Neutral Citation [2013] IEHC 208

THE HIGH COURT

COMMERCIAL

[2011 No. 1548 S]

[2011 No. 86 COM]

BETWEEN

IRISH BANK RESOLUTION CORPORATION LIMITED

(IN SPECIAL LIQUIDATION)

PLAINTIFF

AND

JOHN MORRISSEY

DEFENDANT

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 14th day of May, 2013

1. This judgment is given on issues which, by order of the High Court (Kelly J.) of 23rd January, 2012, were set down to be tried and determined in advance of the determination of any other issues in the proceedings. The two issues are:

(a) Whether the plaintiff was entitled to make demands on foot of the loan facility of February [2009] as it did; and

(b) Whether the relationship between the plaintiff and the defendant went beyond that of a contractual relationship such that a fiduciary relationship existed between the plaintiff and the defendant.

2. The proceedings in which these issues arise were commenced by summary summons dated 13th April, 2011. In the proceedings, the plaintiff, the former Anglo Irish Bank Corporation Ltd. ("the Bank") seeks judgment in the sum of €36,787,674.38 plus interest. The sums in question are the aggregate sums allegedly due and owing by the defendant ("Mr. Morrissey") to the Bank pursuant to facilities granted. The most recent facility letter which covered all the then facilities is dated 2nd February, 2009. Facilities were first granted to Mr. Morrissey by the Bank in 2000.

3. The proceedings were entered into the Commercial List by order of the Court (Kelly J.) of 23rd May, 2011. On 14th July 2011, the Bank's application for summary judgment was refused and the proceedings remitted for plenary hearing. Thereafter, pleadings, notices for particulars and replies thereto were exchanged. There were further interlocutory applications and orders and ultimately the order of 23rd January, 2012, was made for the trial of the two issues set above. That order was made pursuant to an application brought seeking such an order by the Bank. The issues identified appear to arise out of the Bank's claim and the defence pleaded thereto in Mr. Morrissey's amended defence and counterclaim delivered on 21st November, 2011.

4. The demand made by the Bank to which the first issue refers is a demand made in a letter of 19th January, 2010, insofar as relevant in the following terms:

"Dear Sir

LOAN AGREEMENT DATED 2 FEBRUARY 2009
We refer to our facility letter to you dated 2 February 2009 (the 'Facility Letter') which, as you know, has expired, and to our recent correspondence and meetings in relation thereto.

We have considered the proposals made recently on your behalf. However, we regret to inform you that the Bank is not willing to further extend your facilities.

Accordingly, we hereby make formal demand for payment and discharge forthwith of all monies and liabilities due, owing or incurred by you to us. The amount outstanding at close of business yesterday was €36,835,678.31 (being the principal sum of €36,787,674.38 together with interest of €48,003.93 accrued up to close of business yesterday).

Interest will continue to accrue at the rates specified in the Facility Letter until payment.

We further give you notice that failing payment and discharge of the above monies and liabilities to us on or before close of business on Monday, 25 January 2009, we reserve the right without further notice to exercise the power to appoint a receiver over your undertaking, property and assets, the power of sale and all other powers conferred on us by law or by any mortgage, charge or security created by you in our favour.

. . ."

5. The relevant defences pleaded in Mr. Morrissey's defence and counterclaim relevant to the issues to be determined in this module in summary are:

(i) the Bank, in making demand for repayment of all monies then due, was in breach of an express or implied term of the then contractual arrangements between the Bank and Mr. Morrissey; and

(ii) the Bank, in January 2010, was estopped from demanding, calling in or terminating Mr. Morrissey's then facilities;

(iii) the representations, warranties, conduct, advice and consulting services provided by the Bank to Mr. Morrissey since 2000 created a fiduciary relationship between the Bank and Mr. Morrissey.

Background to Issues in Dispute: 2000 to 2009

6. The relationship between the Bank and Mr. Morrissey commenced in 2000. Prior to that, Mr. Morrissey had initially qualified as an actuary, and is a Fellow of the Institute of Actuaries; worked in the insurance industry; with the Investment Bank of Ireland as an investment portfolio manager; with an actuarial consultancy firm in London and then with Guinness Peat Aviation, an aircraft leasing company. In 1994, he set up his own aircraft leasing business and ultimately sold it successfully to Royal Bank of Scotland. He then returned to study, taking an Honours Degree in Experimental Physics in Trinity College Dublin where he met a founder of HAVOK, a software company in which he became involved, provided bridging finance and restructuring assistance which ultimately resulted in its successful sale to Intel. In approximately 1997, Mr. Morrissey commenced a property business, primarily acquiring period properties in Dublin 6 which he renovated and either sold or rented. In evidence, Mr. Morrissey described himself by the year 2000 as having effectively been "a self-employed serial entrepreneur for twenty years with a mixed portfolio of activities".

7. Mr. Morrissey's introduction to the Bank in 1999 was through Ms. Catherine Mullarkey, a senior manager in the banking division who was a spouse of a former colleague in Guinness Peat Aviation. The first facility agreed was a loan of IR£3.6m to enable Mr. Morrissey purchase a commercial property at Park West Business Park, Dublin 12. The loan agreement is comprised of a facility letter of 30th August, 2000, and the General Conditions referred to therein which was accepted by Mr. Morrissey on 31st August, 2000. In accordance with clause 8, the loan was to be repaid in specified quarterly payments of differing amounts commencing on 30th September, 2002, and the full balance outstanding on the facility repaid on or before 30th September, 2015. Those repayment provisions were subject to the right of the Bank, upon the happening of one of the events of default set out in clause 9, to demand repayment.

8. Mr. Morrissey, in evidence, referred to the fact that the initial draft facility letter for the above loan furnished him in July, 2000 included a provision that it was repayable on demand. He objected to this and wrote on 17th July, 2000, insisting that the "facility should not be repayable on demand unless it is in default". Subsequently, Ms. Mullarkey sent on 20th July, 2000, a fax in which she stated "[a]s you will see, I included an event of default clause to give you the comfort you require that the loan would not be called without just cause". Mr. Morrissey, in evidence, explained that he was "acutely aware of the mismatch between a long term asset such as an aircraft or a property or so on and the type of funding that was used to finance it". He stated that it was "an absolutely critical issue to me that I understood the terms of each facility and the terms of any institution that I dealt with and I clarified such issues as and when they arose".

9. There were a series of amendments made to the terms of the facility granted pursuant to the facility letter of 30th August, 2000, between that date and 2006. In the intervening period, there were increases in the amount, variations to the interest rates, changes to the repayment instalment amounts and due dates. However, throughout the period, the facility remained on terms that it could only be demanded by the Bank upon the happening of an event of default and that the balance outstanding on the facility and all interest accrued and payable thereon was repayable on or before 30th September, 2015. It was and remained what is often called "a term loan".

10. In 2001, there was, in addition, a short term facility in a maximum amount of IR£50,000 granted upon the terms of a facility letter dated 5th March, 2001, and accepted by Mr. Morrissey on the same day. The repayment provision of that facility was in the following terms:

> "The Facility is repayable on demand which demand may be served at any time by the Bank at its sole discretion and without stating any reason for such demand. Without prejudice to the demand nature of the Facility, the Facility shall be repaid on or before 30th November 2001. In the meantime, interest is to be funded on a quarterly basis at the end of each calendar quarter."

11. In 2004, it was agreed that capital repayments on the term loan would be reduced initially to €5,000 *per* month commencing on 30th August, 2004, for eight months thereafter, and subsequently that there would be three capital repayments of €10,000 per month commencing on 31st April, 2005. Thereafter, a principal and interest repayment schedule was to be agreed not later than 30th June, 2005, between the Bank and Mr. Morrissey so as to ensure that the balance of the facility be repaid in full no later than 30th September, 2015. Those terms were provided for in an amending facility letter of 17th August, 2004, accepted by Mr. Morrissey. It appears that the capital and interest repayment schedule was not agreed by 30th June, 2005. By an email of 13th December, 2005, from the Bank, the fact that there had been no capital repayments from June, 2005 was raised with Mr. Morrissey and an option given of continuing with capital payments at the rate of €10,000 *per* month or making payments to provide for the total capital repayments over fifteen years at a cost of approximately €35,000 *per* month. The Bank indicated it presumed the former preferable and sought confirmation.

12. Whilst there appears to be some dispute as to whether payments of €10,000 *per* month were made in the first half of 2006, as a matter of probability, it appears to me that they were made but nothing in particular turns on this. What is of importance and relied upon by both parties for different reasons is an exchange of emails which took place in August, 2006, in relation to a possible change in the nature of the facility then in existence, which as already stated was a term facility repayable in full by 2015 and until that date subject only to demand in the event of a default. The exchange of emails took place in a context where there was a proposal to sell a house in Celbridge, which was one of the houses then in Mr. Morrissey's portfolio and the debt reduction required by the Bank as a condition of a release of the property. A loan to value ratio ("LTV") for the facilities and portfolio of 70% was under discussion.

13. By email of 20th August, 2006, Mr. Morrissey, in an email to Mr. Lacko, a member of the Bank's lending team then dealing with his affairs, stated, "presumably, once we are down to 70%, the Euro 10k per month can cease?" In response, Mr. Lacko, on 22nd August, by email, stated:

> "John,
>
> My understanding was that the 10k per month was a temporarily [sic] compromise until the full P&I payments of €35k per month commences.
>
> If you prefer the facility to be on interest only, then we will have to change it to an annual 'Demand Facility' - whereby

the Bank can call/demand its facility at any time, and the facility will be renewed annually. This will be reflected on a new facility letter.

Let me know your thought, John, and I will try to get approval on the basis outlined above."

14. The response from Mr. Morrissey included:

"My entire portfolio is an interest only, so that is what makes best sense if achievable.

I was "happy" with the Euro 10k to take the LTV down to 70%, but now would greatly welcome a reversion to an annual 'demand facility' as this is the way things work across the board.

Do you want to issue a new offer letter to that effect?"

15. The response from Mr. Lacko was:

"That is fine, John.

I will seek approval as per below and we can switch to the new facility type and stop the €10k monthly repayments when the Celbridge house is sold. After the sale of the house, I will issue a new facility letter setting out the new terms."

16. The matter appears to have lain dormant until the end of November, 2006, when Mr. Lacko enquired in an email headed 'Renewal of Facilities' as to how the sale of the house in Celbridge was going and then stated:

"Your facilities with us here are due for renewal. We can kick them out for another year on the same limits and terms as at present, and continuing with the €10k monthly capital repayment. If it is okay with you, I can organise for a new facility letter to be issued to you in the coming days."

17. In response, Mr. Morrissey explained that he had taken the Celbridge house off the market to rent instead and then stated:

"The Euro 10k per month is still causing me disproportionate heartache as I have to continuously to refinance to subsidise Anglo, with no real logic remaining for a continuation of accelerated pay-down given current LTV levels."

18. Mr. Lacko then indicated reasons for the continuation of the €10k monthly repayments and indicated that the best he could do was to go to credit committee and seek approval to go on interest only but it depended on views on the issues he had raised.

19. The Bank agreed to change to an interest only facility. The terms then offered are set out in a facility letter dated 21st December, 2006, which was accepted without amendment by Mr. Morrissey on 3rd January, 2007.

20. The facility letter of 21st December, 2006, states that the purpose of the facility is to renew an existing facility currently fully drawn of an aggregate amount of €3,978,470. Under a heading, 'Repayment Date' it then states:

"The Facility is repayable on demand, which demand may be served at any time by the Bank at its sole discretion and without stating any reason for such demand. Without prejudice to the demand nature of the Facility, the Facility shall be repaid on or before 31st January 2008. In the meantime, interest is to be funded on a quarterly basis at the end of each calendar quarter by way of direct debit."

21. As appears from the above, in addition to becoming "a demand facility", the facility now became repayable on 31st January, 2008, rather than 30th September, 2015, in accordance with the terms of the prior facility letters. On the evidence before me, this change does not appear to have been the subject of any significant discussion or negotiation subsequent to Mr. Lacko's email of 22nd August 2006 referring to a change to an "annual" demand facility.

22. In early 2007, Mr. Morrissey successfully completed the raising of a property fund, Capital D, of €20 million in equity and €50 million in a facility from Bank of Scotland (Ireland). The Bank was not involved in Capital D.

23. Following its successful completion, Mr. Morrissey entered into negotiations with the Bank with a view to refinancing existing facilities from other financial institutions and also obtaining finance to purchase a new property in Liscannor and sought an equity release. Mr. Morrissey's evidence was that part of his purpose in seeking to do this significant additional business with the Bank was to achieve a situation in which the Bank might be interested in participating in a future property fund similar to the recently completed Capital D. Terms were agreed as set out in a facility letter of 27th July, 2007, accepted by Mr. Morrissey on the same day. In accordance with the terms of that letter, the maximum amount of the facility was €20,995,000 and its purposes as follows:

(a) To refinance Bank of Ireland and EBS Building Society in the amount of €14,590,000 in relation to ten listed properties referred to as the "Property Portfolio".

(b) Refinance the existing debt of €3,980,000 drawn down from the Bank in relation to five listed properties referred to as the "Anglo Portfolio".

(c) Provide €775,000 to fund the purchase of Parochial House, Liscannor, County Clare.

(d) To provide an equity release in the amount of €1,650,000.

24. There were five conditions precedent to the drawdown of the facility, one of which was the lodgement of €600,000 to a specified deposit account. The security required included first legal charges over all the relevant properties, an assignment of all the rental income generated from the Property Portfolio and the Anglo Portfolio and a first legal charge over the deposit of €600,000. Under the heading of 'Repayment Date', the facility letter provided:

"The Facility is repayable on demand which demand may be served at any time by the Bank at its sole discretion and without stating any reason for such demand. Without prejudice to the demand nature of the Facility, the facility shall be repaid on or before 31st July 2010. In the meantime, the Facility will be reviewed on an annual basis and interest will be serviced by direct debit on the 5th day of every month."

As appears, the term of this greatly increased facility was approximately three years. An arrangement fee of €45,000 was payable for the facility. The facility letter was expressly stated to rescind and supersede all previous facility letters issued by the Bank to Mr. Morrissey.

25. In October, 2007, the Bank agreed with Mr. Morrissey to grant an additional facility of €4 million on the terms set out in a letter dated 22nd October, 2007, accepted by Mr. Morrissey on 23rd October, 2007, with the addition of one handwritten amendment. This facility was for the purpose of part-financing the purchase of a share portfolio and capitalising the arrangement fee of €20,000. The security was a lien over a specified share portfolio account in the name of Mr. Morrissey with Bloxham Stockbrokers. There were five conditions subsequent, one of which granted the Bank the right, exercisable at its sole discretion, to sell all or part of the shares and apply the proceeds in reduction of the facility in the event that the combined ISEQ quoted trading price of the shares of the portfolio were such that the Loan to Value of the portfolio exceeded 70%. The repayment date provisions were identical to those in the facility letter of 25th July, 2007, *i.e*. a demand facility repayable on or before 31st July, 2010, and in the meantime, there would be an annual review and monthly interest payable.

26. In November, 2007, there were negotiations between Mr. Morrissey and the Bank in relation to additional facilities, primarily to refinance an Irish Intercontinental Bank ("IIB") loan in relation to other properties and an increase in the amount of the share facility. The Bank lending team at that time included, as manager, Mr. Jeremy O'Sullivan, who gave evidence in the proceedings. Mr. O'Sullivan and the then assistant manager in December, 2007 made a credit committee application for the additional facilities and recommended that they be sanctioned. At the time, Mr. Morrissey was not aware of the content or comments made by the manager in the application to the credit committee. He was aware of the fact that sanction had to be obtained from the credit committee of the Bank prior to any formal offer of facilities to him. The Court's attention was drawn to the summary included in the credit application of December, 2007 as representing the then lending team's view of Mr. Morrissey and the benefits for the Bank in doing business with him. It was in the following terms:

> "John Morrissey is a very astute business individual and has amassed an impressive net worth in excess of €50m. In July of this year, we approved a facility of €20,995k to allow the Borrower refinance a number of properties from Bank of Ireland and EBS.
>
> Following this, we also provided a share facility in the amount of €4k to invest in a portfolio of which €4k of equity would be injected.
>
> John has been seeking to consolidate his main banks and has now awarded us with an opportunity to provide further finance to allow the refinance of IIB and also to increase his share purchasing facility.
>
> **This request is a positive from our perspective. Our security is now diversified into residential and commercial properties together with a portfolio of blue chip shares. The share portfolio also allows the Bank access to an additional source of liquidity in the event of a repayment issue with debt funding.**
> This opportunity will again improve our relationship with John and possibly create further business opportunities going forward."

27. The credit committee gave sanction on 14th December, 2007. There were some further negotiations and final terms agreed in January, 2008 for the additional funding and all other facilities available to Mr. Morrissey at that time. The terms are set out in a letter of 16th January, 2008, accepted by Mr. Morrissey without amendment, on 18th January, 2008. The letter, at the outset, states that it rescinds and supersedes all previous facility letters issued by the Bank to Mr. Morrissey. The aggregate facility is divided into three separately designated facilities for different purposes:

> Facility A: €20,995,000 to renew the existing facility currently drawn in the same amount. These were the facilities in the letter of 18th July, 2007.
>
> Facility B: €10,480,000 to enable Mr. Morrissey refinance IIB Bank in the amount of €9,450,000 in relation to specified properties, to provide an equity release of €1 million and capitalise the arrangement fee of €30,000.
>
> Facility C: €6,010,000 to renew the existing share facility drawn in the amount of €3,226,250 and to increase the limit on the facility from €4 million to €6,010,000 in order to part finance the continued purchase of the share portfolio and capitalise an arrangement fee of €10,000.

28. The total security required for these three facilities was similar to the security required in the two facility letters of 27th July, 2007, and 22nd October, 2007, with the addition of the IIB Bank properties. The conditions subsequent in relation to the share portfolio were continued with different LTV percentages. The Bank was now given discretion to sell shares in the event that the ratio of the Financial Indebtedness arising under Facility C to the aggregate of the value of the Portfolio exceeded 0.8:1.

29. The wording of the repayment provisions under the heading 'Repayment Date' remained identical to that in the two prior facility letters and set out above.

30. Mr. Jeremy O'Sullivan left the Bank for the United States at the end of 2007, and he was replaced as account manager by Ms. Deborah Rea who also gave evidence. In February/March, 2008, there were contacts between Ms. Rea and Mr. Morrissey during which she visited his offices in Northbrook Road and in the course of which he made a presentation in relation to the Capital D fund which was then already completed and a separate presentation of a proposed Capital D II fund and the debt facility which it would require. Mr. Morrissey was in discussion with Bank of Scotland (Ireland) in relation to such a debt facility as it had funded the Capital D fund. Capital D II did not proceed by reason of the changed circumstances in 2008.

31. At the same time, in 2008, Mr. Morrissey signalled to Ms. Rea that in accordance with information given to Mr. O'Sullivan in 2007, he would need to fund interest payments on the facilities with the Bank out of the deposit held by him in the Bank in the sum of approximately €600,000 at that time. The Bank agreed to this for the period April to June 2008.

32. On 16th June, 2008, Mr. Morrissey and Ms. Rea met in relation to two issues. Firstly, the loan to value ("LTV") of 80% in relation to the share portfolio had been exceeded consistently since March, 2008, and was then at 98%. Secondly, there was a reduction in the interest shortfall account to €202,000 by reason of the payment of interest out of same. Proposals were discussed whereby Mr. Morrissey would inject cash into the share portfolio to bring the LTV back down to 90% and replenish the shortfall account within approximately six weeks.

33. Mr. Morrissey continued to encounter difficulties in June, 2008, and by letter dated 27th June, 2008, to Ms. Rea he enclosed a letter sent to all his lending banks in which he indicated, *inter alia*, that he would not be in a position to make interest payments on his bank borrowings in the six months commencing 1st July, 2008. He indicated he expected to produce a detailed plan for the banks (to be ready by the end of August) as to how he would resume payments from 31st December, 2008.

34. In August, 2008, approximately €420,000 was realised from trades in shares held by Mr. Morrissey and transferred to discharge the then outstanding interest and a small balance placed in the deposit account.

35. Throughout the autumn of 2008, Mr. Morrissey continued to provide the Bank with updates and proposals but did not resume paying interest and no agreement was reached with the Bank in relation to any of the proposals. By letters dated 26th September, 2008, and 14th November, 2008, the Bank, through Ms. Rea, made clear to Mr. Morrissey that it was not acceptable to the Bank for the rent earned from properties charged to the Bank to be utilised for any purpose other than the payment of the Bank's facilities. In the latter letter, she stated, "once again, I would like to restate the Bank's position that all income received from the Properties must be paid to the Bank in order to meet your interest payments". Ms Rea in evidence explained that the security documents held by the Bank included assignment of rents.

36. A meeting was held on 21st November and on 2nd December, 2008, and Ms. Rea indicated that notwithstanding that all the security documents assigned rent in respect of the charged properties to the Bank, she was proposing to the Bank's credit committee that it allow a deduction of €300,000 (which she estimated to be 50% of Mr. Morrissey's overheads in relation to the charged properties) from the rent received on the properties charged to Anglo. Mr. Morrissey sought a higher deduction. In a further letter dated 8th December, 2008, Ms. Rea warned that if agreement could not be reached on the proposals outlined on or before 15th December, 2008, that the Bank would have no option but to demand immediate repayment of the loans, take possession of the properties and appoint a receiver over the assets charged. Neither of those matters occurred before the end of 2008.

37. Mr. Morrissey had unfortunately suffered ill health in the autumn of 2008. For understandable reasons, he sought at the time to play down the event or its consequences. It limited the time he had available for dealing with the difficult commercial situation with which he was then faced. In addition, he had received medical advice to take time out and decided to do so over the Christmas period in 2008/2009. Whilst the Bank was aware of an event in the autumn of 2008, they do not appear to have been aware of the full facts.

2009 and 2010

38. The factual events immediately leading to the demand made by the Bank and issues in dispute between the parties are those which occurred in 2009 and January, 2010. Certain of these are in dispute. The Court received much detailed oral evidence and contemporaneous documents. The contemporaneous documents are of particular importance as they are more likely to accurately record what took place between the parties and their frame of minds than oral evidence given in 2013, which has been given with the benefit of hindsight, and particularly in the case of Mr. Morrissey, with knowledge of what took place internally within the Bank during the relevant period and about which he is particularly aggrieved. In dealing with the facts of this period, the facts as set out below include my findings of fact.

39. On 7th January, 2009, Ms. Rea wrote again to Mr. Morrissey and stated that if agreement could not be reached on or before 16th January, 2009, in relation to the level of deductions from the Anglo rent that the Bank would have no option but to issue a letter demanding repayment of the loan facilities. She appears to have been unaware at the time that Mr. Morrissey was out of the country.

40. Shortly after that letter, responsibility for Mr. Morrissey's accounts with the Bank was transferred to Mr. Kieran Gilmartin. He had not previously substantively dealt with Mr. Morrissey or his affairs. Mr. Gilmartin, having consulted internally with Mr. Nicholas Lyons, associate director and Mr. Joe McWilliams, director, decided on 15th January, 2009, to issue an instruction to Bloxhams to sell all the shares in Mr. Morrissey's portfolio held as security and to remit the proceeds to the Bank. Mr. Morrissey was notified by email from Mr. Gilmartin once the decision had been taken and Bloxhams notified. The initial response of Mr. Morrissey by email was that the Bank was within their rights to do this, but he cautioned it would ultimately lead to a significant loss for the Bank. He has subsequently challenged the timing and motivation of the Bank in choosing this course of action. The portfolio to be sold included shares in the Bank itself. The Bank was nationalised on 15th January, 2009. For the purposes of the issues in this module, nothing turns on this decision by the Bank, save to note it as part of the background facts as it appears to have affected the relationship between Mr. Gilmartin and Mr. Morrissey from the outset of 2009.

41. In the meantime, Ms. Rea, on 14th January, 2009, by email sought to arrange a meeting with Mr. Morrissey. In response, he explained he was only just back from his trip abroad and suggested a meeting the following week. Ms. Rea on 15th January by email pointed out that in her recent letter, he had been given until 16th January, 2009, to reach agreement and that as he was not making himself available to meet before that date, he was accepting a demand would issue. Mr. Morrissey, in response indicated the Bank was within its rights to issue the demand letter and that he would "deal with it accordingly".

42. By letter of 20th January, 2009, the Bank made demand for repayment forthwith of all the monies and liabilities due by Mr. Morrissey to them, stated at that time to be €38,348,494.70. The Bank also reserved the right to appoint a receiver.

43. A meeting between Mr. Morrissey and Ms. O'Connell, his accountant, and Mr. Lyons, Mr. Gilmartin and Mr. Tierney of the Bank was held on 23rd January, 2009. There is dispute as to what was said at the meeting of 23rd January, 2009, relevant to the first issue to be determined.

44. Mr. Morrissey, in the course of his oral evidence, maintained that representations were made by Mr. Gilmartin at the meeting of 23rd January, 2009, which gave rise to an understanding on Mr. Morrissey's part, referred to in a letter sent approximately one year later i.e. 8th January, 2010, by Baker Tilly, the accountancy firm then advising him. In that letter, it is stated:

> "The understanding was that, if JM complied with the 2009 Agreement, Anglo would continue to work with him until such time as a recovering market would provide the opportunity to either repay the monies owed to Anglo or to restructure the portfolio in a mutually agreeable manner."

45. Mr. Morrissey, in evidence, stated that he had prepared a first draft of the Baker Tilly letter of January, 2010. When asked from whence the understanding referred to above derived, he stated that it was from what was said to him at the meeting of 23rd January, 2009. Later, in evidence, he clarified that the relevant representations were made to him by Mr. Gilmartin. He was unable to identify precisely the representations made. Mr. Morrissey made clear that he was not asserting that there was an agreement made at that meeting by the Bank to provide facilities for any period longer than one year (which was then under discussion). However, he maintained that what was said to him by Mr. Gilmartin at that meeting created an understanding in him, Mr. Morrissey, that if he

complied with the terms under which the 2009 facilities were being granted, that the Bank would extend his facilities beyond the expiry of the term provided in the facility letter or, as he put it, "roll over" his facilities.

46. This evidence of Mr. Morrissey of the representations alleged to have been made at the 23rd January meeting were not been included in his witness statement served on the Bank in accordance with practice directions. No other notice had been given to the Bank that such evidence would be given. The alleged representations were not put to either Mr. Lyons or Mr. Gilmartin, both of whom gave evidence before Mr. Morrissey. The Court therefore does not have the benefit of their evidence on this issue.

47. I find as a fact that no representations of the type contended for by Mr. Morrissey in his evidence were made by Mr. Gilmartin on behalf of the Bank at the meeting of 23rd January, 2009. My primary reason for this finding is that the making of such a representation on behalf of the Bank at the meeting of 23rd January, 2009, is inconsistent with the almost contemporaneous exchanges between Mr. Gilmartin and Mr. Morrissey following the issue of the facility letter by the Bank on 2nd February, 2009 and referred to below.

48. Following the meeting of 23rd January, 2009, there were exchanges between the Bank and Mr. Morrissey in relation, in particular, to information concerning the non-payment of rent in 2008, expenses of Mr. Morrissey funded by the rent received from the Anglo properties in this period and his justification for the €300,000 *per annum* he was asking that he be permitted to deduct from rents going forward.

49. Following those exchanges, Mr. Gilmartin prepared an application to the credit committee in January, 2009, in which he stated that the then proposal and strategy going forward was to support Mr. Morrissey until December, 2009. There were conditions identified to this continued support which were subsequently set out in the facility letter and referred to below. Sanction was given by the Bank's credit committee to Mr. Gilmartin's proposal on 29th January, 2009. Mr. Morrissey was not aware at the time of the terms of the credit committee application or the terms of the sanction save as disclosed by the issue of the facility letter and subsequent exchanges.

50. The Bank issued the final facility letter to Mr. Morrissey on 2nd February, 2009. This is the facility letter which forms the basis of the Bank's claim of an entitlement to make demand on Mr. Morrissey in January, 2010. The facility letter offered four facilities:

> Facility A: The maximum amount of €20,995,000 to renew an existing facility fully drawn down.
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> Facility B: The maximum amount of €10,480,000 to renew an existing facility fully drawn down.
>
> Facility C: The maximum amount of €3,829,000 to renew an existing facility fully drawn down.
>
> Facility D: Maximum amount of €1,037,000 to renew an existing facility drawn down in the amount of €382,149; capitalise interest accrued in the amount of €328,841 under Facilities A & B and to allow an additional €309,000 for interest roll up.

51. Clause 5 of the facility letter made the drawing down of Facility D subject to a condition precedent which included putting in place rental mandates, directing that tenants of eight specified properties pay all rent directly to the Bank. There were further conditions subsequent contained in the facility letter in relation to mandates of future rental payments upon letting of two specified properties and an express agreement by the Bank that Mr. Morrissey retain €25,000 per month of the gross rental income received from the Property portfolio.

52. Clause 8 with the heading 'Repayment' provided:

> "The Facility is repayable on demand, which demand may be served at any time by the Bank at its sole discretion and without stating any reason for such demand. Without prejudice to the demand nature of the Facility, the Facility shall be repaid on or before 31st July 2009. In the meantime, interest is to be funded on the 5th day of every month. Any shortfall in interest may be capitalised up to the limit of Facility D."

An arrangement fee of €100,000 was payable on acceptance of the facility letter and this acceptance gave authorisation to the Bank to debit the fee to Mr. Morrissey's account. As appears the only new monies being advanced were €637,841 within Facility D of which €328,841 was to capitalise accrued interest. Further the repayment date in the 2008 Facility had been 31st July, 2010, and it was now brought forward by one year.

53. Upon receipt of the facility letter, Mr. Morrissey sent to the Bank an email in relation to the term of the facility in which he stated, "[t]erm agreed between us was twelve months. What is it with July 31st 2009? What is the bank trying to achieve with this? Markets are clearly going to be no different in five or six months". In response, there was a conference call between Mr. Gilmartin, Mr. Tierney of the Bank and Mr. Morrissey. The note recording the call prepared by the Bank, in relation to the term, records:

> "■ JM unhappy with facility term (to 31/07/09)
>
> ■ KG informed JM that if facility performs to terms until then Bank will extend to 31/12/09.
>
> • JM seeks assurances that no further fee will be charged to extend term to 31/12/09.
>
> • KG informed JM that if facility performs to terms until then Bank will extend to 31/12/09 with no further fee.
>
> • JM requested written confirmation regarding same.
>
> • KG agreed to E Mail JM outlining that should facilities perform until 31/07/09 the Bank will renew to 31/12/2009 and will not charge any further arrangement fee."

54. Mr. Morrissey in evidence agreed with this record of the call. Later that day, Mr. Gilmartin sent to Mr. Morrissey an email at 16:45 stating:

> "Further to our telephone conversation this morning, I am in a position to confirm that provided your facilities with Bank have performed to the terms outlined in the Facility Letter dated 2nd February 2009, the Bank would not charge an additional arrangement fee should the Bank renew the facilities to 31st December 2009.

> This is strictly without prejudice to the demand nature of the Facility and all of the Bank's legal entitlements under the terms of the security agreements entered into by you with us, including the Bank's entitlement to appoint a receiver or enter into possession of the properties the subject matter of the security granted by you to the Bank.
>
> I trust the above is in order. However, if you have any queries please don't hesitate to contact me."

55. On 5th February, 2009, Mr. Morrissey returned the facility letter dated 2nd February, 2009, signed and accepted without making any amendment thereto. However, he attached a covering letter also dated 5th February, 2009, in which, in relation to the term of the facility, he stated:

> "I have also attached a copy of your email of February 3rd, clarifying that, should these facilities perform in the period up to July 31st according to the agreement, no additional arrangement fee would apply for an extension to December 31st, 2009. I understand from this that extension to December 31st, 2009 will be automatic should the facilities have performed."

56. By an email of 6th February, 2009, Mr. Gilmartin explained that extension of the facility to 31st December, 2009, would not be automatic but will be "subject to credit committee approval and a new facility letter". A further exchange occurred in relation to a query by Mr. Morrissey as to the conditions under which the credit committee may decide not to extend if the facility is performing to which the response given by Mr. Gilmartin by email of 9th February was:

> "It is unusual for the bank to renew any facilities which are not performing in line with sanction. In that regard we have a window to try to rectify this. We revert to credit committee on expiry of all facilities as a matter of Policy. Therefore, there will be no exception in this case. Like all Credit Committee decisions
>
> - market conditions
> - the performance of the loan and
> - our relationship with the Borrower
>
> will be key to providing continued support.
>
> However, if the Facilities fail to perform to terms agreed we will demand the repayment of these facilities immediately."

57. In my judgment, the above exchanges between Mr. Morrissey and Mr. Gilmartin subsequent to the issue by the Bank of the facility letter dated 2nd February, 2009, specifying a repayment date of 31st July, 2009, are inconsistent with a representation having been made by Mr. Gilmartin on behalf of the Bank to Mr. Morrissey at the meeting of 23rd January, 2009, to the effect that "Anglo would continue to work with him until such time as a recovering market would provide the opportunity to either repay the monies owed to Anglo or to restructure the portfolio in a mutually agreeable manner" or that facilities would be extended to any date beyond 31st December, 2009, if performing in accordance with the terms of the facility letter. Mr. Gilmartin did make representations as to what would occur in relation to an extension to 31st December, 2009, if the facilities performed in accordance with the terms of the letter until 31 July, 2009.

58. By the time of the hearing, Mr. Morrissey had become aware of the terms of the credit committee sanction dated 29th January, 2009, for the facilities to him, which became the subject matter of the letter of 2nd February, 2009. The sanction was to extend the facilities until the end of December, 2009 and was not limited to 31st July, 2009, as included in the letter of 2nd February, 2009. Mr. Morrissey's anger at learning that Mr. Gilmartin already had sanction from the credit committee to grant the facilities to him until 31st December, 2009, is understandable in the light of the above exchanges. Mr. Gilmartin explained in evidence, and was supported in this by Mr. Lyons who gave evidence, that the credit committee sanction was an authorisation to a lending manager to grant facilities up to the maximum amount and for the maximum term specified in the sanction. What Mr. Gilmartin included in the facility letter of 2nd February, 2009, was within the sanction given by the credit committee. I find that Mr. Gilmartin did tell Mr. Morrissey in the conference call of 3rd February 2009 "that if facility performs to terms until [31/7/09] Bank will extend to 31/12/09". He did row back from this absolute position in the email of 3rd February prior to Mr. Morrissey's acceptance on 5th February. Nevertheless the fact that Mr. Gilmartin already had credit committee sanction to extend the facilities to 31st December, 2009, calls into question the accuracy of his statements to Mr. Morrissey in the email exchanges referred to above in relation to the need for credit committee approval for an extension from 31st July, 2009, to 31st December, 2009.

59. Most of the rental mandates required by the facility letter were put in place. There was a difficulty in relation to the Hibernian building. The €25,000 *per* month which Mr. Morrissey was entitled to retain was retained out of the Hibernian rentals. The rents from the Hibernian building do not appear to have been mandated directly to the Bank through the spring and summer of 2009 and the transmission of the cheques to the Bank from Mr. Morrissey for the net amount appears to have given rise to problems from time to time. Nothing particular turns on this.

60. The next significant communication was on 19th June, 2009, when Mr. Morrissey sent to Mr. Gilmartin, a note on the recapitalisation of the "JM Portfolio" which he had recently sent to Ulster Bank ("UB") and Bank of Scotland, Ireland ("BOSI") from which he also had borrowings. The document was described as "exploratory in nature" and was for discussion purposes only. He sought Mr. Gilmartin's thoughts on whether it was worth progressing discussions with the Bank at that stage.

61. Mr. Morrissey followed this up with a further email on 30th June, 2009, in which, having referred to other matters, he sought Mr. Gilmartin's "initial thoughts on the recapitalisation plans summary" sent on 19th June and then stated:

> "Finally, I assume you will be sending out, as agreed, an extension agreement for the various facilities with the bank, to tide us over until a more permanent restructuring/recapitalisation is agreed."

62. In response by email of the same day, Mr. Gilmartin expressed what he described as "a knee jerk" reaction and then stated "I will forward facility letters later this week". The facility letter of 2nd February, 2009, was due to expire on 31st July, 2009. No facility letters were sent out by Mr. Gilmartin and in evidence he could not give any explanation as to why he had indicated that he was going to do so and then did not do so.

63. On 21st July, 2009, there was a meeting between Mr. Gilmartin and Mr. Morrissey alone over lunch in the Fitzwilliam Hotel. There

is dispute between Mr. Morrissey and Mr. Gilmartin as to what was said by Mr. Gilmartin at that meeting. The context of the meeting was the submission of the recapitalisation/restructuring discussion document by Mr. Morrissey and the fact that the current facilities were due to expire and become repayable on 31st July, 2009. On a consideration of the several different tranches of evidence given by each of Mr. Morrissey and Mr. Gilmartin as to what was said at that meeting, insofar as is relevant to the issues in dispute, I find as facts the following:

> (i) The primary discussion was of Mr. Morrissey's recapitalisation or restructuring plan.
>
> (ii) Mr. Gilmartin did tell Mr. Morrissey in the course of the discussion that for a period, which he did not expressly specify, the Bank would not demand repayment of the facilities provided Mr. Morrissey continued to pay the net rent into the Bank's account (after deduction of the €25,000 per month).
>
> (iii) Mr. Gilmartin did not make any express representation that such forbearance by the Bank would last beyond the end of 2009.
>
> (iv) The context in which this representation was made was the stated intention of Mr. Morrissey to present a more detailed restructuring plan to the Bank and his other lenders in the autumn of 2009.
>
> (v) Mr. Gilmartin did express approval of the manner in which Mr. Morrissey was managing his property portfolio in the difficult economic climate.

64. Mr. Morrissey sent an email of 24th July, 2009, making reference to a cheque which should have been received by the Bank "under our revised agreement" and confirming an intention to meet up with representatives of the Bank in mid-September together with representatives from BOSI. He also indicated his wish to include Brian Hyland of Baker Tilly, who he stated he had asked to act as an intermediary, if required, in assisting in the general recapitalisation process.

65. During August and September 2009, there were further interactions primarily dealing with practical matters in relation to properties, rents and expenses. There was intention to meet up mid-September and a further complication arose in relation to a potential involvement of the National Asset Management Agency ("NAMA").

66. In early November, there was a dispute in relation to a cheque in respect of the net amount of the Hibernian rent which the Bank contended it did not receive with a reconciliation statement sent on behalf of Mr. Morrissey. This gave rise to further tension between Mr. Morrissey and the Bank.

67. Following this dispute, Mr. Gilmartin on 6th November, received a series of emails in relation to the missing cheque in the course of which Mr. Morrissey by an email at 11:52 a.m. on the same date indicated that he was not in a position to "make up this quarter" and indicated that cash was exceptionally tight. In response, it was indicated that he would be given until 1st January, 2010, to catch up. Mr. Gilmartin in an email at 3:39 p.m. that day stated:

> "We are prepared to give you until 1/1/10 to catch up. We will be reverting to credit committee on this in January and I know from experience that if the rent is not 'caught' up by then we will have to bring in a third party asset manager."

Each party relied on this exchange for different reasons.

68. Ultimately, a meeting was arranged for 19th November, 2009, between the Bank represented by Mr. Gilmartin and Mr. Tierney, Mr. Morrissey and his accountant, Ms. O'Connell, and Brian Hyland and Niall Ledwidge of Baker Tilly. In advance of the meeting on the same day, Mr. Morrissey sent an email to all proposed participants setting out some "concerns, issues and strategies". Having made reference to individual issues and properties, he stated at the end of the note "we also need to firm up on an extension to the current stand-still agreement".

69. Mr. Ledwidge took minutes of the meeting and these were subsequently sent to Mr. Gilmartin. It was made clear that Baker Tilly had added a number of clarifications regarding Mr. Morrissey's management experience and relationships which were not discussed at the meeting but which they considered relevant in the context of his continuing role in managing the portfolio. The draft minutes were the subject of comment by Mr. Gilmartin and ultimately the final version prepared. That final version was enclosed with a letter written by Mr. Hyland (who gave oral evidence) to Mr. Gilmartin dated 10th December, 2009. There are a number of factual matters stated in the letter and the minutes relevant to the issues which I have to resolve. It is agreed that the references in the letter to a meeting on 4th December, 2009, were in error and in fact referred to the meeting on 19th November, 2009. The oral evidence was that Mr. Hyland's letter was developed from a first draft provided to him by Mr. Morrissey's accountant Ms. O'Connell who did not give evidence.

70. The minutes of the meeting of 19th November, 2009, indicate that the meeting was introduced by Mr. Morrissey as a forum for discussion of:

> "a. The role of Baker Tilly ('BT')
>
> b. Capital expenditure requirements for portfolio properties.
>
> c. Rental options breaks with commercial tenants and potential impact on rent-roll going forward.
>
> d. NAMA impact to JM portfolio?
>
> e. Potential restructuring of the portfolio"

71. Also there was discussion of a dispute by the manager ("Harcourt") of the Parkwest property of Mr. Morrissey in relation to non-payment of service charges. Mr. Morrissey, in evidence, emphasised that this was a dispute dating back to 2000 which he had been addressing. Emphasis was placed by Mr. Gilmartin on the fact that a service charge collected by Mr. Morrissey had not been paid over to Harcourt. In relation to the issue, the minutes recorded, *inter alia*:

> "KG stated that he could understand Harcourt's stance given JM had previously retained rent collected on Anglo funded property and used it to fund personal and business expenditure rather than interest on the Borrowings. He felt it was disappointing that this issue has arisen again and that the service charge has been collected and used to fund other

expenditure as the Bank may be forced into a position where it has no option but to fund this."

Mr. Hyland, in his oral evidence, confirmed that this is a correct record of what was said by Mr. Gilmartin.

72. At paragraphs 10 and 11 of the minutes, it is recorded:

> "10. KG reported that Anglo has ceased all interest roll-ups.
>
> 11. KG said that Anglo management would be reviewing all non-performing loans to see if they could be managed by the 'existing managers' and if these existing managers are 'the right people' to manage the portfolios going forward. The JM portfolio, while paying partial interest, is deemed a non-performing loan."

Again, the accuracy of this is confirmed in oral evidence.

73. Finally, insofar as relevant, the minutes record Mr. Morrissey as having detailed certain personal/advisory relationships which were of assistance to his business; the premium rental yields (versus market) and high occupancy rates (circa 98%) that he had been able to maintain as manager, and the fact that all the residential properties in the portfolio are Protected Structures, which requires a specific set of skills in developing, planning and maintenance.

74. The covering letter from Baker Tilly of 10th December, 2009, sending to Mr. Gilmartin a copy of this final version of the minutes, sets out, initially in 15 paragraphs, arguments in favour of the restructuring of Mr. Morrissey's property portfolio. At paragraph 9 of these, it stated:

> "9. The choice for Mr. Morrissey's banks effectively comes down to (a) continue to run he business as is, retaining as much rent as possible, deferring investment in the product and rolling up or writing off the balance of interest while waiting for a general upturn or (b) going with the restructuring option."

75. In relation to the service charge dispute, Mr. Hyland wrote that Baker Tilly had engaged with other parties to the service charge dispute and "consider that progress is being made in this regard". Under a heading of 'Baker Tilly Ryan Glennon Role', he states:

> "As you know we have been discussing restructuring possibilities with all of our client's lending institutions. Having reviewed the various proposals discussed we have formed the view that the restructuring proposal put forward by our client provides the most favourable outcome for all stakeholders and, in fact, is the only viable proposal received given current market conditions. This is particularly apparent when viewed in stark comparison with the liquidation alternative. As part of our role in the restructuring process we are currently preparing a statement of affairs for John Morrissey and reviewing related supporting documentation. In this regard we would be obliged if you could provide current balances on all accounts with Anglo Irish Bank in the name of John Morrissey along with associated interest rates."

76. Finally, under a heading of 'Standstill Agreement', Mr. Hyland stated:

> "We are aware that the current standstill agreement is due to expire shortly and on behalf of our client we request an extension of the standstill agreement to 31 December 2010 to allow us to continue the restructuring process in an orderly and methodical fashion."

Mr. Hyland, in his oral evidence, stated that his reference to "due to expire shortly", he understood the time to be the end of 2009. He was therefore, in effect, seeking an extension for one year from 31st December, 2009.

77. Mr. Gilmartin responded to this letter on 16th December, 2009, and in relation to paragraph 9 of Mr. Hyland's letter set out above as to the options open to Mr. Morrissey's banks, he stated:

> "Notwithstanding your views on the options currently open to the Borrower's banks I believe the Bank has other options open to it other than those you have specified."

In oral evidence, Mr. Gilmartin stated that he had in mind a receiver or asset manager. The letter ended with the following:

> "We are currently considering out options in relation to the standstill agreement. In the meantime, I would appreciate if you would please confirm the maintenance, insurance and tax costs on the Borrower's Anglo funded property portfolio for 2009."

78. There were some differences in the oral evidence as to what exactly was the "standstill" agreement being referred to. On the balance of probabilities it appears to have been the agreement or arrangement made between Mr. Gilmartin and Mr. Morrissey in July 2009 that provided monthly rent (net of €25,000) was paid to the Bank it would not demand repayment and I so find.

79. In the meantime, on 4th December, 2009, Mr. Morrissey had sent to Mr. Gilmartin cheques totalling €9,000 with a note stating that they represented "50% of the deficit as of 1/10/09 due to the cheque mix-up. We will endeavour to deal with the other 50% as soon as is possible."

80. There were no further significant communications between Mr. Morrissey and the Bank in December, 2009. However, there were significant internal communications and a decision taken by the credit committee of the Bank on 18th December, 2009. Mr. Morrissey was unaware of these at the relevant time and only became aware of them in the course of these proceedings.

81. In a memorandum dated 18th December, 2009, Mr. Gilmartin as senior manager, and Mr. Tierney as administrator, prepared a proposal for the credit committee in relation to all Mr. Morrissey's facilities with the Bank. The proposal was for the appointment of a receiver and asset manager. Under the heading of 'Summary and Recommendation', it was stated:

> "The Borrower has admitted to retaining rent from the Anglo portfolio to fund personal and business expenses without the agreement of the Bank. It has come to light that the Borrower has engaged in this elsewhere and as a result there has been a breakdown of trust in the relationship. Further to this we do not believe JM has the required expertise to manage the portfolio going forward. In order to protect our security, we propose appointing a receiver and asset manager when the facilities expire in December."

Prior to that, the document, over two pages, set out a background and, as termed, a "rationale" for the proposal contained therein. This included many facts. The decision made by the credit committee was to appoint a receiver and the receiver to appoint an asset manager subject to the Bank's satisfaction.

82. Mr. Morrissey, in evidence, took serious issue with the content of the memorandum and recommendation, in part by reason of allegedly incorrect facts, in part by the inclusion of matters which had never been put to him and what he considered as unjustifiable expressions of opinion by the writers of the memorandum. Mr. Gilmartin, for his part, disputed the criticisms and sought to justify the factual and opinion content. For the reasons set out below, it is not necessary for the determination of the two preliminary issues s for the Court to assess the accuracy, fairness or reasonableness of the proposal made by Mr. Gilmartin and Mr. Tierney, as the lending team dealing with Mr. Morrissey, to the Bank's credit committee.

83. The Bank did not take any steps in relation to Mr. Morrissey and his borrowings or inform him of the decision made by the credit committee prior to 31st December, 2009. There were a number of relevant exchanges in January, 2010 prior to the issue of the letter of demand issued on 19th January, 2010. The first of these was a long letter dated 8th January, 2010, from Mr. Hyland of Baker Tilly to the Bank. The oral evidence was that Mr. Morrissey substantially drafted the letter, Mr. Hyland worked further on it and that Mr. Morrissey saw and approved the letter prior to it being sent. Its purpose was to request that they be permitted to formally present their business plan and go through Mr. Morrissey's previous track record in distressed environments. It was also written with reference to Mr. Gilmartin's letter of 16th December, 2009. It dealt in some detail with Mr. Morrissey's track record, the quality of management and current occupancy level of his property portfolio and the true management charge on the Anglo portfolio and specific issues in relation to Parkwest. Under a heading 'Compliance with the 2009 Agreement', it stated:

> "With the exception of €9,000 (approximately 1% of the rent-roll), all of the promised payments specified in the 2009 Agreement were made. JM is agreeable to allowing Baker Tilly audit the rentals received since the agreement was made and has agreed to make up any deficit that may arise, including the €9,000. We would like to emphasize that this, to the letter, honours the 2009 Agreement.
>
> The understanding was that, if JM complied with the 2009 Agreement, Anglo would continue to work with him until such time as a recovering market would provide the opportunity to either repay the monies owed to Anglo or to restructure the portfolio in a mutually agreeable manner.

There was never a question of a change in the manager of the portfolio. Indeed, we understand that you expressed your happiness, at the review in mid-2009, with the level of compliance with the 2009 Agreement."

84. Mr. Morrissey's evidence was that the above understanding referred to in this letter was by reason of representations allegedly made at the meeting with Mr. Gilmartin of 23rd January, 2009. Mr. Hyland was not able to assist in what was being referred to. I have already found that the alleged representations were not made at the meeting of 23rd January 2009.

85. The letter then continued to deal with an issue which was causing friction between the Bank and Mr. Morrissey, namely, the failure to pay interest payments during the second and third quarters of 2008, and the retention and use by Mr. Morrissey of rents received from properties charged to the Bank during this period. It then refers to a future role by Baker Tilly and states:

> "We are currently effectively operating as receivers of JM's business on behalf of all of his financing banks. A change of manager by Anglo may require the appointment of a receiver to the portfolio, which would likely precipitate the appointment of receivers by other JM financing banks to protect their positions. Ignoring for a moment the likely knock-on effects on the viability of JM's business and hence his ability to repay his financing banks, we would see this as an unnecessary multiplication of costs."

86. Mr. Hyland then points out that Mr. Morrissey remains essential to the ultimate resolution of the Bank's issues and states "it is our view that a break-up of the JM portfolio, either driven by the banks or by trade creditors, is not in the interests of any of JM's financing banks". Finally, the letter states:

> "The net rentals received by Anglo Irish in 2009 must be very close to the interest charged. As such, we would appreciate if you could provide us with the total of the net rentals received in 2009 versus interest charged on the portfolio, i.e., what percentage of the interest due in 2009 was actually paid by our client? It would be most helpful if this information could be provided in advance of our meeting.
>
> We look forward to hearing from you as regards a date and time to meet to present the Business Plan."

87. Mr. Gilmartin responded to this by letter of 13th January, 2010, in which he indicated a willingness by the Bank to meet in order to consider the proposals but that such meeting would be "strictly without prejudice to all of the Bank's legal entitlements under the terms of the security agreements entered into by the Borrower with us, including the Bank's entitlement to appoint a receiver or enter into possession of the properties the subject matter of the security granted by the Borrower to the Bank". He then raised a number of queries in relation to the management charge and stated:

> "I would also like to clarify that it was never agreed that 'if JM complied with the 2009 Agreement, Anglo would continue to work with him until such time as a recovering market would provide the opportunity to either repay the monies owed to Anglo or to restructure the portfolio in a mutually agreeable manner.'"

Finally, he stated that there was a shortfall of circa €300,000 when comparing the rent collected versus the interest charge in 2009. Facility D in the Facility letter of 2nd February 2009 had included €309,000 in respect of interest roll up.

88. The specific information in relation to the management charge was provided and a meeting then held on 15th January, 2010. On that morning, Baker Tilly emailed in to the Bank an outline of a draft plan in respect of Mr. Morrissey's Anglo portfolio for 2010. That document is headed 'JM - Anglo Plan 2010'. The oral evidence was that some parts, were drafted by Mr. Morrissey and the final document approved by Mr. Morrissey before it was sent into the Bank. It commences by stating "[w]hile the debt/equity swap remains the overall plan, the following are Baker Tilly's interim proposals for calendar year 2010, to deal with the expiry of the existing agreement at December 31st, 2009". It then provides on a single page a series of specific proposals in relation to the payment of rental income less deductions and certain other matters and then states "12-month standstill agreement".

89. Mr. Tierney of the Bank prepared a note of the meeting which was retained internally by the Bank. The meeting discussed the Baker Tilly letter of 8th January, 2010, and the revised outline plan. The note records both Mr. Hyland and Mr. Morrissey stating that

Mr. Morrissey wants to repay Anglo as a "matter of pride" and a presentation of his relationship with Anglo from the start, his track record, expertise and abilities in areas other than properties. There was some dispute in oral evidence as to whether, as recorded, Mr. Morrissey stated that "a receiver should not be appointed as his and Anglo's interests are aligned".

90. At the end of the meeting, it is agreed that Mr. Gilmartin told Mr. Morrissey that the Bank would make a decision within two weeks and revert to Mr. Morrissey within that timeframe. Mr. Morrissey and his advisors, at the time, were not aware of the decision already taken by the credit committee on 18th December, 2009 to appoint a receiver.

91. On 18th January, 2010, Mr. Morrissey wrote a further long letter to Mr. Gilmartin. Its context and purpose is apparent from the second paragraph where, after thanking Mr. Gilmartin for the meeting, he stated:

> "While there is a fair amount of information contained in Baker Tilly's letter of January 8th, much of which was discussed on Friday, there are a number of issues that still require some clarification. As Brian Hyland pointed out, we believe any move by Anglo to attempt to force a change in manager will have a disproportionate reputational effect. As such, I want to ensure that Anglo fully understands our strategy and position prior to making its decision."

92. Mr. Morrissey, in the letter, revisits his strategy from 2006, the market problems post-Lehman, apologises and explains unilateral actions taken by him to which objection had been made, refers to his business and personal ethos and the Bloxham equity portfolio. He then sets out nine reasons for which, in his view, it would be counterproductive for Anglo if they were to force a change of manager on his property portfolio and comments on the interim plan for 2010 presented at the meeting. In conclusion, he stated:

> "Following payment of the outstanding €9,825 from the Q3 rental, I am now 100% compliant with the terms of the 2009 agreement (as previously defined) with the bank. It is likely that the portfolio will be running at or close to 100% occupancy during 2010 and that, with no change in interest rates, approximately 100% of the interest will be paid to Anglo in 2010.
>
> I would ask that Anglo recognizes this and the other arguments made in the past week or so, and continues to work with me to resolve our mutual challenges."

93. On the following day, 19th January, 2010, Mr. Gilmartin called Mr. Morrissey in the morning informing him, as recorded in Mr. Gilmartin's file note that this was a "courtesy call confirming that the Bank would be issuing a demand letter later today". It records Mr. Morrissey as having stated in response that "he would have no choice but to contest". The demand letter set out at paragraph 4 of this judgment then issued.

94. Mr. Gilmartin, in evidence, stated that he did not revert to the credit committee in January in relation to the proposals put forward by Mr. Morrissey and Baker Tilly on his behalf. He agreed that the proposals were in a form which could have been submitted to credit committee, but as he was not recommending extension of Mr. Morrissey's facilities, he did not consider he was obliged to do so. There is no evidence that he consulted with anyone more senior in the Bank prior to rejecting same and issuing the demand letter with a view to appointing a receiver as sanctioned by the credit committee on 18th December 2009.

95. On 22nd January, 2010, Messrs. Black & Company, solicitors for Mr. Morrissey, wrote a lengthy letter to Mr. Gilmartin indicating the shock and distress of Mr. Morrissey at the peremptory way in which he had been given only six days to repay his entire facility of €36,835,678. They stated they were instructed that their client "had no indication from you that this sort of peremptory step would be taken" and that their client "questions whether the Bank is acting in good faith". They then assert that "the Bank is taking irrational and uncommercial actions as a result of its own insolvency". Of relevance to the issues which I have to resolve, they state:

> ". . . We are instructed that subject to the management charge, rental income from the properties the subject of your mortgages has been paid up to date in accordance with the 2009 Agreement.
>
> In light of the above it is believed that the fact that the Bank has decided in your words 'not to further extend' his facilities is a key indicator which corroborates his instructions to us that his facilities have been honoured on foot of the Bank's letter of the 2nd February 2009. It is in that context that we are instructed that our client has been led and it now appears, misled, into continuing strenuously to manage and maintain his portfolio of property, and indeed, as you know preserve the value of the properties.
>
> This work was done in reliance on representations expressed and implied, that on foot of the payments of interest duly made under the above mentioned facility agreement, his position as owner and manager would not be compromised."

96. It was further contended that the demand for monies was in breach of the "Banking contract with our client" and "impractical and impossible of performance". Ultimately, they sought to have the Bank withdraw in writing its threat contained in its letter on or before 25th January, 2010.

97. Mr. Gilmartin wrote in response on 26th January, 2010, and insofar as material, stated:

> "The Loan Agreement was entered into in circumstances where earlier loan agreements had either expired or had been breached by the Borrower. It was a short term refinancing agreement which was entered into to facilitate the Borrower in the short term. The repayment date was 31 July 2009. Since that date we have engaged with the Borrower and with his representatives in an effort to address the situation, but this has not resulted in satisfactory proposals. It was at all times made clear in express terms to both the Borrower and his representatives that further Bank support would be difficult to procure and that the Bank would have to get approval from its credit committee in order to sanction any further extension of said loan agreement. Despite the proposals that have been made on behalf of the Borrower, such further extension was not sanctioned, and accordingly a demand has issued to the Borrower in respect of the sums which are due and owing on foot of the Loan Agreement.
>
> We therefore strongly deny that we have acted in bad faith or in any way precipitously or in breach of any contract with the Borrower. The Borrower is in breach of the repayment terms of the said Loan Agreement. We note that the Borrower is not in a position to discharge the sums now due, and accordingly we confirm that we are now proceeding forthwith to appoint a receiver over the assets secured by mortgages and charges dated 28 September 2000, 10 October 2007, 30 October 2007 and 4 February 2008."

98. The factual position as now disclosed is that the last date upon which the credit committee considered the position of Mr.

Morrissey was 18th December, 2009. The final proposals made by and on behalf of Mr. Morrissey were proposals made at the meeting of 15th January, 2010, (and supplemented by letter of 18th January) on which day he was informed that a decision would be made on same within 2 weeks. No recommendation was made to nor any consideration given by the credit committee to those proposals. The letter, in my judgment, implies that a decision by the credit committee not to sanction a further extension was made after a consideration of the relevant proposals. Whilst ultimately not relevant to the issues the Court has to decide it further explains Mr. Morrissey's anger at the treatment he received from the Bank.

99. Mr. Tom Kavanagh was appointed receiver on 26th January, 2010.

100. These proceedings were commenced by summary summons issued on 13th April, 2011, claiming payment of the amounts set out in the letter of demand of 19th January, 2010, taking into account subsequent interest and realisations by the receiver. The correctness of the precise amounts claimed are not relevant to the two issues which I have to presently determine.

Issues for Determination

101. Prior to determining the issues set down by Order of Kelly J., it is important to emphasise the limits of the Court's jurisdiction. This is a Court of law. Its obligation is to determine the rights and obligations of the parties in accordance with law. "Law" in this context includes the relevant constitutional, statutory and common law, in particular, the law of contract and the applicable equitable principles, particularly in relation to the defence of estoppel. On the evidence, particularly of Mr. Morrissey, there appears, regrettably, to have been a significant gap between his commercial expectation in his dealings with the Bank and the contractual written terms to which he agreed. In his own evidence, he described "a space between understanding and agreement". Unless the former is such that in accordance with applicable legal or equitable principles it is enforceable, it is not cognisable by the Court and the Court must determine and enforce the rights and obligations of the parties in accordance with law.

102. The second preliminary observation having regard to the evidence and Mr. Morrissey's obvious anger at the manner of his treatment by the Bank in not extending his facilities in January 2010, making the demand and appointing a receiver is to emphasise that this is not a dispute which involves a review by the Court as to how the Bank took the decision not to extend Mr. Morrissey's facilities and issue the demand or the reasonableness or fairness of same as the Court might do in a judicial review of a public body to which public law principles apply. No such claim is made or could be made in respect of the decisions taken by the Bank in 2009/2010. Certain of the submissions made on behalf of Mr. Morrissey appear directed to public law principles which do not apply.

Plaintiff's Entitlement to demand Repayment in January, 2010

103. The onus is on the Bank to establish that it was entitled in January, 2010 in accordance with the applicable contractual terms between itself and Mr. Morrissey to demand repayment of the monies the subject matter of the facility letter of 2nd February, 2009, as set out in its letter of 19th January, 2010. The essential case made by the Bank is that in February, 2009, it entered into a written agreement with Mr. Morrissey, the terms of which are those set out in the facility letter of 2nd February, 2009, the Bank's General Conditions referred to therein and the acceptance thereof signed by Mr. Morrissey on 5th February, 2009 ("the 2009 Agreement"). Further the Bank submits that those were the contractual terms between the parties which applied in January, 2010. It is necessary to separately consider whether those continued to be the applicable contractual terms in January, 2010 and whether the Bank was entitled to demand repayment pursuant to same in January, 2010.

104. Pursuant to the 2009 Agreement, the Bank made available to Mr. Morrissey four identified facilities, Facilities A, B, C and D. The first three were to renew existing facilities and Facility D was in part to renew an existing facility and also to capitalise interest accrued and allow an additional €309,000 for interest rollup. Clause 8 of the facility letter is the only provision which related to the period for which the facilities were being granted and provided:

> "The Facility is repayable on demand, which demand may be served at any time by the Bank at its sole discretion and without stating any reason for such demand. Without prejudice to the demand nature of the Facility, the Facility shall be repaid on or before 31st July 2009. In the meantime, interest is to be funded on the 5th day of every month. Any shortfall in interest may be capitalised up to the limit of Facility D."

105. The Bank primarily relies upon the obligation on Mr. Morrissey pursuant to clause 8 to repay the facilities on or before 31st July, 2009, and submits that the 2009Agreement, including clause 8 of the facility letter, continued to be the applicable contractual terms between the parties in January, 2010.

106. Counsel for Mr. Morrissey raised an issue as to the applicable contractual terms between the Bank and Mr. Morrissey after 31st July, 2009. In my judgment, the 2009 Agreement, i.e. the accepted facility letter of 2nd February, 2009, and General Conditions, continued to be the applicable contractual terms between the Bank and Mr. Morrissey after 31st July, 2009, subject only to the Bank's entitlement to enforce its rights thereunder by reason of the representations made by Mr. Gilmartin at the meeting of 21st July, 2009. A submission to the contrary made on behalf of Mr. Morrissey appears to be founded on a misunderstanding that the "expiry of the facilities" on 31st July, as was sometimes referred to in exchanges between Mr. Morrissey and the relevant Bank officials, meant that the 2009 Agreement in relation to those facilities came to an end. The 2009 Agreement, in accordance with its express terms, did not come to an end on 31st July, 2009. Pursuant to the terms of the 2009 Agreement, the facilities became repayable on 31st July, 2009. Notwithstanding, that the facilities may have expired on 31st July in the sense that Mr. Morrissey became obliged to repay to repay same on that date, the 2009 Agreement continued to subsist and to govern the rights and obligations of the Bank and Mr. Morrissey in relation to the facilities subject only to any further agreement or equitable principles such as the estoppel contended for. I propose firstly considering whether pursuant to the terms of the 2009 Agreement the Bank was entitled to make demand in January, 2010.

107. The Bank submits that in accordance with the applicable interpretation principles of commercial agreements, clause 8 of the facility must be construed as imposing an obligation to repay the facilities on 31st July, 2009, and that the Bank was accordingly entitled to demand repayment in January, 2010 as the facilities had not been repaid.

108. The first defence made on behalf of Mr. Morrissey was that the Bank, in making a demand for repayment of the facilities in January, 2010, was in breach of an express or implied term of the 2009 Agreement. Throughout the hearing, this was put on a number of different bases.

109. The principles applicable to the interpretation or construction of the 2009 Agreement are the well-known principles set out by the Supreme Court in *Igote Ltd. v. Badsey Ltd.* [2001] 4 I.R. 511, and *Analog Devices v. Zurich Insurances* [2005] 1 I.R. 274, by reference to what was stated by Lord Hoffmann in *Investors Compensation Scheme v. West Bromwich Building Society* [1998] 1 W.L.R. 896. In summary these principles require the Court to ascertain the intention of the parties, as expressed in the words chosen by them. The appropriate interpretation of the chosen words 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 making the contract.

110. Many of the submissions made on behalf of the Bank and on behalf of Mr. Morrissey in response were directed to the issue as to whether or not the facilities in the 2009 Agreement were or were not facilities "repayable on demand" on any date even prior to 31st July, 2009. The Court is, however, not concerned with that issue as the Bank did not make a demand for repayment of the facilities before 31st July, 2009, in reliance upon its alleged entitlement to do so. The Court is asked to determine the Bank's entitlement to make the demand in January, 2010 *i.e*. after the repayment date of 31 July, 2009.

111. In accordance with the above principles, the Court must interpret the phrase "the Facility shall be repaid on or before 31st July 2009" in accordance with the meaning of those words to a reasonable person having all the relevant background knowledge. That background knowledge or "matrix of fact" as it sometimes referred to includes: the prior dealings between the Bank and Mr. Morrissey set out in some detail in this judgment, and in particular, the nature of the property portfolio for which the facilities were granted; the earlier facilities and the terms of same, and the demand made by the Bank for repayment of the facilities then available to Mr. Morrissey on 20th January, 2009, pursuant to the terms of the then applicable facility letter of 16th January, 2008. Starting with the words used in clause 8 of the 2009 Agreement by the parties and taking into account all the relevant background knowledge, in my judgment, the phrase "the Facility shall be repaid on or before 31st July, 2009" must mean that on 31st July, 2009, Mr. Morrissey became obliged to repay the facilities to the Bank. The phrase is simply not capable of any other meaning.

112. Counsel for Mr. Morrissey also submitted that there was an implied term of the 2009 Agreement to the effect that once interest was paid in accordance with the Agreement, the facilities would be "rolled over" and repayment would not be demanded. It is well established that the courts must be extremely cautious about implying terms into a commercial agreement (see *Tradax (Ireland) Ltd. v. Irish Grain Board Ltd.* [1984] I.R. 1). In my judgment, there is no factual basis on the evidence adduced which would permit the implication of such a term into the 2009 Agreement. The submission is in part based upon an incorrect assessment of the facts pertaining to the facilities granted by facility letters dated 21st December, 2006, 27th July, 2007, 22nd October, 2007 and 16th January, 2008. In each instance, the subsequent facility was granted prior to the repayment date of the relevant preceding facility which it replaced. There had not been a "rollover" of earlier facilities as submitted. Further, if the Court were to imply the term as contended for, it would be implying a term which is inconsistent with the express terms of the contract, which as a general principle the courts will not do (see *Sweeney v. Duggan* [1997] 2 I.R. 531 at p. 539 to 540).

113. Counsel for Mr. Morrissey, in submission, sought to rely on two further implied terms which they contended meant that the Bank was in breach of the 2009 Agreement in demanding repayment in January, 2010. In respect of both submissions, counsel for the Bank objected to the Court considering the submission upon the basis that no such implied term had been pleaded. A secondary submission was made by counsel for the Bank that a basis for the implied terms was not made out on the facts.

114. The first was an alleged implied term as to how the relevant manager in the Bank would and would not behave in making a submission in relation to Mr. Morrissey's account to the credit committee. The purpose of contending for such an implied term was to allege that the submissions made by Mr. Gilmartin to the credit committee in December, 2009, which resulted in sanction for the appointment of a receiver, were in breach of this implied term. No such implied term was pleaded, or referred to in replies to particulars or in the outline written submissions in advance of the hearing. They were only referred to in the closing written submissions. In my judgment, it would be an unfair procedure if the Court were now to permit Mr. Morrissey to seek to rely upon such a term. I would add that I am also of the view that on the evidence there is no basis for implying such a term into the 2009 Agreement.

115. The second term sought to be implied into the 2009 Agreement, was an implied term put during the hearing in a number of different ways, one of which was that "the Bank would not intentionally break the law by systemic acts of fraud and other illegality directed towards its Borrowers, State agencies and the wider community, resulting in an effective attack on the financial stability of the State, and the consequent making of a demand for immediate payment on the basis of a fundamentally transformed reality". Similarly, in my judgment, it would be an unfair procedure to permit such a case to be made in the absence of same being pleaded. I would, however, note that the only evidence in relation to the general standing of the Bank was the fact that it was nationalised on 15th January, 2009, i.e. prior to the conclusion of the 2009 Agreement and also the passing of the Irish Bank Resolution Corporation Act 2013, and the appointment of the special liquidator to the plaintiff on 7th February, 2013. There was no evidence before the Court of activities of the Bank other than its lending to Mr. Morrissey.

116. Accordingly, it is not my intention to consider further the submissions made in favour of either of the above implied terms.

117. There is one further case sought to be made in closing on behalf of Mr. Morrissey which, likewise, was not pleaded. It was that in making demand for repayment in January, 2010, the Bank acted in breach of constitutional rights of Mr. Morrissey. Any such case would have had to be pleaded if it was to be pursued. In the absence of any pleading or any application prior to the commencement of the hearing to amend the pleadings to include such a claim I do not propose considering the submission made.

118. Accordingly, I have concluded, that the 2009 Agreement continued to subsist in January, 2010; that in accordance with its terms Mr. Morrissey was obliged to repay the facilities on 31st July, 2009, and that there was no express or implied term thereof which prevented the Bank demanding repayment after that date. The remaining question is whether the Bank was precluded by what occurred at the meeting of 21st July, 2009, between Mr. Gilmartin and Mr. Morrissey and subsequent exchanges from demanding repayment in January, 2010.

119. As appears from the facts set out above, initially in June, 2009 further facility letters appear to have been envisaged. Mr. Gilmartin, on 30th June, 2009, indicated that he would forward "Facility letters later this week". In fact, no further facility letters were forwarded then or subsequently. However on 21st July, 2009, at the meeting in the Fitzwilliam Hotel, Mr. Gilmartin did either represent to or agree with Mr. Morrissey in the terms I have found and set out at paragraph 63 of this judgment. Most important was that for an unspecified period, the Bank would not demand repayment of the facilities provided Mr. Morrissey continued to pay the net rent into the Bank's account (after deduction of the €25,000 per month). Both men agreed in evidence that no period was specified. Hence insofar as it may be considered an agreement, it was not an agreement to vary the terms of the 2009 Agreement and in particular the repayment obligation on 31st July. Rather it would have to be considered as a collateral agreement made on behalf of the Bank that it would not exercise its right to demand repayment under the 2009 Agreement for an unspecified period of time, provided that Mr. Morrissey continued to pay the net rent into the Bank's account. The Bank, with some justification, contends that any such representation made or arrangement entered into by Mr. Gilmartin on behalf of the Bank cannot give rise to an enforceable agreement as the only identified consideration moving from Mr. Morrissey was an agreement to do what he was already contractually obliged to do, namely, to pay the net rent into the Bank's account. It is not necessary for me to examine that objection by the Bank as on the facts, I have determined that even if the arrangement entered into by Mr. Gilmartin with Mr. Morrissey on 21st July, 2009,

was an agreement by the Bank not to demand repayment of the facilities, that it was not then nor ever subsequently became an agreement not to demand repayment of the facilities on any date after 31st December, 2009.

120. As appears from paragraph 63 of my judgment, my finding of fact is that at the meeting of 21st July, 2009 Mr. Gilmartin did not make any express representation that such forbearance or agreement not to demand repayment by the Bank would last beyond the end of 2009. The period then under consideration by Mr. Gilmartin and Mr. Morrissey was the period of the autumn of 2009 in which Mr. Morrissey had indicated that he intended to present a more detailed restructuring plan to the Bank. This did not occur until November and the meeting of 19th November, 2009, held in relation to it between Mr. Morrissey and others and Mr. Gilmartin and Mr. Tierney of the Bank. The arrangement reached on 21st July, 2009, had by then come to be referred to by Mr. Morrissey as "the Standstill Agreement". Mr. Morrissey's email sent in advance on the morning of that meeting refers to the need "to firm up on an extension to the current Standstill Agreement". The subsequent letter of Mr. Hyland of Baker Tilly, who was then advising Mr. Morrissey, sent on 10th December, 2009, refers to the fact that "the current Standstill Agreement is due to expire shortly" which, in oral evidence, he confirmed he understood to be 31st December, 2009. Mr. Morrissey and Mr. Hyland in their evidence sought to explain the "Standstill Agreement " as referring to the agreement by the Bank that Mr. Morrissey be permitted to deduct €25,000 monthly from the rents payable to the Bank. Whilst it may have included such term, as a matter of commercial common sense having regard to where Mr. Morrissey unfortunately then found himself, the central element of the so called "Standstill Agreement" being referred to in November, 2009 was in my judgement the agreement by the Bank not to demand repayment of the facilities or as the name suggests to stand still. My conclusion is that at latest, at the time of the meeting of 19th November, 2009, Mr. Morrissey was aware that the arrangement entered into by Mr. Gilmartin in July, 2009 that the Bank would forbear or "stand still" on its entitlement to demand repayment would expire on 31st December, 2009. The exchanges between Mr. Morrissey and his advisers and the Bank in January, 2010 before the demand was made appear to me consistent with this finding.

121. Accordingly, my conclusion is that there was no subsisting arrangement or agreement between the Bank and Mr. Morrissey in January, 2010 according to which the Bank had agreed or represented that it would not demand repayment of the facilities granted to Mr. Morrissey pursuant to the 2009 Agreement. It follows that in January, 2010, the contractual terms between the Bank and Mr. Morrissey were exclusively those contained in the 2009 Agreement i.e. the facility letter of 2nd January, 2009, and the General Conditions of the Bank as accepted by Mr. Morrissey on 5th February, 2009.

Estoppel

122. The alternative defence made on behalf of Mr. Morrissey to the Bank's entitlement to demand repayment in January, 2010 is that the Bank was then estopped from demanding repayment of the facilities. The case as pleaded relied upon representations alleged to have been made by Mr. Gilmartin at the meeting of 21st July, 2010. As appears from the facts set out earlier in this judgment, in the course of the hearing, Mr. Morrissey, in addition and primarily, contended that relevant representations had been made to him by Mr. Gilmartin at the meeting of 23rd January, 2009. At paragraph 47 of the judgment, I have found as a fact that no representations of the type contended for by Mr. Morrissey in his evidence were made by Mr. Gilmartin at the meeting of 23rd January, 2009. It is therefore only necessary to consider the defence of estoppel in relation to the representations found to have been made by Mr. Gilmartin at the meeting of 21st July, 2009.

123. The defence of estoppel must be considered in accordance with the principles set out by Griffin J. in the Supreme Court in *Doran v. Thompson* [1978] I.R. 223 at p. 230:

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

124. On the findings of fact made at paragraph 63 of my judgment, I have found that Mr. Gilmartin did not in July, 2009 make any express representation that any forbearance or agreement by the Bank not to demand repayment would last beyond the end of 2009. The onus is on Mr. Morrissey as the person seeking to establish the estoppel that the Bank by its words or conduct made to him "a clear and unambiguous promise or assurance" to the effect that it would not demand repayment of the facilities during a period which includes January, 2010. The representation made to him in July, 2009 was for an unspecified period of time. As found, it was made in a context where Mr. Morrissey intended to present a detailed restructuring plan to the Bank and his other lenders in the autumn of 2009. I have found that Mr. Morrissey and his advisors were aware, at latest by 19th November, 2009, that what they had come to refer to as the "Standstill Agreement" which I have decided included the representation made or agreement reached in July, 2009 would expire at 31st December, 2009. There was no evidence of any express representation made to Mr. Morrissey on behalf of the Bank that it would not demand repayment on any date after 31st December 2009. Having regard to this finding, it is unnecessary for me to consider whether Mr. Morrissey, in reliance upon the representation made by Mr. Gilmartin in July, 2009, acted on that representation and altered his position to his detriment between July, 2009 and January, 2010.

Conclusion on First Issue

125. My conclusion on the first issue set down is that the Bank was entitled to make demand on Mr. Morrissey pursuant to the facility granted in February, 2009 as it did in January, 2010.

Fiduciary Relationship

126. The second issue which is to be determined is "whether the relationship between the plaintiff and the defendant went beyond that of a contractual relationship such that a fiduciary relationship existed between the plaintiff and the defendant".

127. The parties are in agreement that the Bank, as a lender, and Mr. Morrissey as a borrower, do not fall within one of the settled categories of fiduciary relationships. They are also in agreement that the settled classes are not closed and that the existence or not of a fiduciary relationship is primarily a question of fact to be determined by examining the specific facts and circumstances. Counsel for Mr. Morrissey draws attention to what was stated by Cromwell J. in the Supreme Court of Canada in *Galambos v. Perez* [2009] SCC 48, [2009] 3 S.C.R. 247 at para. 48:

> "… apart from the categories of relationships to which fiduciary obligations are innate, such obligations may arise as a matter of fact out of the specific circumstances of a particular relationship: see e.g. *Lac Minerals [v. International Corona Resources Ltd.* [1989] 2 S.C.R. 574;] at p. 648; Hodgkinson *[v. Simms.* [1994] 3 S.C.R. 377], at p. 409. The existence of the fiduciary obligation is thus primarily a question of fact to be determined by examining the specific facts and circumstances: Lac Minerals, at p. 648."

128. In *Irish Life & Permanent plc. v. Financial Services Ombudsman & Ors* [2012] IEHC 367, Hogan J. considered the issue of

possible fiduciary duties in a context of considering the question of what duties a bank would owe towards a customer who sought advice in relation to a mortgage product. At paras. 44 to 47, he stated:

> "44. One common theme running through this- and, indeed, the other appeals- was that the Bank owed no fiduciary duty to advise its customers and that it had, not, in fact done so. There is no doubt but that the lender/borrower relationship does not generally impose fiduciary duties on the lender. The whole object of a fiduciary is based upon a recognition that certain categories of persons owe duties to others over and above conventional contractual obligations by virtue of the special nature of their profession, occupation or position, so that, in Professor Delany's graphic words, such persons 'are obliged to act in a completely selfless manner'. See Delany, *Equity and the Law of Trusts in Ireland* (4th.ed,) (at 213). Trustees, agents, directors and partners are among those normally regarded as fiduciaries.
>
> 45. While the categories of fiduciaries are never closed, there is, I think, a reluctance to extend their boundaries beyond the traditional categories because to do so would effectively impose super-added duties of utmost good faith and complete disclosure to persons who never contracted to do so and thus potentially frustrate the ordinary workings of the commercial world. While all who enter into contracts are obliged to discharge them honestly and in good faith, it cannot be supposed, for example, that a retailer is under a positive obligation to disclose to a customer that he or she is aware that exactly the same goods can be purchased for a lower price from a nearby outlet. That would, however, be the position in law if, for example, a retailer were held to be a fiduciary.
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> 46. Accordingly, save in the special case of where the mortgagee enters into possession of mortgaged property it is clear that the mortgagor/mortgagee relationship is not a fiduciary one: see, *e.g., Irish Life and Permanent pic v. Financial Services Ombudsman* [2011] IEHC 439, *per* Michael White J. Nor can it be said that there is there a general duty on a Bank to insist that customers take independent advice in relation to Bank dealings: see *Bank of Ireland v. Smyth* [1996] I I.L.R.M. 241, 249 and Breslin, *Banking Law* (2nd. Ed.)(at 125).
>
> 47. While all of this is true, at the same time some measure of realism must also temper this analysis. The banking system is, by its nature, a highly regulated one which, is- or, at least, ought to be- based on trust: see, e.g., *Director of Corporate Enforcement v. D 'Arcy* [2006] 2 I.R. 163, 177, per Kelly J. The *laissez-faire* rules which might apply in the case of the borrowing and lending on the international capital markets cannot be applied in exactly the same way in the case of the domestic mortgage market, given that these are matters which gravely affect the long term welfare of most members of the general public. The very fact that the Office of the Financial Services Ombudsman was established by the Oireachtas is itself living testimony of this."

129. A consideration as to whether or not the relationship on the facts herein which developed between the Bank and Mr. Morrissey from 2000 constituted a fiduciary relationship must be informed by a consideration of what is meant by being a fiduciary. Fennelly J. in *McMullen v. Clancy (No. 2)* [2005] IESC 10, [2005] 2 I.R. 445 at p. 470, cited with approval the description given by Millet L.J. in *Bristol & West Building Society v. Matthew* [1998] Ch. 1 at p. 16:

> "'A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr. Finn pointed out in his classic work *Fiduciary Obligations* (1977), p. 2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary.'"

130. The plaintiff submits that the existence of a commercial relationship governed by a contract between parties of equal status has been held to be a strong indicator that a fiduciary relationship does not subsist. In *Hospital Products Ltd. v. United States Surgical Corp* (1984) 156 C.L.R. 41, the High Court of Australia held at para. 33 of the judgment of Gibbs C.J. at p. 70:

> "… the fact that the arrangement between the parties was of a purely commercial kind and that they had dealt at arm's length and on an equal footing has consistently been regarded by this Court as important, if not decisive, in indicating that no fiduciary duty arose."

131. In submission, counsel for Mr. Morrissey accepted that it is a relevant but not decisive consideration. They also refer to the critical aspect of a fiduciary relationship being an undertaking of loyalty *i.e.* the fiduciary undertaking to act in the interest of the other party. They also emphasise that the Court should consider the position of the parties as it results from the agreement or arrangements entered into rather than preceding same.

132. Mr. Morrissey relies upon the documentary evidence in relation to his dealings with the Bank from November, 2001 as establishing by 2010 a fiduciary relationship between the parties. At para. 39 of the defence and counterclaim, the essential claim made is pleaded:

> "39. From 2000 to 2009, the Plaintiff cultivated a close commercial and business relationship with the Defendant by whose loans he has purchased properties, family homes and investments in shares (both public quoted and privately owned) based on a loan to value ratio ('LTV'), which is the ratio of the value of the loans outstanding to the market value of the assets held as security by the Plaintiff. The nature of the business relationship between the Plaintiff and the Defendant was not restricted to that merely of lender and borrower but was akin to dealing with a venture-capital financial who chose to participate with an entrepreneur with an exceptional track record."

133. In submission, counsel for Mr. Morrissey referred, particularly, to the arrangements entered into by the facility letter of 27th July, 2007, pursuant to which the Bank advanced an additional approximately €15 million to enable Mr. Morrissey refinance his then borrowings with Bank of Ireland and EBS Building Society. It is submitted that such an arrangement to refinance borrowings from another bank could only have been an arrangement reached by Mr. Morrissey, trusting the Bank such as to give rise to a fiduciary relationship.

134. During the course of the hearing of this action and subsequent thereto, I have had the opportunity of reviewing in great detail the extensive communications between the Bank and Mr. Morrissey between 2000 and 2010. What comes across clearly is that the Bank was keen to do business with Mr. Morrissey. It cultivated a relationship with him in a manner not uncommon in that period,

inviting him to corporate events and even bringing him and his wife to Rome for a weekend, all expenses paid. It is also apparent that the lending team in 2007 saw considerable benefits for the Bank in doing business with Mr. Morrissey and considered him as an astute business individual. I have referred in some detail in the summary facts to memoranda prepared in 2007.

135. The documentation and oral evidence from Mr. Morrissey also disclose that he was, throughout this period, an experienced and astute businessman. In his oral evidence, he referred to his experience, in particular, in the aircraft leasing industry and that he was aware of "the mismatch between a long-term asset such as an aircraft or property and so on and the type of funding that was used to finance it". The evidence also discloses that Mr. Morrissey at all times entered into detailed negotiations with the Bank in relation to the terms of the facilities. However, what the evidence does not disclose is Mr. Morrissey seeking advice from the Bank in relation to his property business or the share portfolio in respect of which he also obtained borrowings.

136. Further, the evidence does not disclose either Mr. Morrissey seeking advice from the Bank or the Bank proffering advice to Mr. Morrissey in relation to his property investment business or the share portfolio for which he obtained funding. Contrary to what is pleaded at para. 39 of the defence and counterclaim, the evidence does not disclose that the Bank participated in any way as "a venture-capital financier" participating with Mr. Morrissey in his property investment business or share portfolio. The lending terms at all stages were confined to the Bank obtaining a return by way of arrangement fees and interest payments. Insofar as the financing by the Bank permitted Mr. Morrissey to increase the values of his properties by way of redevelopment or otherwise, the benefit of the capital increase was for Mr. Morrissey alone.

137. Insofar as the transfer of existing facilities from other banks in 2007 is concerned, as set out at para. 23 above Mr. Morrissey's own evidence was that part of the purpose was to achieve a situation where the Bank might be interested in participating in a future property fund similar to his then recently completed Capital D fund. In short the purpose was a perceived commercial advantage for Mr. Morrissey.

138. Reliance was sought to be placed upon the fact that Mr. Morrissey had met with Ms. O'Donoghue, a member of the Bank's Wealth Management Division. This was a division established to develop long-term relations with high net worth private clients. Ms. O'Donoghue gave evidence. She had one meeting with Mr. Morrissey in 2005 and two in 2006, one of which was with his wife. In the course of those meetings, I am satisfied that Ms. O'Donoghue did not offer advice to Mr. Morrissey in relation to his investment businesses. Rather, Mr. Morrissey was seeking to ascertain whether the Bank might be in a position to recommend to other clients that they invest in a then envisaged second Capital D property fund. He was not given any encouragement that this would be feasible and in the event the second Capital D fund did not proceed.

139. In my judgment, on the evidence before me, the communications between the Bank and Mr. Morrissey in the years 2000 to 2009 did not include any advice sought from or advice proffered by the Bank or any other steps undertaken which took the relationship outside of the normal commercial relationship of a lending bank and borrowing by an experienced entrepreneur or business person. Each, throughout the period at different points in time was keen to do business with each other. However, the reason for which each was keen to do such business was that each perceived it to be in their respective commercial interests to do business with the other. Regrettably, from Mr. Morrissey's perspective, with the benefit of hindsight, he made a decision in 2006 to make a fundamental change to the terms upon which he would borrow from the Bank i.e. a change to an interest only annual demand facility, and further, in 2007, to move borrowing from other institutions to the Bank. I conclude on the evidence that those were decisions made by Mr. Morrissey at the time in what he then believed to be his own best interests and to his commercial advantage. Further, the Bank, at the relevant time, again agreed to grant the facilities upon terms which it considered to be in its commercial interest.

140. The exchanges as late in the relationship as January and February 2009 demonstrate that the Bank and Mr. Morrissey were each taking steps and seeking to secure arrangements which each perceived to be to their commercial advantage.

Conclusion on Second Issue
141. Accordingly, I have concluded on the second issue that the relationship between the plaintiff and the defendant did not go beyond that of a contractual relationship and that a fiduciary relationship between the plaintiff and the defendant did not exist at any time prior to the making of the demand in January, 2010.

Prior Ruling
142. On 7th February, 2013, while this matter was at hearing, the Oireachtas enacted the Irish Bank Resolution Corporation Act 2013 ("the Act"). On the same day, the Minister for Finance made the Special Liquidation Order ("the Order") pursuant to s. 4 of the Act and appointed Kieran Wallace and Eamonn Richardson as joint special liquidators (the Special Liquidators).

143. On the following morning, counsel for the Bank informed the Court that they had been instructed by the Special Liquidators to continue the proceedings against Mr. Morrissey and to continue with the hearing. At the time, Mr. Morrissey was under cross-examination and had been for several days. Counsel for both parties agreed that the evidence be completed and the Court agreed that there would be a break prior to the closing submissions for the purpose, *inter alia*, of Mr. Morrissey and his counsel and solicitor considering the impact of the Act and the Order on the proceedings and the issues being determined pursuant to the order of 23rd January, 2012.

144. On 19th February, day 12 of the hearing, the closing submissions commenced. At the outset, counsel for Mr. Morrissey made submissions: (1) that the Bank's claim was now stayed pursuant to s. 6 of the Act; (2) that if not, the Special Liquidators were not entitled to continue the claim against Mr. Morrissey; and (3) that the Court should exercise its discretion not to determine the two issues set down for hearing by the order of 23rd January, 2012, by reason of the passing of the Act.

145. Having heard counsel for the Bank, I gave a short *ex tempore* ruling rejecting the first two submissions on the proper construction of the Act and what was now before the Court and decided to exercise my discretion in favour of continuing to determine the issues set down. I gave short reasons and indicated that I would set them out in my written judgment.

146. As appears from the judgment, the issues set down for determination by the Court arise out of the Bank's claim for judgment against Mr. Morrissey and the defence pleaded thereto. They may also be relevant to the counterclaim pleaded by Mr. Morrissey. However, what is important is that they are relevant to and necessary for the determination of the Bank's claim against Mr. Morrissey, having regard to the defence pleaded.

147. Counsel for Mr. Morrissey firstly submitted that the Bank's claim against Mr. Morrissey was stayed pursuant to s. 6 of the Act. This provides, insofar as relevant:

> "6.—(1) In this section 'proceedings', subject to subsection (4), includes counterclaims or cross-claims against IBRC, in

legal actions brought by IBRC, other than those counterclaims or cross-claims which, if successful, would give rise to a right of set-off.

(2) Subject to subsection (6), with effect from the making of the Special Liquidation Order—

(a) there shall be an immediate stay on all proceedings against IBRC,

(b) no further actions or proceedings can be issued against IBRC without the consent of the Court,

. . .

(4) The appointment of a receiver pursuant to a debenture or charge created by IBRC shall not constitute proceedings for the purposes of this section.

. . .

(6) (a) The Special Liquidation Order, and any other thing done under the Special Liquidation Order or pursuant to instructions issued or any directions given to a special liquidator pursuant to this Act—

(i) does not affect any proceedings taken, investigation undertaken, or disciplinary or enforcement action undertaken by the Bank, . . . in respect of any matter in existence at the time the Special Liquidation Order was made or other thing was done . . .”

148. Counsel for the Bank submitted that the Bank’s claim against Mr. Morrissey was stayed pursuant to s. 6(2)(a) of the Act. In my judgment, the Bank’s claim against Mr. Morrissey is not so stayed. It does not fall within the definition of “proceedings” in s. 6(1) and it is not a proceeding against (emphasis added) IBRC as required by s. 6(2) for the imposition of a stay.

149. The next submission was that the Special Liquidators do not have power to continue the Bank’s claim against Mr. Morrissey. In my judgment, they do have such power pursuant to s. 231(1)(a) of the Companies Act 1963, as applied in a modified form by s. 10(1) of the Act. The identification of the relevant provisions is a little tortuous. It starts with s. 10(1) of the Act which provides:

“10.- (1) Subject to subsections (2) and (3) and Part 1 of the Schedule, Part VI of the Act of 1963 applies to IBRC together with any necessary additional modifications.”

Subsection 10 (2) does not exclude s. 231 of the Act of 1963. Subsection 10(3)(a) states:

“(3) The provisions of Part VI of the Act of 1963 that apply to IBRC shall, in their application, be construed—

(a) as if any reference in those provisions to a company being wound up by the Court, however expressed, were a reference to IBRC being wound up by reason of the making of the Special Liquidation Order,”

The Act of 1963 is the Companies Act 1963. Section 231 of the Act of 1963 is within Part VI. Section 231(1)(a) provides:

“231.—(1) The liquidator in a winding up by the court shall have power, with the sanction of the court or of the committee of inspection—

(a) to bring or defend any action or other legal proceeding in the name and on behalf of the company;”

The final modification is made by paragraph 8 of Part 1 of the Schedule to the Act which applies s. 231(1) of the 1963 Act as if “with the sanction of the court or of the committee of inspection” were deleted.

150. The net cumulative effect of the above provisions is that s. 231(1)(a) of the Companies Act 1963, as modified and applied to IBRC by s. 10 and Part 1 of the Schedule to the Act, gives the Special Liquidators the power, without a requirement to obtain sanction of the court or any other person, to bring any legal proceeding in the name of and on behalf of IBRC. This includes a power to continue proceedings as it is well established that s. 231 of the Act of 1963 applies to the continuation as well as initiation of proceedings: *Re Greendale Developments* [1997] 3 I.R. 540 *per* Laffoy J.

151. The third submission was that having regard to the complexities and potentially far-reaching effect of the Act, and in particular, a potential impact by s. 6 of the Act on Mr. Morrissey’s counterclaim, I should exercise my discretion not to determine the two issues set down by order of Kelly J. My conclusion was that it would not be in the interests of the proper and orderly administration of justice to then adjourn the determination of the two issues as requested on behalf of Mr. Morrissey. I had heard all the evidence and it was then the 12th day in the trial of the module to determine the issues. At all times I had made clear that I would only be determining the two issues set down and that the consequences for the full determination of the proceedings including the Bank’s claim and Mr. Morrissey’s counterclaim of whatever my decision on the two issues would be was a matter for another day.

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152. There will be the following declarations on the issues set down for determination:

(i) The plaintiff was entitled to make demand on the defendant pursuant to the facilities granted in February, 2009 as it did in January, 2010.

(ii) The relationship between the plaintiff and the defendant did not go beyond that of a contractual relationship such that a fiduciary relationship existed between the plaintiff and the defendant.

153. I will hear Counsel on a date to be fixed in relation to the directions to be given for the full determination of the proceedings.