

**THE HIGH COURT
COMMERCIAL**

[2021] IEHC 685
2020 No. 131 S

BETWEEN
JAMES D. VANDEVER, CHRISTOPHER SAMUEL FORMAN AND SUZANNE ELISE FORMAN
PLAINTIFFS

AND
PATRICK RAINSFORD AND ANGELA RAINSFORD
DEFENDANTS

JUDGMENT of Mr. Justice Quinn delivered on the 29th day of October 2021.

1. The plaintiffs seek summary judgment in the sum of US\$4,708,739 against the first named defendant and in the sum of US\$2,327,709 against the second named defendant, together with continuing interest.
2. The claim arises pursuant to 16 promissory notes executed by the defendants in favour of Michael R. Forman ("the Deceased") between 22 August 2008 and 20 December 2018. Mr. Forman died on 29 January 2019.
3. The plaintiffs are the trustees of the Michael Forman Living Trust ("the Trust") and the claim is being pursued by them on behalf of that Trust.
4. The defendants seek leave to defend the proceedings. The ground of their intended defence is that the loans the subject of the promissory notes were advanced in the context of a "loan for equity deal". The defendants assert that before any of the monies were advanced and the first promissory note was signed, the deceased agreed that he would seek repayment of the loans not on their stated maturity dates, or extended dates, but only after the business of the companies into which the defendants invested the monies lent was in a position to fund repayment, or "on an exit on sale or flotation" of the relevant companies.
5. The threshold for granting leave to defend such a claim is low and it is only necessary that the defendants demonstrate an arguable case. I have considered the affidavit evidence and submissions made on behalf of the defendants and have concluded that the claims made by the defendants are no more than a bald assertion of the "loan for equity deal" and contradict the documentary evidence exhibited. Accordingly, the plaintiffs are entitled to judgment in the amount claimed.

First Promissory Note for US\$1.5 million, executed 22 August 2008

6. The first named defendant is the sole Obligor on this note.
7. The core obligation stated in this note is in the following terms: -

"For value received, the undersigned, Patrick Rainsford, an individual ("Obligor") hereby promises to pay to Michael R. Forman, an individual ("Holder") at 120 North Robertson Boulevard, Los Angeles, California 90048, or at such other place or to such other party or parties as the holder of this Note may from time to time designate, the principal sum of One Million, Five Hundred Thousand and 00/100 US

Dollars (US\$1,500,000) with interest thereon at the rate of six and one quarter percent (6.25%) per annum (the "Interest Rate")”.

8. The note provides for the payment of interest monthly in arrears commencing on 1 November 2008 up to and including the stated Maturity Date of 1 February 2009, *"at which time any and all unpaid principal together with accrued but unpaid interest shall be due and payable"*.
9. The note provides for an increase in the rate of interest to 10% on the occurrence of any default, and the provision for the payment by the Obligor of all costs and expenses including legal costs incurred by the holder related to the collection of any amounts due under the note. Para. 5 provides: -

"Obligor, for itself and all endorsers, guarantors and sureties of this note, and each of them and their heirs, legal representatives, successors and assigns, hereby waives presentation for payment, demand, notice of non – payment, notice of dishonour, protest of any dishonour, notice of protest, and protest of this Note and all other notices in connection with the delivery, acceptance, performance, default or enforcement of the payment of this Note and agrees that its liability shall be unconditional and without regard to the liability of any other party and shall not be in any manner affected by any indulgence, extension of time, renewal, waiver or modification granted or consented to by the holder".

10. Para. 7 provides: -

"Nothing contained herein shall prevent holder from waiving in any certain instance or in any particular occasion, any right or remedy hereunder (including, but not limited to, the operation of the acceleration clause above) Consent to one such transaction shall not be deemed to be a consent or waiver of any future transactions. No such waiver shall constitute a further or continuing waiver of such right or remedy as to any preceding or succeeding breach hereunder. No single or partial release of any right hereunder or under any instrument securing or guaranteeing this note shall preclude any other or further exercise thereof or the exercise of any other right. Holder shall at all times have the right to proceed against any security for this Note in such order and in such manner as holder may deem fit, without waiving any rights with respect to any other security. No delay or omission on the part of the holder in exercising any right hereunder or under any other instrument shall operate as a waiver of such right or of any other right under this Note".

11. Jurisdiction and choice of law are contentious issues raised by the defendants. Paragraph 10 of the Note provides as follows: -

"This Note shall be governed by and construed in accordance with the laws of the State of California. Any action on this Note must be brought in a US Federal Court

or California State Court having jurisdiction, located in Los Angeles County; Obligor hereby agrees and submits to personal jurisdiction of such courts”.

12. The terms of this note were altered in three important respects by later documents comprising what were referred to as an Omnibus Reaffirmation Agreement made on 31 January 2013 and amendments thereto, referred to in more detail below. The three important amendments were as follows: -
 - i. The maturity date was amended from time to time. Ultimately by the Seventh Amendment to Omnibus Reaffirmation Agreement made on 31 August 2018 “the Seventh Amendment”, it was extended to 28 February 2019.
 - ii. The interest accruing on the Note was capitalised from time to time, and by the Seventh Amendment the principal balance was restated at US\$1,805,625.48.
 - iii. The governing law and jurisdiction was altered by the Seventh Amendment of 31 August 2018 to confer on the parties’ options of both law and jurisdiction in either California or Ireland.

Second Promissory Note for US\$480,075, executed 20 May 2010

13. On this and all subsequent notes, the first and second defendants are joint and several obligors.
14. The stated maturity date is 31 December 2011.
15. This note was in substantially the same form as the first promissory note, with the following differences.
16. The note contained a number of provisions relevant to an option being conferred on the deceased relating to shareholding in eMuse Corporation Limited (“eMuse”) and its subsidiaries. The relevant paragraphs are as follows: -
 - “9. *The proceeds hereof shall be used wholly and exclusively for the general corporate purposes of eMuse Corporation Limited (a company registered in Dublin, Ireland, no. 297026) and its subsidiaries.*
 10. *At the option of Holder all or any part (corresponding to the conversion of any possible number of shares) of the unpaid principal then outstanding may be converted into shares of common stock of eMuse currently owned by the Obligor, at any time starting from the day hereof until the later of (1) the Maturity Date (as such date may be extended by the Holder) or (2) the date that Obligor pays off this Note in full including any outstanding principal, accrued interest and other charges due hereunder, and further provided that Holder gives Obligor not less than five days prior written notice”.*
17. Para. 10 contained further provisions identifying the price per share to be applied upon any conversion.

18. The terms of the second note were later amended in the following important respects -
- (i) The maturity date was extended initially to 31 December 2012 and following a series of further amendments to 28 February 2019. The final such extension was granted by the Seventh Amendment made on 31 August 2018.
 - (ii) The right of the Obligors to prepay the note before a Maturity Date of 30 November 2013 was excluded, "in order to protect the deceased's ability to exercise the conversion right" (Omnibus Reaffirmation Agreement 31 January 2013).
 - (iii) The choice of law and jurisdiction clause was amended to confer an option on the parties to elect for California or Irish law and jurisdiction (Seventh Amendment).

Omnibus Reaffirmation Agreement 31 January 2013

19. The first and second promissory notes were modified by this agreement.
20. The parties to this agreement were the defendants (the first and second named defendant each having signed the agreement), the deceased and a Californian limited company controlled by the deceased called Robertson Cantara LLC ("RC").
21. This agreement recited the first and second promissory note and certain amendments which had previously been made to them.
22. A number of the recitals are relevant: -
- (i) "Recital C - Forman holds a membership interest in RC. On or about January 12, 2009 in consideration for Forman's agreement to extend the maturity date of the US\$1.5 million Note, Obligor granted RC the option to purchase five hundred thousand (500,000) shares (the RC shares) of Obligor's personal share holdings of Class A ordinary shares in eMuse Corporation Limited. ("eMuse"). The purchase price for exercising such option was 0.00125 Euros per share. On or about February 3, 2009, RC exercised the foregoing option and paid Obligor the sum of €625. As of the date hereof Obligor has not delivered the stock certificates evidencing the transfer of ownership interest in the RC shares from Obligor to RC". (emphasis added).
 - (ii) "Recital D - On or about May 6 2010, in consideration for Forman's agreement to advance the loan evidenced by the US\$480,075 Note, Obligor agreed to transfer to Forman RC six hundred and twenty-five thousand (625,000) shares ("the Forman Shares") of Obligor's personal shareholdings of Class A ordinary shares in eMuse. As of the date hereof, Obligor has not delivered the stock certificates evidencing the transfer of ownership interest and the Forman shares from Obligor to Forman".
 - (iii) Recitals E and F recited that the Obligor had requested, and the deceased had agreed to extend the terms of the first and second note for an additional period of time.

23. The agreement extended the maturity dates of the first and second note to 30 November 2013.
24. The agreement contained acknowledgements by the defendants that they had failed to pay any interest or principal due under the notes.
25. The agreement provided at para. 2 (c) a confirmation that the right of the deceased to convert any principal amounts then outstanding into shares of common stock of eMuse Class A ordinary shares remained valid, binding and irrevocable and in full force and effect. The right was extended to the revised maturity date and the clause continued "in order to facilitate Forman's ability to exercise the foregoing conversion right, the Obligor acknowledges and agrees that commencing on the date hereof, the US\$480,075 note shall not be prepayable in whole or in part prior to the maturity date without the prior written consent of Forman, which may be granted or withheld at Forman's sole and absolute discretion".
26. The agreement provided that save for these modifications, the notes and all of their terms remained in full force and effect.
27. In Clause 4 "Miscellaneous", the parties restated the choice of law and governing law to be "the laws of the State of California". Clause 4 (c) then contained an "entire agreement clause" in the following terms: -

"This agreement constitutes the entire agreement between the parties and supersedes all prior oral or written negotiations and agreements between the parties with respect to the subject matter hereof. No modification, variation or amendment of this agreement (including any exhibit hereto) shall be effective unless made in writing and signed by both parties".

28. Clause 4 (d) contained a confirmation by each of the parties to the other: -

"That it has had the opportunity to seek the advice of its own independent legal counsel with respect to the provisions of this agreement and that its decision to execute this agreement is not based on any reliance upon the advice of any other party or its legal counsel. Each party represents and warrants to the other party that in executing this agreement such party has completely read this agreement and that such party understands the terms of this agreement and its significance. This agreement shall be construed neutrally, without regard to the party responsible for its preparation".

Seventh amendment to Omnibus Reaffirmation Agreement, dated 31 August 2018

29. The Omnibus Reaffirmation Agreement was amended on seven occasions, by agreements dated 30 November 2013, 30 June 2014, 30 December 2014, 1 December 2016, 31 December 2016, 15 February 2018 and finally on 31 August 2018, being the Seventh Amendment.

30. The Seventh Amendment recited the prior amendments and extensions of the maturity dates of the first two notes.

31. Recital C provided as follows: -

"On or about January 12, 2009, in consideration for Forman's agreement to extend the maturity date of the US\$1.5 million note Obligor granted RC the option to purchase five hundred thousand (500,000) shares ("the RC shares") of Obligor's personal shareholdings of Class A ordinary shares in eMuse Corporation Limited ("eMuse"). The purchase price for exercising such option was 0.00125 Euros per share. On or about February 3rd, 2009 RC exercised the foregoing option and paid Obligor the sum of €625. As of August, 31 2018 Obligor has not delivered the stock certificates evidencing the transfer of ownership interest in the Forman shares from Obligor to RC.

Recital D – On or about May 6, 2010, in consideration for Forman's agreement to advance the load evidence (sic) by the US\$480,075 Note, Obligor agreed to transfer to Forman six hundred and twenty-five thousand (625,000) shares (the "Forman shares") of Obligor's personal shareholdings of Class A ordinary shares in eMuse. As August 31 2018, Obligor has not delivered the stock certificates evidencing the transfer of ownership interest in the Forman shares from Obligor to Forman".

32. The agreement recited each of the previous amendments to the Omnibus Reaffirmation Agreement and that the Obligor had failed to pay any of the accrued interest or principal amounts due pursuant to those amendments and recited at J: -

"As of 31 August 2018, Obligor is in default of this agreement".

33. By Clause 1 the maturity dates of the first and second notes, which as at that date had been due for repayment on 31 August 2018, were extended to 28 February 2019.

34. The parties acknowledged that, save as expressly amended by this agreement:

"all of the terms, covenants and conditions of the [first and second notes] shall remain in full force and effect and, as hereby modified, Obligor covenants and agrees to perform and preserve each and every term and covenant of the [first and second notes]".

35. Clause 7 provided for Obligor to deliver the outstanding shares on the earlier of any of the following events: -

- a) Written demand by either Forman or RC;
- b) The elimination of any existing legal or contractual restrictions on the transfer of the Forman shares or the RC shares, or;

- c) The sale or transfer of any eMuse shares owned by Obligor for any reason.
36. The agreement contained a restatement of the confirmation that the parties had each had the opportunity to obtain their own legal advice and that decisions to execute the agreement were not based on any reliance on the advice of any other party or its legal counsel.
37. The agreement contained an important provision amending the governing law and jurisdiction, which has become controversial in the context of this application. Clause 4 provided: -

"Governing law. Notwithstanding anything contained in the Agreement to the contrary, the parties acknowledge and agree that either party shall have the option of subjecting the Agreement, the US\$1.5 million Note or the US\$480,075 Note, and all other documents or agreements entered into or referenced in the Agreement to United States law in the jurisdiction of Los Angeles, California or under Irish law in the jurisdiction of Dublin, Ireland".

Third Promissory Note for \$90,000 executed 1 September 2017

38. On 1 September 2017, the defendants issued a promissory note in favour of the deceased for a sum of US\$90,000. The interest rate payable was 10% and the maturity date was 1 September 2018.
39. The third paragraph of the note provided as follows: -
- "Payor expressly waives presentment, protest and demand, notice of protest, demand and dishonor and non – payment of this Note and all other notices of any kind, and agrees to pay all costs of collection when incurred, including reasonable attorneys' fees, and expressly agrees that this Note, or any payment hereunder, may be extended from time to time without in any way affecting the liability of the maker and endorser hereof".*
40. As to governing law and jurisdiction, the note provided: -
- "This note shall be governed by the laws of the state of California. Payor and Payee agree that all actions or proceedings arising in connection with this note shall be tried and litigated only in the state and federal courts located in the City and County of Los Angeles, State of California".*
41. On 1 September 2018, the parties executed a Modification of the third Promissory Note. By this modification the parties agreed to restate the maturity date to 28 February 2019.
42. The modification contained a provision in the following terms: -

"Except as herein specifically modified, no additional modification or amendment to this note is intended, and, except as herein specifically set forth, all of the terms, covenants and conditions of the Note shall remain in full force and effect and, as

hereby modified, Payor covenants and agrees to perform and observe each and every term and covenant of the Note”.

Further Notes

43. Between 20 September 2017 and 31 July 2018, eleven further notes were issued. Seven were for \$90,000 each, and one each for \$80,000, \$100,000, \$120,000 and \$180,000. They contained a series of maturity dates ranging from 1 September 2018 through to 31 December 2018. With the exception of one, modifications were executed on a variety of dates between 1 September 2018 and 31 December 2018, extending the maturity dates of all the notes to 28 February 2019.
44. A note issued on 20 October 2017 and payable on 1 October 2017 was never extended.
45. On 18 October 2019, a note for the sum of US\$210,000 was executed having a maturity date of 28 February 2019.
46. On 20 December 2018 a note was executed for the sum of US\$65,000 having a maturity date of 28 February 2019.
47. The total amounts advanced pursuant to these 2017 and 2018 notes was a principal sum of US\$1,475,000. It is not in dispute that the amounts referred to in each of these notes were advanced. Nor is it disputed that the defendants duly signed the notes.
48. The first and second promissory notes were amended by the First Omnibus Reaffirmation Agreement and seven amendments thereto. This brings to ten the total number of documents executed in respect of the first and second loans. Fourteen further loans were granted, and fourteen promissory notes executed. Eleven amendments were executed modifying their repayment dates, bringing the total of the amending documents in respect of those notes to twenty five. This brings the total number of documents in evidence before this Court to 35, in which the maturity dates were restated, culminating ultimately in all loans being repayable on 28 February 2019 unconditionally.
49. Apart from the general repeated averments as to a “loan for equity deal”, which I consider later, nowhere in the affidavits is any narrative provided by either party as to the events specifically surrounding the execution of the notes during 2017 and 2018 or, more pertinently, the modifications which all culminated in the same final maturity date of 28/2/2019. Between 1 September 2018 and 31 December 2018 any notes which were then maturing, with one exception, were on various dates in that period extended to 28 February 2019. The final two notes, signed on 18 October 2018, for an amount of US\$210,000 and on 20 December 2018, for an advance of US\$65,000 each stated the maturity date of 28 February 2019.
50. Neither party offers any description of what transpired between the parties to bring together all of the maturity dates to the single date of 28 February 2019.

Plaintiffs’ Grounding Affidavit

51. The application for summary judgment is grounded on an affidavit sworn by Mr. James D. Vandever. Mr. Vandever says that he is one of the trustees of the Trust.
52. Mr. Vandever exhibits the promissory notes, an original Declaration of Trust establishing the Trust and the last amendment thereto, correspondence comprising initial letters of demand issued to the defendants and letters exchanged between the plaintiffs' solicitors McCann Fitzgerald and the defendants' solicitors Eversheds.
53. Mr. Vandever refers to the position adopted by the defendants in the correspondence from Messers Eversheds, where they stated:

"Put simply, it was agreed that there would be forbearance and a continual rollover of the Promissory Notes."

The plaintiff states that the trustees do not accept the explanation, which they say are contrary to *"the clear and unambiguous terms of the Promissory Notes"* which he says are *"legally binding and the defendant have not identified any valid basis for disputing their enforceability"*. He avers that the debt as demanded, and interest remains due and that the defendants have no bona fide defence to the claim for summary judgment.

The Trust

54. Mr. Vandever explains that the Trust is a mechanism commonly used in the United States of America to administer an individual's personal wealth. He says that this was originally created by a Declaration of Trust on 25 August 1989, which was amended from time to time, culminating in an amendment and restatement of the Declaration of Trust dated 14 September 2018.
55. Mr. Vandever says that the deceased was the sole trustee of the Trust during his lifetime. In accordance with California law, the deceased's interest in the notes was transferred to the Trust. On the death of Mr. Forman the trustees were appointed as co – trustees of the Trust and they have since their appointment been taking steps to administer the Trust in accordance with its terms.
56. The plaintiffs also delivered an affidavit by Elizabeth Bawden. Ms. Bawden is an attorney qualified and practicing in California. She says that she was instructed by the deceased to advise in relation to his estate planning. She explains the nature of the Trust. It is a common estate planning choice whereby the grantor transfers assets to the living trust while alive and at death the trustee is able to marshal and distribute the assets without resort to probate or court action. She refers to a Twenty Ninth Amendment to the Trust pursuant to which, on the death of the trustor, Mr. Forman, the plaintiffs stand appointed to serve as trustees.
57. The defendants have delivered a replying affidavit of a Mr. Jose L. Patino, of San Diego. Mr. Patino takes issue with a number of points concerning California law, but does not take any issue with the description by the plaintiffs of their status as trustees to pursue the interests of the Trust. Mr. Patino says that California law provides no protection for a suitably established trust against *"the array of California law and proscriptions protecting*

contracting parties from contractually deficient demands for payment, whether from a trustee or a grantor”.

58. Mr Patino continues:

“Attorney Bawden’s affidavit does not address those impediments which I now offer to the court for its consideration of these proceedings.”

59. I shall return to other aspects of California law which are addressed later by Mr. Patino. However, the validity of the Trust, the appointment of the plaintiffs as trustees, the assignment of the notes to the Trust, and the status of the trustees to pursue claims for the benefit of the Trust are not disputed.

Evidence of the first defendant

60. The first named defendant swore two affidavits in response to this application, on 4 November 2020 and 23 November 2020.

61. In his first affidavit the first defendant describes his background, stating that he is an electronics engineer who has established and sold a number of software development companies. In or about 2000, he and a business partner, Mr. Conlon, established the eMuse group of companies, which evolved over a 20 – year period and whose primary focus is now on digital advertising services, mainly in the US market.

62. In 2010, arising from certain differences between Mr. Rainsford and Mr. Conlon, Mr. Rainsford founded what is referred to as the Noster Group of companies, focused on research and developing “data harvesting software”, and which enabled some of the underlying eMuse technology to be developed for a different market.

63. Mr. Rainsford says that his remaining shareholding in the eMuse group is now held through a company in the Noster Group.

64. Mr. Rainsford met Mr. Forman at a venture capital presentation in 2000 when he was looking for further investment in eMuse. He formed a friendship with Mr. Forman who had expressed an interest in investing in eMuse. Mr. Rainsford says that the friendship continued from that time up to the death of Mr. Forman. In the days before Mr. Forman’s death in February 2019 he stayed at his apartment in New York preparing for a presentation to investors.

65. Mr. Rainsford says that he was the founder and operator of the eMuse group and he and his wife Angela the second defendant had invested significant sums in the group prior to meeting Mr. Forman. Mr. Forman “was a key angel investor”. He says that at all times Mr. Forman made it absolutely clear to him that he was: -

“investing in me and my software and development team and, therefore, whatever percentage of the collective Noster and eMuse businesses Angela and I held, whether directly or indirectly, Mike as a silent business partner also had a stake.

This was the basis on which we conducted business and which was established over many years"

66. Mr. Rainsford states that there were three phases when Mr. Forman invested in eMuse and Noster. Before detailing these, he said that *"Mike's shareholding interests evolved over the years in eMuse and Noster from 2000 to the time of his death in January 2019 and was inextricably linked to the loan advances"*. He continued: -

"Each time Mike advanced monies, he made it clear to me that he was investing in eMuse and/or Noster as a group. Mr. Forman never characterised these advances as simply loans. In his (sic) mind, they were all equity plays. He always made it clear that these advances were investments in my business ventures".

67. Mr. Rainsford then refers to the three phases, which he describes as a venture capital round in 2000, "stability and growth, 2008 – 2011", and "post – SICAV 2017 – 2018."
68. Mr. Rainsford says that Mr. Forman's first equity investment was in 2000 when he subscribed for approximately 1,548,750 Class B shares, being 2.28% of ECL for €1 million based on a valuation of US\$40 million.
69. No loan to the defendants or corresponding promissory note is referred to in this round.

"Stability and growth"

70. Mr. Rainsford says that in or about 2008, when he was in dispute with his then business partner Mr. Conlon, that deadlock rendered it impossible for him to raise further funding. This meant the eMuse group was technically insolvent in the absence of fresh investment or new contracts. He was very pessimistic of his chances of securing further investment. He then refers to a meeting on 23 July 2008 held at the Locanda Locatelli, a restaurant in London. The evidence of the conversation at this meeting is central to the defendants' position.

23 July 2008 Meeting at Loconda Locatelli

71. The lunch meeting was attended by the defendant and, his colleague, Ms. Kara Hanahoe together with Mr. Forman and his wife, Maria Doyle, who is later referred to as "Malsi".
72. Mr. Rainsford states that at this meeting he explained to Mr. Forman the financial difficulties which eMuse was experiencing at that time. Mr. Forman said that he would like to invest further in the company. Mr. Rainsford continued as follows: -

"I asked him what he wanted and he said 'shares'. He offered to advance a sum of €1million immediately (equivalent to US\$1.5million at the time) to take the company through the next year or so. At this point Mike (through RPDC) was already a shareholder in ECL and, because of time constraints, the difficulties with Mr. Conlon and in order to avoid going through complicated pre-emption procedures, it was agreed that the investment would be by way of loan to me rather than direct to eMuse and I would provide equity to Mike by giving him an option to acquire at nominal value some of my Class A shares and which were only

held by Mr. Conlon or myself (or our trusts) as founding shareholders. The existing shareholder arrangements also made it difficult to provide security for the loan or give equity without shareholder consents. Mike suggested that he did not need security as this was really an equity play but the loan could carry a good commercial interest rate and then be repaid when eMuse was in a position to do so, for example, on an exit on sale or flotation.

I was very happy with this proposal and agreed to it. I trusted Mike implicitly and he trusted me. Therefore, the agreed basis upon which sums were to be advanced (in July 2008) was by way of a loan which was to be repaid when eMuse was in a position to do so. This reflected the fact that Mike was investing in the eMuse business in effect for an equity return. It was a loan for equity deal”.

73. On 28 July 2008, Mr. Forman transferred the sum of €1million to Mr. Rainsford. The defendant says that this amount then equated to about US\$1.5 million. On 22 August 2008 the first promissory note for US\$1.5 million was executed. Mr. Rainsford said that these monies were used for the sole purpose of running costs/working capital in eMuse.
74. Mr. Rainsford continues by saying that on the 12 January 2009 *“In completing the equity side of the deal reached at the Locanda meeting”* he agreed to grant Mr. Forman or his nominated entity an option to acquire shares in ECL (a subsidiary of the Noster Group) which he then held. Mr. Rainsford says that the 2009 equity is that referred to in Recital C of the Omnibus Reaffirmation Agreement dated 31 January 2013.
75. Mr. Rainsford refers to an additional amount of €750,000 which Mr. Forman subscribed pursuant to a rights issue, thereby increasing his shareholding. This advance was not the subject of any promissory note.
76. Mr. Rainsford refers to the further sum of US\$480,075 advanced in May 2010 *“on our agreed Locanda loan for equity deal and to cover immediate operating costs”*. He refers to the fact that he agreed to procure the transfer to Mr. Forman of additional shares. That loan was evidenced by the Second Promissory Note. Mr Rainsford refers to the conversion rights which are recited in that note.
77. Mr. Rainsford refers to further acquisitions of shares by Mr. Forman in 2011. He says that the effect of these various measures was to confer on Mr. Forman a combined shareholding interest amounting directly and indirectly to a total of 6.38%.
78. Mr. Rainsford refers then to certain restructuring discussions he held with an external investor, referred to as the SICAV, and describes a novation of certain shareholder loans and further investments made by himself.
79. Mr. Rainsford refers to further advances made by Mr. Forman to him in 2017 and 2018 *“on the same loan for equity basis as the sums he advanced in 2008 and 2010”*.

80. Mr. Rainsford says that he agreed to transfer shares in the Noster Group at a suitable later stage, which would bring Mr. Forman's shareholding to a minimum of 10% in the eMuse group and 10% of the defendant's holding in the Noster group.
81. The share transfers were never implemented. Mr. Rainsford avers that at the time of Mr. Forman's death he was waiting to hear from Mr. Forman as to whom the shares should be transferred, and he says that Mr. Forman was very ill in the period immediately preceding his death.
82. In summary, Mr. Rainsford said that the effect of the transactions described above would be that Mr. Forman's investment in eMuse and Noster

"will be realised on an exit event (namely, on a sale or floatation of the business) on a pari passu basis with Angela and myself and without priority as follows: -

- (a) *By a repayment of the loan notes, totalling \$4,708,739 (together with accrued interest as per Mr. Vandever's affidavit, although I have not seen his interest workings for the precise numbers) from [he then refers to debt owed by the companies to himself and the second defendant] and,*
- (b) *By a disposal of equity interest of not less than 10% in eMuse group and Noster group".*

Mr. Rainsford said that the principal amount of the loans from Mr. Forman were "effectively split" as between the different companies, although the loans were advanced to the defendants and not the companies. He says that *"of the total eMuse and Noster debt of around €12 million owed to Angela and myself, Mike's loan notes represent approximately 25% and therefore the debt would be repaid in the proportions 1 : 3 with the debt owed to Angela and myself".*

The Promissory Notes

83. The defendant then addresses the promissory notes themselves when he says the following: -

- "39. I cannot recall who sent me the promissory notes for the 2008 and 2010 advances for the eMuse group. I believe it was Mr. Vandever, who was Mike's long standing lawyer.*
- 40. Following each transfer of money for the 2017 to 2018 advances to the Noster and eMuse groups, Mike and or his assistant, Joe Robinson would send me a promissory note to sign. No explanation was given for why Angela and myself needed to sign the loan notes and we had no part in preparing them. The agreement was always that the loans were repayable on exit as per the loan for equity deal. I assumed that Mike needed the loan notes for his internal paper trail on funds movements and these would sit alongside the equity deal.*

41. *I trusted Mike when he assured me that the loans did not have to be repaid until the business (i.e. eMuse and Noster) was in a position to do so – or upon a sale or floatation of the business. I have no knowledge of the laws of California and the impact of these on any of the arrangements we had put in place.*
42. *The only time the promissory notes were mentioned in my many discussions with Mike was at the end of a year when Mike would say that he would 'roll over' the promissory notes. Even though the promissory notes were structured as one year notes, at no time did Mike ever indicate on an anniversary date that the promissory notes would be called in. Nor did I ever make any repayments against the promissory notes as this would have been entirely inconsistent with the basis upon which these monies were advanced.*
43. *At the end of each year, Mike would call me and say words to that effect: 'It's that time of the year again, how long do you need and Joe Robinson (his assistant) will send over the papers'. By asking 'How long do you need?' I always understood Mike to mean that – consistent with our agreement – he would roll over the loans until the business was in a position to repay the loans or in expectation of an exit event. Indeed, while the first tranche of monies was advanced in 2008, at no stage did Mike ever assert that I was under an obligation to immediately repay these monies. Had he made such an assertion, I would have said that such a demand goes against what we had agreed at Locanda Locatelli on 23 July 2008.*
44. *As I mentioned above, I stayed at Mike's apartment in New York in the week before he died. There was no question of loans being called in, Mike having advanced additional sums only a month before then. Had he done so, not only would it have breached the agreement we reached in 2008, but it would also have imperilled the investment he had made in eMuse and Noster over a period of nearly 20 years.*
45. *I do not recall how the first Omnibus Reaffirmation Agreement came into place. I believe Mr. Vandever sent it to me to update the paperwork for loans advanced in 2008 and 2010 and the 2009 equity and 2010 equity. This was then renewed every year, with the latest document (the Seventh Omnibus Reaffirmation Agreement) being signed 31 August 2018. Each agreement was more or less in the same form, acknowledging the new indebtedness under the loans at the date of the agreement and with some modifications to paragraph 3 to take into account the restrictions on delivery of the 2009 equity and 2010 equity in consequence of my ECL Class A shares being transferred to NVL and subsequently as part of the transaction with the SICAV investor and of which Mike was aware. Neither Angela nor I were advised to take, nor did we take, legal advice when signing the agreements or promissory notes as we both trusted Mike that the agreement was always the loan for equity deal we had agreed back in 2008 at the Locanda meeting".*
84. By this description of the Omnibus Agreements and amendments, the defendant refers to the agreements being in "broadly the same form" with modifications in relation to the

equity element which he recalls, but makes no reference to the fact that each such agreement stipulated a new maturity date.

85. In his second affidavit Mr. Rainsford repeats a number of the assertions as to the content of the "Locanda" meeting. He says that during his lifetime the deceased "*never called on me to repay the sums due on foot of the promissory notes*". He refers to the fact that the deceased continued to advance sums right up until a month prior to his death.

86. In relation to the Omnibus Reaffirmation Agreement, Mr. Rainsford says the following: -

"I did not take legal advice before signing it in January 2013 – some four and a half years after the 2008 promissory note, and two and a half years after the 2010 promissory note. Rather, they simply rolled over on an annual basis in accordance with my agreement with Mike. Indeed, recital C of the omnibus agreement records that on 12 January 2009 I granted Mike through RC the option to purchase 500,000 shares in eMuse and further that this option was exercised on or about 3 February 2009".

87. Mr. Rainsford does not refer to the fact that the option was expressly recited in the Omnibus Reaffirmation Agreement as having been granted in consideration for Forman's agreement "to extend the maturity date of the US\$1.5 million note" (see para. C of the recitals to the Seventh Amendment). The repayment obligation was not stated to be conditional. The recitals in the Seventh Amendment evidence that extensions of new maturity dates were the result of negotiations on each occasion and not pursuant to a broad or general obligation on the part of the deceased to continue granting extensions annually or indefinitely.

88. The defendant states that most of his communications with the deceased were oral and by telephone. He says that whenever they exchanged correspondence by email it was normally focused "on the business". He has reviewed his emails "as they related to the matters referred to in his affidavit" and draws the court's attention to a number of emails which he considers to be significant. Having regard to the 19 year relationship it is noteworthy that so few emails are exhibited. I have considered those exhibits to examine whether they evidence the assertion made by reference to the Locanda meeting.

12 March 2013

89. This is an email from Mr. Forman to Mr. Rainsford written some weeks after the signing of the Omnibus Reaffirmation Agreement. The deceased states: -

"Enclosed are the agreements with regard to our most recent understandings for my loans to you and stock purchased by Robertson Cantara and promised to me. Also this includes the option loan".

The defendant says that he is not sure what the reference is to the "option loan" but he thinks it is the US\$480,075 loan "with the conversion rights". This is a reference to the second promissory note which contains a provision for certain conversion rights. The

paragraph in this exchange of emails to which importance is attached by the defendant is an email from the deceased as follows: -

"Over the weekend I did speak with Jim Vandever, who did mention to me that he has not heard from Steven with regard to the paperwork for Noster and eMuse. As I had mentioned before, I really do not know why this is being done. Notwithstanding the above, it should be an easy transition through a couple of memorandums or letters. Pat, my funding to you is getting quite large and I would like the comfort to know that I am not going to have a problem when you do make your exit. I also do not want an argument with the banks I use for funding as this is what I do. It is a pass through from the banks to my accounts to loan to you. Once again, as mentioned before, I don't see a real problem or hold up as there are only four shareholders for eMuse with you owning 80% or more of the company".

90. The defendant relies on this email to support his suggestion *"that at no time in this email is Mike talking about promissory notes being repaid other than on exit"*.

6 September 2017

91. On 6 September 2017, Mr. Vandever issued an email to a Mr. Jones, an advisor to the defendant, copied to Mr. Forman and Mr. Rainsford and others. He refers to an understanding that the *"Noster shares are to be issued in a manner that will effectively duplicate the ownership interest that Michael (and his entities) maintained in eMuse Corporation"*. He continues *"I believe we will be able to argue that the Noster shares were received as a successor to eMuse or that Michael will be able to effectively offset the gain in some other manner"*.

92. The defendant refers to this email as evidence of his agreement with the deceased as to the issue of further shares in "NPL", as part of new loans to the Noster and eMuse groups. No reference is made to the promissory notes or any modifications thereof.

21 May 2018 emails

93. On this date there was an exchange of emails between Mr. Joe Robinson, another advisor to the deceased, and Mr. Rainsford. The defendant refers to this in the context of confirmations that he was giving to the deceased regarding his shareholding. These emails contain no discussion regarding repayment or maturity dates for outstanding loans. Mr. Robinson states the following: -

"Can you also let us know when we can expect the loan documents and when can the Noster stock shares be issued? Also, if you have any questions on the loan, please include them".

94. In his reply, Mr. Rainsford states as follows: -

"So, Mike owns 10% of Noster mobile stock, and my understanding is he wishes 70% to be in his own name and 3% to go to Robertson. Is that correct?"

The amount of the loan is about \$130,000 the actual figure is €110,000, so when I spoke to Mike I was doing the conversion in my head – hence the confusion.

I have sent all the original loan docs to Mike and Malsi's home address. I have attached the tracking number in case you need it

. . . I have no questions at all, as I think I am fully clear on Mike's intentions".

95. These exchanges occurred on 21 May 2018. One of the promissory notes issued was on 20 June 2018 for a sum of \$120,000, again with a maturity date of 1 September 2018.
96. The exhibited versions of these emails are extracted from a sequence which is not before the court. In so far as they are extracts on which the defendants rely, if anything they illustrate that when notes were being signed and returned this was done in the context of active discussions and exchanges between the parties and not simply placed before the defendants for execution without dialogue. Nor do they advance the case that maturity dates would not be relied on.

Email 29 June 2018

97. On this date Mr. Forman emailed Mr. Rainsford and stated as follows: -

"Pat, I moved a little too fast with regard to the issuance of the Noster stock. The stock should be in the name of Malsi and myself. I don't think you are going to issue the stock in the next day or two, give me a couple of days, I want to see under American tax laws the best way to see how it can be delineated. I should know in a day or two if not yet today".

98. Nowhere in these emails is there any evidence of discussion as to extension of repayment dates. At their height, these evidence ongoing discussions between the parties regarding the structure by which shares would be held by the deceased. Although there is a connection between the loan to the defendants evidenced by the promissory notes and the acquisition of the deceased's interest in the shares in the relevant companies, no evidence is proffered of an agreement to waive reliance on stated maturity dates, or other conditionality in the payment obligation.

Emails with Malsi

99. The defendant states that he remained good friends with the deceased's widow Malsi. He says that he tried to contact her after he received the letters of demand from the plaintiffs calling in the promissory notes with a view to establishing what her understanding was. On 23 August 2019, Malsi replied as follows: -

"Hi Pat,

Sorry you couldn't reach me by fone (sic), but I had some early emergency appointments with several dentists and had to coordinate a oral surgery before the holiday weekend. Jim had called once and said that the estate tax on your notes are over \$2 million and that Chris, the son, will not want to pay that. I told Jim that Michael always rolled the loan over till you sell, but I really don't know how that all

works now as Michael left no instructions or memos just the oral conversations with you and me. I believe the estate taxes are humongous and need to be paid latest by end October. Michael put that burden on his son. Maybe some divine inspiration will come through? I am not busy over weekend and we could connect. Good thoughts. Malsi”.

100. The defendant places emphasis on the words used in this email where Malsi states *“I told Jim that Michael always rolled the loan over till you sell”.*
101. This is no more than a statement on the part of Malsi that as a matter of fact and record the deceased “always” rolled over loan notes prior to his death. She confirms that she herself does not know “how that all works now”.
102. No evidence is proffered of any follow up conversations, although in the absence of an affidavit by Malsi, such evidence would be susceptible to objections under the rule against hearsay.
103. The defendant exhibits an email which he received from Malsi on 26 April 2020, some weeks before the commencement of these proceedings. In this she states the following: -

“Hope your lawyers are good to help you, and I will continue to reiterate Michael’s wishes in your behalf. Take care”.
104. The defendant relies on this email again in support of the assertion that the deceased’s wishes were that the promissory notes would only be repaid on exit. A plain reading of the words and language used in this email does not support this proposition and it is clear that Malsi is simply confirming that she would “continue to re-iterate the deceased’s wishes”. She does not state what those wishes were.
105. These are the only emails or input from the deceased’s widow and no affidavit is sworn by her.

Affidavit of Angela Rainsford sworn 4 November 2020

106. The second defendant swore a short affidavit. She states that she has read the contents of the first defendant’s affidavit and she confirms that what he says is true based on her own knowledge of events. She continues: -
 - “7. *Pat’s relationship with Mr. Forman grew over many years. Pat trusted Mr. Forman implicitly as a friend and business partner and I too had complete faith in Mr. Forman’s integrity.*
 8. *The basis on which I signed the promissory notes was because of the agreement Pat had reached with Mike as set out in Pat’s affidavit.*
 9. *It was in reliance of this agreement that Pat and Mike had (that the promissory notes would only be repaid on the sale or exit of the business (originally eMuse and then the new co. now envisaged). I would never have risked personal bankruptcy*

and putting myself and my children in financial jeopardy – and potentially homeless – if anything had gone wrong and the loan notes called on at any time.

10. *I did not take independent legal advice on the loan notes and was never asked to do so by Mr. Forman or his advisors, before signing them”.*

107. The second defendant did not attend the Locanda meeting and does not assert that she was a party to any of the discussions between the deceased and the first defendant in connection with the execution of the promissory notes. At its most, her affidavit is evidence only of her understanding of the first defendant’s understanding.

Affidavit of Kara Hanahoe sworn 4 November 2020

108. Ms. Hanahoe is the chief marketing officer of the eMuse and Noster group of companies and has worked with the first defendant for over 20 years.

109. Ms. Hanahoe refers to the affidavits of the first and second defendants. She states that her understanding of the agreement between Mr. Forman and the first defendant as to how Mr. Forman advanced monies is as set out in the first defendant’s affidavit.

110. Ms. Hanahoe says that she has checked her diaries for the dates of meetings which she and the first defendant attended with the deceased and his wife Malsi, starting with the Locanda meeting on 23 July 2008. She then refers to eleven further meetings, all of which took place at different locations in London commencing on 19 October 2008, and the last, importantly, of such meetings having taken place on 20 May 2014.

111. Ms. Hanahoe states that at the Locanda meeting the offer of investment came from the deceased and his wife. She continues: -

“At no time at that meeting or any other meeting or occasion at which I was present was it ever suggested or inferred that the funds advanced to Pat by Mike were to be repaid at any time other than on a sale or a floatation”.

112. Ms. Hanahoe continues by stating that every meeting was cordial and friendly and usually held over lunch or dinner at a restaurant. She states that at no time did the deceased ever ask when his money would be repaid or ever mention repayment. She says that the discussions always concerned how to build the business to get an exit.

113. Ms. Hanahoe concludes: -

“Pat trusted Mr. Forman implicitly as a friend and business partner and I too had complete faith in Mr. Forman’s integrity. The idea that repayment of the monies advanced was to occur in any way other than in accordance with the agreement that it be done on the sale or exit of Pat’s business was never discussed at any of the meetings I was present”.

114. At first read this affidavit has the appearance of corroborating the defendant’s assertion concerning the nature of the loans. She makes the general statement that she agrees with the defendant’s account of the Locanda meeting. But the affidavit is carefully

phrased in the negative, when she says that it was not suggested that the notes be repaid "other than on a sale or flotation". No evidence is given by Ms. Hanahoe as to the specifics of any discussions during which it was said that the promissory notes or related agreements were to be subject to an overriding understanding that the maturity dates stated therein would be continuously extended in the manner contended for by the defendants.

115. Between 22 August 2008 and 31 December 2018 thirty five documents were signed by the parties. Apart from Ms. Hanahoe's broad statements of her belief as to the basis of the loans, she does not address or evidence any discussion which would have the effect of varying the maturity dates referred to in those documents.

Further evidence

116. Supplemental affidavits were exchanged sworn by Mr. Vandever and Mr. Rainsford. The plaintiff rebuts the assertions of the defendants and says that they are conflating two separate and distinct obligations, namely the obligation to pay pursuant to the notes and the obligations to issue shares.

117. Whilst the first plaintiff says he was an advisor to the deceased, none of the plaintiffs were a party directly to the conversations on which the defendants rely. The plaintiff exhibits emails which were exchanged between him and the deceased's executive assistant, Mr. Joe Robinson, which includes such matters as instructions from Mr. Robinson relating to the preparation of the amendments to the Omnibus Reaffirmation Agreement in November 2013. These emails are relied on in support of the plaintiff's averment that his understanding of the instructions were that promissory notes were to be repaid on their maturity dates. The defendant, in contrast, relies on certain extracts from these emails, in particular, a statement in an email from Mr Robinson on 1 November 2013 in the following terms: -

"On the \$480,075 note, since this is a convertible note, he [the deceased] does not want that paid as he wants the interest to accrue so he can get more shares".

118. The plaintiff on the other hand relies on this same quote as evidence of a specific instruction concerning a particular maturity date extension.
119. A full reading of the text of that email illustrates that it is part of a chain of instructions to Mr Vandever about ongoing revisions of terms. Critically, the defendant himself states that the loan referred to in the quote "was never converted".

Legal Advice

120. The plaintiff exhibits an email of 3 December 2013 in which the defendant stated to the deceased's advisor Mr. Kaminsky: -

"I will get back to you on this tomorrow. I have no questions at all, and it seems fine to me. Just waiting for my lawyer to get back to me and if all good will send over signed scanned copies ASAP".

121. This email was sent in response to emails from Mr. Kaminsky on 25 November 2013 and a follow up on 2 December 2013 with which Mr. Kaminsky submitted a draft of the Omnibus Reaffirmation Agreement for the defendant's review.

122. Although the defendant stated in his email of 3 December 2013 that he was "waiting for my lawyer to get back to me", he swears in his second affidavit as follows: -

"I may have sought out legal advice, as referred to in the email exhibited by Mr. Vandever, but my recollection is that I did not ultimately obtain legal advice. Indeed, this much is evident from the fact that no comments were ever given by me nor did I propose amendments to any of the documents Mike ever sent me".

123. The plaintiff places reliance on a reference by the defendant to communications between the plaintiff and Mr. Stephen Jones, referred to by the defendant in his first affidavit as "our legal advisor at the time" in the context of communications exchanged in November and December 2017. The defendant states that Mr. Jones was his legal advisor on matters relating to the restructuring of the companies in late 2017 and that he did not know Mr. Jones prior to 2017.

124. The disputed question of whether the defendant took legal advice at any time in relation to the Notes is a question of fact not capable of being determined on this application. But I do not need to determine that question in considering whether the evidence proffered supports or is consistent with the central proposition of the defendant as to the "loan for equity deal" and conditionality of the repayment obligations. The relevance of the references to legal advice is limited. It is clear however from the defendant's own account that he is an experienced businessman, and that he had access to legal advice when he chose to avail of it.

Governing law and jurisdiction – the first two notes

125. The first two notes were expressed to be governed by the laws of the State of California and to the jurisdiction of the US Federal Court or California State Court having jurisdiction.

126. The Seventh Amendment to the Omnibus Reaffirmation Agreement made on 31 August 2018 changed this as follows:

"Notwithstanding anything contained in the Agreement to the contrary, the parties acknowledge and agree that either party shall have the option of subjecting the agreement, the US\$1.5 million Note or the US\$480,075 Note, and all other documents or agreements entered into or referenced in the Agreement to United States law in the jurisdiction of Los Angeles, California, or under Irish law in the jurisdiction of Dublin, Ireland".

127. The term "Agreement" is defined to refer to the Omnibus Reaffirmation Agreement, and the intervening amendment agreements. Therefore, this provision applies to proceedings concerning the first two loan notes and the Omnibus Reaffirmation Agreement as amended from time to time.

128. The plaintiffs say that this is a valid choice of law in accordance with Article 3.2 of Regulation No. EC 593/2008 (the Rome Regulation). They also cite Dicey, Morris and Collins on the Conflict of Laws (15th Ed. Sweet & Maxwell) as authority for the proposition that the Rome Regulation does not prohibit such matters as alternative choices of law or provisions which change the governing law. They quote in particular the statement in that text to the effect that: - "*Once exercised, such an option should be an effective choice of law*".
129. The defendants do not contest the right of the plaintiffs to pursue the first and second notes in this Court.
130. The defendants contend however that Clause 4 purports to confer an unfettered right of election on each of the parties regarding the governing law. They submit that in as much as the plaintiff has invoked the jurisdiction of this court, the defendants retain the right to invoke the laws of California as the governing law for the resolution of the dispute.
131. The plaintiffs say that this reading is untenable and that once the proceedings are commenced in Ireland, they have invoked the right to have the dispute governed by Irish law.
132. The clause states that the agreement shall be subjected to "United States law in the jurisdiction of Los Angeles, California, or Irish law in the jurisdiction of Dublin". The plain reading of these words is that the law governing any such dispute will be the law of the jurisdiction in which the party seeking enforcement has commenced the proceedings, now being Irish law.

Governing law and jurisdiction – the later notes (2017 and 2018)

133. Each of these notes provides that the note should be "governed by the laws of the State of California and the parties agree that all actions or proceedings shall be tried and litigated only in the state and federal courts located in the City and County of Los Angeles, State of California."
134. This provision was never amended. In the initial correspondence following the commencement of these proceedings Messrs. Eversheds on behalf of the defendants stated their intention to enter a conditional appearance with a view to making an application to contest the jurisdiction of this Court.
135. Correspondence was exchanged on this subject and ultimately the defendants did not challenge the jurisdiction of this court to hear and determine the claim. In particular, they acknowledged in submissions that the effect of Article 4 of Regulation EU No. 1215/2012 (the Recast Brussels Regulation) as interpreted in the case law of the EU and of this Court (see *Owusu v. Jackson* Case No. C 281/02 2005 ECR I 383, and by Dunne J. in *Abama v. Gama Construction Ireland Limited* [2011] IEHC 308) is to override an exclusive jurisdiction clause in favour of a non – EU country, such that the defendants, being domiciled in the State, may be sued in this court.

136. As regards governing law, the defendants invoke Article 3 of the Rome Regulation and rely on the provisions of the notes expressing them to be governed by the laws of California.
137. The plaintiffs agree that the later notes are governed by Californian law which therefore is clearly relevant.
138. The plaintiffs submit that whilst the laws of California govern a substantive dispute concerning the loans, on a question of the admissibility of evidence, the *lex fori* applies. They cite the judgment of Denning LJ in *Karner v. Witkowitz* [1950] 2KB 128:

"... The rule of our law which says that documents are exclusive evidence of the transaction which they embody is a rule of evidence and, as such, is to be applied by our courts even when they deal with foreign contracts; because by private international law, the court of trial applies its own rules of evidence just as it applies its own mode of trial."

I shall return later to this subject when considering the submissions regarding the parol evidence rule.

139. Affidavits have been exchanged as to relevant California law, to which I shall return later. Whilst I have considered the evidence as to the law of California, the parties also accept that the question of whether this court should grant summary judgment on this application is a procedural question governed by the *lex fori*. Therefore, I must be informed by the Irish law principles applicable to that question, which are well settled. (See for examples *Aer Rianta Cpt v. Ryanair Limited* [2001] 4 IR 607, *IBRC v. McCaughey* [2014] 1 IR 749, *Danske Bank AS v. Gillick* [2015] IEHC 375, *Ulster Bank v. Dean* [2012] IEHC 248, and *Harrisrange v. Duncan* [2003] 4 IR 1)
140. The parties have referred me also to a number of judgments concerning the application of the parol evidence rule under Irish law including *Ulster Bank v. Dean* [2012] IEHC 248, *Tennants Building Products v. O'Connell* 2013 IEHC 197, *AIB v. Galvin Developments (Killarney)* [2011] IEHC 314, *Connell v. Danske Bank* [2017] IEHC 765, and *Danske Bank v. Shortt* [2020] IECA 137.
141. In summary :
- (a) the substantive governing law of the later notes is California law
 - (b) Irish law governs the test for granting summary judgment or leave to defend
 - (c) the parol evidence rule of Irish law applies

Summary judgment application – leave to defend

142. In *Aer Rianta v. Ryanair*, McGuinness J. said:

"Is it for the court to decide whether in the instant case the defence set out in the affidavits of [the defendant] together with the documents exhibited therewith, is

credible, or in other words, whether there is a fair and reasonable probability of the defendant having a real or bona fide defence. Since there has been no oral hearing and neither deponent has been cross – examined on his affidavit, and it was not for the learned High Court judge to weigh the affidavit evidence of [the parties] or to attempt to resolve the factual contradictions contained in it. Still less is it for this Court to attempt any such task. In deciding whether the defendant may have a “credible” defence, the court must concentrate its attention on the matters put forward in the defence itself. The court does not ask whether the defendant’s account of events is probable, or likely to be true; nor does it ask whether the plaintiff’s account of events is more likely. The question is whether the proposed defence is so far-fetched or so self – contradictory as not to be credible”.

143. In the same case Hardiman J. put the test as follows:

“The fundamental questions to be posed on an application such as this remain:

- Is it “very clear” that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant’s affidavits fail to disclose even an arguable defence?”

144. In *IBRC v. McCaughey*, Clarke J. said: “It is important, therefore, to reemphasise what is meant by the credibility of a defence. A defence is not incredible simply because the judge is not inclined to believe the defendant. It must, as Hardiman J. pointed out in *Aer Rianta Cpt v. Ryanair Limited* [2001] 4 IR 607, be clear that the defendant has no defence. If issues of law or construction are put forward as providing an arguable defence, then the court can assess those issues to determine whether the propositions advanced are stateable as a matter of law and that it is arguable if determined in favour of the defendant they will provide for a defence”.

145. He continued:

*“Insofar as facts are put forward then subject to a very narrow limitation, the court will be required, for the purpose of the summary judgment application to accept that facts of which the defendant gives evidence, are facts in respect of which the defendant puts forward a credible basis for believing that evidence may be forthcoming, or as the defendant asserts them to be. The sort of factual assertions, which may not provide an arguable defence, are facts which amount to a mere assertion unsupported either by evidence or by any realistic suggestion that evidence might be available, or, facts which are in themselves contradictory and inconsistent with uncontested documentation or other similar circumstances such as those analysed by Hardiman J. in *Aer Rianta Cpt v. Ryanair Limited* [2001] 4 IR 607. It needs to be emphasised again that it is no function of the court on a summary judgment motion to form any general view as to the credibility of the evidence put forward by the defendant”.*

146. In *Danske Bank v. Gillic* [2015] IEHC 375, McDermott J. granted summary judgment in a case where he noted the requirement to exercise caution in the exercise of the jurisdiction to grant summary judgment. Having considered the evidence set out in the affidavits submitted he concluded that what was advanced as a defence by the defendant was not credible in the sense in which that term is used by McKechnie J. in *Harrisrange v. Duncan* and by Hardiman J. in *Aer Rianta v. Ryanair*. In a passage particularly apposite to the facts of this case, he concluded: -

"I am not satisfied that the second defendant has adduced any cogent evidence of the type one might expect to exist if the agreement claimed was reached. There is no precise date given as to when it was agreed interest would not accrue or that interest did not accrue in or about January 2009 because of the agreement reached. There is no correspondence or memorandum of agreement relating to the terms upon which the bank would forebear to sue for the monies owed and for what precise consideration. The suggested duration of the alleged forbearance is said to be between 5-7 years. It is not tenable that the terms of such an agreement would not be committed to writing and precisely defined so that the obligations of the parties would be clearly set out. It appears to me to be unthinkable that the bank would agree to an open-ended unstructured, undocumented, forbearance to sue or to take any steps to secure its interests over a period of 5-7 years. It is not clear what, if any, obligations the second defendant had under any such agreement apart from the suggestion that he would cooperate with Browne Asset Management Solutions".

The parol evidence rule

147. The parties referred also to the application of conflicting laws under private international law as to the introduction of extrinsic evidence. In Dicey Morris and Collin's on The Conflict of Laws (15th Ed) at para. 725 this question is discussed: -

"A distinction has been drawn between extrinsic evidence adduced to interpret a written document e.g. a contract and extrinsic evidence adduced to add to, vary or contradict its terms. The admissibility of the former is a question of interpretation, governed in the case of a contract by its applicable law. The admissibility of the latter is a question of evidence, governed, subject to the possible effect of Rome 1 and 2 Regulations, by the lex fori".

148. In this case the evidence, such as it is, which the defendants seek to adduce relating to the repayment obligations pursuant to the promissory notes goes not to interpret any ambiguity in the promissory notes, which are clear in every case as to maturity date, but to vary or contradict the terms of the notes. This being the case the *lex fori* applies and this Court should be cautious about the attempt to establish a collateral contract or to vary the terms of the promissory notes by reference to oral evidence.
149. The parties made extensive submissions regarding the application of the parol evidence rule in Irish law.

150. The application of that rule and of certain exceptions was described by Hogan J. in *Tennants Building Products Limited v. O'Connell* [2013] IEHC 197: -

"By virtue of this rule, the parties to a written contract are presumed to have reduced the entirety of their agreement to writing and that to permit one party to introduce new oral evidence which in effect contradicts the terms of the written agreement would be destructive of legal certainty.

*It is certainly true that a party cannot be allowed to lead evidence as to what he or she subjectively believed the contract to mean: see, e.g., the Supreme Court's decision in *Macklin v. Graecen & Co.* [1983] I.R. 61. Yet the full rigour of the parol evidence rule has been consistently diluted by doctrines such as non-est factum, misrepresentation and the collateral contract rule. If the parol evidence rule were to be applied with remorseless and unbending logic, it might create a form of immunity for those who would carelessly, recklessly and perhaps even falsely misrepresent the terms of the written agreement, often to the disadvantage of the weaker party, thus undermining the very public policy on which the very existence of the parol evidence rule rests.*

*This very principle is reinforced by the Supreme Court's decision in *ICDL GCC Foundation FZ-LLC v. European Computer Driving Licence Foundation Ltd.* [2012] IESC 55 where Fennelly J. observed:*

*"A court will always commence with an examination of the words used in the contract. Moreover, words will, as Lord Hoffman emphasises, normally be interpreted in accordance with their 'natural and ordinary meaning....' Business people will be assumed to know what they are doing and will normally be bound by what they have signed. The exercise is to be conducted objectively. The parties are not permitted to give evidence of their subjective intentions or of the negotiations leading to the conclusion of the contract. Keane J, as he then was, summarised the law briefly but comprehensively in his still unreported judgment in the High Court in *Lac Minerals Ltd. v Chevron Mineral Corporation* (High Court, unreported 6th August 1993).*

Evidence of the surrounding circumstances, but not of subjective intentions, may be admitted to explain the subject-matter and even what particular words used should be understood as referring to. Such evidence will not normally be allowed to alter the plain meaning of words. In truth, there is no real issue in the present case concerning background or surrounding circumstances."

151. Having reviewed further case law, Hogan J. concluded as follows: -

*"The effect of this case-law may be said to be that while the courts will permit a party to set up a collateral contract to vary the terms of a written contract, this can only be done by means of cogent evidence, often itself involving (as in *Mudd and in Galvin*) written pre-contractual documents which, it can be shown, were intended to*

induce the other party into entering the contract. By contrast, generalised assertions regarding verbal assurances given in the course of the contractual negotiations will often fall foul of the parol evidence rule for all the reasons offered by McGovern J. in Deane”.

152. In *Danske Bank v. Shortt* [2020] IECA 137, Ni Raifeartaigh J. considered the relevance of the parol evidence rule in the context of what she referred to as the “banking” cases.

153. Ni Raifeartaigh J. examined the case law extensively. She observed that in many of the cases, the result turned not so much on a rigid application of the parol evidence rule but a finding by the court that there was such a paucity of evidence (*Ulster Bank v. Dean* 2012] IEHC248 and *Promontoria (Arrow) Limited v. Mallon* [2018] IEHC 145) that leave to defend should be refused.

154. On this subject, Ni Raifeartaigh J. concluded as follows: -

“I would also suggest that the policy reasons referred to directly or indirectly in these judgments are indeed important; but their relevance in the present context is not by rendering the evidence inadmissible, but rather by the courts insisting on appropriate standards for testing such evidence (‘cogent’ evidence in the case of a full hearing; and the usual threshold test for remittal to a plenary hearing in an application for summary judgment). In other words, there are good reasons to be cautious about such evidence (once admitted); but these reasons do not justify the evidence being excluded from the outset”.

155. Ni Raifeartaigh J. continued: -

“ for present purposes, the Court thinks it is sufficient to say the following:

- a) *The usual evidential threshold applies in summary judgment cases in respect of a defendant who seeks to have an issue in, and/or the entire case, remitted for plenary hearing. Accordingly, the evidence does not have to reach the threshold that would be required at a trial. This is as true in respect of the issue of a collateral contract as it is for any other issue. (IBRC v. McCaughey is an example of the evidence concerning an alleged collateral contract being measured against the evidential standard in a summary judgment case).*
- b) *Nonetheless, and although the evidential foundation for establishing an arguable case is lower than the evidence required to establish a collateral contract at trial, a court may legitimately reach the conclusion, even on an application for summary judgment, that the evidence put forward by a defendant seeking plenary trial is so implausible, lacking credibility or otherwise thin that even that lesser standard has not been met in a particular case (examples of this are Deane, Mallon and Kennedy)”.*

156. Ni Raifeartaigh J. found that the facts in Shortt fell into Category (b) above and that the evidence put forward by the defendant, even assuming it to be admissible, “did not reach

even the low evidential threshold required for the remittal of an application for summary judgment to plenary hearing”.

157. Although those questions are governed by tests established in Irish law, it seems to me to be appropriate, in examining whether an arguable case has been made out by the defendants, to consider the affidavits, as to the laws of California in so far as they are relevant to the application of that test in this case.

Laws of California

158. The defendants have produced affidavits sworn on 4 and 24 November 2020 by Mr. Jose L. Patino, a partner at Eversheds Sutherland’s law firm in San Diego, California. On behalf of the plaintiff an affidavit has been sworn on 16 November 2020 by Mr. Michael S. Brophy an attorney practicing in Los Angeles, California.

159. Mr. Patino describes the parol evidence rule under California law as a *“liberal parol evidence rule under which such evidence is admissible to clarify the parties’ interest insofar as it is consistent with interpreting the contract”*. He cites what is referred to as the Pacific Gas Exception (Pacific Gas and Electric Company v. G.W. Thomas Drayage etc. [1968] 69 CAL 2D 33) as follows: -

“Parol evidence is admissible to show all circumstances surrounding a transaction in order to determine the meaning intended and understood by the parties”.

160. Mr. Patino continues: -

“Consistent with the liberal application of the parol evidence rule in California, even if the promissory notes in suit contain integration clauses indicating they contain the ‘entire’ agreement between the parties, the parol evidence rule ‘does not, however, prohibit the introduction of extrinsic evidence’ to explain the meaning of a written contract . . . if the meaning urged is one to which the written contract terms are reasonably susceptible”.

161. In the affidavits and in submissions of the parties there was much discussion concerning the application of “entire agreement” clauses such as that contained in para. 4 (c) of the Omnibus Reaffirmation Agreement. In circumstances where that clause applies only to the first two notes, and no equivalent appears in any instrument relating to the following 14 notes, I do not propose to expand on the analysis which the parties made regarding the application of such a clause.

162. Having noted that the Pacific Gas exception limits the facility for introducing parol evidence to cases where such evidence is necessary to determine the meaning intended and understood by the parties, or where it is necessary to resolve any ambiguity on the face of the documents, which does not arise here, Mr. Patino, in something of a contradiction, expands on the rule to say that in the absence of an “integration” clause *“evidence regarding any oral agreements between the parties regarding the timing or form of enforcement of the contractual terms must be factually resolved via trial rather than summary disposition . . . the manner in which the court determines the intent of the*

parties is to hear evidence regarding the oral agreement between the parties as to the enforcement of unintegrated terms of a contractual agreement”.

163. As to the test for summary judgment under the laws of California, Mr. Patino continues: -

“The affidavits of the moving party are strictly construed and those of his opponent liberally construed, and doubts as to the propriety of summary judgment should be resolved against granting the motion (Crocker Nat. Bank v. Emerald [1990] 221 Cal. App. 3 D 852 (reversing summary judgment decision and judgment thereon and noting that when “conflicts appear on the papers submitted in support of and in opposition to the motion, we resolve those conflicts in favour of the non – moving party)”, quoting Mann v. Cracchiolo [1985] 38 Cal. 3D 18. In the presence of such disputed facts, the non – moving party has a right to a trial or evidentiary hearing where the trier of fact will resolve those disputes based on the presentation of evidence, including the cross – examination of witnesses and documents. California law could not be more clear, as noted by the California Supreme Court almost fifty years ago: “Having filed an answer, defendants are entitled to have disputed issues of fact determined by a trial” because “summary judgment proceedings are available for determining whether triable factual issues exist, but not for resolving such issues”. (emphasis added)

164. Mr. Brophy disagrees with the analysis of Mr. Patino. He quotes from the California Code of Civil Procedure, which he says codifies California’s parol evidence rule, and certain modifications, and exceptions. He also cites case law and identifies two exceptions to the rule. He refers firstly to the “Materson Exception”. It applies where “a written agreement is not the complete and exclusive statement of agreement between the parties, the evidence of a separate or collateral oral agreement may be introduced to supply additional terms on any matter in which the written agreement is silent, provided such separate oral agreement is not inconsistent with the written terms.
165. Mr. Brophy continues stating that the second exception is the Pacific Gas exception, under which extrinsic evidence may be introduced to explain the meaning of words used in a contract if the evidence supports a meaning to which the written contract terms are “reasonably susceptible”.
166. Mr Brophy states that the “alleged side agreement” is extrinsic evidence directly contrary to the payment terms set forth in both the Notes and the Reaffirmation Agreement and is substantially irrelevant evidence under California law. He concludes by citing a California Supreme Court judgment that “... an opposing party may not create an issue of fact to defeat summary judgment by offering inadmissible evidence (Perry v. Blackwell Hawthorne”.
167. The high point of Mr. Patino’s evidence as to the parol evidence rule is that a court should “hear evidence regarding the oral agreement between the parties as to the enforcement of unintegrated terms of a contracted agreement.” This proposition is contradicted by his

own reliance to the 'Pacific Gas' exception, which relies on the existence of an ambiguity in the words used in the written agreement.

168. The apparent conflict between Mr. Patino and Mr. Brophy is one which the court should not determine without hearing the witnesses as to California law. However, the parties acknowledge that the test for summary judgment is governed by Irish law (see paragraph 17 of the defendants' outline written submissions). On that subject, Mr. Patino's evidence is that California law provides that *"having filed an answer, defendants were entitled to have disputed issues of fact determined by a trial because summary judgment proceedings are available for determining whether triable factual issues exist, but not for resolving such issues"*. He cites *Rooney v. Vermont Investment Corp* (1973) 10 Cal 38 351 and *Currency Corp v. Wertheim* 2011 B222851, 2011 Cap. App. Unpub. Lexis 3771.
169. This amounts to a submission that it is only necessary for a defendant to state the basis upon which he seeks to defend the proceedings by "filing an answer". Even applying the low bar for establishing an arguable defence this proposition is untenable.
170. In reliance on this general proposition, the defendants presented an elaborate narrative based on the "loan for equity" agreement of the Locanda meeting. The appropriate course on this application is to examine, as I have done, the affidavits to determine whether the claims made by the defendants go beyond mere assertions.

Estoppel

171. The defendants rely on the judgment of Charleton J. in *Ulster Investment Bank Limited v. Rockrohan Estate Limited* [2015] IESC 17, and the judgment of the Court of Appeal in *Allied Irish Bank plc. v Griffin* [2020] IECA 221.
172. In each of these cases extensive evidence was adduced as to the respective conduct of the parties and in particular of reliance on representations made.
173. In the case of *Ulster Bank v. Rockrohan*, the evidence was that the plaintiff bank had "held its hand" before moving for an order for possession and sale of the defendant's lands, in reliance on representations by the defendant that the underlying debt would be repaid from the proceeds of litigation against different parties.
174. In *AIB plc v. Griffin*, the court approached the matter from the perspective that: -
- "The defendant had established an arguable factual basis for his account that on 21 April 2008 he paid one third of the first facility on foot of an assurance from the plaintiff that if he did this, he would have no further liability in respect of it".*
(Emphasis added)
175. Central to these and other estoppel cases is evidence that the party raising the estoppel relied and acted to its detriment either on representations made or on the "convention" established by the conduct of the parties.

176. The defendants say that they signed the notes and agreements under an understanding that they would not be called on to repay otherwise than in accordance with the 'Locanda' agreement. No evidence is proffered that in signing such documents they acted to their detriment in reliance on representations or 'convention'. Whilst the act of signing the notes attracted the liability to repay, it was essentially an act to their benefit, by drawing down the loans. The Omnibus Reaffirmation Agreement and Amendments thereto and the Modifications of the notes were all signed to effect and record extensions to the maturity dates, again to the benefit, not detriment, of the defendants. The ingredient of estoppel which is reliance to the defendants' detriment is therefore wholly absent from the case.

Interest calculations

177. In his supplemental affidavit of 16 November 2020, the plaintiff exhibits an email dated 30 January 2014 from Mr. Robinson (assistant to the deceased) to Mr. Kominsky and the first plaintiff. It states "Good news. Pat has sent the accrued interest per the Omnibus Agreement as amended". He relies on the fact of this payment to submit that it is untenable for the defendants to argue that they never believed that they were obliged to make repayments under the notes. The defendant in his supplementary affidavit disputes this assertion. He says that no such payment was made, and that this averment is contradicted by the interest workings exhibited by the plaintiff.

178. At the time of the Omnibus Reaffirmation Agreement on 31 January 2013, the parties by their signature recited interest accrued on the first note of US\$416,609.59. The Seventh Amendment dated 31 August 2018 recites interest due on the first note as of that date of US\$537,684.64. The plaintiffs have exhibited a schedule of interest calculations which show that in respect of the first note, as at 30 December 2018 a principal sum was due of US\$1,805,625 (this being the revised principal pursuant to the Seventh Amendment to the Omnibus Reaffirmation Agreement) and interest at a sum of US\$575,505. Although interest calculations year on year have not been exhibited, it is clear from the figures mentioned above that the interest amounts varied from date to date, as would be expected. I cannot regard the email referred to above as undermining the plaintiffs' calculations, and nothing has been exhibited to undermine the final schedule showing interest on the first note as of 30 December 2018 at US\$575,405, or the sworn evidence of the plaintiff that this was the true balance owing.

Ex gratia payment to Trust

179. The first defendant refers to payment of an ex gratia amount to the Trust in a different context made by eMuse, and not by any of the defendants. He asserts that he agreed that eMuse would make an ex gratia payment to the Trust "which could be netted off the amount due and owing by the defendants on an exit event."

180. It is difficult to understand how an advance made ex gratia by eMuse to the Trust could be set off against a debt owed by the defendants to the Trust.

181. Nonetheless, the description of the circumstances in which this payment was made is, by contrast with the defendant's assertions regarding the 'loan for equity deal', very specific and detailed and, importantly, has not been controverted by the plaintiffs. That being the

case, I shall deduct this amount of US\$109,000 against the total amount claimed before entering judgement.

Conclusions

182. In respect of the first two notes the plaintiffs are clearly entitled to invoke the jurisdiction of this Court pursuant to Clause 4 of the Seventh Amendment to the Omnibus Reaffirmation Agreement. Having done so, the law applicable is Irish law, as provided for in that clause.
183. In respect of the 2017 and 2018 notes, the agreements and notes provide that the notes shall be "tried and litigated only in the State and Federal Courts of California". Having initially raised an issue as to jurisdiction, the defendants waived this objection and have not contested the jurisdiction of this Court to determine these proceedings.
184. On an application for summary judgment, the test is governed by Irish law, and is that set out in *Aer Rianta v. Ryanair* and the cases considered earlier.
185. Since the substantive law governing the 2017 and 2018 notes is the law of California, I have considered also the sworn evidence as to California law. Even Mr. Patino, who swore on affidavit on behalf of the defendants, refers to the 'Pacific Gas' exception to the parol evidence rule, which means that extrinsic evidence may be adduced to explain the meaning of a written contract. In this case there is no ambiguity to the words used in the promissory notes and other agreements.
186. Mr. Patino accepts that it is open to the court on an application for summary judgment to decide whether a "triable issue remains to be determined". This must engage an examination of the defendants' affidavits to establish whether they contain more than mere assertions of the basis of a defence.
187. The defendants do not dispute the following: -
 - (a) the monies claimed were advanced and not repaid;
 - (b) the notes and Modifications thereof and the Omnibus Reaffirmation Agreement and Amendments thereto were duly executed by the defendants;
 - (c) the plaintiffs as trustees of the Trust are the parties with standing to pursue the claim on behalf of the Trust, recognising that such claim can be no stronger than any claim the Trust would have pursued prior to the death of Mr. Forman.
188. It is not alleged that any of the notes were signed under any form of duress, but instead under a certain understanding held by the defendants.
189. The defendants seek leave to defend on the ground that at the Locanda meeting of 23 July 2008 it was agreed by the deceased that he would advance loans to the defendants and that he would seek repayment only when eMuse / Noster or the underlying businesses of those companies was in a position to fund such repayment or on an exit on sale or floatation. This is referred to as the "loan for equity deal" or the 'Laconda deal'.

190. The defendant says: -
- (a) That this loan for equity deal applied to the loan made in August 2008, May 2010 and to the 14 further loans advanced between 1 September 2017 and 20 December 2018, notwithstanding the specific maturity dates stated on each of the promissory notes evidencing those loans;
 - (b) That the deceased repeated his assurance of the loan for equity deal every time new loans, evidenced by the promissory notes, or extensions of the maturity dates were granted;
 - (c) That the deceased never called for repayment of the monies. That instead each year he asked the defendant "How long do you need?" and following such discussion executed modifications extending the maturity dates;
 - (d) That every time the defendants signed the notes or modifications thereof, or amendments to the Omnibus Reaffirmation Agreement, they did so on the understanding that the Locanda deal was still in place.
191. There is no document evidencing the Locanda agreement. Instead, the defendants description of that agreement is repeated throughout their affidavits, but without any reference to evidence which would explain the contradiction between the defendants' account and the documented agreements or would otherwise corroborate their assertions.
192. Between the promissory notes themselves, the modifications thereto, the Omnibus Reaffirmation Agreement and Amendments thereto, 35 documents were signed by the first defendant and 34 by the second defendant in each one of which the obligation to repay on identified maturity dates is stated without condition.
193. There is no evidence of the deceased demanding repayment on any of the relevant dates. The defendants submit that the explanation for this is that at all times the deceased was observing the Locanda deal. This explanation is contradicted by the documents which evidence that when repayment dates fell due, instead of the deceased waiving repayment, the parties executed a document evidencing an agreed extended maturity date.
194. The second promissory note and the Omnibus Reaffirmation Agreement and Amendments thereto, refer to share options and transfers. They restate and extend maturity dates for the loans without rendering them conditional on a 'loan for equity deal'.
195. The plaintiff acquired shares in the eMuse and Noster entities, but there is no evidence that in doing so he agreed to make the loan repayments conditional on an "equity" outcome. The only connection recorded is where reference is made to an extension of maturity dates in consideration for the granting of certain options. Once extended, the new maturity dates stood.

196. No evidence is proffered to explain how it came to pass that all of the notes (with one exception) come to evolve from a variety of maturity dates to mature on a single date, 28 February 2019, a date which was never extended.
197. The defendant avers to spending time with the deceased in his apartment in the days before his death. He says that there was "*no question of loans being called in, Mike having advanced other monies as recently as December 2018*". The court cannot speculate on the substance of this or other previous discussions, but the defendant's affidavits contain no account or description whatsoever of the contents of conversations held in the period immediately prior to the death of Mr. Forman. The defendant simply repeats the negative averment that "at no stage did Mike ever assert an obligation of repayment".
198. The averment by the defendant that "I always understood Mike to mean that – consistent with our agreement – he would roll over the loans until the business was in a position to repay the loans or an expectation of an exit event", is wholly inconsistent with the undisputed fact that on each occasion when a maturity date arose during the lifetime of Mr. Forman it was extended to a specific date and not by reference to the 'Locanda deal'.
199. The loans made during 2017 and 2018 did not become the subject of "annual rollovers". When extended, they were extended to 28 February 2019.
200. The first defendant provided an elaborate and expansive narrative of the interest the deceased took in the defendant's business. This included a description of share options granted and of shareholdings acquired by the deceased. But there is no evidence to corroborate the assertion that the loans made to the defendants, not being loans to the relevant companies, would not be repayable on their maturity dates. In circumstances where the parties documented each extension the documents evidence the fact that the repayment was not declared to be conditional. I have examined earlier in this judgment the limited number of emails and correspondence relied on by the defendants and have concluded that they amount to no such evidence.
201. The affidavits of the defendants persuade me that they may have led themselves to believe that the deceased would not call for repayments of the debt until certain events occurred which put them in funds to pay, either out of company resources or on "exit event". They may have been reinforced in this belief by the many extensions granted for loan repayments, and the frequency of the extensions may have contributed to a sense that this practice would continue. Nonetheless, the intended defence rests on the proposition that if Mr. Forman had not died before the expiry of the final extension of maturity dates, he would have granted further extensions. Beyond general statements of an "understanding", no evidence has been advanced to support this speculative proposition.
202. The result of these conclusions is that the defendants make a bare assertion of a "loan for equity deal" which, for all its repetition and expansion, is no more than such an assertion

and is contradicted by the executed promissory notes and agreements. Accordingly, their affidavits when scrutinised do not disclose an arguable defence to the claim.

203. Estoppel cannot form the basis of a defence where no evidence is advanced of any reliance by the defendants to their detriment on either representation made by the plaintiff or on the "convention" of frequent extensions. The defendants benefitted from signing the promissory notes, agreements, and modifications.
204. The court will enter judgment for the amounts claimed in this application, namely \$4,708,739 against the first defendant, and \$2,327,709 against the second defendant, together with interest at the contracted rate, less the credit of US\$109,000 referred to in para. 11 of the second affidavit of Mr. Rainsford.