

**THE HIGH COURT**

[2022] IEHC 255  
[2021 1430 P]

**BETWEEN**

**VIRGINIA ROSS**

**PLAINTIFF**

**AND**

**DAMIEN HARPER, LINK ASI LIMITED, BANK OF IRELAND MORTGAGE BANK**

**DEFENDANTS**

**JUDGMENT of Ms. Justice Emily Egan delivered on the 4th day of May, 2022**

**Introduction and factual background**

1. The plaintiff is the wife of Mr. Barnaby Ross ("Mr. Ross"). The first named defendant ("the Receiver") was appointed by the second named defendant ("Link") over a property at Upper Ryninch, Ballina, Co. Mayo ("the Ryninch property") on foot of a charge for present and future advances in favour of the third named defendant ("the Bank") and transferred to Link on the 27th March, 2020.
2. The plaintiff seeks a number of interlocutory reliefs including an injunction restraining the sale of the Ryninch property pending the determination of these proceedings. In the plenary summons, the plaintiff also seeks certain orders against the Property Registration Authority ("PRA") in relation to the Ryninch property.
3. The plaintiff avers that in September, 1995 she moved to Ireland with Mr. Ross, her widowed mother and her young family. They purchased the Ryninch property in 1998, which was intended to be their new family home, and which was purchased with the sale proceeds of their previous family home in the United Kingdom. It appears that, subsequent to the purchase of the Ryninch property, issues arose regarding rights of way and boundaries ("the boundary issues") which took some time to resolve, particularly as the solicitor initially instructed in relation to the conveyance retired from practice. This may explain why it was not until 15th February, 2011 that the plaintiff and Mr. Ross were registered as joint owners of the Ryninch property.
4. The plaintiff avers that in about 2006 Mr. Ross agreed to purchase three, buy-to-let properties, namely the Holiday Cottages at Kings Castle Cottages, Ballina, Killaloe, Co. Clare ("the Holiday Cottages"); that the purchase of these properties was financed by way of a loan in excess of €600,000 from the Bank; and that the plaintiff was unaware of the purchase of the Holiday Cottages and the loans.
5. The solicitor ("the Solicitor") acting on behalf of Mr. Ross in connection with the purchase of the Holiday Cottages gave the Bank an undertaking dated 15th November, 2006 to put in place a first legal charge over the Holiday Cottages and also over the Ryninch property. A first legal charge was created over the Holiday Cottages but not initially over the Ryninch property. The plaintiff avers that she was unaware of all of the foregoing.
6. On the 23rd February, 2011 just eight days after the plaintiff and Mr. Ross were registered as joint owners of the Ryninch property, a charge for present and future advances in favour of the Bank was registered on the Folio. Notably, the charge was

stated to affect only the interest of Mr. Ross in the Ryninch property. The plaintiff avers that at no time was she made aware that any charge was to affect to her family home, the Ryninch property.

7. It appears that Mr. Ross defaulted in the repayment of the loan and that a receiver was appointed over the Holiday Cottages in February of 2014. No receiver was appointed at this time over the Ryninch property.
8. The plaintiff avers that sometime after this (February 2011) the Solicitor wrote to Mr. Ross and herself stating that the boundary issues should be resolved so as to finalise the registration of title of the Ryninch property and ensure that the title was free from any encumbrances.
9. To that end, the plaintiff avers that in late August 2015 she and her husband were contacted by the Solicitor who arranged to meet them in the Castletroy Park Hotel in Limerick on 16th September, 2015. There was some urgency on the Solicitor's part to finalise the boundary issues; which the Solicitor insisted had to be resolved in early course in the couple's own interest. The plaintiff was not provided with any documentation prior to the meeting nor offered any opportunity to obtain independent legal advice on the documentation proffered for her signature at the meeting.
10. The plaintiff avers that on 16th September, 2015, she and Mr. Ross met the Solicitor in the conservatory of the Castletroy Park Hotel and discussed the matter over coffee. The Solicitor had a large file, labelled very carefully, which she consulted on a number of occasions in relation to the boundary issues. The plaintiff and her husband signed one or two documents regarding the boundary issues and also a one-page document, which the plaintiff understood had *"to do with correct ownership and registration with the Land Registry"*. The plaintiff avers that the Solicitor insisted that she sign this one page document, which she was not afforded time to study. The plaintiff says that she trusted the Solicitor, who she was assured was acting in their best interests.
11. Amongst the documents signed by the plaintiff at this meeting was a one-page housing loan mortgage in favour of the Bank. The document, which is exhibited in Link's affidavit is dated 16th September, 2015, identifies the mortgagee as the Bank, the mortgagor as Mr. Ross and the plaintiff, and the mortgaged property as the Ryninch property. The document states that the mortgage incorporates the Irish Building Banking Federation's general housing and loan mortgage conditions, a copy of which it states has been furnished to the mortgagor. The document states that, as security for the payment and discharge of *"the secured liabilities"*, the mortgagor as the registered owner of registered land charges the mortgaged property. The document states *"This is an important legal document. You are strongly recommended to seek independent legal advice before signing it."* The document bears the signatures of both Mr. Ross and the plaintiff and is witnessed by the Solicitor. On the reverse side of the document is a Family Home Protection Act Declaration which was not signed.

12. The plaintiff avers that there was no reason for her to sign this mortgage document on 16th September, 2015 nor to incur any liabilities; that at the meeting there was no mention of any mortgage, nor of any monetary amounts whatsoever; that she was not familiar with this document nor given any explanation of its meaning; that at no time did the Solicitor inform her of the true relevance of her signature on the document, of the magnitude of the loss that she could incur or of the possibility of the loss of the Ryninch property, her family home; and that the Solicitor pressurised the plaintiff, and indeed "*deceitfully induced*" her, into signing the mortgage.
13. The plaintiff states that towards the end of the meeting she was asked to sign a further document which she remembers was referred to as a guarantee; that she immediately felt uneasy and was reluctant to sign it as a guarantee suggested responsibility on her part to pay something; that the Solicitor assured her that the guarantee was just a matter of "*crossing the t's and dotting the i's*"; and that the Solicitor then informed the plaintiff that, in theory she should have third party legal advice although "*this wasn't really necessary*" and was a matter for herself. The plaintiff states that she declined to sign the guarantee.
14. On 23rd September, 2015 the charge on the Ryninch property in favour of the Bank was registered as a burden on the Folio
15. On 27th March, 2020 the Bank transferred all its interest in the loan and charge to Link.

**Correspondence as between the plaintiff and the defendants**

16. The earliest correspondence to the plaintiff in connection with the charge from either the Solicitor or the Bank is exhibited in a letter before action from the Bank's solicitor ("the Bank's Solicitor") dated 2nd August, 2018 calling on the plaintiff to deliver up possession of the Ryninch property within seven days failing which an action for possession would issue. On 26th March, 2019 the Bank's Solicitor sent a second letter to the plaintiff to similar effect.
17. Circuit Court proceedings for possession were issued by the Bank against the plaintiff and Mr. Ross on 8th April, 2019 and apparently stand adjourned. The affidavits of service suggest that the Ryninch property was vacant at that time and that the plaintiff and Mr. Ross were not then residing there but at another address in Co. Tipperary.
18. The Receiver was appointed by Link over the Ryninch property by deed of appointment dated 27th October, 2020. No fresh letter of demand appears to have been issued by Link prior to the Receiver's appointment.
19. The plaintiff wrote to the Receiver on 26th November, 2020 stating that she was very surprised that he had been appointed as receiver over the Ryninch property, her home; that she did not have a loan from the Bank; that the plaintiff had signed a single page document on the 16th September, 2015 but did not understand the content of such document which had not been explained to her; and that she never received any correspondence from the Bank indicating the initial amount of the loan, the interest rate

or the amount outstanding, nor any statements to that effect. In so far as relevant, the correctness of this latter contention is not disputed by the defendants.

20. The plaintiff did not receive a reply to this letter and on 28th December, 2020 sought copies from the Receiver of the relevant documentation such as the loan agreement/facility letter, the security documentation, the letter of demand, the transfer of the loan and charge to Link and other relevant documents. No response to this letter is exhibited.
21. By letter dated 15th January, 2021 the plaintiff issued a data subject access request directly to the Bank seeking similar information in relation to the loan account itself. The Bank replied that it was unable to provide any such information as it did not have authority from the account holder (Mr. Ross) to release any personal data.
22. The plaintiff issued a letter before action on the 24th February, 2021 in which she called upon the first and second named defendants to desist from advertising, marketing, or dealing with the Ryninch property in any way. It appears this was prompted by the plaintiff very recently becoming aware that the Ryninch property was being advertised for sale on the BidX1 website.

**Defendant's replying affidavit and correspondence as between solicitors**

23. The Bank and Link have sworn replying affidavits to the plaintiff's application. The Bank's affidavit avers that, when it advanced the loan to Mr. Ross in 2006, it did so on the understanding that he was the sole legal owner of the three Holiday Cottages and also of the Ryninch property, title to which had not been registered at the time; that the Solicitor had given an undertaking to the Bank that the Bank would have a first legal charge over all of these properties; and that, when it transpired that Mr. Ross and the plaintiff had been registered as co-owners of the Ryninch property, this caused an issue from the Bank's perspective as it had advanced money to Mr. Ross on the promise of a first legal charge over that property.
24. The Bank's deponent refers in some detail to correspondence passing between the Solicitor and the Bank's Solicitor in that regard. However, the Bank did not exhibit this correspondence which has instead been exhibited by the plaintiff. The Bank and Link argued that certain of this correspondence between the Solicitor and the Bank's Solicitor is marked "*without prejudice*", and that this court should therefore not have regard to it.
25. I have considered this objection and have concluded that, in circumstances where the Bank's deponent in effect sets out the contents of that correspondence up to September 2015, any privilege which might previously have attached to the correspondence has been waived. Consequently, the court will have regard to that correspondence prior to September 2015 and will disregard a further letter from the Bank's Solicitor dated 18th July, 2019 which does not form part of the correspondence referred to in the Bank's affidavit and is not detailed therein.

26. The relevant correspondence, to which the court will have regard, commences with a letter dated 10th February, 2014 from the Bank to the Solicitor, in which a copy of the Folio is enclosed. The Bank stated that the Ryninch property was registered in the joint names of the plaintiff and Mr. Ross; that only the joint interest of Mr. Ross had been charged to the Bank, which had not been approved by the Bank's credit department; that title was to have been registered in the sole name of Mr. Ross; that the Bank's loan was to have been secured by a charge over the full interest in the Ryninch property; and that the Bank would continue to rely on the Solicitor's undertaking.
27. On 11th February, 2014 the Bank's Solicitor wrote to the Solicitor drawing her attention to the undertaking dated 15th November, 2006. The letter states that the Ryninch property was registered in the joint names of Mr. Ross and the plaintiff, contrary to representations given in the relevant loan offer letter; that, whilst three charges were registered in the Bank's favour (one in respect of each of the Holiday Cottages) the charge over the Ryninch property affected the interest of Mr. Ross only; that the Bank understood that the title documentation had never been lodged nor had any certificate of title issued; and that the Solicitor's undertaking remained outstanding. The letter requested that the Solicitor revert with some urgency explaining how the Ryninch property came to be registered in joint names.
28. The Solicitor replied by letter dated 20th February, 2014 stating that the property was purchased in 1998 by Mr. Ross and the plaintiff; that there had been huge problems with lodging the transfer documentation in the Land Registry which eventually occurred in 2011; and that before the Solicitor would be in a position to return the title deeds to the Bank with the certificate of title, a right of way agreement signed by one of the adjoining owners was required with which she was dealing urgently. As the charge affected the interest of Mr. Ross only, the Solicitor enquired if the Bank would require the plaintiff to sign a deed of postponement in its favour.
29. By letter dated the 24th February, 2014, the Bank's Solicitor stated that the issue would not be resolved merely by a deed of postponement because the plaintiff did not have an equitable interest in the Ryninch property but rather was a full owner; that this was a "*real problem*" because the loan had been advanced on the basis that Mr. Ross would be the sole owner and that the Bank would have first legal charge over the Ryninch property; and that the matter could be resolved in either of the following ways (a) Mr. Ross and the plaintiff as joint owners would transfer the entire interest in the Ryninch property to Mr. Ross alone and a new mortgage would then be effected by Mr. Ross in the Bank's favour or (b) the plaintiff would execute a guarantee (after independent legal advice) presumably limited in recourse to the Ryninch property and a fresh mortgage would be executed by Mr. Ross and the plaintiff and lodged immediately. The letter finally noted that the Solicitor was not in compliance with her undertaking.
30. None of the above correspondence is marked "*without prejudice*".
31. By letter of the 15th May, 2015, marked "*urgent-without prejudice*", the Bank's Solicitor furnished to the Solicitor a Bank of Ireland 2011 edition mortgage and a guarantee and

indemnity in favour of the Bank for execution by the plaintiff, after obtaining independent legal advice (written evidence of which would be required), of Mr. Ross's liabilities. The letter stated that in order to comply with the undertaking the plaintiff should execute the mortgage, sign the guarantee and make the family home declaration after obtaining legal advice and that the Bank was considering issuing proceedings against the Solicitor for non-compliance with the undertaking, which was not the Bank's preferred course of action. The letter pressed the Solicitor to use her "*best endeavours to progress matters with the utmost expedition.*"

32. By letter dated 7th September, 2015, marked "*without prejudice*", the Bank's Solicitor referred to a telephone conversation with the Solicitor in which he had been informed that the Solicitor intended to drive from her office in Wexford to the home of the plaintiff and Mr. Ross in Limerick with the documents received from the Bank's Solicitor in an effort to get matters resolved by the end of the current week. The Bank's Solicitor stated that otherwise he was instructed to commence proceedings on foot of the undertaking and that the letter was sent without prejudice "*just to mark your card*".
33. The Solicitor replied by open email dated 15th September, 2015 stating that she had arranged to meet Mr. Ross and the plaintiff at the Castletroy Park Hotel to have all new mortgage documentation signed. This is the final piece of correspondence to which the court will have regard.
34. The Bank avers that it is not an appropriate party to the proceedings as it has no further interest in the mortgage or in the Ryninch property; that it is not in a position to say what occurred at the meeting at the Castletroy Park Hotel on 16th September, 2015; that the plaintiff's complaint is effectively against the Solicitor; that the Bank could not have any responsibility for the Solicitor's default; that the Bank's Solicitor specifically informed the Solicitor that the plaintiff should obtain independent legal advice; and that on 18th September 2015, two days after the execution of the mortgage, the Solicitor informed the Bank's Solicitor in writing that the plaintiff had been advised to get independent legal advice.
35. However, the communication dated 18th September 2015 has not been exhibited by the Bank. The court has no sense of the detail of what was communicated to the Bank's Solicitor by the Solicitor in relation to one of the key issues: the guidance given by the Solicitor to the plaintiff that she should obtain independent legal advice. Whilst it appears that the Solicitor will contend that, at some stage, she informed the plaintiff that she should obtain independent legal advice, the details of the advice given are not available to the court. It is unclear whether it will be maintained that this advice was given in relation to the execution of the mortgage or the guarantee, or both. Unfortunately, the court has little information, for the purposes of the present application, on what might be the response of the Solicitor to the very serious allegations made by the plaintiff against her.
36. The replying affidavit sworn on behalf of Link stated that the plaintiff had registered a *lis pendens* as a burden on the Ryninch property; that although it was initially believed that the plaintiff resided at the Ryninch property, it had not been possible to serve the Circuit

Court proceedings for possession on the plaintiff at the Ryninch property. In this regard Link avers that Mr. Ross informed its summons server that the plaintiff resided with him at a different property. Therefore, in circumstances where there was evidence that neither individual resided at the Ryninch property, Link deemed it appropriate to appoint a receiver.

37. Importantly, despite delivering a replying affidavit, the plaintiff has not responded to the contention that she does not reside at the Ryninch property.

#### **The within proceedings**

38. The court was informed during the interlocutory hearing that the plaintiff had commenced professional negligence proceedings against the Solicitor. It appears that these proceedings are at a very early stage.
39. The within proceedings were commenced by plenary summons, issued on 5th March 2021. The plaintiff seeks a range of reliefs against all three defendants including punitive, aggravated and exemplary damages for breach of contract, breach of duty of care, negligence and breach of fiduciary duty; orders setting aside the deeds of appointment of the Receiver, restraining the defendants from dealing with the Ryninch property, compelling the Registrar of Titles to enter a *lis pendens* as a burden on the property; and also a range of declaratory reliefs that the mortgage deed is void.
40. The notice of motion grounding the present interlocutory application was first returnable on 28th June, 2021 on which date the court granted the plaintiff an interim order restraining the sale of the property. That interim order appears to have been continued from time to time up to the present date.

#### **Analysis**

41. The legal principles applying to the grant or refusal of interlocutory relief are well known. As the plaintiff in this case seeks a prohibitory rather than a mandatory injunction, she must establish a fair question to be tried rather than a strong case. The legal submissions of Link observe that the threshold to be surmounted by the plaintiff in such a case is recognised to be reasonably low.

#### **Has the plaintiff raised a fair issue to be tried?**

42. The plaintiff was a litigant in person until shortly before the return date of the interlocutory hearing. As a result, her pleadings lack legal specificity. Furthermore, the plaintiff has not delivered a statement of claim. It is therefore somewhat difficult to assess whether the plaintiff's case is (a) that the mortgage is legally invalid as a result of the undue influence of her Solicitor in procuring her signature or, (b) based upon the doctrine of *non est factum*.
43. The plaintiff was represented by a solicitor and counsel at the hearing of the interlocutory application. Notwithstanding, it was not made clear at the hearing whether the plaintiff relied upon the doctrine of undue influence or *non est factum*, or both.

44. In assessing whether or not the plaintiff has made a case for either undue influence or *non est factum*, the court is severely hampered by the fact that the plaintiff has not joined the Solicitor to these proceedings. Consequently, the court therefore has no insight into what evidence the Solicitor might give in response to the allegations of the plaintiff. As pointed out by the first and second named defendants, this is unsatisfactory and also potentially unfair from the Solicitor's perspective.
45. On the other hand, the court must deal with the application as presented. The defendants have apparently elected not to obtain an affidavit from the Solicitor in relation to the plaintiff's allegations; nor have they furnished an affidavit by the Bank's Solicitor setting out his dealings with the Solicitor and clarifying the issue in relation to the advice apparently given to the plaintiff to obtain independent legal counsel. In so far as the court has been given any information as to what the position might be, it is by way of the Bank's deponent averring as to what another person, the Bank's Solicitor, was informed in a letter from a third person, the Solicitor. The letter itself is not exhibited.
46. At present, therefore the plaintiff's averments concerning what transpired at the meeting with the Solicitor on 16th September, 2015 are uncontradicted on affidavit. Purely for the purposes of the interlocutory application, therefore, the court has little real option but to accept the plaintiff's sworn averments.

**Ulster Bank Ireland Ltd v. Louis Roche and Sorcha Buttimer**

47. The only legal authority opened to the court by counsel for the plaintiff on the question of whether there was a fair issue to be tried was *Ulster Bank Ireland Ltd v. Louis Roche and Sorcha Buttimer* [2012] IEHC 166. In *Ulster Bank*, Clarke J. (as he then was) considered the legal validity of a personal guarantee executed by Ms. Buttimer in respect of a motor trade business run by Mr. Roche through a company. Both defendants were directors of the company, but while Ms. Buttimer was Mr. Roche's partner in the personal sense, she took no part in the business. In evidence Ms. Buttimer accepted that the signature on the relevant guarantee was hers. Clarke J. stated:

*"The fact is that Ms. Buttimer signed a document without making any attempt to ascertain what it was or what its consequences might be. In the ordinary way, she has to bear responsibility for her own actions in so doing. ... She signed banking documents on behalf of a company which was owned by her partner and of which she was a director. Any bank receiving those documents is entitled to assume that she has committed herself to guarantee the loan referred to in the documentation."*

48. Clarke J. stated therefore that subject to undue influence Ms. Buttimer had bound herself as guarantor when she signed the personal guarantee.
49. In considering undue influence, Clarke J. stated that the first question to be addressed was whether Ms. Buttimer was actually under the influence of Mr. Roche. Clarke J. concluded that she was in a dependent and abusive relationship with Mr. Roche and therefore that the first leg of the test was satisfied. Thereafter Clarke J. turned to consider the second question: whether or not the bank might find itself unable to rely



upon a contract entered into as a result of the exercise of undue influence by a party not directly connected with the bank. The question, Clarke J. held was one of constructive knowledge. Did factors exist which would put the bank on inquiry that there was a “*non-commercial element*” to the guarantee or that Ms. Buttimer “*was not a free agent*” on signing the guarantee? If so, then the bank would be required to carry out the necessary inquiries, failing which it would be fixed with constructive knowledge of matters which it would have discovered, had it made appropriate inquiries. Clarke J. referred to the headnote of the decision of the House of Lords in *Royal Bank of Scotland v. Etridge (No.2)* [2002] 2 AC 773 which stated that court’s finding was as follows: -

*“Whenever a wife offered to stand surety for the indebtedness of her husband or his business, or a company in which they both had some shareholding, the lender was put on inquiry and was obliged to take reasonable steps to satisfy itself that she had understood and freely entered into the transaction, The steps reasonably to be expected of a lender in relation to past transactions were to bring home to the wife the risk she was running by standing surety, either at a private meeting with her or by requiring her to take independent advice from a solicitor on whose confirmation the lender might rely that she had understood the nature and effect of the transaction. In respect of future transactions the lender should contact the wife directly, checking the name of the solicitor she wished to act for her and explaining that for its protection it would require his confirmation as to her understanding of the documentation to prevent her from subsequently disputing the transaction. The lender should not proceed until it had received an appropriate response from the wife and should in every case receive the written confirmation from the nominated solicitor. Subject to the husband's consent to disclosure, without which the transaction could not in any event proceed, the lender should routinely furnish to the nominated solicitor financial information relating to the facility and the husband's existing indebtedness to enable a proper explanation to be given to the wife. The nominated solicitor should require confirmation that the wife wished him to act for her, and he might, so long as no conflict of duty or interest arose and he was satisfied that it was in her best interests to do so, also act for the husband or the lender. His advice should be given at a face to-face meeting in the absence of the husband, and its contents need not be directed to the commercial wisdom of the transaction but should include, as a core minimum, an explanation of the documentation, its practical consequences and inherent risks based on the financial information provided by the lender; he should also state that the choice whether to proceed was to be exercised by her and should check that she wished to continue and, if so, he should obtain her consent to his giving the confirmation required by the lender. Since in so advising her the solicitor assumed professional responsibilities to the wife he did not act as agent for the lender, who was entitled to assume that he had acted properly, and, in consequence, knowledge of the contents of advice given to the wife, whether negligently or otherwise, was not to be imputed to the lender.”*

50. Clarke J. noted that in *Etridge* Lord Nicholls found that the bank was put on inquiry when faced with a transaction which called for an explanation of why a wife would stand surety for her husband's debts. For the purposes of deciding the case before him, Clarke J. did not find it necessary to explore the precise parameters of the circumstances in which a bank may be placed on inquiry. Whilst emphasising that his decision should not be taken as implying that the law in Ireland goes as far as the law in the United Kingdom as set out in *Etridge*, Clarke J. found that the bank was placed on inquiry because it was aware of the personal relationship between the two defendants and that Ms. Buttimer was in a less secure position than a spouse. In such circumstances, Clarke J. held that the bank was obliged at least to take some measures to ensure that the proposed surety was entered into openly and freely. Clarke J. found that Ms. Buttimer was entitled to rely on the defence of undue influence because the bank had failed to take any steps to ensure that she was acting freely in circumstances where the bank was placed on inquiry.

#### **Issues for the court**

51. On the above authority, the following issues require adjudication. Has the plaintiff raised a fair question to be tried that her signature to the mortgage was obtained by undue influence? In the alternative has the plaintiff raised a fair question that the doctrine of *non est factum* applies? In either case, did factors exist which would put the Bank on inquiry? Did the Bank carry out the necessary enquiries to ensure that the plaintiff entered into the mortgage openly and freely?

#### **Undue Influence**

52. It appears that the undue influence alleged by the plaintiff is not that of Mr. Ross but of the Solicitor. A presumption of undue influence may arise in relations between a solicitor and client. Usually, this occurs in circumstances where a solicitor obtains some benefit from the transaction in question such as a gift or transfer of property. In this case, of course, there is no such gift or transfer of property to the Solicitor. However, it does appear that the Solicitor may have benefited, or at least may have hoped to avoid a detriment, as a result of the execution of the mortgage by the plaintiff, thereby obviating the risk of legal proceedings against the Solicitor on foot of her undertaking to the Bank. In such circumstances, solely for the purposes of the interlocutory hearing, I consider that the plaintiff has reached the threshold of arguability that the presumption of undue influence arises.

#### **Non est factum**

53. The plenary summons does not plead that *non est factum* applies. However, the plaintiff's affidavits invoke this doctrine.

54. The court was not addressed on the doctrine of *non est factum* by counsel for the plaintiff or the defendants. However, the essential components of the doctrine are well known. Thus, in *Tedcastle McCormack & Co. Ltd v. McCrystal* [1999] 3 JIC 1501, Morris J. held that a person seeking to raise the defence of *non est factum* must prove:

"1. That there was a radical or fundamental difference between what he signed and what he thought he was signing.

2. *That the mistake was as to the general character of the document as opposed to the legal effect.*
3. *That there was a lack of negligence i.e. that he took all reasonable precautions in the circumstances to find out what the document was."*

55. I consider that the plaintiff has raised a fair issue that the first two conditions were satisfied by her description of what transpired in the Castletroy Park Hotel on 16th September, 2015. As to the third condition, if what the plaintiff alleges is correct, then the Solicitor was clearly affected by a conflict of interests, which she should have fully disclosed and explained to the plaintiff. It would be difficult to find the plaintiff guilty of negligence if the court ultimately accepts that she was advised by her Solicitor to sign the document in question, and was assured that it was in her own best interests and would have no impact upon her rights, as she avers.
56. There are certain features of the chronology set out by the plaintiff and by the Bank which might tend to either support or undermine the plaintiff's allegations in relation to the manner in which her signature was procured. However, it would not be appropriate to analyse such matters further in the absence of any account from the Solicitor and in circumstances where I have no reason to believe that the Solicitor is even on notice of these proceedings. Suffice to say that there is sufficient uncontradicted evidence before the court such that the plaintiff can make out an arguable case of either undue influence or *non est factum* in relation to her signature to the mortgage documentation.

#### **The position of the Bank and the other defendants**

57. Therefore, following the structure of Clarke J.'s judgment in *Ulster Bank*, the next issue to be determined is whether this impacts upon the ability of the Bank or Link to enforce the security.
58. This, in turn depends initially upon whether the Bank could be said to have had constructive knowledge of the circumstances giving rise to the potential undue influence or to the defence of *non est factum*.
59. In my view, the plaintiff has raised a fair question to be tried that the Bank and its successor Link, should be fixed with such constructive knowledge. The correspondence between the Bank's Solicitor and the Solicitor demonstrates that the Bank had material concerns about the enforceability of its security and requested the Solicitor to address this issue urgently. Against this backdrop, it is arguable that the Bank's knowledge of the circumstances under which the mortgage was concluded was sufficient to place upon it an obligation to enquire if the plaintiff had entered into the mortgage openly and freely. Yet, no documentation has been put before the court suggesting that the Bank undertook any such enquiries. In this regard it is worth recalling that the Bank had never lent any money to the plaintiff personally and it appears that its officials had never met, nor communicated with the plaintiff, whether before or after her execution of the mortgage, nor furnished the plaintiff with any statements of account indicating the principal sum allegedly outstanding. Nor has evidence been put before the court to the effect that the

Bank was definitively informed that the plaintiff had been offered independent legal advice prior to executing the mortgage (and not merely in connection with the Solicitor's request that she sign the guarantee, which she notably declined to do), nor as to her response to such advice.

**Conclusion on fair question to be tried**

60. Link and the Receiver submitted that, in the absence of a statement of claim, the court could not properly adjudge whether or not there was a fair question to be tried. I agree that it would be preferable if a statement of claim had been delivered. In the absence of a statement of claim it is difficult to ascertain the precise legal basis for the plaintiff's contention that she is not bound by the mortgage, still less that the Bank or Link should be fixed with constructive notice such as to prevent them relying upon the security documentation.
61. However, interlocutory orders are frequently granted in the absence of a statement of claim. In this case, I consider that the plaintiff's affidavits provide sufficient information to enable the court to adjudicate upon the issue presently arising. Therefore, bearing in mind that the plaintiff was legally unrepresented until a matter of days before the interlocutory application, I do not consider that the absence of a statement of claim is fatal to the plaintiff's entitlement to an injunction.
62. Link and the Receiver argued that as the charge is registered as a burden in the Folio, this is conclusive and relied upon *Tanager v. Kane* [2018] IECA 352. I agree that if the plaintiff wishes to obtain rectification of the register on grounds of mistake or fraud, she must seek appropriate relief pursuant to the Registration of Title Act 1964. The current proceedings are not a procedurally appropriate route by which to obtain such an order, particularly as the Property Registration Authority is not even named as a defendant. Unless the proceedings are substantially amended, it is likely that at the trial of the action the plaintiff will be unable to obtain several of the reliefs sought in her pleadings. However this does not mean that the plaintiff is not entitled to the interlocutory relief now sought. The defendants do not contend that s. 31 of the Registration of Title Act 1964 could prevent this court granting such order as deemed just, in order to maintain the status quo pending the trial of the action, where a fair case has been made out of undue influence or *non est factum*.
63. In all the above circumstances, I am satisfied that the plaintiff has made out a fair question to be tried and, indeed, the defendants did not advance any serious argument to the contrary.

**Adequacy of Damages/ Balance of Convenience**

64. Link and the Receiver argue that damages would be an adequate remedy for the plaintiff should she be denied an injunction and succeed at trial. They emphasise that the plaintiff and Mr. Ross do not appear to have been residing at the Ryninch property in 2019 at the time of service of the Circuit Court proceedings for possession. The court accepts that this may be so. The plaintiff has not dealt with this issue adequately in her replying affidavits

and there is doubt as to whether or not the Ryninch property is currently the plaintiff's family home.

65. However there is no suggestion that the Ryninch property is or was a commercial property. Rather the uncontested evidence is that it was initially purchased as a family home with the proceeds of the previous family home of the plaintiff and Mr. Ross in the United Kingdom. The mere fact or possibility that the plaintiff may be residing elsewhere for a period of time does not necessarily mean that the Ryninch property is not her family home at law. Demonstrating that the Ryninch property is not the plaintiff's family home requires evidence which is not before the court at present.
66. It appears that the second named defendant intends selling the property imminently. In these circumstances, I find that damages would not be an adequate remedy for the irreversible and permanent loss by the plaintiff of the Ryninch property.
67. Link and the Receiver observe that the plaintiff has not furnished the usual undertaking as to damages. In this respect, the plaintiff's affidavit states that she "*does not seek to provide an undertaking for damages and requests that the inherent jurisdiction of the court apply, given the financial situation of the plaintiff, to release the plaintiff from having to make an undertaking as to damages*".
68. The plaintiff relies on *Bainne Aláinn Ltd and Shay Hayden v. Glanbia* [2014] IEHC 482 in which Barrett J. stated that there was a number of cases in which a court could hold that it is appropriate to grant injunctive relief notwithstanding the absence of an undertaking as to damages.
69. I am not disposed to grant the plaintiff an interlocutory injunction without an undertaking as to damages. The plaintiff has put before the court no compelling argument as to why it would be unjust to require her to furnish such an undertaking. In addition, there is at least uncertainty as to whether the Ryninch property is or is not the plaintiff's family home. Therefore, I am prepared to grant an interlocutory injunction only on the basis that the plaintiff is prepared to provide the usual undertaking as to damages.

#### **Conclusion and form of Orders**

70. No interlocutory relief is necessary as against the Bank. All of the Bank's rights arising under the security documentation are vested in Link and the Bank has no power whatsoever to offer the Ryninch property for sale or to deal with it in any way. Therefore, the court declines to make any interlocutory order against the Bank restraining enforcement of the debt.
71. Provided the plaintiff gives the usual undertaking as to damages, I will grant an interlocutory injunction restraining the Receiver and Link, their servants or agents, from offering the Ryninch property for sale, pending the trial of these proceedings.

I will hear argument from the parties in relation to the question of costs and any other matters arising on foot of this judgment on Tuesday, 24th May 2022 at 11am.