Neutral Citation [2013] IEHC 250

THE HIGH COURT

COMMERCIAL

[2011 No. 8591 P.]

BETWEEN

BRIAN KING, ROGER BARRETT, WILLIAM TWOHIG, CAIT TWOHIG, BILLY HORGAN, CHRISTY O'SULLIVAN, FIONNUALA BREEN WALSH, JOHN O'DONOGHUE, PAT COLLINS, GER COLLINS, BARRY CROWLEY, KEVIN O'DONOGHUE, AOIFE O'DONOGHUE, LIAM DORAN, AUDREY DORAN, CLIFFORD O'DONNELL, DES FITZGERALD, AARON O'CONNELL, SHARENA P. O'CONNELL, MICHELE McCARTHY, PAT GALVIN, JEANNETTE GALVIN, BETTY MADDEN, DAVE TRACEY, JOHN BOWEN, LIAM O'SULLIVAN, DENIS PRIOR, PATRICK (known as PADDY) WALLACE, KIERON BROPHY AND MARTIN LEYDEN PRACTISING UNDER THE STYLE AND TITLE OF THE BIRR PARTNERSHIP

PLAINTIFFS

AND

ULSTER BANK IRELAND LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Cooke delivered the 7th day of June 2013

1. The declaratory reliefs and other orders claimed by the plaintiff partnerhip in this action have as their effective purpose to forestall, at least in part, the counterclaim brought by the defendant to recover monies due for capital and interest under a loan agreement which has its origins in December 2005. In its counterclaim the defendant (the "Bank") seeks judgment for the sum of €3,494,636.86 on foot of a written agreement which it claims was made on the 18th June, 2008. The plaintiffs agree that a loan agreement was made but assert that it was made on the 22nd May, 2008 and they deny that under its terms, when properly construed, they are personally liable to the Bank for repayment of the capital amount of the loan.

2. As explained below in greater detail, the essential issues between the parties turn upon the provision contained in the document in question relating to the recourse the Bank was entitled to have to the plaintiffs personally and whether it is entitled to look to them on a joint and several basis for the full amount of both capital and interest or whether, as the plaintiffs assert, the true agreement limited the Bank's recourse to the payment of interest. They say the provision in question must be construed in the light the corresponding provision in the original loan agreement of December 2005, and that if there is any ambiguity in the later provision it should be construed in their favour and against the Bank by giving it a business sense in its context. If it is not ambiguous, then there has been a mutual mistake and the plaintiffs are entitled to have the instrument rectified or rescinded. If there is no mutual mistake, there has been a unilateral one which was induced by misrepresentation made by an official of the Bank to the partner who negotiated the agreement at the time.

Background to the Dispute.

3. The background to the claim can be more fully summarised as follows. In the Autumn of 2005, the plaintiffs were brought together to enter into an agreement to form a partnership known as the "Birr Partnership" for the purpose of a commercial venture involving the acquisition and development of a property at Syngefield, Birr, Co. Offaly. They had been brought together for this purpose by three individuals who had previously been involved in promoting or carrying out similar projects. These were: Mr. Kevin O'Donoghue and Ms. Fionnuala Breen-Walsh, solicitors, who practised in partnership in Cork as "O'Donnell Breen-Walsh O'Donoghue" Solicitors; together with Mr. Billy Lewis who was the principal of a company called Social and Affordable Solutions Limited located in the same building as the offices of the solicitors. These three had been involved in development projects in the course of which they had had dealings with a building company, Bowen Construction Limited. The partnership which was formed to acquire and develop the site in Birr was to be structured on the basis that 20 individual partners would be recruited who would hold a 50% interest in the project, the remaining 50% being split equally between the two solicitors as to 25% and two directors of Bowen Construction as to 25%. (The Court was informed that a subsidiary issue has arisen within the project as to whether the Bowen interest was personal to those two directors or an interest undertaken by them on behalf of their company. That isue has no bearing upon the present case.)

4. For the purpose of recruiting the twenty individuals to the partnership, Mr. Lewis prepared a "Project Summary" which described the venture and gave estimated figures for the cost of purchasing the property and obtaining planning permission; the basis upon which these would be financed together with profit projections. Each of the twenty partners was to contribute €50,000 with the 25% equity partners contributing €500,000 each. It was proposed to borrow €2,766,750 and in addition each partner was, if necessary, to undertake to purchase one of the developed units at cost price. This was explained in the Project Summary as follows:-

> "With previous schemes in order to make the package more attractive to the lending institution the partners would agree that in the event of the units not selling that each of them would agree to take one of the housing units at its cost price, that is excluding any aspect of the development profit. It is not envisaged that this would occur however, it gives the lending institution comfort of knowing that should for some reason the units not sell that a proportion of the monies can be recouped by means of the sale to the individual partner. In return for this we would require non-recourse finance from the institution."

5. In previous projects Mr. O'Donoghue had dealt with Mr. Sam Beamish at AIB Bank. Mr Beamish had since moved to the defendant bank in Cork and had indicated to Mr. O'Donoghue and Mr. Lewis that he would be keen to consider any new projects they might be planning.

6. It appears that in anticipation of the formation of the partnership, a contract had already been signed for the purchase of the lands in October 2005 and the vendors had been pressing for the sale to be completed. On a date which has not been provided to the Court, the partnership agreement was entered into and Mr. O'Donoghue and his partner Ms. Breen-Walsh were appointed trustees with power of attorney giving them, *inter alia*, authority to open and operate a bank account for the venture.

The Loan Documentation.
7. Following discussions with Mr. Beamish and the furnishing to the defendant of documentation relating to the partnership, to the property and the contracts together with a valuation of the site, a letter of loan offer issued to "The Secretary, The Birr Partnership C/O Mr. Kevin O'Donoghue" on the 13th December 2005, (the "2005 Facility"). This offered to lend the partnership two amounts: Facility A, an overdraft in the sum of €50,000; and Facility B, a term loan in the sum of €2.9 million.

8. The letter then set out the detailed terms of the offer over six pages. So far as Facility B was concerned, the loan was to be repayable on demand and its stated purpose was to assist with the purchase of the Birr site. Its term was for one year with a normal review date on the 31st December, 2006. Interest was to be charged at variable rate given as "the Bank's Prime 1 + 0.875% rate, currently 3.75% per annum variable." Under the heading "Repayments" it was provided that:

> "Variable Rate: Interest is to be rolled up on the loan pending a full review one year after drawdown. Based on the indicative rate outlined above, annual interest only repayments will be €108,750 in the event of a change in interest rates the Bank at its discretion may alter the monthly repayments or alternatively make any adjustments necessary at the end of the term."

9. Under the heading "Security" the Bank was to have a "(i) First Legal Charge over ten acres at Syngefield, Birr, Co. Offaly". (There was no paragraph (ii) and no other security was mentioned). This section did however set out in five further paragraphs a series of terms relating to the security. These included a requirement that the Bank's permission be sought for any lease of the property; the obligation to provide an acceptable certificate of title; the insurance of the property; compliance by the borrowers with applicable laws and regulations and payment by them of all fees and costs incurred in taking the security.

10. Under a separate heading "Joint and Several" the following condition was set out:-

> "The Bank will have full recourse to all the partners for capital and interest until full planning permission is received. Once full planning permission is in place the bank will have recourse for interest."

11. This offer was accepted on behalf of the partnership and a copy of the letter now dated the 14th December, 2005, was signed by Mr. O'Donoghue and Ms. Breen-Walsh on that date as trustees and attorneys of the partnership. The bank also obtained its own independent valuation of the site from DNG Cowen, Auctioneers, giving it an open market value of €5 million as at the 19th December, 2005.

12. Thereafter the work of preparing and submitting an application for planning permission for a development comprising 163 housing units was proceeded with. The application did not proceed smoothly however due a proposal by the local authority to put a road through the site. Planning permission did not ultimately issue until 27th February, 2008, and then as a permission from An Bord Pleanála for a development of 159 units.

13. In the meantime, according to Mr. O'Donoghue, Mr. Beamish and later Mr. Rory Cogan in the Bank were kept up to date from time to time on the progress of the development and the facilities were said to have been reviewed periodically within the Bank when up to date valuations of the site would be requested. According to Mr. O'Donoghue, during 2007, the file within the Bank was taken over by Mr. Cogan following his promotion to "relationship manager" but he was nevertheless familiar with the project having worked on it from the outset under Mr. Beamish. Although the original one year term duly expired, the Bank allowed the facilities to remain in place upon the basis of the letter of the 14th December, 2005 and interest continued to be rolled up. In May 2007, a new offer letter dated the 29th May, 2007, issued to Mr. O'Donoghue, but this was never signed or returned on behalf of the partnership, nor does the Bank appear to have insisted on its being signed. In that letter of offer the Facility B or "Demand Loan Facility" then had the amount of €3,198,000 and its purpose was described as: "The facility should be made available to assist in the interest roll up on the facility initially agreed in December 2005". Under the heading "Additional Terms and Conditions applicable to all facilities" the security in the form of the first legal charge over the site was repeated and then "Conditions Precedent:" were stated as follows:-

"The Facilities shall not be available for drawdown unless the conditions precedent set out in the general conditions are satisfied and, in addition the following:

- All conditions previously outlined on sanction letter dated the 14th December, 2005, continue to apply.

- It should be noted that should planning not be in place by the review date of the 13th January, 2008, that at minimum the partnership will need to service interest on a quarterly basis from their own resources."

14. Following the grant of planning permission in February 2008 the Bank was so informed and it was furnished with a new valuation dated the 18th April, 2008, which gave the site with planning permission a market value "in the region of €7,950,000".

15. In April, 2008, Mr. O'Donoghue had also been in contact with Mr. Cogan about a separate project at Drinan Street in Cork in respect of which he was interested on a personal basis in obtaining a loan from the defendant. On the 23rd April, 2008, the two met at the Kingsley Hotel outside Cork to discuss that project. According to Mr. Cogan the purpose of that meeting was to discuss the personal credit application which he was submitting on Mr. O'Donoghue's behalf for the Drinan Street project and the Birr Partnership Project was only mentioned insofar as Mr. O'Donoghue requested that the interest continued to be rolled up. There had also been a number of telephone conversations between the two men in which Mr. Cogan informed Mr. O'Donoghue that the Bank was pressing for the partnership to start funding the interest on the loan and he had the impression that Mr. O'Donoghue was highly reluctant to start paying interest.

16. As appears below, there is disagreement between Mr. Cogan and Mr. O'Donoghue as to the precise sequence of meetings and conversations on the 22nd May, 2008, but there is no doubt that on that date Mr. Cogan visited Mr. O'Donoghue at his office in Cork and gave him the Bank's letter of offer of that date for the facility in respect of the Drinan Street project. Mr. Cogan testified that on the same occasion he gave Mr. O'Donoghue the draft form of the letter of offer of the 22nd May, 2008, for renewal of the Birr partnership facilities. It was a draft in the sense that the text was not on the headed notepaper of the Bank. Mr. O'Donoghue testified that he did not receive the document in the manner described by Mr. Cogan, but that it arrived by e-mail on the following day. What is not in dispute, however, is that the offer letter was received by Mr. O'Donoghue at some stage and then read by him and that it was ultimately returned to the Bank at some later date having been signed by himself and his partner Ms. Breen-Walsh: (the "2008 Facility"). (As explained later in this judgment one of the areas of controversy at the hearing concerned the number of versions of the letter in question, when they were presented to Mr O'Donoghue and when the original or originals were signed and returned to the Bank. See paragraph 73 below.)

17. In the letter the Demand Loan Facility was now in the amount of €3.7 million and its purpose was described as "to finance the continuation of interest roll up to the facility initially agreed in December 2005". The term was for "7 months to 30th January, 2009".

18. Under the heading "Additional Terms and Conditions applicable to all facilities" the "Security" was now described as comprising two elements:-

> • "A First legal charge from the Borrower over ten acres at Syngefield, Birr, Co. Offaly {Held}.
>
> • The Bank will have full recourse to all the Partners for Capital and interest. {Held}"
>
> Unlike the 2005 Facility, no distinct section headed "Joint and Several" is included.

19. There then followed two "special conditions":-

> • "The Bank will require an independent valuation from a professional Valuer acceptable to the Bank and on assumptions acceptable to the Bank (the "Valuer") in relation to ten acre site at Syngefield, Birr, Co. Offaly, showing the property having an open market value of not less than €7.5 million. The terms of reference for this report will be set out in the Bank's letter of instruction to the Valuer.
>
> • The Bank to be provided with the terms of the planning permission for development of 159 units and confirmation that no onerous conditions are attaching to same."

20. The remainder of the letter provided for an "Arrangement fee" of a non- refundable amount of€10,000 payable upon acceptance of the facility and contained a sentence common to all three of these letters: "This Facility letter supercedes all prior agreements, arrangements or correspondence between the Bank and Borrower in relation to the Facility". In contrast the renewal offer in the 2007 facility letter had not repeated the recourse clause but had expressly continued the application of the conditions of the 2005 Facility. (See paragraph 13 above.)

21. That, accordingly, is the documentary context out of which the issues in this action arise. Although the above "Special Conditions" clearly recognise that a planning permission had already issued for a development of 159 units, the "Security" was now described as including "full recourse to all the partners for capital and interest," notwithstanding the fact that original2005 Facility had provided that once planning permission issued, the Bank's recourse to the partners would be for interest only: a condition precedent which had effectively been acknowledged in the offer letter of the 29th May, 2007. It is on that basis that the plaintiffs claim that the recourse provision is ambiguous and fails to reflect correctly the actual agreement for renewal of the facility made between Mr. O'Donoghue and Mr. Cogan on 22nd May, 2008.

The Issues

22. The essential issues to be decided in the case can therefore be summarised in question form as follows:-

> (a) Is the second indent of the security provision of the 2008 Facility ambiguous and, if so, must it be construed so as to give the same meaning as the corresponding provision in the 2005 Facility?
>
> (b) If it is not ambiguous, is it so worded as the result of a mutual mistake which entitles the plaintiffs to rectification or rescission?
>
> (c) If there is no mutual mistake is the provision so worded as the consequence of a unilateral mistake on the part of Mr. O'Donoghue which was induced by a misrepresentation on the part of Mr. Cogan?

The Ambiguity Argument.

23. The plaintiffs contend that when the recourse provision of the 2005 Facility is read as a whole including the added word "Held", it is at least ambiguous because the incorporation of that word clearly connotes a reference back to some previous position or condition of the Bank as is the case in the immediately proceeding sentence referring to the first legal charge. That being so, it is submitted that the provision must be construed as meaning that the clause limiting the Bank's recourse to the partners for interest only after the grant of planning permission was to be retained and continued. It is argued that because the sentence as it appears is ambiguous it must be construed against the interest of the Bank which drafted and presented it and in the manner which gives the agreement commercial sense having regard to the surrounding circumstances and background to the banking relationship.

24. The legal principles which fall to be applied by the Court in construing such a provision have not been seriously disputed in the arguments before the Court and the parties have broadly relied upon the same case law while placing different emphasis on particular principles. So far as the Irish case law relied upon is concerned, the parties referred to the judgments of Geoghegan J. in *Analog Devices BV v. Zurich Insurance Co.* [2005] 1 I.R. 274; of Keane J. in *Kramer v. Arnold* [1997] 3 I.R. 43; Murphy J. in the Supreme Court in *Igote Limited v. Badsey* [2001] 4 I.R. 511; and Clarke J. in *Ryanair Limited v An Bord Pleanála* [2008] I.E.H.C. 1. English authorities referred to included *Investor's Compensation Scheme Limited v. West Bromwich Building Society* [1998] 1 W.L.R. 896; *Rainy Sky SA v. Kookmin Bank* [2011] 1 W.L.R. 2900 and *Equity and Law Assurance Society plc v. Bodfield Limited* [1987] 1 E.G.L.R. 124. In relation to the *contra proferentem* rule, reliance is placed upon the judgments of the Supreme Court in *Emo Oil Limited v. Sun Alliance* [2009] I.E.S.C. 2 and the judgment of Clarke J. in *Danske Bank v. McFadden* [2010] I.E.H.C. 116.

25. It is unnecessary therefore to set out any detailed citations from that case law, but sufficient to identify some of the essential points that are most relevant to the arguments that have been advanced in this case:

> - The starting point in the construction of any written agreement where its meaning is in dispute is the actual text of the provision in question;
>
> - The task of the Court is to ascertain objectively the intention of the parties by reference to the meaning to be taken from the words they have used;
>
> - The meaning should be assessed by reference to the language employed, but taking into account the surrounding circumstances including the purpose and context of the contract as known to the parties at the time - the so-called "factual matrix";

- The content of earlier negotiations and declarations by the persons concerned as to what their intention had been are irrelevant;

- The Court should ask itself what the reasonable person possessed of relevant information as to the surrounding circumstances would understand the parties to have meant by the words in which they have expressed their agreement;

- Where the wording used is capable of more than one meaning, that which gives commercial sense in the context of the contractual purpose should be preferred.

- Where the wording is ambiguous and capable of more than one meaning, the provision should be construed against the interest of the party responsible for the drafting and presentation of the document.

26. The plaintiffs submit that the security provision regarding recourse against the partners had been agreed with the Bank before the 2008 Facility Letter was accepted and signed and that the omission of the words "... until full Planning Permission is received. Once full Planning Permission is in place the Bank will have recourse for interest" which appeared in the corresponding clause of the 2005 Facility is the result of a mistake and that the addition of the word" {Held} ", renders the clause ambiguous. When correctly construed in the context of the relevant "factual matrix" it must, they submit, be taken as referring back to the clause of the 2005 Facility and be given the same meaning namely, that recourse to the partners was limited to interest only as from the issue of the planning permission. It is not disputed that the fact that the planning permission had issued on 27th February 2008 was known to both Mr O'Donoghue and Mr Cogan prior to their discussions in May 2008 and that it formed part of the "factual matrix".

Conclusion.
27. In the judgment of the Court, it is clear that if the word "Held" which appears in brackets is left to one side, the second indent of the disputed provision admits of no ambiguity. The Bank is to have full recourse to all of the partners for both capital and interest. That is the plain and obvious sense of the words used and there is no qualification of the condition. Indeed, in one sense it is superfluous and only a statement of the obvious. The Bank's borrower is a partnership and, as such, all of the partners are jointly liable for their borrowing as a matter of law. (See s. 9 of the Partnership Act 1890.) The corresponding provision in the 2005 Facility was necessary (See para. 10 above) because it altered the otherwise normal consequence of a borrowing by a partnership by limiting the recourse of the Bank to interest only once full planning permission had been granted.

28. The plaintiffs, however, argue that the presence in brackets of the word "Held" alters the meaning of the sentence and either (a) requires that it be construed (as in the case of the preceeding sentence relating to the first legal charge), as repeating and reapplying the corresponding provision of the 2005 Facility or (b) renders it ambiguous so as to require it to be construed against the interest of the Bank and in the manner which gives it business efficacy. In the judgment of the Court these arguments are flawed.

29. In the judgment of the Court, if the word "{Held}" as it appears has any significance it is merely that the Bank has (as in the case of the first legal charge) already had possession of the documents needed to give effect to the "security" namely the partnership deed, the names, addresses and other personal details of the individual partners. It signals that no new documentation in that regard is required to be executed for the renewal of the facility. It appears reasonable and obvious that the word "Held" was added to the first indent to avoid the necessity to repeat the text of the five paragraphs which supplemented that provision in the 2005 Facility. (See paragraph 9 above.)

30. In support of their argument, the plaintiffs urge that it is necessary in construing the provision to have regard to the "factual matrix" and in this they include the fact that the facility is a renewal of the 2005 Facility; the fact that the latter's corresponding "Joint and Several" limitation distinguished liability by reference to the grant of planning permission; and the fact that the 2008 Facility was clearly proffered in the knowledge that planning permission had been obtained. On that basis it is argued that it does not make sense that the 2008 Facility should ignore the grant of planning permission so as to expose the partners to liability for both capital and interest when liability for repayment of capital had been intended to terminate once planning permission had been granted.

31. In the judgment of the Court, to adopt that approach is to fall into the error of having recourse to the factual matrix for the purpose of introducing an ambiguity and not for the purpose of resolving an ambiguity which is apparent on the face of the words used in the document. In the judgment of the Court, once it is clear that no particular significance can be attached to the employment of the word "Held" in brackets, so that the words used are devoid of ambiguity, it is impermissible to create an ambiguity about the words actually used in the document as signed by reference to the factual matrix.

32. Although in those circumstances it is not strictly necessary to have regard to the argument advanced as to the need to construe the words in order to give them "business efficacy", it may be no harm to indicate the view of the Court that the argument in question also appears to be unfounded. That argument is to the effect that it made no business sense for the partners in May 2008, to expose themselves to liability for capital repayments given that planning permission had then been obtained.

33. In the view of the Court this is to impose retroactively on the circumstances prevailing in May 2008, one's knowledge of what has happened in the property market in the intervening period. As Mr. O'Donoghue acknowledged in evidence, when he was in discussion with Mr. Cogan about renewing the facility, they were conscious of a deterioration in the property market but Mr. O'Donoghue was convinced it was merely a "lull". We now know that a far more fundamental collapse was under way. At the time, however, it could not be said that there was no business sense whatsoever in a decision by a partnership of developers to postpone all of their repayment obligations for nine months in order to see how the market evolved. At the very outset when the value of the site was far less, they had agreed to accept liability for repayment on a full recourse basis both as to capital and interest pending the receipt of planning permission. Having obtain planning permission, the property was now thought on the basis of professional advice to be of considerably greater value, so the purchase of a nine month moratorium when they were (apparently) fully covered for the amount of the debt, could hardly be characterised as an obviously unbusinesslike or unrealistic decision. Furthermore, the postponement by agreement of the payment of interest on those terms had the additional effect that it avoided any risk that the Bank might call in the entire facility and thereby force a sale in circumstances where the "lull" in the market had made it very uncertain whether the alternative of a sale of the site could be readily achieved. To hold that it made no business sense for the plaintiffs to have agreed in those circumstances to continue their existing pre-planning exposure to liability for principal would be retrospectively to attribute to their supposed reasoning at the time a contemporary knowledge of the collapse in property values which has since occurred.

34. For these reasons the Court is satisfied that the argument as to the condition being ambiguous is unfounded.

Mistake
35. If the recourse provision in the 2008 Facility letter is not ambiguous and not to be construed as contended for by the plaintiffs, it is submitted that it should be rectified upon grounds of mistake. Although separate arguments in this regard are advanced as to its

being wrongly worded as the result of common mistake and alternatively a unilateral mistake, it is possible to address these arguments together as they are both dependent upon the Court being persuaded to find on the evidence that there had in fact been a prior oral agreement which has been wrongly recorded in the document. On this issue the parties are diametrically opposed and there has been extensive disagreement in the evidence as given respectively by Mr. O'Donoghue and Mr. Cogan.

36. The evidence of Mr. O'Donoghue is relied upon by the plaintiffs to maintain that it had been expressly agreed with Mr. Cogan that the terms of the extension of the loans in May 2008, would involve no change in the terms of the 2005 Facility so far as concerned the limitation placed upon the Bank's entitlement of recourse to the partners for interest only once planning permission had issued. Mr. Cogan maintains that there was no agreement to that effect and he points to various internal documents from his credit control superiors within the Bank which are said to record his having been instructed to agree an extension of the facility only upon the basis that the full recourse for both capital and interest would continue notwithstanding the intervening grant of planning permission.

37. Once again, there has been no major dispute between the parties as to the legal principles applicable to a claim for rectification of a contract on grounds of mistake. Both parties acknowledge that the leading authority in this jurisdiction is to be found in the judgment of the Supreme Court given by Griffin J. in *Irish Life Assurance Company Limited v. Dublin Land Securities Limited* [1989] I.R. 253. He first observed:

> "As a general rule, the courts only rectify an agreement in writing where there has been mutual mistake - i.e. where it fails to record the intention of both parties. Although that was the original conception of reformation of an instrument by rectification, nowadays a party who has entered into a written agreement by mistake will also be entitled to rectification if he establishes by convincing evidence that the other party, with knowledge of such intention and mistake, nevertheless concluded the agreement.

He referred to the unreported judgment of Kenny J. in *Lucey v Laurel Construction Co. Limited* (Unreported, High Court, 18th December, 1970). Griffin J. then cited and adopted the essential principles defined by Russell L.J. in the leading English authority of *Joscelyne v. Nissen* [1970] 2 QB, 86, as summarised by Lord Lowry L.J.C in *Rooney and McParland Limited v. Carlin* [1981] NI 138 at 146 as follows:

> "1. There must be a concluded agreement antecedent to the instrument which is sought to be rectified; but
>
> 2. The antecedent agreement need not be binding in law (for example, it need not be under seal if made by a public authority or in writing and signed by the party if relating to a sale of land) nor need it be in writing: such incidents merely help to discharge the heavy burden of proof; and
>
> 3. A complete antecedent concluded contract is not required, so long as there was prior accord on a term of a proposed agreement, outwardly expressed and communicated between the parties, as in *Joscelyne v. Nissen*."

38. It follows accordingly that if they are to be entitled to rectification of the 2008 Facility letter the plaintiffs must establish by evidence that before it was signed on behalf of the partnership there had been a concluded verbal agreement made between Mr. O'Donoghue on behalf of the plaintiffs and Mr. Cogan on behalf of the Bank to the effect that during the period of the agreed extension of the facility, recourse to the partners for capital would be excluded and that their liability would be for interest only.

39. In practical terms this issue turns upon the evidence as to what was done and said between Mr. O'Donoghue and Mr. Cogan leading up to the issue and subsequent signing of the 2008 Facility letter and particularly on the exchanges that took place between them on the 22nd May, 2008. As already indicated in para. 16 above, there has been serious disagreement between the two witnesses in this regard. In essence, Mr. O'Donoghue claims that he was given explicit assurances by Mr. Cogan as to the basis upon which the facility was being renewed which led him to understand that there was to be no change in the position of the members of the partnership as compared with the position under the 2005 Facility so far as concerns the Bank's entitlement to have recourse to them for repayment of capital following the grant of planning permission. Mr. Cogan denies making any such representations or giving any such assurance and testifies that Mr. O'Donoghue understood and accepted the important change that was being made to the recourse provision as a condition of the Bank's agreement to extend the roll-up of interest period.

40. This issue has, accordingly, turned exclusively upon the opposing evidence of Mr. O'Donoghue and Mr. Cogan. No other witness was called on behalf of the plaintiffs and the Court has not heard from Mrs. Breen-Walsh the co-signatory of the facility letter. The evidence came before the Court both in the form of individual witness statements of Mr. O'Donoghue and Mr. Cogan exchanged prior to the hearing and of their oral evidence.

The Evidence of Mr O'Donaghue

41. The immediately relevant sequence of events begins with one meeting which is not in dispute namely the meeting on the 23rd April, 2008, between the two men at the Kingsley Hotel outside Cork City. According to Mr. Cogan this meeting took place in that hotel at approximately 11.30 am. Its main purpose was to discuss the application that Mr. O'Donoghue had made for funding in respect of the Drinan Street transaction.

42. In his witness statement Mr. O'Donoghue said that his next meeting with Mr. Cogan was at 3.00 pm on the afternoon of the 22nd May, 2008, and that it took place also at the Kingsley Hotel. He said this lasted for about 45 minutes and both the Drinan Street and Birr facilities were discussed. He claimed that he was told by Mr. Cogan that the application for an extension of the Birr facility had been successful and that "as requested the Bank are *(sic)* happy to allow matters stand as they were until January 2009, however, from that time that interest would have to be met". He then said:-

> "Rory was specifically asked about security and he said that nothing further was required, he specifically stated the he was happy that his proposal had been accepted by their head office being that the status quo would remain. Matters were to remain exactly as they were save for certain minor matters being a technical amendment to the interest rate calculation, the commitment to discharge interest from January 2009 and that a nominal arrangement fee was to be added to the loan balance. He further asked that an up to date valuation would be required from their valuer DNG Cowen in the sum of €7.5 million. However, apart from this matters would continue as they were".

43. In the witness statement he further said that later on the same day, Mr. Cogan called to the firm's offices in Georges Quay with a hard copy of the loan offer for the Drinan Street project. The hard copy of the loan for Birr was not yet available. He said that the loan offer dated the 22nd May, 2008, subsequently arrived by email on the 23rd May, 2008 at 11.55 am. He said he had no record of the original loan offer being received by post. Having read the loan offer he subsequently spoke to Mr. Cogan by phone on the 12th June, 2008 about the Birr facility. He had notes of speaking to Mr. Cogan on the phone twice on the 20th June, 2008, and on the 7th

July, 2008. "In these calls I specifically asked about the wording of the loan approval and was again assured that no additional security was required, that the status quo was to remain, however, a market valuation of €7.5 million from DNG Cowen would be required to facilitate the ongoing roll up until December 2008".

44. In his direct evidence at the hearing, Mr. O'Donoghue's account of the exchanges on the 22"d May differed in a number of particulars. He again recalled having met Mr. Cogan twice on that day, but that the meeting in the Kingsley Hotel had taken place in the morning and not at 3.00 pm. His recollection was that while Mr. Cogan had received the draft facility letter for the Birr Project it had not been printed off on headed bank paper and he did not have a hard copy with him. He maintained that Mr. Cogan had confirmed that matters were to stay exactly as they had been and that the status quo was to remain. There were "a few minor matters" which had to be discussed namely the obtaining of a new valuation, a small uplift in the interest rate applicable and the inclusion of an arrangement fee of €10,000. He claimed the plaintiffs had no difficulty with those points. He said: "I asked about security specifically is what I was asking, he said the situation was to remain as it was, there was to be no extra security was required". [Transcript Day 2 Question 66.] He added:

> "It was quite clear to me that the two security as such items that they were the property itself and the recourse to the borrowers. They were the only security items that there were. The charge was a legal charge over the site which they had, but the crucial thing here at all times was the recourse to the borrowers.
>
> It was perfectly clear to me what I was talking about and what he was implying too was the basically the recourse situation would remain". [Ibid Q.68]

45. He then said that Mr. Cogan called to the office at 3.00 pm and they met downstairs in the reception area. He said Mr. Cogan gave him the facility letter for the Drinan Street borrowing, but that he did not have the Birr facility letter. He produced what he said was the Drinan Street letter upon which he said he had made a handwritten note at the bottom of the first page: "Spoke to Rory. Am to organise a valuation for him re. Birr. Happy that matters continue as they are until Jan but need to start paying interest. No extra security but need up to date valuation". [Ibid Q. 78.]

46. He testified that it was on the following day, 23rd May that he received the Birr facility letter by email. He did not however open the attachment and look at it until some days later. Asked about his reaction to the "security" provision and the phrase "The bank will have full recourse to all the partners for capital and interest (held)". He gave his understanding in the following terms:

> "My understanding is that it is largely descriptive of the position that was there. The reading of "held" I took as reading it as, as held. So it was describing the position they had with the recourse. At that stage we had not given the bank a copy of the planning permission, I do not think they got it until quite recent times, so that was still outstanding." [Ibid. Q.88]

47. In relation to the phone conversation on the 12th June, 2008, Mr. O'Donoghue said that it was mainly about the Drinan Street facility, but when the Birr facility was mentioned "I asked him to confirm again that dealing specifically with this what was the position with the security references and he confirmed that the status quo was to continue, that there was no change in security". [Ibid Q. 98.]

48. In cross-examination it was put to Mr. O'Donoghue that in April/May 2008, when discussing the renewal of the Birr facility, Mr. O'Donoghue's primary concern and objective was to obtain a further roll-up of the accruing interest and to avoid, in effect, having to go to the partners to obtain payment towards interest. Mr. O'Donoghue denied that he had such a concern. His primary objective was to obtain a further period of preferably twelve months in order to see how the market developed with a view to deciding whether it would be best to proceed with the construction or to sell on the site with the benefit of planning permission. He was not concerned that the Bank would call in the entire loan and a postponement of an interest payment would have been of only modest benefit.

49. Under cross-examination, Mr. O'Donoghue was effectively unable to explain why he had an apparent recollection of two meetings on 22nd May including a meeting in the Kingsley Hotel at 3.00 pm when he accepted that his diary noted a 3.00 pm meeting with Mr. Cogan and Mr. Cogan maintained this had taken place in the solicitor's offices. He said: "Again, unfortunately, I can't give you precise details because the best I can do is give you the recollection I have of what occurred, which is of two subsequent meetings, initially in the Kingsley, subsequently in our office. Precise details of times of both I cannot recall unfortunately". [Day 3. Q. 82] He again maintained that at neither meeting had Mr. Cogan produced a hard copy of the Birr facility letter and that all Mr. Cogan had handed over was the "loan pack" for the Drinan Street facility.

50. Mr. O'Donoghue accepted that on the 22nd May, 2008, at 12.48 he had received an email from Mr. Cogan with the sanction letter for the Drinan Street facility attached. The email said "I will drop in account opening forms together with hard copy of the sanction letter to you office this evening around 3.00 pm. If you are around at that time and have ten minutes to spare, I can run through the offer with you and I will also like to talk to you about the Birr Partnership for a few minutes at that time as well". At 13.04 Mr. O'Donoghue had replied by email to Mr. Cogan "See you at 3.00". :

51. It was put to Mr. O'Donoghue that in the 3.00 pm meeting, Mr. Cogan had gone through the four changes in the proposed facility renewal, namely the uplifted interest, the recourse provision for both principal and interest, the arrangement fee of €10,000 and the need for a fresh valuation. Mr. O'Donoghue agreed that these had been discussed: "I have no difficulty with the fact that those four issues were discussed". It was put to him that he had not indicated any opposition to the change in the recourse for both principal and interest going forward and he answered: "Absolutely not. And it would go completely contrary to the entire thread of the sanction from the start up to there". [Ibid. Q 113-114.] He also said "The question of security was definitely raised and I was definitely told that the status quo was to remain". [Ibid Q. 117.] Counsel put it to Mr. O'Donoghue that Mr. Cogan "will say that he made no such representation to you". Mr. O'Donoghue replied "That won't be true". [Ibid. Q. 118.]

52. Mr. O'Donoghue was asked for his reaction to the "full recourse to all partners for capital and interest" provision in the facility letter when he first read it after the 23rd May, 2008. He explained that he had read the sentence in the context of the facility letter as a whole and in the light of the discussion he had with Mr. Cogan. "So I read the entire paragraph in that context. At that time, the planning permission had not been given to the bank, they had been informed that it was in place and it was read in that context as being descriptive and that they were dealing with the recourse position as they held at that time. And that was my reading of it". [Ibid. Q. 215.] When pressed on the inconsistency of this explanation with the actual wording, Mr. O'Donoghue said: "Well you are ignoring the word "held" afterwards and you are ignoring the reference to the planning permission afterwards. And you are also ignoring the conversations that had taken place". [Ibid. Q.217.]

53. Mr. O'Donoghue did, however, concede that he had asked Mr. Cogan on the 12th June, about the clause because "the wording is

somewhat curious". He added:

> "I wanted comfort that it said what I thought it said. Again this was not done in any pressurised manner. It came up in the conversation that we had which was generally about the Drinan Street facility. I asked what was the situation with the security section and I was told that the situation was to continue as it was". [Ibid. Q.262.]

54. In re-examination Mr. O'Donoghue again confirmed that the four particular changes in the facility renewal had been discussed at the meeting with Mr. Cogan on the 22nd May, 2008 and that they did not present any problem for the plaintiffs. He said "And there was a question of the security and was explicitly said that there was no increase. The status quo was to remain. The position was as it was. There was to be no increase in security". [Ibid Q.704.] In relation to his handwritten note on the Drinan Street letter and the mention "no extra security" he said:

> "That the situation was to remain exactly as it was, which would deal ... the only security which was there was the first legal charge which they had over it, the only other element that could in any way be regarded as security would be recourse. That there was to be no alteration in the terms. It was simply a carry over of what was there previously for medium or modest period of time. Apart from that, it had no impact". [Ibid. Q.708.]

The Evidence of Mr. Cogan

55. As already indicated Mr. Cogan claimed to have a clear recollection of the meeting on the 23rd April, 2008, in the Kingsley Hotel. It apparently coincided with a "wealth event" on the same day, which was being held in the Cork County Council offices located directly opposite the hotel. In his witness statement he said that there was no substantial discussion of the Birr Project at that meeting other than Mr O'Donaghue requesting that interest on the facility continued to be rolled up.

56. Mr. Cogan had the impression that Mr. O'Donoghue was highly reluctant to commence the payment of interest and that while, following the issue of planning permission, the Bank's recourse for capital was confined to the site, if the Bank was to take possession of the site, there was the possibility that the partners would lose their initial investment of €2 million.

57. On the 16th May, 2008, Mr. Cogan submitted a fresh credit application to the Bank's credit committee and he said that on the 20th May the committee indicated that the Bank was not prepared to sanction any further interest roll-up on the original recourse terms.

58. Mr. Cogan was certain in his evidence that there was only one meeting with Mr. O'Donoghue on the 22nd May, 2008, and that this had taken place in the afternoon at Mr. O'Donoghue's office where he had handed over the two facility letters for the Drinan Street and Birr Projects. The Birr facility letter was not on the Bank's headed paper because he needed to discuss the terms with Mr. O'Donoghue before it was finalised. This was because it contained four particular elements which had not previously been discussed namely the increase in the interest rate, the arrangement fee, the need for a fresh valuation and the change in the recourse provision. Mr. O'Donoghue had requested an interest roll-up for a further twelve months which the Bank would only agree to for seven months until the 30th January, 2009. He did not agree that the four changes were "minor matters". Following the discussion, Mr. Cogan sent a copy of the facility letter by email on the following morning. He denied making any statement or representation of the kind claimed by Mr. O'Donoghue as to the meaning of the recourse provision. He insisted that it was only on the basis on the Bank having full recourse for capital and interest that the extension was acceptable to the Bank.

59. In his direct evidence, Mr. Cogan described the meeting at Mr. O'Donoghue's office on the 22"d May in more detail. He had brought with him the "loan pack" for Drinan Street including the forms for opening an account for that borrowing and he "also had duplicate copies of the Birr Partnership but that was not on headed paper as I wanted to discuss a number of items with Mr. O'Donoghue about the facility, along with the terms and conditions for the partnership"'. [Day 4 Q.194.] He had not run off the Birr facility letter on headed notepaper because he needed to discuss the four particular points with Mr. O'Donoghue and he was expecting some challenge to them. He had no recollection of ever saying to Mr. O'Donoghue either on the 22nd May or in the phone conversation on the 12th June that the status quo of the 2005 Facility would remain. He said: "I had clear instructions from my underwriter to discuss the recourse aspect of the loan and that was discussed". [Ibid. Q.227.] He said he did not use the word "security" in that context in his discussions with Mr. O'Donoghue, but used the word "recourse". He was adamant that there had been no meeting in the Kingsley Hotel on the 22nd May. He had no recollection of the telephone conversation mentioned by Mr. O'Donoghue as having taken place on the 20th or 21st May in which it was claimed Mr. Cogan had given him the "great news" that the two facilities had been approved by the credit committee. [Ibid Q.234.]

60. Under cross-examination Mr. Cogan reaffirmed his impression from the April meeting that Mr. O'Donoghue was primarily concerned with getting a roll-up of interest for a twelve month period. Mr. O'Donoghue had specifically made that request and he rejected the suggestion that Mr. O'Donoghue would merely have been happy to take such a moratorium had the Bank offered it. He accepted that following the April meeting when he had put in his application for the renewal of the facility to his underwriters, it was he who had decided to put the roll-up period at six months and that he had not mentioned that to Mr. O'Donoghue before doing so. When preparing the application he had not been at all sure that he would get any interest roll-up period. He accepted when it was put to him in cross-examination that there were two options available to the partnership for renewal of the sanction. One was the option to commence immediate servicing of the interest which would have involved no alteration in the recourse provision under the 2005 Facility. When subsequently recalled, Mr. O'Donoghue denied that any such option had been put to him and maintained that the partners would have been prepared to service interest and such an option would not have presented any problem. The second option was that which Mr. Cogan included in his application and in the draft facility letter which he said he presented to Mr. O'Donoghue on the 22nd May, namely, that interest would be rolled up until January 2009, but that this had to be accompanied with an alteration in the recourse provision which would give the Bank continuing recourse to the partners for both capital and interest notwithstanding the issue of planning permission.

61. This was one ofthe points upon which there was a full divergence of recollection and testimony as between Mr. O'Donoghue and Mr. Cogan. The latter maintained that both options were possible at the time and that he had mentioned the first option to Mr. O'Donoghue during the meeting. He had not prepared a facility letter draft on that basis, however, because of the specific request which Mr. O'Donoghue had made for an interest roll-up period in April.

62. When questioned as to his understanding of the use of the word "held" in the recourse provision he said:

> "I understood it to mean exactly what the sentence says, that the bank would have full recourse to all partners for capital and interest. ... the discussion that I had with Mr. O'Donoghue was clearly on the basis of this is what the recourse will be from now on for this interest roll up period.... I don't place any relevance on the word "held" whatsoever".

[Day 5 Q.475-477.]

When it was put to him that the first option of commencing payment of interest was not put to Mr. O'Donoghue at the meeting, Mr. Cogan said:

> "I didn't put any pressure on Mr. O'Donoghue to accept the facility letter as it was. The options were there for him.... I went through the facility letter with him and I said this is what I need for interest roll-up to be continued and I clearly outlined what I needed for interest roll-up to be continued and there was no opposition whatsoever to that." [Ibid Q.569.]

63. Mr. Cogan was also cross examined in relation to Mr. O'Donoghue's assertion that he had on several occasions asked whether there was to be any change in the security provision. It was put to him that when these references to security were made, Mr. O'Donoghue had included the recourse provision that Mr. Cogan had so understood. Mr. Cogan disagreed. He said:

> "Again I have no recollection of discussions about security, but the facility letter is with Mr. O'Donoghue and if he had these issues, I don't know whey he wouldn't have just looked for an amended facility letter or crossed off the condition that's there, if it was such an issue that was being raised on several occasions, I have no recollection or meanings for those." [Ibid. Q.582.]

He added:

> "Again, if it's a security that is being raised, like the only security that we have is the charge over the property so there is no element, there is no basis for that, it just makes no sense. I know what recourse is and I know what security is, so I don't accept that." [Ibid. Q. 587.]

64. The Court has set out this summary of the opposing testimonies on Mr. O'Donoghue and Mr. Cogan to indicate the divergences between them upon the crucial issue as what actually happened on the 22nd May, 2008; whether there was one meeting or two; whether one of them was in the Kingsley Hotel; whether a hard copy of the Birr facility letter was present and discussed; whether two options were mentioned; and especially as to whether any representations or assurances on the part of Mr. Cogan were made or given in relation to the recourse provision. In the view of the Court it is that evidence that is essential to the tenability of the claim made by the plaintiffs. It should be pointed out, however, that both witnesses were examined and cross examined extensively in relation to correspondence, e-mails and bank documentation both before and after the date of the 22nd May, 2008. For example, Mr. O'Donoghue was questioned about correspondence taking place both with the Bank and with the other partners in the period from August 2008, until the issue with the Bank crystallised in 2010. The purpose of that cross examination was to support the proposition advanced on the part of the Bank that Mr. O'Donoghue had at all times been reluctant to have to turn to the partners to obtain payment of interest and in so doing to have been obliged to disclose to them the full extent of the recourse exposure they had in the project. This proposition was of course rejected by Mr. O'Donoghue.

65. Similarly, Mr. Cogan was extensively questioned on the contents of e-mails passing between him and other officials within Ulster Bank responsible for considering and approving credit facilities. Because the issue before the Court turns ultimately upon the credibility of the testimony given by the two witnesses, it is not necessary in this judgment to set out or address the suggestions that were sought to be made as to the existence of discrepancies between Mr. Cogan's version of events and the implication of particular provisions in the documentation in question. It is sufficient to say that Mr. Cogan's evidence of his dealings with Mr. O'Donoghue is consistent with the contents of the documentation which he exchanged with the underwriters and other officials who had an input into authorising the issue of the offer contained in the draft facility letter which became the 2008 Facility.

66. Thus, for example, in his recommendation at the conclusion of his submissions to the credit committee on the 16th May, 2008, he had said:

> "We wish to acknowledge that the request for an interest roll up on the Birr Partnership loan facility is quite aggressive, however, there are mitigating factors here such as the strength of the investors into partnership coupled with the uplift in value of the site now with the benefit of full planning permission. It has been communicated clearly to the clients that should the bank agree to their request on this occasion that it would be the last interest roll and a provision for interest will have to be made going forward. We are also proposing a fee and a margin uplift given the nature of the client's request."

67. On the 20th May, 2008, a Mr. A. Foley responded with "sanctions or comments" as follows:-

> "In relation to the request to extend the interest roll up concession, this is agreed subject to retention of personal recourse to the borrower's personal assets for principle (*sic*) debt plus interest. Credit risk sign off dated the 22112/05 clearly indicated that the bank would have J and S recourse to the partners for C and I. It is noted that there is some ambiguity on this (phone Con today Foley/Cogan refers) that the RM's [i.e the "relationship manager, Mr Cogan], understanding is that on receipt of planning the bank's recourse for capital sum is ring fenced from the partners other individual personal assets. I do not have the original commitment letter, but if the former scenario is the position, I am not attracted to further interest roll up. Ongoing interest roll up was not part of the initial deal. Please revert so that we can have clarity on this going forward."

Conclusion

68. In resolving this conflict of testimony between the two witnesses called in this case, it is important to bear in mind that, unlike the typical banking case, this is not one in which a bank's customer seeks to resist judgment for the amount of an outstanding bank debt by raising a counterclaim which challenges the basis upon which the contract was made or seeks to claim that a facility letter does not constitute the full agreement because of oral representations made at the time. Here, the Birr Partnership has taken the initiative in suing the Bank for declaratory reliefs with consequence that the plaintiffs bear the burden of proof. Before a judgment could be given in favour of the plaintiffs, therefore, the Court must be satisfied that it is established in evidence and on the balance of probabilities that the representations upon which the claim is based were in fact made. In the judgment of the Court that burden of proof has not been discharged.

69. As between the two witnesses, it is clear that the testimony of Mr. Cogan has been cogent, coherent and consistent with any relevant documentation. On the other hand, there are important discrepancies in the evidence given by Mr. O'Donoghue and very significant flaws in his recollection.

70. In particular, there is the obvious difficulty with Mr. O'Donoghue's claim that there were two meetings on the 22nd May and that one of them took place in the Kingsley Hotel. This enhanced by the discrepancy between his original witness statement that the meeting in the Kingesly Hotel took place at 3.00 in the afternoon and the subsequent oral testimony that it probably took place in the morning.

71. There does not appear to be any logical reason as to why two meetings should have taken place on that day and no explanation offered as to why one of them would have been in the Kingsley Hotel when both Mr. O'Donoghue and Mr. Cogan were based in Cork City.

72. A further difficulty undermining the credibility of Mr. O'Donoghue's account is the difference of a recollection as to the availability of the Birr Partnership facility letter. It is particularly difficult to understand why two meetings would have been necessary on the same day if the written text of the facility letter was not available at either of them. Mr. O'Donoghue conceded that the four changed conditions which Mr. Cogan said he had been required to include in the facility letter were actually discussed at the meeting. He reiterated that he had no difficulty with them. In the judgment of the Court it is far more consistent with the balance of probabilities that Mr. Cogan is correct in his account of having brought two copies of the facility letter on unheaded paper that he went through the four points with Mr. O'Donoghue and then left one of the copies with him. If Mr. O'Donoghue is prepared to concede that these four points were raised and discussed it is difficult to understand why, when he was sent the version he accepts he received by email on the following day, he did not trouble to open and read it until several days later.

73. It should also be pointed out that the difference of recollection as to whether the unheaded version of the draft facility letter was brought by Mr Cogan and handed over to Mr O'Donoghue at the meeting on 22 May was put in a new light by a development which took place on day 6 of the hearing. Counsel for the Bank explained that while searching over night for another document the Bank had by chance come across a lever arch file of documents which had previously been over looked in preparing for trial and in making discovery. Amongst the items on this file was a version of the 2008 Facility letter on paper which lacked the blue "Ulster Bank" title on the first page but which bore an original signature on the third page without date of Mr Cogan and on the fourth page original signatures by Ms Breen-Walsh and Mr O'Donohgue with the addition above each of their signatures of the date 15th September 2008. Mr Cogan confirmed when then recalled that this letter bore his original signature and that while he could not recollect how the document had come into the possession of the Bank he believed it to be the letter he had brought with him to Mr O'Donoghue's office on the afternoon of 22 May 2008. The other original facility letter which had been printed with a first page on plain paper with the "Ulster Bank" title in blue had been signed by Ms Breen-Walsh and Mr O'Donoghue with the addition above their signatures of the date 18th June 2008.

74. The essence of Mr. O'Donoghue's case was that he had been led to understand by Mr. Cogan both on the 22nd May and in the phone conversation of the 12th June, 2008, that the renewed facility would provide an interest roll-up until January 2009, with no change in the provision for recourse in respect of capital and interest as had been provided for in the 2005 Facility once planning permission had issued. As described in the summary of his evidence above, there were a number of occasions upon which he claimed to have asked Mr. Cogan for reassurance or confirmation on that point. The Court is particularly struck, however, by the fact that Mr. O'Donoghue appeared repeatedly to refer to these questions to Mr. Cogan as being about the security for the borrowing rather than being explicit questions as to whether there was any change in the 2005 Facility clause governing the Bank's recourse to the individual partners. This is a feature of his evidence which the Court finds particularly lacking in credibility.

75. In the first place, Mr. O'Donoghue is not only a solicitor of long standing, but one with particular experience of precisely this type of development project with bank funding. He was involved not only as solicitor, but personally as a project developer and borrower, in other similar projects both previously and at the time of these discussions. In those circumstances if, as he claimed, the possibility of abandoning or altering the special provision in the 2005 Facility for recourse limited to interest only after planning permission was granted, would have been "absolutely contrary to the entire thread of the sanction from the start" (see para. 51 above), it is difficult to accept that a solicitor of his experience and expertise would have discussed the issue in such vague and general terms as illustrated by his evidence above of referring to "no additional security" and "the status quo remaining unchanged".

76. If the retention of the provision for recourse limited to interest only was of such importance to him and the possibility of commencing payment of interest was something of no difficulty, it is questionable whether it can be credited that a solicitor with that experience would fail to raise explicitly the question of the recourse clause. In describing the discussion with Mr. Cogan on the 22nd May he said: "With the Birr facility he confirmed that matters were to stay exactly as they were, the status quo was to remain". He then added "I asked about security specifically is what I was asking, he said the situation was to remain as it was, there was to be no extra security was required". (Day 2, Q. 64-66).

77. It is notable the Mr. O'Donoghue claimed that this discussion took place in the absence of any text of the facility letter before them. It is difficult to accept that he would have asked only about "additional security" without making mention of the one important fact that had changed since 2005, namely, that the recourse available to the Bank against the partners had been altered in a material way by the issue of the planning permission. Mr. O'Donoghue not only maintained that he had asked about additional security in these terms, but that Mr. Cogan had understood him to include the recourse provision in his queries. This is particularly difficult to credit having regard to the fact that neither in the 2005 Facility letter nor in the unsigned letter of offer in 2007 had the recourse clause been included under the heading of"Security". It was only in the draft 2008 facility letter, which Mr. O'Donoghue claimed not to have read until he opened the email attachment several days after the 23rd May, that the new recourse clause appeared for the first time under the "Security" heading.

78. If, as he claims, the non-recourse for capital after planning permission was of such importance to the transaction and if there was no copy of the draft text before him on the 22nd May it is, in the view of the Court, highly improbable and difficult to accept that when he later read it before signing the document (either on 18th June or 15th September) that he would not immediately have made contact with Mr. Cogan to question the clause as thus phrased and that he would not have either amended it himself before signing or required Mr. Cogan to make the necessary alteration especially as he conceded that, upon reading it, he found the wording "curious".

79. The Court accordingly finds that there are too many inconsistencies and flaws in Mr. O'Donoghue's recollection of events and discussions and too much strain upon logic in some of his explanations for the discrepancies between his evidence and that of Mr. Cogan, to enable the Court to conclude that his evidence meets the necessary standard of proof. As between that evidence and the evidence of Mr. Cogan the Court finds the latter to be more coherent and reliable. On that basis the Court finds that on the balance of probabilities there was only one meeting between the two witnesses on the 22nd May, 2008 and that it took place at 3.00 pm in the solicitors' offices. The Court is also satisfied that Mr. Cogan produced two copies of the draft facility letter and left one with Mr. O'Donoghue. The Court also accepts (and Mr. O'Donoghue effectively conceded) that the four points which involved changes in the existing facility were discussed. More importantly, however, the Court is satisfied that Mr. Cogan did discuss and explain the Bank's

requirement that the recourse clause had to be changed if there was to be a further roll-up of interest until January 2009, notwithstanding the grant of planning permission; and that Mr. O'Donoghue understood and accepted that change.

80. If follows that the Court is compelled to conclude that there was no prior oral agreement as to what was intended by the Bank or as to what was meant by the new recourse clause contrary to its plain and unambiguous language. There was therefore no mistake whether unilateral or mutual on the part of Mr O'Donoghue and no misrepresentation on the part of the Bank. It follows that the plaintiffs are not entitled to the relief claimed.