Neutral Citation: [2014] IEHC 408

THE HIGH COURT

COMMERCIAL

[2013 No. 1661 P]

BETWEEN

LEONA FLYNN

PLAINTIFF

AND

NATIONAL ASSET LOAN MANAGEMENT LIMITED

DEFENDANT

AND

NATIONAL ASSET LOAN MANAGEMENT LIMITED

PLAINITIFF TO THE COUNTERCLAIMN

AND

JOHN FLYNN (OTHERWISE JOHN FLYNN SNR), LEONA FLYNN, JAMES FLYNN, JOHN FLYNN (OTHERWISE JOHN FLYNN JNR) AND ELAINE FLYNN

DEFENDENDENTS TO THE COUNTERCLAIM

JUDGMENT of Mr. Justice Cregan delivered on the 25th day of July, 2014

INTRODUCTION

(i) The plaintiff in these proceedings and the nature of her claim

1. The plaintiff in this case, Mrs. Leona Flynn, is seeking various declarations from the court in respect of a commercial property known as Belfield Office Park. In her statement of claim Mrs. Flynn seeks the following declarations:-

> 1. That she has transferred her interest in Belfield Office Park to her husband, Mr. John Flynn, pursuant to a contract dated 1st January, 2008, and a Deed of Assurance dated 8th January, 2008 and that since that time she has had no right, title or interest in the said property.
>
> 2. That as a result of this transfer of her interest in the property, she has also transferred her debt of €21.9m to her husband (in respect of loans advanced to her and other members of the Flynn family in respect of that property, by Anglo Irish Bank (now IBRC), which loans have now been acquired by NAMA) and, therefore, that she has no liability to Anglo Irish Bank or NAMA or NALM in respect of such loans.
>
> 3. That she transferred her interest in this property and her debt to Anglo Irish Bank to her husband with the full knowledge and consent of David Drumm, then Chief Executive Officer of Anglo Irish Bank, and that as a result of this consent Anglo Irish Bank, (and now therefore NAMA/NALM), are estopped from denying the transfer to her husband of her interest in the property and the associated debt.
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> 4. That, as a result, she does not owe any monies to Anglo Irish Bank or to NAMA/NALM and as such that she is not in NAMA parlance "an obligor" of NAMA/NALM.
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> 5. That, as she is not an obligor of NAMA/NALM, she is under no obligation to provide a statement of affairs to NAMA.

(ii) The defendant in these proceedings and the nature of their defence

2. The defendant is a company formed by the National Asset Management Agency (NAMA) in accordance with its powers under the National Asset Management Agency Act 2009. In its defence NALM claims the following:-

> (a) That it was a stranger to any agreement between Mrs. Flynn and Mr. Flynn; (however it doubted whether any such agreement had actually been entered into).
>
> (b) That the purported transfer by Mrs. Flynn of her interest in Belfield Office Park and her debt to her husband was invalid and unenforceable because the prior written consent of Anglo Irish Bank was required.
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> (c) That the prior written consent of Anglo Irish Bank was never obtained.
>
> (d) That any purported consent given by David Drumm was not a sufficient consent; that it was at most "an agreement in principle";
>
> (e) That Mr. Drumm did not have the authority to give that consent and that it was at all times only the Credit Committee of the bank which could give such consent and that such consent was never given.
>
> (f) That, there was no representation by Mr. Drumm or reliance on such by the Flynns and, therefore, no issue of estoppel or acquiescence arises.

(g) That, in any event, if the plaintiff sought to rely on any representation of David Drumm as an officer of Anglo Irish Bank, then by virtue of s. 101 of the NAMA Act such an agreement or representation was not binding on NAMA.

(h) That, by virtue of the loans advanced by Anglo Irish Bank, to Mrs. Flynn and Mr. Flynn and their three children, Mrs. Flynn owes money to Anglo Irish Bank; that such loans had been assigned from Anglo Irish Bank to NAMA/NALM and that, therefore, Mrs. Flynn was indebted to the defendant and, as such, was an obligor of NAMA.

(i) That, as an obligor, Mrs. Flynn was obliged to file a statement of affairs with NAMA/NALM.

(iii) The Defendants' Counterclaim

3. In addition to filing a defence to Mrs. Flynn's claim, the defendant also filed a counterclaim against not only Mrs. Flynn but also other members of the Flynn family; Mr. John Flynn (her husband) and her children Mr. James Flynn, Mr. John Flynn Jnr, and Ms. Elaine Flynn.

4. In this counterclaim the defendant claims that each member of the Flynn family is indebted to NAMA/NALM in the sum of €21.9m, that the loan is in default and that the defendant is entitled to judgment in the sum of €21.9m (in respect of loans advanced for Belfield Office Park by Anglo Irish Bank) against all the defendants.

(iv) Mrs. Flynn's Reply and Defence to the Counterclaim

5. Mrs. Flynn has filed a Reply to this defence and counterclaim, denying all the claims, denying liability for the debt and also pleading that s. 101 of the NAMA Act is unconstitutional.

(v.) Defence to the Counterclaim and Reply filed by the rest of the Flynn Family

6. The other members of the Flynn family have also filed a defence to the counterclaim and a reply. In this they make the following claims:-

1. That the defendant's [i.e. NAMA/NALM's] counterclaim is premature and should not be heard until Mrs. Flynn's case against NALM has been heard and determined.

2. That NALM's counterclaim is an abuse of process because it is brought for an ulterior purpose, namely to force Mrs. Flynn to provide a statement of affairs to NAMA.

3. That the facility letter relied on does not represent the entirety of the terms agreed between the Flynns and Anglo Irish Bank; that the loan was an interest only loan; that the loan was and is being repaid by rental income; that there was an estoppel by course of dealing or conduct or convention that where the interest was being paid and the loan was not in default it would not be called in.

4. That the loans are not in default.

5. That the loans have been called in even though there has been no breach of the loan terms.

6. That liability is denied in respect of the loans.

7. That the Flynn loans have been called in by NAMA/NALM for an improper purpose, namely to put pressure on the entire Flynn family and thereby to get them to exert pressure on Mrs. Flynn to accept that she does owe money to NAMA/NALM under the facility letter, to accept that she is an obligor of NAMA and to accept that she is obliged to file a statement of affairs with NAMA.

8. That NAMA/NALM have unlawfully "targeted" the Flynns as one group of investors in the Belfield Office Park and have called in their loans even though they have not called in the loans of the three other members of the syndicate of investors in Belfield Office Park, and in so doing have unlawfully discriminated against the Flynns.

9. That in targeting the Flynns NAMA/NALM are in breach of its statutory duty.

10. That in so doing, NAMA/NALM are guilty of misfeasance of public office.

11. That NAMA/NALM have been guilty of deliberate and deceitful overcharging of interest on the loan.

12. That NAMA/NALM have recklessly disregarded the interests of the Flynns.

13. That NAMA/NALM have failed to conduct itself towards the Flynns in accordance with the basic principles of fairness and natural and constitutional justice.

(vi.) NALM'S Reply to Defence to the Counterclaim

7. NALM in turn has filed a reply to the defence to the counterclaim of all defendants, denying all these allegations.

(vii) The Procedural History of the Proceedings

8. On 11th March, 2013, the High Court (Kelly J.) made an order admitting the proceedings into the commercial list of the High Court. On that date also, the court gave directions in relation to the filing of pleadings and discovery. In addition, the High Court granted an interlocutory injunction pending the determination of the proceedings, restraining the plaintiff from selling property apparently owned by her and her husband at Cooldrinagh, Kerrymount Avenue, Foxrock, Dublin 18, and/or directing the plaintiff to pay into court the proceeds of any sale of such property.

9. On 25th November, 2013, the plaintiffs solicitors, Miley & Miley, served a notice pursuant to O. 60, r. 1 of the Rules of the Superior Courts on the Attorney General to give notice that the plaintiff, Mrs. Flynn, had delivered a statement of claim in which she sought declaratory relief concerning the validity of s. 101 of the National Asset Management Agency Act 2009, having regard to the

provisions of the Constitution.

10. On 16th December, 2013, by order of the High Court (Kelly J.) and without any objection from any of the parties to the proceedings, the court absolved the Attorney General from any further requirement to file legal submissions pending further order noting that the constitutional issue would be only dealt with at the end of the proceedings and only if, in fact, it was necessary to do so.

(viii) Structure of Trial

11. As a result of the structure of the pleadings, it was agreed between all the parties that the trial would be heard in two parts. The first part consisted of Mrs. Flynn's action against NALM; the second part consisted of NALM's action against all members of the Flynn family, (including Mrs. Flynn), seeking judgment in the sum of approximately €21.9m and the Flynns' defence to that claim.

Factual Background to these Proceedings
12. The plaintiff, Mrs. Leona Flynn, was born in New York and is a citizen of the United States. Her father was an American and her mother was Irish, and she lived in America for the early years of her life. As a result of her father's death in the Second World War, her mother returned to live in Ireland with Leona and her older brother and Mrs. Flynn was brought up and educated in Ireland. Mrs. Flynn married John Flynn Snr. and they have three children, James Flynn, John Flynn Jnr and Elaine Flynn, all of whom are defendants in the counter claim. Mrs. Flynn has continued to maintain a close relationship with the United States where many members of her extended family are located. Mr. and Mrs. Flynn now spend a considerable period of time in America – sometimes spending upwards of six to eight months each year there. The rest of the time they reside in Ireland.

13. Leona Flynn and her husband, John Flynn, purchased their family home at Cooldrinagh in Foxrock, County Dublin, in or about 1998. Despite the fact that this was their family home, Mr. and Mrs. Flynn made this house the subject of a trust for the benefit of their grandchildren subject to a right of residence for life for Mrs. Flynn and her husband, John Flynn.

14. Mr. John Flynn Snr was, at the start of his career, a quantity surveyor. Over time, he became a property developer and a property investor. Indeed, Mr. Flynn Snr was a highly successful property developer and property investor throughout the period of the 1990s and 2000s. During that period Mr. Flynn, through various companies, engaged in the development and construction and letting out of a significant number of properties of different types including residential, commercial, office parks *etc.* Mrs. Flynn was not and has not been involved in the day to day running of the business. She described herself as a homemaker. Mr. and Mrs. Flynn's sons, Mr. James Flynn and Mr. John Flynn Jnr appear to have taken a more active role over the last number of years in the running of the business and particularly in the business of property management.

15. In or about 1996, Mr. John Flynn Snr with a number of other business partners and associates purchased the group headquarters of the Jones Group located in Clonskeagh. The other developers who were involved in this project were Patrick Kelly (and his family interests) Joseph Linders (and his family interests) (Mr. McCabe and his associates (The Docfield Group"). Together they built and developed a large complex of offices on the site which is today called Belfield Office Park. Mr. Flynn and his business associates persuaded Compaq, a major computer manufacturer, to come to Ireland and to locate their headquarters at Belfield Office Park with approximately 1,500 staff. Indeed, Mr. Flynn and his business associates built a significant office complex specifically for Compaq on the Belfield Office Park site.

16. It appears that the Belfield Office Park site was purchased by a company called Maldonado Limited. The purchase money for the purchase and development of the site was provided by the various investors outlined above and Anglo Irish Bank. On 28th October, 1996, Maldonado Limited entered into a deed of trust with the investors whereby it agreed to hold the Belfield Office Park on trust for the beneficiaries set out in the schedule to that agreement.

17. The beneficiaries of the Trust were as follows:-

1. The Flynn Family
John Flynn Snr 3%,

Leona Flynn 10%,

James Flynn 4%,

John Flynn Jnr 4%,

Elaine Flynn 4%

Total 25%
2. The Kelly Family
Paddy Kelly 5%

Maureen Kelly 5%

Emma Kelly 5%

Simon Kelly 5%

Chris Kelly 5%

JP Kelly 5%

Liam Kelly 2.5%

Anne Kelly 1.25%

Adam Kelly 1.25%

Fiona Kelly 1.25%

Mark Kelly 1.25%

Total 37.5%
3. The Linders Group 25%
4. The Dockfield Group (McCabes) 12.5%.
100%

Maldonado Limited proceeded to develop Belfield Office Park and to fill it with corporate tenants on commercial leases.

18. Thus in June 2002 Anglo Irish Bank Corporation offered, and the four different investor groups involved in Maldonado accepted, new loan facilities which totalled approximately €84,000,000. These monies were advanced to refinance existing loans, and to develop Belfield Office Park further. The loan facilities were secured, *inter alia*, on the land and buildings at Belfield Office Park.

19. There was some evidence before the court that the culture of the time resulted in developers and Anglo Irish Bank entering into oral agreements for the borrowing and lending of significant sums of money for property development with the documentation only following after the agreement. Indeed in this case Anglo only subsequently learned of the Trust between Maldonado and the beneficiaries in respect of the income from Belfield Office Park. As a result, Anglo, in fact reviewed its existing security. It was unhappy with the security which it had with Maldonado Limited over Belfield Office Park – particularly given that the beneficial interest in the property was in the hands of the beneficiaries over whom it had little or no security. Therefore, it moved to strengthen its security and on 19th June, 2002, entered into a loan facility letter with all the investors – including for the purposes of this case with John Flynn Snr, Leona Flynn, James Flynn, John Flynn Jnr, and Ms. Elaine Flynn.

Facility Letter of 19th June, 2002
20. The terms of this facility letter of 19th June 2002, which contains the agreement between Anglo and the Flynn family are as follows:-

> *"Dear Sirs,*
>
> *Further to our recent discussions, Anglo Irish Bank Corporation Plc ("the Bank") is pleased to confirm its willingness to make available to each of you on a joint and several basis (" the borrowers and each a borrower") loan facilities ("the facilities") on the terms and conditions set out in the general conditions and this facility letter (the "facility letter")."*

21. Paragraph 1 set out the amount of the facility which was in excess of €20,000,000 (for the Flynn family). Section 2 stated that the purpose of the facilities was to repay existing indebtedness of the borrowers to Belfield Office Park Limited and also to be utilised for the borrowers' general purposes.

22. Paragraph 3 of the loan facility is headed "Security" and provides as follows:-

"As security for all amounts owing from the borrowers to the Bank, the Bank require the following security (in form and substance satisfactory to the Bank, and its solicitors in all respects):-

> *(i) A first fixed mortgage over each Borrower's beneficial interest in the property known as the Belfield Office Park at Beaver Row Clonskeagh ("the Property") (which said property is held in trust by the Company for the borrowers and certain other individuals being the persons referred to in appendix 1 hereto (together with the Borrowers "the beneficiaries").*
>
> *(ii) An assignment by way of security of each Borrower's interest in:*
>
> > *(a) the trust deed dated 28th October, 1996, as amended by indenture dated and made between, inter alia, the Beneficiaries and the company.*
> >
> > *(b) the Participation Agreement dated 28th October, 1996, as amended by Indenture dated made between, inter alia, the Beneficiaries and the Company.*
> >
> > *(c) the shares held in trust by for (sic) the Borrowers in the share capital of the Company.*
>
> *(iii) A joint and several guarantee and indemnity in respect of the liabilities of the Borrowers to the Bank pursuant to the facilities.*
>
> *(iv) A joint and several guarantee and indemnity in respect of facilities to be made available by the Bank to members of the Heritage Group, the Docfield Group and the Linders Group as set out in Appendix 1 hereto such guarantee and indemnity to be limited in recourse to the proceeds recovered or recoverable by the Bank pursuant to the security documentation referred to at (i) and (ii) above."*

23. Paragraph 8 of the agreement is headed "Undertakings and Covenants and Representation" and the relevant section provides at s. 8.1:-

> *"Each borrower hereby covenants to the Bank that at the date hereof and for so long as the facilities or any facilities made available to any other beneficiaries secured on such beneficiaries interest in the property remain outstanding:*
>
> *• It has not and shall not transfer dispose of or otherwise deal with the assets referred to at clauses 3(i) and (ii) above.*
>
> *• The deed of trust and the participation agreement as amended by indenture dated comprise the only agreements and/or arrangements between the beneficiaries and/or the company and no borrower shall enter into any other agreements or arrangements in respect of the property and/or the assets the subject of the security documentation."*

24. Section 10 of the agreement is headed "Joint and Several Liability" and provides:-

> *"Each of the borrowers hereby acknowledges and confirms that they are jointly and severally liable on a full indemnity*

basis for all amounts owing to the Bank hereunder."

25. The agreement was signed by Anglo Irish Bank Corporation Plc. And by each member of the Flynn family including Mrs. Flynn.

26. This loan was supplemented by a supplemental loan and facility letter on 21st January, 2003. This loan was also drawn down and was agreed to by the members of the Flynn family.

27. Mrs. Flynn in her evidence accepted that the money was drawn down and accepted that she was initially a borrower from Anglo Irish Bank for a sum in excess of €20,000,000.

The Security for the Loan
28. Subsequently, Anglo ensured that the security for the loan was put in place as follows:-

1. On 28th May, 2003, Mrs. Flynn entered into a mortgage of her beneficial interest of 10% in Belfield Office Park in favour of Anglo. (The other members of the Flynn family also entered into similar mortgages)

2. On 28th May, 2003, Mrs. Flynn (and the other members of the Flynn family) also entered into a guarantee and indemnity in which she (and they) guaranteed the liabilities of other investors in the Belfield Office Park syndicate (*i.e*. the Kellys, the Linders *etc*) up to the limit of their (*i.e*. the Flynns) beneficial interests in Belfield Office Park.

3. On 22nd May, 2003, Mrs. Flynn (and the other members of the Flynn family) also entered into a guarantee where she (and the others) guaranteed to Anglo the payment to Anglo of the €20m (approximately) advanced to each member of the Flynn family under the loan agreement.

29. Thereafter, the Flynns and the other investors managed Belfield Office Park successfully and ensured that the interest on the loans were all paid on time from the rental income. The loans continued on beyond their December, 2002 deadline and continued as interest only loans until the present dispute arose.

Background to the Current Dispute
30. It appears that after the financial crisis in September, 2008, the Anglo loans were transferred to NAMA in or about 2010. NAMA then began the process of reviewing all the loans which it had acquired and the security for these loans. It subsequently wrote to all members of the Flynn family stating that, in NAMA's view, all members of the family were indebted in NAMA in the sum of in excess of €21m in respect of loans from Anglo Irish Bank for Belfield Office Park which NAMA had acquired. As such, each member of the family was an obligor of NAMA according to NAMA. In addition, NAMA requested a statement of affairs from each member of the family.

31. Every member of the Flynn family (apart from Mrs Flynn) provided such a statement of affairs to NAMA. Mrs. Flynn, however, took the view that she was not indebted to NAMA/NALM; that she was not an obligor of NAMA and, therefore, that she did not have to provide a statement of affairs to NAMA. Mrs. Flynn took this view (which, in my view, was clearly held in a *bona fide* manner) because in her view she had transferred her entire beneficial interest in Belfield Office Park (and the debt associated with it) to her husband, John Flynn, in September, 2007. She had done so, on her account, based on tax advice she had received at the time and also, as she believed, with the full knowledge and consent of David Drumm the then Chief Executive Officer of Anglo Irish Bank. Moreover, Mrs. Flynn had subsequently entered into a Contract Of Sale and Deed of Assurance dated 1st January, 2008 and 8th January, 2008, respectively with her husband. She had, therefore, in her view actually transferred her interest in the property to her husband and she had also, she believed, transferred the debt which she owed to Anglo to her husband with Anglo's consent. Therefore, she contended that she was not liable for the debt and refused to file a statement of affairs.

32. Her position in this regard was not accepted by NAMA/NALM who continued to press her for a statement of affairs. Given the impasse, solicitors letters were exchanged between the parties and then Mrs. Flynn issued proceedings seeking the declaratory reliefs in these proceedings.

33. During this process NAMA/NALM came to the view that the actions of Mrs. Flynn made her, in their eyes, an uncooperative debtor. It, therefore, decided that it would call in the loans, not only of Mrs. Flynn but of each member of the Flynn family. It issued a letter of demand to each member of the Flynn family (including Mrs. Flynn) in respect of the loans and, apparently, it intended to issue summary proceedings in respect of these outstanding loans against each member of the Flynn family, including Mrs. Flynn.

34. Mrs. Flynn's proceedings, however, were issued first and as a result NALM took the view that it would, as a matter of procedure, defend the case taken against it by Mrs. Flynn and institute a counterclaim against Mrs. Flynn and all members of the Flynn family in respect of the outstanding loans.

35. It is, however, noteworthy that NAMA/NALM did not call in the loans of any of the other investor groups in the Belfield Office Park.

THE FIRST PART OF THE CASE – MRS. FLYNN'S CLAIM
36. As stated above, it was agreed between the parties that the case fell naturally into two parts. The first part was Mrs. Flynn's case against NALM; the second part was NALM's claim for judgment in the sum of in excess of €21m against each member of the Flynn family, and the Flynns' substantive defences to those claims.

37. Thus, in the first part of the case the issues which the court had to consider were:-

A. Did Mrs. Flynn enter into an agreement with her husband in September, 2007 whereby she agreed to transfer her interest in Belfield Office Park to her husband?

B. If so, did Mrs. Flynn also transfer her debt to her husband?

C. Did David Drumm and/or Anglo give their consent to the transfer of Mrs. Flynn's interest in Belfield Office Park to her husband; if so, what was the nature of that consent; was the prior written consent of Anglo obtained?

D. Did David Drumm/Anglo also consent to the transfer of Mrs. Flynn's debt to her husband?

E. If the consent was given, was it a representation such that it gave rise to an estoppel so that Anglo and now NAMA/NALM are estopped from denying that the transfer of Mrs. Flynn's interest in Belfield Office Park – and the debt

associated there with – took place?

38. The first issue to consider is, therefore, whether Mrs. Flynn entered into an agreement with Mr. Flynn to transfer her interest in Belfield Office Park and the associated debt to her husband.

The Meeting in September, 2007

39. The evidence from Mrs. Flynn, Mr. Flynn and Stephen O'Halloran, (the Flynns' accountant), was that Mr. O'Halloran became concerned in or about 2007 that Mrs. Flynn could face a tax liability in the United States arising out of rental income received in Ireland. This concern arose both because Mrs. Flynn was a US citizen, but also because Mr. and Mrs. Flynn were now spending an increasing amount of time in the United States throughout 2007 and 2008 and appeared to be spending more than six months each year there. Mr. O'Halloran was concerned that, given Mrs. Flynn's citizenship and increasing residency in the US, this might mean that she would be exposed to US tax laws. Mr. O'Halloran and Mr. Flynn both gave evidence that Mr. O'Halloran advised Mr. Flynn to speak to his lawyers or accountants in the US; Mr. Flynn gave evidence that he spoke to tax lawyers in the US and received certain advice to that effect. Arising out of that (and because it was the time to prepare tax returns in Ireland), it was agreed that Mr. and Mrs. Flynn would go into Mr. O'Halloran to discuss the matter further. Mr. O'Halloran gave evidence that although he had regular meetings with Mr. Flynn and spoke to him frequently on the telephone, he also arranged for Mr. and Mrs. Flynn to come into his office each year in or around September/October to discuss and finalise their tax returns to the Irish Revenue authorities.

40. Mrs. Flynn, Mr. Flynn and Mr. O'Halloran all gave evidence that a meeting took place in September, 2007 in Mr. O'Halloran's office and that those present at the meeting were Mr. Flynn, Mrs. Flynn and Mr. O'Halloran. It was variously put to all three witnesses by counsel for the plaintiff either that the meeting did not take place, or that Mrs. Flynn was not present at the meeting. However, I am satisfied on the evidence that the meeting did take place in September, 2007 and that it took place at Mr. O'Halloran's office and I make a finding of fact to that effect. There was no evidence whatsoever before the court that the meeting did not take place.

41. It appears that the central issue which arose for discussion in that meeting was the issue of a potential tax liability for Mrs. Flynn in the US as a result of the taxable income she received from the rental income from Belfield Office Park. It appears, from the evidence of Mr. O'Halloran, that the taxable income arose in the following way: the total amount of borrowings by the four different family interests in Belfield Office Park was approximately €84,000,000; this was financed by a loan from Anglo Irish Bank; the rental income from the various tenants in Belfield Office Park flowed to Belfield Office Park Limited (the company which now held the legal title to Belfield Office Park on trust for the beneficiaries) and thence flowed to all of the beneficiaries in their respective interests in the office park; the total rental income appeared to be of the order of €4.5m per annum; thus, Mrs. Flynn as a 10% beneficial owner in the office park received a rental income of approximately €450,000 per annum. The rental income which accrued from the office park was used to pay the interest on the loan facilities advanced by Anglo Irish Bank. The evidence from Mr. O'Halloran was, however, that even after the interest was deducted, there was still a tax liability which arose for Mrs. Flynn. To a large extent this was sheltered in Ireland, by virtue of capital allowances which Mrs. Flynn had, which could be used to shelter rental income from whatever source in Ireland. However, Mr. O'Halloran was concerned that these capital allowances were not available in the United States and that the depreciation regime which existed under US tax law would not be sufficient to shelter this net income for Mrs. Flynn in the United States and that she would be subject to a tax liability there. Mr. O'Halloran fully accepted in cross examination that he was not a US tax expert and he did not purport in any way to advise his client on US tax law. Nevertheless he said that, following discussions with US tax lawyers, it was his understanding that that was the position.

42. There was a suggestion put to Mr. O'Halloran in cross examination that this issue of a potential tax liability in the US was a sham and/or a contrivance and/or was not true. However, I am satisfied on the evidence of Mr. and Mrs. Flynn and Mr. O'Halloran that there was indeed a potential tax issue which arose for Mrs. Flynn in or about 2007 and that the main purpose of the meeting in 2007 was to engage in *bona fide* tax planning. Thus, I find as a fact, that the purpose of the meeting in 2007 (and the discussions which arose in relation thereto), was to engage in *bona fide* tax planning and to resolve any potential tax liability Mrs. Flynn might have.

43. The suggestion put forward by Mr. O'Halloran to Mr. and Mrs. Flynn was that the legitimate way to avoid this potential tax liability was for Mrs. Flynn to transfer her 10% beneficial interest in the Belfield Office Park to her husband, John Flynn. The effect of this would be to transfer a valuable asset – (the Belfield Office Park was a very valuable property according to the valuations in 2007) – to Mr. Flynn. This meant obviously that the rental income which had formerly accrued to Mrs. Flynn in respect of her 10% beneficial interest would now accrue to Mr. Flynn. However, Mr. Flynn had sufficient capital allowances to cover the rental income in Ireland and also Mr. Flynn had no potential tax liability to the US revenue authorities.

44. Again, it appears, from the evidence of Mr. and Mrs. Flynn and Mr. O'Halloran, that Mrs. Flynn agreed at this meeting in September, 2007 to transfer her 10% beneficial interest in Belfield Office Park to Mr. Flynn in the light of the advice which she received from Mr. O'Halloran.

45. There was much criticism from counsel for NALM that Mr. O'Halloran did not appear to have kept any record of this meeting. Moreover, it does not appear that Mr. O'Halloran kept any diary entries and was unable to put a date on the meeting in September, 2007. Neither were Mr. or Mrs. Flynn. Counsel for NALM put it to all three witnesses that it was extraordinary that the date of this meeting could not be ascertained. These criticisms are, in my view, reasonable; nevertheless I am satisfied that the meeting did occur in September, 2007.

46. The next issue which arose at this meeting was that it clearly occurred either to Mr. Flynn, Mrs. Flynn or Mr. O'Halloran that the consent of Anglo to this transfer would have to be obtained. The evidence of all three persons was that Mr. Flynn then, using his own mobile phone, telephoned David Drumm on Mr. Drumm's mobile phone to discuss the matter. It appears that this was a very short telephone conversation of approximately two minutes duration. It also appears from the evidence that this conversation did not take place on speakerphone and, therefore, the only person who heard what Mr. Drumm was saying was Mr. Flynn. It also appears from the evidence that Mr. O'Halloran and Mrs. Flynn continued chatting to each other whilst this conversation was taking place. Mr. Flynn's evidence was that he informed David Drumm that for US tax reasons his wife wished to transfer her 10% beneficial interest in Belfield Office Park to him and inquired whether that would cause any problems to Anglo. Mr. Flynn's evidence was that David Drumm indicated that there would be no problem with this. Mrs. Flynn and Mr. O'Halloran gave evidence that at the end of the telephone call, Mr. Flynn reported back to them that he had spoken to David Drumm and that "that was fine" or "there was no problem", or words to that effect.

47. I have set out the above evidence in some detail because Mrs. Flynn's entire case rests on this short telephone conversation between Mr. Flynn and David Drumm. It is submitted on behalf of Mrs. Flynn that Mr. Drumm (on behalf of Anglo) consented in this telephone call to the transfer of her beneficial interest in the property and her debt from Mrs. Flynn to Mr. Flynn and that, as a result, Anglo was estopped from denying that any such consent to the transfer was ever given.

48. It was put to Mr. Flynn that this conversation never took place, but on the evidence, I find as a fact that Mr. Flynn did indeed contact David Drumm on or about September, 2007 and that this conversation did take place. There was no evidence to the contrary and Mr. Drumm was not called as a witness by either party.

49. It is noteworthy however that both Mr. Flynn and Mr. O'Halloran gave evidence that, even though David Drumm had given his consent, they assumed the "normal paperwork" would follow.

50. The next step then was to ensure that the proper legal documents were drawn up by Mr. and Mrs. Flynn to effect this transfer.

Sequence of Events from September, 2007 until December 2008

51. After September, 2007 it is not clear what further immediate steps Mr. and Mrs. Flynn actually took to progress this matter. Mr. Flynn said in evidence that he was in constant contact with Aidan Marsh, his solicitor, and Stephen O'Halloran, his accountant, but it does not appear that any written instruction was sent from Mr. or Mrs. Flynn to Mr. Marsh to draw up the relevant documents for a number of months.

52. There is, however, a documentary trail of emails and other documents which appear to set out what happened over the ensuing fifteen months from September, 2007 to December, 2008.

53. Thus, on 30th January, 2008 there is an email from Paula Moran (of Anglo Irish Bank) to Anne McHale (of Ivor Fitzpatrick, Solicitors for Anglo Irish Bank) which states as follows:-

> *"Hi Anne,*
>
> *Aidan Marsh of Beauchamps [Mr and Mrs Flynn's solicitor] called me to inquire that if one of the parties to the Belfield loan was to transfer that interest into the name of his spouse would a full suite of documents need to be re-executed or would one document confirming the adjustment suffice? You might let me know what you think so I may revert to him.*
>
> *Thanks and kind regards*
>
> *Paula"*

54. This email was replied to on the same day by Anne McHale (to which I will refer further below).

55. On 15th February, 2008, Aidan Marsh sent an email to Paula Moran (of Anglo Irish Bank) about Belfield Office Park Limited the relevant part of which states as follows:-

> *"Paula,*
>
> *Incidentally, did you have a chance to consider and discuss with Lennon Heather the question of what procedures have to be put in place if a fractional owner in Belfield wishes to transfer his/her share to his/her spouse? As I mentioned previously this is just an initial query but before doing anything my clients wish to ascertain whether undertaking such a course will result in fresh security documentation having to be executed by all co-owners. Obviously my clients' preference would be for either a simple deed of confirmation to be executed confirming he/she will comply with all the terms of the existing documentation or alternatively, Anglo can join in the Deed of Assurance between the spouses in order to release the existing borrower from the mortgage debt and to obtain sole covenant to discharge the mortgage debt from the new borrower. (sic)*
>
> *I look forward to hearing from you on this.*
>
> *With best regards.*
>
> *Aidan Marsh."*

56. On 15th February, 2008, Paula Moran replied to this email of Aidan Marsh the relevant part of which stated as follows:-

> *"Hi Aidan,*
>
> *Apologies but I obviously omitted to forward on the response I received from Anne McHale at Ivor Fitzpatrick's. Please see below.*
>
> *It seems from Anne's response that there are a number of documents which will need to be completed. If you wish to speak to Anne directly on this matter I have no issue.*
>
> *Kind regards*
>
> *Paula."*

57. This email from Paula Moran dated 15th March, 2008, to Aidan Marsh enclosed the reply from Anne McHale (of Ivor Fitzpatrick) to Paula Moran dated 30th January, 2008, which read as follows:-

> *"Hi Paula,*
>
> *On a quick glance it would strike me that the following would be required:-*
>
> *1. A transfer of the beneficial interest which also acknowledges that transfer is subject to the existing mortgage over the property – a stampable document.*
>
> *2. Notice and acknowledgement from the trustee.*
>
> *3. Mortgage of new interest.*

4. Guarantee of new beneficiary and again (but subject to checking) the guarantee of the other groups may be required. Aidan also would need to be sure on this point.

Subject to the trust documents the consent of others may be required – I will check the requirements I have but this is also a matter for Aidan.

Finally, we would need to consider the outstanding documents – they deal with the groups as are –[what?] is their current status? Do we know if the proposed transfer is between persons who have not yet signed the documentation. If it is, it might work as a lever to get same executed.

Kind regards.

Anne."

58. Mr. Flynn gave evidence that he believed that this email from Aidan Marsh to Paula Moran dated 15th February, 2008, did not refer to the transfer between himself and Mrs. Flynn but instead to a transfer of beneficial interests between other beneficiaries in Belfield Office Park. In response to questions, Mr. Flynn confirmed that there was also a transfer of beneficial interests in Belfield Office Park taking place between Mr. Paddy Kelly and his wife. It is possible, therefore, that this email from Aidan Marsh to Paula Moran related to the transfer of Mrs. Kelly to Mr. Kelly. However, on the balance of probabilities, I am of the view that it is likely that it also relates to the transfer from Mrs. Flynn to Mr. Flynn, firstly, because it is the first written communication from Mr. Flynn's solicitor to Anglo Irish Bank in relation to these matters and secondly, because no contracts had yet been drafted but it was likely that Mr. Marsh had been informed by Mr. Flynn about what was to happen and had perhaps also been instructed to draw up the necessary documents. Mr. Marsh was not called to give evidence to clarify this issue.

59. Thus, Mr. Marsh (as Mr. and Mrs. Flynn's legal adviser) was, therefore, on notice from 15th February, 2008, that there were a number of documents which would need to be drawn up, signed and completed, (including the suite of documents set out in the email of Ms. McHale to Ms. Moran) before a valid and enforceable transfer of Mrs. Flynn's beneficial interest in Belfield Office Park could take place.

60. What is surprising is that there does not appear to be any further work done on this issue between 15th February, 2008 and 23rd November, 2008. By November, 2008 of course the world had changed with the collapse of Lehman Brothers in September, 2008, the imminent collapse of the Irish banks in September, 2008 and the state guarantee to Irish banks on 30th September, 2008.

61. On 23rd November, 2008, Mr. John Flynn sent an email to Aidan Marsh the subject of which was entitled "Transfer of Lee Flynn's interest in Belfield Office Park". The email reads as follows:-

"Dear Aidan,

In order to take advantage of the €250,000 per person limit on capital allowances, we need to transfer Lee's interest in BOP [Belfield Office Park] to me before the end of the year. Could you prepare the necessary documentation to transfer her shareholding and let me know when it is ready. I will arrange for Johanna to go round to everyone to get them to sign it.

Could you also let Anglo know, in case they need to amend any documentation. Lee's guarantee (if she has one on it) should also be released by the bank. I will replace it if necessary.

Stephen O'Halloran will give you any help if you need it.

Many thanks

John" (emphasis added)

62. This email states, in clear and unequivocal terms, that Mr. Flynn is now instructing his solicitor, Mr. Marsh, to prepare the necessary documentation to transfer his wife's shareholding to him. It also contains an instruction to Mr. Marsh to "let Anglo know in case they need to amend any documentation". It is clear, therefore, that Mr. Flynn is aware at this stage that the assignment by Mrs. Flynn of her interest to Mr. Flynn is a document which will require Anglo's consent to amend any relevant documents. This email is also significant because it shows an awareness by Mr. Flynn that, at the very least, Mrs. Flynn's guarantee would have to be released and that he might have to replace it. It is also clear that neither the contract of sale nor the deed of assignment could have been drawn up before 23rd November, 2008, given the terms of this email. It is also noteworthy that there is no explicit reference in this email of any transfer of Mrs. Flynn's debt to Mr. Flynn.

63. On the very next day, Monday 24th November, 2008, at 8.26am, Aidan Marsh replies to Mr. Flynn by email saying

"I will get on this immediately.

Regards

Aidan Marsh".

Clearly, if Mr. Marsh had already drawn up a contract of sale or a deed of transfer he would have indicated this in his email.

64. On the same day, (24th November, 2008), Stephen O'Halloran sent an email to Mr. Marsh on the same subject saying:-

"Aidan,

Can we make the agreement between John and Lee 1st January, 2008, and we are now only getting the other partners and Anglo agreement for the usual consents only.

Any problems let me know.

Stephen"

65. The following day, 25th November, 2008, Aidan Marsh replies to Mr. O'Halloran saying:-

> *"We have a binding contract between Lee and John on that date.*
>
> *Does that suffice and transfer can be dated now?*
>
> *Aidan Marsh"*

This is a somewhat equivocal and confusing email because it would seem to suggest that a written contract between Mr. and Mrs. Flynn was already in place by 25th November, 2008 when it is clear from other evidence that this was not so. It appears to be inconsistent with the email instruction from Mr. Flynn of 23rd November, 2008, with Mr. Marsh's own reply dated 24th November, 2008 and indeed with subsequent emails and correspondence.

Signing of the Contract

66. Subsequently, on 15th December, 2008, (some three weeks after receiving his instructions from Mr. Flynn) Aidan Marsh wrote to John Flynn and Leona Flynn at their home in Palm Beach, Florida, in the following terms:-

> *"Belfield Office Park and former Smurfit H.Q.*
>
> *Dear Lee and John,*
>
> *Lee holds the following interests:-*
>
> *- 1 A 10% beneficial interest in Belfield Office Park, Clonskeagh subject to the various occupational leases in place over Blocks 1-8; and*
>
> *- 2 An 8⅓% beneficial interest in the property and lands known as the former Smurfit H.Q., Dublin, subject to the leases, licenses and agreements that are in place.*
>
> *You have agreed that both beneficial interests will be transferred from Lee to John.*
>
> *There will be no stamp duty or gift tax consequences as you are lawfully married. We will have to get the consent of Anglo to the transfer but I am confirming to Anglo that John will execute the required security documentation in the same form as Lee has already executed.*
>
> *The disadvantages in relation to the proposal are:*
>
> *1. Lee is disposing of valuable interests in Ireland and should be separately advised by independent legal and tax advisers.*
>
> *2. We will ensure that Anglo will release Lee from all obligations under the Belfield and Pamarette deals on or before completion. In both cases Lee's liability was limited to her interest in the property only.*
>
> *3. Both of you will have to consider whether it is a prudent move to move assets from Lee to John given that John has given a number of unlimited guarantees while Lee has been prudent in limiting the number and nature of the guarantees given. In most other cases I am dealing with, developer husbands are moving assets to their wives rather than the other way round!*
>
> *Subject to that, if you are both happy with the documentation could you sign contracts in duplicate where indicated and return them to me.*
>
> *Yours sincerely*
>
> *Aidan Marsh"*

67. It would appear from the evidence that this letter of the 15th December, 2008, encloses - for the first time - the contract and deed of assurance wherein Mrs. Flynn transfers her beneficial interest to Mr. Flynn. If that is so, and I have heard no evidence to the contrary, then that would mean that the contract was in fact signed after 15th December, 2008, and then backdated to 1st January, 2008. Mr. Marsh's letter refers to the fact that "both beneficial interests will be transferred from Lee to John" (emphasis added) and also encloses contracts which are to be signed. More importantly, Mr. Marsh also notes that the consent of Anglo to the transfer would be required and that Mr. Flynn would also have to execute required security documentation. Thus, as at December 2008, Aidan Marsh and indeed Mr. and Mrs. Flynn were aware that Anglo's consent would be required and that new security documentation would have to be executed.

68. A significant issue which arose in this case is that although the contract of sale is dated 1st January, 2008 and the Deed of Assignment is dated 8th January, 2008, both agreements were not in fact signed on those dates, but were signed much later and were backdated to the earlier dates. Indeed, neither Mrs. Flynn nor Mr. Flynn were able to say precisely when the documents were in fact signed by them and when they were backdated. There is nothing on either the contract of sale or the deed of assignment to point to a date on when they were signed; the signatures are not dated; the signatures of the witnesses are not dated and there are no other internal references in either of the documents as to when they might have been signed.

69. One is, therefore, cast back on other documents and emails which created a chain of correspondence between Mr. and Mrs. Flynn and their solicitor, Mr. Marsh of Beauchamps, to draw an inference as to when they might have been signed. In fairness to Mr. and Mrs. Flynn they both accepted that they were signed much later in 2008 and, indeed, their evidence is that the documents were signed in or about mid to late December, 2008 and backdated to 1st and 8th January, 2008.

70. This is of some significance for a number of reasons. Firstly, although in September, 2007 property values in Ireland were still reasonably stable and the valuation in Belfield Office Park was positive, by December 2008 the financial world had changed. The global financial crisis which engulfed the financial world, particularly Ireland, had, as stated above, crystallised in September, 2008 with the collapse of Lehman Brothers in New York and also with the bank guarantee given to the Irish banks by the Irish Government on 30th September, 2008, when they appeared to be in a state of collapse. Secondly, David Drumm had resigned as Chief Executive Officer of

Anglo Irish Bank. Thus, the contract of sale and deed of assurance were signed by Mr. and Mrs. Flynn in the full knowledge that the world had changed and that the Irish banks and the Irish property market – indeed the Irish economy generally – was in a state of collapse.

71. Mr. Flynn's evidence was that the documents were signed in Ireland given that they were witnessed by a friend of theirs who lives in Ireland. Mr. Flynn also gave evidence that after the contract of sale and the deed of transfer had been signed he gave them to his son, James Flynn, to be lodged in James's family home for safekeeping. What is clear, however, is that no copy of these documents was ever sent to the Flynns' legal adviser, (Mr. Aidan Marsh), or indeed to Mr. O'Halloran (their tax adviser), or more importantly to anyone in Anglo to progress matters. These were surprising omissions.

Events from January 2009 – November 2011

72. There is a further email from Aidan Marsh to Mark Kavanagh (who was a solicitor in BCM Hanby Wallace, Solicitors for Anglo) dated 5th January, 2009. This email is headed "Anglo and the Flynn's" and the relevant portion of the email states as follows:-

> *"As I mentioned to you Lee Flynn will be transferring her ownership in Belfield Office Park and the former Smurfit premises at Clonskeagh to her husband John Flynn Snr and we will put in place this documentation sooner rather than later.*
>
> *Best regards*
>
> *Aidan Marsh"*

73. The next document which occurs in chronological order is a document which is apparently a Deed of Confirmation. It was initially dated 22nd January, 2007, but it appears to have taken two years for this document to be agreed by all the relevant parties because it was subsequently, in fact, signed and redated 22nd January, 2009. This was an agreement between the beneficiaries of Belfield Office Park and Anglo Irish Bank in which, *inter alia*, the beneficiaries confirmed their beneficial shareholding in the property. At the first schedule Ms. Leona Flynn is mentioned and in the third schedule her interest is stated to be 10%. Moreover, this document was signed on behalf of Ms. Leona Flynn by her son, James Flynn, pursuant to a power of attorney granted by Ms. Flynn to her son. Counsel for NALM sought to lay great emphasis on this document in that it showed that as at 22nd January, 2009, the Flynns purportedly accepted that Mrs. Flynn's interest was still 10%. Mr. Flynn in evidence did not accept this and stated that this document had been floating around for over two years, that the recital of Mrs. Flynn as a 10% beneficial shareholder was simply incorrect and had been superseded by the transfer to him. In any event, I am not sure much turns on this document one way or the other. It appears that in fact what happened was that James Flynn signed it on or about January, 2007 when Mrs. Flynn's interest was 10%. The document was then sent to the Linders family for signature and it got delayed for about two years and was not updated.

74. The next document which casts light on this matter is a letter dated 10th February, 2009, from Aidan Marsh to Stephen O'Halloran headed:-

> *"Lee Flynn and John Flynn – 10% interest in Belfield Office Park"*
>
> *Dear Stephen,*
>
> *I attach a copy of the contract for sale between Lee and John Flynn agreeing to transfer Lee's beneficial interest in the lands at Belfield Office Park, Dublin 4 to John Senior.*
>
> *I am checking when John wishes this transaction to actually complete.*
>
> *Yours sincerely*
>
> *Aidan Marsh"*

Given Mr. Flynn's evidence that he was in regular contact with Mr. Marsh, it seems a reasonable inference that Mr. Marsh did in fact check with Mr. Flynn as to when this transaction did actually complete. It appears, therefore, that as of 10th February, 2009, Mr. Marsh had a copy of the signed contract between Mr. and Mrs. Flynn but certainly did not have a copy of the Deed Of Assurance and was not aware at that date as to whether the Deed of Assurance had actually been signed.

75. It appears that further discussions took place between the Flynns (and their legal advisers) and Anglo (and their legal advisers) throughout 2009 and 2010. A meeting took place on 21st July, 2009. By this time, of course, the landscape had been transformed dramatically. It also appeared as if, around this time, two separate processes became interlinked. The first process was the process whereby Mr. Flynn (and Aidan Marsh) were trying to get Anglo's consent to Mrs. Flynn's transfer to her husband; the second process was the process in which Anglo was reviewing the security which it had on all its loans and was seeking to get all the parties in the Belfield Office Park to sign a Deed of Rectification in respect of mortgage documentation. (It appears that some of the individual beneficiaries had signed mortgage documentation in respect of their beneficial interests which were not correct and Anglo wished to rectify this situation). Thus, Anglo was seeking Mr. Flynn's consent to the signing of a Deed of Rectification. A stalemate then appears to have arisen in which Mr. Flynn would not agree to execute the Anglo Deed of Rectification unless Anglo agreed to consent to the transfer of his wife's beneficial interest to him; likewise, Anglo refused to consent to the transfer until Mr. Flynn consented to the Deed of Rectification. This impasse seemed to continue from July, 2010 until at least September, 2010 and, indeed, was never resolved. The situation was compounded because Anglo had transferred – or was in the process of transferring – the Flynns' debt to NAMA and, therefore, NAMA personnel became involved.

76. It appears from the emails that at one stage Mr. Declan Guilfoyle (who is described on his email as a solicitor in the Anglo NAMA Due Diligence Team) suggested that if Mr. Flynn signed the Deed of Rectification, that Anglo would then transfer the Flynns' loans to NAMA and would then assist Mr. Flynn in trying to get NAMA to give its consent to Mrs. Flynn's transfer to Mr. Flynn. This approach was heavily –and justly- criticised by counsel for Mrs. Flynn. However, in my view nothing much turns on these issues. They are not particularly relevant to the issues which I have to decide.

77. It also appears that Mr. Brian Motherway, who was an employee of Anglo (and who gave evidence), contacted Mr. Flynn in or about August, 2010 to ask him to sign the Deed of Rectification. Mr. Flynn's evidence was that he refused to do so on the basis that "two wrongs don't make a right", (*i.e.* he was not going to agree to sign a Deed of Rectification in August, 2010 which showed his wife had a beneficial interest of 10% in Belfield Office Park when, was far as he was concerned, she had transferred her 10% interest

to him in January 2008).

78. Throughout 2009 and 2010, although there are occasional emails and letters between the Flynns (and their advisers) and Anglo, there does not appear to be any documentary correspondence of substance between the Flynns (or their solicitors) and Anglo in relation to Belfield Office Park, although it was mentioned in correspondence dealing with other matters.

79. Almost a year later, on 31st May, 2011, Aidan Marsh sent an email to Peter Wilson (who worked for Equity Properties, the Flynn property management company) stating as follows-

> *"Peter,*
>
> *I have a contract for the transfer of Lee's 10% dated 1st January, 2008 – Maitiu witnessed John's signature and I witnessed Lee's. I attach a copy of the contract for your attention and you will see that the contract attached the form of deed of assurance. I understand that shortly after the execution of the contract John and Lee signed the deed of assurance and they hold the original deed (I have not seen it). Frankly there was an urgent requirement to shift the asset at the time on foot of taxation advice from Stephen O'Halloran and Lee and John were not prepared to wait for the delays they would face on legals/formal bank consent.*
>
> *John also tells me that he received consent or acquiescence by Anglo to this arrangement although I have not seen a letter of consent or email confirming this.*
>
> *Best regards*
>
> *Aidan Marsh" (emphasis added)*

80. This email is of significance for a number of reasons. Firstly, it confirms that the contract of sale transferring Mrs. Leona Flynn's interest in Belfield Office Park to her husband, John Flynn, was signed by both parties and witnessed by their solicitors. Secondly, it also shows that the deed of assurance was not signed at the same time or certainly not in the presence of their solicitors; thirdly, it appears from this email that Mr. Marsh, (presumably on information received from Mr. Flynn), was of the view that Leona Flynn and John Flynn signed the deed of assurance shortly thereafter; fourthly, it establishes that Mr. and Mrs. Flynn wanted to sign the contract of sale and deed of assurance due to the urgency on the tax issue and states clearly they "were not prepared to wait for the delays they would face on legals/formal bank consent"; fifthly, it shows that Mr. and Mrs. Flynn were aware that formal bank consent would be required; sixthly, Mr. Marsh confirms that although Mr. Flynn told him he had received the consent or acquiescence of Anglo, he had not seen a letter of consent or email to confirm this.

81. Subsequently Aidan Marsh sent Stephen O'Halloran a detailed email dated 22nd September, 2011, the relevant parts of which state:-

> *"Stephen,*
>
> *As part of the NAMA process, NAMA has circulated fresh security documentation for execution – in effect a rental sweep of excess rents in Belfield. The Flynn's main concern in relation to this is that the documentation still refers to Lee Flynn as holding a beneficial interest in the property…*
>
> *…*
>
> *I understand that at the same time they executed the contracts John and Lee simply took out the deed of transfer and executed it given the urgency of the taxation matters. I further understand from John that he received verbal assurances from at least two officials in Anglo (including David Drumm) that there was no difficulty in doing this given that the transfer was for bona fide tax reasons. John is checking his files and papers to see if there is any email evidence of this from Anglo re their consent.*
>
> *Understandably NAMA wants to see proper evidence of the transfer of this beneficial interest and of Anglo's consent to do so.*
>
> *I think it will be important to show that the decision to transfer this interest was motivated solely by taxation reasons at the time when the financial tsunami had not hit (2007). It should also be borne in mind that Belfield is a performing asset and is likely to continue to be a performing asset given the quality of the tenants in situ…*
>
> *Could you check your files and papers and prepare a letter setting all of this out including the changes in Lee's circumstances or in US tax law/rules which made the change necessary. I have spoken with John and we believe that it is best to put the full case up front at this stage rather than present it in a piecemeal manner because that may result in an unfair and incorrect impression that something improper occurred here.*
>
> *This issue is of crucial importance to both John and Lee. It is possible that NAMA may take an aggressive stance in relation to this matter and if that is the case I expect that Lee may get separate legal and perhaps tax advice. I am hopeful that it will not come to this but we must prepare. I should be grateful if you would start drafting a letter setting out all of these circumstances and you might give me a call on receipt of this email.*
>
> *Best regards*
>
> *Aidan Marsh"*

82. On 24th November, 2011, Stephen O'Halloran replied to Aidan Marsh setting out the background circumstances to why this transaction was done. The letter stated, inter alia:-

> *"Dear Aidan,*
>
> *Re Belfield Office Park and Lee Flynn*
>
> *You and Peter Wilson have informed me that in relation to Belfield Office Park that new security documentation is to be*

done for NAMA and that these documents refer to Lee Flynn.

That is not correct according to my records.

Lee Flynn transferred her 10% holding to John Snr in early 2008.

This transfer was done on my instructions and for USA tax reasons. I do recollect that at a meeting with me John called Anglo at the time to clear it with them. They were not bothered about it as they had full security and it was just deleting a few lines in the paperwork but in the end the security will be exactly the same. So we decided at that time to proceed on the basis that they had no objection. I also believe that you have dealings with Anglo at that time regarding this matter.

After we decided in 2008 to complete this transfer and heard nothing more about Anglo I had put it out of my mind and forgotten all about this paperwork.

However, we proceeded from then on to treat John as the owner of this 10% as well as his own. We have completed his tax returns on this basis.

…

Yours sincerely

Stephen O'Halloran"

83. This Stephen O'Halloran letter is important for a number of reasons. Firstly, it emphasises that Mr. O'Halloran's recollection of Mr. Flynn's telephone conversation with Mr. Drumm was that Mr. Drumm's/Anglo's concern was about the security for the loan rather than the loan itself; secondly, it seemed to throw light on the decision making process of Mr. Flynn in relation to taking no further step to obtain Anglo consent at that time.

Assessment of the Evidence and Legal Issues
(1) Was there an agreement between Mrs. Flynn and Mr. Flynn whereby Mrs. Flynn agreed to transfer her interest in Belfield Office Park to Mr. Flynn?

84. The first issue I have to consider is whether Mrs. Flynn entered into an agreement with Mr. Flynn to transfer her beneficial interest in Belfield Office Park to her husband.

85. In my view, there was such an agreement. It is clear from the evidence of Mrs. Flynn, Mr. Flynn and their accountant, Mr. O'Halloran, that Mrs. Flynn entered into such an agreement with her husband in September, 2007. The agreement was entered into in the offices of her accountant, Mr. O'Halloran. Those present when the oral agreement was entered into were Mrs. Flynn, Mr. Flynn and Mr. Stephen O'Halloran. All gave evidence to the court and confirmed the agreement. It was further agreed between Mrs. Flynn and Mr. Flynn that the transfer was to take place in or around 1st January, 2008, because this was the start of a new tax year and based on tax advice which they received from Mr. O'Halloran, it was considered appropriate that the agreement would commence on that date.

86. The parties to the agreement were Mr. and Mrs. Flynn; the transfer was the transfer of her beneficial interest of 10% in Belfield Office Park; the commencement date was 1st January, 2008; the consideration was that Mrs. Flynn transferred her 10% beneficial interest to her husband and in return he would assume any of the tax liabilities which might accrue from such income. In my view, having heard the evidence of Mrs. Flynn, Mr. Flynn and Mr. O'Halloran, I have no doubt that this agreement was entered into between the parties for valid and lawful tax planning reasons and I make a finding of fact in that regard.

(2) Was the agreement lawfully backdated?

87. It is clear from the evidence that the contract and the Deed of Assurance which were signed pursuant to the oral agreement made between the parties in September, 2007 were, in fact, only signed in or about December, 2008 and backdated to 1st January, 2008, and 8th January, 2008 respectively. This was accepted by the Flynns.

88. One of the issues which arose in the course of the trial was whether the backdating of these documents in this fashion was lawful. Counsel for NALM suggested in cross-examination that, on the facts of this case, the backdating of the documents in this fashion was unlawful. Counsel for Mrs. Flynn, however, submitted that there was nothing improper about the backdating of documents in this fashion. He submitted that if the parties had entered into a lawful oral agreement which was agreed to take effect on or about the date reflected in the written agreement, then it was perfectly proper and lawful for the parties to backdate a document – which was a memorandum of their agreement – to that time. It would however be improper, he submitted to backdate a document if no such prior agreement had been entered into and if the document was backdated with a view to pretending that it had been.

89. Counsel for NALM submitted that the timing of the signing and backdating of documents in this case was of great significance because, whereas in September, 2007 Mrs. Flynn may have believed that she was transferring an asset with a certain positive value (net of the loan) to her husband, it was the case that by December, 2008, the financial crisis had occurred and the value of the property had fallen to such an extent that it was now in negative equity and, therefore what Mrs. Flynn was now transferring was a liability out of her name and into that of her husband.

90. However, given my findings that an oral agreement had been entered into by Mrs. Flynn and Mr. Flynn in September, 2007, and that the parties had agreed that this agreement was to take effect from 1st January, 2008, and given my finding that this agreement was entered into for *bona fide* tax planning considerations, it is clear to me that, although the documents were, in fact, only signed in or about December, 2008 and backdated to January, 2008, such backdating was lawful because it reflected the prior oral agreement of the parties that the agreement was to take effect from 1st January, 2008.

91. Counsel for NALM in their legal submissions, submitted that it was possible that the documents were backdated with a view to misleading the Revenue authorities and that, therefore, the contract and the Deed of Assurance could be unenforceable on public policy grounds. In this regard the court was referred to "*Contract Law*" McDermott (2001 Ed.) para. 15.46 and to the cases therein referred to such as *Sterling v. Woods* (Unreported, McWilliam J., 24th May, 1977) and *Lewis v. Squash Ireland* [1983] ILRM 363. I have considered this text and these authorities, but I am of the view that they are not applicable to the facts of this case. I am

satisfied that there was a prior oral agreement and that this agreement was entered into for *bona fide* and lawful tax planning reasons.

92. Counsel for Mrs. Flynn referred in their legal submissions to "*Chitty on Contracts*" (31st Ed.) Vol. 1 General Principles at para. 2-125 where the learned authors state as follows:-

> *"The parties may begin to act on the terms of an agreement before it has contractual force. When it is later given such force, the resulting contract may then if it expressly or by implication so provides, have retrospective effect so as to apply to work done or good supplied before it was actually made. (See Trollop v. Colls Ltd v. Atomic Power Construction Ltd [1963] 1 W.L.R. 333."*

93. Perhaps the clearest statement of this common law principle can be found in *Grubb & Ellis Co. v. Bradley Real Estate Trust* 909 F.2D 1050 (a decision of the United States Court of Appeals 7th Circuit, 1990). In this case Bradley Real Estate Trust hired Grubb and Ellis, a real estate broker, to act as its agent for the sale of a downtown Chicago building. The agency agreement provided that Grubb & Ellis would receive a commission upon the sale of the building. A dispute arose between the parties about whether commission was due to the broker. At pg 1054 of its judgment, the court stated as follows:-

> *"19. Although there is little recent law on the subject, Illinois courts have, in the past, permitted the "relation back" theory of contract effectiveness: that is, contractual terms may be effective for a period before the contract is executed, so long as such coverage is clear from the face of the contract:*
>
> *20. In the law of contracts, it is elementary that ordinarily a contract speaks from the day of its date, regardless of when it was executed and delivered. It is of common occurrence in connection with deeds, leases and other contracts that, while they are not in effect at all and have no legal existence until delivered, yet, in respect to the date of delivery, they, in point of commencement, relate back or commence in the future. Such relation back or forward contravenes no principle of law and is determined by the intent of the parties as deduced from the instrument itself.*

94. In my view, the backdating of the agreement was not done to obtain an unlawful tax benefit, but rather to reduce to writing a prior oral agreement between the parties.

95. I am satisfied, therefore, that the agreement entered into in September, 2007 was for *bona fide* and lawful tax planning considerations, and that it was agreed between Mr. and Mrs. Flynn that it would come into effect on 1st January, 2008. Therefore, in those circumstances the backdating of the contract and the Deed of Assurance was also lawful because it merely reflected the original agreement between the parties. (It would, of course, be unlawful if the parties had backdated the agreement, where there had been no *bona fide* agreement between the parties at the earlier date and if the whole purpose of the backdating was to evade a tax liability).

96. Counsel for NALM complained that despite the pleadings and the witness statements in this case, the first time they actually became aware that the agreements were signed in December, 2008 and backdated to January, 2008 was at the opening of the trial. Whilst it is, of course, surprising – to put it no higher – that the actual date the contract was signed was not communicated to NALM until the opening of the case, I do not believe on the evidence as presented that there was any intention on the part of the Flynns to mislead NALM on that issue.

(3) Could the transfer from Mrs. Flynn to Mr. Flynn be effective as between Mrs. Flynn and Mr. Flynn without binding Anglo or NALM?

97. One of the issues which arose at the hearing was whether the transfer by Mrs. Flynn of her beneficial interest in Belfield Office Park to Mr. Flynn could be binding and effective between Mrs. Flynn and Mr. Flynn and yet not be binding on either Anglo Irish Bank or NALM. Counsel for Mrs. Flynn submitted that it could; counsel for NALM also accepted that this could be the case – on the authority of a decision of Dunne J. in *Re N17 Electrics Limited (in liquidation*) [2012] IEHC 228.

98. In that case, Dunne J. considered the enforceability of leases entered into by the owner of certain business units in circumstances where the business units were the subject of mortgages/charges in favour of a bank. The said mortgages/charges required the prior written consent of the bank to any assignment of the premises. The prior written consent of the bank was not obtained. That bank's case was that as no prior written consent had been obtained, the leases were not binding on the bank. In the course of her judgment Dunne J. considered the issue of whether the leases could be binding as between the lessor and lessee and yet not be binding on the bank as mortgagee.

99. At para. 15 of her judgment she stated as follows:-

> *"15. Reliance was placed on English authority in that regard and I was referred to a passage from Megarry and Wade, 'Law of Real Property' , 7th Ed., at para. 25-080, a passage which referred to leases granted outside the statutory power, wherein it was stated as follows:*
>
> > *"If the power is excluded and the mortgagor nevertheless grants an unauthorised lease, the lease is void against the mortgagee and his successors in title (unless they are estopped from asserting this), but valid as between the parties to it. The statutory powers of leasing do not deprive the parties of their common law rights to create leases not binding upon each other. For example, if the mortgage contains a covenant by the mortgagor not to exercise a statutory power of leasing without the mortgagor's written consent, the mortgagor may, nevertheless, grant a yearly tenancy which binds the mortgagor under the principle of estoppel but which does not bind the mortgagee.""*

100. Likewise, at para. 17 of her decision Dunne J. stated as follows:-

> *"17. Further reliance was placed on a passage from Fisher and Lightwood's 'Law of Mortgage' at para. 29.18, in which it is stated:*
>
> > *"The mortgagor is unable to confer upon another a greater right than he himself possesses. Thus, in the absence of a statutory or express power of leasing, where, after the mortgage, the mortgagor purports to grant a lease without the privity of the mortgagee, the tenancy will subsist by estoppel between the mortgagor and tenant but will be void against the mortgagee. Such a tenant is liable, like his lessor, to be ejected without notice. His only*

remedy is against the mortgagor …""

101. Likewise, at para. 30 the learned judge stated as follows:-

> *"30. A number of useful observations can be made from the authorities referred to above. I think, first of all, that it is clear that a mortgagor and mortgagee can expressly agree to exclude the power conferred by s. 18 of the 1881 Act. If the power is excluded, it may be done in a way that permits the mortgagor to grant a lease subject to the prior consent of the mortgagee. If such prior written consent is not obtained by the mortgagor and the mortgagor proceeds to enter into a lease with a tenant, the lease will be binding on the mortgagor as lessor, but as against the mortgagee, the lease will not be binding."*

102. Whilst that decision deals with the issue of a mortgagor granting a lease without the prior written consent of the mortgagee, I am of the view that, by analogy, a mortgagor may assign the benefit of his/her equitable interest in a property to an assignee. The assignment is valid as between the mortgagor as assignor and the assignee, but it is invalid as between the mortgagor (as assignor) and the mortgagee where the prior written consent of the mortgagee was required but was not obtained (and/or where there is no estoppel raised). I am conscious, however, that as the point was conceded by NALM, the point was not fully argued before me. I am also conscious that the transfer in this case was of an entire beneficial interest rather than the creation of a leasehold interest and it may be that another case might turn on different facts.

103. Nevertheless, given the concession by NALM, and given that it was not in dispute, I am of the view that the transfer by Mrs. Flynn of her interest in Belfield Office Park to Mr. Flynn was valid and effective as between Mrs. Flynn and Mr. Flynn. This is of some importance to Mr. and Mrs. Flynn, as Mr. Flynn then proceeded to calculate this income as his own income and proceeded to file annual tax returns on their behalf on that basis. In my view, he was so entitled to do.

104. However, for reasons which I will set out later in my judgment I do not believe that the assignment as between Mrs. Flynn to Mr. Flynn was valid or enforceable as against the mortgagee – Anglo Irish Bank.

Was the Transfer between Mrs. Flynn and Mr. Flynn binding on Anglo Irish Bank/NAMA/NALM?

(i). The Structure of the Belfield Office Park Arrangement

105. In order to consider this question it is important to consider the complex commercial structure in which Mrs. Flynn was involved in Belfield Office Park. This consisted of the following elements:-

(1) The legal title to Belfield Office Park was held by Belfield Office Park Ltd. Belfield Office Park Ltd had granted a mortgage over its legal title to Anglo Irish Bank.

(2) Belfield Office Park Ltd held the property in trust for a large number of beneficiaries. These beneficiaries were grouped in four investor/family groups – The Flynns (25%), The Kellys (37.5%), The Linders Group (25%), the Dockfield Group/McCabes (12.5%) Thus Mrs. Flynn held a 10% beneficial interest in Belfield Office Park.

(3) In respect of the financing of Belfield Office Park, Mrs Flynn together with Mr. Flynn and her three children had entered into a loan agreement/facility letter with Anglo Irish Bank on 19th June, 2002 (as supplemented by an additional facility letter of January, 2003) whereby she agreed to repay the bank the sum of €21.9m on a joint and several liability basis.

(4) In return for the loan Anglo Irish Bank had taken security over various elements of the Belfield Office Park and over the legal and beneficial interests held by all the parties in respect thereto.

(5) Each owner of a beneficial interest had entered into a mortgage of that beneficial interest to Anglo Irish Bank. Thus, Mrs. Flynn had individually signed a mortgage agreement with Anglo Irish Bank in respect of her 10% beneficial interest. This Mortgage Deed was dated 28th May, 2003, and provided that she could not assign her beneficial interest or obligation under the mortgage without Anglo's consent.

(6) In addition, Mrs. Flynn (and the other members of the Flynn family) had also entered into a guarantee on 28th May, 2003, whereby she (and the other members of her family) were guarantors for the rest of the family's liability to Anglo Irish Bank on a joint and several basis up to the full amount of the Flynn family loan on the Belfield Office Park development.

(7) In addition, Mrs. Flynn (and the other members of the Flynn family) had also entered into a guarantee on 28th May, 2003, whereby they guaranteed the liabilities of the other members of the syndicate in Belfield Office Park, but only up to the level of their beneficial interest in Belfield Office Park.

106. It can be seen, therefore, that Mrs. Flynn was enmeshed in a highly complex commercial arrangement involving a holding company, a trust, four syndicates of investors, loan facilities and a series of mortgages, guarantees and cross guarantees.

107. In order for Mrs. Flynn to disentangle herself from this structure she would, of necessity, have had to do the following:-

1. To transfer her 10% beneficial interest in Belfield Office Park to her husband (and obtain the bank's prior written consent to do that).

2. To obtain the bank's agreement to release her from the loan agreement, *i.e.* to extinguish the debt or to accept an assignment of her debt to another party, for example, her husband.

3. To get the bank to release her from her mortgage of her 10% beneficial interest to the bank.

4. To get the bank to release her from her personal guarantee in respect of the Flynn family liabilities.

5. To get the bank to release her from her personal guarantee in respect of the liabilities of the other three groups of investors.

6. In turn, Mr. Flynn would have had to execute a new mortgage of his now 13% beneficial interest in Belfield Office Park in favour of the bank.

7. Likewise, Mr. Flynn might have had to execute a new personal guarantee in respect of his liability for the Flynn family liability and, perhaps also in respect of his liability to other groups of investors.

8. It is also possible that Belfield Office Park Ltd might have had to execute a new Deed of Trust to establish that it was now holding the property in trust for a new beneficial ownership structure.

108. It is clear, therefore, when analysed in this way that Mrs. Flynn's transfer to her husband of her beneficial interest in the property was only one element required to disentangle her from the complex web of commercial loans, guarantees, mortgages and trust structures in which she was involved.

(ii) The requirement for prior written consent

109. It is common case between the parties that the contractual relationship between Anglo Irish Bank and Mrs. Leona Flynn, Mr. John Flynn and other members of the Flynn family was governed by the facility letter of 19th June, 2002, and the general conditions incorporated into that contract.

110. The relevant conditions set out in the "General Conditions – Corporate Loans" is set out at Condition 12 which is headed "Negative Covenants".

> *"The borrower shall not, without the prior written consent of the bank:*
>
> > *(iv) save for sales of current assets made in the ordinary course of business, sell, transfer, license or otherwise dispose of the whole or any part of the business, undertaking or assets of the borrower."*

111. In the present case what Mrs. Flynn purported to do was to transfer one of her assets, *i.e.* a beneficial interest in Belfield Office Park to her husband.

112. Therefore, on the face of the contract this required the prior written consent of the Bank.

113. It is common case between the parties that Anglo Irish Bank never gave its prior consent in writing to this transfer by Mrs. Flynn to Mr. Flynn.

114. Therefore, it is incumbent upon Mrs. Flynn to establish that:-

(a) that Anglo Irish Bank had given its prior oral consent to the transfer, to all charges of security and the assignment of the debt, and

(b) that it had waived its right to give a prior written consent, and/or

(c) that Anglo Irish Bank was estopped by virtue of its actions from insisting on its strict legal rights, i.e. the requirement of prior written consent.

(iii) The telephone call with David Drumm

115. As outlined above, Mr. Flynn contacted David Drumm by telephone at this meeting of September, 2007. Mr. Flynn spoke to Mr. Drumm and according to Mr. Flynn's evidence he explained the situation to Mr. Drumm, and Mr. Drumm gave Anglo's consent to the transfer. However, it appears it was a very short conversation of approximately two minutes duration; moreover, the only person who was party to the conversation was Mr. Flynn. Neither Mr. O'Halloran nor Mrs. Flynn were aware of what Mr. Drumm said. However, I accept Mr. Flynn's evidence that Mr. Drumm consented to the transfer on the basis as it was explained to him.

116. Perhaps to correct that infirmity Mr. Flynn subsequently sent an email to David Drumm on 30th October, 2012. This email reads as follows:-

> *"Dear David,*
>
> *I hope that you are well and have not been too badly affected by the hurricane!*
>
> *I am sorry to bother you with stuff relating to the past but I have received the attached letter from Stephen Miley with an item raised by NAMA. I would very much appreciate if you could confirm that your memory of matters is as set out in his letter and coincides with mine.*
>
> *I have a letter of explanation from Stephen O'Halloran of Brock Accounting Services which contains a note relating to the conversation which I can send on to you if it is of any help. I have copied Stephen O'Halloran in on this email just for information purposes.*
>
> *My very best regards*
>
> *John Flynn"*

117. Mr. David Drumm replied to Mr. Flynn on 4th November, 2012, and the relevant parts of his email are as follows:-

> *"Lee Flynn and Belfield Office Park Shareholding*
>
> *Hello John,*
>
> *I read Stephen's letter and while it is difficult for me to recall the fact of every deal we did in Anglo (as I am sure you understand!) I seem to recall that Lee is a US citizen (correct?). I assume the reason she wanted off the title of the property in Ireland was due to the requirement on US citizens to report their worldwide income on their annual federal*

tax return?

What surprises me about the contents of Stephen's letter is that I cannot see how Anglo at the time and hence the National Asset Management Agency now, could possibly have any issue with what happened. Per Stephen's letter, the collateral held by Anglo through Lee was released, and at the same time the same collateral was charged back to Anglo by you. Is this correct? If so Anglo was no worse off and I cannot see why I when requested would not have agreed to this given the legitimate reason for the request and most importantly the fact that the bank was no worse off after the transfer. I don't know if this is any help to you. Let me know if I am not understanding your question correctly. I wish you well in your endeavours to sort things out.

Kindest personal regards

David" [Emphasis Added]

118. Mr. Flynn then replied to Mr. Drumm on 5th November, 2012. The relevant parts of the email are as follows:-

"Hi David,

Many thanks for your response.

You are correct. Lee is a US citizen There are serious US tax implications at issue. If it helps I attach a note that Stephen O'Halloran of Brock Accounting wrote in relation to the reasons and to the telephone request. Stephen is the family accountant and tax adviser. Any information that you could give me in relation to this matter would really be much appreciated.

Keep well and thank you so much for your help on this matter. I really am very grateful. With my best regards.

John" [Emphasis Added]

119. Mr. Drumm did not give evidence in this trial. It appears, however, from his emails that Mr. Drumm does not really recollect the telephone call and his email is somewhat guarded. He says "I cannot see why I, when requested, would not have agreed to this".

120. More significantly it is also apparent from the evidence of Mr. Flynn (in cross examination) that no discussion took place between Mr. Flynn and Mr. Drumm about Mrs. Flynn's debt liability to the bank. Mr. Flynn took the view that in talking about transferring the asset he was also talking about transferring the debt, but the evidence from David Drumm in his emails does not go that far. Moreover, although Mr. Flynn took the view that, if one is transferring the asset, one is also talking about transferring the debt, that is not necessarily so and in particular has no application in circumstances where the debt was already due and owing by him on a joint and several basis with his wife and children.

121. It is pleaded by NALM that Mr. Drumm did not have the relevant authority to give this consent and that the only body within Anglo Irish Bank which could give its consent was the Credit Committee. Mr. Flynn says in reply that as far as he was concerned he went to Mr. Drumm as the Chief Executive Officer of the Bank and as the key decision maker of the Bank. That indeed may be so, but there was also evidence from Ms. Paula Moran, (an Assistant Manager within Anglo Irish Bank at the relevant time), that the Credit Committee was the governing committee which made all decisions in relation to loan applications and also in relation to applications for security and charges for security. This Credit Committee was a high level committee within the Bank; it met at least twice a week and occasionally for further *ad hoc* meetings as and when required. There were four senior executives of the Bank on the Credit Committee, including Mr. Drumm. The evidence also was that this Credit Committee crucially did not just approve loans but also reviewed security provided for such loans and also any amendments to security provided for such loans. It may well have been the case that if Mr. Drumm had brought this application of the Flynns to the Credit Committee it would have been approved and the necessary written documentation set in train, but there was no evidence that Mr. Drumm brought this matter before the Credit Committee. (Given however that in a later part of my judgment I have found that Mr. Drumm's representations did not have the effect contended for by Mrs. Flynn or the Flynn family, it follows that it is not necessary for me to decide whether his representations bound the bank.)

The issue of estoppel

122. It was submitted on behalf of Mrs. Flynn that as a result of Mr. Flynn's conversation with David Drumm, that Anglo had made a representation to the Flynns that it would consent to the transfer, that Mrs. Flynn acted upon that representation and that therefore, Anglo was now estopped from going back on its representation.

123. A clear and succinct statement of estoppel by representation was given by Griffin J. in *Doran v. Thompson Limited* [1978] I.R. 223 at 230, as follows:-

"Where one party has, by his words or conduct, made to the other a clear and unambiguous promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, and the other party has acted on it by altering his position to his detriment, it is well settled that the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, and that he may be restrained in equity from acting inconsistently with such promise or assurance."

124. When one applies that statement of principle to the facts of this case, it is clear that the evidence does not establish that Mr. Drumm made a "*clear and unambiguous promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly*". Even taking Mrs. Flynn's case at its height, the most that could be said was that David Drumm agreed in principle with Mr. Flynn that Anglo Irish Bank would consent to the transfer of her beneficial interest to her husband. That, however, appeared to be "an agreement in principle" or "an agreement to agree". It could not be characterised as an unequivocal representation that Anglo would waive its usual requirements. There was no evidence, for example, that David Drumm said that there would be no need for the bank to give its prior written consent or that there would be no need to fill out the usual paperwork; indeed, Mr. Flynn himself stated that he believed that, as a result of his telephone conversation with Mr. Drumm that the usual paperwork would follow. Thus, in my view there was no evidence of a representation that Anglo would waive its usual requirement for prior written consent.

125. Indeed, according to the plaintiff Mr. Drumm's representation would mean that:-

(a) Anglo would have to consent to the transfer of her beneficial interest to her husband.

(b) Anglo would then have to consent to vacate the mortgage over her beneficial interest.

(c) Anglo would then have to consent to vacate both personal guarantees.

(d) Anglo would also have to organise a new mortgage for Mr. Flynn, and Mr. Flynn would have to enter into such a new mortgage.

In my view, that would stretch the effect of the alleged representation made by Mr. Drumm to breaking point and indeed beyond.

126. But even if all that were done (*i.e.* even if all of the elements of the security for the debt were assigned to her husband in addition to the beneficial interest in the property) it would still leave Mrs. Flynn liable for the underlying debt to Anglo given that there was no evidence whatsoever (i) that Mr. Flynn raised the issue of the debt with Mr. Drumm or, (ii) that David Drumm consented to the assignment or extinguishment of Mrs. Flynn's debt to Anglo or the assignment of it to her husband.

127. Moreover, there is no evidence that Mr. and Mrs. Flynn ever actually relied on any representation or alleged agreement with Mr. Drumm and altered their position to their detriment. The evidence shows that they took no further steps to progress the transfer between September, 2007 and December, 2008; even when they did take steps (*i.e.* by signing the contract and Deed of Assurance) they did not take any further steps thereafter to ensure Mrs. Flynn was absolved from any liability for the debt or to obtain Anglo's consent to the vacation of her mortgages and personal guarantees. Mr. Flynn gave the contract and Deed of Assurance to his son for safekeeping. He did not give the documents to his solicitor to progress the transaction. Thus, there is no evidence of reliance – until that is NAMA/NALM sought to make Mrs. Flynn liable for the debt. At that time, Mrs. Flynn then sought to rely on the alleged agreement with Mr. Flynn. That, however, is not the sort of reliance required by the case law on estoppel.

128. Moreover, after the telephone conversation with Mr. Drumm, Mr. Flynn, as an experienced property developer, either knew, must have known, or ought to have known that a simple telephone call would not suffice to complete this issue. It certainly started the process but Mr. Flynn knew, must have known or ought to have known that Anglo or Mr. Flynn's solicitors would have to take further steps to complete the necessary documents to effect and complete all the relevant steps, and that it was up to Mr. Flynn and/or his solicitors to make that happen. Indeed, the exchange of emails and correspondence make it clear that Mr. Flynn was, in fact, aware that the further consent of Anglo was required and that further documentation would have to be executed to ensure that Mrs. Flynn's mortgage was released and that Mr. Flynn entered into a new mortgage.

129. A further noteworthy element of the evidence of Mr. Flynn and, indeed, Mr. O'Halloran and Mr. James Flynn was that all three witnesses made numerous references to the fact that they expected that "the normal paperwork would ensue" or that "the paperwork would catch up". In my view this can admit of only one possible interpretation: that Mr. Flynn was fully aware that although he had an agreement in principle with Mr. Drumm that the transfer could take place, he was also aware, or should have been aware, that this was a matter which required further paperwork or documentation to be completed. After all this was not a simple situation in which Mrs. Flynn was divesting herself of an interest in a single property in which they were both joint owners. This was a situation in which there were numerous beneficial interests in the Belfield Office Park, in which there were four different syndicates of family investors in the consortium, in which numerous mortgages, guarantees, cross guarantees and indemnities and trust documents had been executed. It was a highly complex commercial structure and not a simple structure. In those circumstances it seems to me that Mr. Flynn knew that the prior written consent of Anglo Irish Bank was still required despite his conversation with Mr. Drumm and, indeed, that further other written documents would have to be signed.

130. Moreover I cannot make any findings of fact in relation to what Mr. Drumm may or may not have said to Mr. Flynn. The evidence is too flimsy. The only evidence is that of Mr. Flynn. He gave evidence in May, 2014 of a two minute telephone conversation which occurred in September, 2007 six and a half years ago; no one else heard the telephone conversation; there was no contemporaneous note of it; there was no record kept by his accountant; there was no attendance note kept by his solicitor of any telephone conversation in which Mr. Flynn might have relayed the telephone conversation to him; Mr. Drumm was not called to give evidence; in his emails Mr. Drumm has a very limited recollection of the incident. It is not possible therefore to make any finding of fact on this point.

131. I am of the view that no estoppel arises in this case. Estoppel is a construct of law and equity. Like all constructs, it must be built on solid foundations. One cornerstone of such a construct is the "representation". The other cornerstone is "detrimental reliance". Neither are present here. One cannot build a vast edifice of estoppel (involving a transfer of ownership, a release from guarantees and indemnities and mortgages and an extinguishment of a debt €21.9 m.) on flimsy foundations. It will inevitably collapse. So it has here.

Conclusion

132. Having considered all the evidence and the legal submissions in this matter, I am of the view that Mrs. Flynn's transfer to her husband is not binding on Anglo Irish Bank/NAMA/NALM for the following reasons:-

1. It is clear from the terms of the facility letter/loan agreement that the prior written consent of the bank was required. It is common case that this was not obtained.

2. The evidence – even taken at its height in favour of the Flynns - is that Mr. Drumm consented to the proposal put forward by Mr. Flynn to the transfer of Mrs. Flynn's interest in Belfield Office Park to him. However, his agreement to that proposal was at most either an agreement to agree, or an outline agreement in principle. There is nothing, either in the evidence or in Mr. Drumm's email, to suggest that Mr. Drumm intended to waive the whole suite of contractual and security arrangements put in place by Anglo Irish Bank over Belfield Office Park. Moreover, the general tenor of Mr. Flynn's evidence on this issue is that the discussion was in relation to the transfer of Mrs. Flynn's beneficial interest in Belfield Office Park only. It did not relate to the debt or any of the other security arrangements.

3. Moreover, the evidence from Mr. Flynn Snr, Mr. John Flynn Jnr and, indeed, Mr. O'Halloran, was that they were at all times aware in their considerable dealings with Anglo over the years that the paperwork "always followed after the event".

4. Indeed, the emails and correspondence from September, 2007 through to 2010 are replete with examples of how Mr. Flynn or Aidan Marsh were well aware that the prior written consent of Anglo was required and that they were endeavouring to obtain such written consent to the transfer.

5. Moreover, it was incumbent upon Mrs. Flynn and Mr. Flynn to follow up the documentation and paperwork with Anglo. It was in their interest to do so, but they do not appear to have taken any steps in this regard.

6. It is also of some significance that the contract and Deed of Assurance drawn up by the Flynns' solicitors and signed by Mr. and Mrs. Flynn make no mention of the assignment of the debt by Mrs. Flynn to Mr. Flynn. Thus, insofar as Mrs. Flynn – and indeed Mr. Flynn – seek to rely on their contract of sale and Deed of Assurance, at their height they only purport to transfer Mrs. Flynn's interest in Belfield Office Park to her husband. They do not purport to – nor do they in law – actually transfer her debt (to Anglo) to her husband.

7. Moreover, the loan facility from Anglo was advanced to all five members of the Flynn family – Mr. and Mrs. Flynn and their three children – on a joint and several basis. Therefore, insofar as Mrs. Flynn – or indeed Mr. Flynn – contend that her debt to Anglo had been assigned by her to her husband she was simply assigning to him a debt which he had already incurred and for which he was already liable on a joint and several basis under the facility letter/loan agreement. He could not, therefore, be a new assignee of a debt for which he was already liable. Thus, when expressed in those terms, it is clear that what Mrs. Flynn, in fact, is contending for, is that her debt to Anglo was in fact "extinguished" by virtue of her purported assignment of her beneficial interest in Belfield Office Park to her husband.

8. The court would need clear and compelling evidence that Anglo had consented to the extinguishment of Mrs. Flynn's liability to Anglo. However, there is no evidence at all before the court that Mr. Drumm consented to the "extinguishment" of Mrs. Flynn's debt to Anglo. The only evidence that there is, is of a two minute telephone conversation between Mr. Flynn and David Drumm in which Mr. Flynn indicated to Mr. Drumm that his wife wished to transfer her interest in the property from herself to Mr. Flynn. That is evidence in relation to the security held for the loan. It is not evidence in relation to the transfer, let alone the extinguishment, of the loan.

9. Moreover, insofar as Mrs. Flynn contends that her interest being transferred to her husband meant that she was, in effect, exiting from the Belfield Office Park, then Anglo would also have had to consent to release her from her personal guarantees. There is no evidence whatsoever that David Drumm or Anglo consented to such a release.

133. In the circumstances, whilst I accept that Mrs. Flynn signed the contract and Deed of Assurance which sought to the transfer her interest in Belfield Office Park to Mr. Flynn, that was not sufficient as a matter of law to make the transfer of her beneficial interest in the property valid and enforceable as against Anglo Irish Bank. Moreover, it was not sufficient as a matter of law to assign her debt to Anglo in respect of Belfield Office Park to her husband. The transfer of her interest in Belfield Office Park was not, as a matter of law, on its own, sufficient to disentangle Mrs. Flynn from the complex web of legal arrangements in which she found herself.

134. In the light of the above, I am driven to the conclusion that the transfer of Mrs. Flynn's interest in Belfield Office Park is invalid and unenforceable vis-à-vis Anglo Irish Bank (now IBRC) and by virtue of the assignment is invalid and unenforceable as against NAMA/NALM.

PART TWO

NALM'S CLAIM FOR JUDGMENT –

Introduction
135. I turn now to deal with NALM's claim for judgment in the sum of €21.9 m. against the Flynns. The Flynns have contested liability for the loan. It is therefore necessary for NALM to prove its debt in the normal way. However a number of objections were taken by the Flynns to NALM's proof of its debt. The first objection was that Mr. Barry O'Brien, who purported to prove the debt, was not an officer of NAMA.

The Status of Mr. O'Brien – was Mr. O'Brien an officer of NAMA?
136. Mr. Barry O'Brien gave evidence on behalf of NALM. He purported to be an officer of NALM or NAMA.Mr. O'Brien in his witness statement which he confirmed in direct evidence stated at para. 1 as follows:-

> *"I, Barry O'Brien, currently hold the position of Asset Recovery Manager in the National Asset Management Agency (NAMA) of which the defendant is a group entity within the meaning of that term in the National Asset Management Agency Act 2009 ("the 2009 Act"). I have held this position from December, 2011 to date. I am an officer of NAMA within the meaning of the 2009 Act."*

137. However, his status as an officer of NAMA was challenged by counsel for Mrs. Flynn and also by counsel for the other members of the Flynn family. The factual basis for this challenge was laid during cross examination and the legal basis for the challenge was the subject of legal submissions in closing speeches by counsel for Mrs. Flynn and the other members of the Flynn family.

138. The legal basis for the challenge is as follows:

Section 4(1) of the National Asset Management Agency Act 2009 ("the NAMA Act") contains the Interpretation section. In the section, various terms are defined. The term "officer of NAMA" is defined herein as follows:

> *"officer of NAMA' means—*
>
> *(a) the Chief Executive Officer of NAMA, and*
>
> *(b) any person assigned to NAMA in accordance with section 42."*

139. Section 42, in its side note, states "NTMA to provide staff to NAMA". Section 42(1) provides as follows:-

> *"(1) The NTMA shall assign so many of its staff to NAMA as the Board determines, upon the recommendation of the Chief Executive Officer of NAMA, after consultation with the Chief Executive of the NTMA, to be necessary for the performance by NAMA of its functions under this Act.*
>
> *(2) Before employing or otherwise engaging a person to be assigned to NAMA under subsection (1), the NTMA shall ascertain to its satisfaction that the person –*

(a) is of good character and has not been convicted of any offence likely to render him or her unfit or unsuitable to perform the duties that the person is required to undertake or is likely to be required to undertake,

(b) has not been disqualified or restricted from acting as a director under the Companies Acts, and

(c) has no material conflict of interest, whether actual or potential.

(3) Before the NTMA assigns a member of its staff to NAMA under subsection (1), the NTMA shall ensure that he or she provides a statement of his or her interests, assets and liabilities to the Chief Executive Officer of NAMA and the Chief Executive of the NTMA in a form that the NTMA specifies."

140. It is submitted by Mr. McDowell, S.C. therefore, that the phrase "officer of NAMA" has a specific statutory meaning as defined in s. 4(1) and in this case, (given that Mr. O'Brien is not the Chief Executive Officer of NAMA), it means "any person assigned to NAMA in accordance with s. 42" by the NTMA. Mr. McDowell S.C. submits that Mr. O'Brien joined NALM/NAMA directly from Investec, a private sector commercial bank. Mr. O'Brien in evidence confirmed that he never worked for the NTMA. In those circumstances, Mr. McDowell submits that as Mr. O'Brien never worked for NTMA, he could never have been assigned by the NTMA to NAMA pursuant to s. 42(1) of the Act, and therefore he could not be an officer of NAMA within the meaning of s. 4(1) of the Act.

141. Mr. Redmond S.C. in reply for NAMA/NALM referred to the fact that Mr. O'Brien in his direct evidence confirmed his witness statement and that his witness statement stated he was an officer of NAMA. Mr. McDowell S.C. in reply contended that the evidence of Mr. O'Brien given in cross examination proved the direct opposite.

142. The exact evidence given by Mr. O'Brien under cross examination on this point is as follows (at Day 9, p. 11):-

"Q. You are in First Active, you are in Investec and did you move directly from Investec to your position with NAMA.

A. Correct.

Q. You didn't go to the NTMA in the middle?

A. No.

Q. I see. You weren't a member of its staff at any point?

A. No."

143. In the circumstances, and given this evidence by Mr. O'Brien in cross examination, it appears that Mr. O'Brien was never employed by the NTMA. In those circumstances he could never have been assigned to NAMA by NTMA within the meaning of s. 42(1) of the NAMA Act. Therefore he could not be "an officer of NAMA" within the definition of that term as set out in s. 4(1) of the NAMA Act 2009.

144. I must therefore conclude that Mr. O'Brien is not an "officer of NAMA" within the meaning of s. 4(1) of the NAMA Act 2009.

The Consequences of such a Finding

145. During the closing submissions, I inquired of counsel for NALM what consequences would flow from a finding by the court that Mr. O'Brien was not an officer of NAMA. Counsel for NALM accepted that if such a finding were made then the evidence of Mr. O'Brien would not be admissible to prove the NALM debt against the defendants.

146. In my view, this was a correct submission and in the circumstances, the evidence given by Mr. O'Brien in his witness statement and in his direct evidence which goes towards proving any alleged debt due and owing by Mrs. Flynn or any other members of the Flynn family is therefore inadmissible.

The Bankers' Book Evidence Act 1879 and section 191 of the NAMA Act

147. Moreover, Mr. McDowell S.C. on behalf of Mrs. Flynn contended that the issue of whether Mr. O'Brien was or was not an officer of NAMA was not merely a technical objection. He submitted that under the NAMA Act it was only officers of NAMA who could, in fact, give evidence in a court of proof of a debt. In this respect he relied on s. 191 of the NAMA Act 2009.

148. Section 191 of the NAMA Act provides as follows:-

"(1) In this section " Act of 1879 " means the Bankers' Books Evidence Act 1879.

(2) Where –

(a) a copy of an entry in a bankers' book (within the meaning given by section 9(2) of the Act of 1879) falls to be produced in evidence,

(b) the book is in the custody or under the control of NAMA or a NAMA group entity, and an officer of NAMA or a NAMA group entity gives evidence (orally or by affidavit) that—

(i) he or she truly believes that the book or record was kept in the ordinary course of the bank's business, and

(ii) the book is in the custody or under the control of NAMA or the NAMA group entity, then the requirement for proof in section 4 of the Act of 1879 shall be taken to have been satisfied. (emphasis added)

(3) The Act of 1879 has effect in relation to the books and records of NAMA or a NAMA group entity as if—

(a) NAMA or the NAMA group entity were a bank,

(b) references to bankers' books in that Act were to the ordinary books and records of NAMA or the NAMA group entity, and

(c) references in that Act to an officer of a bank were references to an officer of NAMA or the NAMA group entity."

149. Section 4 of the Bankers' Book Evidence Act 1879, provides as follows:-

> *"A copy of an entry in a Bankers' Book shall not be received in evidence under this Act unless it be first proved that the Book was at the time of the making of the entry one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business and that the book is in the custody or control of the bank.*
>
> *Such proof may be given by a partner or officer of the bank and may be given orally or by an affidavit sworn before any commissioner or person authorised to take affidavits."*

150. Mr. McDowell submits that the legal effect of s. 191 of the NAMA Act is that pursuant to s. 191(2)(c) it is only an officer of NAMA or a NAMA group entity who is entitled to give evidence of proof of a debt.

151. I note that the side note to s. 191 is headed "Evidence – Application of Bankers' Books Evidence Act 1879". Mr. McDowell's submission is that s. 191 of the NAMA Act modifies the 1879 Bankers' Book Evidence Act such that references to bankers' books in the 1879 Act can be taken as references to the ordinary books and records of NAMA pursuant to s. 191(3).

152. In my view this submission is correct. The Bankers Book of Evidence Act 1879 is a statutory exception to the hearsay rule. It permits banks to prove a debt if an officer or partner of the bank proves it. Section 191 of the NAMA Act provides that, on the assumption that the debt has been acquired by NAMA, it can then be formally proved by an officer of NAMA. However, there does not appear to be any provision in the NAMA Act to permit a debt to be formally proved by a person who is not an officer of NAMA. Thus, as Mr. O'Brien is not an officer of NAMA, he is not in a position to prove the debt.

The Section 190 Certificate

153. The NAMA Act also provides another mechanism by which NAMA can provide evidence of the amount due. Indeed, the side note to s. 190 of the NAMA Act is headed "Evidence – amount of debt due".

154. Section 190 of the Act provides as follows:-

> *"In any proceedings for the recovery by NAMA or a NAMA group entity of money, a certificate in writing under the seal of NAMA or the common seal of the NAMA group entity that a specified sum of money was owing to NAMA or the NAMA group entity at the date of the certificate by a specified person on a specified account is, at any time within one month after the date of the certificate, evidence that the sum specified in the certificate is and remains owing to NAMA or the NAMA group entity by the person and on the account specified in the certificate."*

155. Mr. McDowell S.C. submitted that the legal effect of this section was that NAMA could produce a certificate in writing under the seal of NAMA which would be *prima facie* evidence at least, of a specified sum of money due and owing to NAMA or a NAMA group entity at the date of the certificate.

156. However, it is common case that no such certificates were produced in this case.

No Running Account or Books of Account

157. It was also a noteworthy feature of this case that neither Mr. Barry O'Brien nor any other witness on behalf of NAMA sought to put before the court any evidence of the running account which Anglo Irish Bank had with the Flynns or indeed any running account from the date on which the Anglo debt was acquired by NAMA. In normal cases where a bank seeks to prove a debt against a debtor, the bank produces evidence of the running account either from its inception to the date of demand, or if that is too lengthy, a record of the more recent transactions on the account. This running account also sets out at the end a current figure due and owing to the bank at a point in time or when the account is closed or when the account is ruled. In the present case, no such running account was presented to the court at all. The court was left therefore completely in the dark as to the functioning and workings of this account.

158. Thus the next evidential problem which arises in relation to the proof of the NAMA debt is that NAMA did not produce in evidence any document which purported to be a running account of the Flynns' account with Anglo or NAMA. That is accepted by NAMA. Indeed, Mr. James Flynn, on a number of occasions in his evidence, complained that neither he nor his family had ever seen any statements of their account with NAMA (which seems a surprising state of affairs for a statutory body with a statutory obligation to be "transparent"). Mr. Redmond S.C. submitted that NAMA did not produce statements, that that was an IBRC matter and that that function was currently administered apparently by a company called "Capita" on behalf of IBRC. That may well be so, but apart from that submission the court heard no evidence on these points.

159. The fact that no running account was ever produced in evidence is of considerable significance in this case for a number of reasons:-

> (i) If a party is seeking judgment, especially as here for a large sum in excess of €21.9m, there must be a figure certain which that party must prove. There must be a figure certain which a defendant can dispute if appropriate and there must be a figure certain for which the court can enter judgment if appropriate. In the present case there is no evidence what that figure certain is or should be.
>
> (ii) However, most importantly, Mr. James Flynn gave evidence that, in round terms, the total annual interest on the entire loan on Belfield Office Park was approximately €1.8m per annum and the approximate annual rental income from Belfield Office Park was approximately €3.14m per annum; however, he said he had no idea what was happening to the excess of rental income over interest charges which he put at approximately at €1.25m per annum. It was also unclear, on the evidence, for how many years this situation had been continuing. It is possible that it has been going on since NAMA acquired the debt in 2011 or indeed for many years before that. In these circumstances, the overall debt might have been reduced by several millions. However, there is no clarity as to whether this surplus was credited to the

account at all, whether it was credited to the overall account of all four groups of borrowers or whether it was credited on a pro-rata basis to the Flynns' account and to the other investor accounts. Whatever the true situation is, the point is that the defendants - and the court - are totally in the dark about these credits to the account because no running account was ever produced in court, let alone proven in evidence.

(iii) In addition, Mr. James Flynn gave evidence that Hewlett Packard had paid Belfield Office Park Limited – a sum of €3m approximately (for dilapidations or arrears of rent, or a penalty for breaking the lease). It is not clear whether this €3m has been credited to the account at all, or if so, whether it has been credited to the overall account or whether it has been apportioned in part to the Flynns' account.

(iv) In addition the Flynns contend that a sum should be offset for interest overcharging. Mr. O'Brien in his witness statement accepted that there had been some overcharging and put forward a figure of €142,888.91 as an estimate by NALM of overcharging as at 24th April, 2014. This figure clearly, therefore, has to be deducted from the account and this was accepted by counsel for NALM

160. NALM then sought to prove the debt relying on the evidence of Mr. James Flynn. But that course of action is entirely unsatisfactory because Mr. Flynn denies the debt; also Mr. McDowell S.C. for Mrs. Flynn submitted that any so called concession made by Mr. James Flynn could not be binding on his client.

161. Mr. Redmond S.C. accepted in closing submissions that if he wanted judgment he would have to concede on the €3m Hewlett Packard credit which he said brought his claim down to €18.7m. But again, that does not seem to meet the defendants' objection because it does not take account of any principal which might have been repaid by the excess of rental income over interest on the loan.

162. Thus, the court is simply at sea in a case such as this where no running account is produced and where there is no evidence at all about whether certain credits or debits claimed are visible and can be proved or disproved.

163. Given all the above, the court is simply not in a position to have any clarity about what is the amount due to NALM, if any, from the Flynns. In these circumstances and without the benefit of any running account, the court could not enter judgment in any amount in favour of NALM (apart from the evidential points raised above). In those circumstances, NALM's claim for judgment against the defendants must be dismissed.

THE FLYNNS' DEFENCES TO NALM'S CLAIM

Introduction

164. I now turn to deal with the various defences to the NALM claim raised by Mrs. Flynn and the other members of the Flynn family. I do so in the knowledge that although NALMs claim for its debt has been dismissed for the reasons set out above it is clear that NALM could simply re-present its claim within a few weeks and the parties would have to reargue the case in its entirety again. This would clearly be unfair to all parties. Moreover the issues of the EBS loan, the interest overcharge and other related matters are separate and discrete issues. In addition the Flynns have counterclaimed against NALM for breaches of statutory duty and these must also be determined.

Right of access to the courts

165. A preliminary argument, made on behalf of the defendants to the counter claim (i.e. Mrs Flynn and the other members of the Flynn family), is that NALM has disregarded, and effectively set at nought, the exercise by Mrs Flynn of her right of access to the courts to have her dispute with NALM determined. Essentially the defendants' argument is that Mrs Flynn has a constitutional right of access to the courts and a right to litigate her claim against NAMA/NALM; however, Mrs. Flynn argues that, as a consequence of NAMA/NALM not only defending that claim but instituting a counter claim against Mrs Flynn and all other members of her family for judgment in the sum of €21.9m, that NAMA/NALM have in effect placed a "tariff or toll" of €21.9m on the exercise of the plaintiff of her right of access to the courts to litigate her claim with NAMA/NALM.

166. To substantiate this claim the defendants rely upon the decision of the High Court in *Mac Cauley v. Minister for Posts and Telegraphs and the Attorney General* [1966] I.R. 345. In that case the High Court (Kenny J.) held that a right to have recourse to the High Court to assert and vindicate a legal right is one of the personal rights of the citizen referred to in Article 40.3.1 of the Constitution: it followed that s.2 (1) of The Ministers And Secretaries Act 1924, (insofar as it required the fiat of the Attorney General to be obtained before legal proceedings could be validly instituted in the High Court against a Minister), was therefore repugnant to the Constitution. The court also held that the provisions of the 1924 act meant that the State had not, as far as was practicable, by its laws defended and vindicated the right to have recourse to the High Court.

167. However the issue in that case was that the plaintiff who wished to sue a Minister in the High Court could not even validly commence his action until he had obtained the fiat of the attorney general. Thus the refusal of the fiat was a full denial of the plaintiffs' right to have recourse to the High Court.

168. That is not the situation here. The consent of NAMA or NALM or indeed any other party is not and was not required before the plaintiff issued her proceedings in the High Court. Once she had done so NALM was fully entitled to defend those proceedings as it saw fit.

169. It was also entitled to institute a counter claim against Mrs. Flynn and indeed other members of the Flynn family for the debt which it says is due and owing to it. Indeed the issue of whether Mrs. Flynn owes any debt to NALM is at the heart not only of her proceedings against NALM but also of NALM's proceedings against her. It follows therefore that it simply could not be said that in counterclaiming against Mrs. Flynn (or indeed any other members of the Flynn family) that NALM is in any way seeking to place a tariff of €21.9m on the exercise by the plaintiff of her right of access to the courts. Mrs Flynn has exercised that right and NALM, as is its right, has sought to fully defend its position in these proceedings. In my view the defendants' argument in this regard is misconceived and must be rejected.

Abuse of process

170. The next argument which Mrs. Flynn and the other members of the Flynn family have raised is that the proceedings brought by NALM against the other members of the Flynn family by way of the counterclaim is an abuse of process. It was submitted on behalf of the other members of the Flynn family that the only reason NALM had instituted proceedings against the Flynn family was to seek to compel Mrs. Flynn to acknowledge that she was indebted to NALM and therefore that she was an obligor of NALM; if so, this meant that the claim against the Flynn family was brought for an improper or collateral purpose and was therefore an abuse of process.

171. As is stated in *Civil Procedure in The Superior Courts* (3rd Ed.) Delaney and McGrath at page 587:

> *"Proceedings will be considered to be an abuse of the process of the court where they are brought for an improper or ulterior purpose such as causing vexation or oppression to a party. In Re. Majory [1955] CH 600 Evershed MR explained that there is a:*
>
> *"… general rule that court proceedings may not be used or threatened for the purpose of obtaining some collateral advantage to themselves, and not for the purpose for which such proceedings are properly designed and exist; and the party so using or threatening proceedings will be liable to be held guilty of abusing the process of the court and therefore disqualified from invoking the powers of the court by proceedings he has abused."*

172. An example where an improper motive was found to exist occurred in *Sean Quinn Group Ltd v. An Bord Pleanala* [2001] 1 I.R. 505 where Quirke J. held, pg 512, that he was satisfied:

> *"On the evidence that the proceedings herein have been commenced by the plaintiff in a cynical, calculated and unscrupulous fashion for the sole purpose of seeking a commercial advantage over its competitor, the sixth defendant. I am further satisfied that the purpose for which the proceedings have been instituted has not been to redress a wrong or a grievance, to right an injustice, to ensure compliance by the sixth defendant and by other potential developers with provisions of national or international or international legislation, to ensure the proper and lawful planning and development of any particular area or for any other commendable, environmental or civic spirited reason. I am quite satisfied that the sole purpose of the proceedings is to inflict damage upon its competitor, the sixth defendant and I am satisfied that that is an improper purpose for the commencement of proceedings and an improper use of the process of the court."*

As a result Quirke J. struck out the proceedings as an abuse of process.

173. The test for an abuse of process was also restated by the Supreme Court in *Grant v. Roche Products (Ireland) Ltd* [2008] IESC 35, where Hardiman J. stated as follows:

> *"The classic and long established definition of an abuse of process is that of Isaacs J. in Varawa v. Howard Smith Company Ltd [1911] 13 CLR 35 at p. 91:"*
>
> > *'In the sense requisite to sustain an action, the term "abuse of process" denotes that the process is employed for some purpose other than the attainment of the claim in the action. If the proceedings are merely a stalking horse to coerce the family in some way entirely outside the ambit of the legal claim upon which the court has been asked to adjudicate they are regarded as an abuse of process for this purpose…..'"*

174. However in this case Mrs. Flynn has instituted proceedings against NALM seeking a declaration that she is not indebted to NALM; in turn NALM has filed a defence and counter claim pleading that she is indebted to NALM in the sum of €21.9million. Moreover NALM plead that the loan agreement, pursuant to which the monies were advanced to Mrs. Flynn, also advanced these monies to Mr. Flynn and the other members of the Flynn family on a joint and several basis. Thus insofar as NALM is calling in the loan of Mrs. Flynn, it submits that it must also call in the loan as against all members of the Flynn family.

175. In my view, I do not believe that NALM has instituted proceedings against the Flynn family for an improper purpose (ie. to seek to compel Mrs. Flynn to acknowledge that she is an obligor to NALM). This is because NALM in its defence to Mrs. Flynn's proceedings has pleaded quite explicitly that in its view Mrs. Flynn is an obligor of NALM and indeed has sought declarations from the court to that effect. In my view therefore, the conduct of NALM in instituting proceedings against the other members of the Flynn family is not an abuse of process.

Misfeasance in Public Office

176. The members of the Flynn family also submit that NALM has committed the tort of misfeasance in public office. This claim is based on the following arguments:

> "(a) That NALM has issued proceedings against the Flynns for an improper purpose ie. to compel Mrs. Flynn to acknowledge that she was an obligor of NAMA.
>
> (b) That in dealing with the Flynn family, NALM acted in bad faith. It put forward the reason for calling in the loan (ie. an unsatisfactory business plan) which was untrue; it concealed the real reason for calling in the loan ie. that Mrs. Flynn was, in NAMA's view, an obligor.
>
> (c) That because Mrs. Flynn denied she was an obligor NALM set in train a process of enforcement against the entire Flynn family to call in the loan. In so doing, it was exercising its power in bad faith and was therefore subjectively reckless.
>
> (d) In the manner in which it conducted itself in its dealings with the Flynn family NALM sought to neglect its public law responsibilities and ignored recent jurisprudence which identifies and articulates the nature of NALM status and obligations in respect to borrowers in the context of a decision to enforce.
>
> (e) A failure on the part of NALM to clearly state in any correspondence from August 2012 onwards to the Flynn family that the real reason for calling in the loan was the refusal of Mrs. Flynn to furnish a statement of affairs to NAMA is evidence of bad faith on NALM's part."

177. The tort of misfeasance in public office has been the subject of a number of recent High Court and Supreme Court decisions which have helped to delineate the scope of the tort.

178. In *Omega Leisure Limited v. Barry and Others* [2012] IEHC 23, Clarke J. considered the tort of misfeasance in public office and stated at para 8.1 of his judgment:

> *"8.1 As indicated earlier, there was ultimately consensus between counsel as to the proper test to be applied. In Kennedy, Kearns J., having comprehensively reviewed the relevant law, approved of a passage from Butterworth's – The Law of Torts (Grubb Ed.) at para. 17.54 which included the following:-*

'Finally, reckless indifference as to the illegality and its probable consequences is sufficient to ground the tort in its second form. This recklessness must, however, be subjective. It follows that the officer must be shown not to have had an honest belief that he was acting lawfully, meaning that he either knew his act was unlawful or that he wilfully disregarded the risk that it was.

8.2 In the Supreme Court in Kennedy the judgment of the court was delivered by Geoghegan J.. At pp. 262 – 263, he held as follows:-

'I do not think that there is any Irish authority which prevents the element of subjective recklessness being introduced into the ingredients of the tort of misfeasance in public office (a tort which has not received much judicial consideration in this jurisdiction at any rate). I would, therefore, favour acceptance in this jurisdiction of that concept in the context in which it is introduced by Clarke J. and, ultimately, in the House of Lords by Lord Steyn.

8.3 It follows that the test as described by Kearns J. is now the appropriate standard to be applied and it seems clear therefore that the law in this jurisdiction now recognises that a public official can be guilty of the tort of misfeasance of public office in circumstances where that official is subjectively reckless as to whether his actions are lawful. It is as against that standard that the actions of Superintendent Barry need to be judged. In that context it is necessary to turn to the evidence which is relied on by Omega as suggesting that the court should conclude that Superintendent Barry was subjectively reckless as to the lawfulness of his activity."

179. In *Beatty v. The Rent Tribunal* [2006] 2 I.R. 191, Geoghegan J. in the Supreme Court stated as follows at pg 199:-

"The circumstances in which (if at all) a judge or tribunal may be sued for damages for misfeasance in public office as distinct from ordinary negligence need not be considered in this judgment. The High Court Judge expressly found that there was no malice or improper intentions on the part of the respondent. That being so, there can be no question of liability for misfeasance in public office based on deliberate misbehaviour. It has, however, been pointed out in the supplementary written submissions lodged on behalf of the applicants and in the oral submissions of their counsel, that the House of Lords in Three Rivers D.C. v. Bank of England (No. 3) [2000] 2 W.L.R. 1220, held that deliberate misconduct is not always necessary to ground an action for misfeasance in public office. Subjective recklessness may be sufficient. To quote Lord Steyn at p. 1232 of the report:-

'Reckless indifference to consequences is as blameworthy as deliberately seeking such consequences. It can therefore now be regarded as settled law that an act performed in reckless indifference as to the outcome is sufficient to ground the tort in its second form.'

This view of the law was approved by this court in Kennedy v. The Law Society (No. 4) [2005] IESC 23. I agree, however, with the views expressed by Fennelly J. in his judgment where he has pointed out that even though subjective recklessness short of deliberate misconduct may be sufficient, nevertheless 'bad faith in the exercise of public powers … is the essence of the tort.'"

It is against these standards that the actions of NALM and its officials are to be judged.

180. There is however no evidence before this Court which establishes that any official of NALM was subjectively reckless as to whether his actions were or were not lawful. It is undoubtedly the case that the relationships between NAMA/NALM and all members of the Flynn family are fraught. That is not surprising given the difficulties encountered by Mrs. Flynn and the other members of the Flynn family in their dealings with NAMA/NALM and likewise the difficulties which NAMA/NALM have encountered in their dealings with the Flynn family. It is the case that there are very significant issues at stake here for the Flynn family. It is also the case that the Flynn family complain vociferously about their treatment at the hand of NAMA. Mr. James Flynn and Mr. John Flynn Senior, both gave evidence about what they regarded as the high handed and arrogant treatment which they suffered at the hands of NAMA/NALM and their officials in their dealings with them. NAMA/NALM for their part clearly regarded the Flynns as uncooperative debtors and formed the view that they would have to call in the loans and issue proceedings against them. This has of course led to a highly charged and hard fought case between NAMA/NALM and the members of the Flynn family.

181. However, there is no evidence before this Court that any official of NAMA/NALM actually believed that their actions were unlawful or were subjectively reckless as to whether their actions were lawful. At each step in the battle between NAMA/NALM and the Flynns, officials in NAMA apparently had recourse to their own internal legal department and also to outside legal advisers. That of course does not give them a free pass. However, I can find no evidence at all that any official of NAMA or NALM was subjectively reckless as to whether his actions were lawful.

182. In these circumstances, I would conclude that the allegations of misfeasance in public office are unsustainable.

The Cork Property Loan

183. Another issue which has arisen in these proceedings is whether Mrs. Flynn is indebted to NAMA in the sum of €2.69m in respect of a loan advanced by EBS to members of the Flynn family in 2000 and renewed on 2nd July 2004. Mrs Flynn and the other members of the Flynn family contend that no monies were ever advanced to Mrs. Flynn in respect of this property. NAMA, on the other hand, maintain that there is a facility letter from EBS to the Flynn family (including Mrs. Flynn which Mrs. Flynn signed on 2nd July 2004) which establishes, in NAMA's view, that Mrs. Flynn is a borrower on the 2004 facility.

184. This matter occupies a somewhat curious place in the pleadings. In the statement of claim Mrs. Flynn pleads that NAMA/NALM has asserted that Mrs. Flynn (together with her husband John Flynn senior, her son James Flynn, her other son John Flynn junior and her daughter Elaine Flynn) were borrowers with EBS in respect of certain facilities. The agreement in question is an agreement in the amount of €2.6m for a term of seventeen years. The purpose of the loan was for the purchase of building No. 13, Cork Airport Business Park, County Cork. Mrs. Flynn pleads that NAMA/NALM "*appears to have now withdrawn that assertion and appears to concede that it was mistaken in asserting the plaintiff had any interest in the investments associated with this development at Cork Airport*."

185. In its defence NAMA/NALM expressly plead that Mrs. Flynn is indeed a borrower under this loan agreement (between John Flynn senior, John Flynn junior, James Flynn, Elaine Flynn and Leona Flynn of the one part and EBS of the other part) dated 2nd July 2004.

However this loan has not been called in by NAMA and it does not form part of its claim in its current proceedings against Mrs. Flynn or the other members of the Flynn family. Mr. Redmond S.C. submitted that NAMA's case in respect of the EBS loan was that the loans were advanced by EBS to Mrs. Flynn as one member of the Flynn family, that the EBS loan was transferred to NAMA and that therefore Mrs. Flynn now owes that money to NAMA and as such she is an obligor to NAMA. However he also clarified that a claim had not yet issued in respect of that loan.

186. Thus the question of whether the loan was or was not advanced to Mrs. Flynn is an issue in these proceedings. That was accepted by both parties. Although it has not been called in, it is relevant because NAMA relies on this loan to assert that Mrs. Flynn is an obligor to NAMA.

187. It is therefore necessary to trace the somewhat convoluted history of this loan.

188. Having considered the documents which were opened to the court and upon which the witnesses have given evidence and having considered the submissions of the parties, I am of the view that Mrs. Flynn was not a party to the EBS loan in respect of the Cork Airport Business Park premises for the following reasons:-

1. Mr. James Flynn gave evidence that the building No. 13 Cork Airport Business Park was purchased by a company called Mallia Properties Limited. Mallia Limited held the property in trust on behalf of four members of the family - John Flynn senior, John Flynn junior, James Flynn and Elaine Flynn each with a 25 per cent interest. Mrs Leona Flynn was not a beneficial owner of this property

2. On 18th December 2000 EBS sent a letter to the directors of Mallia Properties Ltd entitled "Final amended loan offer". The amount was in the sum of €2.69 million. The purpose of the loan was for the purchase of an office unit at Block 13 Cork Airport Business Park. The borrower was stated to be Mallia Properties Ltd. Importantly the security for the loan agreement was *inter alia* stated to be the joint and several guarantees of John Flynn senior, James Flynn, Elaine Flynn, John Flynn junior and Leona Flynn to cover all liabilities of the borrower to EBS. However the name "Leona Flynn" was crossed out and initialled. James Flynn gave evidence that he believed that he spotted the mistake and that he deleted his mother's name from the facility letter.

3. On 20th December 2000 Ronan Egan manager of EBS Property Finance wrote a letter to EBS solicitors (Philip W. Bass and Co.) headed "Re. Mallia Properties Ltd amended loan proposal" and set out a copy of the amended loan offer. This amended loan offer is dated 20th December 2000. It appears similar in all respects to the letter of the 18th December, 2000, in that it is a loan facility in favour of Mallia Properties. However, the security for the loan is now stated to be the joint and several guarantees of John Flynn senior, James Flynn, Elaine Flynn and John Flynn junior. Thus, Mrs Leona Flynn has been removed as a guarantor on this loan.

4. On 20th December 2000 Aiden Marsh of Beauchamps solicitors wrote a letter to Philip Wm Bass & Co. solicitors in respect of this property and on behalf of Mallia Properties Ltd stating that "*Ms. Leona Flynn does not and will not have any interest in the property. The property will be held by Mallia Properties Ltd in trust for four members of the Flynn family as follows*" and it set out therein the other members of the Flynn family and their 25 per cent beneficial interest.

5. On 21st December 2000 Mallia Properties Ltd entered into a deed of trust with John Flynn senior, John Flynn junior, James Flynn and Elaine Flynn stating that Mallia Properties Ltd held the relevant property in trust for John Flynn senior, John Flynn junior, James Flynn and Elaine Flynn. There is no mention of Mrs. Leona Flynn in this deed of trust and it is clear therefore that she did not have a beneficial interest in the said property.

6. On 21st December 2000 the guarantors entered into a guarantee with EBS to guarantee the liabilities of Mallia Properties Ltd in respect of this property. The guarantors are stated to be John Flynn, James Flynn, Elaine Flynn and John Flynn junior and each of these persons has signed the guarantee. Again there is no mention of Mrs Leona Flynn in this document.

7. On 21st December 2000 Beauchamps solicitors wrote to the EBS solicitors Philip Wm Bass & Co. referring to the personal guarantees given by John Flynn senior, James Flynn, Elaine Flynn and John Flynn junior in favour of the EBS building society in respect of the indebtedness of Mallia Properties Ltd. Again it is clear from this letter that the guarantors were only the members of the Flynn family but not Mrs. Flynn.

8. There is also a Royal and Sun Alliance insurance policy dated 19th December 2002 which states that the insured in respect of the property is Mallia Properties Ltd. This is of relevance because a later Royal and Sun Alliance insurance policy relied on by NAMA/NALM purports to show that the insurance policy is in the name of all the Flynn family including Mrs. Flynn.

9. In July, 2004, this loan facility was refinanced. Mr James Flynn gave evidence that in or about 2004 Mallia Properties Limited had two assets in trust. The first was the property at Cork Airport Business Park; the second was a property in Clonsaugh. The tenant in Clonsaugh went into liquidation and the Flynn family (excluding Mrs. Flynn) decided to redevelop the property. In doing so they decided to take both assets out of the trust and put them directly into their own names. This involved a refinancing with EBS because the financing of the properties would now be done by all members of the Flynn family excluding Mrs. Flynn.

10. Mr James Flynn gave clear and uncontroverted evidence that his mother never had any legal or beneficial interest in the property at Cork Airport Business Park, that she was never party to any loan agreement with EBS in respect of that property, that no monies were ever advanced to her by EBS in respect of that property and that therefore she had no liability in respect of that loan. He also explained that the original error which had occurred in December 2000 – in which her name was incorrectly listed in an earlier loan facility letter was carried through into the loan letter of 2nd July 2004.

11. The loan agreement upon which NAMA/NALM rely is the letter dated 2nd July 2004 from EBS to John Flynn senior, John Flynn junior, James Flynn, Elaine Flynn and Ms. Leona Flynn which states that EBS has approved loan facilities in favour of all of the above parties. The purpose of the loan was for the purchase of the building 13 Cork Airport Business Park in Cork. The security was stated to be a mortgage over the said property and an assignment over rental income. The specific security of a guarantee, which had appeared in the first loan offer in December 2000 appears to have been dropped. Perhaps this might account as to why the error was not picked up at this stage. This letter is signed by Mrs. Flynn. But it is clear from her evidence and that of Mr. James Flynn that her signature was in error. This also was a loan

facility offer of €2.69 million. However the entire purpose of this loan was the refinancing of the premises at Cork Airport Business Park. It did not involve the purchase of a new property.

12. It is true that there is a letter dated 11th November 2004 from Beauchamps solicitors (the Flynns' solicitors) to Philip Wm Bass and Co. stating that the declaration of trust in respect of the above property included the interest of Leona Flynn. However EBS solicitors in fact wrote to Beauchamps on 2nd December, 2004, replying to that letter, stating that they had located their old file in this matter and that there appeared to be a misunderstanding. They also enclosed a copy of Beauchamps' letter of the 20th December, 2000, wherein the 2000 trust was set out (which confirmed that the only persons who were the beneficiaries of the trust were all members of the Flynn family excluding Mrs. Flynn). The letter from EBS solicitors stated "*Subsequent correspondence confirmed that the situation was dealt with on that basis*." It is clear therefore from this letter that EBS and their solicitors were of the view, and knew that the original loan facility was advanced to Mallia Properties Ltd on the basis that the only beneficial owners were the members of the Flynn family excluding Mrs. Flynn.

13. It is clear therefore that the intention of all parties (i.e. EBS as lender and all members of the Flynn family (excluding Mrs. Flynn), as borrowers) was that the loan agreement in July 2004, was a refinancing of the December 2000 agreement and that it was at all times intended that the monies which were advanced in July 2004, to refinance the property were only to be advanced to the same parties who were the beneficial owners of the property in December 2000, (i.e. John Flynn senior, John Flynn junior, James Flynn and Elaine Flynn but specifically not Mrs. Flynn).

14. On 26th January 2005 a mortgage was created in favour of EBS over the Cork property. The mortgagors were stated to be John Flynn senior, John Flynn junior, James Flynn and Elaine Flynn. Again there is no mention of Mrs. Leona Flynn.

15. On 26th January 2005 an assignment of rental income agreement was entered into between EBS and John Flynn senior, John Flynn junior, James Flynn and Elaine Flynn. This was the second element of the security for the 2004 loan. Again all members of the Flynn family are party to this agreement with the exception of Mrs. Flynn.

16. The next document upon which NALM relies is a letter dated 21st May 2009 from EBS to John Flynn senior, John Flynn junior, James Flynn, Elaine Flynn and Mrs. Leona Flynn. This however is simply a letter setting out an agreement to fix an interest rate on the relevant loan for a five year period. It is not, and does not purport to be, a new loan agreement. The original error set out in the July 2004 loan agreement has been repeated in this letter so that Mrs. Flynn appears as a borrower on the loan account. Unfortunately this litany of errors is compounded by the fact that Mr James Flynn has signed this agreement on Mrs. Flynn's behalf pursuant to a power of attorney. (It appears that Mr. James Flynn also signed on behalf of his father and his sister pursuant to a power of attorney also and therefore this mistake can be explained on that basis). Mr. James Flynn also gave evidence that he signed this document in error.

17. The EBS loan was transferred to NAMA and on 21st February 2012 NALM wrote to Miley and Miley (solicitors for Mrs Flynn) stating that Mrs Flynn was indebted to NALM pursuant to the EBS facility letter dated 2nd July 2004 and the EBS facility letter dated 21st May 2009. However the facility letter dated 21st May 2009 was, as stated above, simply a letter fixing rates on the original loan.

18. On 8th March 2012 Miley and Miley on behalf of Mrs. Flynn replied to NALM stating that: "*We are instructed that our clients' name was included in error in the EBS Building Society facility letter of 2nd July 2004. Our client receives no benefit from this facility; has no interest in the property which comprises the security for the loan; did not complete any security documentation in relation to it and did not authorise any payment to be made on foot of the loan offer. Our client accordingly has no liability in respect of this loan. We are further instructed that Mr. James Flynn, our clients' son held a number of powers of attorney from various members of the Flynn family and that the document dated 21st May 2009 dealing with the interest was insofar as our client is concerned, completed in error on foot of that power of attorney when Mr. James Flynn was completing the same document on foot of other powers of attorney for the members of the Flynn family*." It is clear therefore that Mrs. Flynn's position has been consistent from the start.

19. NALM replied to Miley and Miley on 2nd November 2012 stating: "*A facility letter, once executed by the borrower and monies drawn on foot of same is evidence of a contract of debt*."

20. It is clear therefore that the position is maintained by NALM that Mrs. Flynn is liable to the EBS and therefore to NALM in respect of the EBS loan.

21. Mr. Barry O'Brien was the witness who gave evidence on behalf of NALM in respect of the EBS loan. However he admitted in cross examination that it was not a property or a file that he was directly involved in. Indeed although Mr. O'Brien stated that he discussed this file with his case manager, it does not appear that he in fact read the file before he made his witness statement or indeed before he came to give evidence in this matter.

22. No witness from EBS was called to give evidence in respect of this issue.

23. Having considered all the evidence in this matter, and the relevant documents above, I am of the view that Mrs. Flynn has no liability to EBS, and therefore to NALM, in respect of the loan advanced by EBS to other members of the Flynn family either in December 2000 or in July 2004. It is clear from the evidence of Mr. James Flynn, and indeed Mrs. Flynn, that it was never intended that she be party to this loan agreement; the monies were never advanced to her; she never had any beneficial interest in the Cork property; she never signed any of the security documentation in respect of the Cork property either in 2000 or in 2004; she never signed personal guarantees, mortgage documentation or an assignment of rental income agreement. The only piece of evidence against her in respect of the EBS loan is the facility letter dated July 2004 which she in fact signed. However I am satisfied, having heard all the evidence in respect of this issue, that this signature was made in error and it was never intended that she would be party to this loan agreement. Moreover it appears from the documentation that EBS was also clearly of the view both in December 2000 and in July 2004 that the financing of the Cork property was only to be done by way of a loan advanced to members of the Flynn family excluding Mrs. Flynn.

24. I am satisfied therefore that there was no consensus *ad idem* between EBS and Mrs. Flynn to bring a contract into existence in July 2004. Mrs Flynn signed her name to the loan agreement by mistake. In the circumstances therefore I find as a fact that Mrs. Flynn was not a party to the loan agreement between EBS and the other members of the Flynn family dated July 2004 and I find as a fact that her signature on this loan agreement was made in error. I also find as a fact that

her signature on the 2009 letter (which sought to fix the interest rate for a period of five years) was also made in error by her son James Flynn pursuant to a power of attorney.

25. In the circumstances I would conclude that Mrs. Flynn does not owe any liability to EBS or to NALM pursuant to the EBS loan and therefore she is not an obligor of NAMA pursuant to the EBS loan.

The Absence of Mr. Marsh as a Witness

189. Mr. Aidan Marsh was the defendants' solicitor and legal adviser. He clearly played a significant role in the events which occurred during the course of 2007 to 2012. In addition, he filed a witness statement on behalf of the defendants. However, he was not called as a witness in the course of the trial.

190. Counsel for NALM submitted to the court that the court should draw an inference from his refusal to give evidence or from the fact that he was not called by the defendants. Mr. Redmond submitted that the absence of Mr. Marsh as a witness was analogous to Hamlet without the prince and that the obvious reason why Mr. Marsh was not called was because what he would have to say as an experienced conveyancer was contrary to the case which the plaintiff sought to put forward.

191. Mr. O'Reilly S.C. on behalf of the defendants submitted that this was not so and that the decision not to call Mr. Aidan Marsh as a witness for the defendants was made for *bona fide* tactical reasons. Indeed, Mr. O'Reilly S.C. submitted that when, at an early stage of the evidence Mr. Redmond had inquired of the defendants whether Mr. Marsh was going to give evidence, Mr. O'Reilly's response was that it all depended on the cross examination of Barry O'Brien.

192. Mr. O'Reilly S.C. also referred to *Fyffe's v. Dublin City Council and Others* [2009] 2 I.R. 417. .In *Fyffe's*, Laffoy J., at p. 505 of her judgment reviewed the authorities and principles applicable to a situation in which a court was asked to draw an inference from absent witnesses. In that case the plaintiff submitted that the court should draw inferences from the failure of the defendants to call certain witnesses. The plaintiff relied on a number of English authorities to support that proposition. Laffoy J. reviewed the UK authorities, including *McQueen v. Great Western Railway Company* [1875] L.R. 10 Q.B. 569; *Reg v. IRC exp. Coombs & Co* [1991] 2 A.C. 283; *Wisniewski v. Central Manchester H.A.* [1998] Lloyds Rep. Med 223 (in which Brooks L.J. in the Court of Appeal set out the relevant principles to be applied) and further decisions of the English High Court which applied the principles set out in Wisniewski. Laffoy J. at p. 508, para 199, stated that "*Where an issue arises as to whether an adverse reference should be drawn, I consider that the principles outlined in Wisniewski are helpful guidelines for the court*".

193. The principles in *Wisniewski* are as follows as stated by Brookes L.J.:-

> *"From this line of authority I derive the following principles in the context of the present case:-*
>
> *1. In certain circumstances the court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.*
>
> *2. If a court is willing to draw such inferences they may to go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence if any adduced by the party who might reasonably have been expected to call the witness.*
>
> *3. There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.*
>
> *4. If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even it is not wholly satisfactory, the potentially detrimental affect of his/her absence of silence may be reduced or nullified."*

194. Laffoy J. at para. 200 of her decision concluded that she did not consider it appropriate to draw an inference from the failure of the defendants to call Mr. McLoughlin as a witness. In arriving at this conclusion Laffoy J. had regard to a number of factors set out therein. One of these factors was that it was a legitimate tactical decision for the defendants to make in the context of the adversarial process.

195. This matter was also considered in *Smart Mobile Ltd v. Commission for Communications Regulation & Ors* [2006] IEHC 338 [where Kelly J. referred to the *Fyffes* decision and the principles set out by Brooks L.J. in *Wisniewski*. In this case under the normal procedures of the Commercial Court a witness statement had been tendered, but that witness was not called. Kelly J. stated that the principles set out by Laffoy J. in *Fyffes* and also by Brooks L.J. in *Wisniewski* were helpful guidelines and insofar as it was necessary to do so, he proposed to apply them in the case at hearing. He stated that these principles "have a particular relevance in the case of witnesses who provide statements of proposed evidence but are not (without explanation) called to testify"

196. In the present case, counsel for the defendants submit that it was a legitimate tactical decision not to call Mr. Marsh. In fairness to Mr. O'Reilly S.C., he had been specifically asked by Mr. Redmond S.C. whether he intended calling Mr. Marsh and his reply was "that it all depended on the cross examination of Mr. O'Brien". In the circumstances, I am of the view that the decision by the defendants not to call Mr. Marsh was a legitimate tactical decision for the defendants to make in the adversarial process which applies in the Irish legal system. .

197. In the present case, although Mr. Marsh had tendered a witness statement and although it was perhaps surprising that he was not called as a witness for the defendants, I do not believe that it would be appropriate to draw an adverse inference from the defendants' refusal to call him as it appears to have been a legitimate tactical decision for the defendant to make.

Was there an event of default?

198. NALM, in its counterclaim, is seeking judgment against the Flynns on a joint and several basis in the sum of €21.9m approximately. This, it says, is due and owing on foot of the facility letter dated 19th June 2002, (as amended on 21st January, 2003), and made between the Flynn family and Anglo.

199. In para. 69 of the defence and counterclaim, NALM pleads that it was an express condition of the 19th June 2002 facility letter that all amounts outstanding under the facility letter should be paid on demand and that without prejudice to that, the said amounts

were repayable no later than 31st December 2002. It also pleads that this indebtedness and other loans were acquired by NALM on or about 13th December 2010. It also pleads at para. 75 of its defence and counterclaim that, in breach of agreement, the members of the Flynn family "*entered into default in respect of the loan facilities and accordingly as it was entitled to do, by letter of demand dated 5th February 2013 the plaintiff to the counterclaim demanded repayment by 5pm on 12th February 2013 of the aggregate sum of €21,942,744.59 which represented the principal sum and interest thereon to 27th January 2013. No payment has been made to date*."

200. The defendants to the counterclaim pleaded that the loan was not in default. Therefore an issue arises which this court has to decide as to whether the loan is in default.

201. The reason why NALM says the loan is in default is because the loan agreement specifically provides that the loan shall be repaid on or before 31st December, 2002. In fact the relevant terms of the facility letter dated 19th June, 2002, is para. 7 which is entitled "Repayment Date" and it provides as follows:

> *"The facilities are repayable on demand which demand may be served at any time by the bank at its sole discretion and without stating any reason for such demand. Without prejudice to the demand nature of the facility, the facility shall be repaid on or before 31st December 2002. In the meantime interest is to be funded on a quarterly basis at the end of each calendar quarter."*
>
> *Notwithstanding and without prejudice to the demand nature of the facilities it is acknowledged by the borrowers that in the event that any beneficiary or the company defaults in their respective payment obligations to the bank, the bank shall be entitled to demand repayment of the facilities."*

202. These provisions are amplified by the general conditions at s. 4.1 which states as follows"

> ***Repayment/Prepayment***
>
> *4.1 "Notwithstanding that repayments of the facility are to be made over or within a specified period or on or before a specified date (as set out in the facility letter) the facility is and shall at all times be repayable on demand which demand may be served at any time by the bank at its sole discretion and without stating any reason therefore"*

203. Mr James Flynn, giving evidence on behalf of the Flynns, stated that at all times the loans operated within its terms and that at all times the interest on the loan was paid. He also gave evidence that on several occasions when the borrowers made repayments of principal to Anglo, that Anglo executives discouraged them from doing so on the basis that if such repayments of principal were made it caused a problem for the bank in that it had to find another borrower to whom to loan those monies.. No evidence was given from any executive from Anglo in respect of this matter.

204. Mr James Flynn gave evidence that after the initial period of 31st December 2002, there was no demand by Anglo either to the Flynns or any other members of the investment syndicate to repay the loan. Thereafter the loan continued to be maintained and to be serviced by the payment of interest at the required levels.

205. It appears therefore, that Anglo did not demand that the loan should be repaid on or before 31st December, 2002, or indeed afterwards. The bank, in effect, consented to the loan continuing as a demand loan for an indefinite period. Mr. James Flynn has given evidence to that effect and there was no evidence before the court to contradict or modify this evidence. In the circumstances therefore, I find that Anglo did indeed agree that the loan did not have to be repaid on or before 31st December, 2002 and that it continued thereafter as a demand loan *sine die*.

206. I also note that there are no "*Events of Default*" clauses within the loan facility which would specify that, if, for example, the loan to value ratio fell, this might constitute an event of default.

207. NALM produced no evidence to the court to show that there had been any default on the loan by the Flynns in respect of any of its repayment terms. Its sole argument that the loan was in default was that it had not been repaid by the 31st December, 2002.

208. In the circumstances I would conclude that there has been no event of default and that the Flynns are not in default on the loan.

Was it a demand facility?

209. As set out above, NALM plead that the 19th June, 2002, loan agreement was a loan which was repayable on demand. It also pleaded that by letter of demand dated 5th February 2013, NALM demanded repayment by 5pm on 12th February 2013. But despite the said demand no payment has been made to date.

210. The members of the Flynn family in their defence to the counterclaim in para. 8f pleaded that the loans in question were not demand loans. However the evidence of Mr. James Flynn on this point was clear. On a number of occasions in his direct evidence and in cross examination he accepted that the loans were demand loans. I therefore find as a fact that the loans were demand loans.

Is NALM estopped from calling in the loan even though it is a demand facility?

211. The members of the Flynn family argue however, that although it was a demand loan, the loan agreement did not properly, accurately or appropriately set out the full lending arrangements between Anglo and the various individuals who were involved in the financing of the development. They plead that the financing arrangements were predicated on the repayment of the interest on an ongoing basis and the repayment was not subject to a specific term. They also plead, that since the expiry of the repayment date on 31st December, 2002, an estoppel by convention or representation was established pursuant to which the bank consistently accepted interest payments on the loan, paid from the rental income from the property, in full discharge of all financial obligations under the loans. They also plead , in the alternative, that a course of dealing had been entered into between the investors and Anglo whereby Anglo had accepted a situation in which the rent from the development was utilized in order to pay the bank debt until such indebtedness was entirely repaid. Thus they plead that Anglo had no specific right to demand an accelerated payment of the entirety of the indebtedness to Anglo (now NALM) and that Anglo (and now NALM) are estopped from so doing. These claims are all denied by NALM which also seeks to rely on s.101 of the NAMA Act.

212. Mr. James Flynn gave evidence that the loan operated on a satisfactory basis for many years whilst Anglo was under its previous management and until the crisis in September 2008. His evidence was that the rent from Belfield Office Park was always sufficient to pay the interest on the loan on a quarterly basis and that such interest was always paid. He also gave evidence that the rental

income from Belfield Office Park was more than enough to pay the interest on the loans and generated a surplus which was used to pay down the principal sum due to Anglo on certain occasions. In his view this arrangement was entirely acceptable to Anglo and indeed as stated above whenever the members of the Flynn family (or indeed all members of the wider investor syndicate) made repayments of principal to Anglo that this was in fact discouraged by Anglo executives.

213. It was submitted therefore on behalf of the Flynns that this evidence, established a course of dealing between Anglo and the borrowers and/or is sufficient to raise an estoppel which would prevent Anglo/NALM from now demanding repayment of the entire facility.

214. However in my view that submission is not well founded. Whilst it is the case that the evidence establishes that the rent was indeed used to pay the interest on the loan (and indeed seems to have been sufficient to pay the interest on the loan), there is no evidence whatsoever that if there was a shortfall in the rent (such that the quarterly interest could not be paid), that the bank would absorb the loss. Mr. James Flynn did not say in his evidence that if the rent was less than the interest that the bank would simply either waive the excess interest due or seek to roll up the interest into the capital sum. In the normal way, a bank would always insist that the interest on the loan be paid by the borrower. If the borrower was unable to pay the interest then a bank such as Anglo would normally insist that the interest be paid from the borrowers' own funds or in the alternative be rolled up into the loans. However the bank would usually come to an arrangement with the borrower if there was a shortfall in the repayment of interest on the loan. There is no evidence that this occurred in the present case.

215. I am satisfied therefore that, on the evidence, no case can be made out that Anglo accepted that it only ever required that the rental income from Belfield Office Park be used to pay the interest on the loan and that if there was a shortfall that the bank would let that situation continue.

216. Thus, although the evidence establishes a pattern of repayments whereby the rent paid the interest on the loan, that is not sufficient to raise an estoppel or a course of dealing that the bank (or NALM) must therefore be obliged to accept the rent and only the rent, no matter what level it is at, to pay the interest on the loan.

217. In essence it was argued by the Flynns that because of the course of dealing and estoppel issues which arose, that Anglo/NALM would never to be able to call in the loan.

218. The argument only has to be stated in these terms to realise that it is an untenable proposition. I would therefore hold that the defendants' submissions in relation to these issues of course of dealing and estoppel are not supported by the evidence and that Anglo and/or NALM are not estopped from calling in the loan.

The Interest Overcharging Issue

219. At para. 10 of its Reply to the defence and counterclaim the Flynns claimed that the Bank (Anglo) "consistently, systematically and deliberately overcharged interest at all times and concealed the amount of interest so overcharged". They also pleaded that this concealment of excessive interest overcharges was contrary to the obligations of a financial institution to act honestly, fairly and without deceit in its interaction with the borrowers. It also pleaded that NALM was informed of the deceitful overcharging of interest prior to its acquisition of the loans.

220. NALM, in its Reply, denied that the Bank consistently, systematically or deliberately overcharged interest at any time, and also expressly denied that NALM was informed of any deceitful overcharging of interest prior to its acquisition of the assets. This issue of deceitful overcharging of interest was also pressed in the legal submissions on behalf of the Flynns.

221. The evidence in relation to interest overcharging was given by Mr. James Flynn. In his witness statement he states as follows:-

> ***"Overcharging***
>
> *13. A short time after this meeting my family initiated proceedings against IBRC for fraudulent overcharging on 5th June, 2013.*
>
> *14. I stand over the calculations of overcharging set out by Eddie Fitzpatrick in his letter dated 4th May, 2012. In response to para. 43 of Barry O'Brien's witness statement dated 27th January, 2014, I do not recall a letter from the bank making any offer for the refund of €137,000 or enclosing a cheque in that amount. I certainly do not recall rejecting such an offer. I however remember the offer of €419.74 in the letter of John Reihill dated 17th July, 2012, being made which was rejected."*

222. Mr. James Flynn gave evidence that Mr. Eddie Fitzpatrick was a forensic accountant specialising in banking, retained on behalf of the defendants to review their accounts with Anglo/IBRC, with a view to assessing whether any interest had been overcharged on their accounts. Mr. Fitzpatrick appears to have conducted such an exercise and on 4th May, 2012, Mr. Fitzpatrick wrote to Mrs. Siobhan Whiston of IBRC in relation to Belfield Office Park Limited. The letter is headed "*Re: Joseph and Patrick Linders, Belfield Office Park Limited*" and the first line of the letter states:-

> *"Further to authority forwarded to you in November, 2011 I now attach initial claim on behalf of the above named clients as follows."*

The letter then appears to set out a review of at least four accounts and purports to identify situations in which the wrong rate of interest was charged on these accounts. In relation to all four accounts, however, it appears that the complaint only runs until 27th November, 2001.

223. Thus, it appears, that on all four account, the forensic accountant retained on behalf of the defendants seems to have concluded that in respect of those four accounts, the correct margin was applied after 27th November, 2001.

224. Mr. Barry O'Brien for NALM in his witness statement has exhibited this letter from Mr. Fitzpatrick. Mr. O'Brien also exhibited a letter from John Reihill replying to Mr. Fitzpatrick's letter, saying that the bank had reviewed the relevant interest rates and indicating that on three of the accounts there was no interest overcharge and that on one account there was an interest overcharge calculated as at 10th July, 2012, at €419.74.

225. Mr. O'Brien for NALM, in his witness statement dealt with the issue of interest overcharging and accepted that there appeared to have been an element of overcharging of interest affecting all borrower groups involved in Belfield Office Park. He stated in this

witness statement that:-

> *"I understand that the Bank offered to repay all borrower groups involved in Belfield Office Park the aggregate sum of €142,888.91 approximately in repayment of the overcharge of interest and which figure also included an amount of compensation. I further understand, however, that this offer has been rejected by the borrower groups involved in Belfield Office Park."*

226. At para. 44 of his witness statement Mr. O'Brien states that he understands that Anglo had confirmed to NAMA that the correct interest was charged from 2004 up to the date of acquisition of the loan facilities by NAMA, but that NAMA continued to charge interest on the compound figure which included the overcharged interest as NAMA was unaware at the time of acquisition of the loans that the incorrect level of interest had been charged from 2002 to 2004.

227. The evidence in relation to the issue of interest overcharging produced to the court was unsatisfactory. The defendants did not call Mr. Eddie Fitzpatrick to give evidence. No further evidence on the amount of overcharging, the duration of the overcharging or the total quantum involved in any alleged overcharging was provided by the Flynns at all. Although allegations of deceitful overcharging had been made in the pleadings and, indeed, in the legal submissions, it is quite clear that there is absolutely no evidence whatsoever before this Court to establish that any such overcharging was deceitful or dishonest or wrongfully concealed.

228. There is evidence of overcharging but given the unsatisfactory state of the evidence on this issue, I am not in a position to conclude what the total level of such overcharging might be. I note however, that Mr. O'Brien on behalf of NALM accepts that as at 24th April, 2014, a sum of €142,880.91 appears to have been offered by the Bank to all the borrowers in satisfaction of the overcharging issue. This figure has not been undermined by the defendants. I would, therefore, conclude that there is no evidence of any deceitful overcharging on the part of the Bank.

Was the Letter of Demand dated 5th February, 2013 invalid because it stated an incorrect amount?

229. The letter of demand from NALM to Mrs. Flynn and all the other defendants was dated 5th February, 2013. In this letter of demand, NALM demanded payment of the sum of €21,942,744.59 and all interest thereon up to the date of payment of the said sum. The letter also stated that interest continued to accrue in accordance with the facility letters and the relevant interest in respect of the relevant accounts per day was set out in the letter.

230. Counsel for the defendants submitted that this letter of demand was invalid for a number of reasons. Firstly, they submitted that the letter of demand was invalid because it stated an incorrect amount which was being sought by the Bank; secondly, they submitted that the real reason for calling in the loan was not stated on the face of the letter. I will deal with this issue later in this judgment.

231. It is submitted on behalf of the Flynns that NALM has sought the repayment of an inaccurate amount (*i.e.* a sum which is not legally due and owing). The Flynns say the claim has been overstated by the inclusion of a claim for excessive interest (which they say has been accepted in part by NALM in that Mr. Barry O'Brien accepted that a refund of interest was due from NALM to the Flynn family); thus they submit the letter of demand was inaccurate in that it included a claim for interest at a time when NALM knew, or ought to have known, that the said interest should be deducted from the amount claimed. The Flynns' claim, that because the letter of demand does not accurately set out the actual amount of money due and owing, it is therefore, an invalid letter of demand. This issue is set out in the defendants' submissions filed before the court hearing and supplemented by their closing submissions.

232. In this respect, Mr. O'Reilly S.C. for the defendants, sought to rely on *County Leasing Limited v. East* [2007] EWHC 2907 Q.B. In the course of submissions I was referred to certain paragraphs of the decision of Judge Richard Seymour Q.C., (sitting as a judge of the High Court) in that case. At para. 120 of his decision Seymour J. noted that the defendant had submitted that there had been no valid demand for payment under the agreement in question in those proceedings. As is stated at para. 121 of his judgment, Seymour J. states as follows:-

> *"121. The argument for Mr. East [the defendant] was that the amount sought by CLAM's [the plaintiff] demand dated 3rd December, 2005, STG£1,233,033.90 was so vastly in excess of the sum actually due, if I found that clause 5 of the penalty, that it could not sensibly be treated as a demand for the sum which was actually due. The argument was a difficult one, for Mr. Stacey [counsel for the defendant] accepted in principle that it was unnecessary for a demand for payment to be valid, that the document by which the demand was made specify any sum as that said to be due or, indeed, that if a sum was specified, it was specified correctly. Mr. Stacey referred me to some observations of Walton J. in Bank of Baroda v. Panessar [1987] CH 335:*
>
> > *'I cannot see any reason why the creditor should not do precisely what he is, by the terms of his security, entitled to do; that is to say, to demand repayment of all money secured by the debenture. As the High Court of Australia [in Bunbury Foods PTY Ltd v. National Bank of Australasia Ltd [1984] 51 ALR 609 at pp. 619-620] points out, it would seem stupid that the creditor could put in, without imperilling the validity of the notice, an entirely wrong sum, and one that is much more likely to be give rise to confusion and difficulty than is the form of the notice adopted in that and the present case. Indeed, it is quite clear that knowledge of the precise amount of the sums outstanding is only required in the exceptional case, because in most cases, as in the present case, the debtor has no real means whatsoever of paying off the sum which is due, and it would seem to be idle to put the creditor to what might be very considerable expense in ascertaining the precise amount due when there is no likelihood that that sum will represent a realistic target at which the debtor can aim. If on the contrary, the debtor is in a position to pay off the sum demanded and wishes to know the exact and precise sum, he can communicate with the creditor and ask the creditor what sum he is expecting to be paid. Under those circumstances, one imagines that the creditor would say, "Well the last accounts, which are not complete, show in fact a sum of X pounds owing from you. If you can pay that sum at once, then we need not worry too much about the additional sum; we can settle that later" or something along those lines. At any rate on this point I propose to follow the Australian case which seemed to me to be redolent of good common sense.'*
>
> *122. The reasoning in Bunbury Foods PTY Ltd v. National Bank of Australasia Ltd was based in part upon an old Privy Council case, Campbell v. Commercial Banking Co of Sydney [1879] 2 NSWLR 375. At p. 385 of the advice of the Privy Council it was said:-*
>
> > *'As to the first of these grounds, the learned judges of the Supreme Court have held, and in their Lordships opinion have correctly held, not only that a notice under the Act is not bad because it demands more than is due, and that the jury should have been so instructed (a ruling which affects principally the finding on the second issue),*

but that where a demand is made for a larger amount than that which is really due, such demand does not do away with the necessity for tendering what is actually due unless there is at the same time a refusal to accept less.'

124. In my judgment, the decision of the Privy Council in Campbell v. Commercial Bank & Co of Sydney should not be interpreted as having determined that a demand for an amount in excess of that actually due was ineffective if the person making the demand declined to accept the sum properly due when that sum was tendered. As it seemed to me, the question of whether or not a demand is valid falls to be determined at the time it is made, not at some later date. Moreover, whether a demand is valid or not must, I think, depend upon proper construction of the document by which the demand is made, and not upon circumstances arising after the production of the document. It must either be necessary for a demand to state accurately the amount due, or not. If, as the authorities, certainly in Australia, show it is not necessary for the sum due to be stated accurately, than the statement of the correct sum due is not necessary for the demand to be valid."

233. Applying those principles to the facts of this case it seems clear that the letter of demand, even if it did overstate the amount due from the defendants to NALM, is still a valid of letter of demand. In the circumstances, the submission of the defendants that the letter of demand is invalid is not well founded.

234. However, Mr. O'Reilly S.C. for the defendants makes a further submission. He seeks to rely on a recent decision of the Supreme Court in *Murphy v. Bank of Ireland and Official Assignee in Bankruptcy* [2014] IESC 37. In that case McKechnie J. (delivering a dissenting decision) emphasised the strictness which applies to statutory procedures which have adverse consequences for the party affected. In *Murphy* an appeal against an order of adjudication in bankruptcy was brought on the basis that the sum claimed in the notice of demand, the particulars of demand and notice requiring payment were incorrect. Mr. O'Reilly S.C. submitted that the Supreme Court (in its majority and dissenting opinions) had regard to the fact that the bankruptcy code was regarded as being penal in nature and submitted that the Supreme Court was unanimous in stating the principle that where the sum claimed exceeded the amount actually due, then the demand was invalid. He submitted that the NAMA Act, was also penal in nature for a number of reasons. He submitted that one of the principal consequences of a vesting order (which NAMA is entitled to apply for) is that (pursuant to s. 155) it extinguishes the chargor's equity of redemption in the land concerned but does not extinguish the debt secured by the charge concerned and thus, the legislation bears the hallmark of a penal sanction such as that identified in *Murphy* by the Supreme Court. Thus, he submits that on the authority of *Murphy*, that where NALM pursue a particular method of execution which may have penal consequences, a strict approach is required under the legislation

235. However, in my view, the *Murphy* case can be distinguished from the present case because the particulars of demand and notice requiring payment which were served on the appellant by the Bank in that case were statutory notices prescribed by s. 8(1) of the Bankruptcy Act 1988. This provides that a bankruptcy summons may be granted mainly if the creditor proves that:-

"3. A notice in the prescribed form requiring payment of the debt has been served on the debtor."

As McKechnie J. pointed out in his decision on p. 2, the process involved in the making of a demand (in a document entitled "Particulars of Demand and Notice) requiring Payment" by the petitioning creditor for payment of the sum specified, followed by the service of a bankruptcy summons, (in respect of which if default in payment is made, an act of bankruptcy is committed) thereby allows the creditor to petition on that ground to have the debtor judged a bankrupt. Thus, what was at issue in the *Murphy* decision was whether the demand complied with the relevant terms required for such a demand in the Bankruptcy Act

236. By contrast in this case, the letter of demand sent by NALM to the defendants is a normal letter of demand of a kind which occurs where a creditor, for example, a financial institution, is seeking repayment of money due from a debtor. Such a letter of demand is not a creature of statute. Moreover, counsel for the defendants has not pointed to any provision of the NAMA Act which governs the issuance of letters of demand by NAMA.

237. Thus, I would distinguish the *Murphy* decision on that ground. The issue of whether the NAMA Act is penal in nature similar to that in the *Murphy* decision is not a matter which needs to be decided by this Court in this decision. Thus, in my view, the challenge to the validity of the letter of demand fails on this ground also.

Breach of fair procedures

238. However the most substantive arguments made by the Flynns against NALM is that they were treated unfairly by NALM. This claim is, in fact, that they were treated so unfairly by NALM that it amounted to a breach of their natural and constitutional rights to fair procedures and that it amounted to a breach of statutory duty by NALM.

239. The Flynns make two specific arguments on this point. These are:

1. That in calling in the loans (and in the correspondence leading to the calling in of the loans) NALM gave misleading reasons for calling in the loan and failed to disclose the real reason for calling in the loan. In so doing NALM deprived the Flynns of their right to be heard.

2. That NALM, in calling in the loans of Flynns, but not the loans of all of the other investor groups in Belfield Office Park, unlawfully "targeted the Flynns".

260. I turn now to consider each of these claims. In so doing I will firstly review the evidence, secondly review the legal principles applicable and thirdly consider the application of those principles to the facts of this case.

The evidence: The correspondence on the Business Plans leading to the calling in of the loans

261. I turn therefore firstly to a consideration of evidence .NALM asked the borrowers of Belfield Office Park to submit a business plan. It appears that a first version of Belfield Office Park Limited business plan was submitted to NALM at NALM's request by the Flynns and the other investor groups on or about the 18th May, 2011. This set out a detailed business plan for the office park. It appears to be a document written by the directors of Belfield Office Park Limited (i.e. members of all four investor groups) for NAMA according to a NAMA template.

262. On the 1st August, 2012, NAMA wrote to all members of the four investor groups in Belfield Office Park about the business plan. It is noteworthy that this letter is written to all four investor groups. The letter stated that the business plan submitted on behalf of Belfield Office Park Limited (BOPL) had been carefully reviewed and assessed in detail by NAMA's independent business plan reviewer (Kavanagh Fennell Advisory). The letter also stated that following this assessment a decision had been made by NAMA that it was not

satisfied that the business plan complied with NAMA's statutory objectives including those relating to the reduction of a person's indebtness to NAMA and the achievement of the optimum property management and realisation strategy. It stated that the business plan was rejected for the following reasons:

> *(i) There was no support forthcoming from you or any of the other shareholders of BOPL with respect to the shortfall and taking indebtedness and the OMV [Open Market Value] of the assets into account. [This letter also states that NAMA would require a statement of affairs from each member of the borrowing group as part of that submission]*
>
> *(ii) The proposed date for sale of the asset (2016) is outside the guidelines set by NAMA.*
>
> *(iii) The administrative function is considered to be below the required standard. [examples were then given]*
>
> *(iv) Differences between the shareholders have surfaced in relation to the letting of the office space.*
>
> *(v) In view of the above and taking account of past performance and the outcome of the IBR, NAMA is not satisfied that the borrowers management team is best placed to manage the work out of the asset in NAMA's best interest.*
>
> *(vi) As a result of the business plan being rejected, NAMA is currently considering the options available to it in relation to the facility agreement. However NAMA is prepared to consider any submissions that you would like to make before a decision is made in this regard. Should you wish to make a submission this should be submitted to NAMA in writing no later than close of business on the 15th September 2012." (emphasis added)*

It is noteworthy that all these objections were common to all investor groups (with the exception of Mrs. Flynn's refusal to file a Statement of Affairs).

264. On 13th September, 2012, the representatives of the four investor groups in Belfield Office Park Limited replied to this letter from NAMA of 1st August, 2012. Their letter was written to Barry O'Brien, Asset Recovery Manager of NAMA who gave evidence in this trial on these matters. (The letter was forwarded to Barry O'Brien from Peter Wilson of Belfield Office Park Limited under cover of a letter dated the 14th September, 2012). Importantly, the letter dated the 13th September, 2012, from Belfield Office Park Limited, is signed by Patrick Linders on behalf of the Linders Group, James Flynn on behalf of the Flynn Group, Chris Kelly on behalf of the Heritage Group and John Walsh on behalf of the Docfield Group. In other words the correspondence from NAMA dated the 1st August, 2012, sent to Belfield Office Park Limited was sent to and clearly affected all four investor groups within Belfield Office Park Limited. As such it was replied to on behalf of all four investor groups within Belfield Office Park Limited. The letter of the 13th September, 2012, sought to revise the business plan and to address the concerns of NAMA in respect of it. (It is not necessary for me to set out in detail the various revised proposals which were made by BOPL in this regard).

265. It is at this point that matters go off the rails. The revised business plan of 13th September, 2012, was replied to by NALM by letter dated the 11th January, 2013, sent by Barry O'Brien. This letter states as follows:-

> *a. "As you will also be aware from previous correspondence, neither the original business plan submitted in respect of Belfield Office Park nor the subsequent correspondence received from Belfield Office Park Limited on your behalf dated the 13th September, 202, was acceptable to NAMA and in particular neither provided an adequate repayment schedule for the repayment of the outstanding debt. We note that no further proposals have been received from you regarding the repayment of the loan facilities, the subject of the facility agreement in the interim.*
>
> *b. NAMA is currently finalising the most appropriate course of action for it to take in relation to the facility agreement in line with its statutory purposes. The purpose of this letter is to advise you that a decision is imminent in order to allow you or any advisers on your behalf make further submissions as you or they see fit to NAMA in respect of the loan facilities. Please note that any such submission should be in writing can be received by NAMA no later than close of business on Monday, 21st January, ("the cut off date").*

267. Most importantly, it appears that this letter of 11th January, 2013, was only sent to each member of the Flynn family (ie. the Flynn investor group within Belfield Office Park Limited). Mr. James Flynn gave evidence that this letter was not sent to any of the other three investor groups within Belfield Office Park Limited. Mr. Barry O'Brien also gave evidence to this effect. Thus, it appears that at this stage, a decision had been taken by NALM to write only to the Flynn family in respect of Belfield Office Park Limited. It is not clear why this is so. No reasons were given by NALM in any of the correspondence or in evidence. There is no reason why this letter of 11th January, 2013, should not have been sent to all members of the investor group in Belfield Office Park, if NALM was genuinely concerned about the business plan for BOPL. It was clear at this time that all investor groups were fully engaged with NAMA in respect of the business plan for Belfield Office Park. It was also clear that NAMA had concerns about the business plan and that all members of the investor groups tried to address those concerns by letter dated the 13th September, 2012. Given that NALM still had concerns, it is difficult to understand why its letter of the 11th January, 2013, setting out those concerns and stating that there would be a cut off date on Monday 21st January, was not sent to all members of the investor group in Belfield Office Park Limited.

268. That letter of the 11th January, 2013, was replied to on the 21st January, 2013, by James Flynn on behalf of the Flynn group. He refers to the fact that the correspondence of 11th January, 2013, had been sent to various members of the Flynn family; he also states that "we are deeply disappointed to receive your correspondence. We believe that we have asset managed the Park well over the past few years and have created real value in what has been the most difficult financial environment since the Great Depression". The letter then went on to give final proposals and submissions in relation to how best to maximise the asset at Belfield Office Park Limited. This letter was signed by James Flynn on behalf of the Flynn group, not on behalf of all four investor groups.

269. It does not appear that any other members of the investor group in Belfield Office Park Limited replied to Barry O'Brien of NAMA by the cut off date of the 21st January, 2013 – although this is not surprising given that they had not been sent the relevant letter.

270. The final letters in this chain of correspondence were two letters from NALM to members of the Flynn family dated the 5th February, 2013, calling in the loans. I will call one letter the "Letter of Reasons and the second letter "the Demand Letter". Given the importance of this Letter of Reasons I set it out below in full:-

> *5 February 2013.*
>
> **Facility letter dated the 19th June, 2002 (amended by letter dated the 21st January, 2003) between (1) IBRC (formerly Anglo Irish Bank Corporation plc) and (2) John Flynn senior; Leona Flynn; James Flynn; John Flynn**

junior and Elaine Flynn ("the Borrowers") ("Facility agreement")
Dear Sir,

I refer to all correspondence issued from NAMA, in particular NAMA's letter dated the 11th January, 2013.

A final opportunity was given to the borrowers to make final representations and submissions with regard to the facility agreement acquired by NAMA including a satisfactory repayment proposal. An assessment of all submissions received was undertaken (together with information already to hand) and was presented to and considered by a NAMA committee with decision making authority on the 24th January, 2013. The outcome of this process is that NAMA is not satisfied that the submissions made meets with NAMA's statutory objectives, including but not limited to, those relating to the reduction of the indebtedness of the connection to NAMA. In particular NAMA has grave concerns regarding the following:-

1. The loans are in default and have been for a substantial period;

2. The summary assets strategy proposed by the Connection are not compatible with NAMA's requirements for debt reduction and

3. No satisfactory strategy for debt reduction has been presented.

NAMA's committee with decision making authority has finalised its review of the submissions and has concluded that repayment of the loans is demanded forthwith. Accordingly we enclose a demand letter for your immediate attention.

Please note that the contents of this letter are entirely without prejudice to and shall not be construed as a waiver of any rights and remedies including the appointment of receivers, available to NAMA, NALM or any NAMA group entity under any loan agreements, security documents, the National Asset Management Agency Act 2009, and other legislation and/or otherwise conferred by law. All such rights are exercisable at the discretion of the entities concerned.

All co-borrowers in respect of these loans have been copied in this correspondence.

Yours faithfully

Barry O'Brien

For and on behalf of NALM."

271. As McCarthy J. said in *Hay v. O'Grady* [1992] 1 IR 210 at 217; "*the arid pages of a transcript seldom reflect the atmosphere of a trial*." This was exactly the case here. Mr. Barry O'Brien of NAMA/NALM was cross examined for a number of hours by Mr. McDowell S.C. on behalf of Mrs. Flynn. He seemed unable to justify why the letter of the 13th January, 2013 and the letters of 5th February, 2013 had only been sent to the Flynns. Mr. McDowell S.C. went through each of the reasons in the letters and asked why this would justify singling out the Flynns. No satisfactory answers were given. Mr McDowell then asked whether the fact that Mrs. Flynn had refused to give a statement of affairs was a reason. Mr. O'Brien admitted that it was. When asked was it a "significant reason" he accepted that it was. When pressed that it was the only reason, there were long silences. Repeatedly. When pressed about what other reasons there were for calling in the loan, there were again long silences, repeatedly. Indeed, Mr. O'Brien was unwilling to say that it was the only reason, and yet unable to say what other reasons there were for calling in the loans of the Flynn family only and not those of the other investors.

272. Mr. O'Brien stated that NALM was of the view that it was always clear to both parties that Mrs. Flynn's refusal to provide a Statement of Affairs was a major issue. Mr. McDowell S.C. then asked if that were so, why was it not put in the letter? There was no satisfactory answer to that question. It was then put to the witness that the reason it wasn't in the letter was because a decision had been made by NAMA not to put it in writing, to try to hide it as a factor and by referring constantly to the business plan to make it appear as if NAMA was treating the Flynns in a non discriminatory manner. There was no satisfactory answer given to that question either.

273. It was clear that every single reason given in these letters related equally to all four investor groups in Belfield Office Park. None were particular to the Flynns. The only differentiating factor between all four investor groups was Mrs. Flynn's refusal to provide a statement of affairs.

274. Eventually Mr. O'Brien conceded in cross examination by Mr. O'Reilly S.C. that when the letter of 11th January, 2013 had been written to the Flynns "the only point of differentiation" between the Flynns and the other investor groups was that Mrs. Flynn refused to provide a statement of affairs [transcript 9/59]

275. Mr. O'Brien also admitted in response to a question from Mr. O'Reilly S.C. that if Mrs. Flynn had "confessed" to being an obligor of NALM, the letter of 11th January, 2013 would not have been sent and no further action would have been taken. Mr. O'Brien also accepted that if the letter of 11th January, 2013 had not been written, the letters of 5th February, 2013 would also not have been written and the loans would not have been called in.

276. In the circumstances, and based on the evidence, I am driven to the conclusion that the only reason NALM had, in fact, for calling in the Flynns' loans on 5th February 2013 was because Mrs. Flynn denied the debt and refused to provide a statement of affairs and I make a finding of fact in that regard. It therefore follows that the other reasons set out in the Letter of Reasons of 5th February, 2013 were not the real reasons for the calling in of the loan and I make a finding of fact in that regard also.

277. The complaint made by the Flynn family is that the real reason why the loan was called in was because Mrs. Flynn was refusing to give a statement of affairs. Therefore, the Flynns say, this letter of 5th February, 2013, was entirely misleading. It sets out misleading reasons, which purport to relate to the business plan and it did not set out the real reason, (namely that NAMA was concerned that Mrs. Flynn was refusing to provide a statement of affairs). In my view, this objection by the Flynns to the NALM Letter of Reasons is well founded.

278. I am of the view therefore, that the reasons put forward by NALM in its Letter of Reasons of the 5th February, 2013, were

inaccurate and misleading. The letter was, as Mr. McDowell S.C. submitted, "a smokescreen". If NALM was truly dissatisfied with the business plan put forward by all investor groups for Belfield Office Park Limited it would have decided to call in the loans of all four investor groups in Belfield Office Park Limited. The fact that it did not decide to call in the loans of all four investor groups leads inexorably to the conclusion, in my opinion, that this was not the real reason for calling in the loans. Mr. O'Brien under cross examination could not put forward any cogent explanation as to why, if NALM were truly concerned about the business plan, the loans of all four investor groups were not called in.

279. I am also aware that there was a separate and parallel chain of correspondence between Mrs. Flynn and NALM (and its legal advisers Ronan Daly Jermyn), which parallels the correspondence on the business plan. Mrs. Flynn was sent the letter of 1st August, 2012, in which NAMA set out its reasons for rejecting the business plan for Belfield Office Park Limited. This letter was responded to on Mrs. Flynn's behalf by Miley and Miley her solicitors on the 10th September, 2012. In turn this letter was replied by Ronan Daly Jermyn solicitors for NAMA on 5th October, 2012, requesting that Mrs. Flynn makes a submission to NAMA by Friday 12th October, 2012, and requesting a statement of her affairs. After further correspondence Miley and Miley wrote to Ronan Daly Jermyn on the 12th November, 2012, stating that their client's position was unchanged and that she would not be providing a statement of affairs. NALM also wrote to Mrs. Flynn on the 11th January, 2013, in identical terms to the letter sent to all of the members of the Flynn family on that date. In turn Miley and Miley replied to NALM on the 21st January, 2013, repeating their client's stance. Likewise NALM sent Mrs. Flynn the Letter of Reasons on the 5th February, 2013, in identical terms to the letters sent to all of the members of the Flynn family on the same date setting to their reservations about the business plan and enclosing the demand letter calling in the loan.

280. Thus it is clear that there were two parallel streams of correspondence going on between NALM and Mrs. Flynn and NALM and other members of the Flynn family. These two parallel streams converged on 5th February, 2013.

281. These misleading reasons caused immediate confusion within the Flynn family. Indeed Beauchamps solicitors acting on behalf of the Flynn family wrote to NALM on the 12th February, 2013, one week after the loans were called in, stating that:-

> *"Our clients cannot understand why they have been singled out in the Belfield Consortium for demand. The Belfield Consortium consists of four separate groups with separate facilities, albeit interconnected by limited recourse guarantees. Our clients believe that the demand is predicated and based on a fundamental and arbitrary unfairness which is connected with NAMA's requirement of Lee Flynn to give a statement of affairs in circumstances where she is not required to do so."*

282. Moreover, having listened to the evidence of James Flynn, I was impressed by his genuine bewilderment, (at the time), as to the precise reasons as to why the family loans were called in. As far as he was concerned if it was about the business plan for Belfield Office Park then why weren't all the loans of all investor groups called in? If it was because of his mother's stance then why was that not actually clearly stated in the letters? Or was there another reason altogether?

283. The question which then arises is whether this was lawful or not, and/or whether by sending out the letter in this way NAMA deprived the Flynns of their right to be heard and of an opportunity to engage properly with NALM in respect of the real issues and to make representations on these points. I will return to this later in my judgment.

The allegation that the Flynns were "unfairly targeted"

284. The other central allegation in this case is the allegation by the Flynns that they were unfairly and unlawfully "targeted" by NALM. The essence of this allegation is that, although there are four investor groups in Belfield Office Park, and although NALM apparently decided that it was not satisfied with the business plan for Belfield Office Park submitted by all the four investor groups, it has only called in the Flynn loans and has not called in the loans of the other three investor groups. The Flynns submit that this is grossly unfair, unlawful and a breach of statutory duty.

285. The claim is made by the Flynns in their pleadings in a number of different ways. For example at para. 11 of the defence to the counterclaim and reply filed on behalf of members of the Flynn family it is stated as follows:

> *"It is asserted and pleaded that the development is in effect a co-ownership or partnership between eighteen individuals who own specific percentages of the property in question as far as is described in the schedule annexed hereto. It is asserted and pleaded that the defence and counterclaim is inaccurate and wrong. It seeks to characterise the lending relationship in a wholly erroneous manner which does not reflect a true legal relationship between the parties. The development is financed by lending arrangements and relationships previously between the bank and now IBRC and the eighteen individual investors in question. The lending arrangements between all the investors are the same. It is therefore asserted and pleaded that the lending arrangement between all the investors in the development are identical. Thereby each of the investors has a right to be treated appropriately and in a manner consistent with the regular administration of the lending arrangements. It is asserted and pleaded that the initiation of these enforcement proceedings specifically target these defendants to the counterclaim who are investors and does not initiate any enforcement proceedings against other investors. It is asserted and pleaded that the initiation of these proceedings against these defendants to the counterclaim is a direct consequence of the initiation by the plaintiff of her proceedings against the defendant. It is asserted and pleaded that this is a targeted and deliberate attempt to intimidate, harass and threaten these defendants to the counterclaim solely on account of the proceedings and the character of relief sought by the plaintiff against the defendant. It is asserted and pleaded that the plaintiff to the counterclaim has characterised the plaintiffs behaviour as non co-operative. It is asserted and pleaded that the initiation of enforcement proceedings solely against these defendants to the counterclaim and the plaintiff in the above targeted manner discloses a biased and discriminatory approach to the institution and continuation of proceedings on the part of the defendant and the plaintiff to the counterclaim". (emphasis added)*

286. The allegations in these pleadings are also made in the written and oral submissions to the court on behalf of the Flynn family. The essence by this claim by the Flynns is that they have a right to be treated equally to all other investor groups by NALM and that they have a right not to be discriminated against or "targeted" by NAMA.

287. NALM defend its actions on two grounds. Firstly, they argue that, as and from 1st August, 2012 to 5th February, 2013, they were dissatisfied with the Belfield Office Park business plan and eventually rejected it. However, in my view, if that argument were correct then it would mean as a matter of logic that NAMA would have to move against all four members of the investor group in Belfield Park. In other words if NAMA did have a genuine difficulty with the Belfield Office Park business plan ,which is entirely within their statutory powers and prerogative, then the logic of that position would demand that they would move against all four members of the investor group in Belfield Office Park. The corollary is also true: if NAMA had genuine concerns about the Belfield Office Park

business plan, then it would not be a lawful, proportionate or justifiable action only to call in the loans of the Flynn group. This would amount, in my view, to an unlawful "targeting" of one investor group – unless NALM can put forward some objective justification for so doing.

288. In the present case therefore I am of the view that the first justification put forward by NALM as to why they called in the Flynn loans (ie. the reasons relating to the business plan) is without substance. It might justify calling in the loans of all four members of the investor group but it would not justify calling in the Flynns' loans alone.

289. However the second argument of NALM is more substantive. This argument is that NALM was entirely justified in moving against the Flynns and calling in the Flynn loans because one of the borrowers - Mrs. Flynn - denied all liability for the loan, denied that she was an obligor of NAMA and refused to provide a statement of affairs to NAMA. NALM was therefore suspicious of her behaviour and believed that Mrs. Flynn might have assets which she did not want to make available to NALM in respect of her debt. In other words, NALM argued, all things being equal, NALM must treat all four investor groups in Belfield Office Park equally; however if there is an issue, which is significant, by which one investor differentiates himself from the other investors then NALM is justified in treating that person differently from the others.

290. As I have found above, Mrs. Flynn is indebted to NALM and she is an obligor of NALM. As such therefore NALM was within its rights to regard the Flynns as different to other members of the investor group in Belfield Office Park because all other investor groups accepted they were obligors of NAMA (and provided statements of affairs) whereas Mrs. Flynn, being part of the Flynn group did not.

I turn now to consider the applicable legal principles.

Legal principles applicable

(i.) The NAMA codes of practice
291. Mr O'Reilly S.C. on behalf of the Flynn family referred to s. 35 of the NAMA Act 2009. Section 35(1) provides as follows:

> *"Within three months after the establishment, NAMA shall prepare codes of practice for approval by the minister in relation to the following matters:*
>
> *(a) The conduct of officers of NAMA.*
>
> *(b) Servicing standards for acquired bank assets.*
>
> *(c) Risk management including with regard to debtors.*
>
> *(d) Disposal of bank assets.*
>
> *(e) The manner in which NAMA is to take account of the commercial interests of credit institutions that are not participating institutions.*
>
> *(f) Any other matter in relation to which the minister directs NAMA to prepare a code of practice.*

292. Section 35(3) provides as follows:

> *"After a code of practice is approved by the minister, every person to whom it applies shall have regard to and be guided by that code in the performance of his or her functions and in relation to any other matters to which the code relates."*

293. Mr O'Reilly S.C also relied on the NAMA Code of Practice on Risk Management including with regard to debtors. This Code of Practice was first approved by the Minister for Finance on the 5th July, 2010 with an updated version approved by the Minister for Finance on the 9th September 2013. Section 1.1 of the document provides as follows:

> *"This document is designed to fulfil NAMA's obligations under s.35 (1) of the National Asset Management Agency Act 2009 (the Act) to publish certain codes of practice. In the event of any conflict between the Act and this code of practice, the Act will take precedence. Terms used in this code have the same meaning as terms defined in the Act NAMA will act at all times to obtain the best achievable financial return for the state".*

294. Section 3.2 of the code which is headed Key Principles provides as follows:

> *Debtors will be treated in a reasonable manner*
>
> *In discharging its responsibilities to the tax payer, NAMA, acting commercially, intends to deal with debtors in a reasonable manner, but recognising debtor's corresponding obligations to NAMA as described in s.3.3 (mutual responsibility). In particular NAMA will endeavour;*
>
> *(c) to deal with stake holders reasonably vis-à-vis other peers/competitors in similar circumstances. (emphasis added)*

295. Thus, Mr. O'Reilly S.C. submits, NAMA has a statutory duty enshrined in a code of practice to deal with debtors in a reasonable manner and to endeavour to deal with stake holders reasonably vis-á-vis other peers/competitors in similar circumstances. Mr. O'Reilly submits therefore, that given that the Flynns are only one of four investor groups in Belfield Office Park, given that the loan agreements with Anglo were made simultaneously and on similar terms with all investor groups, that the security for all loans is identical, that the interest rate is the same and that the repayment terms are the same, it follows therefore, that the Flynns must be treated in all respects reasonably and in a similar manner vis-à-vis all other members of the investor group in Belfield Office Park by NAMA, if all things are equal. In my view this submission is well founded.

296. Thus NAMA has a statutory duty, and an obligation enshrined in the code, to treat all investor groups in Belfield Office Park equally - unless there is an objective justification for treating one member of the group differently.

(ii.) Duty of transparency
297. Mr. O'Reilly S.C. also relies on s.11 of the NAMA Act 2009. Section 11 (1) of the Act provides as follows:

"In order to achieve its purposes, NAMA shall perform the following functions: [the functions are therein set out at paragraphs a to d.]"

298. Section 11(6) of the Act provides as follows:-

"NAMA shall act in a transparent manner in carrying out its functions under this Act to the extent that to do so is consistent with the proper and efficient and effective discharge of those functions".

299. In my view this is an important statutory section which casts a clear obligation on NAMA to act "in a transparent manner in carrying out its functions under this Act". What is meant by "transparent" is not defined by the Act and indeed it would be difficult to do so.

300. However on the facts of this case I am of the view that the duty to act in a transparent manner in carrying out its functions must mean at a minimum:

1. that if NAMA is purporting to move against an obligor and/or to call in a loan it must set out all its real reasons for its decision in its letter of demand.

2. that NAMA must not put forward reasons in the letter of demand which are misleading.

301. When one considers the application of this statutory duty of transparency to the facts of this case, it is clear that the Letter of Reasons of 5th February, 2013 (which accompanied the letter of demand) did not accurately set out the real reasons for calling in the loan. In particular as set out above, the letter of 5th February 2013 set out reasons which were not the real reasons for calling in the loan. Moreover the said letter does not include the real reason for the decision to call in the loan: Therefore there is a breach of the statutory duty of transparency.

(iii.) Is the Decision of NALM to call in the Flynn Loan a Private Right or a Public Power?

302. NALM in its legal submission submits that NALM enjoys private rights as well as having public powers and that the right to demand repayment and pursue enforcement in default thereof is an example of such a private right. It submits that the exercise of such rights is not subject to the requirements of natural and constitutional justice and fair procedures.

303. In my view, the submission by NAMA (or NALM) that the exercise by it of alleged private rights is not subject to the requirements of natural and/or constitutional justice and/or fair procedures is a deeply unattractive proposition. Moreover such a proposition is not supported by authority.

304. In *Treasury Holdings and Others v. NAMA and Others* [2012] IEHC 297, Finlay Geoghegan J. held that a decision by NAMA to enforce is a decision in the area of public law. As was stated in that judgment at para. 75:-

"The first issue is whether or not the NAMA decision to enforce is a decision in the area of public law and, as such, amenable to judicial review. It is indisputable that NAMA is a public body established by statute with duties and functions imposed by statute for the public interest purposes set out in the Act. What is in dispute between the parties is whether the decision taken by NAMA on 8th December, 2011, to enforce against Treasury is a decision in the realm of public law, and as such, amenable to judicial review. Treasury contends that it is such."

305. At para. 79 of her judgment, Finlay Geoghegan J. having reviewed the relevant authorities including *Byrne v. The Commissioner of An Garda Síochána* and *O'Donnell v. Tipperary (South Riding) County Council* [2005] 2 I.R. 483 and the relevant English authorities stated as follows:-

"79. I have concluded, applying the principles in Beirne and O'Donnell , that NAMA has failed to establish that its decision to enforce is not a decision amenable to judicial review. In my judgment, on the statutory framework and facts, it fails both limbs of the applicable test set out in Beirne and applied in O'Donnell.

80. Firstly, in taking the decision to enforce, NAMA is exercising a public function imposed on it by s. 11 of the Act for its statutory purposes set out in s. 10 in the public interest. . . . The function or duty being discharged by NAMA in taking this decision is in no sense a private duty. It is taken pursuant to the functions given them by Statute for the stated purposes all in the public interest. . . .

81. Secondly, the right to make this decision does not derive solely from contract or the consent or agreement of Treasury. Whilst it is true that NAMA may not enforce against Treasury unless the relevant contractual conditions which permit the lender to enforce have been met, NAMA's entitlement to enforce does not derive solely from the contracts entered into by Treasury with the participating banks. NAMA's entitlement to exercise the lender's rights under the contractual provisions arises from its acquisition by operation of law pursuant to s. 90 of the Act, and the provisions of s. 99, and in some instances, s. 147 of the Act.

. . .

83. In my judgment, the decision of NAMA to enforce taken on 8th December, 2011, was a decision amenable to judicial review. As already stated, that was a composite decision to make demands and if such demands were not met, to appoint receivers. The further decision to proceed with enforcement and to appoint the receivers taken on 25th January, 2012, is likewise and for the same reasons a decision amenable to judicial review."

306. Likewise in this case, the decision by NALM to call in the loan and enforce the loan on 5th February, 2013, is clearly an exercise of public power and not purely an exercise of a private right. The letter of demand of 5th February, 2013, even on its own terms, refers to the fact that the indebtedness or acquired bank assets was within the meaning of the "NAMA Act 2009". Likewise the accompanying Letter of Reasons of the 5th February, 2013, refers to the fact that NAMA is not satisfied that the business plan meets with NAMA's "statutory objectives". In those circumstances it is clear that the decision by NALM to enforce the loans against the Flynns is a decision within the realm of public law.

307. Therefore if the decision to enforce is one which is taken with the framework of public law, it follows that two principal rights flow from such a finding. These are:

(a) The right to be heard prior to the taking of the decision and

(b) The duty on the part of NALM to act fairly and in a reasonable manner.

(iv.) The Right to be Heard

308. In *Treasury Holdings v. NAMA*, Finlay Geoghegan J. considered the issue of whether Treasury Holdings had a right to be heard by NAMA before NAMA made a decision to enforce. At para. 85 of her decision, the learned High Court judge noted that the parties in that case were in agreement with the principles set out by the Supreme Court in *Dellway Investments v. NAMA* [2011] IESC 14, were applicable. Finlay Geoghegan J. also noted that:-

> *"In Dellway, the seven judges of the Supreme Court were unanimous in concluding that on the facts therein, the applicants had a right to be heard prior to the taking of the decision by NAMA pursuant to s. 84 of the Act."*

309. In the *Treasury* case, counsel for NAMA submitted that although Dellway was authority for the proposition that a decision taken by NAMA pursuant to s. 84 of the NAMA Act to acquire eligible assets may attract a right to be heard, it was not authority for the proposition that NAMA in taking any decision, post acquisition, including a decision to enforce, is obliged to give a borrower a right to be heard. This argument, however, was rejected by Finlay Geoghegan J. who stated at para. 87 of her judgment:-

> *"In my judgment, the decision cannot be so understood. The Supreme Court in Dellway simply did not address either the obligations of NAMA in taking decisions pursuant to its powers after the acquisition of eligible Bank assets, nor the entitlement of a debtor in any particular factual situation to be heard prior to the taking of a decision to enforce.*

310. At para. 88 of her decision, she stated as follows:-

> *"If I am correct in deciding that NAMA, in making the decision to enforce, was taking a discretionary decision pursuant to a power conferred on it by statute, it is common case that the existence of a duty on it to give Treasury an opportunity to be heard or Treasury's right to be heard, is dependent upon its status as a person who is or may be affected by such a decision. Such principle was restated in several of the Supreme Court judgments in Dellway, deriving both from the well known statements of principle by Walsh J. in East Donegal Cooperative v. Attorney General [1970] I.R. 317 at p. 341, and a consideration of the common law principles, in particular, by Hardiman J.*
>
> *89. However, in Dellway in the Supreme Court, as in this application, the issue in dispute was the appropriate criteria or test for determining whether the applicants were affected by the decision taken pursuant to s. 84 of the Act, and whether, in accordance with those criteria, they were affected on the facts therein. In Dellway, Fennelly J. at para. 82 identified the dispute in that case in the following terms:-*
>
> > *'The parties have offered two theories of the test for entitlement to a hearing. According to NAMA, only interference with a legal right qualifies. The appellants propose a broader criterion for assessment of effects, which would not be limited to cases of probable encroachment on legal rights.'*
>
> *90. Fennelly J. found in favour of the broader criterion. His conclusions are summarised at para. 99 of his judgment:*
>
> > *'It does not appear to me that it has been established that the right to be heard before a contemplated decision is made depends on establishing interference with a specific and identifiable legal right. It is difficult to discern a principled basis for restricting the right in that way. The courts have never laid down rigid rules for determining when the need to observe fair procedures applies. Everything depends on the circumstances and the subject-matter. The fundamental underlying principle is fairness. If a decision made concerning me or my property is liable to affect my interests in a material way, it is fair and reasonable that I should be allowed to put forward reasons why it should not be made or that it should take a particular form. It would be unjust to exclude me from being heard. For the purposes of the right to be heard, I would not draw a sharp line, what is sometimes called a 'bright line' of distinction between an effect which modifies the legal content of rights and the substantial effect on the exercise or enjoyment of rights.*
> >
> > *…*
>
> *93. Whilst the other judgments put matters in a slightly different way, it does not appear to me that any of the other judges disagreed with an entitlement to be heard where, at minimum, the decision would have 'material practical effects on the exercise and enjoyment of the rights of the applicants'.*
>
> *…*
>
> *94. Even adopting this formulation, there is the additional question as to the nature of the rights and interests which may satisfy this test. Rather than attempt to address this on a theoretical or abstract basis, it appears to me preferable to consider the opposing submissions of the parties on the facts applicable to Treasury in the autumn of 2011. It is common case that a person's right to be heard is dependent upon the specific facts applicable to that person. In Dellway, Denham J. (as she then was) stated at para. 84:-*
>
> *'In light of the constitutional right to be heard, to fair procedures, the question is whether any such right to be heard by the appellants arise implicitly in the Act of 2009 and in the circumstances of the case'."*
>
> (The reference to the paragraph numbers in the judgment of Fennelly J in Treasury Holdings are due to the original approval

311. Finlay Geoghegan J. then considered the question of whether Treasury, in the circumstances of that case, had a right to be heard prior to the taking by NAMA of a discretionary decision to enforce. The learned judge came to the conclusion that Treasury did indeed have a right to be heard on the basis that Treasury did have rights and interests which were affected by the decision to

enforce.

312. At para. 108 of her decision Finlay Geoghegan J. stated as follows:-

> *"108. I reject the floodgates argument. The right to be heard is, as has been determined, fact specific. On the facts herein, it is dependent upon the nature of the rights held by Treasury in its property and development businesses and the entering into the MOU and subsequent exchanges with NAMA in relation to the potential term sheets.*
>
> *109. Finally, it defies commonsense in a commercial context to consider that Treasury is not adversely affected by the decision to enforce incorporating, as it does, the inevitable appointment of a receiver."*

313. In the present case I am of the view that all members of the Flynn family were also clearly adversely affected by the decision of NALM to call in the loans, to enforce its security against them and if necessary to appoint receivers.

314. Clearly, as they are adversely affected by the decision to enforce, it follows therefore in the light of the principles set out in *Dellway* and in *Treasury Holdings* that they have a right to be heard.

315. It is clear that NALM engaged in a chain of correspondence (commencing on the 1st August, 2012 and ending on the 5th February, 2013), in which NALM initially corresponded with all investor groups of Belfield Office Park Ltd. (including members of the Flynn family) and then from January 2013 until 5th February, 2013 with members of the Flynn family alone. It purported in this correspondence to indicate to the Flynns and to Belfield Office Park Ltd. that it was considering making a decision and it invited representations. To that extent therefore NALM purported to provide members of the Flynn family with a right to be heard.

316. The issue however which arises in this case is whether the Flynns' right to be heard was fully and properly vindicated by NALM in this correspondence. The issue arises because NALM set out misleading reasons in its correspondence and omitted to state in its letter the real reason for calling in the loan namely the fact that Mrs. Flynn was refusing to provide a statement of affairs. The question which then arises is: were the Flynns given a proper opportunity to be heard on the real and significant issues for calling in the loans? What is the substantive scope of the right to be heard?

317. In *Dellway*, Hardiman J. stated at para 361 of his decision:

> *"It is trite law to say that a right to a hearing carries with it a right to notification of the proposed decision and to sufficient detailed information, including criteria, as may be necessary to allow the person to be affected to make the best case he can against the decision which he fears. He is also, very probably, entitled to reasons for the decision taken, if any. The finding that Mr. McKillen is entitled to be heard in the present case naturally imports these necessary consequences of the existence of that right." (emphasis added)*

318. This statement of principle by Hardiman J. in *Dellway* was also emphasised by Finlay Geoghegan J. in *Treasury Holdings* at para 112 of her judgment wherein she states as follows:-

> *"In Dellway, Hardiman J. at [para 361] stated that the obligation on NAMA, if applicable, includes an obligation to notify 'of the proposed decision and to sufficient detailed information, including criteria as may be necessary to allow the person to be affected to make the best case he can against the decision which he fears'. Counsel for NAMA submits that this requirement of notification goes beyond what is contemplated by the majority of the other judges. Even if this is so in its detail, it appears to me that, at minimum, if there is a right to be heard or an obligation to give an opportunity to be heard, then there must be, at minimum, notification that the proposed decision is under consideration and sufficient information about the reasons for which it is proposed. Absent such information, the right to be heard would be meaningless. It is unnecessary on the facts herein, to consider the level of detailed information which it might be necessary for the decision maker to give. This appears to me to depend upon the individual facts." (Emphasis added)*

319. Another relevant decision is *Mallak v. Minister for Justice Equality and Law Reform* [2012] IESC.59 a decision of the Supreme Court of 6th December, 2012. In that decision Mr. Justice Fennelly stated at para. 2 and 3 of his judgment:

> *2. "The particular issue for decision on this appeal is the extent to which decision makers are obliged to disclose the reasons for which they are made. This question is, of its nature, closely related to other features of the rules of natural justice compendiously covered by the broad principle of audi alteram partem, which include the giving of prior notice of impending decisions, of the matters which the decision maker will take into account and in appropriate cases, the disclosure of information and even, in some cases, the holding of a hearing.*
>
> *3. "While our courts have extensively considered the adequacy of reasons when they have actually been given, there has been no principled consideration of the question whether a general obligation to furnish reasons exists at all or, if it does not, in what cases reason should be given and why. There is a persistent view as evidenced by the High Court judgment in the present case, that there is no general obligation of the common law to give reasons for administrative decisions. There must be a close relationship between the process of giving prior notice and giving reasons after the event."*

In that case the Minister refused to give any reason for refusing an application for a certificate of naturalisation.

320. In para. 43 of his judgment Mr. Justice Fennelly stated as follows

> *"It cannot be correct to say that the "absolute discretion" conferred on the Minister necessarily implies or implies at all that he is not obliged to have a reason. That would be the very definition of an arbitrary power. Leaving aside entirely the question of the disclosure of reasons to an affected person, it seems to me to be axiomatic that the rule of law requires all decision makers to act fairly and rationally, meaning that they must not make decisions without reasons."*

321. In para. 66 Fennelly J. stated as follows

> *"In the present state of evolution of our law, it is not easy to conceive of a decision maker being dispensed from giving an explanation either of the decision or of the decision-making process at some stage. The most obvious means of achieving fairness is for reasons to accompany the decision. However it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the*

affected person has been enabled to respond to the concerns of the decision-maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded.

322. Writing extra-judicially Mr. Justice O'Donnell (a colleague of Mr. Justice Fennelly on the Supreme Court) in an essay entitled "*Nial Fennelly: Mallak and the Rule Of Reasons (in Of Courts And Constitutions – Liber Amicorum In Honour Of Nial Fennelly*) stated at page 229

> *"It is for paragraph 66 that Mallak is regularly cited and will no doubt be further cited in the future. It is an important and lucid statement of the law and one which does not purport merely to restate or synthesise existing law but rather to advance a principle of broad application and in doing so, significantly advances the boundaries of the territory now occupied by the duty to give reasons……..On this view, Mallak is a new starting point and creates a presumption of a duty to give reasons or even if you will, a rule of reasons".*

323. In this case, the Flynns complain that they have been deprived of their right to be heard. The right to be heard is expressed in the Latin maxim "*audi alteram partem*". The verb "*audi*" is expressed in the imperative mood. It is a command, a direction, to the court or tribunal: hear the other side, listen to the other side. This duty to hear gives rise to a corresponding right: the right to be heard. The right to be heard is a powerful and important right. Although it is expressed in the passive voice, it is in fact, an active right: a right to speak or a right to make representations to the court, tribunal or statutory body which seeks to make a decision which affects the person concerned. It is a right which is at the heart of our legal system. For if a person is denied a right to be heard, they are shut out of participation in the vital process which affects their interests. This right to be heard has been recognised for hundreds of years. It has been recognised and protected in our constitution since 1937 and it has been articulated and applied in numerous cases of the High Court and Supreme Court over the last few decades.

324. The right to be heard necessarily means that the person affected must know the action which is being proposed and the reasons for that action. This gives them an opportunity to make representations on the issue and to rebut, if they can, the reasons for the action. It follows therefore that the person affected must be informed of the real reasons for the proposed action and not be given misleading or spurious reasons. If a person is not given the real reasons for a proposed decision and/or if he is given misleading or spurious reasons, then his representations cannot deal with the actual reasons. In such a case the right to be heard is not vindicated. It becomes a nullity. That is the case here.

325. Moreover if a statutory body such as NAMA does not give full substance to the right to be heard it creates insidious and undesirable effects. If the real reasons are not set out, it creates a suspicion in the eyes of the affected person that he has not been told of the real reasons for the decision. This leads to a further suspicion that there are other "unspoken reasons", that there is "another agenda" or in this case that NAMA was out "to target" the Flynns.

326. It is in this atmosphere of unspoken, reasons that suspicion of government agencies thrives. That is not in the public interest. It is not conducive to public trust in a vital state body such as NAMA. I am of course conscious that NAMA is exercising an important statutory function on behalf of the citizens of Ireland. But it must exercise those functions in accordance with the principles of fairness and natural and constitutional justice.

327. This concern about suspicion breeding suspicion is not merely conjecture. In this case, James Flynn gave evidence that the first time he was told by NAMA of the real reason why the loan was being called in, was at a meeting with NAMA on 28th February, 2013 some three weeks after the letter 5th February, 2013 calling in the loan. Such was his level of suspicion of NAMA's behaviour at this time that he secretly recorded the meeting on his mobile phone without telling NAMA. He did so, he said "because he wanted to get a handle on what was going on. We were very much in the dark as to what was going on." Whilst this action was the subject of justifiable criticism by NALM, it is precisely to avoid this sort of behaviour that there is a duty to provide reasons, and thus to give substance to the right to be heard.

328. I am conscious that NALM says that it had the benefit of the Flynns' views on the business plan and that it separately had the views of Mrs. Flynn on whether she was an obligor of NAMA. That may be so but it misses the point. NALM failed to give the Flynn family an opportunity to make representations on the real reason for its decision. In so doing it denied them the right to be heard on the real issue. And of course therefore it could not hear the Flynns' arguments on this reason.

329. Indeed Mr. James Flynn gave evidence (Day 9/132) that at this meeting on, 28th February, 2013, he tried to explain to NALM that it would be better to let the courts decide as to whether his mother was an obligor of NAMA; he also explained in detail that Mrs. Flynn was not an obligor in respect of the Cork property; he indicated that NALM's main claim up to that point had been that his mother was an obligor in relation to Cork not Belfield Office Park; he also indicated that certain private equity funds were interested in purchasing the Flynns' group assets; he also indicated that he wanted to work cooperatively with NAMA and that he had been doing so for five years. He also indicated that he had a report on allegedly fraudulent overcharging which might come out in court proceedings but he did not want to "go down that road". These were all matters which members of the Flynn family might have made representations about - had they been given the opportunity before NALM committed itself to instituting proceedings.

330. In the light of the above I would conclude that the failure to state the real reason in the Letter of Reasons dated 5th February 2013, and indeed in their earlier letter of 13th January 2013 deprived the Flynns of the right to be heard.

(v.) Duty to act in a fair and reasonable manner – obligation on NALM not to "target" the Flynns unlawfully

331. The next issue to consider is whether NALM was under a duty to act fairly and reasonably in taking a decision to enforce and if so, whether it did, in fact act fairly and reasonably.

332. In my view, it is clear, given the statements of principle by Walsh J. in *East Donegal Cooperative v. The Attorney General* [1970] I.R. 317, the decisions of all the Supreme Court judges in *Dellway (*and in particular the judgment of Fennelly J.,) the expression of principle by Costello P. in *McCormack v. Garda Síochána Complaints Board* [1997] 2 I.R. 489 and indeed the decision of Finlay Geoghegan J. in *Treasury Holdings* that NAMA is under an obligation to act fairly and reasonably in relation to taking the decision to call in the Flynn loans.

333. Moreover, another appropriate legal principle to apply in this case is the NAMA code of practice adopted pursuant to section 35 of the NAMA Act 2009 referred to above. This code in effect imposes an obligation on NAMA also to act in a reasonable manner and in particular it imposes an obligation on NAMA "to endeavour to deal with stakeholders reasonably vis-à-vis other peers/competitors in similar circumstances". It is of course hedged about with the qualification about NAMA's responsibility to the tax-payer and also the debtor's corresponding obligations to NAMA. It does however mean that NAMA must seek to deal with debtors reasonably vis-à-vis other debtors in similar circumstances. On the facts of this case therefore, it is necessary for NAMA or NALM to deal with the Flynns

reasonably vis-à-vis other debtors in similar circumstances which on the facts of this case means the other investor groups in Belfield Office Park. Therefore NALM must deal with all the debtors in Belfield Office Park in a similar fashion unless there is some objective justification not to do so.

334. The ground upon which the Flynns argue that NALM has not behaved in a fair and reasonable manner towards them is because they say NALM has "targeted" the Flynns and has called in the Flynn family loans without calling in the loans of other members of the investor group.

335. However, I am of the view that the action of NALM, to date, in treating the Flynns differently to the other investor groups was objectively justifiable because Mrs. Flynn denied she had a liability and refused to provide a statement of affairs whereas all other members of all investor groups did so.

336. I should also state that the position now is, as I have found above, that Mrs. Flynn is an obligor of NALM. On the assumption therefore that she does indeed provide a statement of affairs to NALM, it would seem then that the Flynns are in exactly the same position as all other members of the investor group in Belfield Office Park. In those circumstances, I am of the view that, unless there are other significant differentiating factors, it would not be lawful for NALM to call in the loans of the Flynn family on their own or to treat them differently to all other investor groups in the Belfield Office Park. If they were to do so, it would amount to unlawful, unfair and unreasonable discrimination against the Flynns on the part of NALM.

(V.I.) No valid demand letter.
337. Given my findings about the need to give reasons, the right to be heard and the duty to act fairly and reasonably, I am of the view that NALM, has failed to provide a full opportunity to the Flynns to be heard. It has therefore failed in its duty to act in a reasonable manner. It follows that the letter of demand of 5th February, 2013 was not a proper valid or lawful demand. It must therefore be set aside. It follows that the Flynns are not in default on their loan at this point in time because the loan has not been properly, lawfully or validly called in.

CONCLUSIONS
338. I would therefore conclude as follows:

1. There was an agreement between Mrs. Flynn and Mr. Flynn whereby Mrs. Flynn agreed to transfer her interest in Belfield Office Park to Mr. Flynn. This agreement was entered into in September 2007.

2. The agreement was subsequently signed and executed in mid–to-late December, 2008 and backdated to 1st January and 8th January for the contract and deed of assurance. The agreement however was lawfully backdated.

3. The transfer from Mrs. Flynn to Mr. Flynn was effective as between Mrs. Flynn and Mr. Flynn.

4. However the transfer between Mrs. Flynn and Mr. Flynn is not binding on Anglo Irish Bank/NAMA/NALM. There was no clear representation made by Mr. Drumm to Mr. Flynn that Anglo Irish Bank would release Mrs. Flynn from her debt to the bank.

5. There was no evidence that Mr. Drumm agreed to release Mrs. Flynn from her guarantees and indemnities to the bank.

6. Therefore Mrs. Flynn is an obligor of NALM and is indebted to NALM in respect of the Belfield Office Park loan.

7. Mr. O'Brien was not an officer of NAMA and therefore he could not give evidence about any debt due and owing to NAMA.

8. NAMA's claim for €21.9 m. was not proved in evidence.

9. The Flynns' submission that NAMA denied Mrs. Flynn her right of access to the Courts is not sustainable.

10. The Flynns' argument that NAMA has engaged in abuse of process in bringing these proceedings is also unsustainable.

11. The Flynns' argument that NAMA/NALM is guilty of misfeasance of public office is also unsustainable.

12. Mrs. Flynn has no liability for the Cork property loan.

13. There was no event of default on the loan.

14. The loan was a demand facility.

15. Anglo (and therefore NALM) is not estopped from calling in the loan.

16. The Flynns' submission that NALM engaged in deliberate overcharging is rejected.

17. NALM gave misleading reasons for calling in the loans. Incorrect reasons were stated in its Letter of Reasons dated the 5th February, 2013 and in its letter of demand dated 5th February, 2013. The real reason was not stated on the letters. In setting out incorrect and misleading reasons in its letter and in not setting out the proper reasons for calling in the loans, NALM has acted unfairly and unlawfully and in breach of its statutory duty of transparency. Moreover it has deprived the Flynns of their right to be heard.

18. NALM has not unlawfully "targeted the Flynns". It treated the Flynns differently because Mrs. Flynn denied the debt and refused to provide a statement of affairs. NALM treated different borrowers within the Belfield Office Park differently because there was an objective justification for so doing.

19. However if Mrs. Flynn does provide a statement of affairs then, on the facts as presented in this case, there is no other objective justification for NALM to treat the Flynns differently from other borrowers in Belfield Office Park. Therefore if NALM were to call in the Flynn loan without any other objective differentiating factor between the Flynns and the other investor groups, that would be a breach of its statutory duty and of its code.

20. Given that the real reasons for calling in the loan were not stated in the letter of demand the letter of demand should be set aside.