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Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **04/02/2014**

No. 11/105087

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

Between:

IRISH BANK RESOLUTION CORPORATION LIMITED
(FORMERLY ANGLO IRISH BANK CORPORATION LIMITED)

Plaintiff;

AND

JACQUELINE DOLAN

Defendant.

Master McCorry

[1] By writ of summons issued 15 September 2011, the plaintiff claimed from the defendant the sum of £31,659,571.32 on foot of a guarantee dated 18 November 2008 whereby the defendant guaranteed payment on demand "of all present and future indebtness and liabilities owed to the plaintiff by Jermon Limited not exceeding £39,271,000.00 plus interest". The defendant entered an appearance to that writ on 22 September 2011, and there being no defence served, the plaintiff entered default judgment on 10 January 2012 in the sum of £31,980,259.17 inclusive of interest. By

summons issued 26 October 2012 the defendant applied for an order setting aside the default judgment.

[2] Jermon Limited ("the Company") was a property development company incorporated in or about 1998 by the defendant's husband Peter Dolan with the purpose of managing investment of surplus profits generated by his pharmacy business. At that time the defendant worked as a teacher in a secondary school but at her husband's request became a director in the company. However, in her affidavit grounding her application, sworn 12 October 2012, she avers that she was a director in "name only", neither attending day to day meetings or taking note of the company finances beyond what her husband told her. She took a career break from teaching to become a full time carer for their 4 children, resigning altogether in 2000. Peter Dolan, with her agreement, focussed on the Company, engaging such professional assistance as was required. The Company experienced rapid growth in the retail and office property sectors largely funded by significant bank borrowing but with the downturn in the property market, and the global banking crisis, it ultimately experienced "severe working capital pressures". In August 2009 the plaintiff bank ("the Bank") and the company entered into a loan facility agreement, a condition precedent of the offer of a loan being that the Company enter into an "interest rate swap agreement" the purpose of which was to hedge or protect against interest rate fluctuations. Then in November 2009 the defendant was told by Peter Dolan that the Bank required them to enter into personal guarantees in its favour. At paragraph 12 of her affidavit she states: "I was not at all happy about being required to sign a personal guarantee, but nevertheless I was persuaded against my better judgment to do so because Peter told me the Company was under significant financial pressure, and the loan facility was vital to its ability to continue to trade. At the time I was not aware of the full extent of the Company's borrowings, nor was I told, or did I realise, that the guarantee was actually for a sum of £39 million (no amount is specified at cl.2.2 (a), albeit it has recently been pointed out to me that the total amount recoverable from the guarantor is specified over the page at paragraph 2.3)."

[3] At paragraph 13 of her grounding affidavit the defendant avers:

> "I do recall that my husband and I had to go to the offices of C&H Jefferson solicitors in Belfast to sign the guarantee. It was simply explained to me in the most general terms that there could be adverse consequences from signing the guarantee. I was not given any legal advice (or advice separate from my husband) about the nature and extent of the guarantee and indemnity, nor the full potential personal liability it might give rise to. Further, I was not asked whether or not I was familiar with the terms of the underlying loan facility and of the interest rate swap agreement, which for the avoidance of any doubt, I was not. I realise that the Agreement does contain an express acknowledgement above the signatures, but to be candid I simply signed where I was asked to, below my husband, and our signatures were witnessed. The period spent in C&H Jefferson's office was relatively short".

Ultimately the financial pressures on the Company were such that on the 27 January 2011 it was placed in administration and Her Majesty's Revenue and Customs issued a winding up petition. The statement of affairs revealed a net deficit of £100 million.

[4] That is the alleged factual basis for the defendant's submission that she has a meritorious defence to the Bank's claim, primarily based on undue influence, but in addition to failure by the Bank to advise in the exceptional circumstances of the case. I will return to these issues in due course, but before that I will consider a further ground for her application to set aside the default judgment, namely that the Bank does not have locus standi to pursue the action which ought, she contends, to have been taken by the National Assets Management Agency ("NAMA"), and therefore that the default judgment ought to be set aside on the ground that it is irregular.

The first issue: Locus Standi

[5] Before considering the relevant legislation of the Oireachtas (the Irish Parliament) by which the National Assets Management Agency ("NAMA") came

into being (The National Asset Management Agency Act 2009, "the 2009 Act"), and the Terms and Conditions of Acquisition and the Acquisition Schedule dated 1 November 2010 in respect of the Company, the defendant's argument, in summary, is as follows. NAMA acquired the benefit of the Company's indebtedness under the loan agreement on 3 December 2010 under the terms of the 2009 Act and the Schedule of Acquisition dated 1 November 2010. The writ of summons with the Bank as plaintiff was issued after the acquisition by NAMA, on 11 September 2011. The defendant argues that as the Bank takes the action pursuant to section 91(3) of the 2009 Act it is required if NAMA so directs to do all that it, as a participating institution, is permitted to do under relevant foreign law (obviously in this case the law of Northern Ireland) to assign to NAMA the greatest interest possible in the foreign bank asset. In other words, the defendant contends, under Northern Ireland Law acquisition of the loan takes effect as an assignment of all legal and beneficial title thereto to NAMA. If this is so and all legal and beneficial title had been transferred initially, the action ought to have been taken by NAMA, or NAMA and the Bank, but not the Bank alone. The plaintiff for its part contends that this argument is based on a misconception of the provisions of the 2009 Act and Terms of Acquisition, which senior counsel Mr Shaw QC sought to demonstrate by an analysis of those provisions against the background of what they are designed to do.

[6] The preamble to the 2009 Act states that it provides for the establishment of a body to be known as the National Asset Management Agency for the purpose, inter alia, of the acquisition by the agency of certain assets from persons to be designated by the Minister of Finance; effecting the expeditious and efficient transfer of those assets to the agency; the holding, managing and realising of those assets and the taking of steps to protect, enhance and better realise the value of transferred assets. Section 4 (1) provides "Acquire" in relation to a bank asset, shall be construed in accordance with subsection (2) which includes at (2) (a) "any form of legal or beneficial transfer …". "Acquired bank asset is defined as meaning "a bank asset that NAMA or a NAMA group entity has acquired, and in which NAMA or a NAMA group entity retains an interest." A "designated bank asset" "means a bank asset specified in an acquisition schedule that has been served on a participating

institution in accordance with section 87 or 89." Finally a "participating institution" "means a credit institution that has been designated by the minister under section 67 …." In this case the process began with the letter dated 12 February 2010 by the then Minister of Finance which simply states:

> *"In exercise of the powers conferred on me by section 67 of the National Asset Management Agency Act 2009 (No.34 of 2009), and following consultation with the Governor and the Regulatory Authority, I designate Anglo Irish Bank Corporation Ltd and each subsidiary of Anglo Irish Bank Corporation Ltd without exemption as a participating institution under the National Asset Management Agency Act 2009."*

[7] The mechanism for preparation and service of the schedule of bank assets to be acquired is set out at section 87 of the Act, section 87(1) providing: "When NAMA has identified an eligible bank asset of a participating institution that NAMA proposes to acquire, and has determined the acquisition value of that asset, NAMA shall serve on the institution a schedule (referred to in this Act as an "acquisition schedule")". The section goes on to stipulate what an acquisition schedule should contain with respect to each asset to be acquired and provides at subsection (7) that "The date of acquisition of a designated bank asset shall be at least 28 days after the relevant acquisition schedule is served on the participating institution concerned unless NAMA specifies a shorter period in the acquisition schedule." Section 90 (1) provides "….. the service of an acquisition schedule on a participating institution in accordance with section 87 …. operates by virtue of this Act to effect the acquisition of each bank asset specified in the acquisition schedule by NAMA …. on the date of acquisition specified in the acquisition schedule as the date of acquisition of the bank asset, notwithstanding that the consideration for the acquisition has not been paid." In this instance the acquisition schedule was dated 1 November 2010 (the date upon which the instrument is stated to have been made by NAMA). Parts A to C provides details of the assets to be acquired including security such as guarantees and indemnities. The parties did not specifically identify where the guarantee provided by the defendant appears in the schedule but I assume that it is included or such an obvious point would have been taken well before now. The acquisition schedule also

contains the standardised Acquisition Terms and Conditions Version 1.0 dated 22 March 2010. It will be necessary to consider relevant provisions in these terms and conditions in some detail in due course.

[8] Returning to the Act, section 91 makes provision for the effect of service of the acquisition schedule in relation to foreign bank assets, which is the situation in this case, as a foreign bank asset is defined in the section as a "bank asset in which the transfer or assignment of any right, title or interest that NAMA proposes to acquire is governed in whole or in part by the law of a state (including the law of a territorial unit of a state) other than the State." Although there appeared to be some initial confusion about this arising from the plaintiff's affidavit evidence, it is now agreed by the parties that subsection (3) is the provision which governs transfer in this case. It provides:-

> *"To the extent that a bank asset proposed to be acquired by NAMA is or includes a foreign bank asset-*
> *(a) if the law governing the transfer or assignment of the foreign bank asset permits the transfer or assignment of that asset, the participating institution shall if NAMA so directs do everything required by law to give effect to the acquisition, or*
> *(b) if the relevant foreign law does not permit the transfer or assignment of the foreign bank asset, the participating institution shall if NAMA so directs do all that the participating institution is permitted to do under that law to assign to NAMA the greatest interest possible in the foreign bank asset."*

The defendant says that in the present case subsection (3) (a) applies as the law of Northern Ireland does permit such transfer or assignment. In the event that this is not the case then subsection (b) would apply which must be read in conjunction with subsection (4) which provides:-

> *"A participating institution, to the extent that a foreign bank asset is one to which subsection (3) (b) applies-*

(a) is subject to duties, obligations and liabilities as nearly as possible corresponding to those of a trustee in relation to that bank asset, and
(b) shall hold the bank asset for the benefit and to the direction of NAMA,
in each case subject to the nature of, and the terms and conditions of the acquisition of, the foreign bank asset."

The purpose of subsection (3) is then further clarified at subsection (5) which stipulates that it applies "in so far as the service of an acquisition schedule would not, of itself, as a matter of foreign law, operate to give effect to the acquisition of the foreign bank asset or otherwise effect or achieve the result referred to in that subsection in relation to such a bank asset"; but all of the foregoing provisions in subsection (3) (a) and (b), i.e. whether the transfer or assignment is permissible under the foreign law or not, must be read in the light of subsection (6) which states:-

"Without prejudice to subsection (4), a participating institution shall, immediately upon being so directed by NAMA to do so, execute and deliver to NAMA any contract, document, agreements, deed or other instrument that NAMA considers necessary or desirable to ensure that there is effected a binding acquisition by NAMA …. under the applicable law, of the interest specified in the relevant acquisition schedule. ***NAMA may issue more than one direction under this subsection in connection with a foreign bank asset****."*

The emphasis in the final sentence is mine because it has a bearing to a point raised by the defendant in respect of the final transfer of legal title in this case at NAMA's direction on 11 September 2013, to which issue I will return.

[9] Turning then to the acquisition terms and conditions, in particular Clause 3, Manner of Acquisition and clause 4, NAMA Trusts. Clause 3.1 dealing with Outright Transfer, the default position as it were, stipulates:

"Subject to the Act, the terms of any relevant acquisition document and Clause 3.3 (Overseas assets and limited transfer assets), each acquisition by the transferee of an acquired designated bank asset shall take effect:

(a) as a sale, assignment and transfer by the participating institution to the transferee of all legal and beneficial rights, title, interests, benefits, and obligations ….in, to, of, under and in respect of that acquired designated bank asset; and

(b) subject to Paragraph (a) as if that acquired designated bank interest had been novated to the transferee."

Under the heading "overseas assets and limited transfer assets" Clause 3.3 provides:

"In respect of an overseas asset and a limited transfer asset:

(a) then participating institution agrees and acknowledges that, by virtue of application having been made for it to be, and having been, designated as a participating institution under the Act, it has agreed to sell, assign and transfer, and the transferee has agreed to acquire and assume, all of the participating institution's legal and beneficial rights, title, interests, benefits and obligations …. in to, of, under and in respect of that overseas asset or, as the case may be, that limited transfer asset pursuant to the provisions of the Act;

(b) to the extent permitted by any applicable overseas law, the acquisition of the participating institution's rights and obligations under and in respect of that overseas asset or limited transfer asset shall take effect in accordance with Clause 3.1 (outright transfer); and

(c) the provisions of Clause 4 (NAMA trusts) shall apply."

[10] Thus in summary, under the scheme created by the Act and the Acquisition Terms and Conditions, each acquisition of a designated bank asset takes effect as an outright transfer by the bank to NAMA of all legal and beneficial rights in respect of the asset as if it had been novated; and where the asset is an overseas one, the bank agrees that all of its legal and beneficial rights title and obligations are transferred to NAMA, and to the extent permitted by the applicable overseas law (law of Northern Ireland) this is to take effect as an outright transfer; but in addition, where overseas

assets are concerned the provisions of Clause 4 (NAMA trusts) applies. Clause 4.1 (a) provides:

> *"The provisions of this Clause 4 (NAMA trusts) shall apply, unless expressly disapplied, to:*
> *(i) each acquisition pursuant to the Act …. of an overseas asset …. So that a trust is deemed to be created in favour of the transferees, in addition to any other method of acquisition of each such designated bank asset;*
> *(ii) to the extent not already effectively acquired pursuant to Clause 3.1 (Outright transfer) or the Act, the proceeds of every asset acquired …; and*
> *(iii) all trusts created in favour of the transferee or, if different, NAMA …. including where an acquisition document specifies that the designated bank asset will be acquired by way of trust."*

Thus the scheme ensures that not just the asset is covered but also, expressly, any proceeds of an acquired asset and any trust created by a participating bank in favour of NAMA, but where the asset includes a trust this must be read in the light of Clause 4.1 (b). It stipulates:

> *"If the participating institution holds, immediately prior to the acquisition date, **legal title** to all or part of any acquired designated bank asset or security or rights granted as part of an acquired bank asset as **security trustee** or agent or equivalent role for the benefit of itself and other secured creditors, then the trusts created by this Clause 4 (NAMA trusts) apply only to the beneficial interest acquired by the transferee in such acquired designated bank asset and do not extend to that legal title (which remains with the participating bank)."*

That is to say, if the participating bank holds the asset as a security trustee or the equivalent, for its own benefit and that of other secured creditors, then what is transferred to NAMA is the beneficial interest only with legal title remaining with the bank. However, this must be read in the light of clause 4.9 (a) which provides:

"If this clause 4 (NAMA trusts) operates or applies to, or is expressed to apply to, an acquisition of an acquired designated bank asset, the transferee …. may at any time after the relevant acquisition date require that the participating institution give further or better effect to that acquisition by means of a full legal transfer of that designated bank asset (or part of it) on such terms as the transferee or, as the case may be, NAMA may require."

This obviously ties in with section 91 (6) of the Act, whereby NAMA may make more than one direction under section 91 (3) in respect of foreign bank assets, and is therefore relevant to the final transfer of legal title in this case at NAMA's direction on 11 September 2013.

[11] Finally, for the sake of completion, in relation to NAMA trusts, clause 4.2 stipulates:

"The participating institution acknowledges, declares, agrees that, with effect from the first acquisition date, it holds any and all rights, title, interests and benefits, present and future, in, to, of understand in respect of each acquired designated bank asset to which this Clause 4 (NAMA trusts) applies …. including all the proceeds thereof, as bare trustee, absolutely for the transferee."

This is reinforced at Clause 4.5 which provides that "Each NAMA trust shall: (a) be a bare trust;" and also Clause 4.6 which says: "Any trustee of an acquired designated bank asset that is the subject of a NAMA trust shall, to the extent permitted by applicable law, comply with any direction given by the transferee and, if different, NAMA, in relation to such acquired designated bank asset."

[12] The statutory and contractual framework being thus, I now turn to consider in more detail the defendants arguments and the plaintiff's rebuttal. This begins with the defendant's proposition that there is an inconsistency between Clause 4.1 (b) which provides that NAMA trusts created by Clause 4 apply only to the beneficial interest acquired by the transferee in the asset and do not extend to legal title which

remains with the bank, and Clauses 3.1, 3.3 and 4.10. Her counsel points to an apparent change of tack between what was initially said by Mr Robert Fay filed on behalf of the plaintiff on 21 October 2013, in which at paragraph 9 he concedes that the asset concerned is an overseas bank asset acquired under section 91 (3) (a) (i.e. To the extent that a bank asset proposed to be acquired by NAMA is or includes a foreign bank asset- (a) if the law governing the transfer or assignment of the foreign bank asset permits the transfer or assignment of that asset, the participating institution shall if NAMA so directs do everything required by law to give effect to the acquisition) and further that that the plaintiff agreed to hold the legal interest in all overseas assets on trust as bare trustee subject to its obligations as contained in Clause 4.6 ("Any trustee of an acquired designated bank asset that is the subject of a NAMA trust shall, to the extent permitted by applicable law, comply with any direction given by the transferee and, if different, NAMA, in relation to such acquired designated bank asset."). However, Ms Jill Annett, solicitor for the plaintiff, in her earlier affidavit filed on behalf of the plaintiff on 14 December 2012 said at paragraph 5 that the loan was held on trust for NAMA pursuant to section 91(4), ("A participating institution, to the extent that a foreign bank asset is one to which subsection (3) (b) applies- (a) is subject to duties, obligations and liabilities as nearly as possible corresponding to those of a trustee in relation to that bank asset, and (b) shall hold the bank asset for the benefit and to the direction of NAMA, in each case subject to the nature of, and the terms and conditions of the acquisition of, the foreign bank asset."). The defendant contends that if section 91 (3) (a) applies then the obligation to do everything required by law to give effect to the acquisition is seemingly conditional upon NAMA so directing. The main point however is that the defendant says that the plaintiff's assertion that only beneficial interest in the asset (loan and guarantee) was transferred does not sit well with the provisions of Clauses 3.1, 3.3 and 4.10 (additional protection). In other words, there is ambiguity as to whether or not at the date of the initial acquisition full legal interest or only beneficial interest was acquired. That ambiguity the defendant says is evidenced by the subsequent express transfer of legal interest to NAMA on 11 September 2013, prompted, they say, by the plaintiff being alerted to the potential problem by the defendant's first skeleton argument in this case. This ambiguity it is argued must be

construed in accordance with the contra proferentem rule, and the benefit of any doubt given to the defendant. Further, the defendant argues, issues of contractual or statutory construction or interpretation should more properly be matters for further scrutiny, evidence and determination at a full hearing.

[13] The plaintiff's response is as follows. Firstly, with respect to the difference between Ms Annett's averment that the plaintiff relied upon section 91 (4) and Mr Fay's evidence that it relied upon section 91 (3), counsel Mr Shaw Q.C. confirmed at the outset of his submissions that this was due to a mistake by Ms Annett and in fact the plaintiff relies upon section 91 (3), as the law of Northern Ireland permitted assignment of such assets. Section 91 (6) simply provides that the bank shall as directed by NAMA execute such documents, contracts deeds as NAMA deems necessary to effect the transfer of the asset, in other words NAMA is in control with the Bank remaining involved but acting at NAMA's direction. When one understands the practical operation of the scheme there is no inconsistency. Essentially, he says, the schedule identifies the asset, its value is measured and agreed and moneys are transferred to the bank in return for the transfer of the debt which in effect is purchased by NAMA. The customer may for a time continue to work with the bank or sometimes NAMA will take over and the customer would deal directly with it. Clause 4 of the acquisition terms and conditions sets out how NAMA trusts are managed with Clause 4 (9) reserving NAMA's entitlement to require a full legal transfer at such time as it requires, which is what occurred on 11 September 2013. In other words, up until then the bank retained legal title as a bare trustee for NAMA but with NAMA able to require the bank to execute a legal transfer at any time. He refers to paragraph 13 of Mr Fay's affidavit of 21 October 2013 which it is useful to quote in full because it effectively encapsulates the factual basis for the plaintiff's argument on the locus standi issue. Mr Fay avers:

> *"As such, whilst the Guarantee had been acquired by NALM on 1 November 2010, until 11 September 2013 legal title to the Guarantee continued to be held by the Plaintiff/Respondent. As such, the right to call up the loan to the Company and the Guarantee belonged to the Plaintiff/Respondent which was at that stage legal owner of*

the loans to the Company and the guarantee. Similarly, I consider that the subject proceedings have been correctly brought by the Plaintiff/Respondent as legal owner of the Guarantee, as trustee for NALM and for the benefit of NALM for, on 1 September 2011, legal title to the loans to the Company and the Guarantee rested with the Plaintiff/Respondent. When Default Judgment issued in favour of the Plaintiff/respondent against the Defendant/Appellant on 10 January 2012, this position remained. The Plaintiff/Respondent was legal owner of the Guarantee, as Trustee for NALM and for the benefit of NALM."

(NALM is a subsidiary of NAMA and is the NAMA "group entity" as defined in the Act specified by NAMA to acquire the bank assets in this case. No point has been raised about this by the defendant.)

[14] As regards the inconsistency between Clause 14 (NAMA trusts) and the operation of Clause 3, which underpins the defendant's argument that there is an ambiguity which should be interpreted in favour of the defendant (contra proferentem), the plaintiff contends that Clause 4.1 (a) is just a menu of the types of assets, including bank assets, proceeds and trusts which the acquisition scheme is designed to capture. This accords with my own interpretation of the clause at paragraph [10] above. Clause 4.1 (b) is designed to cover the situation where one of a number of banks acts as a security trustee for a number of other banks who had contributed to a loan, which situation is not relevant in this case, and is simply an extension of the menu of the assets which might require to be covered, with Clause 4.1 (c) being in effect a mopping up provision.

[15] The legislation and acquisition terms and conditions are complex; a reflection of the complex commercial relations between the banks and their commercial customers, and involving assets governed not only by the law of the Republic of Ireland but also overseas assets governed by the laws of other jurisdictions including Northern Ireland. However, they must be read and interpreted in the light of a practical understanding of what they were intended to achieve, namely to ensure the effective acquisition of a variety of assets, whether by transfer of legal interest or beneficial interest only, in return for payments of value by the banks to the acquiring

agency. Going back to the preamble of the Act: its stated purpose is to establish a body to be known as the National Asset Management Agency for the purpose, inter alia, of the: the acquisition by the agency of certain assets from persons to be designated by the Minister of Finance; effecting the expeditious and efficient transfer of those assets to the agency; the holding, managing and realising of those assets and the taking of steps to protect, enhance and better realise the value of transferred assets; and what is contained in the provisions of the Act and the terms and conditions considered above, seems to me to achieve that end. On my understanding of the provisions when read carefully by reference to their intended purpose, there is no inherent ambiguity apparent. However, the issue does not rest there because it is then necessary to ask whether what happened in this case was inconsistent with the scheme which had been devised. The defendant points to the inconsistency between what was said by Ms Annett and Mr Fay, but the explanation given by the defendant's counsel that the former was simply mistaken when she referred to section 91 (4) instead of section 91 (3), and in fact the plaintiff relies upon section 91 (3) is persuasive when one considers the two provisions. Section 91 (3) requires the participating bank, where an overseas asset is concerned: either if the law governing the transfer of the asset permits the transfer or assignment of that asset, the bank shall if NAMA so directs do everything required by law to give effect to the acquisition; or if the relevant foreign law does not permit the transfer or assignment of the asset, the bank shall if NAMA so directs do all that the bank is permitted to do under that law to assign to NAMA the greatest interest possible in the foreign bank asset. Subsection (4) on the other hand provides that where the latter situation prevails, i.e. the foreign law does not permit transfer of the asset, the bank is: " (a) is subject to duties, obligations and liabilities as nearly as possible corresponding to those of a trustee in relation to that bank asset, and (b) shall hold the bank asset for the benefit and to the direction of NAMA, in each case subject to the nature of, and the terms and conditions of the acquisition of, the foreign bank asset." In other words, subsection 91 (4) flows from one of a number of alternative positions arising from subsection (3) and does not as it were stand on its own. Aside from that, it is the defendant's own case that the plaintiff must have been relying on section 91 (3). In those circumstances I cannot see that there is any issue justifying full trial arising

from what was clearly a mistake in Ms Annett's affidavit. Further, I see no other issues arising from the affidavit evidence or the submissions made to this court, which would suggest that there was some inconsistency or departure between the provisions of the Act and the acquisition terms and conditions, and what occurred in this case.

[16] In conclusion, having read and considered the legislation and the relevant Acquisition Terms and Conditions, in the light of what they were designed to achieve, and in the light of the affidavit evidence as to what actually occurred in the present case, I am satisfied that there is no inherent inconsistency giving rise to ambiguity between the various provisions or acquisition terms, nor any inconsistency or departure between the scheme thus devised and what actually took place in this case. The defendant in her evidence has shown no basis for this court to find: that there has been, or even may have been, any departure from the scheme devised; or any factual basis upon which the court could question that at the time of the initial acquisition on 1 November 2010, NAMA acquired, as it was entitled to so do, beneficial interest only, with legal title as bare trustee remaining with the bank. That being so, no basis has been demonstrated to justify a finding that the plaintiff does not have locus standi to bring this action, or that the default judgment entered on 10 January 2012 is irregular on grounds of lack of locus standi. As I have found no ambiguity in the legislation or acquisition terms and Conditions, then the contra proferentem rule does not arise. As to the defendant's final point, namely that issues of construction should be left to trial, I think that this is an over simplification of the applicable principles. At this point the court is not considering the merits of a defence, but whether or not there is an ambiguity in the legislation. That requires a reading and understanding of the legislation, and having done that, and concluded that there is no ambiguity, there simply is no construction issue to be reserved for trial.

The second issue: meritorious defence.

(a) The Principles

[17] In any application to set aside a regularly obtained judgment the primary issue for the court is whether or not the defendant can demonstrate that he has a defence to the plaintiff's claim, which has some prospect of success, and almost invariably an affidavit setting out the merits of the defence is required. There is considerable case law dealing with this issue and various formulations of the test to be applied. The basic principles are set out in Evans v Bartlam [1937] AC 473: (a) per Lord Atkin at 480; The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure; (b) The Rules of Court give to the judge a discretionary power to set aside the default judgment which is in terms 'unconditional' and the court should not lay down rigid rules which deprive it of jurisdiction; (c) the primary consideration is whether the defendant has merits to which the Court should pay heed; and (d) there is no rigid rule that the Defendant must provide a reasonable explanation for delay in bringing the application but clearly this is a factor to which the court will have regard in exercising its discretion to set aside a default judgment.

[18] The Evans v Bartlam principles were referred to by Sir Roger Ormrod in Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc [1986] 2 Lloyd's rep 221, where the Court concluded that to arrive at a reasoned assessment of the justice of the case the Court must form a provisional view of the probable outcome if the judgment were to be set aside. In McCullough v BBC [1996] NI 580, Girvan J held that the primary consideration was whether a defendant had merits justifying the matter going to trial. At p583-584 he held:

> *"For my part I consider that the defendant should succeed in an application to set aside judgment if he can show that he should in the interests of justice be permitted to*

defend the action…. If it is clear that a defendant has in reality no defence to the plaintiff's claim the setting aside of judgment would be unjust to the plaintiff and would not be unjust to the defendant since it would merely delay the enforcement of the plaintiff's undoubted rights and send to trial an indefensible case. If, on the other hand, there is a real triable issue between the parties justice will normally require that the matter should be allowed to go to trial."

Girvan J differed from Sir Roger Ormrod in Evans v Bartlam in that he saw no "compelling reason why the court should be required to form a provisional view of the probable outcome if the judgment were to be set aside" as this exercise would have to be carried out at an early stage on the basis of limited material.

[19] Higgins J considered the issue in Tracy v O'Dowd [2002] NIJB 124, wherein after analysing the various authorities he concluded at p132:

"If the defence put forward has no prospects of success then the way ahead is clear. There is nothing to be gained by setting aside a regularly obtained judgement even on conditions and ordering a trial, the result of which is a foregone conclusion. If the situation is otherwise, that is, that it has not been demonstrated that the defence has no prospects of success, then it follows a fortiori and logically that the case must have prospects of success. Like Girvan J I find it difficult to see how the question, whether the defence is likely to succeed, can or should be determined on affidavit evidence when much may depend on the credibility or recollection of witnesses or the evaluation of forensic evidence or even the construction of a document. If it has not been demonstrated that there is no prospect of the defence being successful, is a defendant, other matters being equal not entitled to have his side of the case heard"

[20] In this jurisdiction a more recent example of a decision in an application to set aside default judgment is that of Gillen J in Bank of Ireland v Mervyn Coulson (unreported judgment delivered 29.10.09). This was an appeal from an order of Master McCorry dated 11 March 2009 dismissing the application of the defendant

Mervyn Coulson to set aside a judgment entered on behalf of the plaintiff on 30 November 2007. Affirming the Master's order Gillen J held-

> *"[32] If a judgment is regular, then there is an almost inflexible rule that there must be an affidavit of merits i.e. an affidavit stating facts showing a defence on the merits (Farden v Richter (1889) 23 QBD 124).*
>
> *[33] For the purpose of setting aside a default judgment, the defendant must show that he has a meritorious defence. The meaning of this expression has been discussed in a number of authorities including Alpine Bulk Transport Company Inc. v Saudi Eagle Shipping Company Inc., The Saudi Eagle (1986) 2 Lloyd's Report 221 CA, Day's case, Ann McCullough v British Broadcasting Corporation (1996) NI 580.*
>
> *[34] The principles to be derived from these authorities are these. First, the procedure for marking judgment in default is not designed to punish the defendant by destroying his right to a fair and full hearing in relation to the plaintiff's claim but rather as part of the disciplinary framework established by the rules of the court which are designed to ensure proper and timeous conduct of litigation (see McCullough's case at p. 584)*
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> *[35] Courts must be wary to form provisional views of probable outcomes which experience has shown can readily be shown to be fallacious when the matter is tried out. In essence I think that Lord Wright at p. 489 in Day's case captured the approach that the court's should adopt when he said:*
>
> > *"In a case like the present there is a judgment which, though by default, is a regular judgment, and the applicant must show grounds why the discretion to set aside should be exercised in its favour. The primary consideration is whether he has merits to which the court should pay heed; if merits are shown the court will not … desire to let judgment pass and which there has been no proper adjudication …"*

(Reference to the Day case is to Day v RAC Motoring Services Limited [1999] 1 AER 1007.)

(b) Undue Influence

[21] On the basis of the factual background as summarised at paragraphs [2-3] above, which the court assumes in her favour having regard of course to reasonable credence, the defendant firstly seeks to raise a defence based on undue influence by her husband, of which the plaintiff had notice. In the 30th edition of Chitty on Contracts at 7-056, undue influence is defined in the following terms:

> *"The equitable doctrine of undue influence is a comprehensive phrase covering cases in which a transaction between two parties who are in a relationship of trust and confidence may be set aside if the transaction is the result of an abuse of the relationship. The transaction may be set aside if the claimant shows that the other party obtained it by abusing the relationship; this, as we shall see, is often termed actual undue influence, but it is probably better to refer to such cases as ones in which undue influence is actually proved. A transaction may also be set aside in the absence of direct proof if the Claimant shows the existence of relationship of trust and confidence with the other party and that the transaction is one that calls for explanation. Then it would be presumed that the transaction was the result of undue influence unless the presumption is rebutted."*

At paragraph 7-104 under the heading "Undue influence by a third person" which is the situation which is alleged to arise in this case: Chitty states:

> *"Where one party seeks to avoid a contract on the ground of undue influence by a third person, it must appear either that the third person was acting as the other party's agent, or that the other party had actual or constructive notice of the undue influence."*

[22] It is clear therefore that in the present case, where it is not alleged that any undue influence was exercised by the plaintiff itself, to establish a defence based on the doctrine, the defendant must show either that her husband was acting as an

agent for the plaintiff, or the plaintiff had actual notice of undue influence, or constructive notice. Lord Nicholls of Birkenhead, in a judgment to which I will return below, observed in *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44 at paras [6] and [8],

> *"Undue influence is one of the grounds of relief developed by the courts of equity as a court of conscience. The objective is to ensure that the influence of one person over another is not abused …"*
>
> *"… [It] arises out of a relationship between two persons where one has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage."*

Citing the above paragraphs in Etridge, Lord Millett in National Commercial Bank (Jamaica) Ltd v Hew [2003] UKPC 51 at paragraphs [29] and [30] states:

> *"Undue influence is one of the grounds on which equity intervenes to give redress where there has been some unconscionable conduct on the part of the defendant. It arises whenever one party has acted unconscionably by exploiting the influence to direct the conduct of another which he has obtained from the relationship between them.*
>
> *Thus the doctrine involves two elements. First, there must be a relationship capable of giving rise to the necessary influence. And, secondly, the influence generated by the relationship must have been abused."*

[23] The context of the present case, where it is not alleged that the plaintiff bank exercised undue influence itself, but rather was arguably on notice, actual or constructive that a relationship existed between others, which was capable of giving rise to a possibility of undue influence being exercised by one against another, is not at all unusual. Indeed, in one view, it arises out of the most common situation where undue influence is raised, namely between a husband and wife, and typically in a guarantor type of situation. That is the main thrust of the House of Lord's judgments in the Etridge cases, where it considered the approach adopted, and the principles

established in the case of Barclays Bank Plc v O'Brien [1994] 1 A.C. 180 (HL). Essentially what O'Brien established is that whilst the law imposes no obligation on one party to a transaction to check whether the other party's concurrence was obtained by undue influence, in certain circumstances, a party to a contract may lose the benefit of his contract, entered into in good faith, if he ought to have known that the other's concurrence had been procured by the misconduct of a third party. This gives rise to competing interests between the bank and those raising undue influence; and what O'Brien decided was where the balance of those competing interests lay. On the one side, there is the need to protect a wife against a husband's undue influence. On the other side, there is the need for the bank to be able to have reasonable confidence in the strength of its security. Otherwise it would not provide the required money. The problem was to find the course best designed to protect wives without unreasonably hampering the giving and taking of security. The solution was to set out the steps a bank should take to ensure it is not affected by any claim the wife may have that her signature of the documents was procured by the undue influence or other wrong of her husband. This solution involved **putting the bank on inquiry** (my emphasis). In Etridge Lord Nicholls considered the question of the threshold when the bank is put on enquiry at paragraph [14]

> *"44 In O'Brien the House considered the circumstances in which a bank, or other creditor, is "put on inquiry". Strictly this is a misnomer. As already noted, a bank is not required to make inquiries. But it will be convenient to use the terminology which has now become accepted in this context. The House set a low level for the threshold which must be crossed before a bank is put on inquiry. For practical reasons the level is set much lower than is required to satisfy a court that, failing contrary evidence, the court may infer that the transaction was procured by undue influence. Lord Browne-Wilkinson said [1994] 1 AC 180, 196 :*
>
> > *"Therefore in my judgment a creditor is put on inquiry when a wife offers to stand surety for her husband's debts by the combination of two factors: (a) the transaction is on its face not to the financial advantage of the wife; and (b) there is a substantial risk in transactions of that kind that, in procuring the*

wife to act as surety, the husband has committed a legal or equitable wrong that entitles the wife to set aside the transaction."

In my view, this passage, read in context, is to be taken to mean, quite simply, that a bank is put on inquiry whenever a wife offers to stand surety for her husband's debts".

[24] However, the application of the principles could arguably differ in this case where the wife is not just the spouse of the husband who allegedly has exercised undue influence over her in regard to persuading her to stand as a personal guarantor for his debts. She is also a commercial partner of his, in the sense of being a co-director in a company and it is the company's debts that she is guaranteeing rather than her husband's personal debts. The case then takes on more of the flavour of a commercial transaction. Is that situation covered by the Etridge principles? At paragraph [49] of his judgment in Etridge Lord Nicholls commented that the shareholding interests and the identity of the directors are not a reliable guide to the identity of the persons who actually have conduct of a company's business, which would appear to be consistent with the facts alleged by the defendant in the present case. This suggests that Etridge is wide enough, arguably, to cover the present situation.

[25] However, even if that is not the case, and the defendant had a more active role in the running of the company, that may not rule this defendant out entirely, Lord Nicholls at paragraph [87] stated:

"87 These considerations point forcibly to the conclusion that there is no rational cut-off point, with certain types of relationship being susceptible to the O'Brien principle and others not. Further, if a bank is not to be required to evaluate the extent to which its customer has influence over a proposed guarantor, the only practical way forward is to regard banks as "put on inquiry" in every case where the relationship between the surety and the debtor is non-commercial. The creditor must always take reasonable steps to bring home to the individual guarantor the risks he is running by standing as surety. As a measure of protection, this is valuable. But, in all conscience, it is a modest burden for banks and other lenders. It is no more than is reasonably to be expected of a creditor who is taking a guarantee from an individual. If the bank or

other creditor does not take these steps, it is deemed to have notice of any claim the guarantor may have that the transaction was procured by undue influence or misrepresentation on the part of the debtor."

However , he goes on to say:

"88 Different considerations apply where the relationship between the debtor and guarantor is commercial, as where a guarantor is being paid a fee, or a company is guaranteeing the debts of another company in the same group. Those engaged in business can be regarded as capable of looking after themselves and understanding the risks involved in the giving of guarantees.

*89 By the decisions of this House in O'Brien and the Court of Appeal in Credit Lyonnais Bank Nederland NV v Burch [1997] 1 All ER 144 , English law has taken its first strides in the development of some such general principle. It is a workable principle. It is also simple, coherent and eminently desirable. I venture to think this is the way the law is moving, and should continue to move. Equity, it is said, is not past the age of child-bearing. In the present context the equitable concept of being "put on inquiry" is the parent of a principle of general application, a principle which imposes no more than a modest obligation on banks and other creditors. The existence of this obligation in all non-commercial cases does not go beyond the reasonable requirements of the present times. In future, banks and other creditors should regulate their affairs accordingly. *815"*

[26] I do not read this to mean that Lord Nicholls entirely rules out the application of the principles of undue influence, and the resultant placing of a bank on enquiry, in every commercial situation, but rather that the threshold at which an institution such as a bank would be required to make inquiry is higher, perhaps depending upon the circumstances of a particular case, much higher, than for example in a purely domestic situation, with arguably a case of a wife playing a subsidiary role in a company falling somewhere in between the purely domestic relationship as in the O'Brien cases, and the relationship between business partners active in a commercial venture. I must remind myself at this point that it is not the role of this court to try

this issue but simply to ask whether, taking the facts in the her favour, the defendant raises an arguable defence, that is, a defence with some prospect of success.
With this in mind I am guided by that passage from the judgment of Lord Scott, in Etridge, at paragraph [219] where, referring to the doctrine of undue influence, he states:

> *"It is a presumption which arises if the nature of the relationship between two parties coupled with the nature of the transaction between them is such as justifies, in the absence of any other evidence, an inference that the transaction was procured by the undue influence of one party over the other. This evidential presumption shifts the onus to the dominant party and requires the dominant party, if he is to avoid a finding of undue influence, to adduce some sufficient additional evidence to rebut the presumption."*

[27] The question then arises, whether it is necessary for the persons alleging undue influence, having established that the relationship was capable of giving rise to undue influence, to prove that in fact it had been exercised. This question goes to the heart of what the doctrine of undue influence actually says, and the consequences where the issue is raised. Looking at the basic principles Lord Nicholls in Etridge at paragraph [13] and [14] states:

> *"Whether a transaction was brought about by the exercise of undue influence is a question of fact. Here, as elsewhere, the general principle is that he who asserts a wrong has been committed must prove it. The burden of proving an allegation of undue influence rests upon the person who claims to have been wronged. This is the general rule. The evidence required to discharge the burden of proof depends on the nature of the alleged undue influence, the personality of the parties, their relationship, the extent to which the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship, and all the circumstances of the case.*
>
> *[14] Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient, failing satisfactory*

evidence to the contrary, to discharge the burden of proof. On proof of these two matters the stage is set for the court to infer that, in the absence of a satisfactory explanation, the transaction can only have been procured by undue influence. In other words, proof of these two facts is prima facie evidence that the defendant abused the influence he acquired in the parties' relationship. He preferred his own interests. He did not behave fairly to the other. So the evidential burden then shifts to him. It is for him to produce evidence to counter the inference which otherwise should be drawn.

And at paragraph [16]:

"Generations of equity lawyers have conventionally described this situation as one in which a presumption of undue influence arises. This use of the term "presumption" is descriptive of a shift in the evidential onus on a question of fact. When a plaintiff succeeds by this route he does so because he has succeeded in establishing a case of undue influence. The court has drawn appropriate inferences of fact upon a balanced consideration of the whole of the evidence at the end of a trial in which the burden of proof rested upon the plaintiff. The use, in the course of the trial, of the forensic tool of a shift in the evidential burden of proof should not be permitted to obscure the overall position. These cases are the equitable counterpart of common law cases where the principle of res ipsa loquitur is invoked. There is a rebuttable evidential presumption of undue influence."

[28] In practice therefore, what the doctrine of undue influence does is give rise to a rebuttable evidential presumption, the analysis of which by Lord Scott in Etridge at paragraph [219] (already quoted at paragraph [25] above) is, particularly in the context of an application to set aside a default judgment, enlightening. He states:

"The presumption of undue influence, whether in a category 2A case, or in a category 2B case, is a rebuttable evidential presumption. It is a presumption which arises if the nature of the relationship between two parties coupled with the nature of the transaction between them is such as justifies, in the absence of any other evidence, an inference that the transaction was procured by the undue influence of one party over the other. This evidential presumption shifts the onus to the dominant party and requires the dominant party, if he is to avoid a finding of undue influence, to adduce

*some sufficient additional evidence to rebut the presumption. In a case where there has been a full trial, however, the judge must decide on the totality of the evidence before the court whether or not the allegation of undue influence has been proved. In an appropriate case the presumption may carry the complainant home. But it makes no sense to find, on the one *854 hand, that there was no undue influence but, on the other hand, that the presumption applies. If the presumption does, after all the evidence has been heard, still apply, then a finding of undue influence is justified. If, on the other hand, the judge, having heard the evidence, concludes that there was no undue influence, the presumption stands rebutted. A finding of actual undue influence and a finding that there is a presumption of undue influence are not alternatives to one another. The presumption is, I repeat, an evidential presumption. If it applies, and the evidence is not sufficient to rebut it, an allegation of undue influence succeeds."*

[29] Thus the way the doctrine of undue influence operates in practice in a situation where the presumption arises, is that if on a hearing of the evidence the judge is satisfied that the plaintiff has failed to rebut the presumption, then the allegation of undue influence succeeds, giving rise to a defence to the action. In the present case let us assume for the moment; taking the facts in the defendant's favour as this court at this stage is required to do, with respect to the nature of the relationship which is alleged to give rise to a presumption of undue influence; that such a relationship is capable of giving rise to the presumption; and on a hearing of the evidence the plaintiff fails to rebut that presumption, what is the practical effect of that? It would seem that the whole point of Etridge and the protocol which it sets out, is that before arriving at an end conclusion the court must consider the steps taken by the bank to protect the defendant from undue influence. If the bank has taken sufficient steps then the presumption of undue influence could be deemed to have been rebutted. I turn therefore to consider what Etridge expects of a bank where it is put on enquiry, what steps were taken in this case, and whether they met the Etridge test. However, before starting that exercise it is important for this court to again reminds itself that it should not attempt to try disputed facts on affidavit evidence, and assuming reasonable credence must take the facts in the defendant's

favour. Thus, although the plaintiff refers me to affidavit evidence by Kieran Dowling And Gordon Parker which it argues demonstrates that the defendant was an experienced businesswoman with direct and personal knowledge of the company and its finances; who had derived considerable benefits from the posts held, and had access to a wide range of legal, financial and professional advice; this court must be careful not to embark upon a balancing exercise between that affidavit evidence and the averments in the defendant's affidavits. It is not the purpose of this court to try the factual issues on affidavit evidence.

[30] What then should a bank put on enquiry do when taking a personal guarantee from a person in the position of, or similar position to, the defendant in this case? Lord Nicholls deals with at paragraph 79 of his judgment in Etridge, as follows:

> *"79 I now return to the steps a bank should take when it has been put on inquiry and for its protection is looking to the fact that the wife has been advised independently by a solicitor.*
> *(1) One of the unsatisfactory features in some of the cases is the late stage at which the wife first became involved in the transaction. In practice she had no opportunity to express a view on the identity of the solicitor who advised her. She did not even know that the purpose for which the solicitor was giving her advice was to enable him to send, on her behalf, the protective confirmation sought by the bank. Usually the solicitor acted for both husband and wife.*
> *Since the bank is looking for its protection to legal advice given to the wife by a solicitor who, in this respect, is acting solely for her, I consider the bank should take steps to check directly with the wife the name of the solicitor she wishes to act for her. To this end, in future the bank should communicate directly with the wife, informing her that for its own protection it will require written confirmation from a solicitor, acting for her, to the effect that the solicitor has fully explained to her the nature of the documents and the practical implications they will have for her. She should be told that the purpose of this requirement is that thereafter she should not be able to dispute she is legally bound by the documents once she has signed them. She should be asked to nominate a solicitor whom she is willing to instruct to advise her, separately from*

her husband, and act for her in giving the necessary confirmation to the bank. She should be told that, if she wishes, the solicitor may be the same solicitor as is acting for her husband in the transaction. If a solicitor is already acting for the husband and the wife, she should be asked whether she would prefer that a different solicitor should act for her regarding the bank's requirement for confirmation from a solicitor.

The bank should not proceed with the transaction until it has received an appropriate response directly from the wife.

*(2) Representatives of the bank are likely to have a much better picture of the husband's financial affairs than the solicitor. If the bank is not willing to undertake the task of explanation itself, the bank must provide the solicitor with the financial information he needs for this purpose. Accordingly it should become routine practice for banks, if relying on confirmation from a solicitor for their protection, to send to the solicitor the necessary financial information. What is required must depend on the facts of the case. Ordinarily this will include information on the purpose for which the proposed new facility has been requested, the current amount of the husband's indebtedness, the amount of his current overdraft facility, and *812 the amount and terms of any new facility. If the bank's request for security arose from a written application by the husband for a facility, a copy of the application should be sent to the solicitor. The bank will, of course, need first to obtain the consent of its customer to this circulation of confidential information. If this consent is not forthcoming the transaction will not be able to proceed.*

(3) Exceptionally there may be a case where the bank believes or suspects that the wife has been misled by her husband or is not entering into the transaction of her own free will. If such a case occurs the bank must inform the wife's solicitors of the facts giving rise to its belief or suspicion.

(4) The bank should in every case obtain from the wife's solicitor a written confirmation to the effect mentioned above."

[31] What then should the solicitor do in order to ensure that the defendant is not the subject of undue influence? Lord Nichols deals with this also:-

"65 When an instruction to this effect is forthcoming, the content of the advice required from a solicitor before giving the confirmation sought by the bank will,

inevitably, depend upon the circumstances of the case. Typically, the advice a solicitor can be expected to give should cover the following matters as the core minimum. (1) He will need to explain the nature of the documents and the practical consequences these will have for the wife if she signs them. She could lose her home if her husband's business does not prosper. Her home may be her only substantial asset, as well as the family's home. She could be made bankrupt. (2) He will need to point out the seriousness of the risks involved. The wife should be told the purpose of the proposed new facility, the amount and principal terms of the new facility, and that the bank might increase the amount of the facility, or change its terms, or grant a new facility, without reference to her. She should be told the amount of her liability under her guarantee. The solicitor should discuss the wife's financial means, including her understanding of the value of the property being charged. The solicitor should discuss whether the wife or her husband has any other assets out of which repayment could be made if the husband's business should fail. These matters are relevant to the seriousness of the risks involved. (3) The solicitor will need to state clearly that the wife has a choice. The decision is hers and hers alone. Explanation of the choice facing the wife will call for some discussion of the present financial position, including the amount of the husband's present indebtedness, and the amount of his current overdraft facility. (4) The solicitor should check whether the wife wishes to proceed. She should be asked whether she is content that the solicitor should write to the bank confirming he has explained to her the nature of the documents and the practical implications they may have for her, or whether, for instance, she would prefer him to negotiate with the bank on the terms of the transaction. Matters for negotiation could include the sequence in which the various securities will be called upon or a specific or lower limit to her liabilities. The solicitor should not give any confirmation to the bank without the wife's authority."

[32] In this case, as she averred in paragraph 13 of her grounding affidavit, the defendant received advice from a solicitor in the Belfast firm of C&H Jefferson. Conflicting affidavit evidence has been provided by the parties as to the circumstances in which the advice was given and the extent of the advice. The plaintiff argues that it is sufficient to look at the letter dated 13 February 2009 from C&H Jeffersons to show that the bank had fulfilled its Etridge obligations, whereas

the defendant says that in fact the bank paid lip service only to those obligations. An interlocutory court will always be cautious about reaching a decision on an issue such as that. Unless the evidence of the defendant is so implausible that this court can place no reliance upon it whatsoever, it is inappropriate for this court to embark upon a detailed weighing of that evidence in order, as it were, to arrive at some sort of provisional view as to the likely outcome of a full hearing of the evidence as to the advice provided at trial (per Girvan J in McCullough v BBC and Gillen J at paragraph [35] in Bank of Ireland v Coulson). This applies in all applications to set aside default judgments, but particularly so in cases where the meritorious defence relied upon is one such as undue influence, where the question for the court, having heard all the evidence, is whether or not, if the relationship is one which gives rise to a presumption of undue influence, the plaintiff has done enough to rebut that presumption, (Lord Scott in Etridge at paragraph [219] already quoted at paragraphs [25] and [28] above). In other words, to borrow Lord Nicholls words: "Whether it will be proper to infer that outside advice had an emancipating effect, so that the transaction was not brought about by the exercise of undue influence …". Warne & Elliott in Banking Litigation at paragraph 3-009 caution that the question as to whether a solicitor who has given the advice sought by the bank, has actually brought home to the guarantor the risks the guarantor was running by standing as surety, "is not always easily resolved at an interlocutory stage." This court may form its own view as to the strength or weakness of the parties' respective positions, but that view, based as it is on an early assessment of affidavit evidence cannot equate to a judgment reached by a judge who has had an opportunity to hear the entirety of the evidence including cross examination of witnesses. Whatever reservations this court may, or may not have, as to the reliability of this defendant's account, they are not such that the court could or should, without very strong reason, at this stage hold that her entire evidence is unreliable. That being so it follows that this court must at this stage, conclude that the defendant has done enough to satisfy it that she has an arguable defence based upon undue influence, and set aside the default judgment, and give leave to defend on that issue.

(c) Failure to Advise

[33] The defendant has sought to raise an additional arguable defence based on the plaintiff's failure to advise the defendant in the exceptional circumstances of this transaction, which arise from the sheer size of her potential exposure and also the insistence by the bank that the company enter into an interest rate swap agreement (a mechanism for spreading risk) in respect of the various loans guaranteed by the defendant. The plaintiff adduced evidence that this in fact this was the 3rd such interest rate swap agreement between the parties and the defendant therefore had prior experience of them. That of course would be a matter of disputed evidence which this court should not endeavour to resolve at the interlocutory stage for the reasons set out in the foregoing.

[34] However, before we get to that point it must of course be shown by the defendant that the argument stands up in law. The defendant's argument is not entirely unsupported by authority. She concedes that in the normal way a bank owes no duty of care in tort or contract to advise prospective guarantors: Barclays Bank Plc v Khaira [1992] 1 AC 180 and Union Bank of Finland v Lelakis [1995] CLC 27, but both cases acknowledged that in certain exceptional circumstances a bank could incur a liability to advise a prospective guarantor. Warne & Elliot at 2-09 note that some transactions are so unusual or sophisticated that they are "bound to be preceded by an explanation or description of some kind by the bank." Bankers Trust International Plc v PT Dharmala Sakti Sejahtera [1995] 4 Banking Law Reports 38 concerned interest rate swap agreements and in that case Mance J did consider whether the complexity and novelty of the product took it outside the normal commercial relationship between bank and customer, but he did not decide the point because on the facts the nature of the commercial relationship was not such as to justify the imposition of a wider advisory role on the bank.

[35] More recently that bank customer relationship, and any duty by a bank to advise, was considered by Lord Millett in National Commercial Bank (Jamaica) Ltd v Hew [2005] UKPC 51 at paragraphs [13] and [14]. In that case the defendant sought

to argue that the bank owed him a duty to advise in circumstances where the wisdom of the commercial venture for the purposes of which he was requesting the loan was in question. He stated:-

> *"[13] The legal context in which this question falls to be decided is well established. In Banbury v Bank of Montreal [1918] AC 626 at 654, Lord Finlay LC said:*
>
> > *'While it is not part of the ordinary business of a banker to give advice to customers as to investments generally, it appears to me to be clear that there may be occasions when advice may be given by a banker as such and in the course of his business … If he undertakes to advise, he must exercise reasonable care and skill in giving the advice. He is under no obligation to advise, but if he takes upon himself to do so, he will incur liability if he does so negligently.'*
>
> *[14] It is, therefore, not sufficient to render the bank liable to Mr Hew in negligence that Mr Cobham knew or ought to have known that the development of Barrett Town with the borrowed funds was not a viable proposition. It must be shown either that Mr Cobham advised that the project was viable, or that he assumed an obligation to advise as to its viability and failed to advise that it was not. Their lordships have examined the transcripts of the trial with care, and have failed to find any evidence to support any such finding."*

[36] In relation to a failure to advise a customer, Warne & Elliot: *Banking Litigation* (1999 edn.) p 28 states:

> *"A banker cannot be liable for failing to advise a customer if he owes the customer no duty to do so. Generally speaking, banks do not owe their customers a duty to advise them on the wisdom of commercial projects for the purpose of which the bank is asked to lend them money. If the bank is to be placed under such a duty, there must be a request from the customer, accepted by the bank, under which the advice is to be given"*

Warne and Elliott also quote Lord Millett at paragraph [22] of National Commercial Bank (Jamaica) Ltd v Hew where he states:

> *"It may well have been foolhardy of Mr Hew to embark on the project without obtaining estimates of the likely costs and cash flow forecasts; but the bank was under no duty to advise him against such a course. It may have been unwise of Mr Cobham to have lent the money without insisting on being provided with such estimates and forecasts and without having conducted a feasibility study of his own. But, as Mr Cobham explained, any such study would have been for the bank's protection, not Mr Hew's. The reason he did not call for such a study is that he did not think that the bank's interests required it; the bank had sufficient security to support a much larger loan than anything that was contemplated at the time. This is a useful illustration of the truism that the viability of a transaction may depend on the vantage point from which it is viewed; what is a viable loan may not be a viable borrowing. This is one reason why a borrower is not entitled to rely on the fact that the lender has chosen to lend him the money as evidence, still less as advice, that the lender thinks that the purpose for which the borrower intends to use it is sound."*

[37] Hew of course arose against a very different background to the present case, which concerns an allegation that the bank failed to advise in the exceptional circumstances of a loan swap agreement and very large potential exposure for the guarantor; whereas in Hew, where no such duty to advise was found, the allegation was that the bank ought to have warned the defendant in respect of the wisdom of the venture for which he was borrowing money. But the Hew case is nevertheless relevant in that it reiterates the underlying principles regarding a bank's duty to give advice, and shows the difficult position in which a bank, acting primarily as a lender, can find itself from the very nature of the transaction taking place. This highlights the need for clarity in terms of the duty to advise which a bank undertakes, if any, and why the law must be cautious about implying terms which include the duty to advise, into the contract between the borrower and lender. It seems to me that that need for caution arises whether the attempt to impose on the bank a duty to advise arises in respect of questions about the purpose for which a loan is requested and granted, or to the complexity of the contractual relationship or the financial product being provided, as in the present case. Given the basic principles and reluctance by courts to impose upon banks a

duty to advise in the absence of clear contractual terms evidencing the intention of the bank to adopt an advisory role, and there being no suggestion of such clear contractual terms in this case, such authority as is relied upon by the defendant to impose such a duty to advise is sparse. It amounts at best to an attempt to push out the established boundaries, or to put it another way, is simply too speculative to demonstrate a defence on the merits or a defence which had prospect of success. I am not therefore satisfied that the defendant has demonstrated that she is entitled to have default judgment set aside and leave granted to defend the action, on the basis of the plaintiff's failure to advise in the exceptional circumstances of the case.

[38] In summary, I order that the default judgment entered 10 January 2012, being a regularly obtained judgment, be set aside, and that the defendant have leave to defend the plaintiff's claim on grounds that she has demonstrated that she has a meritorious defence based on undue influence. I will hear counsel on the issue of costs.