Neutral Citation [2015] IEHC 334

THE HIGH COURT

[Record No. 2010/3237S]

BETWEEN/

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

LIAM FAHEY, GERALD PAUL, BERNARD CROWLEY, CLAIRE KEELAN and BRIAN KEOHANE

DEFENDANTS

JUDGMENT of Ms. Justice Iseult O'Malley delivered the 21st day of May 2015

Introduction

1. In these proceedings the plaintiff claims the sum of €10, 676,158.76 and continuing interest on foot of a joint loan facility drawn down by the defendants. As of the date of the hearing the amount claimed including interest is €12,059,522.06

The contract documents and correspondence

2. The plaintiff relies on a letter of loan sanction dated the 22nd December, 2006, ("the December 2006 letter"). The key provisions relating to the details of the agreement were as follows:

- The sanction was for two loans, Facility 1 and Facility 2.
- The amount of the loan for Facility 1 was stated to be €10, 640,000.
- The purpose of Facility 1 was to assist in the purchase of about 15 acres of land at Ballyleary, Co. Cork. These lands, which were priced at €13.3m, had full planning permission for the development of 167 residential units plus a crèche.
- Interest on the loan was expressed to be at prime rate varying, plus 1%, per annum, "currently 5.25 %".
- Repayment was provided for in the following terms:

> *"Interest only to be repaid on facility pending clearance in full from site fines of €91,000 per residential unit sold. Any residual balance will be repayable at the end of the repayment period."*

- There was no definition of the term "repayment period".
- Facility 2 was for the sum of €6m, which was stated to be for the purpose of development finance towards construction of the buildings already referred to. Repayment was to be

> *"Interest to be rolled up within the facility for a period of twelve months pending clearance from site fines of Eur 51,000.00 per residential unit sold. Any residual balance will be repayable at the end of the repayment period."*

- The letter provided that all facilities were subject to review by the 30th September, 2007.
- The security for the facilities was to be legal charges over both the Ballyleary lands and another site ("Marinegate"), which was intended to be developed by the same defendants (with the exception of Claire Keenan), plus limited recourse collateral mortgages over both properties from the then owners/vendors of the two sites.

3. The letter stated that the facilities were subject to the terms and conditions set out in the letter and also to the plaintiff's general terms and conditions. Of the latter, the clauses of relevance in the case are the following.

- Clause 1.1.1, which, in describing the various facilities offered by the bank, referred to loan accounts as being

> *"usually medium to long-term facilities" with "customised repayment options".*

- Clause 1.1.2, which stated as follows:

> *"Other specific terms and conditions may apply to facilities in accordance with the relevant letter of sanction or other agreement in writing between the bank and the borrower and to the extent, if any, that the specific terms and conditions conflict with the general terms and conditions set out in this booklet, then the specific terms and conditions will apply."*

- Clause 3.1.1, which provided that loan account facilities were repayable on demand but also stated:

> *"However, in normal circumstances the bank expects that the loan will be available as stated in the letter of sanction."*

• Clause 3.1.2, which stated that without prejudice to the plaintiff's right to demand repayment at any time, the happening of any event specified in clause 4.2 might lead the plaintiff to make demand for payment without notice to the borrower.

• Clause 4.2, which set out various "events of default", including "a material change" relevant to the borrower, which, in the opinion of the plaintiff, was prejudicial to the plaintiff's interest.

• Clause 7.4, which provided that each party to a facility on a joint account was jointly and severally liable to the bank for repayment of the facility and was subject to all of the applicable terms and conditions.

4. There was no review in 2007 but the December 2006 letter was subsequently the subject of what is described by the bank as a "variation" or "renewal" of the facility by letter of loan sanction dated the 23rdApril, 2009 ("the April 2009 letter"). This letter referred only to Facility 1 and there was no mention of a facility for development finance. The terms of the offer were identical to the December, 2006 offer so far as the amount, purpose and security for the loan were concerned, and in stating that the offer was subject to the terms and conditions set out in the letter and also to the bank's general terms and conditions. However, the interest rate was now

> *"Base lending rate varying, plus 2% per annum, currently 3.863% per annum."*

5. There was also a special condition noting that the above interest rate included a funding premium of 0.5%.

6. Under the heading "Repayment" it was provided that

> *"Facility is subject to review/refinance by 30/4/2010. In the interim interest to be provided as it falls due. Any residual balance will be repayable at the end of the repayment period."*

7. There was no reference in this letter to repayment being made out of sales of the units.

8. In conclusion it was stated that this letter of sanction was in substitution of and not in addition to any previous facility letters.

9. The April 2009 letter was signed by all of the defendants but only a faxed copy of the signed document was returned to the bank. The original has never been produced.

10. On the 17th December, 2009, a further letter of sanction was issued. Again, the offer was subject to the terms and conditions set out in the letter and the bank's general terms and conditions. The amount, purpose and security of Facility 1 were unchanged from the 2006 offer. Facility 2 was not referred to. The interest rate was base lending rate plus 2%, at that time 2.743% per annum. The facility was to be subject to review/refinance by 30/4/2010. In the interim interest was to be paid as it fell due and any residual balance was to be repayable at the end of the repayment period.

11. In a separate letter, dated the 18th December, the borrowers were told that the new letter of offer would, following their acceptances, replace

> *"the existing letter of offer dated 13/04/2006."*

12. It is common case that this date was an error and that what was intended was a reference to the letter of December, 2006.

13. The borrowers were also told that, pending receipt of their acceptances, the facility was to continue to be governed by the terms and conditions of the existing letter of offer

> *"which terms are hereby extended for a further period ending on (a) 31/01/2010 or (b) the date of receipt of the New Letter of Offer duly accepted by you, whichever is the earlier…*
>
> *…Please note that this letter is supplemental to and not in replacement of the existing letter of offer and save as varied by the terms of this supplemental letter, all other terms and conditions applicable to the facility remain unchanged pending acceptance of the new letter of offer."*

14. The letter warned that surcharge interest could be charged if the borrowers defaulted.

15. This letter of sanction was returned to the bank, by letter dated 28th January, 2010, by Mr. Brendan Cunningham of McNulty Boylan & Partners, who expressed themselves to be acting on behalf of "Liam Fahey, Gerald Paul, Bernard Crowley & Ors." The covering letter read as follows:

> *"We are returning the Letter of Sanction, which has been signed by our Clients.*
>
> *We have been instructed and so believe,that our Clients have paid interest on this loan as it came due, and that it is their intention to continue to do so in the future.*
>
> *However, whilst we are returning the documentation duly completed, it is incumbent on us to register in the strongest possible terms, our concern and dismay at the changes in terms that are being unilaterally imposed on our Clients, by the Bank, and in particular the following:-*
>
> > *1. Originally our Clients borrowed at a Rate of prime plus 1%, now they are being asked to pay base plus 2%.*
> >
> > *2. Our clients had applied for, and been furnished with, Development Finance to enable the property to be developed. Without discussion that Development Finance has been withdrawn, which had the immediate result of seriously damaging our Client's ability to bring this development to fruition.*
>
> *These, and other changes, have led to fundamental changes in the terms which are not being offered, but are effectively being imposed on our Client."*

16. The letter of sanction was not in fact "duly completed" by all the borrowers, in that it was not signed by Mr. Keohane.

17. On the 12thMarch, 2010, the bank issued letters of demand, signed by Mr. John Callanan, to each of the borrowers.

18. Mr. Cunningham responded on the 22nd March, 2010, this time on behalf of Mr. Fahey only. He said that it was his understanding that the review of the loan was not due to take place until the 30th April, and that the bank was not entitled to demand repayment prior to that date in the absence of default. He also said that his client would welcome a meeting to discuss the account.

19. Mr. Callanan replied promptly, stating that, since not all the parties to the loan had signed the letter of offer, the facility had expired on the 30thJanuary, 2010. He expressed a willingness to have a meeting with the borrowers, preferably together, otherwise individually.

20. No meeting appears to have taken place. There was a sequence of correspondence in which Mr. Cunningham asked (now on behalf of Mr. Fahey, Mr. Crowley and Mr. Paul) for various documents and information not in his possession to be forwarded to him prior to a meeting. It appears that Mr. Cunningham did have some discussions with Mr. Cormac Veale, a bank official in the Credit Management department.

21. On the 21st May, 2010, Mr. Cunningham wrote to say that his clients were in advanced negotiations with Respond (a social housing agency) in relation to taking part of the property. He proposed that in the meantime, as a gesture of goodwill, his clients were prepared to pay a full year's interest in advance.

22. On the 14th June, 2010, Mr. Callanan sent out fresh letters of demand to each of the borrowers.

23. Mr. Cunningham responded (apparently on behalf of Mr. Fahey) on the 18th June. In this letter it was asserted that

> *"You are aware that there is a dispute regarding the nature and extent of the Borrowing in this particular instance.*
>
> *It is, and at all stages was our client's understanding that the Facility being made available, allowed the Bank to have recourse only to the property which was being provided as Security, and didn't allow any additional recourse to the individual Borrowers."*

24. Mr. Cunningham said that legal advice in the context of the loan had been provided by the solicitors who acted on behalf of Ridge Developments Limited, Brian Keohane and Claire Keelan, and that Mr. Fahey did not have the opportunity of having independent legal advice in the matter.

25. It was not accepted that the bank was entitled to call in the loan.

The proceedings

26. The summary summons was issued on the 12th July, 2010. Initially, the matter was entered into the Commercial Court list, on foot of an application made by the plaintiff without objection on the part of the defendants. It was subsequently taken out, on the basis that discussions were continuing between the parties and the plaintiff did not wish to remain in that list.

27. The statement of claim refers to the agreement made in December, 2006 and pleads that

> *"In accordance with the terms of the aforesaid banking contract as varied and renewed, the Plaintiff provided banking facilities to the Defendants and the Defendants availed of the facilities thereby granted and the Plaintiff has further and in accordance with the terms of the said agreement charged interest for and on account of the amounts outstanding and at the rates agreed and calculated in accordance with the custom and practice of banking."*

28. Reference is then made to the letters of demand of the 14thJune, 2010, the failure of the defendants to discharge the amount due and the continuing accrual of interest calculated as of the 16th June, 2010.

29. In a reply to a notice for particulars, the plaintiff asserted that the original letter of loan sanction was that of the 22nd December, 2006.

> *"Thereafter agreement was reached on the variation of the facility in accordance with the provisions of a Letter of Loan Sanction dated 23rd April, 2009…*
>
> *In accordance with the provisions of the Letter of Loan Sanction dated 23rd April 2009, the facility was subject to review/refinance by the 30th April 2010. The Plaintiff declined to renew the facility at the expiration of the said period having regard to the non-progression of the development and further having regard to the fact that not all the Defendants were co-operating in the provision and execution of the contractual loan and security documents…"*

30. The first named defendant, in his original defence, pleaded that the loan agreement contained the following express or implied terms:

- That the sums were advanced for the purpose of constructing a residential development;
- Repayment of the sums advanced was to be made from the sale of the development, with a specified sum being paid in respect of each unit sold;
- The loan was recourse to the property provided as security and was not recourse to this defendant.

31. The development had not been completed and as a consequence the term of the loan had not expired.

32. Without prejudice to the foregoing it was pleaded that there was an implied term that the loan would continue as long as interest payments were being made.

33. It was also pleaded that it was the obligation of the plaintiff to ensure that the primary security for the loan was put in place, and

that its failure to do so amounted to a breach of a condition of the contract such as entitled the defendant to be released from the agreement.

34. There was also an allegation that this defendant did not receive independent legal advice in relation to any transaction with the plaintiff, and was not advised so to do by the plaintiff.

35. In an amended defence, the first named defendant further pleaded that the failure of the plaintiff to put the primary security in place amounted to contributory negligence within the meaning of s. 34 of the Civil Liability Act, 1961 (as amended) and, as a separate argument, that the defendant had at all material times been a consumer within the meaning of the Consumer Credit Act, 1995 (as amended).

36. The defence of the second and third named defendants was in all material respects identical to the original defence of the first named defendant.

37. The fourth and fifth named defendants pleaded that the loan agreement was at all material times on the basis that repayment of the capital sum would only come from the sale of the properties when the units were developed, and that, pending that clearance in full from site fines, the repayments were interest only.

Oral Evidence
Michael Murphy

38. In 2006 Mr. Murphy was a lending manager within the business banking unit in the South Mall branch of the plaintiff. He said that typically customers that he dealt with would have come to him via the branch of the bank where they held their original accounts. The business banking team would take over the running of any credit application, would prepare a credit paper and present it to the relevant authority in the bank, which was usually a credit committee in Dublin. If it was approved, the approval would be forwarded to the business banking unit for the issuance of the letter of sanction.

39. Mr. Murphy said that he himself had a discretion in the order of €1m, but typically the loans he was dealing with were in excess of €10m.

40. The borrowers in this case had come into contact with the business unit through the Fermoy branch of the bank, where the manager was Ms. Marianne Harris. They had an investment portfolio, in their joint names, based in Cork city, which was "domiciled" in Fermoy but managed in the business banking unit. Mr. Murphy said that he had met them in relation to the Marinegate development. He described Mr. Paul and Mr. Crowley as "well-regarded businessmen", and "substantial borrowers and substantial businessmen" whose backgrounds were profiled in the papers presented for the credit applications. Mr. Crowley had been an auctioneer and was involved in a number of businesses. Mr. Paul was a property developer and had been an architect. Mr. Fahey was seen as "an investor/property developer." One of his primary interests was the Briar Rose, a public house and restaurant in Cork city. There was an adjoining development called Ard Fallon, carried out by Mr. Fahey with Mr. Paul and Mr. Crowley, and another bar in Douglas.

41. On the 9th October, 2006, a loan offer was made to Messrs. Fahey, Crowley, Paul and Keohane for the development of 43 units on this site. The Ballyleary lands were referred to in the same letter but ultimately they were the subject of the separate letter in December, 2006. The reason for this was that Ms Keelan was to be added in to the transaction as a joint borrower. Ms Keelan and Mr Keohane are siblings, whose construction company, Ridge Developments, was engaged in building out Marinegate and was to be similarly engaged for the Ballyleary development.

42. Mr Murphy said that he recalled a meeting in 2006, in the Radisson hotel in Cork, to discuss the Ballyleary project. It was attended by his senior manager, Mr. Jim O'Mahony; the Fermoy branch manager Marianne Harris; Mr Murphy himself; Mr. Fahey and Mr. Paul. He was uncertain as to whether any other persons were present. The credit application was made, and was sanctioned, after that meeting.

43. Dealing with the December 2006 letter, Mr. Murphy said that the reason that the two facilities were dealt with separately was that the loan to assist the purchase was to be advanced initially. He went through the terms of the offer, including the special conditions attached to Facility 2 and confirmed that no request had ever been made to draw down this facility and no works were ever carried out on the site.

44. Mr. Murphy said that all the loan facilities were demand loan facilities.

45. With reference to the stipulation in the letter of offer that it was subject to the bank's general terms and conditions, Mr. Murphy was asked whether those terms and conditions had been furnished and said that they would have been furnished with the letter of offer. He said that they made it very clear that the bank reserved its right at any point to demand repayment.

46. Mr. Murphy was asked about the contention made on behalf of the defendants that this was a non-recourse loan. He defined a non-recourse loan as being one where the bank would not have recourse to the individual, beyond the security pledged as part of the letter of offer. He said that this was not a non-recourse loan, and that such had never been requested or even mentioned. It had not been presented to the credit committee as a non-recourse loan.

47. The statement of the account opened in respect of the loan was produced, showing that Facility 1 was ultimately drawn down in March 2007.

48. The last payment in respect of interest was on the 16th June, 2010, after the second letter of demand, on which date payments were received from three of the defendants. The total balance due as of the date of the hearing was €12,059,522.06.

49. Dealing with the security stipulated in the letter of offer, Mr. Murphy said that there had been a legal charge executed in respect of the Marinegate property and a full transfer of that property to the borrowers. In relation to Ballyleary, the limited recourse collateral mortgage had been executed. The legal charge had not been put in place because not all of the defendants had signed the necessary documentation. The bank was relying on a solicitor's undertaking, and proceedings had been issued in that respect.

50. The facility was not formally reviewed in 2007 as provided for in the letter of offer. Mr. Murphy referred to the deterioration in the property market at that time and said that there were ongoing, informal meetings to give the bank updates on the proposed or potential development of the site including the possibility that Respond, or another social housing agency, would take some of the units. By April 2009 such an agency would have been the only source of potential sales, or arranging an end user for the units.

51. The facility was reviewed in April 2009. The interest was being paid in accordance with the agreement and the bank decided to extend the facility for a further 12 months up the end of April 2010. At this stage, according to Mr. Murphy, the deterioration of the market was "in full flow" and there certainly would not have been a rationale to commence development of the site.

52. In the application to the credit committee for the extension, the borrowers were categorised as having a relatively stable credit rating. The assets over which the bank held security were set out, including, in Mr. Fahey's case, the Briar Rose, a house in Clonakilty and a number of units in Marinegate. The security was considered to be adequate.

53. A fresh letter of offer was issued, approving an extension to the limit on the loan account for the year, but in relation to Facility 1 only. In the bank's view there was no basis to continue with the €6m development facility and it was not prepared to extend it.

54. Mr. Murphy described this letter of offer as being *"essentially a continuation"* of the December 2006 offer, extending or approving an extension to the limit on the loan account for a further 12 months.

55. The interest rate under the December 2006 letter had been the prime rate plus 1%. Mr. Murphy said that in 2009 there was a money-markets crisis and that the cost of money to the bank had increased significantly. It therefore sought to increase its rates to recoup the cost of that funding. The rate set in the April 2009 letter was a base lending rate plus 2%.

56. It was stated in the letter that the facility was subject to review and re-finance by the 30th April, 2010. Interest was to be paid as it fell due, with the residual balance to be paid at the end of the repayment period.

57. Asked what options the bank had at the time of issuing this letter, Mr. Murphy said that, rather than extending the facility, it could have demanded repayment of the loan, or perhaps restructured the loan to amend the payment terms.

58. The letter issued to the borrowers and was signed by all of them. The bank received a copy of the signed document, sent by fax from the office of Ridge Developments. Mr. Murphy suggested, without contradiction, that the original was mislaid but not by the bank. He said that the bank was concerned about the fact that it did not have an original, and that it was therefore decided in December, 2009 to reissue the letter. It was to be re-signed by the borrowers and returned to the bank. He issued the letter of sanction of the 17th December, 2009, followed by the letter of the 18th December.

59. Mr. Murphy moved to a different department of the bank shortly afterwards and had no further involvement with the file.

Cross-examination of Mr Murphy

60. In cross-examination by Mr Murphy BL, the witness was referred to the letter of December 2009 and was asked about the meaning of the last paragraph, quoted at paragraph 13 above, and in particular the reference to the "existing letter of offer". He said that this referred to the December 2006 letter, and that it meant that, if the borrowers did not sign the December 2009 offer, the facility would be solely governed by the December 2006 terms. As he moved within the bank shortly afterwards, he did not see or deal with the response in January 2010 from Mr. Fahey's solicitor, Mr. Cunningham.

61. Mr. Murphy was cross-examined about his recollection of the meeting in the Radisson Hotel, which he said had taken place in 2006. It was put to him that in fact it was at the end of 2008, or early 2009, the purpose being to review the Ballyleary facility, and that this was the first time Mr. Fahey had met him. He disagreed, saying that it was in 2006 and the purpose was to discuss the proposal for that development and facility. He said that he could distinctly remember Mr. Fahey saying *"It depends what you think we're worth"* with reference to the rate of interest to be charged by the bank, and the bank's wish to win the business. Mr. Murphy agreed that there was a lot of competition in the market in 2006 and that the borrowers could have gone to other banks for this project.

62. It was put to Mr. Murphy that

> *"Mr. Fahey will say, it wouldn't even have entered into his mind any issue in relation to interest rates. That wouldn't even have entered into his mind in 2006. He had no day-to-day dealings really in relation to the proposal to AIB to lend them money and all of that was dealt with by Claire Keelan and any discussion in relation to interest rates in 2006 it would have been, if anyone had said it, it would have been Claire Keelan who said it."*

63. Mr. Murphy said that he was not sure he agreed with that, and that he remembered the comment distinctly.

64. He denied that he had been under pressure in 2006 to recommend the loan to the credit committee.

65. He accepted that there was engagement between himself and the borrowers in early 2009 and that he had seen a document date 25th March, 2009, headed "Ballyleary". This document, which came from Mr. Fahey but was clearly a presentation on behalf of the partners, proposed that an application be submitted to the planning authority for a change in the planning permission on the site so as to reduce the cost of the development. It asked for a reduction in the bank interest rate from three and a half per cent to 3.125% in view of the deterioration in the property market.

66. Mr. Murphy accepted that the decision to increase the rate of interest under the April 2009 offer required the agreement of the borrowers, and that it was "a fundamental change".

67. Mr. Murphy was asked how anybody would know, looking at the December 2006 offer, that it was repayable on demand. He referred to the statement in it that the offer was subject to the terms and conditions set out in the letter and also to the bank's general terms and conditions. Asked how a reader would know what the repayment period was, he said:

> *"The repayment period, I suppose obviously the nature of the facility and the indefinite timeline to complete and develop out the facility, it would be near on impossible to predict an exact term of the facility and that is why in the second page there is that review clause where all facilities would be subject to review by the 30th September 2007."*

68. Asked how one would know that the bank could have personal recourse to the borrowers, given that the security for the loan was the charge over the lands to be developed and the Marinegate site, Mr. Murphy said that he was absolutely sure that there was full recourse because in 15 years of banking he had never approved a non-recourse facility. He referred to section 7.4 of the general terms and conditions, which provided that each party to a facility was jointly and severally liable to the bank for the repayment of that facility, and was subject to all of the applicable terms and conditions. He said that it was his understanding that with any type of loan there would be full recourse to the individual borrower unless it was explicitly stated that it was non-recourse.

69. It was put to Mr. Murphy that Mr. Fahey would say that he always understood that the loan was non-recourse and that the bank's security was the charge over the lands. Mr. Murphy said that he completely disagreed with that. Asked whether he was saying that he specifically drew Mr. Fahey's attention to the fact that he would be personally liable, he said that he did not recall having that conversation.

70. Mr. Murphy was questioned about whether the general terms and conditions booklet had been sent out with the letter of offer. He said that to the best of his recollection offer letters, when signed by him, would have been sent to Marianne Harris (the Fermoy manager) for counter-signature and issuance by her.

> *"In all cases the general terms and conditions would have been included from our offices."*

71. The letter and booklet would have been put together in an envelope in his office for sending to Ms. Harris. He did not think that they were fastened together with a paper clip.

72. Asked if he was "just assuming" that Ms. Harris had included the terms and conditions with the letter of offer, Mr. Murphy said:

> *"Of course there would have to be an element of assumption, yes. Again, I issue something to Marianne Harris for signature and onward transfer to the client."*

73. He accepted that he could not say for certain that Ms. Harris included the booklet.

74. Mr. Murphy confirmed that only one copy of the December 2006 offer had issued, and that it had been addressed to Mr. Fahey on behalf of the partnership. He agreed with the suggestion that this was because the bank had the closest business relationship with him.

75. It was put to Mr. Murphy, and agreed by him, that it was a specific term of the 2006 agreement that the facility was repayable on an interest-only basis pending clearance in full from site fines. It was further put, and agreed, that the facility came within the meaning of the phrase "loan account" in the general terms and conditions. He accepted, while maintaining that the bank could demand repayment at any point, that it would not do so without a reason.

76. The witness did not accept the proposition that, the facility not having been reviewed in September, 2007, the review provision had lapsed and there was no obligation on the borrowers to engage with a review thereafter.

77. He said that the significant decline of the property market meant that the bank was in a significantly worse position both in terms of the value of its underlying security and the means by which it was going to be paid. This meant that there had been a "material change relevant to the borrower", within the meaning of the default provisions in the general terms and conditions.

78. It was accepted that the December 2009 letter did not reflect the fact that the credit committee was by then of the view that either the borrowers should be asked for further security or the loan should be called in in January 2010. Rather, Mr. Murphy said, it reflected the April 2009 letter.

79. The document prepared by Mr. Murphy for the credit committee in April 2009 was put to him. He had, at that time, expressed the view that security cover and repayment capacity was adequate overall. The clients were "fully aware" that the site had devalued considerably since purchase but were committed to paying the interest on the loan from their own resources, pending improvement in market conditions. He felt that although they would be disappointed with the increase in the interest rate, they would continue to work with the bank in every way possible. It had also been noted that proposals in respect of the Marinegate loan would reduce the defendants' borrowing by about €1 million.

80. Counsel for Mr. Fahey has raised the issue of his capacity when entering into the loan agreement. The following is the cross-examination on that issue.

> *505 Q. Very finally then, you were familiar with Mr. Fahey's background and you were aware that his main interest was in the Briar Rose, Were you aware of that?*
>
> *A. That is correct yes I was aware of that yes*
>
> *506 Q. And would you accept that was his main interest? His main business interest was Briar Rose.*
>
> *A. Well as alluded to or as referred to in some of the comments he was both an investor and a developer there is a reference to a rent roll being derived from the Briar Rose property, I do know and from recollection that he actually went back to operate it himself I think it may have been leased out for a period and he may have gone back in to operate it himself so between property investment and property and operating the pub himself is my understanding of Liam Fahey.*
>
> *507 Q. Well what Liam Fahey will say is that his day to day job his livelihood is as a publican running the Briar Rose that is his livelihood that is his job he is a publican and his main livelihood comes from the Briar Rose?*
>
> *A. I can't dispute his involvement in the Briar Rose but I can certainly recall there was a point where he was not involved in operating the Briar Rose again maybe its for Mr. Fahey to clarify whether or not that happened, but there was a point in the, throughout our relationship that I was aware that Briar Rose property was leased out and was being operating by somebody else.*
>
> *508 Q. By a company?*
>
> *A. I'm not sure, no sorry the company I'm guessing you are referring is Emvale Taverns which is Liam Fahey's own company. My understanding is that there was other parties involved again I would stand to be corrected on that.*
>
> *509 Q. But that is what Mr. Fahey would say that his main livelihood as a publican, yes he had investments, lots of people have investments, but that doesn't change their day to day activity. You could be an accountant with property investment, you could be a teacher with property investment and in this case Mr. Fahey was a publican with property investment, that is what Mr. Fahey would say?*

A. In any of our reports as you will see throughout the court documents the Bank would have regarded Mr. Fahey as a very shrewd property investor, property developer firstly and foremost and I think that would be brought through and that is alluded to within the documents and any documents we presented to our credit. First and foremost we would regard him as a quite astute and well regarded property investor, property developer.

510 Q. The other thing that Mr. Fahey will say is that he has no experience in property development, he has no experience in the building trade and that is not his area at all and he was involved in some investments but purely as an investor and he had no role in deciding whether this was a good development or what type of development it should be or how many units, that was not his role, he is not a property developer in the sense that he is not a builder he is not engaged in that line of activity at all?

A. I would not agree with that and certainly the Bank's position would be very clear that we regarded Mr. Fahey as an astute businessman involved in property investment, property development, he purchased, he was involved in a development at Ard Fallon, he was involved obviously in Cobh One, Cobh Two, there was also a property play in Youghal's in Clonakilty which we referred to in security earlier so you know if you were to ask me my opinion as to whether or not that I'd regard him as a publican I'd disagree with that.

81. On behalf of the second and third named defendants, it was put to Mr. Murphy by Ms. Fawsitt SC that their evidence would be that in or about 2008 or 2009, the bank had required the partners to discharge the partnership account in respect of Marinegate and to take individual responsibilities for shares in it. Part of the consideration was said to be that the bank would continue to honour the €6m facility for the development of Ballyleary. Mr. Murphy did not accept this and said that the proposal to take on or "partition" the debt in respect of Marinegate came from the partners.

82. Mr. Murphy was asked when the bank had made the decision that the Ballyleary development was not to go ahead. He said that such a decision had never been taken. The €6m facility was stood down because in 2009 the likelihood of the development progressing was extremely remote, given the economic environment. He also stated that there was a cost to the bank in allowing the facility to stand, and it had by then been standing for three years without being utilised. He pointed out that the document presented by Mr. Fahey in 2009 did not refer this facility. Finally, he referred to a clause, in the general terms and conditions, providing that if a facility was not drawn down within six months it could be withdrawn. However, there was nothing to suggest that, if another proposal were to be put to the bank that made financial sense, the bank would not advance a further facility.

83. Mr. Murphy accepted that the borrowers had continued to engage with the bank after the letter of demand and after the initiation of proceedings.

84. He confirmed that in terminating the facilities the bank was relying on the December 2006 letter of sanction. He clarified that the letter of the 18thDecember, 2009, was following the letter of offer of the 17th December and was not in itself designed to create a contract.

85. It was accepted that, in contrast to the equivalent documentation that had been issued for the Marinegate facility, there was no reference in this facility to reaching a mutual agreement.

86. Ms. Fawsitt put it to Mr. Murphy that by raising the interest rate and then suing the borrowers, the bank had "brought the house down around their ears" because other lenders had followed suit and called in their loans. She said that representations had been made to the bank to the effect that without the development finance, the matter could not be progressed, but that the bank had never said until now that the facility had lapsed. He did not accept this, on the basis that the April 2009 offer had not included that facility. He agreed that in that offer it was still envisaged that repayment of Facility 1 would be from the sale of properties on the site, and that in the interim the interest payments would be made from the borrowers own resources.

87. Mr. Murphy said that the limit on the account was no longer active as of the date upon which it should have been reviewed in 2007. It had therefore technically expired before April 2009, when a new limit was put up of a further 12 months. Under the letter of December 2009 the extension was approved up to the 31st January, 2010, pending receipt of the signed letter of offer.

88. It has to be noted that much of the cross-examination of Mr. Murphy was conducted on the basis that certain evidence would be given by or on behalf of the defendants. In the event, none of the defendants called any evidence.

Evidence of Mr. Callanan

89. In 2009 Mr. Callanan was the senior lending manager in Business Banking in the South Mall branch. He said that he became involved with the defendants' file in December 2009 when Mr. Murphy moved to a different position in the bank. He had not previously dealt with them. He wished to get the December 2009 letter of sanction signed and returned to the bank. There was a concern that the bank only had a faxed copy of the signed April letter and not an original.

90. The December letter came back signed by four of the parties but not by Mr. Keohane. Because it was not signed by all of them the bank advised that the facility would expire on the 31st January, 2010. Mr. Keohane did not sign and the facilities were called in by letters dated 12th March.

91. Mr Fahey's solicitor Mr Cunningham responded on his behalf that the effect of the April 2009 letter was that the facility was in place until 30th April, 2010, when it was due for review. Since the account continued to operate within the terms of the facility and there had been no default, the bank was not entitled to call for payment of the full amount. It was said that Mr Fahey would like a meeting to discuss the loan.

92. In reply, Mr. Callanan referred Mr. Cunningham to the previous correspondence and said that copies of the relevant undertaking could be provided if required.

"As this is a matter of urgency I would be grateful if you could contact me to arrange a meeting with your client."

93. The undertaking in question was the solicitor's undertaking to register the bank's beneficial interest in Ballyleary. The bank subsequently issued proceedings against the solicitor who had given that undertaking, seeking an order to compel compliance.

94. Mr Cunningham wrote back asking for copies of various documents before finalising a meeting, on the basis that his firm had not acted for Mr Fahey in relation to the borrowing.

95. A meeting was planned but postponed. The bank was informed that the borrowers were at an "advanced stage" in negotiations with Respond, the social housing agency, and that to demonstrate their goodwill they were prepared to discharge in advance a full year's interest on the loan.

96. Mr. Callanan said that in the circumstances the bank decided to give the borrowers "the benefit of the doubt" as to the expiry date of the facility. However, given the subsequent lack of cooperation in relation to convening a meeting it was decided to call in the loan again, by letters to each of the borrowers dated the 14th June, 2010. The letter sent to Mr. Paul was, in error, dated the 14th March. However, the letters went out on the 14th June and referred to the state of the account as of that date.

97. Mr Cunningham replied to the letter of demand on the 18th June asserting that there was a dispute regarding the nature and extent of the borrowing, on the basis that it was at all times the client's understanding that the facility being made available allowed the bank to have recourse only to the property which was being provided as security, and did not allow any additional recourse to the individual borrowers. He requested all relevant documentation and referred again to the offer to pay a year's interest in advance.

98. Mr. Callanan's evidence was that he had a clear understanding that there was full, joint and severable recourse to all five borrowers. He had been seeking to have a meeting with them to establish clearly the state of their affairs, in circumstances where the property market had collapsed to the point that repayment of the borrowings would not come from the sale of the sites and there was little prospect of the sites being developed. The offer to pay the year's interest in advance was insufficient and the bank needed to know what else was available to support the loan.

99. The summary summons issued on the 12th July, 2010.

Cross-examination of Mr Callanan
100. In cross-examination Mr. Callanan confirmed that it was his view that the bank could have relied upon the letter of sanction of April 2009 but that, because the bank did not have the original of that letter, there was a question mark over it. By issuing the letters of March 2010, based on the fact that the five borrowers had not signed the more recent letter of 17th December, 2009, the bank no longer had to rely upon the April 2009 letter and was not bound by the provision therein relating to a review in April 2010.

101. It was put to him that, therefore, the bank could not rely upon the April letter for the purpose of charging an extra half per cent interest on the loan from December 2009. Mr. Callanan accepted this.

102. Mr. Callanan said that his understanding of the situation was that the facilities were repayable on demand. The 2006 agreement, which contained the reference to clause 3.1 of the bank's terms and conditions (providing that loan account facilities were repayable on demand), was reviewed in April 2009. An amended letter of offer at that time was not returned signed by the five borrowers. In those circumstances the facilities were out of contract since the review date and the bank was entitled to call in the loan.

103. With reference to the provisions in the letter of 2006 for interest only payments pending clearance in full from site fines, Mr.Callanan agreed that it was a specific clause. It was put to him that the contract expressly provided that if there was a conflict between specific terms and the general terms and conditions, the specific terms and conditions would apply. Mr.Callanan said, referring to the history of the site, that by March 2010 it was unlikely that the borrowers would be able to comply with that provision. He said that in seeking a meeting with the borrowers he was not excluding the possibility that the site might be developed as part of the solution. If Respond had contracted to acquire a sufficient number of houses to repay the loans the bank would have looked at that. In this context he referred to Mr Murphy's evidence as to the fact that Respond and Cluid had been in discussion with a large number of developers in Munster and there was little confidence that they would have the funding required. There was so little information from the borrowers as to the involvement of these agencies that the bank could not, in March 2010, see it happening.

104. Mr. Callanan said that he had read the Marinegate file and was aware that there had been an understanding that those houses would be acquired by Cluid, but that had not happened. Ultimately, only three houses were sold and the borrowers took on personal liability for eight units each. It was put to him that he was mistaken, that Marinegate had never been intended for social housing. He initially accepted that he could be wrong but said that it was not the bank's preferred option that the borrowers would repay the loan from rental income. Subsequently, the witness said that there was a reference in the papers to a commitment from Cobh UDC to acquire the 43 units for €13m. It was then put to him that there had been a proposal in 2011 or 2012 that NabCo would become involved in a 20-year social housing scheme which would have guaranteed a rental income of €6m over the 20 years. Mr. Callanan said that he was not aware of that.

105. Mr. Murphy BL said that evidence in relation to this matter would be given by an accountant. He put it to Mr. Callanan that such a development would have been attractive as an investment for pension funds. Mr. Callanan said that it would not have been attractive to the bank because it would have required long term funding on its part, with a rental income net of taxes that would have been barely sufficient to meet a standard repayment schedule.

106. Mr. Callanan did not agree with the proposition that interest accruing on the account was not due until charged to the account. He believed that it was due at the date of the demand, at the rate of base plus 2%. Interest was calculated daily and the interest period was three months. It was put to him that in this case the demand had issued on the 14th June but the interest was brought up to date on the 16th July.

Submissions on behalf of the defendants
Interpretation of the contract

107. All of the defendants submit that the repayment of the loan was governed by the express terms of the December 2006 letter of sanction providing that it was to be repaid out of the site fines. No definite, limited repayment period was identified, and it is submitted that in the circumstances the period must be taken to be whatever period of time it takes to build and sell the units so that the loan can be repaid from site fines. It is argued that the general terms and conditions, providing as they do for repayment on demand, cannot either override or be reconciled with the specific terms of the letter. Since interest payments were made as they fell due, the borrowers were not in default and the bank was not entitled to call in the loan.

108. It is contended that, having regard to the case made in the pleadings, the plaintiff should not be permitted to argue that the December 2006 agreement was in some way superseded by a new agreement created by the letter of April 2009. The arguments made in this respect are

- that there was no fresh consideration in April 2009;

- the letter is meaningless without reference to the 2006 letter;

- it would be inconsistent with the actions of the bank, and

- it would be inconsistent with the bank's claim that the 2006 letter is the basis for the agreement between the parties and that it was "varied and renewed" by April 2009 letter.

109. The defendants rely upon the judgment of Finlay Geoghegan J. in *Allied Irish Banks Plc v Galvin Developments (Killarney) Limited& Ors.* [2011] IEHC 314 in which a similar repayment term, in relation to payment out of the proceeds of sale, was considered. In that case, a number of letters of sanction contained different provisions for the repayment of capital and interest. There was provision for a review at stated times.

110. Finlay Geoghegan J. noted that the letters were silent as to an express obligation to repay the loans or interest, and as to the bank's recourse to the borrowers. She found that the express agreement on repayment terms did not include the loans being repayable on demand, and was, in that respect, in conflict with the general terms and conditions. She therefore held that clause 3.1.1 of the general terms did not apply. However, because there was no express provision as to what was to occur in the event of default by the borrower, the general terms and conditions did apply where, as in that case, the borrower was in default. The bank was therefore entitled to call for repayment. In those circumstances she found it unnecessary to consider the consequences of the failure of the parties to reach agreement after the specified review date.

111. The defendants say that since they were not in default, the express repayment terms continued to govern the contract and the plaintiff was not entitled to demand repayment. The April 2009 letter was not the result of a "review", rather it was the result of a unilateral decision by the plaintiff without any input from the defendants.

112. The defendants make a number of criticisms of the way the plaintiff handled matters. Since many do not seem to have any legal significance I do not believe it necessary to set them out.

113. The plaintiff says that it is entitled to rely on the provision for review in the December 2006 letter. It is pointed out that none of the defendants has denied signing the April 2009 letter, which was issued on foot of the review. The fact that the bank has not been able to produce the original is said not to affect the enforceability of this agreement between the parties. The April 2009 letter is described as constituting a new contractual relationship, which replaced the agreement of 2006.

114. The plaintiff denies the assertion that there was no consideration provided for the April 2009 letter. Relying upon the decision of Charleton J. in *ACC Bank Plc v Dillon & Ors.* [2012] IEHC 474, the case is made that the plaintiff contracted to provide and/or maintain the facility, subject to the terms and conditions set out in the letter. The borrowers contracted to continue to pay back the loan with a different rate of interest, and they proceeded to comply with the contract by paying the increased rate.

115. All of the parties are agreed that the letter of December 2009 is not enforceable, since it was not signed by all the borrowers.

Submissions made by the first named defendant only
Whether the general terms and conditions were furnished to the defendant

116. Mr. Murphy BL submits that the onus of proof is on the plaintiff to prove that the booklet was sent out, and that the evidence of Mr. Michael Murphy does not discharge that onus. The only person who could prove that it was sent was Marianne Harris, the Fermoy branch manager, and she did not give evidence. He relies on the finding of fact by Finlay Geoghegan J. in *Galvin Developments* that, in that case, the booklet had not been sent.

117. However, in *Galvin Developments*, positive evidence had been given by the defendant that the document had not been received. In the instant case, it was not even put to Mr. Murphy that Mr. Fahey did not receive it. In any event, Finlay Geoghegan J. held, in accordance with the decision in *Leo Laboratories Ltd. v. Crompton B.V.* [2005] IESC 31, that the terms and conditions were incorporated into the contract by reference.

118. I consider that Mr. Murphy's evidence of the bank's system, in the absence of challenge on the facts of this case, would be sufficient to prove delivery of the document on the balance of probabilities. However, if I am wrong in that, it is clear that the general terms and conditions were incorporated by express reference in the letter of sanction.

The consumer credit issue

119. The case is made on behalf of the first named defendant that in entering into the loan agreement he was acting as a consumer within the meaning of the Consumer Credit Act, 1995.

120. Section 2(1) of the Act defines a "consumer" as

> *"a natural person acting outside his trade, business or profession"*

while a "creditor" is

> *"a person who grants credit under a credit agreement in the course of his trade, business or profession".*

A "credit agreement" for the purposes of the Act is

> *"an agreement whereby a creditor grants or promises to grant to a consumer a credit".*

121. The plaintiff says, relying on *Benincasa v Dentalkit (Case C-269/95), Allied Irish Bank Plc v Higgins& Ors.*[2010] IEHC 219 and *Allied Irish Bank Plc v Fahy* [2014] IEHC 244, that the defendants did not act as consumers in entering into the agreements in question and that therefore the protective provisions of the Consumer Credit Act, 1995 (as amended) have no relevance.

122. In *Benincasa*, the applicant had intended to establish a business selling dental hygiene products under a franchise agreement. The contract contained a provision conferring jurisdiction on the courts of Florence but the applicant instituted proceedings in Germany, claiming that the agreement was void under German law. The question of the appropriate forum turned on whether or not he entered into the contract as a consumer, within the meaning of the Brussels Convention, since he had not at that stage

commenced trading. The relevant provisions of the Convention referred to "proceedings concerning a contract concluded by a person for a purpose which can be regarded as being outside his trade or profession".

123. The German court sought a ruling as to whether the Convention must be interpreted as meaning that a plaintiff who has concluded a contract with a view to pursuing a trade or profession, not at the present time but in the future, may be regarded as a consumer. In answering this question in the negative, the Court said:

> *"As far as the concept of 'consumer' is concerned, the first paragraph of Article 13 of the Convention defines a 'consumer' as a person acting 'for a purpose which can be regarded as being outside his trade or profession'. According to settled case-law, it follows from the wording and the function of that provision that it affects only a private final consumer, not engaged in trade or professional activities (Shearson Lehman Hutton, paragraphs 20 and 22).*
>
> *It follows from the foregoing that, in order to determine whether a person has the capacity of a consumer, a concept which must be strictly construed, reference must be made to the position of the person concerned in a particular contract, having regard to the nature and aim of that contract, and not to the subjective situation of the person concerned. As the Advocate General rightly observed in point 38 of his Opinion, the self-same person may be regarded as a consumer in relation to certain transactions and as an economic operator in relation to others.*
>
> *Consequently, only contracts concluded for the purpose of satisfying an individual's own needs in terms of private consumption come under the provisions designed to protect the consumer as the party deemed to be the weaker party economically. The specific protection sought to be afforded by those provisions is unwarranted in the case of contracts for the purpose of trade or professional activity, even if that activity is only planned for the future, since the fact that an activity is in the nature of a future activity does not divest it in any way of its trade or professional character.*
>
> *Accordingly, it is consistent with the wording, the spirit and the aim of the provisions concerned to consider that the specific protective rules enshrined in them apply only to contracts concluded outside and independently of any trade or professional activity or purpose, whether present or future."*

124. In *Allied Irish Banks v Higgins*, Kelly J. considered *Benincasa* in the context of a case involving a number of individuals who formed a partnership for the purpose of buying and developing certain lands. He accepted, on the basis of the evidence, that property development or investment was not their principal or main business. However, he rejected the proposition that a person could have only one business or trade or profession, outside of which any borrowings must be made as a consumer. In this regard he referred to s.18 of the Interpretation Act, 2005, by virtue of which the singular imports the plural unless the context requires otherwise. He found that the contract in question could not be seen as being for the purpose of satisfying the individual needs of the defendants in terms of private consumption.

125. In *Allied Irish Banks plc v Fahy*, this court applied the principles of *Benincasa* and *Allied Irish Banks v Higgins* to loans taken out by a solicitor for what the court held to be commercial purposes. (That judgment may be under appeal.)

126. The argument mounted by counsel for the first named defendant under this heading is that the plaintiff was acting in the course of an integral part of its business in extending credit to the first named defendant. This defendant, however, although borrowing for "business purposes", was not engaged in the "business" of supplying credit or engaging in credit transactions, and was therefore acting as a consumer.

127. It is submitted that the burden is on the bank to demonstrate that the borrowers were not consumers, reliance being placed in this regard on the judgment of the Court of Justice of the European Union in *CA Consumer Finance SA v Bakkaus (Case C-449/13).*

128. *Bakkaus* concerned a request for a preliminary ruling in relation to certain provisions of Directive 2008/48/EC. The issues in the case related to the provision of adequate information to consumers, and the obligation to assess the creditworthiness of consumers, in advance of entry by them into credit agreements. The borrowers in the case had taken out personal loans in the region of €20,000 and had defaulted on the terms. At the hearing of the creditor's claim, the national court had raised concerns arising from the failure of the creditor to give any evidence of the pre-contractual information or assessment of creditworthiness. However, the contract signed by one of the borrowers contained a signed acknowledgement by her that she had received and taken note of the "Standard European Information form" (being a copy of the form annexed to the Directive).

129. Among the questions asked by the referring court were whether the provisions of the Directive precluded national rules according to which the burden of proving non-compliance with a creditor's obligations lies on the consumer, and whether they precluded the creditor from being able to prove compliance by means merely of the standard form whereby the consumer acknowledged fulfilment of the obligations.

130. Having regard to the principle of effectiveness, the Court held that the Directive does preclude rules according to which the burden of proving non-performance of obligations lies with the consumer, or according to which proof of the standard form has the effect of reversing the burden of proof.

131. It is submitted that the judgment of Kelly J. in *Allied Irish Banks plc v Higgins* is unsatisfactory insofar as it applied the definition of "consumer" found in the judgment of the ECJ in *Benincasa*. The criticism is based on the argument that *Benincasa* was concerned with the interpretation of the Brussels Convention on Civil Jurisdiction, not with the Consumer Credit Directive, and is not to be regarded as an authoritative interpretation of the concept of a consumer.

132. Reliance here is placed on the recent opinion of the Advocate General in *Costea v. SC Volksbank Romania SA (Case C-110/14)* delivered on the 23rd April, 2015. This concerns Directive 93/13/ EEC (the Unfair Contract Terms Directive). Counsel has provided the court with the text of the opinion in French, accompanied by an "unofficial" English translation. The language of the latter is not without difficulty, as can be seen in the following description of the issue in the case:

> *"…the present case is special in that it raises questions about the quality of the consumer of a legal professional on the conclusion of a credit agreement whose repayment is guaranteed by a building owned by his cabinet individual lawyer. Thus, it is to consider, first, the question of the impact of special skills and knowledge of a person acting as a consumer and, secondly, the influence of the role this person plays in the context of a*

guarantee ancillary contract as a consumer under a main contract credit."

133. It appears that the applicant was a commercial lawyer, whose personal borrowings were guaranteed by his own, solely-owned, law firm which in turn was the owner of a building.

134. By virtue of Article 2 of that Directive, a "consumer" is any natural person who, in contracts covered by the Directive, is acting for purposes which are outside the scope of his or her business while a "professional" means any natural or legal person who, in such contracts, is acting in the course of his or her professional activity, whether public or private.

135. The Advocate General notes that the concept of a "consumer" arises in many spheres of EU law but says that there is no single definition of that concept. He considers that there is therefore no uniform approach to be taken, noting that in different situations a person may act sometimes as a consumer and sometimes in the course of business. In this respect he refers to *Benincasa* and the observation therein that

> *"A single person can be regarded as a consumer in connection with certain transactions and an economic operator in relation to others."*

136. In a paragraph relied upon by the defendant in the instant case the Advocate General says:

> *"Ultimately we are dealing with an objective and functional concept, whose manifestation depends on a single criterion: the inclusion of the legal transaction in the context of foreign operations to professional practice. Indeed, as pointed out by the Romanian Government, the Directive does not establish additional criteria to determine the quality of the consumer. It is, moreover, a concept defined situational, that is to say, in relation to a concrete legal transaction. Therefore, we cannot deprive a person of the ability to be in the situation of a consumer in respect of contracts not covered by his business because of his general knowledge or profession, but be taken into account only its location in a specific legal transaction."*

137. Ultimately, whatever the difficulties of translation, it is clear that the Advocate General is of the view that personal knowledge and experience cannot in themselves preclude a finding that an individual acted as a consumer in a particular context. Reference is made to the fact that the Court's case law dealing with the Brussels Convention takes a restrictive approach, because the Convention provisions involve exceptions to the general criteria for jurisdiction and must be strictly construed. However, when dealing with Directive 93/13, if it is not clear whether the purpose of the transaction was personal or professional, the court should consider the predominant purpose. The contracting party must be considered to be a consumer if the professional purpose, taking into account all the circumstances, was not dominant.

138. It is submitted by counsel for the first named defendant that this approach is entirely at odds with that in *Allied Irish Banks Plc. v. Higgins* and that, therefore, the premise of the latter decision must be doubted.

139. It is submitted that in this case, the plaintiff was clearly acting in the course of its business, since lending is integral to its business. However, the borrowers, even if borrowing for business purposes, were borrowing as an incidental part of their business and were therefore acting as consumers.

Discussion and conclusions

140. The principles to be applied by the court in construing the contractual documents are not in dispute. They are set out in the judgment of Lord Hoffman in *Investors Compensation Scheme Limited v West Bromwich Building Society* [1998] 1 All E.R. 98, approved in this jurisdiction in the Supreme Court in *Analog Devices BV v Zurich Insurance Company* [2005] 1 I.R. 274. The principles are as follows:

> *"(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*
>
> *(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*
>
> *(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.*
>
> *(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (see Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd. [1997] 2 WLR 945*
>
> *(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in The Antaios Compania Neviera S.A. v. Salen Rederierna A.B. 19851 A.C. 191, 201:*
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> > *". . . if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."*

141. Having regard to these principles and to the evidence in the case, I have come to the following conclusions.

142. Firstly, there is no evidence arising from either the written terms or the oral evidence that this was a non-recourse loan and I consider that each of the borrowers was, in accordance with the general terms and conditions, jointly and severally liable.

143. The original agreement of December 2006 clearly envisaged and provided that repayment of the capital sum would be from the proceeds of the development. No repayment period was specified, since it was not known when the development would be completed. There was, therefore, no specified date by which repayment was to be made. In my view, the bank would not have been entitled to rely on the general terms and conditions to make a demand for repayment while these express terms were in force.

144. However, the agreement did provide for a review the following year. A provision for review of a contract in this context must, in my view, mean that the parties leave open the possibility that the contractual relationship between them may be varied on foot of the review.

145. The fact that no review in fact took place in 2007 may have meant that, technically, for the bank's internal governance purposes, the loan reached its "limit" and expired. However, on the evidence, all parties continued to treat it as being in continued existence and complied with its terms. If necessary, I would hold that it did continue in being as a matter of law.

146. I also consider that the fact that no review took place in 2007 did not mean that the plaintiff thereby lost in perpetuity the right to carry out a review. That would not accord with principles of business efficacy or, in all likelihood, what the parties contemplated when entering into the agreement.

147. In any event, when the plaintiff did review the agreement and when the letter of offer of April 2009 was sent out, none of the defendants objected and all of them signed the letter. I do not believe that anything turns upon the loss of the original, given that there is no dispute about the signatures.

148. The April 2009 letter was expressed to be in substitution for, and not in addition to, the letter of December 2006. Whether it is described as a "substitution", as stated in the letter, or "essentially a continuation", as per Mr. Murphy's evidence, or a "variation or renewal" as pleaded, there are as a matter of fact significant variations from the earlier letter which had the effect of altering the contract between the parties. In particular, in my view, the withdrawal of Facility 2 (the unused development finance facility) and the dropping of the provision for repayment from the proceeds of the development had the effect of dissociating the repayment of the capital sum for Facility 1 from the progress of the development. This can hardly have gone unnoticed by the defendants at the time, although no issue appears to have been taken with it until the following year.

149. There was still no definition of the concept of the "repayment period" but the provision for review and/or refinance in April 2010 was clear.

150. I consider that the combined effect of these provisions – the dropping of the provision tying the repayment of the capital to the proceeds of the development and the new review date – meant that the bank was no longer bound by an agreement to await completion and sale of the units for the purpose of repayment. However, it was not entitled to repayment on demand (in the absence of default) before the review date.

151. If this is correct, the plaintiff was not entitled to unilaterally alter the terms of the April 2009 letter, in the absence of default in relation to the terms thereof. The fact that the bank did not have the original letter did not, as I have already found, mean that the parties were not bound by it. The demand made in March 2010, made on the basis that not all of the defendants had signed the December 2009 letter, was therefore invalid. However, in the event the bank did not take any further steps before the expiry of the period provided for in the April 2009 letter, and made a fresh demand after that.

152. It is very clear from the evidence that throughout this period efforts were being made, in particular by the defendants, to come up with a solution to the situation. It is noteworthy that they continued to meet the interest payments and indeed offered to pay a year's interest in advance. However, I do not consider it necessary to decide whether any party could or should have tried harder – ultimately, the point is that no new agreement was reached.

153. That being so, and the express term for the period for review having expired, in my view the repayment obligations of the defendants became governed by the general terms and conditions. To find otherwise would be to find that the repayment obligation of borrowers is cancelled by a failure to agree terms after a review. Those general terms and conditions provide for repayment on demand. I therefore find that the demand of June 2010 was validly made.

154. There remain the separate issues argued on behalf of the first named defendant.

Status as a "consumer"

155. It is abundantly clear that the first named defendant does not meet the test applied in *Benincasa* and *Allied Irish Banks Plc v Higgins*, since it cannot be said that he borrowed in excess of €10 million from the plaintiff to satisfy personal needs in terms of private consumption.

156. As far as the burden of proof in relation to the status of the borrower is concerned, I see no reason to depart from the general principle that "he who asserts must prove". The court in *Bakkaus* was dealing with a situation where there was no question but that the individuals concerned were consumers. The issue then was the burden of proof in relation to the obligations on the lender arising from that fact. Proof of compliance with those obligations is undoubtedly a matter to be demonstrated by the lender in those circumstances. However, that it is quite a different matter to a proposition that that the lender bears the burden of proving a negative, that is, that a borrower was not a consumer.

157. I do not think it necessary to consider whether the Advocate General's opinion in *Costea* represents a change in the approach of the Court of Justice, and a restriction of the authority of *Benincasa* to jurisdictional issues, because I am of the view that under no formulation of the applicable test could the first named defendant be regarded as having acted as a consumer in this context. That is because I consider that the same outcome results from an application of the "predominant purpose" test to the transactions involved in the instant case.

158. This is not a situation where, as described by Barrett J. in *Ulster Bank Ireland Ltd. v. Healy* [2014] IEHC 96, an individual invested surplus income or borrowed monies without thereby making that investment his or her business or trade. This defendant was not making an investment with his own funds. He was engaging in a commercial development in the expectation of profit, and funding

the development by borrowing. Apart from his business as a publican, the uncontradicted evidence is that he was also in business as a property developer. I see no reason to doubt the logic of Kelly J. in holding that a person may have more than one business.

159. While it was put to Mr. Murphy that Mr. Fahey was not at an early meeting in relation to the development and did not meet him until a much later date, no evidence was given to that effect. There is also the evidence that he was the author of the document submitted to the bank in March 2009, at which point he certainly appears to have been taking a proactive, one might say a leadership, role in the partnership.

Contributory negligence
160. On this issue, the first named defendant argues that s. 34 of the Civil Liability Act, 1961 can be relied upon for the purpose of invoking the concept of contributory negligence. The contention here is that the term "wrong" as used in that Act includes breach of contract. It is submitted that this is a different issue to the admittedly non-existent "tort of reckless lending".

161. The alleged contributory negligence is said to lie in the failure of the bank to ensure that the legal charges were properly put in place over the lands.

162. Quite apart from the fact that the evidence is that the charges were not put in place because some of the defendants (who were all jointly and severally liable) did not execute the necessary documents, this argument is misconceived. The instant case is not an action for damages or compensation for a wrong, whether for breach of contract or otherwise. It is an action for repayment of a liquidated sum on foot of a loan contract. The concept of contributory negligence has no role in this context.

Decision
163. Having regard to the foregoing I propose to enter judgment for the plaintiff.