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Judgment: approved by the Court for handing down | *Delivered:* **22/06/2012**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISON

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BETWEEN:

ULSTER BANK IRELAND LIMITED
-and-
ULSTER BANK LIMITED
As Security Trustee for the Finance Parties

Plaintiffs/Respondents;

-and-

MICHAEL ADRIAN TAGGART
-and-
JOHN DESMOND TAGGART

Defendants/Appellants.

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McCLOSKEY J

I INTRODUCTION

[1] These are separate, inter-related actions in which the Plaintiffs sue the Defendants on foot of guarantees allegedly executed by the Defendants on 8th August 2007 and 30th November 2007 respectively. The Plaintiffs successfully applied for summary judgment in both cases. The Master made orders in the Plaintiffs' favour in the amounts of £5 million and €4.3 million. The Defendants challenge these orders before this court.

[2] The Plaintiffs are banking organisations engaged in the business of providing conventional banking facilities and services. The Defendants carry on business as builders and developers. Both Defendants are directors of Taggart Holdings Limited, a member of the Taggart group of companies (which I shall describe as "*the Taggart Group*"). The Defendants have shareholdings of 51% and 49% respectively in

the Taggart Group. The latter is a multi-million pound business which, until recently, had a turnover which was at one stage £165 million per annum. The Defendants' construction and development business activities have been conducted both locally and further afield. A substantial growth in the Group's profits in 2006 was widely reported. In May 2007, the "Ulster Business" publication described the Group as " *one of Ireland's fastest growing house builders, with significant investment interests in the UK, France and New Zealand*". The first-named Defendant ("MT") described a plan to increase housing unit sales to 1,000 units annually from 2007 and to achieve an annual turnover in excess of £1 billion by 2012. In 2006, the Group purchased Fraser Estates for an amount variously described as £88 million and £100 million. In September 2006, the Sunday Independent Business described the Defendants as "*the richest business people in the country*". The Defendants' own affidavits describe their turnover for year ended December 2006 as £112 million. The Taggart Group has been in administration since 20th October 2008, the administrator being PWC. Based on all the evidence, it seems to me appropriate to describe the Defendants as experienced businessmen, whose business activities have involved them in extensive dealings with financial and lending institutions.

Chronology

[3] I record the following landmark dates and events:

(a) **27th October 2006**: the first "Kinsealy" guarantee.

(b) **5th June 2007**: the first of the Plaintiffs' Credit Committee reports belonging to this period.

(c) **28th June 2007**: engagement of KPMG by the Defendants.

(d) **29th June 2007**: the bank's letter of instructions to their solicitors (McKees).

(e) **19th July 2007:** the date when the second-named Defendant ("*JT*") executed, unilaterally, what I shall describe as "the August 2007 guarantee" (which was held in escrow).

(f) **23rd July 2007:** the "July 2007 facilities letter".

(g) **6th August 2007:** the KPMG "Cash Flow Forecast" report.

(h) **8th August 2007:** *inter-partes meeting,* during which the Plaintiffs and Defendants executed the August 2007 guarantee.

(i) **22nd November 2007:** the "November 2007 facilities letter".

(j) **30th November 2007:** the second Kinsealy guarantee.

(k) **12th September 2008**: the Plaintiffs' letters of demand to the Defendants, requiring payment on foot of both guarantees.

(l) **18th May 2009:** pre-action letters from the Plaintiffs' solicitors to the Defendants similarly demanding payment.

(m) **4th June 2009:** Writ of Summons in the first action (concerning the August 2007 guarantee).

(n) **9th June 2009:** Writ of Summons in the second action (concerning the second Kinsealy guarantee).

(o) **3rd December 2009**: service of the Statement of Claim in both cases.

(p) **23rd December 2009:** Order 14 Summonses.

(q) **December 2009 – January 2011**: generation of 16 affidavits in connection with the Order 14 applications.

(r) **7th January 2009**: Writ of Summons issued by the Defendants against the Plaintiffs claiming damages for negligent mis-statement, misrepresentation and breach of contract.

(s) **3rd March 2011:** combined judgment of the Queen's Bench Master.

(t) **14th March 2011:** Notices of Appeal.

(u) **29th March 2011:** Statement of Claim in the Defendants' action against the Plaintiffs.

(v) **June 2011 – March 2012**: generation of twelve further affidavits in connection with the Order 14 appeals.

(w) **20th July 2011**: Tughans' replies to interrogatories in the action of ***Tughans Solicitors –v- Taggart Maples LLC*** in Florida Circuit Court, USA.

(x) **13th and 14th June 2012:** hearing of these appeals.

(y) **22th June 2012**: date of this judgment.

II THE LITIGATION DISPUTE IN OUTLINE

The August 2007 Guarantee

[4] The first of the Plaintiffs' actions against the Defendants is founded on a written deed of guarantee dated 8th August 2007. The Plaintiffs' case is that, pursuant to this guarantee and in consideration of financial facilities provided, the Defendants' unconditionally and irrevocably guaranteed payment to the Plaintiffs, on demand, of all indebtedness of Taggart Holdings Limited, subject to a financial ceiling of £5 million. The Plaintiffs assert that by reason of the escalation of the debt of Taggart Holdings to some £10.7 million, payment of £5 million was demanded on 12th September 2008. No payment having been received and following a further solicitors' letter of demand dated 18th May 2009, proceedings were duly initiated, by Writ of Summons issued on 4th June 2009. As recorded above, the Plaintiffs' application for summary judgment succeeded.

The Second Kinsealy Guarantee

[5] In the second action, the Plaintiffs' case against the Defendants is founded on a written guarantee dated 30th November 2007 ("*the second Kinsealy guarantee*"). The Plaintiffs' claim that, pursuant thereto, the Defendants unconditionally and irrevocably guaranteed payment to the Plaintiffs, on demand, of all indebtedness of Taggart Holdings, subject to a financial ceiling of €4.3 million, in consideration of the provision by the Plaintiffs of financial facilities to the company. The Plaintiffs contend that this guarantee was additional to any other extant guarantee or security. It is claimed that by 28th August 2008 the company's indebtedness to the Plaintiffs was around €14.5 million and that, in particular, the company was unable to discharge its obligations to the Plaintiffs pursuant to a loan agreement dated 14th October 2004. On 12th September 2008, the Plaintiffs demanded payment by the Defendants of €4.3 million under the guarantee. No payment having been made, and following a solicitor's pre-action letter dated 18th May 2009, proceedings were issued on 4th June 2009 and, in due course, the Master acceded to the Plaintiffs' application for summary judgment.

The Defendants' Riposte

[6] As appears from the litigation chronology, beginning at paragraph [3](m) above, the twin applications for summary judgment followed hot on the heels of service of the two Statements of Claim. The evolution of the litigation was such that no Defence has been served in either case. As a result, the defences which the Defendants raise are to be found in a combination of the affidavits filed on their behalf [thirteen in total] and the written and oral arguments of their counsel. In very brief compass, the Defendants raise issues of misrepresentation, non-disclosure and unilateral mistake. It seems to me that, properly analysed, as regards the August 2007 guarantee, the Defendants further make the case that they complied fully with the true terms of this agreement, with the result that the Plaintiffs' demand and

ensuing proceedings are in breach thereof and, given the Defendants' full discharge of their contractual obligations, there can be no liability on their part. As regards the second Kinsealy guarantee, the Defendants make the case, in essence, that this is vitiated by misrepresentation: their main (though not sole) contention is that the Plaintiffs misrepresented this as a mere replacement guarantee entailing the imposition of no altered or extended liabilities on the Defendants.

The Evidence

[7] In accordance with conventional practice, all of the evidence considered by this court (and below) has taken the form of affidavits and documentary exhibits. None of the parties sought to cross-examine the deponents of affidavits filed on behalf of their adversary. Ultimately, there was a veritable proliferation of affidavits [28 in total], augmented by voluminous documentary materials. As appears from paragraph [3] above, sixteen affidavits were generated at the first instance stage of these proceedings, while a further twelve have materialised post-Notices of Appeal. One consequence of this phenomenon is that the evidential matrix at the appellate stage differs from that prevailing when the Master gave judgment. It is unnecessary to elaborate on the reasons for this evolution. I have considered all affidavits and documents in full. What follows is an outline of the more salient aspects of the evidential matrix before the court.

III THE AUGUST 2007 GUARANTEE

[8] The August 2007 guarantee was preceded and surrounded by certain material events and communications, both internal and *inter-partes*. I propose to review the most significant of these, beginning with the internal Credit Committee reports of the Plaintiff generated in June 2007.

The Credit Committee Reports of June 2007

[9] These reports, coupled with other materials, confirm, *inter alia*, that two of the Plaintiffs' protagonists throughout the events under scrutiny were Messrs. Barr and Ennis, who have sworn several affidavits in these proceedings. The deliberations and recommendations of the Plaintiff's internal Credit Committee are documented in certain reports. In the evidence before the court, the first of these is dated 5th June 2007. The subject matter of this report is, broadly, the Plaintiffs' perception of the unacceptable level of the Taggart Group's indebtedness to the Plaintiffs. The report records certain proposed fund raising activities on the part of the Defendants and examines, in turn, the discrete issues of loan to value ratio ("*LTV*"), exceeding overdraft limits, rebounding company cheques, house completions and the provision of financial information. This report suggests that there has been an LTV covenant breach and excessive drawings, attributed to over ambitious growth plans and inadequate internal financial controls. The possibility of requiring "*additional personal guarantee support*" from the Defendants personally is considered, but

rejected. The next report of this *genre* is dated 19th June 2007. This reiterates the same perceived mischiefs. It documents "*numerous meetings with the customer … including the full Board of Directors of Taggarts (including Michael and John Taggart …* [and] *the Group's auditors, KPMG*", during recent weeks. In passing, this provides support for the later averments in the Defendants' affidavits to like effect. It notes a current LTV of 70.5%, projected to reduce to 68% and records two concrete fund raising measures, namely refinancing of the Group's Manchester operations by the Bank of Scotland and the sale of one of its assets, Fraser Estates. The report continues:

> "*Both of the above proposals for regularisation are now being taken forward by Taggarts with substantial progress expected by 31st July 2007.* ***In the interim,*** *we have also agreed that Michael and John Taggart are to provide personal guarantees to a level of our satisfaction. We have discussed this with Credit and it has been agreed that the level of £5 million joint and several guarantees is considered appropriate in these circumstances*".

[My emphasis].

For convenience, I interpose the observation that the Defendants contend that the passage quoted immediately above, considered in its full context, supports the central plank of their defence to the August 2007 guarantee action, viz. that it was to be of temporary duration only and that they complied with the associated requirements.

[10] The "General Purpose Report" of the Plaintiffs' Credit Committee, dated 5th June 2007, noted certain recent excesses (of circa £1.2 million) on the current accounts of Taggart Holdings and a breach of the LTV covenant. The report further recorded that since 2005 the Defendants had pursued an ambitious growth strategy in the north-west of England through their Manchester Division, entailing some nine sites for around £21 million, all funded by the Plaintiffs and another bank. Three of these sites were being developed and none of them was generating income. Having rehearsed certain facts and factors, the report continued:

> "*We regard this situation as unacceptable for a business the size of Taggarts (total debt of £266 million mostly in SPVs with third party equity and about to complete on the £96 million Millmount acquisition) and believe it has contributed to the lack of adequate financial control within the Group*".

The report noted certain evolving possibilities designed to provide finance for the Group. A breach of the LTV covenant was documented, in the context of potential measures designed to address this default. The report, under the rubric "Excess Position", continued:

> "*The excess position peaked last week at £2.3 million, at which time cheques for £300,000 were returned … the excess has reduced to £1.2 million …*".

The report concluded:

> "*Taggarts' ambitious growth plans for Manchester and inadequate financial controls within the Group are the primary reason for the current excess position and LTV covenant breach …*
>
> *Provision of financial information and forecasts has been poor this year and we have been cautious to the Group recently as evidenced by the fact that we have only £25,000 of the Group's debt*".

The report contemplated, as a possible measure, the possibility of requiring further personal guarantees from the Defendants, in addition to the extant €4.3 million guarantee. One of the internal responses to the report described –

> "*… a serious lack of financial planning and control on the part of the customer whilst pushing forward with a highly ambitious strategy for growth without ensuring an adequate capital base or cash flow …*".

[11] An updated version of this report was produced on 19th June 2007. The names of Messrs. Barr and Ennis, both of whom later swore affidavits in these proceedings, are associated with both reports. The second report recorded that "*… significant work remains to be done to achieve a satisfactory outcome*". Next, by letter dated 29th June 2007, the Plaintiffs instructed McKees in the following terms:

> "*We should be grateful if you would act on behalf of the Banks in taking the security in favour of the Banks referred to below …*
>
> ***Security required (in addition to that already held)**:*
>
> *Joint and several personal guarantee from Michael Taggart and John Taggart in the amount of £5 million*".

This letter of instructions, which included other significant contents, was signed by Mr. Barr. This was the impetus for certain ensuing communications between McKees and Tughans, mainly by the medium of e-mail. These communications were not constant. Rather, they were characterised by peaks and troughs and spanned the period 4th July to 9th August 2007.

June – August 2007: E-mails and Letters

[12] The Plaintiffs' internal resolution to seek to secure personal guarantees from the Defendants in the amount of £5 million was duly reflected in their letter of instructions to McKees, dated 29th June 2007. Broadly, at this juncture, the Plaintiffs were taking steps to implement certain proposed courses of action. It was noted that KPMG had been engaged on behalf of the Defendants (*infra*). During the immediately ensuing period, the protagonists – on paper – became McKees and Tughans. McKees, acting speedily, prepared a £5 million personal guarantee to be executed by the Defendants, forwarding this to Tughans as early as 4th July 2007. Notably, execution of this did not occur until five weeks later. During the intervening period, the solicitors exchanged communications by e-mails and letter. One of the Tughans' e-mails, dated 16th July 2007, recorded that the Defendants were in continuing discussion with the Plaintiffs "*… about the nature of the guarantees (**specifically the time period after which they fall away**)*" [my emphasis]. *On its face,* this communication is suggestive of an anxiety on the part of the Defendants to secure that any guarantees to be imposed upon them would be time limited and is indicative that this was, at this stage, a live, unresolved issue. It is not without significance that execution of the guarantee was declined on this basis. By further e-mail dated 18th July 2007, Messrs. Tughans proposed a specific clause requiring the Plaintiffs to review the need for the personal guarantees at three monthly intervals. This is reflective of my observation above. The Plaintiffs then confirmed to McKees that they would resist inclusion of a clause to this effect and this was duly conveyed to Tughans. Notwithstanding, in their detailed e-mail of 19th July 2007, Tughans informed McKees, *inter alia*, that the Plaintiffs –

> "*… are still in discussion with* [your clients] *on the facility to be provided …*",

with the result that whereas JT had signed the personal guarantee this "*… should be held in escrow pending our respective clients' agreement*". In passing, MT has averred that he was unaware of this e-mail (see paragraph [25] of his third affidavit). Notwithstanding, this communication is suggestive of the absence of any final agreement between the parties. One particular feature of the documentary trail belonging to this important period is the "twin track impression" which emerges: whereas the actions of both parties' solicitors are a clear reflection of the Plaintiffs' letter of instructions to McKees, there are emerging indications that a separate, parallel track was evolving, entailing direct communications between the Plaintiffs and the Defendants. The apparent absence of inter-solicitor communications, coupled with the apparently small number of solicitor/client communications, during the phase 19th July to 8th August 2007 lends some support to this analysis.

[13] One of the key e-mails belonging to this period is that sent by Tughans to McKees on 18th July 2007. The clear thrust of this is that the Defendants were committed to executing the £5 million personal guarantee, which was described as

"*agreed*"; that this would be of "*unlimited duration*"; that the Defendants were requesting a clause requiring the Plaintiffs to review the necessity for the guarantee at three-monthly intervals; that all existing personal guarantees, other than the first Kinsealy guarantee, would be discharged; and that JT would execute the guarantee the following day, with MT to follow suit the following week. By an e-mail dated 19th July 2007, McKees informed Tughans:

> "*Here is the guarantee - £5 million on the nose. The bank will not concede the three month review point*".

The guarantee was clearly attached to this e-mail. It was duly executed by JT, on the same date, and held in escrow. Later on the same date, 19th July 2007, Tughans e-mailed a "*suite of documents*" to McKees, including the joint personal guarantee, stating:

> "*Please note that Taggarts are still in discussions with Ulster on the facility to be provided – accordingly, these documents should be held in escrow pending our respective clients' agreement…*
>
> *The Personal Guarantee has been signed by John Taggart only. I understand the bank have agreed that Michael can sign on his return next week.*"

By a subsequent e-mail dated 20th July 2007, Tughans confirmed to McKees that the personal guarantee was to be treated as "*live*". The next material development was the facilities letter of 23rd July 2007 – see paragraph [3](f) above – which was subsequently signed by Mr. McHugh (then the Taggart Group's managing director) and JT, on behalf of Taggart Holdings, on 8th August 2007 viz. the same date on which the August 2007 guarantee was executed (containing the signatures of both Defendants and Mr. McHugh). It is clear that the signatures and executions which preceded the further events of 8th August 2007 did *not* finalise the financial arrangements between the parties. Rather, they represented something partial and incomplete only. Following the events of 8th August 2007 (*infra*), on 10th August 2007, McKees received from Tughans the original, duly executed guarantee, under cover of a letter dated 9th August 2007 from Tughans. The latter letter contains no hint of the "*temporary*", or time limited, qualification which was to surface in due course in these proceedings as a major plank of the Defendants' resistance to the first of the summary judgment applications.

The July 2007 Facilities Letter

[14] The August 2007 guarantee is inextricably linked with what I have described above as the July 2007 facilities letter. Both formed part of the overall whole of the financial arrangements struck between the parties. Properly analysed, these are to

be viewed as a series of contracts. While the "facilities letter" was the main, or dominant, contract the August 2007 guarantee which followed was a freestanding, though inter-related, contractual instrument. The essential thrust of the overall arrangements constituting the parties' bargain was the provision of a series of financial facilities by the Plaintiffs to the Defendants, coupled with the imposition of repayment and other, related obligations on the Defendants and other potential financial liabilities, including those arising out of the guarantee. Once executed, the July 2007 facilities letter acquired the status of a binding agreement made between and signed by the parties. This agreement embodies the following terms in particular:

(a) That the Banks would approve a draw down of £1,700,000 (£850,000 each Bank) from the Taggart Group's land loan accounts to the current accounts held with the Ulster Bank subject to the terms and conditions of the July 2007 Agreement which were in addition to and should be read in conjunction with the previous facility letters entered into between the parties;

(b) The Ulster Bank accounts were to operate within the approved £647,000 limit;

(c) KPMG was to review financial information and report to the Banks as detailed in their letter of engagement dated 28th June 2007;

(d) Certain financial information was to be provided by the Taggart Group to the Banks;

(e) Updated professional valuations of the Group's Harrington, Lumb Mill and other relevant sites were to be provided as soon as available;

(f) The Taggart Group would continue to progress the disposal of the FEL and update the Banks in "a timely manner";

(g) The Group's Manchester division was to be re-financed. The Taggart Group was to update the bank on progress in a timely manner. The refinance was to ensure that in future the Bank's Club Facility operated within all covenants including the 70% LTV covenant and that the Defendants overdraft facility operated within its approved limit;

(h) The Taggart Group was to provide the 30% equity element required for the acquisition of the Royton site from outside the Club Facilities. The Banks would provide a 70% funding on the basis of a satisfactory PV;

(i) All outstanding interest on the Club Bank Facilities were to be brought up to date;

(j) The Defendants were to provide joint and several personal guarantees;

(k) LTV was not to be in excess of 70%.

The reference to the personal guarantees is to be noted. This letter was generated by the Plaintiffs on 23rd July 2007. The offer which it contains was duly accepted by the Defendants, as evidenced by their personal signatures on the same date as that of execution of the August 2007 guarantee viz. 8th August 2007. This was, of course, a climactic date on which, *inter alia*, the evidence suggests that a "multi-disciplinary" summit meeting, attended by all relevant parties and their representatives, occurred.

The KPMG Report of 6th August 2007

[15] This report forms part of the context in which the events of July and August 2007 unfolded. The evidence shows that KPMG were formally engaged by the Defendants on or about 28th June 2007. They were retained to provide a range of specified financial/consultancy services. Mr. Hansen was to be their main representative. The contracted services included appropriate meetings between KPMG and representatives of the Plaintiffs. The contractual period was to be of four weeks' duration, commencing (mainly) on 9th July 2007. Their ensuing report was dated 6th August 2007. This date is far from insignificant, preceding as it did the "summit" meetings between the parties two days later. In their report, KPMG advised, *inter alia*:

> "*The forecast loan to value (LTV) for each operation and on a consolidated basis at each of the three key funding periods are* [sic] *set out …*
>
> *Weekly forecast LTVs are included …*
>
> ***The forecast LTVs show a significant reduction from a consolidated LTV as at 31st July 2007 of 65.5% to 53.7% after refinancing of Manchester, a further reduction to 28.7% after injection of £5 million from the sale of Fraser Estates and a ... end position of 34.2%.***"

[My emphasis].

The Defendants place some emphasis on this passage and, in their affidavits, claim that this issue featured in discussions with the Plaintiffs at the ensuing meeting on 8th August 2007. The KPMG report further forecasted an increasing funding requirement to a peak of £4.9 million in early September 2007, reducing to £4 million by 14th September 2007, later peaking at £5.6 million in late October 2007 with, ultimately, an overdraft requirement reduced to "*a negative cash position*" at the beginning of November 2007 and projected to be £1.3 million at the end of December 2007. The report, under the rubric of "Cash Flow Forecast", concluded:

> "*Management are seeking the support of Ulster Bank and Bank of Ireland throughout the period covered by the above forecast*".

[16] It is appropriate to interpose here some of the key averments in the third affidavit of MT:

> "*Despite KPMG's conclusion that the LTV was currently within range … the* [Plaintiffs] *continued to take issue with the LTV because the KPMG report projected that it would rise above 70% temporarily for a short period before dropping to 53%. This was discussed at length at this meeting* [on 8th August 2007] …
>
> *The Bank did not accept that the LTV issue was resolved because of this projection. Mr. Ennis said therefore that the Group would not be able to draw down any further funds unless we signed the personal guarantees…*
>
> ***Throughout this period I had always resisted signing even a single 'temporary' PG but did so on 8th August on the basis that Mr. Ennis stated that the Bank would not continue to work with the Group unless the Guarantee was signed. Mr. Ennis confirmed on 8th August that the Guarantee was a temporary measure. John* [JT] *and I signed the Guarantees on that day only on the basis that they were temporary and required only to cover any period when the LTV was in excess of the 70% limit ..."***

[My emphasis].

The Defendants contend that these averments are supported by the facilities letter of 23rd July 2007 (*supra*) which, they submit, forges an indelible link between their joint personal guarantee of £5 million and the confinement of LTV to a maximum of 70%. They further submit, in this context, that the averments of Mr. Ennis (in paragraph 48 of his second affidavit) that the Taggart Group would be forbidden from drawing down any further funds absent execution of the Defendants' personal guarantees are confounded by the aforementioned July 2007 facilities letter.

The Plaintiffs' Notes of the Meeting on 8th August 2007

[17] It is undisputed that on 8th August 2007, there was a meeting attended by Messrs. Barr and Ennis (on behalf of the Plaintiffs), both Defendants and certain KPMG representatives. I have already described this as an event of unmistakable importance. What was transacted during this meeting is, of course, a matter of

contention. The evidence contains what purport to be the contemporaneous notes of one of the attendees, Mr. Ennis. While this records various steps and measures, it makes no mention of the August 2007 guarantee. However, the Defendants' affidavits are insistent that this issue was canvassed and they contend that this finds support in the second affidavit of the Plaintiffs' solicitor, Ms Glenn (cf. paragraph 18). Whereas it is highlighted on behalf of the Plaintiffs that neither the word "*temporary*" nor any synonym features in the record of Mr. Ennis, it is retorted on behalf of the Defendants that his notes do not mention the August 2007 guarantee at all. The notes of Mr. Ennis, the duly executed guarantee and the ensuing formal inter-solicitors' letters of 9th and 10th August 2007 signalled the end of this discrete phase.

The Defendants' Affidavits: Some Particular Features

[18] I have already outlined above the issue of proceedings in both actions (in June 2009) and the two applications for summary judgment, each dated 23rd December 2009, supported by a relatively formal affidavit sworn by the Plaintiffs' solicitor. The next landmark development occurred in March 2010, when the first of the Defendants' replying affidavits, sworn by MT, was filed. In this affidavit, MT:

(a) Questioned the date of Mr. McHugh's signature (8th August 2007 or 7th August 2008?), thereby putting in issue the validity of the August 2007 guarantee.

(b) Said nothing about his apparent aforementioned absence from the country.

(c) Asserted "*intense pressure which impaired my capacity to have time to reflect on the significance of the guarantee*".

(d) Attributed to an unidentified solicitor a representation to the effect that "*… we did not require to obtain* [independent/individual] *advice because the Personal Guarantees* [sic] *were only a temporary measure whilst an issue in relation to LTV (loan to value) was resolved between the Group and the Banks. Against a background of the pressure placed on my brother and I that the Banks would cease to support the Group against an agreed overdraft (whose limits had not been exceeded), would stop all cheques and the personal pressure for preparation for my wedding, my brother and I reluctantly agreed to sign the guarantees* [sic], *and on the understanding that these were only temporary*".

(e) Asserted, without particulars, duress and misrepresentation on the part of the Plaintiffs.

On the same date, 4th March 2010, JT swore an affidavit which was silent on the August 2007 guarantee, focussing mainly on the second Kinsealy guarantee.

[19] In the thrust and counter-thrust which followed, all of the remaining affidavits filed on behalf of the Defendants (eleven further affidavits) were reactive to the affidavits filed progressively on behalf of the Plaintiffs. During this process, the "story" was incrementally augmented, ***by all parties***, and a bigger picture gradually emerged. MT's second affidavit was sworn seven months after his first. This expressed an intention to have affidavits sworn by further deponents, two of whom did not, in the event, do so. MT further averred:

> "*If the hearing of the summary judgment application is adjourned I will be providing much greater detail in support of our defences including the circumstances of the signing of the* [August 2007] *guarantee and regarding meetings with the Plaintiffs in support of our contention that the guarantees were given as a temporary measure only until the matter of the loan to value covenants was resolved*".

This affidavit offers no explanation of why this "*much greater detail*" was not contained in either the affidavit being sworn or MT's first affidavit. I must take into account, however, that MT's second affidavit was sworn less than one week following the entrance of newly appointed solicitors on the Defendants' behalf. This was the third firm of solicitors to have represented the Defendants since the beginning of the events under scrutiny. MT's third affidavit was sworn some three weeks later. In this affidavit, the August 2007 guarantee is described, emphatically, as "***temporary***". I observe that this affidavit contains no meaningful particulars of the "***temporary***" appellation. Although the assertions of extensive discussions between the Plaintiffs and the Defendants during the relevant period are unparticularised, there are indications in other parts of the overall evidential matrix lending apparent support to this claim. The main averment in MT's third affidavit of substance is to the effect (without particulars) that Mr. Ennis informed MT that the guarantee "*… could be provided as a temporary measure required pending resolution of the LTV issue*". This affidavit continues:

> "***In the context of the above, paragraph 6 of my affidavit of 15th March 2010 requires clarification because it gives the impression that I am recounting what the Bank said at the meeting on 8th August 2007. In fact, paragraph 6 is a mixture of what I was told during the meetings and discussions with Mr. Ennis referred to above and at the meeting on 8th August 2007 and what Mr. Stewart said to me (reporting the Bank's call to our office)***".

For the reason which I have proffered, there is *arguable* substance in MT's further averments of frequent discussions with Messrs. Ennis and Barr during the period under scrutiny. Furthermore, while I have described one of MT's averments as unparticularised (*supra*), I remind myself of the need for vigilance to ensure that no

individual item of evidence is isolated from its full context, particularly in a 'trial by affidavit' scenario.

[20] At this juncture, JT swore his second affidavit. This also required "clarification", to correct a previous averment that this Defendant was in Paris on 27th October 2006 and to retract same. This Defendant further avers that he had no direct involvement in banking affairs pre-June 2007 and, thereafter, "*… I was not involved in any activity of the Group due to my ill health and did not attend any board meetings*". He also asserts minimal contact with Tughans and claims that MT "*… made the final decision on any issues about finance or legal documents*". This affidavit, while purporting to address the August 2007 guarantee, makes no mention of the unilateral version thereof executed by this Defendant in July 2007. It continues:

> "*I recall calling into the office on my way to Michael's pre-wedding party but I do not remember why we attended the office or signing any guarantee on that day. I can confirm however that it was 8th August 2007 …*
>
> ***I have subsequently been informed by Michael that an agreement was reached with the bank that this guarantee was a temporary measure to allow clarification of the LTV issue ...***
>
> *I do not recall having received any advice in 2007 from anyone about personal guarantees and I would not knowingly have entered into a personal guarantee that substantially expanded my personal liability … given* [that] *I was seriously ill; I was attempting (and have been for many months) to negotiate my exit from the Group due to illness; the Group was in a 'work out' situation with the Club Banks*".

[My emphasis].

JT swore three further affidavits. In his third affidavit, he reiterates his assertion of "*medical problems*", exhibiting a brief doctor's letter and suggesting the advent of further "*detailed expert evidence*". His fourth affidavit is properly described as perfunctory. In his fifth affidavit, he asserts ignorance of the involvement of Tughans on behalf of the Plaintiffs and claims that, possessed of such awareness, he would have "*… ensured that alternative legal advice was sought on behalf of the Taggart Group of companies in relation to the discussions that were taking place …*" with the Plaintiffs between June and December 2007.

[21] The barrage of affidavits continued. While JT swore three further affidavits, there were four additional affidavits from MT. I have considered these in full, together with the fifteen affidavits filed on behalf of the Plaintiffs. In the further affidavits filed on behalf of the Defendants, the emphasis was progressively on the

second Kinsealy guarantee and sundry further issues, including the Defendants' second action against the Plaintiffs and the Florida litigation involving Tughans.

IV THE SECOND KINSEALY GUARANTEE

[22] The focus of the Plaintiff's second action and second application for summary judgment is what I shall describe as "*the second Kinsealy guarantee*", executed on 30 November 2007. This guarantee is to be considered in conjunction with its 2006 predecessor ["*the first Kinsealy guarantee*"].

[23] It is appropriate to view the Plaintiffs' case regarding the second Kinsealy guarantee through the prism of the central issue ventilated by the Defendants in their attempted resistance to summary judgment. A main focus of attention in this respect is the alleged conduct of the solicitors representing the Plaintiffs at the material time, Messrs. McKees. It is acknowledged that *both* firms of solicitors representing the parties recognised the problematic nature of the previous security. It is contended that Messrs. McKees were guilty of misrepresentation by presenting the new arrangement to the Defendants' solicitors as a "*replacement*". The Defendants effectively make the case that the true terms of the bargain struck between the parties were to the effect that the liabilities imposed on the Defendants by the second Kinsealy guarantee were the same as those created by its predecessor. The thrust of the Defendants' resistance does not merely cast aspersions on the professional conduct of Messrs. McKees on behalf of the Plaintiffs. It also calls into question the professional conduct of and services provided by their own solicitors, Messrs. Tughans.

[24] Against the background outlined above, I shall highlight (only) some of the salient features of the evidence. The first Kinsealy guarantee, which is dated 27th October 2006, focussed on a financial guarantee undertaken by both Defendants in the amount of €4,300 in respect of the so-called "Facility 11". This guarantee was plainly directly associated with a "facilities letter" agreement between the parties, bearing the same date, which defined Facility 11 as "*demand loan for €4,300*" and stated:

> "*This facility is to be repayable on demand …*
>
> *This facility shall be repaid at €36,000 (or Sterling equivalent) per completion at the Forthill and Rochford Manor developments or from the same of a site, whichever is the earlier*".

I pause here. The Defendants contend that there is no evidence that they at any subsequent time agreed to any variation of this repayment mechanism, with the result that any purported variation thereof is unlawful. Approximately one month later, on 29th November 2006, the Plaintiffs' Credit Committee compiled one of its

"General Purpose Reports". This documented a LTV breach of 74.5% (exceeding the agreed limit of 70% and continued:

> "*It was agreed that the LTV breach would be regularised by increased site fines on residential agreements in Trim and Ballycarry and the four site sales. We are now in receipt of satisfactory solicitor's confirmation that the company's site known as Atlantic Wharf in Londonderry is the subject for an unconditional contract for sale at £6 million …*
>
> *We are agreeable to the reduction in pricing to 1.75% on Kinsealy and a reduction in site fines on Trim and Ballycarry to usual levels …*".

This report is linked to one of the *inter-partes'* e-mails, which makes no reference to the extant contractual site fine of €36,000 per property (*supra*). In this context, the Defendants highlight the following averment in one of Mr. Barr's affidavits:

> "*To the best of my knowledge I am not aware of any concerns being raised in relation to the balance due on the Facility 11 account or the payments to the account*".

In his next affidavit, Mr. Barr avers that he "*would have*" discussed certain issues with Mr. McHugh (of the Defendants) and suggests that one of Mr. McHugh's e-mail responses "*run with this*" is "*unequivocal*". Mr. Barr further deposes to the "*belief*" that "*earlier*" [unexhibited] *e-mails "would have"* included reference to the €36,000 site fines. The *potential* frailties in Mr. Barr's averments are self-evident.

[25] During the events preceding execution of the second Kinsealy guarantee, McKees and Tughans were in communication with each other. In an e-mail dated 22nd November 2007, McKees stated:

> "*I … now enclose … the personal guarantee …**the personal guarantee mirrors the original guarantee we issued ... last year – it is just for the €4.3 million and costs in the usual way, but is no longer facility specific, as Facility 11 will disappear on refinance. The amount I believe does relate to the 'equity' in Kinsealy and on that basis forms part of the overall*** **[Taggart Homes Ireland Limited]** ***Facility 12***".

[My emphasis].

Some of the words to which I have added emphasis are highlighted on behalf of the Defendants in support of their emphatic contention that the true nature of the November 2007 agreement between the parties was that there would be no enlargement of the Defendants' extant 2006 Kinsealy guarantee liabilities. The

aforementioned e-mail coincides with the facilities letter of 22nd November 2007, designed to supersede its predecessors. This described itself as supplemental to the loan agreement of October 2004 and to be read in conjunction with previous facilities letters dated 23rd July 2007 and 8th August 2007. It purported to *amend* all of the former, describing Facility No. 11 as a "*demand commitment*" in the amount of €4,086, involving Taggart Homes Ireland Limited and Facility 12 as a "*demand commitment*" of €19,000, involving the same corporate entity. The latter was also described as a "*demand loan*". On 29th November 2007, Tughans wrote to the Plaintiffs, enclosing two "*duly executed*" documents. The first was the "*supplemental facility letter dated 22nd November 2007*". The second was the "*letter of draw down dated 29th November 2007*", requesting "*draw down in full of €19 million made available as Facility 12 under the Supplemental Facility letter*".

[26] During the period preceding execution of the second Kinsealy guarantee, Tughans wrote to Mr. McHugh, by e-mail dated 31st October 2007, raising the following two issues:

> "*1. THIL* [Taggart Homes Ireland Limited] *lent the money to THKL* [Taggart Homes Kinsealy Limited] *in breach of the group facility agreement – it shouldn't have done so and* [the Plaintiffs] *are concerned to make sure the money comes back within the group security …*
>
> ***Under ROI law ... THKL can't properly give the guarantee ...***
>
> *2.* [The Plaintiffs] *are clearly keen to absolve this …* ".

On the basis of the available evidence, this e-mail appears to have been the immediate impetus for the ensuing execution of the second Kinsealy guarantee. On 2nd November 2007, Tughans communicated by e-mail with Mr. McHugh as follows:

> "*… Essentially the Banks want to see Kinsealy brought within the Taggart Holdings Group asap* ***and regard the proposed security assignment as a short term interim measure ...***".

[My emphasis].

In a chain of e-mail communications belonging to this period, the Defendants suggest that what was "on the table" was an elaborate, **corporate**, solution. They argue that the "mischief" identified was a breach of the laws of the Republic of Ireland, occasioned by a loan effected between companies belonging to the same group. One of these e-mails noted that the status of Taggart Homes Kinsealy Limited as a subsidiary of Taggart Holdings Ireland Limited was "*purely accidental*". One of the initial e-mails belonging to this period suggests persuasively that the genesis of the second Kinsealy guarantee was a discovery by McKees that Taggart

Homes Kinsealy Limited did not form part of the Taggart Holdings Group. As a result –

> "*…the giving of* [the 2006 Kinsealy guarantee] *should have been whitewashed within the Section 34 procedure in the Republic. It was not so whitewashed. Therefore it was not lawful for the Guarantee to be given.*"

This stimulated a suggestion by McKees that, as part of a package of remedial measures, the Defendants execute personal guarantees.

[27] I would highlight some of the further inter-solicitors' communications belonging to this period, all of which took the form of e-mails. From the outset, the mischief identified, by McKees, was an invalid loan between two members of the Taggart Group and an associated "*Group Cross Guarantee*" invalid under Irish law. On 1st November 2007, McKees proposed (in terms) that "*the guarantee* [to] *be retaken.*" One of the responses elicited from Tughans was the suggested mechanism of a formal declaration of trust. In mid-November 2007, the Plaintiff's proposed remedial measures, set out in detail in McKees' communication of 12th November 2007, did *not* include the execution of any personal guarantee by the Defendants. This is reflected in the Tughans' communication of 19th November 2007, which attached a suite of formal instruments and other documents, none of which was a personal guarantee. The McKees' response of 22nd November 2007 was "*In principle sounds fine …*", albeit not unqualified. On the same date, McKees stated:

> "*The old* [personal guarantee] *gets released – a new one (still for 4.3) goes in in support of* [Taggart Homes Ireland Limited], new Kinsealy fixed charge and guarantee".

On behalf of the Defendants, it is contended that it is at least arguable that this communication supports their "like for like" contention. This contention, they argue, gains further momentum from the next McKees' e-mail to Tughans, also dated 22nd November 2007, which attached "*the EGM Pack and the personal guarantee*" and continued:

> "*The personal guarantee mirrors the original guarantee … it is just for the €4.3 million plus interest and costs in the usual way, but is no longer facility specific, as Facility 11 will disappear on refinance.*"

[28] At this point in the sequence of events, the Plaintiffs sent their facilities letter of 22nd November 2007 to the defendants. This letter, by its terms, was expressly linked to, *inter alia*, the July 2007 facilities agreement. This letter, which was duly executed by the Defendants, apparently on 29th November 2007, thereby bringing into existence a further contract between the parties, identified, *inter alia*, certain "***cross-guarantees***". These were defined as "*the omnibus cross-guarantees to be*

executed by each of the Borrowers and Guarantors". Read in conjunction with the McKee's letter of 28th November 2007, this letter was labelled "*the supplemental facilities letter*". It was clearly designed, *inter alia*, to enable the Defendants to draw down "Facility 12" viz. the "*demand loan*" of €90 million by the Plaintiffs to Taggart Homes Ireland Limited. The aforementioned McKees' letter identified a series of duly executed instruments, which included:

> "*Personal Guarantee of Michael Taggart and John Taggart in the sum of €4.3 million in favour of the Security Trustee in support of the obligations of Taggart Homes Ireland Limited*".

On 29th November 2007, Tughans confirmed on behalf of the Plaintiffs their clients' "*acceptance of the undertakings set out above*". On the same date, Tughans forwarded the duly executed supplemental facility letter of 22nd November 2007 to the Plaintiffs and also attached a letter of draw down requesting release of the bank loan of €90 million in respect of Facility 12. On the same date, 29th November 2007, Tughans, *inter alia*, requested McKees to forward "*the letter of release in respect of the existing €4.3 million guarantee given by Michael and John Taggart in due course*". In passing, I record the Defendants' assertion that neither this e-mail nor its content was conveyed to them or to Mr. McHugh. Furthermore, I note the relevant part of the affidavit evidence in this respect, which records that, pursuant to a Khanna subpoena, Tughans confirmed (in terms) that the documents (e-mails, letters *et alia*) contained in the evidence before the court constitute the totality of all such documents in their possession, custody or power [see the affidavit of Ms Alexander of Collyer Bristow LLP]. This affidavit also contains averments to the effect that, having reviewed large quantities of documents supplied by the Defendants:

> "*There is no record within them of any discussions between Tughans and the Defendants or advice to the Defendants from Tughans in respect of the New Kinsealy Guarantee … and there is no record within them of any discussion amongst the Taggart Group Directors (whether including the Defendants or otherwise) regarding the New Kinsealy Guarantee.*"

[29] In completing this section of the judgment, I record, and repeat, my awareness that what is both averred and contended on behalf of the Defendants is strongly contested by the Plaintiffs in many significant respects. I note that the Plaintiffs' affidavits contain averments from Mr. Barr characterising the second Kinsealy guarantee as an exercise described by him as "*re-execution*" of its predecessor. In other averments, Mr. Barr acknowledges having "*no specific recollection*" of certain conversations, while asserting simultaneously that specified matters "*would have been*" discussed. In other affidavits, there are averments from Mr. Ennis which detail the dates and duration of certain mobile telephone communications with MT, decline to particularise the content thereof and,

employing the conditional tense (again) raise the possibility of *additional* telephone calls of this kind, without reference to supporting records. In this context, it was highlighted on behalf of the Defendants that there is, as a minimum, a *possible* unexplained shortfall of some £18 million in repayments allegedly made by them to the Plaintiffs (some £39 million versus around £21 million).

V THE DEFENDANTS' SEPARATE ACTION AGAINST THE PLAINTIFFS

[30] In the context of the Plaintiffs' Order 14 proceedings and appeals, the Defendants' separate action against them features as something of a satellite issue. By Writ of Summons issued on 7th January 2011, indorsed with a Statement of Claim, the Defendants claimed against the Plaintiffs:

(a) Damages (unliquidated) for alleged breach of a contract made orally in August 2007.

(b) Damages for alleged misrepresentation by the Plaintiffs to the Defendants.

(c) Rescission of the alleged August 2007 contract.

(d) The return of monies paid by the Defendants to the Plaintiffs in September 2007.

In June 2011, there was a change of solicitor representing the Defendants. Their January 2011 Writ against the Plaintiffs has been dormant since its inception. In this context, I record that, at the conclusion of his submissions, Mr. Simpson QC (on behalf of the Defendants) informed the court that the Defendants have not made any complaint to the Law Society about Tughans; they have not brought any action against Tughans; they have been in administration since 20th October 2008; and they have not sought to rely on any evidence from KPMG, notwithstanding that Mr. Hansen was in attendance at the meeting on 8th August 2007.

VII CONSIDERATION AND CONCLUSIONS

[31] I have considered the various contentions and arguments advanced in the parties' respective arguments. It is unnecessary to reproduce these *in extenso*. In argument, my attention was drawn to an earlier decision of this court in ***Maginn –v- Crossey*** [2008] NICH 13 and the following passage in particular:

> *"[17] As appears from the commentary in the Supreme Court Practice 1999, Volume 1 (pages 1567-1568), there is a close association between applications under Order 86 and those made under Order 14 of the Rules of the Supreme Court. In an application for summary judgment of this*

nature, various well established tests and principles, all of them inter-related, have been devised. The onus rests on the Plaintiff to establish that there is no defence to his claim for specific performance. Summary judgment is appropriate where the court '. . . is satisfied not only that there is no defence but no fairly arguable point to be argued on behalf of the Defendant', per Jessel MR in ***Anglo Italian Bank v.Wells*** *[1878] 38 LT 197, at page 201. Similarly it has been stated that summary judgment is inappropriate where the court concludes that there is a triable issue between the parties. Another of the established tests is whether there is 'a fair probability of a defence':* ***Ward v. Plumbley*** *[1890] 6 TLR 198. Further, it has been suggested that unconditional leave to defend should be granted where there are unexplained features of both the claim and the defence which are disturbing because they bear the appearance of falsity and disreputable business dealings and questionable conduct. In such circumstances, the court should not attempt to make tentative assessments of the parties' respective prospects of success or the relative strengths of their respective cases: see the decision in* ***Oskar*** *[1984] 128 SJ 417."*

The judgment continues:

"[18] A convenient summary of the correct approach is found in Civil Proceedings, The Supreme Court (Valentine), paragraph 11.49:

> *'The Defendant need only raise a reasonable doubt about the Plaintiff's entitlement to judgment, assuming all facts in his favour, or that serious questions of fact or law are involved. Obviously an Order 14 hearing is rarely an appropriate forum for resolving issues of fact, but if the result of the action depends on an issue of pure law, even if complex or highly debateable, it should be fully investigated and determined under Order 14'.*

I accept the submission on behalf of the Defendant that judgment under Order 86 should be refused where the Defendant raises a defence to which the court will pay some heed."

In ***Landaug –v- Saunders*** [unreported, 3rd April 2006], the English Court of Appeal stated [p. 3, transcript]:

> "*There is here a goldmine for cross-examination … when one looks at the totality of that evidence, one is not left in a situation where one has the feeling that this defence has no prospect of success, nor indeed is so shadowy that conditions should be imposed upon the Defendant requiring the payment of monies as a condition of being allowed to defend*".

In ***National Westminster Bank –v- Daniel*** [1994] 1 All ER 156, the test formulated by the English Court of Appeal was whether there was a "*fair or reasonable probability of the Defendant having a real or bona fide defence*" (at p. 160). Some of the decided cases belonging to this field also highlight, unsurprisingly, factors such as the timing of any defence raised by the Defendants, the circumstances in which it is first raised, the terms in which it is formulated and the contents of the Defendants' affidavits. In the application of these factors to any given litigation equation, they may be decisive, as in ***Greenstein –v- Broome and Wellington LP*** [2009] EWCA Civ 589 (see paragraphs [18] – [21] especially. In other litigation contexts, they will not. It is trite to observe that every case is fact sensitive and all cases call for an evaluative judgment on the part of the court formed on the basis of untested affidavits and (as here) documentary evidence and in the absence of sworn testimony elicited by the mechanisms of examination-in-chief, cross-examination and appropriate judicial questioning.

[32] Neither party questioned the correctness of the approach in principle of the Master at first instance: see paragraph [8] of his ruling. Furthermore, his summary of the general approach on behalf of the Plaintiffs appears to me to apply fully in the determination of these appeals. The Master recorded a submission on behalf of counsel for the Plaintiffs (Mr. Horner QC, appearing with Ms Simpson) in these terms:

> "[9] … *It was not the task of the court to assess the credibility of each witness in the way that would be carried out by a trial judge. Rather, the court must stand back, look at the totality of the evidence and assess the credibility of the defence as a whole*".

The carefully constructed submissions of counsel on behalf of the Plaintiffs resolve to the proposition that, based on the evidence, there is no fair or reasonable probability of the Defendants making out a real or bona fide defence to the Plaintiffs' claims. On behalf of the Defendants, the contrary proposition was advanced. Emphasis was placed on the onus resting on the Plaintiffs, the exacting test of the threshold to be overcome and the myriad factual issues in dispute between the parties.

[33] I consider that Order 14 proceedings may properly be viewed as an exception to the general practice in this jurisdiction whereby, as a reflection of the principles of

adversarial litigation and oral *inter-partes* hearings, faithful to the common law tradition, characterised by the examination-in-chief and cross-examination of witnesses, duly supplemented by appropriate judicial questioning, a full blown trial is the well established norm. I consider that one of the tools to be applied in the determination of Order 14 applications is that of **confidence**. The court, having considered the totality of the available evidence and the parties' competing arguments, must be sufficiently confident that the Defendants' resistance to the Plaintiffs' claim can be fairly and properly dismissed on paper, without a trial characterised by the elements, procedures and safeguards of conventional adversarial litigation. Summary judgment is appropriate only where the court is satisfied that, fairly and realistically, the Plaintiffs' case is unanswerable.

[34] The Plaintiffs' assault on the defences which the Defendants seek to raise through the media of their affidavits and their counsel's arguments raise the following questions in particular:

(a) Why were these defences not raised timeously and sooner?

(b) How can the affidavits of MT and JT be reconciled?

(c) What instructions, if any, were given by the Defendants to their solicitors, Tughans?

(d) What were the exact terms of the representations attributed by the Defendants to the Plaintiffs' agents?

(e) How do the Defendant account for certain defences previously advanced by them but now, apparently, no longer pursued?

(f) Bearing in mind certain well established legal principles, how can the Defendants plausibly contend that the two guarantees under scrutiny do not constitute the totality of these discrete bargains struck between the parties?

The submissions of Mr. Horner QC and Ms Simpson further urged the court to read – and construe – certain documents in a particular manner. They contend, *inter alia*, that certain words, such as "*interim*" can *only* have one meaning. They draw attention to the absence of words and phrases in relevant contemporaneous documents. They suggest that there is an absence of logicality, rationality and credibility in the defences ventilated. They invite the court to construe certain documents, such as the KPMG report, in a manner exclusively favourable to the Plaintiffs' case and fatally unfavourable to the Defendants' case. They ask the court to accept that Mr. Ennis **would have** recorded the "temporary" qualification in his contemporary notes of 8th August 2007. They advert to asserted deficiencies and inconsistencies in the affidavits sworn on behalf of the Defendants. They further

suggest that the Defendants' contentions belong properly to the realm of an action in professional negligence against their solicitors, Tughans.

[35] I stand back from the totality of the evidence and the parties' arguments, adopt a balanced and panoramic view and give effect to the governing principles as follows. I conclude that the present cases are paradigm examples of the inapplicability of the Order 14 procedure. A vast proliferation of affidavits in this kind of case is no substitute for *viva voce* evidence elicited by examination-in-chief, cross-examination and appropriate judicial questioning all of which will enable the court to assess the veracity of witnesses and to make confident findings of fact. I find myself unable to make such findings based on the voluminous evidence assembled and duly considered. I specifically decline to interpret contemporaneous communications – documented in e-mails and letters and forming the subject of assertions and rebuttals by both sides – in a summary fashion. As appears from my résumé of certain key features of the evidence above, there are distinct indications that the evidential matrix before the court may not be complete. Arguably the clearest illustration of this is found in the affidavits of both sides. These are replete with averments crying out for further probing, challenge and clarification. There exists, in my view, a veritable ***Saunders*** '*goldmine for cross-examination*'. I have considered all of the evidence critically, against this framework. Having done so, and taking into account that the evidential matrix has swollen substantially since the ruling at first instance, I differ, with respect, from the Master. The degree of confidence which is a pre-requisite to any summary judgment order is lacking. Similarly lacking are the ingredients of irresistible potency (vis-à-vis the Plaintiffs) and impotent resistance (vis-à-vis the Defendants). In circumstances where there are obvious doubts, questions, uncertainties and obscurities, I am clearly of the view that the evidential matrix in the present case will remain incomplete, uncertain and obscure until all of the conventional adversial trial processes have been exhausted. Given this analysis and conclusions, I decline to explore the legal principles bearing on the defences ventilated: this exercise simply does not arise.

[36] Giving effect to the reasoning and analysis above, and differing from the Master with appropriate deference, I conclude without hesitation that summary judgment is inappropriate in either action. I, therefore, allow the Defendants' appeals.

[37] Finally, I would emphasize that this judgment neither attempts nor purports to make concluded findings, whether of fact or otherwise. It is to be read and construed accordingly.