

UNAPPROVED



THE COURT OF APPEAL

Record No.: 2021/22

Donnelly J.

Neutral Citation Number

[2022] IECA 88

Faherty J.

Collins J.

BETWEEN/

BANK OF IRELAND MORTGAGE BANK

PLAINTIFF/RESPONDENT

-and-

ETHEL DALY

(As Legal Personal Representative of the late Marcus John Albert Deceased)

DEFENDANT/APPELLANT

-and-

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JUDGMENT of Ms. Justice Donnelly delivered on this 6th day of April, 2022

Issue

1. This is an appeal against the Order of the High Court granting the plaintiff (hereinafter “the Bank”) summary judgment against the defendant (hereinafter “the appellant”) arising from a guarantee for €300,000 (executed on the 5th August, 2020) and a loan €350,000 (accepted on the 30th October, 2009 and drawn down in October 2010) entered into by Marcus Daly Senior (hereinafter, “the guarantor” or “the deceased”) to cover debts owed by his son (hereinafter “MDJ” or “the main borrower”) and daughter in law (hereinafter collectively referred to as “the borrowers”) to the Bank. This appeal addresses whether an arguable defence may arise on the specific facts concerning the extent of the duty of disclosure, if any, required to be given to a guarantor to any change (compared with an earlier loan offer seen by the guarantor) in conditions precedent in the loan agreement related to the borrowers’ creditworthiness.

Facts

2. In brief, the borrowers agreed to purchase a house (“the Dublin property”) at auction. This was financed, in part, by two four-month bridging loans provided by the Bank in March 2006 and June 2006 in the total sum of €1.9 million. The purpose of those facilities was to enable the borrowers obtain a permanent home loan in respect of the property. Due to financial difficulties, the borrowers were unable to move from the bridging facilities which then expired. The Bank brought High Court proceedings in 2008 against the borrowers in respect of the bridging facilities.

3. The deceased then entered into discussions with the Bank about financially assisting the borrowers. The solicitors who were acting for the borrowers, Crowley Millar, set out the results of those discussions in a letter dated the 29th October, 2009 to the Bank saying that they had been asked to do so by the deceased. In so far as material, the agreement reached between the deceased and the Bank provided:-

- a) The deceased would make a payment of €360,000 to the Bank at the time of drawdown by the borrowers;

- b) The balance due on the bridging loans would be advanced by the Bank to the borrowers by means of a standard mortgage secured on the Dublin property;
- c) The Bank will issue a letter of home loan offer to the borrowers on the standard terms without delay; and
- d) MDJ would furnish to the Bank prior to drawdown:
 - (i) An up to date tax clearance certificate.
 - (ii) His accounts of the 31st December, 2008.
 - (iii) A certificate of his gross income to the end of June 2009, or, if required and if available, to the end of October 2009.

4. The following day, on the 30th October, 2009, the Bank issued the letter of loan offer to the deceased for €350,000 which was secured by way of a mortgage over a property of the deceased in Galway. The deceased accepted that offer but as the purpose was to facilitate the making of the payment of €360,000 to the Bank, it was not drawn down until October 2010.

5. On the 19th February, 2010, the bank issued a letter of loan offer (“the February 2010 loan offer”) to the borrowers, offering to provide a loan facility in respect of the outstanding €1.65 million, to be secured on the Dublin property. One of the special conditions set out in Clause 4 of the loan offer was that the deceased would provide a guarantee for €300,000 prior to execution of which he was to take legal advice. Another special condition set out therein, was that the deceased would make a payment of €360,000 to reduce the borrowers’ existing term loans with the Bank. As will be discussed further below, the evidence demonstrates that the details of this loan offer were known to the deceased.

6. There were three conditions precedent in the February 2010 loan offer to the borrowers which “must be complied in full to the lender’s satisfaction before the loan can proceed”. The first condition precedent referred to the requirement for the production of original audited or certified accounts for the previous 2 years to confirm *inter alia* MDJ’s capacity to derive a

personal income of at least €430,000 approximately after business expenses and excluding rental income; management figures had to be provided for the current financial year supported by the last six months' bank statement to confirm current turnover levels. All documentation "must be to the satisfaction of the lender". The second, cited as a sub-clause of the first condition, was a requirement for an accountant's written confirmation that MDJ's tax affairs were up to date.

7. The third was in essence a valuation of the property for mortgage purposes showing the valuation in an amount not less than €1.5m and which must be on terms acceptable to the lender.

8. According to the Bank these pre-conditions were complied with to their satisfaction. It is the appellant's case that none of the conditions were satisfied and this was not communicated to the deceased before he entered into the guarantee or before drawing down on the loan the subject of the Bank's offer of the 30th October, 2009 to assist his son to the value of €350,000.

9. The February 2010 loan offer was not accepted by the borrowers within the stipulated time. Further negotiations between the Bank and the borrowers but not involving the deceased appear then to have taken place. An Income and Expenditure Account for MDJ for the year ended the 31st December, 2009 from a firm of accountants showing a net profit of less than that set out in the relevant condition of the February 2010 loan offer, was furnished to the Bank. Certain information was sent to the Bank which they say they were satisfied with. It is not disputed on affidavit that the income of MDJ did not reach the level expressed to be required by the condition precedent in the February 2010 loan offer. There is no evidence that the deceased was ever informed that MDJ had not complied in full with the conditions precedent in the February 2010 loan offer.

10. In May 2010, another loan offer ("the May 2010 loan offer") was issued to the borrowers and was accepted by them. This was for the same amount and was secured on the

Dublin property but with the pre-conditions of the February 2010 loan offer removed. The special conditions relating to the guarantee and down-payment to be made by the deceased were retained. There is no evidence that the May 2010 loan offer was ever sent to the deceased. Despite the Bank's reliance on the May 2010 loan offer, the appellant argues that the deceased was not made aware of that loan offer. The appellant says that the deceased's solicitor only advised him in relation to the February 2010 loan offer and not the May 2010 loan offer.

11. The evidence discloses that the deceased initially declined to execute the guarantee on foot of legal advice which had apparently been received from the solicitors independently engaged by him to advise on the guarantee. The evidence suggests however that the legal advice concerned the original February 2010 loan offer. Nonetheless, the deceased executed the guarantee on the 5th August, 2010. The guarantee was in favour of the Bank, whereby, in consideration of the Bank making or continuing banking facilities to the borrowers, the guarantor guaranteed to pay to the Bank, on demand, all monies owing to the bank in respect of the facility granted by the Bank to the borrowers in respect of an identified account. The guarantee was limited to the principal sum of €300,00 plus interest. The amount advanced to the borrowers on foot of this loan amounted to €1.65 million and was advanced on the 1st November, 2010.

12. Subsequent to execution of the guarantee, the Bank issued a side letter dated the 16th August, 2010 to the deceased, providing, for the avoidance of doubt, that the Guarantee was limited to €300,000 and was to be released by the Bank on the earlier of the occurrence of a) the payment of €300,000 off the capital balance or b) when a valuation was produced, supporting a Loan to Value ratio of maximum 90%. This letter states that the Bank was providing facilities to the borrowers in accordance with the May 2010 loan offer. This letter was based upon an earlier email sent by Crowley Millar, the solicitors for the borrowers, in which they say they note the correct date of the loan offer as the 11th May, 2010 and set out in

draft form the content of the side letter required from the Bank. The side letter referred to the special conditions at clause 4(b) of the loan offer, a clause which was similar in both the February 2010 letter and the May 2010 letter.

13. The deceased duly drew down his own loan offer of €350,000 in part payment of the €360,000 to the Bank. All payments required under the loan facility were made by the deceased from drawdown up to the date of his death in July 2016.

14. The borrowers defaulted on the loan and a formal demand was made on the 3rd February, 2014 and the guarantee was called in on that date. The guarantor did not make payment towards any part of the guarantee which resulted in the Bank issuing a summary summons on the 9th September, 2015. The guarantor died on the 18th July, 2016. The grant of probate issued on the 16th March, 2017 and his executrix, Ms. Ethel Daly was substituted into these proceedings as the defendant.

15. The Bank also issued proceedings in respect of the Bank's loan to the deceased on the 19th November, 2018.

16. On the 17th December, 2018, the Bank issued a motion for judgment in each of the proceedings. In the affidavit grounding the application in respect of the Guarantee, Mr. Emmet Pullan averred that in addition to the principal sum of €300,000, interest to the sum of €65,224.76 which accrued between the 4th February, 2014 and the 21st November, 2018 was payable with further interest on the principal sum from the 22nd November, 2018. In respect of the proceedings relating to the loan, Mr. Pullan's affidavit set out how repayments had been made on the loan and that after the death of the deceased and on the issue of the Grant of Probate, the Bank wrote to the appellant calling in the loan. He set out how at the time of the swearing of the affidavit the sum of €294,452.32 was due and owing.

17. The motions for judgment were contested by the appellant. She claimed, *inter alia*, on behalf of the guarantor's estate that:-

- (a) The Bank's waiver of compliance with certain pre-conditions which related to the financial position of MDJ which were set out in a loan offer to the borrowers on the 19th February, 2010 were pre-conditions which inured not only to the benefit of the Bank but also for the benefit of the guarantor. The appellant argued that this waiver of compliance was not communicated to the guarantor before he executed the guarantee. It is the appellant's case that had the guarantor been aware of this non-compliance with the pre-conditions, he would not have executed the guarantee.
- (b) The appellant also claimed that the loan was so inextricably linked to the guarantee that there was a credible argument that the loan contract is capable of rescission for the same reasons.

The High Court judgment

18. In a lengthy judgment ([2020] IEHC 667), the motion judge granted summary judgment in respect of the amounts outstanding on the guarantee and the loan. The judgment sets out in detail the averments made in the affidavits between the parties and the communications between relevant actors. It is not necessary to recite this history in full for the purpose of deciding this appeal.

19. In respect of the information provided by MDJ to the Bank and compliance with the conditions precedent, the motion judge emphasised that these were to be complied with to the "satisfaction of the Bank." He accepted the averment made on behalf of the Bank that "the submissions made satisfied the [Bank] in relation to the preconditions in the February, 2010, edition of the Offer Letter and accordingly, the final, operative, Loan Offer Letter of 11th May 2010, was issued without those conditions precedent."

20. The motion judge held that there was nothing particularly unusual about the May 2010 offer and that it was not so unusual or uncommon that additional security in the form of a personal guarantee from a third party may be required.

21. The motion judge described the guarantee as a “stand-alone” guarantee agreement of an “all sums due” type, which creates stand-alone obligations which the deceased accepted in accordance with the terms of the document itself; in so far as his liability was concerned it does not express itself to be subject to the terms of any other agreement. I would note however that the guarantee expressly referred to a specific facility/account. No reference was made in the guarantee to the February 2010 loan offer. He also noted that it was not disputed that the deceased had received independent legal advice and that he had certified to that effect beneath his signature executing the guarantee. He also noted that the side letter referred to the May 2010 loan offer.

22. The motion judge referred to the averments made by the appellant that her late husband had never received a copy of the May 2010 offer letter, the basis for which was that no copy of same was found in the files he maintained in his home correspondence. The solicitors to whom the deceased went for independent legal advice had told the appellant that the deceased had not provided them with a revised letter of loan offer. The motion judge said it did not prove anything other than no copy had been found and he noted there was no affidavit from the borrowers’ solicitors despite their involvement. He held however, that the averments even taken at their height did not provide any prospect of a *bona fide* or stateable defence to the Bank’s claims. He also said that they had to be looked at in the context of the overall evidence including the letter sent by the deceased which referred to the loan offer of May 2010, which confirmed his having taken independent legal advice and said that he was in possession of a copy of the executed Guarantee and Indemnity.

23. The motion judge referred to the principles upon which motions for summary judgment must be approached. Those principles are not at issue in this appeal.

24. He referred to the decision of the High Court in *Irish Bank Resolution Corporation Limited v. Cambourne Investments Incorporated* [2014] 4 I.R. 54 (“*Cambourne*”) relied upon

by the appellant. He distinguished those facts from the present. In terms of the decision in *Cambourne*, he was of the view that the case had in fact turned upon the status of the party as a borrower not as a guarantor and it was in that context that the relevance of the condition precedent being “for the benefit of both sides” had to be understood as meaning the Bank and the borrower.

25. Overall, the motion judge held that it was very clear to him that the appellant had no defence. While he held that it was a “mere assertion” to say that the deceased had seen the February 2010 loan offer but not the May 2010 offer, he held that *nothing turns on whether the deceased did or did not see those letters*. He held there was no evidence of any representations having been made to the deceased by the Bank, that it could not be disputed that the letters were not offers to the deceased but were offers to the borrowers and that the May 2010 loan offer which was accepted by the borrowers did not contain any preconditions.

26. He was not satisfied that *Cambourne* was an authority for the proposition that a waiver by the Bank of preconditions in a loan offer to its borrowers avoids the guarantee given by the deceased. The guarantee was explicit as to the Bank’s ability to vary terms as between the Bank and the borrowers, although the motion judge did not accept that there had been a variance.

27. He held that while there was no general duty on a creditor to advise or disclose information to a guarantor, there was a limited duty “...to disclose any unusual feature of the contract between the creditor and the debtor which makes it materially different in a potentially disadvantageous respect from what the guarantor might naturally expect” (per Irvine J. in *SRI Apparel Limited v. Revolution Workwear* [2017] IECA 226). He held that no unusual feature could be identified in the present case insofar as the contract between the Bank and the borrowers was concerned.

28. The motion judge referred to the decision in *Bank of Scotland v. Bennett* (reported under *Royal Bank of Scotland v Etridge (No. 2)* [2002] AC 773 from 871 to 878). He distinguished it from the present case on the basis that, here, there were no unusual features such as the ranking agreement that existed in *Royal Bank of Scotland v. Etridge (No.2)*. He also distinguished the Court of Appeal decision in *Allied Irish Bank plc v. Cuddy* [2020] IECA 221 in which the Court held that the evidence put forward amounted to more than bare assertion and that leave to defend was warranted, unlike in the present case where no credible evidence had been put forward by the appellant. He rejected the appellant's case in holding that he was not satisfied that there was a fair or reasonable probability that she had a real or *bona fide* defence.

The Appeal

29. The appellant filed 19 grounds of appeal. Grounds relating to the Consumer Credit Act, 1995 were not relied upon at the hearing of the appeal. A central argument in the appeal was that it was an error on the part of the motion judge to hold that whether the deceased had or had not seen the February or May 2010 loan offers was irrelevant. As a matter of law, it was submitted, the motion judge erred in concluding that the terms of the February 2010 loan offer and in particular, the preconditions relating to the creditworthiness of the borrowers, did not inure also to the benefit of the guarantor and therefore the Bank was not obliged to inform him of the waiving and/or changing of those preconditions in the loan offer of May 2010 prior to the guarantee being executed.

The Submissions

30. In oral submissions, counsel for the appellant confirmed that the central point raised by the appellant was not that a Bank had a general duty to disclose to a potential guarantor the credit risk of a borrower. Instead the point was more focused; where there are pre-conditions

in a loan offer which protect a guarantor and those are effectively abandoned by the Bank, then the Bank must disclose that to the guarantor in certain fact specific situations.

31. In the present case, counsel submitted, the evidence disclosed that the capacity of MDJ to repay the loan was important to the deceased. The letter written by the borrowers' solicitors Crowley Millar, showed that they were acting as a type of conduit to the Bank in relation to the concerns of the deceased. The February 2010 loan offer had pre-conditions directed to the risk of default; in particular that MDJ was required to have income of a certain amount and his tax affairs in order. Those were missing from the May 2010 loan offer and that fact was never communicated to the deceased on the evidence before the High Court.

32. Counsel accepted that his argument was one based upon misrepresentation. When the situation changed as between the Bank and the borrowers the deceased was not informed. In the circumstances of this case that amounted to a misrepresentation. Counsel submitted that his case was therefore not based upon the line of argument that there was something unusual about the facts as had been the case in the *Bank of Scotland v. Bennett* decision or as espoused in *SRI Apparel Ltd v. Revolution Workwear Ltd*. There was instead a very fact specific feature of this case of active engagement between the Bank and guarantor on certain preconditions as to creditworthiness but there had been no disclosure of the change to those preconditions which adversely affected the guarantor.

33. The case of *Cambourne* was of relevance, counsel submitted. It was a case which indicated that pre-conditions in a loan between a lender and a borrower could affect the guarantee itself. Charleton J. in *Cambourne* was considering the conditions precedent as between debtor and borrower when he said:-

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

Counsel submitted however that Charleton J. had specifically considered and rejected the submission of the Bank in that case that it could waive conditions precedent without notice to the borrower and/or the guarantor. Counsel submitted that the High Court had accepted in another case, for the purpose of establishing an arguable defence to a motion for summary judgment, relying on *Cambourne*, an argument that “*a creditor is not entitled to waive a condition precedent, insofar as a guarantor is concerned*” (*Stapleford Finance DAC v. McEvoy* [2018] IEHC 99 at para. 15(1) (“*Stapleford*”))

34. Counsel submitted that if the February 2010 loan offer had been drawn down, then, following *Cambourne* and *Stapleford*, this case would have been sent for plenary hearing. These conditions precedent were material to the guarantor and thus the failure to notify the deceased, as prospective guarantor, before he executed the guarantee that they were being waived/deleted, materially altered the guarantor’s position.

35. Counsel for the Bank submitted that the first consideration for the Court was its role as an appellate one. This was not a hearing *de novo*, but was one concerned with whether the decision of the High Court identified and applied the correct legal principles. Counsel submitted that the case being made by the appellant in the High Court was identified by the motion judge at para. 12 and 13 of the judgment. According to the High Court, this was a case where the appellant claimed that the conditions precedent in the February 2010 loan offer were preconditions for the benefit not just of the Bank but for the benefit of the deceased as guarantor. The appellant in the High Court asserted that the Bank waived those preconditions without communicating them to him. The appellant in the High Court said that the deceased would not have executed the guarantee, nor would he have drawn down the loan if he had known the conditions had been waived. The motion judge identified a review of the evidence as an important part of his task based upon the legal principles. Counsel for the Bank made the point that this argument of the appellant had somewhat changed to one of misrepresentation.

36. Counsel pointed to para. 75 of the High Court judgment, where the judge stated it was not for the court to resolve factual disputes in the context of a motion for summary judgment but was entirely appropriate that the court would conduct an assessment of the evidence including the documentation and correspondence in order to determine if the defendant had made out a credible defence. That assessment must include an analysis of whether the facts had a reasonable foundation. The motion judge found the evidence was unsatisfactory and had noted that there were certain people who had not sworn affidavits.

37. In answer to a question from the Court asking if the Court ought to proceed on the basis that the deceased saw the February 2010 loan offer but not the May 2010 loan offer, counsel accepted that the letter of February 2010 was made available to him, but he could say that it was not addressed to the deceased. He also accepted that the May 2010 loan offer was not addressed to the deceased. Counsel referred to paras. 46 to 48 of the judgment. In those paragraphs the motion judge considered the detail of the February 2010 loan offer and found that as of the 20th March, 2010 the loan offer had lapsed and that was clear to anyone who read it.

38. Counsel distinguished this case from the situation in *Royal Bank of Scotland v. Bennett* and submitted that creditworthiness of the borrower was in fact held not to be relevant (relying on para. 349 of the report of the case). There had to be something out of the ordinary and that was not the position here.

39. Counsel submitted that *Cambourne* and *Stapleford* were of no assistance. In *Cambourne*, the decision was that the Bank was not entitled to waive the preconditions that related to the borrower. In relation to *Stapleford*, counsel submitted that the case must be treated with caution because in that case the judge had taken a global view of the six grounds advanced by that defendants and permitted them to go to plenary hearing.

40. Counsel also referred to the decision in *Stafford v. Mahony* [1980] I.L.R.M. 53. He submitted that insofar as misrepresentation was being relied on, in order for that to be established the misrepresentation had to be made to the deceased and there was no evidence whatsoever that this had occurred in this case. At its highest the evidence is that the document was made available to him, but it was not addressed to him and was not formally provided to him.

41. In reply, counsel for the appellant pointed to previous submissions where the issue of misrepresentation was raised. He also referred to the terms of the guarantee. Albeit that there was no evidence as to banking practice in relation to the sending of the loan offer to prospective guarantors, the evidence here pointed to the deceased having had sight of the February 2010 loan offer to the borrowers. The Bank have not said that they never called for the February 2010 letter to be sent to the deceased. On the evidential level, counsel pointed to the affidavit of the appellant as regards the letter of May 2010 in which she called the Bank out in respect of its attitude. She averred that she had checked her husband's meticulous records, checked with his independent solicitors who confirmed that the deceased did not provide them with that letter and that, despite request, the Bank had not provided her solicitors with any letter demonstrating that the May 2010 letter had been sent to the deceased. Counsel for the appellant noted that while counsel for the Bank sought to distance the Bank from the February 2010 letter, he said that the Bank's affidavits did not seek to distance themselves from receipt of that letter by the deceased. He said one would have expected such an averment if they were seeking to distance themselves from the representation in the letter.

42. With respect to clause 4 of the guarantee which allowed for post-guarantee changes in the relationship between the Bank and the borrower, counsel submitted that was commonplace within commercial guarantees. Counsel submitted however that this was not a case about post-guarantee activity, but it is about what went on *before* the guarantee was executed. It was not

a case that the Bank could not vary afterwards but the submission was that they could not vary it *before* the guarantee was executed.

43. Counsel confirmed that this was not a case of relying on an unusual feature between the lender and the borrower, rather there was a representation that the lender would lend on a particular basis whereas in fact it lent on another basis. This was more akin to a straightforward misrepresentation case. This was a fact specific situation where this guarantor had been involved in these matters. Counsel was asked whether there was anything unusual then in the Bank changing its mind about the creditworthiness of the borrower. Counsel submitted that this was more than an implicit representation. The terms of the October 2009 letter from the borrowers' solicitors to the Bank written at the behest of the deceased were broadly translated into the February 2010 letter from the Bank to the borrowers. This was a very fact specific situation. From the deceased's perspective, the Bank never rowed back from what was specified in that October 2009 letter and replicated in the February 2010 letter. This was the basis on which the risk was undertaken by the deceased. The Bank were required to tell him if they were changing the basis. Accordingly, counsel for the Bank was in error when he spoke of these conditions being met. These were objective matters of which the Bank had to be satisfied. They could not have been satisfied that they had occurred because objectively they had not. They could waive them, but it could not be said that the precondition had been met to the satisfaction of the Bank if they had not, objectively speaking, been met.

Discussion

Legal Principles

44. The legal principles applicable to a motion for summary judgment were not in contention and indeed they were correctly cited by the motion judge. Rather than restate the relevant principles as set out in *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1, it is perhaps more

beneficial to recite the observations made by this Court (Collins J.) in *Allied Irish Bank plc v. Cuddy* which reflect the essence of those principles. At paras. 28 and 29 Collins J. stated:

*“[28] The “proper parameters” of the Order 37 procedure provide the critical guardrails for the appropriate resolution of this appeal. A defendant against whom summary judgment is granted is thereby deprived of a full hearing on the merits. Ordinarily, they will not have an opportunity to cross-examine the deponent(s) for the plaintiff, will not be able to compel third parties to give evidence by way of sub-poena and will have no opportunity to seek discovery or avail of any of the other litigation tools available to parties in plenary proceedings. That is justified and proportionate where – and only where – ‘it is very clear that there is no defence’: Harrisrange, paragraph 9(ix). That summary judgment should not be granted where there is any arguable defence – there being no requirement to show a prima facie defence, less still a defence that will probably succeed at trial – has been emphasised by a long line of authorities, many of them analysed by McKechnie J in Harrisrange. The decision of the Supreme Court in *Irish Bank Resolution Corporation (in special liquidation) v McCaughey* [2014] IESC 44, [2014] 1 IR 749 reaffirms the continuing vitality of these authorities, as well as emphasising the very limited role of the court at summary judgment stage in making any qualitative assessment of the credibility of a defence.*

*[29] As regards issues of law, while such issues may in principle be resolved on an application for summary judgment, a court should only do so ‘where the issues which arise are relatively straightforward and where there is no real risk of an injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment’: per Clarke J (as then he was) in *McGrath v O’Driscoll* [2006] IEHC 195, [2007] 1 ILRM 203 (at page 210), cited with approval by*

the Supreme Court (Denham J) in Danske Bank t/a National Irish Bank v Durkan New Homes [2010] IESC 22.” (Emphasis in original).

The Guarantee

(i) *Factual Starting Point*

45. For the purposes of this appeal, a highly significant finding made by the High Court was the view taken that “*nothing turns, for the purposes of the decision which this court must make, on whether [the deceased] did or did not see the February and or May 2010 offer letters*”. In fact, however, the appellant’s argument is premised entirely on the contention that the deceased saw the February 2010 loan offer and not the May 2020 loan offer. That issue is therefore the starting point for consideration of this appeal.

46. While the motion judge did give views on the averments made by the appellant regarding the issue of whether the deceased had received the February 2010 loan offer and not the May 2010 offer, the findings he makes in the course of a lengthy para. 125 of his judgment must be considered in light of the focus he places on the absence of a particular averment. This was the absence of an averment by or on behalf of the appellant, that the Bank had made verbal or written representations directly to the deceased in respect of the February 2010 loan offer. The motion judge refers to the appellant’s averment that when legal advice was provided to the deceased “the only facility available to him was the February 2010 facility”. He also refers to her explanation as to how the side letter may have referred to the May 2010 facility but that it was not available to the deceased. He says that these are no more than assertions and “*are assertions unsupported by evidence.*”

47. It is an interesting feature of the Bank’s written submissions that in the course of making a submission about representation to the deceased they state “while the Deceased may well have had sight of the [February 2010 loan offer]...”. It is apparent that while the Bank strongly contests that an arguable defence arises, there is no real basis for drawing an inference that the

deceased did not see that letter. Indeed, at the hearing of the appeal, counsel for the Bank in his careful submission, did not contest the view that the deceased “had available to him” the February 2010 letter. I am quite satisfied that the appellant has, at least, an arguable case that the deceased had the letter of February 2010, made available to him.

48. On the other hand, there is no evidence that the deceased had sight of the May 2010 loan offer. The Bank has never said that it sent the letter to him, although it had ample opportunity so to do on affidavit. The appellant has given evidence of her husband’s diligence in his affairs and the absence of a copy of the May 2010 letter amongst his records. The side letter was issued after the guarantee was executed but this had followed an email exchange between Crowley Millar, solicitor for the borrowers and the Bank concerning its terms. It is noteworthy that this email starts by the solicitor saying “I note the correct date of the loan offer is 11th May 2010...” He was the solicitor for the borrowers. There is no reference to any change having been made to the conditions precedent in that loan offer. In any event, I am satisfied that there is no evidence that the deceased had seen the May 2010 letter prior to the execution of the letter and there was sufficient evidence to draw an inference that, arguably, he had not seen it.

49. The motion judge focused on the legal aspects of the position as regards the February 2010 loan offer; the letter was neither directed to the deceased nor contained representations to him and on its face, it was to lapse within one month. It was those factors that led him to believe that it was irrelevant that the deceased had sight of it.

50. As the starting point therefore is that the deceased did not know about the May 2010 loan offer letter, this means that this appeal must be considered from the perspective that, arguably, the deceased was of the view that liability on foot of the guarantee would arise only if the conditions precedent in the February 2010 loan offer were satisfied.

(ii) *Would a failure by borrowers to comply with conditions precedent ever be sufficient to discharge a guarantor from liability?*

51. Were the answer to the question just posed required, as a matter of law, to be answered in the negative, then the High Court correctly granted summary judgment and no further enquiry need be made. However, *SRI Apparel Limited v. Revolution Workwear* and *Royal Bank of Scotland v. Etridge* make clear that there are circumstances in which a guarantor may be discharged from liability if it is established that there were, in the words of Irvine J. in *SRI Apparel Ltd. v. Revolution Workwear Ltd.*, “any unusual feature of the contract between the creditor and the debtor which makes it materially different in a potentially disadvantageous respect from what the guarantor might naturally expect”. However, here, it is not being posited by the appellant that there were “unusual features” in the sense considered in *SRI Apparel Ltd.* and *Royal Bank of Scotland v. Etridge*. Thus, apropos the question posed, for present purposes it would require the appellant to establish an arguable case that there are nevertheless factors peculiar to the case that rendered it prejudicial to the guarantor not to have been advised by the Bank in advance of the May 2010 loan offer to the borrowers that the said loan offer did not contain the conditions precedent which the guarantor was aware were contained in the February 2010 offer. This matter will be discussed more fully in subheadings (iii), (iv) and (v) below.

52. The case of *Cambourne* is authority for the proposition that, depending on the terms of the contract, conditions precedent in a loan agreement may well be for the benefit both of the Bank and the borrower. In that case, the conditions precedent as to loan to value ratio and value of the property were said to be for the benefit of both sides and, the nature of the contract was such that these conditions could not be severed. Charleton J. held that as the conditions precedent were not met in that case, the loan had never come into operation. He then said that the contract obligation to guarantee under the facility letters must fail. That was not the end of

the matter because on the construction of separate guarantees entered into by the two relevant defendants in that case, those guarantees remained valid. They were all-sums guarantees whereas the guarantee in the present case was facility/account specific.

53. In *Stapleford*, MacGrath J. held that the following amounted to an arguable ground of defence for a guarantor:

“A creditor is not entitled to waive a condition precedent, insofar as a guarantor is concerned. The decision of Charleton J. in Irish Bank Resolution Corporation Limited v. Cambourne Investments Incorporated [2014] 4 I.R. 54 is cited in support of this contention. Referring to the term of the facility letter Mr. Gardiner S.C. highlighted that the security to be provided included ‘an assignment over the capital’s allowances relating to the fit out of the fourth floor, Connaught House, Burlington Road, Dublin 4’, and he emphasised that the terms and conditions of the facility letter itself, and the general conditions, provide that the facilities will not be available for drawdown unless the conditions precedent are satisfied. He submits that the moneys provided for in the facility letter were drawn down without, inter alia, this condition being met.”

54. In this appeal, the Bank stresses that the above argument was simply one of six grounds of appeal that were sent for plenary trial. Accordingly, the Bank appears to suggest that this ground would not have been sufficient on its own. I do not consider that this construction of what was decided by MacGrath J. to be correct. Although MacGrath J. accepted the argument that the court would not have to conclude in favour of the defendant that all the points raised by him were arguable, it was sufficient that at least one was arguable for it to be sent to plenary hearing, on two occasions in the judgment he expressed the view that the grounds were *“at least arguable as grounds of defence.”*

55. The defence raised here is novel and, save to the extent that a similar issue was raised before MacGrath J. in *Stapleford*, it has not been the subject of adjudication in this jurisdiction previously. It is at least arguable that a failure by borrowers to comply with conditions precedent, where the lender nonetheless proceeds to allow the drawdown of a loan, could be sufficient to discharge a guarantor from liability.

(iii) *Loan facilities and creditworthiness of borrowers; are there obligations to potential guarantors?*

56. It bears repeating that the case being made is not that there is a general duty of disclosure on a financial institution to a potential guarantor as regards the creditworthiness of the borrower. That was the accepted starting point in the appeal. This Court has already accepted in *SRI Apparel Ltd v. Revolution Workwear Ltd*, the principle espoused by the Court of Appeal of England and Wales in *Royal Bank of Scotland v. Bennett* that “*a creditor is obliged to disclose to a guarantor any unusual feature of the contract between the creditor and the debtor which makes it materially different in a potentially disadvantageous respect might naturally expect.*”

57. In *Royal Bank of Scotland v. Bennett*, the ranking system of creditors, was “*an unusual feature of the contract between the creditor and the debtor which makes it materially different in a potentially disadvantageous way from what the guarantor might naturally expect*”.

58. From the above, it can be seen that there may be certain situations where creditors must disclose certain matters to the guarantor.

(iv) *Disclosure of a change in conditions precedent which were known to the guarantor*

59. Although this is not a case with unusual features such as were in issue in *Royal Bank of Scotland v. Bennett*, there are quite fact specific features here. This was a situation where a potential guarantor who has made an agreement with the Bank, the evidence of which is the letter of 29th October 2009 which the borrowers’ solicitors sent to the Bank. This referred to

an agreement reached between the deceased and a representative of the Bank in respect of which a loan would be given to the deceased to enable him reduce the borrowers' indebtedness. This required the main borrower to furnish specific information concerning his creditworthiness to the Bank. It is at least arguable that the conditions as to creditworthiness in that email were for the benefit of the deceased and not just for the borrowers. Those conditions concerned issues of salary and tax and the conditions precedent (although not identical) concerning those issues were part of the February 2010 loan offer. The evidence establishes that the deceased was aware of those conditions precedent in the facility letter (and at least appears to have some input into them). Prior to the deceased executing the guarantee, the evidence, at a minimum, points to the deceased not having been made aware of the fact that the loan facility letter which forms the actual loan agreement no longer included the conditions precedent.

60. The Bank relied heavily on the case of *Stafford v. Mahony* as authority for the proposition that there could be no arguable defence to this guarantor where they had never made any representation to the deceased guarantor and that the February 2010 letter was not addressed to him. The situation in *Stafford v. Mahony* was that the evidence disclosed that the defendant auctioneers had not made any representations to the purchaser but had at all times been dealing with his brother. The High Court (Doyle J.) held that even assuming that the defendants had made the alleged representation to the plaintiff's brother and that the plaintiff has learned of these prior to purchasing the property, the defendants would not have been under a duty of care to the plaintiff in such circumstances since they could not reasonably have contemplated that the plaintiff would have relied upon that information.

61. The facts in this appeal reveal potentially important differences from those in *Stafford v Mahony*. In the first place, this Court is dealing with the appeal on the basis that the deceased/guarantor was aware of the loan facility. There were direct dealings between the

Bank and the deceased concerning aspects related to the creditworthiness of the borrowers. It is at least arguable that the Bank could have reasonably contemplated that the deceased would have relied upon those conditions precedent in the particular circumstances of this case; the letter from the solicitors for the borrowers to the Bank prior to the February 2010 loan offer had raised the concerns of the deceased in respect of issues of significance namely salary and tax issues and those concerns appear to be reflected in the February 2010 loan offer which set out conditions precedent concerning those same matters albeit differently expressed. Those factual issues and the legal implications of any such findings are matters which can only be properly resolved at a plenary hearing.

(v) *Has the appellant made out an arguable defence that in these circumstances there was a duty on the Bank to disclose the removal of the conditions precedent prior to the guarantee being entered into?*

62. What this Court has to assess is whether the February 2010 loan offer, which must be accepted as having been seen by the deceased and the conditions precedent of which reflected an “agreement” between the Bank and the guarantor containing provisions dealing with the creditworthiness of the borrowers, arguably amounted to a representation from the Bank that the loan would only be given to the borrowers when those conditions were fulfilled. The appellant’s case on appeal has been built, although regrettably perhaps not so clearly built in the High Court, on the issue of the misrepresentation by the failure to alert the deceased to the removal of the conditions precedent relating to the creditworthiness of MDJ in the loan approval actually given. The February 2010 loan offer says that the conditions precedent “must be complied with in full to the Lender’s satisfaction before the loan can proceed” and at Clause 5, General Condition 9(c) that “all and any Conditions Precedent in (in Part 3) must be complied with in full to the Lender’s satisfaction within two months from the date hereof. The Loan must be drawn down with 3 months from the date hereof”. The Bank has said that these

conditions had to be met to its satisfaction and that it was entitled to waive them. Considerable time was spent in the judgment discussing how there was a discretion vested in the Bank which allowed it to accept the proffered proofs by MDJ as to compliance with the conditions precedent in the February 2010 loan offer. On the other hand, it is at least arguably the case that these were conditions that had objectively to be met to the Bank's satisfaction. The Bank has not put in evidence that these conditions precedent were met in an objective sense (it would be difficult to see how they could say that in light of the clear issue concerning the income level of MDJ). The Bank has simply averred that they were met to its satisfaction. The Bank's evidence is that in the May 2010 letter there were no such conditions precedent.

63. It is arguable that in a situation where the Bank was aware that the potential guarantor was engaging with it on the basis of a certain view of creditworthiness of the borrower and where the loan offer to the borrowers (seen by the guarantor) contained similar conditions precedent with a view to ensuring the borrowers' creditworthiness, that this could have amounted to a representation that those conditions were central not just to the Bank's decision to make the loan to the borrowers but also to the deceased's decision to act as guarantor. It is thus arguable, but it is not for this Court to decide, that the decision to proceed with the giving of the loan by the Bank in the absence of (objective) compliance with those preconditions was prejudicial to the deceased. It is also arguable, but again not for this Court to decide, that if that change had been flagged to the deceased, he would not have entered into the guarantee. Those are factual matters for the trial court to decide and if the trial court decides those in favour of the appellant's position, then it will be for the trial court to take a considered decision on the law as to whether in those circumstances the deceased is discharged from the guarantee.

64. From the foregoing, it is at least arguable that the issue of pre-conditions and knowledge of the guarantor of those preconditions could amount to a defence. Given the particular facts here, this case it is arguably different from the general rule that a financial institution owes no

duty to a guarantor in respect of his or her knowledge of the creditworthiness of the borrower. In so far as Clause 4 of the guarantee has been relied upon by the Bank, it is at least arguable that such a post-guarantee protective clause is irrelevant to this issue which turns on varying the terms affecting the view of the creditworthiness of the main borrower prior to the guarantee being entered into.

The Loan Agreement

65. The argument pertaining to the loan agreement is dependent on the success of the above argument. It is certainly arguable that, although the entry into the loan agreement predated the February 2010 loan offer and the entry into the guarantee, the deceased would not have drawn down his loan in October 2010 if he had known of the absence of the conditions precedent in the May 2010 loan offer. In those circumstances, it is also appropriate that the liability of the deceased in respect of that loan offer be left over for trial.

66. What is clear however is that the deceased (or his estate) would not be entitled to retain the principal received in respect of the loan. I note that the appellant had tendered the sum of €162,663.85 being the outstanding amount of the principal sum. This was not accepted by the Bank who maintained their entitlement to that amount together with interest. I would direct that, prior to being permitted to defend the matter in plenary hearing, the appellant must pay over the sum of €162,663.85. This payment, and acceptance thereof, is without prejudice to the parties' respective positions and in particular to the Bank's position that the actual liability on the loan is significantly higher.

Conclusion

67. The role of a court hearing a motion for summary judgment is to adjudicate in the first place whether the plaintiff has made out a *prima facie* case for judgment and thereafter the court may only grant summary judgment where there is no arguable defence. It must be very clear that there is no arguable defence.

68. In the present case, the High Court judge took the view that it was irrelevant as a matter of law as to whether the deceased had received the February 2010 loan offer to the borrowers or the May 2010 loan offer to the borrowers. The essence of the claim made on behalf of the deceased's estate depended entirely on the crucial contention that the deceased was only aware of the February 2010 loan offer and not the May 2010 loan offer. The first offer contained conditions precedent relating to establishing creditworthiness of the relevant borrower whereas the second offer did not contain those conditions in circumstances where objectively speaking those conditions cannot be said to have been met. From the specific facts here, the deceased guarantor had been in communications with the Bank and a letter was written by the borrowers' solicitor to the Bank in October 2009 outlining an "agreement" between them which referenced matters concerning the creditworthiness of the main borrower. Those matters reflect in large part the conditions precedent set out in the February 2010 offer letter dealing with the creditworthiness of the main borrower. The concern about the creditworthiness of the borrower was an issue therefore that the Bank were arguably aware was of importance to this particular guarantor. It is at least arguable that the issue of pre-conditions and knowledge of the guarantor of those preconditions amounts to a defence. This is also arguably different from the general rule that a financial institution owes no duty to a guarantor in respect of its knowledge of the creditworthiness of the borrower.

69. As it is also arguable that the deceased would not have drawn down the loan if he had known of the absence of the conditions in the May 2010 letter, it is also appropriate to leave that matter to the trial of this action. The principal received in respect of that loan however is repayable and must be repaid in full prior to the appellant being granted leave to defend.

70. In all the circumstances, it is not very clear that there is no arguable defence. The appeal will be allowed.

71. Prior to being permitted to defend the matter in plenary hearing however, the appellant must pay over the sum of €162,663.85 that was drawn down in respect of this loan. This payment, and the acceptance thereof, is without prejudice to the parties' respective positions and in particular to the Bank's position that the actual liability on the loan is significantly higher.

72. In light of the foregoing I will make an order that the Bank is to deliver a statement of claim within 21 days of the date of this judgment. If the appellant wishes to seek particulars arising from that statement of claim she must do so within 14 days of the receipt thereof. The Bank shall have a period of 21 days to respond to that notice for particulars. Thereafter, the appellant has a period of 21 days from the date of service of those replies to particulars in which to file a defence. I also direct that the parties must seek case management/priority in the High Court. Subject to any further directions given by the High Court in that case-management the parties are to abide by the time limits set out in the rules for any other pre-trial orders or steps in the proceedings, such as, but not limited to, an application for discovery or interrogatories.

73. As regards costs, given that the appellant has successfully appealed against the order for summary judgment made against her in each of these cases, it would appear to follow that she is entitled to the costs of her appeals, those costs to be adjudicated in default of agreement.

74. If the Bank wishes to contend for a different form of order on this appeal (including the order for costs), it will have liberty to apply to the Court of Appeal Office within 14 days for a brief supplemental hearing. If such hearing is requested and results in an order in the terms I have provisionally indicated above, the Bank may be liable for the additional costs of such hearing. In default of receipt of such application, an order in the terms proposed will be made.

In circumstances where this judgment is being delivered electronically, Faherty and Collins J.J. have authorised me to record their agreement with it.