the Bank was entitled to rely on the letter of 2nd May 2007 to cure any defects in the letter of the 29th May 2007. Furthermore the Learned High Court judge erred in law and/or in fact in*

drawing the inferences from the foregoing circumstances, 'it would almost certainly follow that he [the Deceased] would understand the consequences of increasing the level of the overall amount guaranteed and altering the beneficiaries'."

35. In submissions, Everyday accepted that the Bank was on inquiry of undue influence and that there was an obligation on the Bank to ensure that reasonable steps were taken to ensure that the Deceased was openly and freely agreeing to provide the requested security. It contended it had done so. This was disputed by the appellant.

36. The appellant argued that there was a requirement on the Bank to make reasonable investigation of the Deceased's affairs; that the Bank ought to have contacted the Deceased directly and sought a nomination of a solicitor to act on his behalf directly from him rather than from David Flood. It was submitted that the Bank "*should have sought and obtained from A. B. O'Reilly Dolan & Co. confirmation that they had, in fact, been instructed by the Deceased to act on his behalf*". It was contended that the Bank should have advised the solicitors that the Deceased, at that time, had no indebtedness to the Bank, was not a customer of the Bank and had not been so for ten years or so.

37. In all submissions, it was contended that if the Bank was to have reasonable grounds to rely on the letter of 2 May 2007 from Mr Cosgrove, it must have been satisfied that the solicitor had given *adequate* independent legal advice. It was submitted that the letter of 2 May 2007 was inadequate and that the letter put the Bank on inquiry such that it ought to have conducted its own independent inquiries as regards the Deceased's family home and the finances of the Deceased as guarantor and "*his position in life*". It was pointed out that the Bank had knowledge that the quarry was worth approximately €8m, which was €3.5m less than the Deceased's total exposure under the two guarantees. In addition, counsel adverted to the fact that a different solicitor issued the second letter on 29 May 2007 in

respect of different guarantees, which was a further reason why the Bank could not rely upon the letter of 2 May 2007 in the circumstances of this case.

38. The appellant argued that there was not one, but two transactions in the circumstances of this case. The first transaction did not proceed. The changes to the original arrangements were such that the transaction, as actually completed, was in fact a different transaction to that contemplated in April and on 2 May 2007. This meant that the Bank could not rely upon the letter of 2 May 2007 to rectify any deficiencies in the letter of 29 May 2007 in order to rebut the presumption of undue influence. Counsel pointed to the fact that the loan in respect of the Sutton site was now to two rather than to three sons of the Deceased, which thereby increased his possible exposure under the guarantee for that loan; there was no longer any security from David Flood; the Deceased executed two guarantees instead of one and the total exposure increased from €10m to €11.5m.

Discussion

39. The last point may be easily disposed of. At all times the transaction between the members of the Flood family and the Bank concerned the financing of the purchase of the Sutton site by the Flood Partnership and an overdraft facility as working capital for the proposed development. The Bank altered the structure of the proposed facilities in response to the requirement that David Flood was not to be a purchaser of the Sutton site nor a party to the loan to acquire the site. The alterations of the details of the structure of the transaction was part of the negotiations leading to one concluded agreement. No party to the transaction treated the variations as giving rise to a fresh request for finance from the Bank requiring fresh sanction. David Flood was still concerned in the enterprise as he was a joint borrower under the overdraft facility, and he was providing a personal guarantee of the loan to purchase the site. At all times the Deceased was the guarantor of the facility necessary for his sons to acquire the Sutton site and for the overdraft required to enable

them to develop it. While David was no longer to be on the title to the Sutton site, it was still available as the principal security for the loan and he was providing a personal guarantee so he would still be liable to the Bank in the event of a default. The fact that the Deceased was now providing two separate guarantees of the two facilities instead of one covering both, in the circumstances of this case, in my judgement did not result in a fresh transaction: in each case the Deceased was offering to guarantee all sums due to the Bank for the liabilities under two facilities to be advanced to his sons, whether there was one or two guarantees executed. It is true that his overall exposure was increased from €10m to €11.5m. While this might in different circumstances be capable of giving rise to a separate transaction, in my judgement the alterations were no more than reflections of the finalising of the parties' positions in the one transaction, albeit that the Deceased's ultimate exposure was increased. I would for these reasons reject this ground of appeal.

40. It follows in my judgement that the Bank was entitled to treat the transaction as one transaction. Indeed Ms Meade had made clear in her letter received on 21 May 2007 where she confirmed that the Bank was relying on the all sums charge executed on 2 May 2007 while requesting that the Deceased execute two guarantees to replace the existing guarantee executed on 2 May 2007. No issue was taken with this assertion. That being so, when the Bank received the letter of 29 May 2007 enclosing the two new executed guarantees, it was entitled to construe that letter together with the earlier letter from the same firm of solicitors written when the Deceased executed the first guarantee of the two facilities on 2 May 2007. From the Bank's perspective, the Deceased had already been advised by O'Reilly Dolan & Co in relation to the transaction on that occasion and there was no reason to require them to confirm again that they had advised him in relation to the execution of the replacement all sums due guarantees, merely because his potential liability had increased from €10m to €11.5m. That they should do so was explicit in the two letters

of sanction which replaced the offer of 13 April 2007. The entire purpose of ensuring that the Deceased attended his own solicitors to execute the replacement guarantees was that they could advise him of the implications of the alteration of the transaction and the implications for him. As is discussed more fully below, the details of the advices given by the solicitor to the Deceased is a matter between them and the Bank is not concerned to inquire into the adequacy of the advice given to the Deceased.

41. The crucial issue in this case is whether the Bank took reasonable steps to ensure that the Deceased was openly and freely agreeing to provide the security requested. If it did, then it (and Everyday as its successor in title) would be entitled to enforce the security notwithstanding the fact that the relationship between the Deceased and David Flood gave rise to a presumption of undue influence, that the transaction was, from the perspective of the Deceased, an improvident one and that the independent legal advice actually afforded to the Deceased prior to granting the charge and the guarantees was inadequate.

42. The answer depends on the balance between the rights and interests of, on the one hand, vulnerable persons who provide security for loans where they may have no other financial interest in the underlying transaction and the interests of lenders who offer to lend sums on the basis that such security is available to them in the event that the borrower defaults, on the other hand. It is a matter which has troubled the courts in this and other jurisdictions for many decades, if not more. Historically the courts have been anxious to protect vulnerable parties against impropriety by borrowers and have developed protections to be afforded to such persons, depending on the nature of the vulnerability and the possible impropriety. If those protections are lacking, then one sanction is that the lender may not rely on any security provided by the vulnerable person as guarantor of the obligations of the borrower(s). The principles applicable have been set out in *Royal Bank of Scotland v. Etridge (no.2) [2001] 3 WLR 1021*, a decision of the House of Lords and, in

this jurisdiction, in *Tynan v. Registrar for the County of Kilkenny & Anor. [2011] IEHC 250.*

43. In *Royal Bank of Scotland v. Etridge (no.2)* the House of Lords considered a number of appeals where wives had gone surety for the borrowings of their husbands. The issue was whether their consent to enter into guarantees with the banks for their husband's or his business's debts was vitiated by impropriety by the husbands and whether this entitled the wives to set aside their contracts of surety.

44. Lord Scott noted that the bank acquired rights by the grants from the surety wives themselves and observed that the issue was whether the surety wife is bound by her apparent consent to the grant of the security to the bank. In general, it is the objective manifestation of contractual consent that is critical. At para. 146 he said that the husband's impropriety, whether undue influence or misrepresentation, in procuring his wife to enter into a suretyship transaction with the bank would not entitle her to set it aside unless the bank had notice of the impropriety. It is the bank's notice of the husband's impropriety that creates the wife's right to set aside the transaction.

45. Certain relationships between the parties may give rise to a presumption of undue influence. Lord Scott held that this is an evidential rebuttable presumption which shifts the onus from the party who is alleging undue influence onto the party who is denying it. In his judgement it is a tool which shifts, for the moment, the onus of proof to the other side. Thus, a wife who guaranteed the debts of her husband's struggling business may assert a presumption of undue influence by the husband based upon their relationship and the nature of the transaction and then the onus will shift to the bank to introduce evidence to counteract the inference of undue influence if it is to enforce the guarantee against the wife.

46. Lord Scott identified the crucial question to be what steps the bank ought to take where there is a risk of impropriety so that it becomes reasonable for the bank to rely on the apparent consent of the wife to enter into the transaction. His answer was that the bank should take reasonable steps to satisfy itself that the wife *understands* what she is doing. At para. 164 he held that the bank, in the ordinary case, does not have to satisfy itself that there is no undue influence- it must take steps to satisfy itself that the wife understands the nature and effect of the transaction.

47. Lord Nicholls noted that the steps required of banks will not guarantee that in future wives will not be subject to undue influence or misled when standing surety, as this was not possible. At para 50 he identified steps which the bank should take itself when the bank has "been put on inquiry" as to possible impropriety by the husband. He held that in *exceptional cases* to be safe (i.e. for its protection) the bank must insist that the wife be separately advised in relation to the proposed transaction. Lord Nicholls' view was that the bank should not be expected itself to attempt to discover whether a wife's consent is being procured by the undue influence (or misrepresentation) of her husband and likewise it should not be expected to insist that the wife's solicitor confirms this to be the case. At para. 54 he stated

> *"The furthest a bank can be expected to go is to take reasonable steps to satisfy itself that the wife has had brought home to her, in a meaningful way, the practical implications of the proposed transaction."*

48. Ordinarily, according to Lord Nicholls, it will be reasonable that a bank should be able to rely upon confirmation from a solicitor, acting for the wife, that he has advised the wife appropriately. Critically, the advice is private to the solicitor and his or her client, the wife. Lord Nicholls continued

"77. ...The bank does not have, and is intended not to have, any knowledge of or control over the advice the solicitor gives the wife. ....To impute to the bank knowledge of what passed between the solicitor and the wife would contradict this essential feature of the arrangement. ...

78. In the ordinary case, therefore, deficiencies in the advice given are matters between the wife and her solicitor. The bank is entitled to proceed on the assumption that a solicitor advising the wife has done his job properly."

49. Lord Hobhouse discussed the importance of a wife having her own solicitor acting on her behalf in the transaction. At para. 122 he held

"... The solicitor in question will not be acting for the bank. Any knowledge the solicitor acquires from the wife will be confidential as between the two of them. If it renders untruthful the statement or certificate [that the wife understands the transaction], the solicitor cannot sign them without being in breach of his professional obligation to the wife and committing a fraud on the bank. The wife's remedy will be against the solicitor and not against the bank. If the solicitor does not provide the statement and certificate for which the bank has asked, the bank will not, in the absence of other evidence, have reasonable grounds for being satisfied that the wife's agreement has been properly obtained. Its legal rights will be subject to any equity existing in favour of the wife.

50. Lord Scott held that a solicitor acting for a wife intending to go surety for her husband owed a duty to explain the nature and effect of the documents. In general the solicitor should:

"(i) explain to the wife, on a worst case footing, the steps the bank might take to enforce its security;

(ii) make sure the wife understands the extent of the liabilities that may come to be secured under the security;

(iii)explain the likely duration of the security;

(iv) ascertain whether the wife is aware of any existing indebtedness that will, if she grants the security, be secured under it;

(v) explain to the wife that he may need to give the bank written confirmation that he has advised her about the nature and effect of the proposed transaction and obtain her consent to his so doing."

So, if the wife's solicitor informs the bank that she understands the nature and effect of the transaction, it is reasonable for the bank to assume that the solicitor has discharged his or her duty to his or her client and has discussed the five points referred to. In those circumstances, what Lord Scott calls the ordinary case, and subject to disclosure by the bank of relevant financial information concerning the husband or his business as is within its knowledge, the bank cannot be reasonably required to take any further steps before it can reasonably rely upon the security she enters into thereafter.

51. An exception is where the bank knows or has reason to suspect that the solicitor has not given the wife a proper explanation of the nature and effect of the transaction. In those circumstances the bank should take *"some appropriate step"* to remedy the failure of the solicitor adequately to inform the wife as otherwise the bank cannot be assured that her consent was given in circumstances where she understood the nature and effect of the proposed transaction.

52. For the purposes of this appeal, these judgments mean that the bank should take reasonable steps to satisfy itself that the vulnerable proposed surety has brought home to him or her in a meaningful way the practical implications of the proposed transaction if it is to rely upon the surety in the future. The requirement to take reasonable steps arises

where there is a risk of some impropriety, as a failure to do so may result in it being unable to enforce the security granted. In the ordinary case the bank should be satisfied that the proposed surety understands the nature and effect of the proposed transaction where the proposed surety is represented by their own solicitor and the solicitor confirms to the bank that he has explained the nature and effect of the proposed transaction to his client. Ordinarily it will be reasonable for the bank in those circumstances to assume that the solicitor has fulfilled his duty to his client and that he has advised his client appropriately. It is not required to interrogate the adequacy of the advice given, as that is solely a matter between the solicitor and his client. It follows that inadequate advice to the vulnerable proposed surety is not a basis for setting aside the surety entered into, unless it can be shown that the bank was either actually aware of or had reason to suspect that the solicitor had not adequately explained the nature and effect of the proposed transaction to the proposed surety prior to the surety entering into the transaction.

53. In *Tynan v. Registrar for the County of Kilkenny* Laffoy J. in the High Court considered whether a deed of confirmation executed by the mother of a mortgagor was ineffective because she did not in reality receive independent legal advice prior to executing the deed. The mother of the proposed mortgagor in fact had an interest in the mortgaged property which had been her family home, yet she confirmed by the deed that she had no interest in the mortgaged property. Her solicitor wrote to the mortgagee

> *"I hereby confirm that Ms. Eileen Tynan of Rose Villa 71 Callan Road Kilkenny attended at our offices today for the purpose of obtaining independent legal advice for a Deed of Confirmation in your favour. This relates to the execution of a mortgage by her daughter Veronica Tynan in relation to the property.*

I confirm that I explained the contents of the Deed of Confirmation to Ms. Tynan and that I am satisfied that she understood same and was happy to execute the said Deed."

54. Laffoy J. considered the judgments in *Etridge* and endorsed the observations of Lord Nicholls at para 78:

> *"'Confirmation from the solicitor that he has advised the wife is one of the bank's preconditions for completion of the transaction. But it is central to this arrangement that in advising the wife the solicitor is acting for the wife and no one else. The bank does not have, and is intended not to have, any knowledge of or control over the advice the solicitor gives the wife. The solicitor is not accountable to the bank for the advice he gives to the wife. To impute to the bank knowledge of what passed between the solicitor and the wife would contradict this essential feature of the arrangement. The mere fact that, for its own purposes, the bank asked the solicitor to advise the wife does not make the solicitor the bank's agent in giving that advice. In the ordinary case, therefore, 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 has done his job properly.'*
>
> *In my view, in an analogous situation, the last two sentences in the above quotation can be regarded as representing the law in this jurisdiction."*

Thus deficiencies in the advice given by the independent solicitor are a matter between the wife and her solicitor. The bank is entitled to assume that the solicitor advising the wife has done his or her job properly.

55. At para. 4.5 Laffoy J. confirmed that the independent solicitor was not acting for the bank, referring to the quote from Lord Hobhouse at para. 122 cited above. She accepted

that in order to be able to enforce the security or rely on the deed the bank requires confirmation of the solicitor's instructions and a belief that he has carried out his retainer:

"4.6 Finally, [counsel] relied on two passages from the speech of Lord Scott. In the first (at para. 171), Lord Scott stated:

> *'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.'*

That, in my view, can be regarded as representing the law in this jurisdiction applicable to an analogous situation. In the second passage (at para. 174), which does not have a bearing on the factual situation in this case because the solicitor who advised the plaintiff was not acting for either the mortgagor or the mortgagee, Lord Scott stated:

> *'If the solicitor is acting also for the husband, his role presents a little more difficulty. It is, after all, the existence of the risk of undue influence or misrepresentation by the husband that requires the bank to be reasonably satisfied that the wife understands the nature and effect of the transaction. If there is some particular reason known to the bank for suspecting undue influence or other impropriety by the husband, then, in my view, the bank should insist on advice being given to the wife by a solicitor independent of the husband (see Lord Browne-Wilkinson in* O'Brien*, at p 197). But in a case in which there is no such particular reason, and the risk is no more than the*

possibility, present in all surety wife cases, of impropriety by the husband, there is no reason, in my opinion, why the solicitor advising the wife should not also be the husband's solicitor. In the ordinary case, in my opinion, the bank is entitled to rely on the professional competence and propriety of the solicitor in providing proper and adequate advice to the wife notwithstanding that he, the solicitor, is acting also for the husband.'

The reference in that passage to O'Brien *is to the decision of the House of Lords in* Barclays Bank Plc v. O'Brien *[1992] 3 WLR 593, which was approved by Geoghegan J. in* Bank of Ireland v. Smyth*."*

56. Judge Laffoy held that the principle that the lending institution should be able to rely on independent advice should apply where the legal advice is given to a third party who is postponing a right or interest in mortgaged property so that a lending institution can get good security free of that right from the mortgagor. She identified the core issue before her as being whether the mortgagee is entitled to rely on the deed and the solicitor's letter as establishing that the plaintiff got independent legal advice as a result of which she understood the implications of executing the Deed of Confirmation. In the circumstances she held that there was no doubt that the advice she received was independent. Likewise, there was no doubt that the plaintiff knew that she was signing a document in connection with her daughter, the mortgagor, obtaining a loan from the mortgagee and giving a mortgage over the premises to the mortgagee. In relation to the solicitor's letter to the lending institution Laffoy J. stated:

"The letter of 5th December, 2005 specifically confirmed that the contents of the Deed of Confirmation had been explained to the plaintiff and that she understood what she was doing in executing it. It is difficult to see what more the mortgagee could have done to ensure that the plaintiff did understand the implications of

executing the Deed of Confirmation, insofar as it was necessary to give the mortgagee's charge priority over the right the plaintiff claims. Counsel for the mortgagee suggested that it would lead to utter chaos if a mortgagee could not rely on a letter from an independent solicitor on the lines of the letter of 5th December, 2005. I agree."

57. I am satisfied that *Tynan* represents the law in this jurisdiction and that Laffoy J. correctly applied it. This means that the Bank in this case took the reasonable steps necessary to entitle it to rely upon the guarantees entered into by the Deceased on 25 May 2007, notwithstanding the presumption of undue influence, the improvident nature of the transaction and the inadequacy of the advices given by the Deceased's solicitors prior to his execution of both the guarantees and the charge. Each letter of offer required the Deceased to take independent legal advice as a condition of the lending. This was done. The fact that David Flood nominated the solicitor to act for the Deceased is not relevant to the duties and obligations the independent solicitors owed to their client. It was the firm of solicitors who undertook to give the independent advice and the firm which wrote the letters to the Bank, therefore the fact that the Deceased attended two different members of the firm on two different dates and that two different solicitors wrote the letters of 2 and 29 May 2007 is neither here nor there. From the Bank's perspective, the firm was nominated to act on behalf of the Deceased, the firm held itself out as acting on his behalf and did act on his behalf: it was not required to confirm that the solicitors were in fact instructed by the Deceased to act on his behalf.

58. The Bank furnished the Deceased's solicitor with all of the documents related to the transaction in its possession. It did not furnish the valuation for the quarry as it had not yet been obtained and there is no evidence that the solicitors raised any query regarding the value of the lands to be charged, so this failure on the part of the Bank to inform the

Deceased's solicitors of the valuation of the lands does not amount to any want of disclosure on the part of the Bank.

59. The Bank was required to furnish information in relation to the proposed transaction in order that the proposed surety might understand the nature and effect of the proposed transaction: it was not required to furnish additional financial information it may have about the proposed surety to the proposed surety's own solicitor. Therefore the Bank was not obliged to inform O'Reilly Dolan & Co that the Deceased was not indebted to the Bank and had not been a customer of the Bank for ten years.

60. On 2 May 2007 the Deceased's solicitor wrote 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."* This letter is in almost identical terms to that in *Tynan* and in my judgement the Bank was entitled to rely upon it as confirming that the Deceased knew and understood the nature and effect of the proposed transaction and consented to grant the guarantee sought. There was no obligation on the Bank to enquire further or to explore the adequacy of the advice given to the Deceased. It was entitled to assume that the solicitors had fulfilled their obligations to the Deceased and explained the nature and effect of the transaction to him and thus that his consent, as evidenced by the execution of the guarantees was a valid, informed consent. I would reject the submission that the letter was inadequate and put the Bank on inquiry as to the Deceased's financial circumstances.

61. The details of the transaction were varied, as I have explained, and the Bank ultimately required the single guarantee of 2 May 2007 in the sum of €10m in favour of the Deceased's three sons to be replaced by two separate guarantees totalling €11.5m. I have already explained that in my judgement there was only one and not two transactions and that therefore the Bank was entitled to rely upon the entire correspondence from the

Deceased's solicitors. Specifically, the Court is not limited to the terms of the letter of 29 May 2007 when considering whether the Bank had taken reasonable steps to ensure that the Deceased knew and understood the nature of the transaction. The issue is whether the solicitor confirmed this fact to the Bank. The second letter referred to *"two <u>new</u> Letters of Guarantee, duly executed by [the Deceased]"* (emphasis added). As Lord Scott held in *Etridge*, the Bank was entitled to assume that the solicitor had performed his obligations and this applies to the second occasion the Deceased attended his solicitors for legal advice just as much as to the first occasion. The nature of the transaction had not altered in its essentials, though the risks to the Deceased had increased. The Deceased's solicitor had confirmed that he knew and understood the nature and effect of the transaction as it was structured on 2 May 2007 and there was no reason to doubt that the solicitor subsequently explained the implications of the variations to the Deceased. That being so the confirmation that the Deceased knew and understood the nature and effect of the revised transaction is to be found in the letters of 2 and 29 May 2007 read together: it is a question of substance not form and I am satisfied in the circumstances that the Bank took all reasonable steps to ensure that the Deceased was properly advised as to the nature and effect of the transaction before entering into the guarantees sought and that it was reasonable for it to rely upon the executed guarantees and the letters of confirmation from the Deceased's solicitor.

<u>Conclusion</u>

62. For all of these reasons I agree with the High Court that the bank is entitled to rely upon the guarantees of 25 May 2007 and I would dismiss the appeal.

63. My preliminary view is that the respondent has been wholly successful and therefore it should be entitled to the costs of the appeal. If the appellant wishes to contend otherwise she should contact the office of the Court of Appeal within ten days of the delivery of this

judgment and request a short hearing on the question of the costs of the appeal. In that event the appellant should file written submissions of not more than 1500 words within seven days of contacting the office and the respondent should file written submissions of not more than 1500 words seven days thereafter.

64. Binchy and Pilkington JJ. have authorised me to indicate their agreement with this judgment.