Neutral Citation Number [2011] IEHC 314

THE HIGH COURT

COMMERCIAL

2010 2787 S

BETWEEN

ALLIED IRISH BANKS PLC.

PLAINTIFF

AND

GALVIN DEVELOPMENTS (KILLARNEY) LIMITED, SOUTER ENTERPRISES LIMITED, JEREMIAH GALVIN, COLM GALVIN, DENIS GALVIN, JOHN SHEE AND JOSEPH HANRAHAN

DEFENDANTS

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 29th day of July, 2011

1. This judgment relates to the plaintiff's ("AIB") claim for judgment in differing amounts against the first named defendant, Galvin Developments (Killarney) Ltd. ("GDK") and the third, fourth and fifth named defendants, Jeremiah Galvin, Colm Galvin and Denis Galvin, whom I will refer to collectively as the Galvin Brothers. Judgment has already been obtained (in default and by consent) against the second, sixth and seventh named defendants.

Historical Relationship

2. GDK is a company incorporated in 1992. The Galvin Brothers are its directors and shareholders. GDK is the successor to a longstanding partnership, originally of the parents of the Galvin Brothers, known as the Killarney Construction Partnership. GDK was, until the collapse of the property market and events giving rise to these proceedings, successful in the business of development and construction of residential housing and commercial projects.

3. AIB has been the banker to GDK since its incorporation and was the banker to the Killarney Construction Partnership. Originally, GDK was a customer of the Killarney branch. In 1995, its accounts were moved to the South Mall branch in Cork, and in particular, to the Commercial Lending Department which dealt with what were referred to as "Large Ticket" accounts.

4. At all material times since 1995, Mr. Jeremiah Galvin was the principal person who dealt with AIB on behalf of GDK and the Galvin Brothers. Since at least 2002, the primary relationship of GDK and the Galvin Brothers was with Mr. William Madden of the South Mall branch and, successively, his assistants, Mr. Conor O'Sullivan and Mr. Colm Spillane, all of whom gave evidence.

5. The events in issue in these proceedings commence in 2006. A strong relationship had been established between the Galvin Brothers and, in particular, between Mr. Jeremiah Galvin and Mr. Madden and Mr. O'Sullivan. I find that by the end of 2006, the relationship was such that Mr. Galvin considered Mr. Madden to be a financial advisor in relation to the business of GDK and the Galvin Brothers, and placed trust and confidence in him. Mr. Madden, for his part, respected the Galvins as, he stated in evidence, "cautious, careful businessmen". Mr. Madden also stated that he found Mr. Jeremiah Galvin to be "a capable and meticulous businessman". AIB organised (and, presumably, funded) Mr. Galvin to socialise with its employees by, inter alia, playing golf in the UK and attending a rugby World Cup game in Cardiff. When Mr. Conor O'Sullivan left AIB and took up a position elsewhere, he asked Mr. Jeremiah Galvin to act as a referee.

6. Notwithstanding this close relationship, the Galvin Brothers also sought banking facilities elsewhere. In particular, it obtained finance from Bank of Ireland for the development and construction of a shopping centre in Killarney. This lending predated 2007.

7. The AIB facilities, the subject matter of this claim, may broadly be divided into what were referred to as historical facilities and those relating to the Coolegrean development. The latter was a joint venture with the second named defendant, then called Mowlam Residential Care Ltd. ("Mowlam") and its principals, the sixth and seventh named defendants, Mr. Shee and Mr. Hanrahan.

Claims

8. The claims made in these proceedings relate to the following facilities:

(i) Against GDK in respect of historical facilities on loan accounts set out in a letter of sanction of 4th September, 2008. The total sum claimed to be due as of 8th March, 2011, is €32,341,553.28 ("GDK Historical").

(ii) Against GDK in respect of the Coolegrean development. The claim is made in respect of two accounts: Account No. 49884145 and Account No. 49884228. In respect of each of these, the original letter of sanction is 28th March, 2007, and the facilities were renewed and extended by letter of sanction of 4th September, 2008, which is the relevant agreement at the date of demand. The total amount claimed to be due in respect of these facilities as of 8th March, 2011, is €13,607,030.52 ("GDK Coolegrean").

(iii) Against the Galvin Brothers on Account No. 49879145 in relation to Coolegrean. The original letter of sanction is dated 28th March, 2007, and the facilities were renewed and extended by letter of sanction of 4th September, 2008. The total sum claimed due as of 8th March, 2011, is €10,469,701.72 ("Galvin Brothers Coolegrean").

(iv) Against the Galvin Brothers on Account No. 49577210 in respect of a loan for an interest in a hotel in Provence, France, pursuant to a letter of sanction of 19th June, 2008. The amount claimed is €355,656.62 as of 8th March, 2011 ("the Provence Loan").

(v) Against the Galvin Brothers pursuant to letters of guarantee of the GDK Coolegrean loans a sum of €13,607,030.52 ("Coolegrean Guarantee").

(vi) Against the Galvin Brothers pursuant to letters of guarantee of the GDK historical loan dated 12th September, 2008, subject to a maximum amount of €19,480,000.00 with amended relief sought to the effect that such amount is well charged on the Galvin Brothers interest in 120 acres at Cappagh, Muckross, Killarney, County Kerry ("Historical Guarantee")

Defences and Counterclaims
9. The defences and counterclaims made by GDK and the Galvin Brothers are, in summary:

(i) In respect of all the facilities, GDK and the Galvin Brothers contend that AIB was not entitled to demand repayment on the dates of the respective letters of demand as none of the facilities were repayable on demand.

(ii) GDK is only liable for 50% of the amount drawn down on the GDK Coolegrean loan, and, if necessary, rectification of the accepted letter of sanction of 4th September, 2008, is sought.

(iii) The Galvin Brothers are only liable for 50% of the amount drawn down on the Galvin Brothers' Coolegrean loan Account No. 49879145. If necessary, rectification of the accepted letter of sanction of 4th September, 2008, is sought.

(iv) The Galvin Brothers' Coolegrean Guarantee is only for the liability of GDK (i.e. 50% of the loan drawn down) and is restricted in recourse to the Galvin Brothers' interest in the lands at Cappagh.

(v) The Galvin Brothers' Historical Guarantee is restricted in recourse to the lands at Cappagh (this is agreed by AIB).

(vi) The Galvin Brothers' Provence Loan was not repayable at the date of demand for distinct reasons to the general contention.

(vii) AIB is not entitled to recover the surcharge interest applied to four accounts, as there was no agreement to this effect.

Issues
10. I propose considering and determining the issues arising in the following order:

(i) Whether or not AIB was entitled to demand repayment of the various facilities on the dates of the respective letters of demand.

(ii) Whether or not AIB is entitled to recover surcharge interest applied to four accounts.

(iii) Whether GDK is liable for 100% or 50% of the amount drawn down on the GDK Coolegrean Loan.

(iv) Whether the Galvin Brothers are liable for 100% or 50% of the amount drawn down on the Coolegrean Loan Account No. 49879145.

(v) Whether or not the Galvin Brothers' Coolegrean Guarantee of the GDK liability on the Coolegrean Loan is restricted their interest in the lands at Cappagh.

(vi) The nature of the relief, if any, to which AIB is entitled in respect of the Galvin Brothers' Historical Guarantee of the GDK Historical Loans restricted to their interest in the lands at Cappagh.

11. The facts in dispute in the proceedings relate, primarily to the issues relating to the Coolegrean joint venture loans and the guarantees thereof.

Coolegrean Joint Venture
12. The relevant evidence included the oral evidence and witness statements of Mr. William Madden, Mr. Conor O'Sullivan and Mr. Colm Spillane on behalf of AIB; and Mr. Jeremiah Galvin, Mr. Seamus O'Mahony, Mr. Colm Galvin and Mr. Denis Galvin on behalf of the Galvins and contemporaneous documents. The findings of fact are made on an assessment of the evidence tendered in the context of those documents, as well as my observation of the witnesses in giving their evidence.

13. All witnesses were giving evidence in 2011, both with the benefit of hindsight and, in a factual context, totally different to that in which the transactions took place from 2006 to 2008. This appears to have coloured what I consider for the most part to be their current honestly held perception of what may have occurred in 2006-2008.

14. In the autumn of 2006, Mr. Jeremiah Galvin ("Mr. Galvin") was approached by Mr. Shee and Mr. Hanrahan in relation to an opportunity to acquire and develop a 16.9 acre site belonging to the Mercy Order in the centre of Killarney. At all material times, it was envisaged that there would be a nursing home and retirement units built on approximately four acres and residential housing on the balance. Mr. Shee and Mr. Hanrahan and their company, Mowlam, had expertise in the former, whereas the expertise of the Galvin Brothers and GDK was in the latter.

15. Mr. Galvin sought advice from William Fry, solicitors, in Dublin as well as from Mr. Boland, a financial advisor, and discussed the matter with Mr. Madden and Mr. O'Sullivan of AIB.

16. From the outset, it was agreed that the joint venture would proceed on the basis of a co-ownership as distinct from a partnership. All the relevant parties appear to have understood that a co-ownership would involve each side of the joint venture acquiring a 50% interest and being liable only for 50% of the liabilities. This was understood to be in contradistinction to a partnership where each side of the joint venture would have been liable for the entire debts of the partnership.

17. It was also envisaged that the first part of the development would be the nursing home and retirement village. First Capital, based in Cork, was identified as an investment firm with high net worth clients which would find investors for this part of the development by reason, inter alia, of attractive tax allowances.

18. In early December 2006, a co-ownership agreement was under preparation and discussions took place between Mr. Galvin and Mr. Madden and Mr. O'Sullivan of AIB. By 21st December, 2006, an internal position paper was prepared by Mr. Madden and Mr. O'Sullivan on the proposal by the Galvin Brothers and Mr. Hanrahan and Mr. Shee, "seeking indicative Heads of Terms for purchase of zoned development land in Killarney". That internal document records the proposal as:

"Clients are forming a Joint Venture to purchase 17 acres of zoned development land in Killarney. It is to be purchased by J, C&D Galvin (50%) and Hanrahan & Shee (50%) and will ultimately be developed by Galvin Developments Ltd. under licence.

Purchase price of the land is €34m, clients will introduce €8m cash and are seeking to borrow €24m.

The facility is sought on a 50% recourse to the Galvins and a 50% recourse to Hanrahan & Shee."

19. Heads of Terms were drafted and the evidence given consistent with the handwritten note on the document was that Mr. T. Hopkins, a general manager in AIB, who was Mr. Madden's superior, agreed to the issue of the Heads of Terms by AIB to the Galvins and Mr. Shee and Mr. Hanrahan.

20. Heads of Terms were issued to Mr. Galvin for the Galvin Brothers on 21st December, 2006. Following further discussion, revised Heads of Terms were issued. Insofar as relevant, these provide:

"Borrower: - Jerry Galvin, Colm Galvin, Donnacha Galvin, John Hanrahan, Joe Shee

Amount: - EUR26,000,000 (Twenty Six Million Euro) Loan Account. The loan amount may be increased subject to the borrowers providing a lien over deposit funds on at least €1:€1 basis.

Purpose: - Assist in the purchase of 17 acres of zoned development land in Killarney.

Conditions: - . . .

- Recourse:

- The Bank will have joint & several recourse to Jerry Galvin, Colm Galvin and Donnacha Galvin for 50% of the drawn debt.

- The Bank will have joint & several resources to John Hanrahan and Joe Shee for the remaining 50% of the drawn debt.

- The Bank is to be fully satisfied with the value of the supporting security.

- Bank to be satisfied with clients ability to meet the interest costs on the loan with independent confirmation of income to be provided.

. . .

Covenants: - On receipt of Planning Permission the Bank would be disposed towards sanctioning funds for initial development costs.

Project Finance: Prime Rate Varying plus 1% varying. For indication purposes the rate as at today's date would be 5.25%.

1. Nursing Home

Subject to a signed contract being in place for the onward sale of the Nursing Home and the Bank being satisfied as to the status of the contract, we would be disposed towards advancing a level of funds for the construction of the Nursing Home.

2. Residential

The Bank would also be disposed towards advancing alevel of funds towards the development of the residential portion of the site subject to a level of pre-sales.

Additional Funding: On receipt of planning permission the Bank will consider funding initial development costs, levies, etc. The borrowers will be required to fund the majority of the Stamp Duty costs.

The facilities and terms and conditions attaching, as outlined in this Term Sheet are subject to formal approval by the Bank and the issuance of a formal Offer Letter, including the Bank's standard terms and conditions, for acceptance by the borrower."

21. As appears, the proposal agreed to in the Heads of Terms was that the recourse of AIB in respect of the facilities to be granted was to be limited to 50% of the drawn debt to each of the Galvin Brothers, jointly and severally, and Mr. Shee and Mr. Hanrahan, jointly and severally. Such limitation on recourse was unusual. It was also unusual for the Galvins to be given Heads of Terms by AIB. This was the first occasion upon which the Galvin Brothers had obtained Heads of Terms from AIB in respect of any of its developments or facilities.

22. On 18th January, 2007, the Galvin Brothers and Mr. Shee and Mr. Hanrahan and GDK and Mowlam entered into a co-ownership agreement. At para. 2.1 this provided:

"BUSINESS OF CO-OWNERSHIP AND COMPLETION

2.1 The Co-Owners are or shall be the Co-Owners of the Co-Ownership Property as tenants in common and have come together as such for the purpose of carrying on the Business to its best commercial advantage in accordance with the terms of this Agreement to the intent that the Co-Ownership shall be regulated solely by this Agreement to the exclusion of the Partnership Act 1890 and the Limited Partnership Act 1907 (as amended)."

Clause 15 of the agreement provided for certain terms in the event that, "the relationship of the parties the subject of this Agreement is determined to be a partnership". Having regard to the overall terms of the agreement, this does not appear to have been the intention but included as a matter of precaution in the event that contrary to the terms agreed, particularly at clause 2.1, the relationship was so determined.

23. The co-ownership agreement was furnished to AIB, probably in the month of January 2007.

24. Further discussions took place in January and early February as to how the joint venture should proceed. Proposals for Phase I and Phase II were prepared and furnished by Mr. Galvin to Mr. Madden and Mr. O'Sullivan by 13th February, 2007. By this point in time, the proposal was that the two companies, GDK and Mowlam, would purchase the four-acre site for €8m intended for the nursing and retirement village. The balance of the site (12.9 acres) would be acquired in the names in the five individuals with the purchase of 6.45 acres to be completed immediately, and the balance of 6.45 acres to be deferred for one year.

25. The document furnished to AIB stated, in relation to the promoters, "It is a partnership between the two companies to acquire the property as co-owners in the proportion 50%/50%". Whilst the AIB witnesses sought to rely upon this in evidence as indicating some shift in position, I find that there was, at the time, no intention to enter into a partnership. Further, that at the relevant time, Mr. Madden and Mr. O'Sullivan understood that the continued proposal was that of a co-ownership (in the terms already explained) between the two sides of the joint venture.

26. On 14th February, 2007, the day after that document was received, a meeting was held between Mr. Madden and Mr. Galvin and Mr. Seamus O'Mahony, an advisor who accompanied Mr. Galvin. The handwritten notes of Mr. Madden and Mr. O'Mahony taken at that meeting were produced in evidence and explained by them.

27. Mr. Madden's evidence is that he did not inform Mr. Galvin at that meeting, nor at any other time between the issue of the Heads of Terms in December 2006 and the issue of letters of sanction in March 2007, that AIB was not prepared to make the facilities available for the Coolegrean joint venture upon the basis of recourse of the drawn debt as to 50% to the Galvin Brothers and 50% to Shee & Hanrahan, as indicated in the Heads of Terms. The handwritten notes of the meeting are consistent with a discussion on the basis of a 50% liability of each side of the joint venture.

28. At that meeting, the proposal discussed and entertained was that GDK and Mowlam would acquire the four acres intended for the nursing home and retirement village and that the Galvin Brothers and Mr. Shee and Mr. Hanrahan acquire the balance in two tranches of 6.45 acres. I find that, at the meeting, both Mr. Galvin and Mr. O'Mahony understood that the 50% recourse indicated in the Heads of Terms continued to apply and no indication was given by Mr. Madden that such term did not apply. Further, that no indication was given by Mr. Madden that the current proposals,involving the two companies, some development funding and two phases involved any significant departure from or increased risk to AIB from the proposals the subject matter of the Heads of Terms.

29. At the end of the meeting on 14th February, 2007, Mr. Madden sought additional information for the purpose of an application for approval to the Credit Committee and the issue of facility letters.

30. Contracts for purchase of the lands dated 14th February, 2007, were executed.

31. A detailed proposal was prepared by Mr. O'Sullivan for the AIB Credit Committee meeting to be held on 8th March, 2007. Approval was sought for the facilities under discussion, namely:

To GDK and Mowlan: €8.25m towards the purchase of the 4 acres and €9.6m towards development of the nursing home and retirement units.

To the Galvin Brothers, Mr. Shee and Mr. Hanrahan: €11.48m towards the purchase of 6.45 acres.

The content of the proposal was not, of course, disclosed to the potential borrowers at the time it was prepared. The proposal was made and approval was sought upon the basis of full recourse on a joint and several basis to the borrowers. No express reference is made to the Heads of Terms or to the 50% recourse referred to therein. The evidence is that Mr. O'Sullivan would have prepared and Mr. Madden would have approved the terms of the proposal to the Credit Committee.

32. Surprisingly, neither Mr. Madden nor Mr. O'Sullivan was able to recall, when giving evidence, when or by whom a decision was taken, contrary to the express 50% recourse stated in the Heads of Terms, that approval would now be sought from the Credit Committee on the basis of a full joint and several recourse to the parties.

33. Mr. O'Sullivan's evidence was that he never told Mr. Galvin that there was a change in the 50% recourse specified in the Heads of Terms. There was no evidence that any person on behalf of AIB informed the Galvin Brothers prior to the issue of the draft letters of sanction that AIB was not prepared to make facilities available for the Coolegrean joint venture on the basis of 50% recourse to each of the two parties to the joint venture. No person on behalf of AIB informed the Galvin Brothers that the facilities now being offered were not those envisaged by the Heads of Terms, or that there was any fundamental change in the nature of the facilities, or that that there was any increased risk to AIB. The discussions which took place between January and March 2007, I find, were a continuation of the discussions which had commenced prior to and incorporated the Heads of Terms. At all material times, Mr. Galvin, and through him, the other two Galvin Brothers and GDK, understood and believed that the facilities being offered by AIB were in accordance with the 50% recourse indicated in the Heads of Terms.

34. The evidence is that AIB at this time was keen to provide the facilities in relation to the Coolegrean joint venture. Further, that it was aware that the Galvin Brothers had significant facilities from Bank of Ireland. I also find on the evidence that if in the period between January and March 2007 AIB had informed the Galvins that it was not willing to make the facilities available with recourse to each of the joint venture parties limited to 50% of the drawn debt that the Galvins would have sought the facilities elsewhere.

35. In accordance with standard practice, draft letters of sanction were furnished to Mr. Jeremiah Galvin in respect of the proposed facilities for GDK and Mowlam and in respect of the proposed facilities for the Galvin Brothers and Mr. Shee and Mr. Hanrahan in connection with the Coolegrean project. The purpose of issuing draft letters of sanction is to enable the borrowers raise any issues on the proposed terms. There was a discussion subsequently between Mr. O'Sullivan and Mr. Galvin in which a number of issues were raised. Surprisingly, there is no evidence that any issue was raised by either person in relation to the nature of the recourse of AIB to GDK and the Galvin Brothers. In relation to the form of guarantees sought from the Galvin Brothers, the only related issue raised concerned the provision by the Galvin Brothers of "independent tangible security to a minimum value of EUR3m". This was sought in the draft letters in support of a guarantee from the Galvin Brothers sought in the letter sanctioning facilities to GDK and Mowlam, and as security in the letter of sanction in relation to the facilities to the Galvin Brothers and Mr. Shee and Mr. Hanrahan. AIB, by this term, were seeking security over the Galvin Brothers' interest in a shopping centre. Mr. Galvin sought to introduce in its place cash of €2.6 million. This was subsequently agreed to. Whilst the final letters of loan sanction issued on 28th March, 2007, continued to refer to the "independent tangible security of EUR3m", a side letter was written on the same day by Mr. O'Sullivan confirming that, "the bank is agreeable to accepting EUR2,600,000 cash input into the purchase of Phase II in lieu of the provision of security valued at EUR3m".

36. Two letters of sanction were issued dated 28th March, 2007, in relation to the Coolegrean project. Each of these commenced with the words:

"The Bank is pleased to offer you the facilities below subject to the terms and conditions set out in this letter and subject also to the Bank's General Terms and Conditions Governing Business Lending a current copy of which is enclosed. **These are legal documents and should be read very carefully**."

The evidence of Mr. Galvin was that no copy of the bank's general terms and conditions were enclosed. AIB's witnesses could not say that they were enclosed. I find that they were not enclosed.

37. In the first letter, the borrower is named as "Galvin Developments (Killarney) Limited and Mowlam Residential Care Limited." There are two separate loan accounts specified, Account 1 and Account 2 in the sums of €8.25m and €9.6 million. Repayment is specified as follows:

Loan Account 1

Full net sale proceeds from the retirement units to be lodged in reduction of the debt following the clearance of Loan Account 2. Interest to be met every six months from date of drawdown.

Loan Account 2

Full net proceeds from the Nursing Home and retirement units to be lodged in reduction of the debt. Interest may be met from within the facility sanctioned.

38. The security specified includes a collateral mortgage from St. Brendan's Trust ("the Vendor") and a first charge from GDK and Mowlam over their beneficial interest in the four-acre site at Coolegrean. This appears to have been because the development was to take place under a contract of sale to avoid a liability for Stamp Duty. Nothing turns on this. The guarantees specified as security were as follows:

"3. Joint & Several Letter of Guarantee for EUR17,930,000 from Jeremiah Galvin, Colm Galvin, Denis Galvin, John Shee and Joe Hanrahan supported by a charge over 6.45 acres of zoned residential land at Coollegrean, Killarney.

4. Joint & Several Letter of Guarantee for EUR17, 930,000 from Jeremiah Galvin, Colm Galvin, Denis Galvin supported by independent tangible security with a minimum value of EUR3m."

39. The second letter of sanction specifies as the borrower "John Shee, Joe Hanrahan, Jeremiah Galvin, Colm Galvin, Denis Galvin". Repayment specified is: "Interest to be met every six months from date of drawdown. Facility to be reviewed twelve months from date of drawdown". Security specified is a collateral mortgage from St. Brendan's Trust and First Charge from the five persons each over the 6.4 acre site, and in addition, "independent tangible security to a minimum value of EUR3m to be provided upfront". As already explained, certainly, this latter provision was agreed to be a cash provision of €2.6 million. Mr. Galvin contends that such arrangement also related to the guarantee of the company borrowings which required similar security.

40. As appears, each of the letters of sanction is silent as to an express obligation on the Borrowers named to repay the loans or pay interest or as to AIB's recourse to the persons named as borrowers, and as to the nature of the liability of such persons for the repayment of the drawn down loans. The repayment clauses do not refer to any joint and several liability on the borrowers to repay. The only reference to a joint and several liability is amongst the five named persons in respect of the guarantee of the company borrowings which is stated to be "supported by a charge over 6.45 acres".

41. Each of those letters was accepted in writing and, in the case of the companies, by resolution passed by the respective boards. No legal advice appears to have been obtained by the Galvin Brothers or GDK in connection with the acceptance of the letters of sanction.

42. On 25th April, 2007, a letter of sanction was issued to GDK in respect of ten facilities. This was, in most instances, a renewal, or possibly, extension of certain of the existing historical facilities. The only relevance to the issues which I have to determine is that as part of the security there was specified:

"Letter of guarantee for EUR19,480,000 in favour of the Bank from Jerry, Colm and Donnacha Galvin, for the obligations of Galvin Developments (Killarney) Ltd.

This guarantee is supported by and restricted to their interest in:

- 120 acre at Cappagh, Mucross, Killarney."

This was also accepted by resolution of the company.

43. During the summer of 2007, the Coolegrean facilities were drawn down. There was produced in evidence a copy of a guarantee signed by each of the Galvin Brothers on 20th July, 2007, in which, curiously, the customer guaranteed is also specified as the Galvin Brothers. In addition, they executed a letter of consent/lien/setoff on 20th July, 2007, over an account in which €2.6m was held.

44. In September 2007, there appears to have been a further review of the GDK Historical facilities and a further letter of sanction dated 3rd September, 2007, issued in respect of eleven facilities. Again, this was primarily a renewal of facilities with some additional or extension of facilities. The security specified includes, again, a letter of guarantee from the Galvin Brothers for EUR19,480,000 in favour of the bank, but on this occasion, it was stated:

"This guarantee is supported by their interest in:-

120 acre at Cappagh, Muckross, Killarney."

The facility letter was accepted by resolution of the company in this form.

45. A further review of the Historical facilities appears to have occurred in February 2008. A letter of sanction of 5th February, 2008, issued, on this occasion with twelve facilities, and the requirement in relation to the letter of guarantee of EUR19,480,000 reverted to the stipulation "this guarantee is supported and restricted to their interest in: . ." This form of stipulation followed a negotiation between Mr. Galvin and Mr. O'Sullivan on the issue of the letter. The GDK resolution accepting the offer of facilities in the letter of sanction dated 5th February, 2008, contains an express reference to the amended provision in relation to the guarantee to be provided by the Galvin Brothers.

46. There were produced in evidence eighteen letters of sanction from AIB to GDK in respect of historical facilities. Each of these

required as security a letter of guarantee from the Galvin Brothers. All provided that the guarantee was either "supported by" or "supported by and restricted to their interest in" specified property. Since 2005, the property had been the 120 acres at Cappagh. For the most part, the guarantees were expressed to be "supported by and restricted to their interest in . . ." This appears to have been the consistent position since 2005. In the earlier period, there were examples where the guarantee was only supported by a charge over specified property. The evidence of Mr. Madden, which I accept, is that he had discussions with Mr. Galvin in approximately 2003, in which he explained in some detail the difference between a guarantee which was simply supported by a charge over or their interest in specified property and one which was supported by but also restricted to their interest in the property. As explained this latter guarantee does not appear intended as a personal liability except in relation to their personal interest in the lands. I am satisfied Mr. Galvin understood this distinction. Further, insofar as there were occasions upon which guarantees were sought from the Galvin Brothers which were not restricted to their interest in the lands at Cappagh, there was previously a particular reason given for which AIB required, at the relevant time, an unrestricted guarantee. It was commoncase that this occurred during a development loan for what was referred as the Tesco development in Killarney.

47. Mr. Galvin gave evidence that on some unspecified date, Mr. Conor O'Sullivan informed him that he had been told by the AIB Security Division that in relation to the Guarantees, the wording "supported by" meant, essentially, the same thing as "supported by and restricted to their interest in . . ." Mr. O'Mahony gave evidence that whilst in a car with Mr. Galvin, he had overheard such a conversation. Nevertheless, Mr. O'Mahony was doubtful as to the accuracy of the view being expressed by Mr. O'Sullivan. I find that, such a conversation overheard by Mr. O'Mahony did occur in the autumn of 2007, probably after the letter of sanction of 3rd September, 2007 of historical facilities , which only contained the phrase "supported by" and did not specify that the guarantee was restricted the Galvin Brothers' interest in the lands at Cappagh. However, I have also concluded that Mr. Galvin, sensibly, did not continue to rely on this explanation and, in February 2008, expressly sought the reinstatement of the provision in the letter of sanction of 5th February, 2008, that the guarantee was also to be restricted to their interest in the lands at Cappagh.

48. Insofar as it is relevant to the issues which I have to determine in relation to the facilities sanctioned in September 2008, I have concluded that Mr. Galvin, subsequent to February 2008, continued to be aware of the potential distinction between a guarantee which was simply supported by an interest in lands and one which was both supported by and restricted to the Galvin Brothers' interest in lands.

49. There is one further unusual and important feature of the security taken over many years by AIB from the Galvin Brothers. It appears that the practice was to ask the Galvin Brothers to personally sign guarantees, which, on their face, were unrestricted, save in relation to the amount, notwithstanding that the relevant letter of sanction from AIB to GDK might have specified that the guarantee was to be restricted to their interest in lands. Accordingly, insofar as the Galvin Brothers signed letters of guarantee which, on their face, imposed a personal liability up to say €19,480,000, by agreement with AIB, South Mall they simply relied upon the provisions of the letter of sanction to GDK to restrict AIB's entitlement to pursue them personally, other than in relation to their interest in the specified lands.

50. In the summer of 2008, the evidence is that cashflow became difficult for GDK and the Galvin Brothers in relation to the Coolegrean project and other projects. They were in discussion with AIB in relation to the extension of certain facilities. By this time, Mr. O'Sullivan had left AIB and he had been replaced by Mr. Colm Spillane as the relationship manager with GDK and the Galvin Brothers. Close contact between Mr. Galvin and Mr. Spillane continued through the summer of 2008. Work continued on the nursing home and retirement units. Between March and August 2008, confirmation was received by AIB that First Capital had executed contracts to purchase a total of thirty retirement units (in trust). Drawdown of the development facilities sanctioned in the letter of 28th March, 2007, to GDK and Mowlam continued against the architect's/engineer's certificates.

51. In September 2008, additional development funding was sought for GDK and Mowlam and sanctioned by the Credit Committee of AIB. Mr. Spillane had responsibility for preparing the letters of sanction. The evidence of Mr. Spillane is that in the initial draft of the letter of sanction for the facilities to GDK and Mowlam, he specified a guarantee from the Galvin Brothers for the obligations of GDK and a separate guarantee from Mr. Shee and Mr. Hanrahan for the obligations of Mowlam. However, on the instructions of Mr. Madden, he changed this provision in the draft letter of sanction issued to provide for a single guarantee from all five individuals for the obligations of GDK and Mowlam. There is agreement between the parties that upon receipt of the draft letter of sanction in this form, Mr. Galvin immediately objected to Mr. Spillane. There is disagreement as to the basis and nature of the objection. Mr. Galvin's evidence was to the effect that he objected and emphasised to Mr. Spillane that the Galvin Brothers would not provide a guarantee to cover the obligations of Mowlam, since, as co-owners, they had only agreed to give personal guarantees for the obligation of GDK. Further, that any guarantee was to be restricted to the Galvin Brothers' interest in the lands at Cappagh. He gave evidence that his belief at the time was that AIB was attempting to fix the Galvin Brothers with liability for Mowlam, contrary to what he understood to be the continuing application of the 50% recourse to the respective parties to the joint venture agreed in the Heads of Terms applicable to the earlier loan sanction. Mr. Spillane's evidence was to the effect that he understood Mr. Galvin to be concerned that the Galvin Brothers might, in giving such a guarantee, become liable for obligations of Mowlam extraneous to the Coolegrean project. I find, insofar as Mr. Spillane may have so understood the objection, it was a misunderstanding. Mr. Galvin's evidence is clear and consistent that throughout the entire period, he believed that GDK and the Galvin Brothers were only liable for 50% of the draw down debt. I have concluded, as a matter of probability, as far as Mr. Galvin was concerned, that was the basis of the objection made. The draft letter of sanction referred expressly to guarantees "in respect of Loan Accounts 1 and 2 above" and, hence, could not have included other liabilities of Mowlam. Mr. Spillane had not been involved at the time of the Heads of Terms in December 2006, and he states that he was not aware, in September 2006, of the limited recourse specified in the Heads of Terms. This may have given rise to a misunderstanding on his part.

52. AIB subsequently agreed to alter the guarantee requirements in the letter of sanction so as to seek a guarantee from each of the Galvin Brothers for the liabilities of GDK and each of Mr. Shee and Mr. Hanrahan for the liabilities of Mowlam in the final form of the letter of sanction. Mr. Spillane's evidence was that he considered this change to be one of form and not substance. Whatever of Mr. Spillane, the letter of sanction was also issued in the name of Mr. Madden. He was, of course, aware of the limited recourse originally sought and specified in the Heads of Terms. He had also directed the initial change to the September 2008 draft letter of sanction so as to expressly specify that the guarantee was to be of the liabilities of both GDK and Mowlam. The 2007 letter of sanction, as appears from above, had been silent as to the obligations guaranteed. I have concluded that as a matter of probability, in September 2008, Mr. Madden was aware that there may have been a lack of clarity as to the potential liability of GDK and the Galvin Brothers for 100% or only 50% of the drawn debts in relation to the Coolegrean project.

53. I also find that, as a matter of probability, there was no discussion of or oral agreement reached between Mr. Spillane and Mr. Galvin that the Galvin Brothers guarantees of the GDK Coolegrean loan was to be restricted to the lands at Cappagh. This is a distinct factual issue. Mr. Spillane did not include any reference in the revised letter following his conversation with Mr Galvin to the lands at Cappagh in relation to each of the Galvin Brothers' guarantees of the obligations of GDK. I find that Mr. Galvin is incorrect in his memory that this issue was discussed with Mr Spillane.

54. The facts surrounding the signing of the letters of sanction and guarantees in September 2008 demonstrate a regrettable casualness of AIB, GDK and the Galvin Brothers in relation to the execution of documents. It is agreed that the letters of sanction and guarantees were sent by AIB in one envelope to the Galvin Brothers' office in Killarney. They were either sent directly from AIB South Mall in Cork or via the Killarney branch office. Nothing turns on this. It is also agreed that there were two covering letters. All of the documents which required signature by the Galvin Brothers, either as directors of GDK or personally, were signed in GDK's offices and Mr. Denis Galvin brought them to Mr. William Shannon, manager of the AIB Killarney branch office. Mr. Denis Galvin identified the signatures of the Galvins and Mr. Shannon witnessed those signatures. It is agreed that this was done on 10th September, 2008. Mr. Shannon then also required the Galvins to sign waivers concerning legal advice in relation to the guarantees. These were taken away by Mr. Denis Galvin, who got his brothers to sign the letters, and they were returned to Mr. Shannon. It is agreed that those letters were signed in blank by the Galvin Brothers.

55. The documents signed by the Galvin Brothers on 10th September, 2008, both personally and in their capacity as directors of GDK, are the documents under which AIB now pursues its claim against GDK and the Galvin Brothers. There were three sets of documents:

(i) Letter of sanction of Historical facilities to GDK dated 4th September, 2008, and three guarantees signed by each of the Galvin Brothers of GDK's liabilities for those facilities.

(ii) Letter of sanction dated 4th September, 2008, for Coolegrean facilities to GDK and Mowlam and three guarantees signed by the Galvin Brothers.

(iii) Letter of sanction to the Galvin Brothers and Mr. Shee and Mr. Hanrahan in relation to Coolegrean facilities dated 4th September, 2008.

56. The first set of documents relating to the Historical facilities were accompanied by a covering letter dated 5th September, 2008, from Mr. Spillane addressed to the three brothers in relation to the guarantees sought from them. Included in the instructions in relation to the execution of the guarantee, it was stated, "your guarantee is to be secured and restricted to your interest in the following item of security: legal charge over 120 acres at Cappagh, Muckross, Killarney, County Kerry".

57. The second set of documents relating to the GDK and Mowlam Coolegrean facilities were also accompanied by a covering letter dated 5th September, 2008, from Mr. Spillane to the Galvin Brothers with instructions in relation to the execution of the guarantees. There was no similar statement of any restriction in relation to those guarantees.

58. The letter of sanction in relation to the GDK Historical facilities, which included as a new facility €2m towards the development of the nursing home and retirement units at Coolegrean, specified under the heading of 'Security' at No. 6:

"Letter of guarantee to be signed for EUR19,480,000 in favour of the Bank by Jerry, Colm and Donnacha Galvin, for the obligations of Galvin Developments (Killarney) Ltd.

This guarantee is supported and restricted to their interest in:

- 120 acres at Cappagh, Muckross, Killarney."

Notwithstanding the express restriction indicated in the letter of sanction, the form of guarantee which the Galvin Brothers each signed was, on its face, a full personal guarantee limited only in the amount of €19,480,000. It is not in dispute that AIB may only rely upon and pursue the Galvin Brothers pursuant to such guarantees in relation to their interest in the lands at Cappagh. The evidence given on behalf of AIB indicates such practice by AIB at its South Mall branch was not acceptable to the Central Security Division of AIB. Mr. Spillane, in evidence, explained the existence amongst the papers of a different version of the letter dated 5th September, 2008, to the Galvin Brothers in relation to the execution of these guarantees (without the express reference to the restriction of the guarantees to the lands at Cappagh) as being a purported (but incorrect) copy sent to the Central Security Division as they would not accept a restriction only in a letter of loan sanction, but would have required a special form of guarantee. This appears to have been the consistent practice between AIB, South Mall, and the Galvin Brothers in relation to the Historical facilities where the guarantees sought and obtained were restricted to the Galvin Brothers' interest in the lands at Cappagh. It demonstrates the willingness and a practice of the parties to execute and accept documents, the Guarantees, which were not intended to be relied upon in accordance with their express terms having regard to other terms implicitly agreed i.e. the restricted nature of the guarantee as stipulated in the letter of sanction to a different person *i.e.* GDK..

59. The letter of sanction of 4th September, 2008, of the Coolegrean facilities to GDK and Mowlam, specifies as security it Items 3, 4 and 5:

"3. Letter of Guarantee for EUR21, 750,000 to be signed by Jeremiah Galvin in favour of the Bank for the obligations of Galvin Developments (Killarney) Limited in respect of Loan Accounts 1 and 2 above.

4. Letter of Guarantee for EUR21, 750,000 to be signed by Colm Galvin in favour of the Bank for the obligations of Galvin Developments (Killarney) Limited in respect of Loan Accounts 1 and 2 above.

5. Letter of Guarantee for EUR21, 750,000 to be signed by Donnacha Galvin in favour of the Bank for the obligations of Galvin Developments (Killarney) Limited in respect of Loan Accounts 1 and 2 above."

As appears, there was no reference to the lands in Cappagh, either as support for or as a restriction to the Guarantees. Loan Accounts 1 and 2 above were respectively EUR8,433.708 representing the then drawn down balance used in the purchase of the four acres of the land at Coolegrean, and EUR13,500,000 towards the development of the nursing home and retirement units. Of this, EUR9, 600 had previously been drawn down under the facility of 2007. This addition of €3.9m was the new element in the facility in September 2008.

60. The three guarantees executed by the Galvin Brothers, as sought in the Coolegrean letter of loan sanction, are in similar form to the first set of guarantees in terms of the substantive clauses and unrestricted except as to the amount. Likewise, notwithstanding that it is agreed that they were executed and returned to Mr. Shannon at the Killarney Branch of AIB on 10th September, 2008, they are also dated 12th September, 2008. Further, in this instance, the names of the borrowers inserted are "Galvin Developments (Killarney) Limited and Mowlam Residential Care Limited". Each guarantee is expressed to be a guarantee of the liabilities of the 'Borrower' as defined. AIB now accept that in accordance with the letter of sanction, the guarantees were only intended to be a guarantee of the liabilities of GDK and not of Mowlam. I have concluded that as a matter of probability, the details in the Schedule to

the guarantees, including the date, were inserted after their execution by the Galvin Brothers on 10th September, 2008. The Galvin Brothers probably executed guarantees with the relevant details including identity of the borrower and limitation of amount in blank and AIB completed the details after execution of the documents.

61. The Galvin Brothers assert that the relevant agreement in September 2008 was to provide a guarantee of the liabilities of GDK in respect of the Coolegrean facilities restricted to their interest in the lands at Cappagh. I find no factual basis for such an assertion. The Galvin Brothers each signed an unrestricted guarantee with, as a matter of probability, the relevant Schedule details blank. Nothing turns on this fact by reason of the now agreement of AIB not to rely upon them as a guarantor of the liabilities of Mowlam whose name was incorrectly inserted. I am satisfied that there was a practice in relation to facilities to GDK of requiring the Galvin Brothers to sign a guarantee which, on its face, was unrestricted and for AIB to agree by the terms of the letter of sanction that the guarantee should be treated as restricted. However the letter of sanction signed and accepted on 10th September, 2008, by the Galvin Brothers, albeit in their capacity as directors of GDK in respect of the loan facilities to GDK and Mowlam for the Coolegrean project, does not contain any wording of restriction of the required personal guarantees. Much emphasis was placed in evidence upon the earlier representations allegedly made by Mr O'Sullivan as to the similarity of the words "supported by" and "supported by and restricted to" in relation to the lands at Cappagh. In the letter of sanction of 4th September, 2008, there is no reference to the three guarantees from the Galvin Brothers being supported by the lands at Cappagh. Mr. Galvin, in evidence, and supported by the evidence of his brothers, also sought to rely upon the covering letter attached to the letter of sanction in respect of the GDK Historical loans which, it was stated, was the first in the bundle and which they understood as referring to all the guarantees which they were to give. That evidence even if I were to accept it is of no assistance to the Galvin Brothers. On 10th September, 2008, the Galvin Brothers signed and accepted two separate letters of loan sanction in relation to facilities to GDK, the Historical facilities and the Coolegrean facilities. Even a cursory glance at the security provisions in each of the letters of sanction would have made absolutely clear that the guarantees sought in respect of the Historical facilities were restricted to the lands at Cappagh and that there was no similar restriction in the guarantees sought in respect of the Coolegrean facilities. The established practice was to stipulate the restriction in the letter of sanction and not a side letter.

62. Accordingly, I find as a fact that the guarantee given by each of the Galvin Brothers on 10th September, 2008, (albeit dated 12th September, 2008) is a personal guarantee of the liability of GDK (and not also of Mowlam as stated therein) restricted only in amount to €21,750,000.

63. At the time of the renewal of the existing facilities and the grant of certain new facilities in September 2008, there was already in place a signed contract for the purchase of the nursing home. In addition, First Capital had agreed to purchase in trust thirty retirement units. The additional funding was for the purpose of completing that part of the development. The development appears to have run into significant difficulties by the end of 2008. First Capital was unable to complete the purchase of the thirty retirement units. GDK was under financial pressure in seeking to complete the development work. A series of meetings were held between Mr. Madden, Mr. Galvin and others towards the end of 2008 and early 2009. Some small additional finance was granted at the end of 2008.

64. In February 2009, Mr. Galvin's evidence is that he was shocked to learn that Mr. Madden considered that GDK and the Galvin Brothers were liable for 100% of the drawn down debt in respect of the Coolegrean project. Further, that Mr. Madden considered that AIB held unrestricted guarantees from the Galvin Brothers for the facilities to the Coolegrean project. Mr. Galvin at all times maintained that GDK and the Galvin Brothers were only liable for 50% of the drawn down debt and that all guarantees given by the Galvin Brothers were restricted to the lands at Cappagh. His evidence is that Mr. Madden told him that that "was not what the paperwork said". I find that such a conversation did take place and Mr. Madden did so state.

65. Shortly thereafter, Mr. Madden, at the request of Mr. Galvin, wrote to him setting out what AIB perceived the obligations of GDK and the Galvin Brothers to be. In his letter of 4th March, 2009, Mr. Madden stated, "we have checked our records and enclose copies of letters of relevant offer herewith". He then set out AIB's understanding of the position and insofar as it relates recourse and the personal guarantees at issue, he stated:

"In relation to Galvin Developments (Killarney) Ltd as per letter of offer dated 04/09/2008 (attached) the Bank has recourse to Jerry, Colm and Donnacha Galvin for €19.48m via personal guarantees however this recourse is restricted to your interest in 120 acres at Cappagh, Muckross, Killarney.

In relation to Galvin Developments (Killarney) Limited and Mowlam Residential Care Limited as per letter of offer dated 04/09/2008 and previous letter of offer dated 28/03/2007 the Bank has full recourse to Jerry, Colm & Donnacha Galvin and to Joseph Hanrahan and John Shee for €21.75m each via personal guarantees. This recourse is not restricted.

In relation to Jerry, Colm & Donnacha Galvin, Joe Hanrahan and John Shee as per letter of offer dated 04/09/2008 and previous letter of offer dated 28/03/2007 as these facilities are in personal names the Bank has full personal recourse to all 5 borrowers on a joint and several basis."

66. There is no dispute about the first set of guarantees is restricted to the Galvin Brothers interest in the lands at Cappagh.

67. It is now agreed by AIB that the copy of the letter of offer dated 4th September, 2008, purporting to have been accepted and signed by the Galvin Brothers enclosed with the letter of 4th March 2009, is not, in fact, the letter of offer which they did sign on 10th September, 2008. The version enclosed with Mr. Madden's letter referred under security to guarantees from each of the Galvin Brothers, "for the obligations of Galvin Developments (Killarney) Limited. and Mowlam Residential Care Limited.". Much emphasis was placed by Mr. Galvin on the distress which this caused to him and his brothers as they did not believe that they had signed a letter of sanction to that effect. Further, that AIB continued to assert that they had accepted such a letter, even in the affidavits sworn at the commencement of these proceedings.

68. Whilst it is understandable that the Galvin Brothers should feel very aggrieved that AIB stated that they had signed a form of letter of sanction which, in fact, they had not signed, and purported to provide a copy of such a signed letter, save in relation to credibility, and indicative of a casual approach by AIB to the treatment of executed documents it is not now relevant to the matters at issue in the proceedings. There is no clear explanation of how AIB, in March 2009 and thereafter, had on its records a form of letter of sanction with an acceptance page purporting to have been signed by the Galvin Brothers when it is now agreed that the version they signed is different.

69. In January 2009, the sale of the nursing home was completed and approximately €5.9m applied in reduction of loan No. 2 under the facilities to GDK and Mowlam.

70. Throughout 2009, there were further meetings between AIB and the Galvin Brothers, a representative of the Mercy Order and other relevant persons in relation to the Coolegrean project. Relations between the Galvin Brothers and the Mowlam representatives deteriorated in this period.

71. In March 2009, AIB determined it would not be in a position to fund the purchase of the final 6.45 acres contracted for by the joint venture.

72. Various proposals were put as to the basis upon which AIB would provide some continued funding throughout 2009. No agreement was reached between AIB and GDK and the Galvin Brothers.

73. In January 2010, AIB sought a decision from the Galvin Brothers in relation to the provision of additional security requested for the purpose of providing continuing facilities. No agreement was reached.

74. On 15th February, 2010, a lien over a €2.6m deposit in the names of the Galvin Brothers was set off by AIB in reduction of the liabilities pursuant to the facilities to the Galvin Brothers and Mr. Shee and Mr. Hanrahan in connection with the purchase of the 6.45 acres.

75. On 18th February, 2010, AIB made a decision to call in the borrowings. The first letter of demand was made on GDK on 19th March, 2010. Thereafter, a series of letters of demand were issued. They are all in similar form and refer to an amount for principal and interest owing at the relevant date and then make a demand for immediate payment. Letters of demand were also issued under the guarantees, including the guarantees which are agreed to be restricted to the Galvin Brothers' interest in the lands at Cappagh.

AIB's Entitlement to Demand Repayment in March 2010

76. AIB relies upon its General Terms and Conditions Governing Business Lending in support of its entitlement, in March 2010, to demand repayment of both capital and interest then due on the various facilities advanced to GDK and the Galvin Brothers in the three facility letters of 4th September, 2008. The first issue is whether or not those General Terms and Conditions form part of the agreement under which the facilities were renewed or made available in September 2008.

77. Each of the three letters of sanction commence with the words:

"The Bank is pleased to offer you the facilities below subject to the terms and conditions set out in this letter and subject, also, to the Bank's General Terms and Conditions Governing Business Lending, a current copy of which is enclosed. These are legal documents and should be read very carefully."

78. I found, as a fact, that the copy of the bank's General Terms and Conditions Governing Business Lending was not enclosed with each of the letters as indicated. Nevertheless, there is an express and clear reference to the incorporation of those terms in the offer made by AIB to GDK and the Galvin Brothers which was accepted by each in writing. GDK and the Galvin Brothers could have sought a copy of the Terms if they so wished. They did not do so.

79. It is a well-established principle of contract law that terms may be incorporated into a written agreement signed by the parties by express reference. The failure to enclose a copy of the conditions does not preclude their incorporation by express reference. See, *inter alia, Sweeney v. Mulcahy* [1993] ILRM 289, and *Leo Laboratories Ltd. v. Crompton B.V.* [2005] 2 I.R. 225. In my judgment, the agreement between AIB and GDK and the Galvin Brothers, respectively, in September 2008, in relation to all the facilities the subject matter of these proceedings, included, by express reference, AIB's General Terms and Conditions Governing Business Lending.

80. AIB produced, in evidence, its General Terms and Conditions Governing Business Lending of June 2008, as the applicable General Terms to the September 2008 agreements. These are the terms which, in my judgment, are included in and form part of the September 2008 agreements between AIB, GDK and the Galvin Brothers. The scheme of the General Terms is, after an Introduction and Interpretation section, it refers specifically to the overdrafts, loan accounts, terms loan accounts, interest and forward foreign exchange facilities and then has certain general provisions. Many of the facilities to GDK and the Galvin Brothers were described as loan accounts in the letters of sanction. I propose firstly considering entitlement of AIB to demand repayment of the loan accounts in March 2010.

81. The General Terms and Conditions, at para. 3.1, provide:

"Repayable on Demand

3.1.1 Loan account facilities are repayable on demand. However, in normal circumstances, the Bank expects that the loan will be available as stated in the letter of sanction.

3.1.2 Without prejudice to the Bank's right to demand repayment at any time, the happening of any of the events set out in clause 4.2 may lead to the Bank making demand for payment, with or without notice to the Borrower."

82. Clause 4.2, insofar as relevant, provides:

"Events of Default

4.2 A term loan though expressed to be repayable over or within a specified period may be terminated by the Bank and the Bank may demand early repayment at any time with or without notice to the Borrower upon the occurrence of any of the following events:

(i) On the failure by the Borrower to make any repayment of principal or interest on the date is it is due."

83. AIB seeks to rely upon the above provisions in two ways. Firstly, it submits that, notwithstanding the repayment terms in the letters of sanction, the loan account facilities were repayable on demand. Secondly, it contends, in the alternative, that by March 2010, there was, in respect of each the facilities, a failure to pay interest on the due date, and hence, an entitlement to demand repayment pursuant to clauses 3.1.2 and 4.2(i).

84. GDK and the Galvin Brothers submit that the letters of sanction contained express repayment terms which conflict with the general provisions in clause 3.1.1 and clause 3.1.2 and in reliance on clause 1.1.2 of the General Terms, the provision in the letters of sanction apply. Clause 1.1.2 provides:

"1.1.2 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."

85. In the letters of sanction of September 2008 in respect of each facility, there is a heading 'Repayment' and differing provisions as to the repayment of both the capital and interest and normally provision for review or refinance by a specified date. Construing those provisions objectively in accordance with the principles set out by the Supreme Court in *Analog Devices B.V. v. Zurich Insurance* [2005] 1 I.R. 274, in the relevant factual matrix and having regard, in particular, to the purpose of the individual loans expressed in the letters of sanction, in my judgment, there was express agreement by AIB on repayment terms which did not include the loans being repayable on demand by AIB. Those express repayment provisions are in conflict with clause 3.1.1 of the General Terms insofar as they provide that loan account facilities are repayable on demand. Accordingly, in my judgment, clause 3.1.1 of the General Terms did not apply to the facilities, including the loan accounts the subject matter of the letters of sanction of 4th September, 2008. By reason of my next conclusion, it is unnecessary for me to consider the effect of the failure by AIB and GDK and the Galvin Brothers to reach agreement following review of the facilities after the specified dates in the letters of sanction.

86. The letters of sanction are silent as to what is to occur in the event that GDK or the Galvin Brothers are in default in making the interest payments stipulated for the individual loans and other facilities. As the letters of sanction contain no express provision as to what is to occur in the event that the borrower defaults, it appears to me that the General Terms in clause 3.1.2 and clause 4.2 (i) apply. Thus, insofar as there had been a failure by GDK or the Galvin Brothers to pay interest on the date it was due in respect of each or any of the facilities prior to the date of demand, it appears to me that AIB was entitled to demand repayment of both the capital and interest then due.

87. It is not in dispute that on the dates of demand that GDK and the Galvin Brothers were in default in respect of interest payments on the Loan Accounts in the various facilities.

88. In my judgment, it follows from the above that AIB was entitled to demand repayment of Loan Accounts 1 and 2 referred to in the letter of sanction of 4th September, 2008, to GDK and Mowlam; the loan account referred to in the letter of sanction of 4th September, 2008, to the Galvin Brothers and Mr. Shee and Mr. Hanrahan, and facilities 1-9 inclusive in the letter of sanction of 4th September, 2008, in relation to the historical liabilities of GDK. The remaining four facilities to GDK in the letter of 4th September, 2008, were development bonds in favour of Kerry County Council. The evidence was that two of these were no longer in existence, one released and one paid by the bank. Insofar as there are two further development bonds which may still be in existence, it is unclear to me at this stage whether AIB seeks any relief in respect of same or what is the basis for such relief in accordance with the General Terms and Conditions. They are very small matters in the context of the overall claims and I will allow the parties further address this, if necessary.

89. A separate submission was made in relation to the ability of AIB to demand repayment in respect of a loan of €350,000 to the Galvin Brothers made pursuant to a letter of sanction of 19th June, 2008. Its purpose was funding towards the purchase of a 7% shareholding in the Dolce Hotel at Fregate, Provence, France. The repayment provision stated, "review/refinance by 31/10/2008 in the interim interest to be provided for as it falls due". For the reasons already explained, it appears to me that AIB was entitled to demand repayment of this loan in the event of interest being due and unpaid. The apparently undisputed evidence is that at the date of demand on 19th March, 2010, there was accrued interest of €39.55. No evidence was offered on behalf of the Galvin Brothers that they had continued to pay interest as it fell due on that loan account. On the statement of balances as at 8th March, 2011, handed into court, the total amount outstanding is stated to be €355,656.62 which includes further interest accrued and alleged to be unpaid since March 2010. Hence, there does not appear to be a basis for distinguishing the entitlement of AIB to demand repayment of this loan by reason of due and unpaid interest.

Surcharge

90. AIB charged a "surcharge interest" to four accounts. This was principally done in relation to the overdraft facility of GDK. This is facility No. 1 in the Historical facilities renewed in the letter of sanction of 4th September, 2008. AIB claims an entitlement to impose the surcharge interest pursuant to General Terms 5.9.1-5.9.3. These clauses, it contends, permits it to do so where the balance exceeds the relevant limit. Two objections are made on behalf of GDK to AIB's entitlement to impose its surcharge interest. First, the evidence of Mr. Galvin is that at the time of the letter of sanction of 4th September, 2008 the overdraft account of GDK was already well in excess of the €1.5m sanctioned in the letter. This is not in dispute. Further, his evidence is that every cheque written on the GDK account was done with the approval of the bank. This appears to be correct in the sense that the bank met the cheques presented for payment. A further type of drawings from this account appears to have been the payment of interest due to AIB on other loan accounts. This was done by agreement.

91. The second basis of the objection is that the letter of sanction of 4th September, 2008, at a time when the overdraft facility was already in excess of the sanctioned amount expressly provided in relation to interest that it was to be charged at "prime varying, plus 1.5% per annum, currently 6.5% per annum". Where, as on the facts herein, the letter of sanction contains an express provision in relation to the rate of interest payable and contains no reference to the possibility of any differing interest rate being applicable in certain circumstances, it appears to me that insofar as the General Terms and Conditions contain a provision for the charging of interest at any rate other than the interest rate expressly set out in the letter of sanction, that it is in conflict with the terms of the letter of sanction and, accordingly, pursuant to clause 1.1.2 of the General Terms does not apply. Even if I were to be wrong in this, I am not satisfied on the facts that AIB have established that there were unauthorised borrowings or that the overdraft was unauthorised. Accordingly, insofar as the claims for interest include surcharge interest, AIB is not entitled to same.

100% or 50% Liability of GDK and Galvin Brothers

92. I now turn to the most difficult issue in these proceedings, namely, whether AIB is entitled to recover from GDK and the Galvin Brothers, respectively, 100% or 50% of the drawn debt, pursuant to the facilities the subject matter of the letters of sanction of 4th September, 2008, and interest thereon.

93. In summary, the findings of fact I have made in relation to the facilities advanced to GDK and Mowlam and the Galvin Brothers and Mr. Shee and Mr. Hanrahan for the Coolegrean project, insofar as they relate to AIB's right of recourse for the drawn debt are:

(i) The application for facilities in late 2006 was on the basis of a 50/50 recourse i.e. 50% to Galvin Brothers and 50% to Shee and Hanrahan.

(ii) AIB in the Heads of Terms represented an express willingness to grant facilities subject to the conditions set out on the basis of a 50% recourse to the Galvin Brothers

(iii) AIB's statement that it would restrict its recourse to 50% of the drawn debt was intended to and did procure that the Galvin Brothers continued to seek facilities for the Coolegrean project from AIB.

(iv) The discussions, which continued from January to March 2007, were a continuation of the same application for facilities for the Coolegrean project, albeit different in their detail. Whilst the revised facilities discussed included loans to the companies GDK and Mowlam, no person on behalf of AIB indicated that there was any difference in the risk profile of the borrowers, or that this was a new proposal materially different from that the subject of the Heads of Terms.

(v) No person on behalf of AIB informed the Galvin Brothers orally or in writing, that AIB was unwilling to grant facilities on the basis of a 50% recourse prior to the issue of the letters of sanction in March 2007.

(vi) There was no new oral agreement on 50% recourse made on behalf of AIB subsequent to the issue of Heads of Terms.

(vii) No application was made on behalf of the Galvin Brothers for facilities for the Coolegrean project on the basis of a 100% recourse.

(viii) The discussions at the meeting on 14th February, 2007, between AIB and Mr. Galvin were consistent with a 50% recourse.

(ix) If the Galvin Brothers had been informed prior to acceptance of letters of sanction that AIB was unwilling to restrict its recourse to them and GDK to 50% of the drawn debt, they would have sought the facilities elsewhere. AIB were keen to provide facilities for the Coolegrean project and were aware that GDK or the Galvins had significant borrowings from Bank of Ireland from another project.

(x) The Galvin Brothers believed at the time of acceptance of the letters of sanction of March 2007, personally and as directors of GDK that AIB's agreement to restrict recourse to 50% of the drawn debt continued and applied.

(xi) No person on behalf of AIB informed the Galvin Brothers between March 2007 and September 2008 that AIB intended to or considered itself entitled to 100% recourse to GDK and the Galvin Brothers for the drawn debt.

(xii) In September 2008, prior to acceptance of the letters of sanction, AIB agreed to delete a security requirement that the Galvin Brothers give a guarantee for the liabilities of Mowlam.

(xiii) There was an established practice of AIB, at its South Mall branch prior to 2007, of requiring the Galvin Brothers to execute unrestricted guarantees of the liabilities of GDK (except as to amount) and agreeing in a letter of sanction to GDK to restrict AIB's recourse under the guarantees to the Galvin Brothers' interest in specified lands.

(xiv) AIB's 'General Terms and Conditions Governing Business Lending' referred to in each of the letters of sanctions were not enclosed with any letter of sanction in March 2007 or September 2008, nor was any term thereof brought to the attention of GDK or the Galvin Brothers.

94. AIB contends that the agreements between the parties exclusively comprise the relevant letter of sanction of 4th September, 2008, and the General Terms and Conditions governing business lending. It submits that they are commercial agreements made for commercial purposes between businessmen. As such, they must be construed by the court objectively in accordance with the applicable general principles of interpretation. The Supreme Court in *Analog Devices B.V. v. Zurich Insurance Company* [2005] 1 I.R. 274, set out the current approach of the Common Law courts where Geoghegan J. at p. 280, cited with approval, the approach of the House of Lords:

"In modern times, these principles have received further expansion from the House of Lords. Lord Hoffman in I.C.S. v. West Bromwich B.S. [1998] 1 W.L.R. 896 considered that quite a radical change had come about, the result of which, 'subject to one important exception', was to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. He then set out the modern principles at p. 912 as he saw them and which I would accept:-

'(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 next mentioned, 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 grammar; 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 meaning 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 Ltd. v. Eagle Star Ass. Co. Ltd*. [1997] A.C. 749.

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense 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 *Antaios Compania S.A. v. Salen A.B*. [1985] A.C. 191, 201:

'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'."

95. Applying the above principles, AIB submits that the letters of sanction must be construed objectively as making GDK and the Galvin Brothers, respectively, liable for 100% of the drawn debt on a joint and several basis with Mowlam and Mr. Shee and Mr. Hanrahan, respectively.

96. GDK and the Galvin Brothers submit that AIB has only recourse to them for 50% of the drawn debt. They do so on three different bases:

(i) The letters of sanction of 4th September, 2008, and the General Terms and Conditions governing business lending are not the full or exhaustive agreed terms applicable to the borrowing. They submit that the agreed terms include an oral agreement that AIB's recourse is limited to 50% of the drawn debt. They also submit that the agreement to limit recourse to 50% of the drawn debt as set out in the Heads of Terms, may be considered to be a collateral contract and, in accordance with the applicable principles, form part of the agreement in relation to facilities the subject matter of the letters of sanction of September 2008.

(ii) Alternatively, on a proper application of the construction principles in *Analog Devices B.V.,* the letters of sanction should be construed as only imposing a liability on GDK or the Galvin Brothers for 50% of the drawn debt.

(iii) Thirdly, they submit, if necessary, that they are entitled to an order for rectification of the agreements between the parties in September 2008, to include a restriction on AIB's right of recourse to GDK and the Galvin Brothers to 50% of the drawn debt.

Collateral Contracts
97. In my judgment, GDK and the Galvin Brothers are entitled to succeed in their contention that there existed a collateral contract according to which AIB agreed to limit its right of recourse to 50% of the drawn debt. I am using 'collateral contract' in the sense explained by Cooke J., in the Supreme Court of New Zealand in *Industrial Steel Plant Ltd. v. Smith* [1980] 1 N.Z.L.R. 545, at p. 555, quoting with approval from Cheshire and Fifoot on Contracts (5th N.Z. Ed. 1979, 53-54):

"The name is not, perhaps, altogether fortunate. The word 'collateral' suggests something that stands side by side with the main contract, springing out of it and fortifying it. But, as will be seen from the examples that follow, the purpose of the device usually is to enforce a promise given prior to the main contract and but for which this main contract would not have been made. It is rather a preliminary than a collateral contract. But it would be pedantic to quarrel with the name if the invention itself is salutary and successful."

The same quotation is included in Cheshire, Fifoot & Furmston's *'Law of Contract'*, 13th Ed., at p. 66.

98. It is clear that not every statement or promise made in the course of negotiations for a contract may give rise to a finding that a collateral contract exists. To be so treated, a statement must be intended to have contractual effect, see *'Chitty on Contracts'*, 29th Ed., para. 12-004 and cases referred to therein. The finding of a collateral contract may also be guided by policy considerations. Counsel for GDK and the Galvin Brothers drew attention to the statement in McDermott *'Contract Law'* at para. 6.42:

"Whether or not a collateral contract will be found to exist is often guided by policy considerations. For example, in *Industrial Steel and Plant v. Smith*, Cooke J. stated that 'there is some room for judicial discretion here, but that is often the case with suggested collateral contracts . . .' In his seminar article on collateral contracts, Lord Wedderburn also focused on the element of judicial discretion involved in the process:

'The frequency with which such 'collateral contracts' make their appearance . . . depends upon the extent to which the courts are willing to spell them out of a situation where this is a possible, but not a necessary analysis. Their increasing tendency to favour such a view in cases where justice is promoted by so doing, gives added importance to the 'collateral contract'."

99. On the facts herein, the statement relied upon by GDK and the Galvin Brothers is that reduced to writing in the Heads of Terms in relation to recourse, to the effect that AIB would have joint and several recourse to the Galvin Brothers for 50% of the drawn debt and to Mr. Shee and Mr. Hanrahan for 50% of the drawn debt. The first question is whether or not this was a statement intended to have contractual effect. The Heads of Terms is a commercial agreement and must be construed objectively in accordance with the principles in Analog Devices B.V. . The Heads of Terms were not intended to constitute an unconditonal binding agreement between the parties to make available or take the facilities referred to therein. Neither, however, construing them in accordance with their terms in the relevant factual matrix were they intended to be devoid of contractual effect. AIB were aware at the time that the Heads of Terms were being sought for the purpose of the Galvin Brothers taking further steps to enter into a co-ownership agreement with Mr. Shee and Mr. Hanrahan and for the purpose of permitting the joint venture parties enter into an agreement to purchase the lands in question. The joint venture parties needed to know that facilities would be made available. Each of those steps took place prior to the issue of letters of sanction. The final paragraph of the Heads of Terms states:

"The facilities, and Terms and Conditions attaching, as outlined in this Term Sheet, are subject to formal approval by the Bank and the issuance of a Formal Letter, including the Bank's standard Terms and Conditions, for acceptance by the Borrower."

100. The Heads of Terms, in my judgment, were a representation by AIB that subject to two conditions, it would make facilities available, on the terms and conditions indicated or any variation agreed to the five named persons as joint venturers in the Coolegrean project for purchase and development. The two conditions were formal approval by AIB and the issuance of a formal letter of sanction. The representations were intended to induce the potential borrowers to continue in negotiations with AIB to obtain the facilities referred to therein. In particular, as already stated, the proposal for funding was sought on the basis of a 50/50 recourse to the parties to the joint venture. The representation made by AIB in the Heads of Terms that it was prepared to make facilities available with a limited 50% recourse to each party to the joint venture was intended to and did induce the parties to continue in negotiations with AIB. This was known to AIB to be a fundamental term as far as the Galvin Brothers were concerned. On the evidence, I find that if AIB, in its Heads of Terms, had not represented a willingness to restrict recourse to each side of the joint venture to 50% of the drawn debt, that the Galvin Brothers, as a matter of probability, would have sought facilities for the Coolegrean project elsewhere.

101. The undisputed facts are that in the course of the negotiations between AIB and the Galvin Brothers between January and March 2007, no person on behalf of AIB informed the Galvin Brothers that AIB was unwilling to make facilities available for the purchase and development of the Coolegrean lands on the basis of a 50% recourse to the Galvin Brothers and 50% to Mr. Shee and Mr. Hanrahan (or their companies) as indicated in the Heads of Terms. In the period January to March 2007, AIB remained keen to provide facilities for the Coolegrean joint venture. Each party had a proven track record. It was also aware (as recorded in the Credit Committee minutes of 8 March 2007) that GDK and the Galvin Brothers had significant facilities from Bank of Ireland for another development.

102. AIB contends that the facilities sought changed from those in the Heads of Terms, such that it was a new proposal to which the Heads of Terms did not apply. On the facts found, this is not correct. Whilst there were changes, the negotiations were a continuation of those which commenced prior to the proposal which resulted in the Heads of Terms. On many aspects, the parties agreed to a variation of the provisions in the Heads of Terms, including the introduction of GDK and Mowlam as purchasers and developers of the nursing home and retirement units and the deferment of the purchase of part of the lands. There were other consequential variations agreed, including two separate sets of facilities, one to the companies and one to the individuals. Further, AIB considered and accepted a request for development funding as had been envisaged in the Heads of Terms.

103. The letters of sanction issued to GDK and Mowlam and the Galvin Brothers and Mr. Shee and Mr. Hanrahan in March 2007, contain no express term in relation to the right of recourse of AIB to GDK or the Galvin Brothers as borrowers for the drawn debt nor as to the liability of the named borrowers to repay the drawn debt. Firstly, in relation to the facilities granted to GDK and Mowlam in the letter of 28th March, 2007, those companies are simply named as the Borrower. In relation to repayment, it is stated in relation to Loan Account No. 1, "full net sale proceeds from the retirement units to be lodged in reduction of the debt following the clearance of Loan Account No. 2. Interest to be met every six months from date of draw down". In relation to Loan Account No. 2, it is stated, "full net sale proceeds from the nursing home and retirement units to be lodged in reduction of the debt. Interest may be met from within the facility sanctioned". In neither case is there an express reference to the persons on whom those obligations fall. Insofar as the security specifies joint and several letters of guarantees from the Galvin Brothers and Mr. Shee and Mr. Hanrahan, it does not expressly stipulate who or what is being guaranteed. The special conditions are silent in relation to recourse of AIB to the Borrowers.

104. The letter of sanction to the five individuals is similarly silent as to any express liability of the five individuals to repay or that any such obligation is on a joint and several basis or any limitation of recourse by AIB. In relation to repayment, it is stated, "interest to be met every six months from date of draw down. Facility to be reviewed twelve months from date of draw down". There is no provision in relation to capital repayment.

105. AIB relies upon clause 7.5 of the General Terms and Conditions as imposing joint and several liability. This provides:

"Each party to a facility on a joint account is jointly and severally liable to the Bank for repayment of the facility and is subject to all of the applicable terms and conditions."

This, to some extent, begs the question as to whether the facilities referred to in the letters of sanction are intended as a joint facility or on a joint account. Upon the findings already made, such term was not drawn to the attention of GDK and the Galvin Brothers, but was incorporated by reference into the agreements concluded by acceptance of the letters of sanction. It is also subject to clause 1.1.2 of the General Terms set out above and hence the absence of any conflicting specific term agreed between AIB and GDK and the Galvin Brothers.

106. I have concluded on the facts found herein that there existed a collateral contract in the sense of a prior representation by AIB intended to have contractual effect that it would limit its recourse to the Galvin Brothers (and by subsequent agreed inclusion GDK) to 50% of the drawn debt of agreed facilities , which became a binding collateral contract when those parties entered into the agreements in March 2007 in relation to the facilities referred to in the letters of loan sanction and continued to subsist when the parties entered into the further agreements in September 2008 to extend the facilities already drawn down and make certain further borrowings.

107. Important to my conclusion on the existence of the collateral contract is the undisputed practice between GDK, the Galvin Brothers and AIB at South Mall of the execution by the Galvin Brothers of personal guarantees for the liabilities of GDK unlimited except as to amount relying on a statement by AIB in the letter of sanction to GDK that AIB's recourse to the Galvin's pursuant to such guarantees was restricted to their interest in specified lands. Such contractual arrangements are unusual. They also involve an element of trust from the Galvin Brothers that AIB would not enforce the personal guarantees signed by them in accordance with their express terms. By 2007, the guarantees were given for €19,480,000, whilst the lands at Cappagh were stated to be valued at approximately €3M. The representation by AIB in the letters of sanction to GDK in relation to the historical facilities that it would restrict recourse pursuant to the personal guarantees from the Galvin brothers to their interest in the lands at Cappagh may similarly be analysed as a statement which induced the Galvin brother to give unrestricted personal guarantees and upon signature thereof became a collateral contract to the unrestricted contracts of personal guarantees from the Galvin Brothers.

108. In the course of the hearing, the dispute focused on the issue of whether the recourse was for 100% or 50% of the drawn debt. It did not appear to be in dispute that it follows from a finding of a 50% right of recourse that GDK and the Galvin Brothers also have a liability for interest on 50% of the drawn debt.

Guarantee of GDK Coolegrean Loan
109. I have already determined that the guarantee given by each of the Galvin Brothers on 10th September, 2008, (albeit dated 12th September, 2008) is a personal guarantee of the liability of GDK (and not also of Mowlam as stated therein) and not restricted to their interest in the lands at Cappagh. It follows that such guarantee is a guarantee of GDK's liability for 50% of the drawn debt and interest.

Guarantee of Historical Loan
110. It is agreed that the Galvin Brothers' liability pursuant to the guarantees executed in September 2008 of the liability of GDK for the historical loans is restricted to their interest in the lands at Cappagh. Mr. Galvin, in evidence, indicated the willingness of himself and his brothers to transfer the lands to AIB (presumably, in full and final settlement of their liabilities under those guarantees). It is not clear to me, in the context of such willingness, what relief is sought by or should be granted to AIB.

Summary of Conclusions
111. (i) AIB was entitled to demand repayment of the various facilities (other than possibly two development bonds) on the dates of the respective letters of demand.

(ii) GDK is only liable for 50% of the drawn down amount on the GDK Coolegrean loan and interest thereon.

(iii) The Galvin Brothers are only liable for 50% of the amount drawn down on the Coolegrean Loan Account No. 49879145 and interest thereon.

(iv) The Galvin Brothers guarantees of GDK's liability on the Coolegrean loan are not restricted to their interest in the lands at Cappagh. They are personal guarantees of GDK's liability for 50% of the drawn debt and interest.

(v) AIB is not entitled to recover surcharge interest applied to the four relevant accounts.

(vi) It is unclear as to the nature of the relief to which AIB is entitled in respect of the Galvin Brothers' guarantee of the GDK historical loans restricted to their interests in the lands at Cappagh.

Relief
I will give the parties an opportunity of attempting to agree the amounts now due, having regard to the findings and conclusions in this judgment; the position in relation to the development bonds and the form of relief, if any, to which AIB is entitled in respect of the Galvin Brothers' guarantees restricted to their interest in the lands at Cappagh prior to the finalisation of any Order.