Neutral Citation 2011 [IEHC] 544

THE HIGH COURT

Record Number: 2010 No. 6866P

Between

Judith Whelan, Therese Lynch, Philip Lynch, Eileen Lynch,

Phillipa Lynch and Paul Lynch

Plaintiffs

And

Allied Irish Banks Plc., Matheson Ormsby Prentice, solicitors LK Shields, solicitors

Defendants

Judgment of Mr Justice Michael Peart delivered on the 8th day of December 2011:

On the 8th February 2007, Judith Whelan, under Power of Attorney from her parents Philip Lynch and Eileen Lynch and also from her siblings, Paul Lynch, Therese Lynch and Philippa Lynch, signed on her own and their behalf an AIB Bank loan facility letter in the sum of €25 million, a Deed of Transfer for the purchase of 86 acres at Kilbarry, Waterford for that sum, as well as a Deed of Charge to secure those borrowings on the land, all in the honest belief that the loan was a non-recourse loan, meaning to her that at no stage could the Bank seek to recover that sum from them personally, and that in the event that the sum was not repaid by the borrowers, the only remedy available to the Bank was to sell the land. This belief was one held also by her father, Philip Lynch, her mother Eileen Lynch, and the remaining plaintiffs who are her brother and sisters.

There is also evidence that Philip Lynch at all stages never intended that this transaction would be one whereby the plaintiffs would bear any risk. There is however other evidence which suggests that at least up to the 7th February 2007 he was open to the possibility that there would be recourse to all the plaintiffs, albeit that he was willing to provide a personal guarantee to AIB in respect of his childrens' exposure should AIB require that. Ultimately no such guarantee was sought by AIB, even though all the plaintiffs were named as borrowers in the final facility letter circulated on the 8th February 2007.

These lands were purchased by the Lynch family and one other party, Gerard Conlon, on a 50:50 basis, and as tenants in common. He too was a signatory to the final facility letter, the Deed of Transfer and the Deed of Charge, but had executed these documents on the evening of the 7th February 2007 in advance of the closing, as he could not be present at the closing, which took place at the offices of Messrs A & L Goodbody (A&L), solicitors for AIB.

Matheson Ormsby Prentice (MOP) were Gerard Conlon's solicitors, having acted for him for some years and in many substantial property transactions. They were instructed by him in relation to this transaction, and with the agreement of the Lynchs, to act also for the Lynchs in relation to the conveyancing aspects of this transaction.

Because the Lynchs were purchasing the lands jointly with Mr Conlon, it was necessary to have a Co-ownership Agreement prepared in order to regulate the relationship between the parties in relation to the development of the lands. LK Shields (LKS) were retained by the Lynchs for the purposes of reviewing the draft Co-ownership Agreement which was being prepared by MOP. As the transaction evolved and drew towards a conclusion LKS became a conduit for information from MOP to the Lynch side, who never had direct contact with MOP. LKS also prepared the Powers of Attorney under which Judith Lynch acted on the 8th February 2007, and they assisted MOP generally in relation to the transaction on the Lynch side. But their retainer as such was confined to the Co-ownership Agreement, and that was the only matter for which a fee note was ever raised by LKS. The costs of conveyancing and mortgage were paid to MOP on a 50-:50 basis by Mr Conlon and the Lynchs.

The plaintiffs' belief on the 8th February 2007 that they had signed up to a non recourse loan was supported by the fact that LKS had informed the Lynch side that the removal by AIB on the afternoon of the 7th February 2007 of a particular clause from the facility letter which had specifically stated that there would be recourse to all the borrowers, had been removed in the final version and that this reflected the fact that recourse was to the land only and that AIB no longer required recourse against the plaintiffs.

The lands were purchased by all parties with a view to development and onward sale, either prior to the development of the lands, or on a piecemeal basis, or post-development, and in the certain belief and expectation on their part at the time of purchase, that even following a successful rezoning of the lands and certainly after planning permission was obtained, there would an exponential uplift in the value of the lands, such that on the Lynch side a net profit of some €21million was anticipated. To allow time for the rezoning of the lands, the planning application and development of the lands, the facility letter in question provided that the loan was not repayable for a period of two years.

By February 2009 when the loan facility was due for renewal, the lands had been rezoned and planning permission obtained, but the lands had not been developed and no part of it had been sold on. No principal had been repaid because that was not required under the terms of the facility, but interest thereon was paid, as required, by both Mr Conlon in respect of his half of the loan, and the Lynch side for the other.

When AIB issued a draft new facility letter in January 2009, it was clear to the Lynchs from the terms of that draft letter that the Bank was, contrary to their own belief, did not regard the 2007 loan as being non-recourse, but rather one under which both the Lynchs and Mr Conlon were personally liable for the sum of €25 million and on a joint and several basis, as the new facility provided specifically for full recourse, and on the basis of joint and several liability.

The Lynchs were not prepared to sign such a facility letter as it was seen as a departure from what they believed was the non-recourse nature of the 2007 facility. The failure by the parties to agree the terms of the new facility resulted ultimately in AIB calling in the loan. The Lynchs believed that the Bank's remedy in these circumstances was simply to sell the lands, and that if there was a

shortfall from the price achieved, this was the Bank's loss and that they had no responsibility for that shortfall.

Letters of demand were issued by the Bank to all borrowers, and in due course Summary Summons proceedings were issued and served by the Bank seeking to recover from all the borrowers the amount of the loan.

Those proceedings as against the Lynch family members have been stayed by order of the Commercial Court so that the present proceedings can be determined, since the only defence to those proceedings is that the loan was in fact non-recourse. This Court is required to determine that issue, and in the event that the plaintiffs are wrong, then to determine whether they are entitled to indemnities from the Bank on the basis of negligent misrepresentation, and/or from either or both of MOP and LKS, who in different ways were involved in the transaction on behalf of the Lynchs, on the basis that they were negligent in providing incorrect information or advice as to the nature of the loan, and/or otherwise breached the duty of care owed to the plaintiffs. In turn, the defendants seek indemnities from each other, depending on the Court's conclusions. In so far as MOP gave information to LKS in relation to certain changes in the loan facility letter on the 7th February 2007, they maintain that such information was correct, and that if what LKS informed the Lynch side in relation thereto was incorrect, it is because LKS misunderstood or misinterpreted the information, resulting in the Lynch side being misinformed and misadvised in relation thereto.

It is common case that as a result of the current economic downturn and its effect on land values, the lands purchased have a value of something in the order of €3-4 million, and that any sale of the lands now will leave a very significant shortfall in the amount lent by the Bank for their purchase.

Nobody on the Lynch side made any direct approach to AIB for a loan facility, and had no dealings or contact with AIB personnel prior to drawdown of the loan. The task of approaching AIB was entrusted by Philip Lynch to Mr Conlon, and it is Mr Lynch's evidence that in whatever way he stated it to Mr Conlon, it was made clear to him that any loan to be arranged was to be on a non-recourse basis. It is also the case that in fact Mr Conlon never sought a non recourse loan from AIB, who were therefore never aware of the Lynchs' wishes in that regard.

Neither is there any evidence that Matheson Ormsby and Prentice who were retained by Mr Conlon to act for him in the purchase, and who later were acting for the Lynchs in relation to the conveyancing aspects of the transaction, were ever informed either by Mr Conlon or by anybody on the Lynch side, that the only form of loan acceptable to the Lynchs was a non-recourse loan. The Lynchs in fact never had any contact with anybody in MOP, until Judith Lynch met Ronan McLoughlin of that firm at the offices of A&L on the 8th February 2007 when the transaction was completed by her under Powers of Attorney from her other family members.

Neither is there any evidence that the Lynchs at any time informed LKS that the loan facility from AIB had to be on the basis of non-recourse and that they would not proceed with the purchase on any other basis.

This very brief factual summary, which will have to be expanded upon in due course, demonstrates the difficult task facing the plaintiffs who seek to establish negligent misrepresentation on the part of AIB, and negligence on the part of either or both firms of solicitors.

That difficulty is not ameliorated for the plaintiffs by the fact that neither Mr Conlon nor either of his associates, Mr Gunne and Mr Godsil, who had contact with AIB in the person of Derek O'Shea in relation to the loan being negotiated, have been called to give evidence on behalf of the plaintiffs, or indeed by any of the defendants, and the Court is asked to draw the inferences against the plaintiffs in that regard.

In addition, AIB have chosen not to call any evidence whatsoever following the closure of the plaintiffs' evidence, on the basis that the plaintiffs have failed to make out any prima facie case against AIB. The Court has not therefore heard any evidence from Derek O'Shea even though he had prepared a witness statement. The plaintiffs, who have been thereby deprived of an opportunity to cross-examine him, in turn ask the Court to draw inferences against AIB from their failure to go into evidence, and in particular to call Mr O'Shea as a witness even though he had prepared a witness statement for these proceedings.

Relationships and lines of communication:

Allied Irish Bank (AIB)/ A & L Goodbody (A&L):
AIB is a bank who had an existing and significant relationship with Mr Conlon, but not with Mr Lynch. It had already lent very significant sums of money running to hundreds of millions of euro to Mr Conlon, and there is evidence in this regard that in so doing and in agreeing to make the present loan, it had exceeded its own guidelines, and furthermore, presumably in the light of this, was not prepared to lend to him alone on the Kilbarry lands, and required the involvement of Philip Lynch in the loan. While Philip Lynch had no banking relationship with AIB, he was widely known to be a extremely wealthy and successful businessman, and at the time good for the loan.

Philip Lynch's evidence is that after Mr Conlon had approached him in 2006 offering to cut him into the deal, he informed Mr Conlon that he was interested but only on the basis of a non-recourse loan. There is no evidence that Mr Lynch had any further contact with Mr Conlon prior to the 7th February 2007- the day before the purchase was completed - about how those negotiations were progressing. Indeed, it is clear from the evidence given by him and others on the plaintiffs' side, that he is a man who, once he had decided on a particular strategy or planned an investment, and it is clearly so in the present case, he left the detail and the working out of his plans to his staff, particularly his assistant, Robert Burns, and latterly his daughter Judith Whelan who at the beginning of February 2007 was employed by the family to look after matters concerning family finance and investments.

Similarly, he appears to have left it to Mr Conlon to arrange the finance for this transaction from AIB once he had decided to pursue the Waterford project further, and relied upon him to do as he required. But there is no evidence that thereafter he made further contact at any time to find out how matters were progressing with AIB. He stood back from the transaction once he had given the go ahead for it. Nevertheless, he believed at all times prior to closing the transaction that he could withdraw from it, and that in such an event he would be able to come to an agreement with Mr Conlon, whom he trusted, in relation to the return of his half of the deposit, even with a possible uplift on that sum. He was not aware that AIB would not lend at all to Mr Conlon on this land without his own involvement in the loan.

A&L acted for, and advised AIB in relation to the loan facility, and prepared the necessary security documents. They were informed that MOP were acting for all the purchasers, and communicated with MOP, though they were aware that LK Shields also acted for the Lynchs in relation to the Co-ownership Agreement.

As I have said, the transaction was completed at the offices of A&L on the 8th February 2007 when Judith Whelan executed all

documents for the Lynch side under Powers of Attorney, and in the presence of Ronan McLoughlin of MOP, acting for all the purchasers, who in due course discharged their fees.

Matheson Ormsby Prentice (MOP):
MOP were instructed by Mr Conlon to act as solicitors in relation to the purchase of the Waterford lands. He was an existing and significant client of that firm, who had acted for him on many occasions previously. They acted in the present transaction also for the Lynch side in relation to the conveyancing and mortgage for the purchase, but say that they were never instructed by the Lynchs in relation to the terms of the loan being obtained. There is no evidence that their instructions to act came from the Lynch side directly, and it can be presumed that it was Mr Conlon or one of his associates who informed MOP that they were to act also for the Lynch side. One way or the other they were certainly acting for the Lynch side and raised their invoice in due course to Mr Conlon and the Lynchs.

Any communication either by AIB or by A&L in relation to the loan facility was to MOP. At times they were asked by AIB or A&L to take instructions from the Lynchs in relation to the facilities being offered. They acted for Mr Conlon in relation to the Co-ownership Agreement, and were informed that LKS were acting for the Lynch side in relation to that document, and communicated with LKS in relation to its terms, and, as the transaction was nearing completion, in relation to other matters such as the Powers of Attorney, Family Home Declarations, and the terms of the facility letter as that document evolved into its final form.

They communicated in the normal way with Mr Conlon in relation to all matters relating to the transaction, and arranged for the execution by him on the 7th February 2007 of all necessary documents, including the ultimate facility letter, as he was unavailable for the closing itself.

MOP attended the closing of the transaction at the offices of A&L on behalf of all purchasers, though this was the first occasion on which MOP had met with Judith Whelan or anybody on the Lynch side.

L K Shields (LKS):
LKS were instructed initially by the Lynchs in relation to the preparation of the Co-ownership Agreement to be entered into between them and Mr Conlon. As far as LKS is concerned that is the extent of its retainer, though they accepted during the hearing that as the transaction progressed to a conclusion their involvement extended to what they have described as administrative assistance. That assistance related to the preparation of the Powers of Attorney to enable Judith Whelan to execute all necessary documents on behalf of her mother, father and siblings, as well as Family Home Protection Act declarations. Their involvement extended also, without any specific retainer in this regard, to passing on to them information which was communicated to LKS by MOP in relation to the facility letter.

The Lynchs maintain that LKS were acting for them in relation to all aspects of the transaction, including in relation to the terms of the facility letter in all its various forms from time to time, and have given evidence that LKS was the only firm of solicitors with whom they had any direct contact. It is a fact that LKS had in the past and over many years acted for Philip Lynch in many significant transactions and were "his solicitors", and indeed it is a fact also that a long-standing personal relationship existed between Laurence Shields and Philip Lynch, and the family generally.

While the Lynchs say that they were reliant on advices from LKS in relation to all aspects of this transaction, it is accepted that at the outset of this transaction they were retained in relation to the Co-ownership Agreement only, as obviously MOP could not represent both sides to that agreement. But there is little doubt that as the transaction evolved and was approaching completion on the 8th February 2007, this involvement increased to the extent that LKS was the conduit by which information from AIB/MOP was communicated to the Lynchs, including as to the nature of the facility letter which was ultimately signed. Indeed, when giving his evidence Laurence Shields accepted that LKS was by that time acting for the Lynchs above and beyond the Co-ownership Agreement. That is not to be understood however as an acceptance by him that his firm was specifically asked to give advice in relation to the facility letter, and the nature of it. There has been no evidence that by the 7th and 8th February 2007 the relevant personnel in LKS were ever given instructions or information by the Lynch side from which they could understand the significance of the a critical question asked by Robert Burns arising from information received by LKS from MOP and passed on by LKS, in relation to the terms of the final facility letter. I will come to the series of emails and telephone conversations which took place around this issue on those dates, as they are central to some of the issues to be decided. In particular, it appears clear that at no stage did the Lynch side either in writing or in any telephone or other conversation with LKS state clearly or even obliquely, that under no circumstances would the Lynchs proceed with this transaction unless the loan facility was a non-recourse facility.

Chronology of events:
The plan to purchase the lands appears to have been hatched by Mr Conlon around the beginning of 2006.

Mr Conlon and Mr Lynch were each extremely successful and well-known businessmen with substantial assets. They knew other very well indeed and had a mutual high regard for each other. Mr Conlon had invited Mr Lynch to join the Board of his Harlequin Group, and appears to have appreciated greatly the input of Mr Lynch to Harlequin. It has been stated by Mr Lynch in his evidence that the invitation to him to participate in the purchase of these lands was a gesture of appreciation by Mr Conlon for the assistance given by Mr Lynch in relation to Harlequin, since the deal was believed to be one that could yield a considerable profit for all involved following a rezoning and development of the lands.

Whether that is the true reason Mr Lynch was invited to participate from Mr Conlon's point of view, we do not know since Mr Conlon has not been called to give evidence, but at any rate that was Mr Lynch's belief at the time. It is now known from an internal memorandum within AIB that Mr Conlon was over extended with AIB and that the Bank would not lend to Mr Conlon alone for this purchase and required Mr Lynch's participation. That at least raises the possibility that Mr Conlon's real motive in inviting Mr Lynch into the transaction was to overcome that difficulty. But we do not know for certain, and perhaps do not need to know at this stage. We do know that on the 26th January 2006 Mr Conlon sent an email to Mr Lynch stating that he was looking at sites in Waterford and that he was "*happy to do a 50:50 ... if you would like*". There is also an email from Richard Godsil, an associate of Mr Conlon, to Mr Conlon which, inter alia, stated *"how do we involve Philip Lynch?"*

By the end of March 2006 matters had progressed to the point where Mr Lynch had expressed interest in the deal, as Robert Burns emailed Mr Lynch in relation to making arrangements for the payment of one half of a deposit of €5 million, and indicated that the proposed closing date for the purchase was 31st December 2006. By this time steps had already been taken by Mr Conlon in relation to the rezoning of the lands to permit the desired development of the lands. In addition a planning application was underway the result of which was expected around June 2006.

Mr Lynch provided a draft for €2.5 million to Mr Conlon in respect of his share of the deposit. But at this stage no agreement had been

reached between Mr Conlon and Mr Lynch as to the precise division of participation of the parties in the deal, and this draft was provided on the basis of trust between Mr Conlon and Mr Lynch. The Contract was executed by Mr Conlon "in trust", but the names of the parties on whose behalf the contract was signed was not revealed at that point. Mr Lynch had not made any decision as to how the Lynch interest would be held.

On the 10th April 2006 MOP by letter headed "*Our client: Gerry Conlon (in trust)*" enclosed the executed Contract and a draft for €5 million, which was to be held in trust by the Vendor's solicitors pending satisfactory responses to various matters which had already been raised by MOP in a previous letter dated 26th March 2006. Indeed the letter stated also that the deposit was to be held and not negotiated until those matters had been attended to, and stated that the executed contract was being returned "*as a sign of our client's good faith*". It appears that there may have been interest in these particular lands from other parties, and Mr Conlon was anxious to secure them.

By May 2006 the Conlon side was informing Mr Lynch that even by that time the value of the lands had risen to €35 million, and that there was interest at hat figure.

Some indication of Mr Lynch's intention that any borrowings for this land would be non-recourse is contained in a memo which Mr Lynch asked Robert Burns to prepare for Mrs Lynch in order to keep her informed as to the nature of the transaction at the end of May 2006. In that memo Mr Burns refers to any borrowings for the transaction being *"secured on the land itself'.* It is worth mentioning at this point that on the Lynch side, and even on the part of Mr Lynch and Robert Burns, there seems to have been some confusion or uncertainty about distinctions between the concept of security and the concept of recourse, but I shall return to that in due course. But it clear that the reference to the borrowings being *"secured on the lands itself'* was intended to convey that the lending bank would have recourse only to the land, rather than personal recourse to the borrower(s). He stated also that *"once the rezoning is through, a bank will lend on the land itself without looking for any other personal assets to support the loan".* Again, one can see that if this was intended to mean that there would be no personal recourse in relation to any proposed loan, the concept of security is being confused with that of recourse.

In this respect it is of some relevance to note that when previously Philip Lynch had considered investing in a different project being driven also by Gerard Conlon, namely the Millennium Project, and where proposed borrowings of €129 million were involved, Philip Lynch withdrew his interest in that project around June 2006 because loan facilities from AIB were being offered only on a joint and several recourse basis. He relies on this for support for his contention that he does not get involved in a significant investment deal unless borrowings were to be non recourse, and for support for his contention in relation to the Kilbarry lands that he never intended that the borrowings would be other than non-recourse, and that if he had been aware that they were recourse only, he would have withdrawn from the transaction. He contends that since AIB knew, following his withdrawal from the Millennium Project, that he was averse to joint and several recourse borrowings, they must have known that he would not proceed on any different basis in relation to the Kilbarry purchase. The plaintiffs say that LKS were also aware for some time of Philip Lynch's unwillingness to borrow on the basis of joint and several full recourse.

He and the other plaintiffs are all adamant that it was only because they received an unequivocal assurance from LKS on the 8th February 2007 that the final loan facility was non-recourse, that the transaction was closed on that date and the funds drawn down from AIB. They believe also that the manner in which changes were made to the AIB facility letter as it evolved through its various drafts and into its final form is consistent with their belief that at all times AIB was aware that what they required was a non-recourse loan, and that the late change to the final version on the 7th February 2007 by the removal of clause 5 was consistent with non-recourse, rather than recourse as AIB contend. But I will have to return to that issue in more detail in due course.

By June 2006, it is clear that while Robert Burns was active in relation to exploring finance for Kilbarry, and was in touch with Ernst & Young in relation to possible structures for the purchase such as the use of a limited partnership in order to pass benefit to the Lynch children. There are a number of memos made by Robert Burns and communications by email with Mr Lynch which set out possible funding mechanisms. One such memo dated 21st June 2006 refers to non-recourse borrowings *"probably from Bank of Ireland"* and the limited partnership idea, but without any reference to any question of joint and several liability with Mr Conlon. It would appear that Bank of Ireland would have required security over other lands besides the Kilbarry lands, and this may have caused Mr Lynch not to pursue finance through Bank of Ireland.

Exactly when Mr Lynch gave the go ahead to Mr Conlon to approach AIB for funding is not clear, but certainly by the 19th September 2006 Robert Burns was able to tell Mr Lynch that Richard Godsil (Conlon side) *"will arrange finance with AIB for the balance of £20 million".* He also informed him that Mr Godsil was hopeful that by the closing date 31st December 2006 rezoning would be in place resulting in an uplift in the value of the lands to €70 million, so that all the borrowings could be secured on those lands alone. By this time the lands were included in the draft development plan for rezoning, and this was considered to be a cause for optimism that rezoning would be achieved.

On the 20th September 2006 Robert Burns had a telephone conversation with Emmet Scully of LKS and they discussed the proposed purchase and in particular the idea of a limited partnership, and some perceived difficulties which could arise in relation to it. By October 2006 the idea of a limited partnership had been abandoned.

That memo records also Emmet Scully's understanding at that stage that this purchase was one which was intended to have what is described as "*a quick turn around*" and that it was intended that the Lynchs would not stay in it for long. I presume this to mean that once rezoning was achieved, and perhaps planning permission also, the lands might be sold on, thereby achieving a considerable profit for the Lynchs on their investment given the substantial uplift in value.

By this time the identity of who exactly would be named on the Lynch side as purchasers had not been decided. Indeed, Mr Lynch in his evidence has stated that even by this time he had not finally decided if he would go ahead with the purchase. He was prepared to withdraw if necessary. Neither had MOP been instructed as to the entity which would hold the property on the Lynch side of the transaction.

Not having the benefit of any evidence from Mr Conlon or Richard Godsil or anybody else from the Conlon side, or any witness from AIB, one does not know at what stage the Conlon side approached AIB in relation to funding, or what if anything was said about the loan having to be on a non-recourse basis. It could be that non-recourse was not discussed, since there is an AIB document entitled "*Presentation to Credit Committee 23/11/2006 Gerry Conlon connection*" which sets out some detail in relation to the application for funding. The date 23/11/2006 appears to have been incorrect and according to correspondence from AIB it should have read 21st December 2006. As stated already, the sale was due to be completed on the 31st December 2006.

That document states inter alia,:

"As outlined in the mark up, Sector are recommending the Bank provide 100% funding of purchase price subject to full personal recourse to Gerry Conlon whose net worth is circa £190 million and Philip Lynch whose net worth is to be provided prior to drawdown." (emphasis added)

This document also notes that it is the purchasers' plan to sell a portion of the lands in order to clear or reduce the Bank debt, and that plan seems to be confirmed by the contents of an email from Robert Burns to Mr Lynch dated 5th December 2006 where he stated that "*Richard [Godsil} sees the longer term vision as being a disposal of land up to the value of the AIB loan circa 30-40 acres with the balance to be held for the medium term and sold on a piecemeal basis to maximise value. Richard's view is that this would be a discussion to be had between you and Gerry [Conlon]. The land could be borrowed on by you personally once the AIB loan was cleared*."

What seems perfectly clear at this stage is that it was the Conlon side which was in contact with AIB in relation to organising finance, that the Bank was contemplating a loan in the sum of €25 million and that they saw this as being one where there would be full personal recourse to both Mr Conlon and Mr Lynch, and that further discussions needed to occur between Mr Lynch and Mr Conlon in order to work out details such as if or how the lands would be partially disposed of after rezoning was achieved in order to reduce or eliminate these borrowings. It is clear that these borrowings were not intended to be long term in nature since the deal was thought to be one that would have a quick turnaround with all parties achieving a significant profit quickly.

While the document bearing date 21st November 2006, but said to be in fact dated 21st December 2006 referred to full personal recourse to both Mr Conlon and Mr Lynch, it should be mentioned that another internal AIB document dated 18th December 2006 which seems to have been prepared for the purpose of a Bank Credit Committee meeting refers in paragraph 4.5.1, and again at paragraph 7, to full recourse to Mr Conlon with no mention of recourse to Mr Lynch. However, a similar document prepared for that meeting on the 21st December 2006 contains a recommendation of the loan facility "*on the basis of full recourse to borrowers*". The decision made is noted in manuscript at the foot of that document and notes support for the proposal, but that further information is needed on Mr Lynch.

It is also clear that while by this time Mr Lynch had given thought to how his interest would be held and in whose names (limited partnership or in the names of him, his wife and his children) a decision was yet to be made. Indeed, it would appear that even though the closing date was fast approaching on the 31st December 2006, Mr Lynch had still not finally decided whether or not to proceed. That was, at least according to his own evidence, because it would all hinge on the loan from AIB being non-recourse consistent with his decision to withdraw from the Millennium Project, and any other terms that AIB would require, since this was a transaction which he was not prepared to be involved in unless it was "at no risk" i.e. non-recourse and not joint and several with Mr Conlon.

AIB issued a document referred to as "Heads of Terms" on the 22nd December 2006. The Lynch side did not receive this document until the 3rd January 2007. By this time the closing date had passed. Nevertheless MOP were in touch with the Vendor's solicitors in relation to conveyancing details, and no doubt were anticipating the service of a Completion Notice.

The Heads of Terms dated 22nd December 2006 which issued from AIB set out details of two loans totalling €25 million, and having referred to interest terms and security to be given over the Kilbarry lands, went on to set out some Special Conditions and in particular that a Net Worth Statement would be required for Mr Lynch and "*Full joint and several personal recourse*". Other internal AIB documents dated 3rd January 2007 again refer to this facility being on the basis of full recourse to both Mr Conlon and Mr Lynch

Mr Lynch, Robert Burns and other members of his company One51 were in Spain at the beginning of January 2007 where they were gathered for the purpose of planning the company's activities for the coming year. It seems to have been while in Spain that Robert Burns first became aware of the contents of the Heads of Terms which Richard Godsil emailed to him on the 3rd January 2007. That email requested that Robert Burns contact Mr Godsil to discuss the matter, but he did not do so according to his own evidence. But he did speak to Mr Lynch about it as soon as he could while in Spain, and there is a brief handwritten memo of that conversation made by Mr Burns and which bears the date 4th January 2007. The memo records a conversation about a number of matters but includes the following at item 3 which sets out bullet points as follows:

Not NR/Joint +Several: Fall Apart

What value now to go? 50m

Talk to Godsil now about going

Play to Godsil

Impact elsewhere

Divert problem

This note is explained by Mr Burns as meaning that because the terms were for full recourse and because there was to be joint and several liability between Mr Conlon and Mr Lynch, the deal would likely fall apart because Mr Lynch was not prepared to go ahead with the loan on that basis. The reference to "what value to go" is said to mean that Robert Burns would discuss with Richard Godsil some terms on which Mr Lynch would withdraw which would reflect the increase in value in the Kilbarry lands, thought to be then worth €50 million, since the contract was executed. In other words, apart from getting back his share of the deposit paid, Mr Lynch would receive an additional sum of money if he withdrew. However, there seems to have been no immediate contact by telephone or otherwise with Richard Godsil immediately thereafter, even though Mr Lynch had issues about the Heads of Terms. He was prepared to walk away from this transaction at this stage unless the loan was non-recourse and unless the joint and several condition was removed. He was also unhappy about providing a Net Worth Statement as he did not want Mr Conlon to have access to such details. It is possible that this Net Worth Statement was required by AIB in relation to €5 million of the total loan which was in respect of the deposit paid to the Vendors. In that regard there is an email from Mark Harris of AIB to Robert Burns dated 4th January 2007 which states:

> *"Robert- one other thing that the [Credit} Committee would like to see in the statement from Ernst & Young is the ability to fund 50% of the second facility (Eur5mfacility) in the event that the rezoning is not achieved. "*

This was Robert Burns's understanding in relation to the request for a Net Worth Statement as he refers to it in that vein in his email of the following day to Ernst & Young.

At this stage Robert Burns was in touch with Ernst & Young in relation to tax planning aspects of the transaction and in relation to the calculations necessary in order to deal with the equalisation of benefit to the Lynch children which was part of Mr Lynch's objective in entering into this transaction in the first place. However it is clear that at this stage, Robert Burns was not certain that Mr Lynch would proceed with this deal at all, even though he believed at that date that the deal was to close on the 10th January 2007, because there is an email from him to Mr Lynch on the 8th January 2007 as follows:

> *"Philip- Have you had any further thoughts on Waterford land? Godsil plans to close the contract on Wednesday. I am working with Marion [Ernst & Young] on the equalisation among the family in case you want to proceed with it. " (emphasis added)*

One can see immediately that the question of whether or not the AIB loan was recourse or non-recourse or whether it was on the basis of joint and several liability with Gerard Conlon was not mentioned as an issue yet to be resolved. But it is clear that if it was still an issue for Mr Lynch, no steps had been taken with AIB or through Mr Conlon or his representatives to address it. It seems to have been left in the air. There is no evidence that any such contact was made around this time in order to address these issues which Mr Lynch has stated were crucial to his decision whether to proceed or not.

Ernst & Young got back to Robert Burns later on the 8th January 2007 in relation to the shares each Lynch child should take in order to achieve equalisation of benefit and those calculations and figures are contained in a memorandum of that date which Robert Burns prepared for Mr Lynch. Having set out those figures, Robert Burns concluded the memorandum as follows:

"If you want to proceed with the purchase please let me know if you are happy to proceed with the children taking a 20% share in the deal on this basis and I can amend the purchase contract accordingly. "

I assume that the reference to "purchase contract" is intended by him to refer to the Deed of Transfer to be executed by the Vendor. But again one can see that there is no reference whatsoever to the outstanding issues of recourse and joint and several liability with Mr Conlon. But Robert Burns emailed Ernst & Young on the 9th January 2007 indicating a confirmation of the split between the Lynch family members and asked them to talk to Ronan McLoughlin of MOP in relation to that. Since MOP were dealing with the conveyancing matters, they needed to have those details for the purposes of the Deed of Transfer.

But Robert Burns has stated that even at this stage he still believed that Mr Lynch had not made a final decision on whether or not to proceed with the purchase. I accept the sincerity of his evidence in this regard. Nevertheless it is a truly extraordinary state of affairs given that he believed at that point that the sale was to close on the following day, and there appears to have been no concern or inquiry about the terms of the loan which he knew Mr Lynch was unhappy with. There is no evidence that any steps were taken in relation to these issues, if they were as crucial as has been stated in evidence. These outstanding issues were not even brought to the attention of MOP who no doubt were preparing to complete the sale. Nevertheless Robert Burns was progressing matters in case the deal was proceeding.

On the 9th January 2007 he emailed Mr Lynch to update him in relation to the purchase. He stated in that email:

> *"Contracts are being drafted for Waterford and I am arranging for the childrens details to be sent to MOPs who acting [sic} on the deal. A Co-ownership Agreement between you and jerry [Conlon} will be with me later this week. I will need to get this reviewed particularly in the light of harlequins 20% carry. Deal expected to close early next week."* (my emphasis)

There is no evidence that Mr Lynch made any response to this email.

LKS had not been retained at all at this stage, even in relation to the preparation of the Co-ownership Agreement. So there can be no question of LKS being in any way aware of the transaction at this time and any issues relating to recourse facilities and the joint and several issue. Clearly the closing date had moved forward to "next week" and this was mentioned by Robert Burns in an email to Ernst & Young on the 9th January 2007.

On the 9th January 2007 Ronan McLoughlin of MOP wrote to Robert Burns confirming that he had received details from Ernst & Young in relation to the shares of the Lynch family to be reflected in the Deed of Transfer, and went on:

"All parties should be listed on the facility letter and you might advise as to the current status of same as we are now coming under increasing pressure to complete the transaction and expect a completion notice to be served on us in the immediate future. I will require PPS numbers and addresses for Philip Lynch and the children in the immediate future.

I am now preparing a draft Co-ownership Agreement between the parties. You might advise as to who would be reviewing same from the Lynch's perspective. "

Clearly MOP were unaware whether a loan facility was in place, or of any terms as to recourse/joint and several, and they do not appear to have been involved directly with AIB in relation to the loan application as such. This was something being attended to by their clients as far as they were concerned and they awaited details in relation thereto.

The need for all parties to be named in the facility letter even though the children were not providing equity as such was information given by Ernst & Young to MOP. In other words they advised that it was necessary, presumably as part of tax planning, that the Lynch children should appear as borrowers in addition to Mr Lynch and his wife, Eileen Lynch. That information does not appear to have reached AIB by the time it prepared the first version of the loan facility letter dated 9th January 2007, since the borrowers named in that facility letter are named only as Gerard Conlon and Philip Lynch.

The evidence has been that this initial version of the facility letter was not seen by the Lynch side until 2009, and in that regard it is to be noted that it is addressed to both borrowers but care of an address which is Mr Conlon's office. Presumably it was received there by Mr Conlon, but certainly the Lynch side never saw it at that time. While the loan is one to both borrowers the letter itself makes no reference either to the loan being a full recourse loan or to it being on the basis of joint and several liability, as some other later versions did. It does however refer to the need for a Net Worth Statement for Mr Lynch. Such a statement was provided on the 1oth January 2007 by Ernst & Young giving details of Mr Lynch's income and total net worth. It stated that based on that information it could be confirmed that he "*has sufficient net assets to fund the personal loan sought of £2.5 million*" - this being a reference to his half of the €5 million deposit.

It is argued by the defendants that the absence of a specific reference to full recourse in this facility letter did not mean that the

loan was other than full recourse, and reference in that regard is made to the fact that the letter states at the outset that the facilities are subject to the terms and conditions set out in this letter and "*subject also to the Bank's General Terms and Conditions Governing Business Lending*", where that position is made clear. It is contended by AIB that if the loan was intended to be other than full recourse, that would need to be specifically set forth therein in order to indicate something other than normal full recourse.

Nevertheless, it is clear that though this letter had issued to Mr Conlon, neither Mr Lynch nor anybody on the Lynch side saw it. There is no evidence either that Mr Conlon contacted the Lynch side about it. As far as Robert Burns and Mr Lynch were concerned, a final decision whether or not to proceed had still not been made, and that decision would depend on the terms being offered by AIB for the loan.

On the 11th January 2007 Robert Burns wrote to Ernst & Young by email stating that he was still in Spain until the weekend but told them that he had left a message with Mark Harris of AIB about putting the Lynch childrens' names on the facility letter. But that is not to say that he had seen the first facility letter by that date. He had not. But again there is no mention of the concern that the facility be non-recourse and not joint and several, and that any steps be taken to ensure that this was dealt with.

On the 16th January 2007 MOP received a Completion Notice from the Vendors solicitors by letter dated 15th January 2007. By this time the Lynch personnel had returned from Spain. The Notice required that the sale be completed "*within 28 days from the date of service of this Notice (excluding the date of service)*".

That meant that the sale had to be completed on or before the 13th February 2007.

On the 16th January 2007 AIB produced a second version of the facility letter in which the borrowers are named as Gerry Conlon, Philip Lynch and the Lynch children. For some reason Mrs Lynch is omitted but it is safe to presume that this was accidental. Again, the Special Conditions referred to a Net Worth Statement for Philip Lynch, and that the Bank needed to be satisfied prior to drawdown that a Co-ownership Agreement was in place between the parties. Asfor security, the letter required a "*first ranking all sums legal charge over 86 acres of land at Kilbarry, Waterford City to vest in the names of [the borrowers]".*

This facility letter was sent by AIB to its solicitor, Alan Roberts of A & L for his approval on the 16th January 2007, and was said to replace the previous version. It had not by then been formally issued to the borrowers.

By the 17th January 2007, Robert Burns had contacted Emmet Scully of LKS in relation to that firm acting for the Lynchs in relation to the Co-ownership Agreement being drafted by Ronan McLoughlin of MOP. Initial contact was made in that regard by him on the 15th January 2007. On the 17th January 2007 Mr Scully in a note to Jim Gollogly, a partner in LKS, noted a conversation which he had had that day with Robert Burns and in which he (Mr Scully) had stated that he had not yet received a draft of that agreement from MOP, and that Mr Burns has asked him to chase it up with MOP. That note also notes that LKS had been retained in relation to the Co-ownership Agreement, and also that while MOP were dealing with title matters, Mr Burns had nevertheless mentioned that Mr Lynch may wish Messrs. Reidy Stafford, solicitors, with whom he had previous dealings to look at the title. That did not in fact occur.

But in this internal LKS memo Mr Scully went on to suggest to Mr Gollogly that that he (Mr Gollogly) should "*take over the chasing*", and in that regard Mr Scully stated:

> *"... as per my initial memo the sensitive issue is the carry. Initially the thinking was a 50:50 sharing but G. Conlon pushed for a carry on basis that he dealt with planning. In principle it seem (sic) that a 20% carry agreed for Conlon side but Robert sees this as based on profit after interest and mise expenses. You will need to liaise with Robert on that aspect closely".*

There is nothing to indicate that LKS were informed by Robert Burns or anybody else on the Lynch side at this stage that issues around recourse and joint and several liability for the AIB loan were yet to be addressed, or indeed that the transaction might not proceed at all. They were simply asked to look after the Lynch interest in the Co-ownership Agreement.

This reference to 'carry' should be explained briefly. When Mr Conlon and Mr Lynch discussed the proposal to purchase these lands, the idea was that Mr Conlon and the Lynch side would share on a 50:50 basis. However, at some later stage Mr Conlon wanted the share split to be 40% on the Lynch side, with the balance of 60% to be shared between him as to 40% and the balance of 20% for one of his companies, Quinby Limited, whose personnel were going to be directly involved in getting the lands rezoned and in obtaining planning permission for the development of the lands. The 20% for Quinby was to be in recognition of that work and input. Mr Lynch was opposed to that initially, but seems to have reluctantly agreed to it, and that was something which had to be reflected in the Co-ownership Agreement, even though Quinby was not to be a named purchaser on the title or the loan. It was simply to have a 20% interest in the profit from the transaction under the terms of the Co-ownership Agreement.

The first draft of the Co-ownership Agreement was furnished by MOP to LKS by letter dated 31st January 2007 for review. A telephone call had preceded that letter, and the letter goes on to refer to the fact that LKS had been informed by MOP in that call that a Completion Notice had been served by the Vendor's solicitor. That letter from Ronan McLoughlin stated in this regard:

> *"... it is incumbent upon us to complete this transaction no later than Thursday 8th February 2007 " (emphasis added)*

That deadline was overstated by Mr McLoughlin to LKS, since as a matter of fact the Completion Notice required that the sale be completed no later than 28 days hence i.e. 13th February 2007. Mr McLoughlin has explained that he stated the 8th February 2007 as a precaution "*in order to concentrate minds",* as he felt that if there was any slippage in relation to closing the whole deal might be lost.

The Lynchs were never informed that in fact the deadline for completion was the 13th February 2007, and they now maintain that they were needlessly rushed during the 7th and 8th February 2007, and that they were deprived of an available opportunity to take full advice and be satisfied as to the nature of the final facility letter they signed on the 8th February 2007, and which was seen by them for the first time on that date. They claim that the notification of the earlier deadline was a negligent act by MOP, but I shall return to that in due course.

At some stage during January 2007 Robert Burns was asked by Philip Lynch to prepare a Memorandum for a Lynch family meeting which to be held on the 26th January 2007. The purpose of the meeting appears to have been to get all the family members together so that they could be given information and updated with advice in relation to various investments and plans for the future. Among the matters on the agenda was the purchase of the Kilbarry lands. In this Memorandum, Robert Burns referred to the fact that Mr and Mrs Lynch had paid €2.5 million in respect of 50% of the deposit, and that the balance of the purchase money being €20 million was

"*due to be paid to the vendor early next week*". He went on: "*This balance, along with stamp duty and fees, is being financed through a loan with AIB secured on the land itself*". (emphasis added)

There was much questioning of the plaintiffs at the hearing as to what they understood was meant by "*secured on the land itself*", and as to what their understanding, and indeed that of Mr Burns (who attended the meeting) was of the concept of security, and the separate and distinct concept of recourse, and the differences between the two. It is quite clear to me that these two concepts were confused and conflated by all, and that whether they were right or wrong, the belief of all was that these AIB borrowings would be and had to be such that there would be no risk to the individual borrowers, and that the Bank's remedy in the case of default was to take back the lands so that it could be sold, the bank getting what it could for it.

It is perhaps understandable that the Lynch children might not have previously had to consider and understand what is meant by recourse, and the distinction between recourse and non-recourse, even if, having bought their own houses and obtained a bank loan for that purpose which was secured on the property, they would be familiar with the concept of security.

I must say I find it incomprehensible that a successful and experienced business such as Mr Lynch who, over a long business career in which he has enjoyed enormous success, has borrowed many millions of Euro in the course of that career, would be as confused as he appeared to be about what was meant by a recourse or non-recourse loan, the concept of security, and the differences between the them. One view of his evidence in this regard would be that he was deliberately obfuscating, and by his answers trying to make sure that his knowledge of such concepts was at best uncertain. A reading of the transcript of his cross-examinations in this regard make for very difficult reading. But nonetheless I was able to observe him in the witness box when he gave his answers, and I remain satisfied that, unbelievable as it may seem to others, his understanding of the precise distinctions between these concepts, and his understanding of these matters generally is vague and uncertain. Perhaps that is a consequence of being the sort of man who having made a decision to pursue a particular course of action, leaves the detail and the fulfilment of his plans to his trusted lieutenants. The evidence has been that this is his habit. A man who is as totally occupied with business interests as Mr Lynch appears to have been at these times, and who has many ventures and investments ongoing at any particular time, not just in this jurisdiction but abroad, perhaps must delegate details to others. But risks run alongside that modus operandi, as it presupposes that the lieutenants know exactly what is to be done, and fully understand which matters he regards as being of particular importance to the ultimate decision to proceed. They must be kept fully informed and up to date at all stages, otherwise some matters of crucial importance to the decision maker may not be fully appreciated, and may not be communicated to others who need to know.

However, I am satisfied that when the purchase of the Kilbarry lands was discussed at this family meeting, it was understood to be a purchase that would be at no risk to the family. Even if they had no particular awareness of the concept of a non-recourse loan, their belief was that there would be no recourse to them in the event that any sale of the land did not realise sufficient to discharge the loan to AIB. I believe that this was Mr Lynch's understanding also. It is consistent with the fact that he did in fact walk away from the Millennium project because the facilities on offer were full recourse.

It can be argued by the defendants, as it has been in this case, that if this was of such crucial importance to proceeding with the purchase, it is extraordinary that there is no evidence whatsoever that this was communicated to Mr Conlon who was left the task of arranging the finance, save perhaps for a telephone call to Mr Conlon by Mr Lynch from Heathrow airport on 7th February 2007 which I will come to in due course.

There is no evidence that Mr Conlon made any application for such a loan to AIB. There is no communication with MOP informing them of this absolute requirement. Neither is there any evidence that at any stage LKS were instructed either by telephone, email or letter that unless the loan facility was non-recourse the Lynch side would not proceed. The crucial importance of this requirement is something which appears to have been kept from all other actors in this transaction. I will come to the events of the 6th, 7th and 8th February 2007 in due course, when information as to the nature of the loan facility, as it evolved over those days, was provided to MOP by AIB, and by MOP to LKS, and through the latter to the Lynch side.

Going back to the 31st January 2007 which was a few days after the family meeting referred to, Mr Burns emailed Mr Lynch to tell him that he would be meeting with Richard Godsil that morning and would "*broach the subject of early buy out*". That meeting took place, as he sent a further email to Mr Lynch later that morning to say that he had met Mr Godsil and "*had a good meeting*", and that Mr Godsil would revert in relation to the Kilbarry lands, and that they would meet again when Mr Conlon returned at the end of that week. There is nothing in that memo to indicate that the nature of the proposed loan from AIB was discussed.

On the 31st January 2007, MOP wrote also to Mr Godsil on the Conlon side enclosing a copy of the draft Co-ownership Agreement which had been furnished to LKS, and sought any comments in relation thereto. He told Mr Godsil that they had until the 9th February 2007 to complete the transaction, and also that he was liaising with Alan Roberts of A & L (for AIB) "*to ensure that all matters on the banking side are in situ*", meaning the issue of the final facility letter in time for the closing of the sale. He also wrote to the Vendor's solicitors to tell them that he was finalising the Co-ownership Agreement and was also "*finalising our security requirements with my clients*" bank" and expected to close the transaction early in the following week.

By the 2nd February 2007 LKS still had not had sight of a facility letter, and they needed to see this so that its terms would be reflected in the Co-ownership Agreement. He spoke to Ronan McLoughlin of MOP about that on the 2nd February 2007, and was informed by him that he did not have that document at that stage. They spoke also about the need for Powers of Attorney to be executed to enable Judith Whelan to execute all necessary documents on behalf of the other Lynch family members, and that for this purpose LKS would need to know what documents were involved. Mr McLoughlin stated that he would get back to him about that.

There would appear to have been some lack of information with LKS as to what was to be in the Co-ownership Agreement and Robert Burns sent an email to LKS on the 2nd February 2007 in which some matters were clarified. Of interest is that in that email Robert Burns states:

"*Philip will provide a guarantee to the bank regarding the childrens 'portion of the loan depending on whether the bank (AIB) require it. The children need to be reflected in the loan documentation, can you please ensure that this is done*."

Far from indicating any absolute requirement for non-recourse facilities, this reference to Mr Lynch providing a guarantee for his childrens' liabilities under the loan would suggest that the loan was anticipated to be one where there would be full recourse, including against the children, otherwise no guarantee would be necessary.

On the evening of Friday 2nd February 2007 LKS emailed Robert Burns to ask if he knew when the facility letter would issue as MOP had not received it. On the following day (Saturday 3rd February 2007) Robert Burns emailed LKS stating that he was under the impression that the bank had re-issued the loan facility with the names of the Lynch children included in it.

On the 3rd February 2007 Robert Burns also emailed Judith Lynch who by that time was involved in managing this transaction in tandem with Robert Burns. She had been requested by her father to take up an employed position in relation to the family's business and financial interests at the end of January 2007. She started in that position on the 3rd February 2007, and certainly could not by then have been up to speed on the details of the Kilbarry land purchase, though no doubt she knew that it was in train following the family meeting the previous week. But she had not seen the Heads of Terms document which issued from AIB in late December 2006. It was not available at the family meeting on the 26th January 2007. She would have had no knowledge of what terms were on offer from AIB though it would appear from what she and others said about the family meeting that she would have expected the facilities to reflect non-recourse as she and the others believed that the purchase was to proceed on the basis of 'no risk' to the family.

Robert Burns was about to go abroad again on business with Mr Lynch and would not be returning until Wednesday 7th February 2007. In his email to Judith Lynch on the 3rd February 2007 he updated her on the current position. It is worth setting out that email in full in so far as it relates to this transaction. It states:

> *"Hi Judith*
>
> *Only picked up your message, I'm tied up during Monday but if you want to go ahead with Jim [Gallogly of LKS} that's great to move it along.*
>
> *The key is that Richard Godsil (Jerry Conlon's manager) wants to take the 20% profit carry on a per acre basis. This needs to be redrafted with effect that bank debt is cleared first, then expenses, then remaining equity due to investors and finally the carry to be paid.*
>
> *Richard has approached it this way as he sees a 3 year timeframe to dispose of the land and wants to take profit as he goes.* ***However as the debt is joint and several to everybody it is critical that it gets taken out as quickly as possible****.*
>
> *Marion [Ernst & Young} is up to speed on events to date with the exception that the profit share has now been altered on the Lynch side. The deal was signed in trust by Jerry Conlon last March so there are no issues as to who goes on the final contract on Thursday.*
>
> *The bank (AIB) should issue the loan letter with all your names on it as borrowers. If needs be Philip will need to guarantee the childrens borrowings but to date the bank have not yet requested it.*
>
> *Give me a call anytime Monday to run through anything on it. " (emphasis added)*

It will be observed that this loan was believed by Mr Burns at this stage to be joint and several to all borrowers and that Mr Lynch was prepared of necessary to guarantee his childrens' liabilities given their inability to service borrowings of this magnitude. It will be recalled also that the Heads of Terms received from AIB at the end of December 2006 had specified full joint and several recourse, and that the memo of a conversation which Robert Burns had with Mr Lynch in Spain on the 4th January 2007 is said to indicate that Mr Lynch was prepared to walk away unless the facility was non-recourse and unless there was no joint and several liability.

There is no evidence of any communication between the Lynch side and the Conlon side after that in relation to seeking a non-recourse loan, even though this is said to have been a deal-breaker as far as Mr Lynch was concerned. The fact that as late as 3rd February 2007, five days prior to the anticipated closing date Robert Burns was aware that the loan was joint and several to everybody and that the childrens' liability may have to be guaranteed by Mr Lynch, suggests that these were no longer issues for Mr Lynch, but the plaintiffs' evidence has been that during all of this time there was no question of them proceeding to complete this purchase unless the loan was non-recourse. There is no evidence of what if anything Mr Conlon had been asked by the Lynch side to do in this regard with AIB. The available evidence suggests that AIB was never requested to provide a non-recourse loan. There is no evidence that Mr Lynch discussed that aspect of the transaction with Robert Burns or anybody else, and neither was the matter raised with either MOP or with LKS.

It is submitted by the plaintiffs that, because the email dated 2nd February 2007 from Robert Burns to LKS (Jim Gollogly) referred to the childrens' portion of the loan and the need for them to be included in the loan documentation, and that LKS should ensure that this happens, and referred also to the fact that a guarantee may be required from Mr Lynch in respect of their liabilities, such instructions from Mr Burns meant that LKS had a responsibility to ensure that the loan facility letter reflected a non-recourse loan. It is submitted that any requirement for a personal guarantee from Mr Lynch for his childrens' portion of the loan is inconsistent with a joint and several liability. They point also to the fact that LKS were involved in the preparation of the Co-ownership and Powers of Attorney and that they had asked for a copy of the loan documentation for that purpose, and submit that these documents were not sought by LKS simply so that the Powers of Attorney could reflect what documents Judith Whelan would be authorised to sign, and in order to complete their review of the draft Co-ownership Agreement, but also because LKS were aware that the plaintiffs had not seen the facility letter and were unaware of what their obligations would be under it. Mr Gollogly stated that he was seeking these documents for the purposes of completing his work on the Co ownership Agreement, being what LKS consider to have been the extent of their retainer since MOP were acting for all the purchasers in relation to the conveyancing. But the plaintiffs refer to that email from Robert Burns to Mr Gollogly on the 2nd February 2007 wherein*, inter alia*, he was asked to ensure that the children were included in the loan documentation. In this way it is submitted that LKS were asked to advise in relation to the facility letter also.

I appreciate that nobody on the Lynch side had seen a final facility letter up to this point. I appreciate also that LKS certainly were asked to ensure that the children were reflected in the loan documentation. But LKS were also informed by Robert Burns that Mr Lynch would give a personal guarantee for the children if the bank required it. I fail to see how up to this point LKS are supposed to have gleaned from all of these communications that a deal-breaker for the Lynch side was that the loan had to be non-recourse. I do not believe that they were ever so informed, and I do not think it is reasonable to impute knowledge in this respect from what they knew and had been told by way of information and instructions. I do not even believe that it is reasonable to conclude on the evidence that even the Lynchs themselves had any basis for believing at that stage that the AIB loan would be non-recourse.

If it were, then one has to wonder why on the 3rd February 2007 in his email to Judith Lynch, who was holding the reins while he would be abroad over the following week, and who had only in the previous day or two had any direct dealings with this transaction, Robert Burns states unequivocally that "*as the debt is joint and several to everybody it is critical it gets taken out as quickly as possible*". He does not even go on to tell her that things may change over the next few days whereby the bank may agree to non-recourse. He never even mentions that possibility, if it was one at that point.

That is all consistent with an earlier email from Robert Burns on the 31st January 2007 which was just after the family meeting on the

26th January 2007. In that email, as I have already stated, Mr Burns informs Mr Lynch that he is meeting Mr Godsil and "*will broach the subject of an early buy out*". The desire for an early buy out was because the loan was joint and several and full recourse in my view. That is consistent with his email to Judith Whelan to which I have just referred. In fact it makes perfect commercial sense that if all borrowers were liable for €25 million on a joint and several basis, there would be agreement between all concerned that the land would be sold on at a profit as soon as possible.

It is also a fact, confirmed by her in her evidence, that when Judith Whelan received this email referring to personal guarantees and "*joint and several to everybody*", she did not react by telephoning or emailing anybody to query this. I would have thought that she, who herself was one of the borrowers, would have reacted swiftly in the face of this information which was quite explicitly informing her that this loan was not a no risk loan, but one under which she was liable jointly and severally with the other members of her family. It would seem as if this email caused her no surprise therefore. Her reply to Robert Burns on the 4th February 2007 simply states "*Ref Waterford - I will speak to Jim [Gollogly} tomorrow regarding agreement and AIB facility & Power of Attorney etc. if any issues I will come back to you*."

If Robert Burns was of the view, as he clearly was as of the 3rd February 2007, that the loan was joint and several and that a personal guarantee may be required to be given by Mr Lynch, I fail to see how this Court can be expected to hold that LKS were either informed, or should have gleaned from everything that was going on, that the contrary was the position up to this point at least. Neither has there been any evidence that anything was said to MOP to instruct them that only a non-recourse loan was acceptable to the Lynch side, or that they were aware of that requirement. Neither firm was in any way involved, or instructed to be involved, in any discussions or negotiations with AIB in relation to the terms of any such loan application. Mr Lynch, and therefore all on the Lynch side, had apparently entrusted the matter of the loan application entirely to Mr Conlon.

At midday on 5th February 2007 a telephone conference call took place between LKS (Imdaad Sulaiman and Jim Gollogly), and Robert Burns who was abroad at the time with Mr Lynch. That conversation lasted about 15 minutes. Mr Sulaiman's memo of that conversation relates to the Quinby carry and other issues related only to the completion of the Co-ownership Agreement. Again, there is no note of anything having been discussed as to the nature of the AIB loan facility.

Shortly after that conversation, Mr Sulaiman emailed MOP at 12.52pm informing him that he hoped to let MOP have a marked up copy of the Co ownership Agreement by the end of that day. He went on to say:

> *"In the meantime, I would ask that you please note the following for the purposes of the issue of the AIB facility letter - 10% to be in the names of Eileen and Philip Lynch; the balance 40% is to be in the name of each the children, namely Judith, Therese, Phillipa and Paul. Please confirm that the facility letter will be in all of the above mentioned names for the purposes of identifying the names of the borrowers".*

It is clear that the focus of LKS at this point was in relation to the Co-ownership Agreement, which was the matter in respect of which they had been retained by the Lynchs, the other conveyancing aspects of the transaction being within the remit of MOP.

Ronan McLoughlin of MOP replied one hour later raising a further query as to how the shares of the Lynch family members were to be reflected in the Co ownership Agreement, and asked also who would be signing the transaction documents under Powers of Attorney and asked for sight of those in order to deal with any queries AIB's solicitors may have. He also stated that he would ask AIB to prepare the security documentations as soon as possible, or at least to advise as to the nature of the security documents that would be required. This was so that they could be reflected in the Powers of Attorney. They also needed to be reflected in the Co-ownership Agreement.

By the afternoon on the 5th February 2007 the Lynch side had still not seen any final version of the facility letter. LKS wanted to see it for the purposes of the Co-ownership Agreement and the Powers of Attorney. MOP had emailed A&L (for AIB) at 11.17am that morning requesting a copy of the facility letter and other security documents, and mid-afternoon that day Mr Roberts of A&L emailed a draft Certificate of Title to which was attached also a draft of the proposed Deed of Mortgage. No draft or copy facility letter was sent on this occasion, but the draft Deed of Mortgage named Mr Conlon and all the Lynchs as mortgagors, and described the liabilities which were being secured by this mortgage as:

> *"all monies, obligations and liabilities (including without limitation in respect of principal, interest, fees and expenses) whether certain or contingent which now are or at any time hereafter may be or become due, owing or incurred to the Lender by the Mortgagor whether solely or jointly with any other person and whether as principal or surety. "*

Clause 1.4 provided that "*where two or more persons are included in the expression the "Mortgagor" the obligations and liabilities secured by this Mortgagor (sic) shall be deemed to be joint and several obligations and liabilities of such persons*."

There is nothing within this document to indicate any limitation of recourse against the borrowers or any of them. In addition it specifies, as shown above, that the Lynchs were assuming a joint and several liability for all of Mr Conlon's indebtedness to AIB.

A memorandum for file made by Mr Sulaiman on 5th February 2007 (Tab 138 of Core documents) contains information as to what he was informed about this transaction when he became involved. He notes the fact that the transaction involves a purchase of lands at Waterford for €25 million, of which €5 million had already been paid by way of deposit with one half having been paid by Mr Lynch, with the balance being funded by bank loan. Interestingly this handwritten memo refers to the "*joint & several PI and GC*'. It goes on refer to the children being on the title and a possible guarantee by Mr Lynch in relation to the children. It deals also with shares being taken by the respective parties and the Quinby carry, and other matters.

During the 5th February 2007 Mr Conlon appears to have been getting anxious about the delay in completing this transaction and contacted John Ryan of MOP, who was a client relationship partner there for Mr Conlon. Mr Ryan got in touch with Mr McLoughlin for an update, and that is contained in an email sent to Mr Ryan at 21.37 hrs on the 5th February 2007. This memo refers to a number of conversations with Richard Godsil about details of the deal between Mr Conlon and the Lynch parties, and refers to delay in getting details as to precisely who on the Lynch side were to be named as purchasers. Other matters are referred to but there is no mention of the need for a non-recourse facility, but he does note that he emailed Mr Godsil about "*details regarding fUnding given the closing date*". He then refers to the Completion Notice which was served by the Vendor, and states that while the Notice would not expire until the 16th February 2007 he had informed all concerned that it would expire on the 9th February 2007. In fact the Lynch side was informed that the sale had to be completed on the 8th February 2007. He did this, according to the memo, "*to concentrate minds*". He notes also that only on the 5th February 2007 had he been informed of the Lynch parties who had to be included on the title, and that he had immediately informed AIB and contacted LKS and the Vendor's solicitors in order to arrange closing for Thursday 8th February 2007. It notes also that AIB will have to re-issue a facility letter showing all the Lynchs as borrowers and then states "*but*

from talking to A&L it would appear the only security required is a mortgage over the property".

At 16.47hrs Mr Gallogly of LKS emailed a copy of the draft Co-ownership Agreement to Ronan McLoughlin of MOP.

6th February 2007:
At 9.47hrs on 6th February 2007 Judith Lynch emailed Mr Sulaiman of LKS asking him to email to her the Powers of Attorney for each of the Lynch family, and let him know that one of her sisters, Therese, would be travelling to Northern Ireland the following day and she wanted to have her execute her Power of Attorney before she left.

At 11.11am that day, the Powers of Attorney were emailed with a covering letter explaining that these documents would empower Judith Whelan to execute all documents in connection with the purchase including "*the borrowing of any monies to assist in the acquisition and/or development of the Kilbarry lands*". There is no reference to the nature of any such loan facilities being recourse or non-recourse, and in his evidence Mr Sulaiman stated that this was because he had never been told about any need for the loan to be a non recourse loan. It was also suggested to him that by this time the retainer of LKS in the transaction had clearly become extended beyond the mere review of the draft Co-ownership Agreement, since he was by then dealing with the preparation of Powers of Attorney, but he stated that his involvement in relation to those documents was simply by way of "*administrative assistance*" to MOP who were acting for the Lynchs in the transaction itself. I should refer to the fact that on the 6th February 2007 Mr Sulaiman noted in the final paragraph of a memo which he made of a conference call conversation with Judith Whelan, in which Mr Gollogly also participated, that:

> *"Finally, Jim [Gollogly] confirmed to Judith that LKS's involvements in this transaction was just in respect of the Co/ ownership Agreement, and that he would not be getting too involved in MOP's side of the actual purchase transaction. Judith again agreed with this course of action".*

In her evidence Judith Whelan did not agree that this was said by her, but it is submitted by LKS that this note is consistent with the fact that LKS did not attend at the closing of the purchase at the offices of A&L on the 8th February 2007 at which only MOP attended on behalf of the Lynchs.

Judith Whelan on the other hand stated in her evidence that her family had not yet seen the facility letter, and accordingly they did not know at that stage what they were being asked to sign up to. She was firmly of the view, as she expressed in her evidence, that as far as she and all on the Lynch side were concerned LKS would be reviewing the facility letter for them, but she did not accept that the involvement of LKS at that stage was still limited only to their review of the Co-ownership Agreement but extended to advising in relation to the facility letter also.

At 13.01hrs on 6th February 2007, MOP emailed a letter to LKS enclosing a draft of the proposed Mortgage Deed, and a copy of the Memorandum and Articles of Association of Quinby Ltd. That letter went on to state that MOP still awaited a facility letter from AIB, and requested LKS to let them have a draft of the proposed Power of Attorney so that they could submit it to A&L (for AIB) for their approval.

At 14.06hrs on the same date, MOP emailed a letter to A&L replying to certain matters raised in a letter from A&L dated 5th February 2007. But this letter makes no reference to the fact that MOP still awaited sight of the AIB facility letter, which suggests that they were awaiting same directly from AIB rather than through A&L.

At 18.58hrs on 6th February 2007, AIB emailed A&L with a copy of the revised facility letter indicating that adjustments had been made to it, and they asked for confirmation that it could be issued. This version of the facility letter named Mr Conlon and all the Lynch parties as borrowers, and at Condition 6 therein provided that for "*Full joint and several recourse of Gerard Conlon and Philip Lynch for all EUR 25,000,000 debt*." (emphasis added)

7th February 2007:
Given that the sale was due to close at 12 noon on the following day, it is unsurprising that there was a good deal of email traffic and telephone calls on the ih February 2007 in order to make sure that everything was in order to complete this transaction by the deadline for completion as notified by MOP following the receipt of the Notice of Completion by the Vendor's solicitor in January.

Robert Burns and Philip Lynch were in London on the 7th February 2007 on their way back from a business trip to Zurich. They had meetings in London in the morning and were in Heathrow Airport during the afternoon awaiting a flight back to Dublin. They were in contact with Judith Whelan during this day, and she in turn was liaising with LKS. Certain telephone calls which took place during this day will need to be considered carefully, as the evidence is said to

be that it was during the course of the ih February 2007 that Philip Lynch finally made it clear to Judith Whelan that this transaction would not proceed unless the loan from AIB was non-recourse. Whether or not that actually happened and if it did whether she communicated that position to LKS is very much disputed by LKS, and I will come to that.

Neither LKS nor the Lynchs had seen any facility letter by the morning of 7th February 2007, though AIB had sent one to A&L for their advice before circulating it to the borrowers. In addition it is clear from discussions which occurred during that afternoon that there were still matters to be finally thrashed out and agreed in relation to the Co-ownership Agreement as it had not become clear that AIB would agree to a proportionate repayment of the bank debt upon any sale of part of the property. There were outstanding issues also to be resolved in relation to the Quinby carry.

At 09.50hrs on 7th February 2007 Mr Sulaiman (LKS) had a telephone conversation with Ronan McLoughlin (MOP) and from his notes of that conversation they discussed the fact that from the loan of €25 million to be drawn down, €20 million would be used to discharge the balance of the purchase monies to the Vendor, and they discussed how the balance would be dealt with by way of refund to Mr Conlon and to Philip Lynch of their shares of the deposit already paid. It was also confirmed that the closing would take place at 12 noon on the following day. There is nothing in that note to suggest that there was any discussion as to the nature of the facilities i.e. being recourse and joint and several, or non-recourse.

At 10.00hrs, Mr Sulaiman emailed a lengthy letter to Judith Whelan in which the key points of the Co-ownership Agreement were set forth. At 10.16hrs, he emailed MOP, and having referred to his earlier conversation with Mr McLoughlin and to documents received that morning, he noted that Mr McLoughlin was to revert to him with a copy of the AIB facility letter when it came to hand.

Between that time and 10.58hrs Mr Sulaiman appears to have spoken to Robert Burns. At 10.58hrs he emailed MOP again stating that he had spoken to his client and he confirmed certain matters concerning the Quinby carry and also stated that the €5million surplus

from the loan cheque was to be split equally between Mr Conlon and Mr Lynch -this being by way of refund of the deposit paid by them.

I might just remark again that at this stage on the 7th February 2007 there is no mention of any issue in relation to whether or not the loan was a recourse or non-recourse loan.

At 11.12hrs Mr Sulaiman emailed both Robert Burns and Judith Whelan to tell them that he had spoken to Mr McLoughlin (MOP) about the Quinby carry. The Lynchs were of the view at this point that no payment should be made to Quinby until all bank debt was discharged. He tells them also that MOP have said that the bank is agreeable to a part payment of debt on a proportionate basis if part of the lands are sold, but that there is nothing yet in writing from AIB in this regard, but that they could telephone Mr Derek O'Shea at AIB in relation to this in order to get a verbal assurance from him.

At 11.45hrs, Mr Sulaiman again emails Mr McLoughlin to tell him that his client has been in touch in relation to the proportionate repayment of bank debt, and that *"[the client] does not accept this"*, but that he has been informed also that "*our respective clients will be speaking to each other on this issue and no doubt we will revert to each other with confirmation of further instructions*".

A&L emailed an amended draft of the facility letter to certain personnel within AIB at 15.05hrs, the most relevant amendment being that instead of the loan being full recourse of Mr Conlon and Philip Lynch, that condition now made it "*full joint and several recourse to all of the borrowers ...* " (emphasis added)

There was no additional condition inserted requiring any personal guarantee by Philip Lynch in respect of his childrens' liability for the loan. It appears that A&L felt that given that all were named as borrowers, recourse should also be to all borrowers, rather than to just two of them, otherwise there might be difficulties in relation to enforcement should that arise at some later stage. This email asked AIB to review these changes and if they were happy with them, to issue them to Mr Conlon, Mr Godsil and Mr Conor Gunne as well as MOP for the Conlon side, and to Philip Lynch and LKS for the Lynch side.

The plaintiffs submit that if Mr Roberts's advice that such a clause be inserted had in fact been inserted in the final version of the facility which was circulated the following morning, they and all concerned would have been in no doubt that the bank was requiring that all the Lynch family members would be jointly and severally liable on a full recourse basis for the entire of the amount of the loan and interest. But as we shall see, that did not happen. Instead, this clause was removed completely.

At 15.10hrs, Mr Sulaiman emailed Ronan McLoughlin (MOP) attaching a copy of the Co-ownership Agreement "*incorporating all of my amendments as of 5 February 2007*", and he also requested that he be sent a copy of the AIB facility letter when it was received by MOP.

At 15.40hrs Mr Sulaiman had a telephone conversation with Derek O'Shea of AIB following which he prepared a memo of that conversation for his file. In it he states that he had telephoned Mr O'Shea further to instructions received from Robert Burns (who was still in London with Mr Lynch at this point). His call to Mr O'Shea was to "*ascertain whether or not we would obtain written confirmation from the bank as regards its acceptance of proportionate repayment of bank debt*". The note indicates that Mr O'Shea confirmed that in principle the bank would have no objection to part or parts of the land being sold and the sale proceeds being used to partly reduce bank debt, but that any confirmation in writing from AIB in this regard would have to be "extremely watered down" since the current facility letter was based on Board approval, and that any letter confirming the bank's position on proportionate repayment could be seen as a discrepancy between such a letter and the terms of the facility letter.

This memo also notes:

> *"As regards the latest facility letter, Derek confirmed that it was in the process of literally being printed out before being circulated to all concerned".*

Again, there appears to have been no discussion about the recourse or non recourse nature of the loan facility. Certainly as far as Mr Sulaiman was concerned he had not received any instructions in relation to that issue. He was simply dealing with the terms of the Co-ownership Agreement, and trying to get that agreed by all in time for the closing of the sale on the following day, albeit that he was also assisting in the preparation and execution of the Powers of Attorney which Judith Whelan would need for the closing.

That conversation with Derek O'Shea seems to have been preceded by a telephone conversation between Mr Sulaiman and Robert Burns at 15.27hrs, the latter being at Heathrow Airport at the time. Again, Mr Sulaiman made a detailed memo of that conversation for his file. The call addressed the two issues of the proportionate repayment from a partial sale of the land, and also issues relating to the Quinby carry. Mr Burns is noted as asking Mr Sulaiman to try and get some written confirmation from AIB in relation to AIB's agreement to a proportionate repayment, and Mr Sulaiman confirmed that he would liaise with AIB in that regard to try and get it sorted out. He was also instructed to try and get some figures from Quinby in relation to certain planning and other costs which Quinby were looking to have reimbursed out of any partial sale, and that these should be deducted before the profit to Quinby was calculated and paid.

While Mr Sulaiman was talking to Mr O'Shea of AIB, Robert Burns had phoned him also, and had left a message for Mr Sulaiman to call him back. He did so and, according to his note of that conversation, was told by Mr Burns that the issue about proportionate repayment had been resolved, and that the Lynchs were prepared to agree to a proportionate repayment on the sale of part of the property. Again, there is not a mention of the nature of the loan facility having been discussed.

That memo also notes the contents of a telephone conversation between Mr Sulaiman and Mr McLoughlin which took place at 16.15hrs when Mr Sulaiman was able to confirm that the proportionate repayment issue had been agreed between the Conlon side and the Lynch side. There was further discussion about some details of that, and also the manner in which the Quinby carry would be calculated, with Mr Sulaiman requesting further information about what expenses may have been incurred by Quinby in relation to re-zoning and planning. It appears from the note that Mr McLoughlin that said that he would endeavour to get further information in relation to that matter.

At this point in that afternoon, and at 15.59hrs to be precise, AIB's Derek O'Shea sent an email to A&L and Mr Gunne of the Conlon side. He intended that the email would also go to Mr Sulaiman but the latter's email address was incorrect on the email and was not received by him at this time. He also copied MOP with same. This email reads:

> *" to all together:*

we have been asked to make changes to the letter by various parties today. As time is of the essence I attach a draft of the letter that we are happy with.

Please confirm if it is ok with all and we can arrange how to get it to Ronan Me [MOP]." (emphasis added)

This version of the facility letter did not incorporate the type of clause advised by Mr Roberts in his email to AIB at 15.03hrs referred to above. Instead it contained a Condition 5 which read:

> *"Full joint and several recourse of Gerry Conlon and Philip Lynch for all of the EUR25, 000,000 loan plus interest, costs and charges. " (emphasis added)*

A similar clause had been in the previous version which was sent by AIB to A&L at 18.58hrs on the 6th February 2007. However, an additional clause 6 was included in the amended version which stated that the Bank would "*reasonably consider requests made by the borrowers to release part or full proceeds from the sale of portions of the site being acquired as long as the bank considers that it retains a satisfactory level of security cover (as deemed satisfactory by the Bank at that time)".* This reflected the request for some assurance from AIB in relation to proportionate repayment upon the sale of part of the lands to which I have referred above. But the nature of the facility remained full joint and several recourse to Mr Conlon and Mr Lynch.

As I have said, this version of the facility letter did not accord precisely with the advice given to AIB by Mr Roberts of A&L earlier that afternoon at 15.05hrs, when it was advised that recourse should be to all the borrowers and not just Mr Conlon and Mr Lynch, because it might otherwise give rise to enforcement difficulties. Neither has there been any evidence as to who is meant by "various parties" who had requested changes to the facility letter as stated by Mr O'Shea in his email.

Mr McLoughlin forwarded a copy of Mr O'Shea's email and attached facility letter to Richard Godsil on the Conlon side at 16.03hrs marked "FYI" [for your information].

Through the error in his email address, Mr Sulaiman had not received this version of the facility letter by the time he emailed Judith Whelan and other Lynch children at 16.09hrs that afternoon. In that email he attached a number of Family Home Protection Act declarations which needed to be signed by those persons for the purpose of the closing of the transaction at noon on the following day. That email makes no reference to any issue over whether the loan was recourse or non-recourse.

But Ronan McLoughlin (MOP) emailed the facility letter to Mr Sulaiman a short time later at 16.12hrs, and Mr Sulaiman forwarded it to Judith Whelan and to Robert Burns at 16.32hrs, and asked them to confirm that Condition 1 and Condition 2 contained therein had been dealt with. Those related to a valuation of the lands and also a net worth statement for Philip Lynch. As it happens, Robert Burns was on a flight from London to Dublin when this email was sent, and he saw it only later after he had arrived in Dublin.

But by this time, according to the plaintiffs' evidence, Philip Lynch, while awaiting his flight to Dublin, had made it clear to Robert Burns Judith Whelan, and possibly Mr Conlon that he would not proceed with this transaction unless the loan was going to be a non-recourse loan. An issue arises as to why, if she knew that this was her father's position, she did not immediately upon receipt of this email from Mr Sulaiman, get on to him by phone or email to let him know that there was a problem with the nature of the facility, since it referred to full joint and several recourse to Mr Conlon and her father.

When cross-examining Judith Whelan, Paul Sreenan SC for LKS, he asked her whether this condition as to full recourse did not "jump off the page". Her answer was: "*it may have, but it didn't Mr Sreenan - I saw the clause but I didn't react to it, Mr Sreenan, no*" (T5, Qs 263-264).When pressed about that at T5, Q.265 she said: "*It did, but the matter would either proceed to our satisfaction on a non-recourse basis or not. I wasn't concerned with that because we wouldn't sign this*". At T5, Q.275 she was asked why having seen Condition 5 she did not immediately email back to Mr Sulaiman that she was concerned about Condition 5, and tell him that it was a requirement of the Lynch side that the loan be non-recourse and that her father had phoned her once or even twice that day about the issue of recourse. Her answer was: "*I don't know. I believe Mr Burns was in communication with Mr Sulaiman*". But her subsequent answers indicate that she was not aware of that at this point in time, but became aware of that only in more recent times following the making of discovery. She also confirmed that she had not contacted Mr Gunne on the Conlon side about it, and also that she had not contacted her father about it either. She could not recall if she had had any conversation on this issue later that evening with either Mr Burns or her father (T5, Qs. 282-287).

To return to the chronology of events on the afternoon of the 7th February 2007, there is an email from Alan Roberts of A&L to Derek O'Shea of AIB timed at 16.40hrs, which is some 41 minutes after Mr O'Shea of AIB had circulated the penultimate version of the facility letter to Mr Roberts, Mr Gunne (on the Conlon side), and MOP (the email address for Mr Sulaiman was incorrectly stated and he did not receive it until a little later from MOP) which deals with the terms of the revised facility letter sent to the various parties by Mr O'Shea. At point 2 of that email Mr Roberts refers again to the contents of Condition 5 and states in that regard:

> *"2. While I accept that commercially the intention of the Bank is to have full recourse on a joint and several basis to Mr Conlon and Mr Lynch only, the letter of sanction should state that the Bank's recourse is to all borrowers for the full amount of the loan plus interest etc. The only other option would be to have specific limited recourse language in both the letter and the mortgage for Mr Lynch's family."*

As shown above, the email concluded with a request to addressees to "*please confirm if it is ok will all* ...". In answer to this request Mr Gunne on the Conlon side replied to all at 17.07hrs that evening by saying:

"*Hi Derek- The facility letter is in accordance with my understanding of what was agreed*".

This suggests that full recourse came as no surprise to the Conlon side.

At this point in time, Mr Burns and Mr Lynch were on a flight back to Dublin from Heathrow Airport. By this time also, Mr Sulaiman (LKS) had received the latest facility letter from Mr McLoughlin of MOP at 16.12hrs, and he had forwarded it to both Judith Whelan and Robert Burns at 16.32hrs. It had, as mentioned above, a condition that the loan was "*Full joint and several recourse of Gerry Conlon and Philip Lynch* ... ".

Mr Sulaiman has produced a memo for his file which notes that he spoke to Robert Burns at 18.05hrs. That was shortly after Mr Burns had landed at Dublin Airport, though the memo itself states that at this time "*Rob in transit between connecting flights*". That must be an error as Mr Burns had landed at Dublin by then. However, while it was a call that lasted just over 9 minutes, Mr Burns in his evidence has stated that he has no recollection of this telephone conversation, but did say that it could have taken place. According

to Mr Sulaiman's memo, Mr Burns stated that he would have more time to deal with any outstanding issues the following morning once he had had a chance to review the flow of emails and the facility letter which had been sent to him while he was travelling. But, according to the memo, Mr Burns also stated that as far as Condition 1 was concerned (land valuation) the Conlon side were dealing with this and were in contact with both AIB and MOP in relation to it, and that as far as Condition 2 (net worth statement for Mr Lynch) was concerned, AIB had received that about a month previously.

This memo then states:

> *"Re possibility of Goodbodys/bank wanting the joint/several clause to apply to both Gerrv. Philip and all the Lynchs, Rob felt this wouldn't be a problem. " (emphasis added)*

In his evidence Mr Burns stated that he could not have said that as it was inconsistent with everything else. It is particularly inconsistent with the evidence of Mr Lynch and Mr Burns that while they were awaiting their flight to Dublin from Heathrow Airport Mr Lynch had made it clear that he was not prepared to go ahead with this deal if the AIB loan was full recourse and joint and several. I will come to those conversations shortly.

Mr Sulaiman's memo deals with other issues also such as the Quinby carry and proportionate repayment, but there is nothing of relevance in that which I need to refer to at this point.

It will be recalled that AIB had received advice from Alan Roberts of A&L during the afternoon following the circulation of this penultimate facility letter which contained the clause requiring recourse against Mr Conlon and Mr Lynch, and they had advised that unless the recourse was against all the borrowers, and not just two, there could be difficulties with enforcement. Later that evening AIB appear to have made a decision that instead of specifying recourse against all the borrowers as advised by Mr Roberts, the recourse clause would be removed altogether. How that information reached Mr Sulaiman is not clear.

At 18.56hrs, Mr Sulaiman emailed Jim Gallogly (LKS) stating:

> *"Ronan [MOP} just left a message after speaking to Derek at AIB. Apparently the joint and several recourse condition in the facility letter is to be taken out in its entirety- confirmation of this to follow".*

A minute later, according to the call log of his telephone calls that evening, he called Judith Whelan. Unfortunately there is no memo of that conversation, and Mr Sulaiman does not recall what was said. He agreed in cross-examination that this message from Mr McLoughlin was important, and that he certainly would have wanted some confirmation from AIB about the proposed change, and that a copy of the amended facility letter would constitute such confirmation.

When Jim Gollogly received Mr Sulaiman's email at 18.56hrs, he emailed back to Mr Sulaiman asking:

> *"Is the recourse limited to the property then. MOP need to clarify. "*

Mr Sulaiman appears to have phoned Mr McLoughlin at 18.59, or maybe Mr McLoughlin had phoned him, because at 19.04 he emailed Mr Gollogly again stating:

> *"Just off the phone with Ronan - he confirmed that it is to be limited to the security being the property - the confirmation of this will be evidenced by the revised facility letter which will have no mention of the joint and several recourse against the individual borrowers. "*

Mr McLoughlin agreed that he had spoken to Mr Sulaiman having left an earlier voice message for him. It was suggested to him in cross-examination that he had made no mention of the fact that the reason for the change to the facility letter was because of enforcement difficulties, but Mr McLoughlin disagreed with that. It was pointed out to him that in his witness statement prepared for this case Mr McLoughlin, when dealing with this telephone conversation, had made no reference to having mentioned this enforcement difficulty. Mr McLoughlin disagreed that this was because he had not mentioned it. He again confirmed that he had stated this to Mr Sulaiman, and that he had passed on to Mr Sulaiman what he had been told by Mr O'Shea of AIB. It was suggested to him that because he had made no contemporaneous note of his conversation, and several years had passed since that call, it was preferable to regard Mr Sulaiman's evidence as correct since he had made a note of the conversation. Mr McLoughlin disagreed. (T.16, Qs. 330-349)

One can see that by this time the proposal by AIB to remove clause 5 altogether was being interpreted by LKS as meaning that the facility letter would represent a non-recourse loan, with the bank's remedy being limited to realising their security in the event of default, and with no recourse to any of the borrowers for any shortfall.

As a matter of law, however, and as far as AIB was concerned, the removal of the recourse clause altogether did not in any way alter the nature of the facility, since all the borrowers were named as borrowers in the facility letter, and accordingly, even without any specific reference to recourse in the Special Conditions, all borrowers would in any event be liable for repayment of all the borrowings, and as confirmed in the Bank's General Terms and Conditions to which the facility was subject also as stated in the facility letter.

It must be remembered also that this exchange took place in the immediate aftermath of Mr Sulaiman's conversation with Mr Burns at 18.05hrs when Mr Burns had stated that full recourse to Mr Lynch and all the Lynch children would not be a problem. In other words, if that is correct, he had been given no information to the effect that full joint and several recourse was unacceptable to the Lynch side. That was the context in which he was receiving this later information from Mr McLoughlin (MOP) that the recourse or at least that the facility letter would be "*limited to the security being the property*". The Lynch side suggest that this change reflects the fact that Mr Lynch during the afternoon had spoken to Conor Gunne and said that a full recourse loan was a non-runner.

At 19.17hrs Jim Gollogly (LKS) emailed Robert Burns as follows:

> *"Apologies for not being around earlier. I had to go down the country and am only recently back. Imdaad [Sulaiman] and I have been talking on several occasions and I know he has been in touch with you.*
>
> *I was concerned about the suggestion that rather than AIB relying on a Philip Lynch and G Conlon full recourse commitment that they want to tie in each of the children as well. I don't think this makes sense for either AIB or the children. I now understand it may well be recourse to property only, which is a great help. " (emphasis added)*

Mr Sulaiman was copied on this email too, and said in his evidence that he probably saw it. Nevertheless he did not make contact with either AIB or A&L in order to clarify the position.

Nobody on the Lynch side had confirmed to AIB that the circulated facility letter was acceptable to the Lynch side, as Mr Gunne had earlier done on behalf of the Conlon side at 17.07hrs. Neither had the final version of the facility letter, with the recourse clause removed, been circulated. That would not happen until the following morning.

At 22.15hrs, Ronan McLoughlin (MOP) emailed Mr Conlon's personal assistant (and copied it also to Mr Godsil) asking them to let Derek O'Shea (AIB) have a drawdown request for the two loan amounts "as per the attached draft facility letter" as soon as possible the following morning. The "attached facility letter" to that email was the version which still referred to full joint and several recourse to Mr Conlon and Mr Lynch, but the email was being sent after Mr McLoughlin had passed on the information to Mr Sulaiman that the recourse clause was going out altogether.

At 22.21hrs, Mr McLoughlin sent a similar request to Robert Burns to arrange for a drawdown request to be sent to AIB in the morning, but it does not appear that with that email he attached a copy of any facility letter. It is not referred to as an attachment. But he did say that if Mr Burns had any queries he should contact him.

8th February 2007:
At 07.53hrs, Judith Whelan emailed Robert Burns and asked him to arrange for the drawdown request to be sent to AIB. She apparently did not know who in AIB was the point of contact, and in any event stated that she was busy travelling around to pick up various documents fro her family members.

At 08.08hrs, Robert Burns emailed an assistant in Mr Lynch's office (Gillian Burdon) and asked her to arrange a request on headed paper in relation to the drawdown and to "*run it by Imdaad in LK Shields*".

A few minutes later, Robert Burns emailed Mr Sulaiman and asked:

> "***Is the loan now recourse to land only***?" (emphasis added)

The use of the word "now" certainly suggests that at least until Mr Burns had received the email from Mr Gallogly the previous evening at 19.17hrs (above) he knew that the facility letter was full joint and several recourse. That is consistent also with the conversation which Mr Sulaiman noted he had had with Mr Burns at 18.05hrs on the 7th February 2007 when Mr Burns is noted to have stated that joint and several liability for all the Lynchs would not be a problem.

Gillian Burdon seems to have spoken to Mr Sulaiman sometime between 08.08hrs and 09.33hrs following the request by Mr Burns that she fax to AIB a drawdown request but to run it by Mr Sulaiman first, because there is a note made by Mr Sulaiman of a call from Ms. Burdon in which she appears to have asked him to draft the drawdown request and to let her have a copy of the facility letter. At 09.33hrs, Mr Sulaiman sent her a draft drawdown request, and stated:

> *"Further to our telephone conversation earlier this morning, I now attach the latest version of the AIB facility. Please note that a further version should be following later this morning. This is to reflect the (act that the bank now only require legal recourse against the property being their security for the loan - they no longer require any legal recourse as against Philip, Gerry or the Lynch children". (emphasis added)*

The plaintiffs have pointed to the fact that on the previous evening Mr Gollogly had stated that the facility "*may well be recourse to property only*", whereas in the present email Mr Sulaiman is stating that the change to the facility is to reflect "*the fact*" that the bank require recourse only to property, and that as far as they were concerned the matter was put beyond doubt. Mr Burns has stated that he took this to mean that the loan was non-recourse and that this sat comfortably with what he says Mr Lynch had stated the previous afternoon at Heathrow Airport- namely that he would not proceed if the loan was recourse.

In so far as it is alleged that LKS were negligent in giving this clear advice the loan was non-recourse, Mr Sulaiman has stated that he was simply passing on to the Lynch side what he had been told by Mr McLoughlin (MOP), and that the LKS retainer was confined to reviewing the Co-ownership Agreement for the Lynch side, albeit that he had also provided some administrative assistance to MOP by way of arranging for certain forms to be signed. LKS maintain that it was never part of their brief to provide advice in relation to the loan facility.

At 09.43hrs, Gillian Burdon replied to Mr Sulaiman by email and stated that Mr Burns would sign the drawdown request when he has seen "*the final facility letter*".

At 09.36hrs, AIB emailed to Mr McLoughlin (MOP) and copied to Mr Godsil on the Conlon side, but not to anybody on the Lynch side, as follows:

> *"Ronan/Alan:*
>
> *agreed final version of the Letter of Sanction (assuming the Lynchs don't have further necessary changes at the 1ih hour).*
>
> *Ronan, please let me know ASAP when you hear from the Lynch's solr that the Letter of Sanction is ok and I will get it sent to you. "*

The earlier version of the letter had been sent by AIB to Mr Sulaiman by AIB, albeit that the email address was incorrectly stated. But this final letter was not.

At 09.46hrs, Mr McLoughlin forwarded AIB's email to Mr Godsil and Mr Gunne on the Conlon side, but appears not to have copied to LKS or anybody on the Lynch side. The email to the Conlon side stated:

> *"Richard/Conor,*
>
> *See below. The reference to Gerry and Philip only as being joint and several has been deleted as it may have caused issues on enforcement for A/B. "*

It will be noticed that there is no reference by Mr McLoughlin to the latest facility letter being now a non-recourse loan, as Mr Sulaiman has stated Mr McLoughlin had told him the previous evening. Mr Burns has said that it was never communicated to him by anybody that the reason for the removal of the recourse clause was to improve enforcement possibilities for AIB, and that had he known that he would certainly have got in touch with Philip Lynch, since the latter had told him he would not sign up to a recourse loan, and would expect Mr Burns to contact him in the event that the loan was recourse. The contrary argument is that the reference to enforcement has nothing to do with the concept of recourse, since even if it was a non-recourse loan, AIB would still have to enforce their remedies if there was default in order to put in a Receiver or otherwise arrange for the sale of the lands.

As I have said, Mr McLoughlin did not communicate to LKS the fact that the final facility letter had been amended so as to remove completely the recourse clause because it was thought by A&L to possibly cause enforcement difficulties for AIB. Rightly or wrongly, Mr Sulaiman had interpreted whatever was said to him by Mr McLoughlin the previous evening as meaning that the loan was now non-recourse and that there would be recourse to property only. Mr McLoughlin disputes that this was what he told Mr Sulaiman. Mr McLoughlin has no note of that conversation on his file.

Mr Sulaiman was awaiting sight of the final version of the facility letter which he was expecting would reflect the fact that there would be no recourse to the borrowers. He was expecting this to be reflected, as he had been told, by the removal of the recourse clause completely. At 12.03hrs Mr McLoughlin sent an email to Mr Sulaiman to which he simply attached without any comment the amended facility letter. That facility letter named Mr Conlon and all the Lynchs as borrowers, and there was no clause in the Special Conditions specifying against whom there would be recourse.

In his oral evidence Mr Sulaiman stated that he did not in fact open this attachment as it was not within his remit, as MOP were dealing with that matter, LKS's brief being confined to reviewing the Co-ownership Agreement. In his witness statement on the other hand he has stated that he did open it. It would appear on balance that he must have opened it as at 12.16hrs he forwarded it to Robert Burns and Gillian Burdon and stated *"you will note that the special condition regarding any recourse as against Philip and Gerry has now been removed"*. It is reasonable to conclude that he could not have stated this if he had not seen that it was so. In his evidence he stated that because of what he had been told by Ronan McLoughlin the previous evening, and because the facility letter reflected this by the removal of the recourse clause, he did not give any consideration to the fact that from a legal point of view the removal of the recourse clause completely in fact had the effect of making all the borrowers fully liable on a joint and several basis. He stated that he had no reason to doubt what he had been told the previous evening in this regard.

The closing of the transaction had been put back to 15.00hrs at the offices of A&L by this time, as Judith Whelan had indicated that she had another meeting to attend at 13.00hrs.

Mr Burns has stated that he could not be expected to understand from the email sent to him by Mr Sulaiman at 12.16hrs that because the special condition as to recourse had been removed completely that recourse was now against all the borrowers, especially given that he had earlier been told that recourse was to land only.

It must be borne in mind also that at this stage, even though AIB when sending the final version of the facility letter to Mr McLoughlin Mr O'Shea asked him to let Mr O'Shea know that it was okay with "the Lynch's solr", this information was in fact never communicated. Mr McLoughlin in his witness statement has stated that he presumed that the Lynchs' solicitor had communicated directly with AIB in that regard.

Mr O'Shea had heard nothing from anybody about whether or not the Lynchs were happy with the final facility letter. At 14.05hrs, Mr McLoughlin emailed Mr O'Shea to find out if he had heard anything in this regard, and at 14.46hrs Mr O'Shea replied stating that he had heard nothing further except that a drawdown request from the Lynchs had been received. Mr McLoughlin in his evidence stated that he presumed that the Lynch side had been in direct touch with the Bank.

So it was that this transaction completed during the afternoon of the gth February 2007 at the offices of A&L for AIB. Mr McLoughlin was there as the purchasers' solicitor. Judith Whelan attended and executed all relevant documents on her own behalf and on behalf of the other Lynch family members, including the final facility letter. Mr Conlon was not there but had executed all necessary documents on the previous evening. No representative of LKS was present nor expected to be present. It appears from a file memo created by Mr McLoughlin that following the completion of all the necessary documents on the gth February 2007, the funds were transferred to the Vendor's solicitor on the following day, the 9th February 2007.

Judith Whelan gave some evidence of what occurred at the closing of the transaction when she was there with Mr McLoughlin. She was asked by Mr Sreenan for LKS if she had reviewed this final facility letter before she signed it, and she confirmed that she did (T.5, Q. 423). But she could not recall actually asking him if the facility was now non-recourse, and a fair summary of what she said in relation to this is that she presumed that the final facility letter was non-recourse because Mr Sulaiman had stated that it was when he emailed Mr Burns to that effect. She was asked why, if non-recourse was so important, she did not simply ask either Mr McLoughlin or Mr Roberts. Her response to that question was that she does not recall that she did not ask that question (T.5, Qs.430-433).

Mr McLoughlin's evidence was that Judith Whelan did not ask any question about the nature of the facility (T.l5, Q. 247). It was suggested to him by John Gleeson SC for LKS that this would have been the last opportunity he would have had to ascertain whether or not the Lynchs had approved the facility letter. He stated that all the documentation had been sent to LKS so that they could advise their clients in relation to it. He stated also that the Lynchs were not MOP's clients in relation to financing, and that MOP were acting only in relation to title, and that while they were acting for Mr Conlon in relation to the mortgage, LKS were acting for the Lynchs in that regard. As far as Mr McLoughlin was concerned Judith Whelan had received advice from LKS and he stated that if she was unhappy with the facility letter she would not have turned up for the closing of the transaction. Nevertheless the fee invoice raised by MOP subsequently was addressed to Mr Conlon and the Lynch side, and the Lynchs discharged 50% of that invoice, which was in the sum of €50,000 plus VAT. (T. 16, Qs. 398-413)

I need to go back in time now to the time when Mr Lynch and Mr Burns were at Heathrow Airport on the afternoon of the 7th February 2007. It will be recalled that at 16.32hrs the penultimate facility letter had been emailed by Mr Sulaiman to both Judith Whelan and Mr Burns, and that facility letter contained Condition 5 which was for full joint and several recourse to both Mr Conlon and Mr Lynch. Judith Whelan saw this email and the facility letter, and has stated in her evidence that the presence of that condition did not concern her at that point since she presumed that it would be followed by a different facility letter, because her father had told her by phone shortly before at 15.40hrs that he would be proceeding only if the loan was non-recourse (T.2, Q.146). According to her evidence her father had told her that he would only proceed on a non-recourse basis and that he was going to communicate with Niall Donnelly on the Conlon side, and that he would get back to her about that. She said also that he had later informed her that he had spoken to Conor Gunne and had instructed him that this was the only basis on which he would proceed. She therefore understood

that the facility letter which Mr Sulaiman had emailed to her was not the final version of the facility letter. While she was in Mr Burns's office on the following morning, she also became aware of the confirmation to Mr Burns received from Mr Sulaiman that the loan was recourse to land only, and that the Bank would not be requiring recourse against any of the Lynchs.

Mr Burns gave evidence of his recollection of the phone calls made from Heathrow Airport on the afternoon of the 7th February 2007. He stated that he and Mr Lynch had been at meetings in London that morning following their return from Zurich. He recalled that he had discussed the Kilbarry land deal with Mr Lynch at Heathrow while awaiting their flight back to Dublin. They discussed the Quinby 20% carry, and also the fact that they had not seen any facility letter since the Heads of Terms had been circulated which referred to a joint and several liability between Mr Lynch and Mr Conlon. Mr Burns stated that Mr Lynch's view as expressed to him was that he would not do a joint and several loan and would not give any guarantees (presumably a reference to guarantees on behalf of his children). Neither did he want the children to be at any risk. Mr Burns stated that Mr Lynch turned to him and stated that he was going to telephone Mr Conlon, but he had been unable to get him on the phone, and that he had telephoned Conor Gunne. Given the passage of time, he could not recall anything about that call, except that he could recall Mr Lynch using a particular phrase during the call, and that it stuck in his memory. That phrase was that Mr Lynch "*did not do these things*". This was understood by Mr Burns to mean that Mr Lynch would not do a joint and several recourse loan with Mr Conlon, and would not give guarantees (T. 6, Qs. 343-352).

Mr Burns thinks that he was in touch with Mr Godsil that afternoon about the issue of proportionate repayment. He recalled also that he had left a voice message for Mr Sulaiman the drift of which was that "*there was an issue around the joint and several*", but he could not recall exactly what he had said in that regard (T.6, Qs. 353-356).

Mr Burns also recalled that Mr Lynch had spoken to Judith Whelan on the morning of the 7th February 2007, and that Mr Lynch had spoken to her again while he was at Heathrow Airport. He did not give any evidence of what was said. Presumably he was not aware of what was said by Mr Lynch to her.

Mr Lynch gave evidence in relation to these conversations at Heathrow. He has stated that by that time he was not aware of any proposal by which his wife and children would be liable for the AIB borrowings. He stated in his direct evidence that the final facility letter which Judith Whelan signed at the closing reflected what he had requested Mr Gunne to arrange with AIB in a call to him on the 7th February 2007 from Heathrow- i.e. a non-recourse loan, and that if he had not received confirmation on the morning of the 8th February 2007 that this was now a non-recourse loan he would not have proceeded with the transaction (T.11, Qs. 135-138).

Mr Lynch at all times was relying on the Conlon side to arrange a non-recourse loan with AIB. He never spoke to anybody in AIB himself. He has stated that he spoke to Conor Gunne while he was at Heathrow Airport, and that as a result of that call he expected that Mr Gunne would "*act on delivering a facility letter to us to our satisfaction*" and that he relied upon him to do so (T.11, Q. 566). It is a fact that Mr Gunne never contacted Mr Lynch or anybody on the Lynch side to inform them that AIB was taking out the recourse clause altogether because AIB were of the view that it might cause difficulties for enforcement. It was suggested to Mr Lynch in cross-examination that the failure by Mr Gunne or anybody else on the Lynch side to communicate that information is inconsistent with Mr Lynch having said to Mr Gunne during this alleged call to Mr Gunne that he would not get involved in a recourse and joint and several loan. Mr Lynch agreed when he stated "*Correct - it is not in keeping with the message he gave me*" (T.11, Q. 573). Unfortunately neither Mr Conlon, Mr Gunne, Mr Donnelly nor Mr Godsil have been called by the plaintiffs to give any evidence in order to assist in establishing exactly what was said by Mr Lynch during the calls he made that afternoon, or what if any action was taken by Mr Gunne or anybody else on the Conlon to address with AIB the fact that Mr Lynch was not prepared to sign up to a recourse loan.

Unfortunately Mr Lynch's own recollection of exactly what he said to whom that afternoon is hopelessly unreliable. Perhaps that is understandable since he had no cause to try and recollect these conversations until at least 2009 as the issue of whether or not this loan was a recourse loan did not arise until the beginning of 2009 when a new facility was being offered by AIB to replace the previous one. Mr Lynch has no contemporaneous note of the conversations. Nor have Mr Burns nor Judith Whelan. Everybody concerned is trying as best they can to recollect what may have been said. I have read and re-read Mr Lynch's cross-examination by Mr Sreenan about these telephone calls. While Mr Lynch attempts to hold the line on the fact that he spoke to Judith Whelan and told her he would not be proceeding if the loan was other than non-recourse, and called Mr Donnelly because he could not reach either Mr Conlon or Mr Gunne, and asked Mr Donnelly to get either of them to call him, and that he spoke to Mr Gunne to tell him that he would not proceed unless the loan was non-recourse, his recollection is hopelessly confused and unreliable. I will not set out that cross-examination in detail, but it can be found in T.11, Qs. 409-538.

John Hennessy SC for AIB cross-examined Mr Lynch also in relation to these calls, albeit in not as much detail as had Mr Sreenan had, but Mr Lynch's answers during that cross-examination do not assist me in placing reliance on Mr Lynch's recollection (T. 13, Qs. 308-315).

If things happened as Mr Lynch has stated, it is entirely inconsistent with what Mr Sulaiman notes Mr Burns having said to him during the call between them at 18.05hrs on that same day. It will be recalled that Mr Sulaiman's note included the following:

" "*Re possibility of Goodbodys/bank wanting the joint/several clause to apply to both Gerry, Philip and all the Lynchs, Rob felt this wouldn't be a problem*. "

I have no reason to doubt the accuracy of Mr Sulaiman's note.

There is no evidence that anybody on the Conlon side approached AIB after these calls on the ih February 2007 to inform AIB that the loan would have to be non-recourse. Neither is there any evidence that anybody on the Lynch side contacted LKS or MOP to instruct them that the Lynch side would proceed with this transaction only if the loan was a non-recourse loan. It is true that LKS were asked to confirm that the loan was non-recourse, and that they advised that it was, and that a new facility letter would issue to reflect that situation. But there is no evidence that they were told that unless it was non-recourse the Lynchs would withdraw from the transaction. It is clear also that nobody on the Lynch side made any direct contact with AIB either before on or after the 7th February 2007. They left it to Mr Conlon to make all such approaches, but never contacted him or anybody else on the Conlon side subsequently to inquire as to the position, and never received any confirmation from the Conlon as to what type of loan had been applied for or had been approved. They say they relied upon LKS to advise them in relation to everything, including the nature of the loan being made available.

Following the completion of the purchase on the 88h February 2007, Judith Lynch and everybody on the Lynch side believed, rightly or wrongly, that they had signed up to a non-recourse loan. That is clear and I accept that. They believed that because of what had been communicated to them by Mr Sulaiman in that regard on the morning of the 7th February 2007. However, it is also clear from the

terms of the facility letter signed by Judith Lynch on the 8th February 2007 that it was a full joint and several recourse loan to all the named borrowers.

There was no discussion about the nature of the facility at the offices of A&L. It is clear that Judith Whelan simply signed the facility letter produced to her. The document was not read over to her or by her at that stage. She certainly did not ask any question about it either to Mr McLoughlin or to Mr Roberts. Nobody from LKS was present at the closing. But it is perfectly clear that if she had asked for confirmation that what she was about to sign was a non-recourse loan facility she would have to have been informed by either of those solicitors that it was not. It clearly was not. But if Mr McLoughlin's evidence is correct, and I do not doubt that evidence, he never understood that the changes made to the facility letter on the evening of the 7th February 2007 were other than for the purpose of ensuring that there would be no difficulties with regard to enforcement, and there was no reason why he should have had any other understanding as he had never been informed by the Lynch side or the Conlon side that recourse was a problem for the Lynchs. I can only conclude that whatever he said to Mr Sulaiman about these changes on the evening of the 7th February 2007 was misunderstood by Mr Sulaiman. It is unclear why there should have been that misunderstanding but there clearly was.

That the Lynchs believed that this loan was non-recourse following the closing of the sale is, apart from their own averments in that regard, confirmed by an answer which Judith Whelan gave to Mr Lynch much later on the 15th September 2008 when he asked in an email what recourse AIB had in the event that interest was not paid on the loan. She replied that the bank had no recourse, as recourse was to the land only.

This belief is also said by the Lynchs to be demonstrated by the fact that during 2008 there were discussions with a number of different parties with whom some discussions had taken place in relation to a sale of some of the lands following re-zoning and planning permission. In the event, no agreement was reached in relation to that, but it is said by the plaintiffs that if they had known or believed the loan to be recourse they would have pursued the interest shown with much more vigour, as they would have considered it imperative to pay down these borrowings as soon as possible.

The February 2007 facility was due for renewal in two years' time, and on the 15th January 2009, Richard Godsil (Conlon side) emailed Judith Whelan attaching a copy of a new facility letter proposed by AIB. This facility letter contained a clause stating that there was to be "*full joint and several recourse of Gerard Conlon and Philip Lynch for all of the £25,000,000 loan plus interest, costs and damages*". She appears not to have opened the attached facility letter for some days but she saw it on the 21st January 2009 and was immediately concerned to see that a joint and several liability clause was contained therein, as she had understood that this was not the basis of the facility which this letter was intended to replace. At 08.27hrs that morning she emailed her father and stated that the Bank had "*issued a new facility letter to roll over the facility and Gerry wants to meet as they have amended to include additional security of Joint and Several from you and Jerry (sic)".*

She went on to state:

"*We cannot sign this so our options are to service the interest due but no other commitment, i.e. prepared to hand back the keys*. "

Philip Lynch responded at 09.04hrs that morning and said: "why sign up to *int* [*erest*]?"

At midday, Judith Whelan responded by stating that she had spoken to her husband to get his view and that he had said that the bank have two options in the event that interest is not paid; firstly to "*appoint a Receiver to take the land and seek due interest or renew the facility on the original terms. Certainly no grounds for anything else*".

Half an hour later Philip Lynch replied:

"*so they have the right to go after int [erest] payments? If so who do they go after? ?EPL, PL and kids? If term sheet gets changed they will hit us for abt 3pc over cof [cost of funds]"*

There was further discussion and emails about this question within the Lynch camp, and they took advice from others also. AIB's view when contacted was that if the loan was to be non-recourse this would have to have been specifically inserted into the facility letter. In February 2009 Robert Burns had a meeting with LKS (Emmet Scully) to discuss the matter also. I do not propose to set out details of all these discussions further, as I wanted to refer to it simply to indicate that I am satisfied that between the initial drawdown of the facility on the 8th February 2007 and January 2009 when the replacement facility letter was circulated, the Lynch parties were genuinely of the belief that the loan was a non-recourse loan.

In the event, they never signed up to the replacement facility and this in due course led to AIB issuing letters of demand and proceedings against all the plaintiffs to recover the sum of €25 million.

During the course of this trial, there was a great deal of evidence given in relation to meetings in 2009 between the plaintiffs and LKS as to whether or not the facility was recourse or non-recourse. Eventually access was given to the MOP file and there was much discussion and questioning about that too. I do not consider that it is useful to go into that denouement in order to resolve issues arising from the event of January - February 2007. What views were formed post-2007 by the various parties is not really relevant to the determination of the issues to be decided.

Eventually the relationship between the plaintiffs and LKS deteriorated to the point where in due course they sought advice from their present solicitors, and these proceedings were commenced in order to determine whether the plaintiffs have any defence to the proceedings brought against them by AIB, and if they have not, whether or not either LKS and/or MOP are obliged to indemnify them on the basis ofhaving given negligent advice/information as to the nature of the AIB facility.

The claim against Allied Irish Bank:
The plaintiffs seek declarations that they are not indebted to the Bank in the sum of €25 million, plus interest, and that they are not indebted to the Bank in respect of any sums which may now be, or in the future may be, owing by Mr Conlon in respect of that sum.

They seek rectification of the lending and security documents so as to reflect what they say was the true agreement, namely a non-recourse loan. They also seek indemnities from the second and third named defendants, as well as damages under various headings, including negligence and misrepresentations.

Paragraph 17 of the plaintiffs' Statement of Claim pleads:

> *"17. ... all of the defendants owed duties to the plaintiffs, and in particular a duty not to misrepresent to the plaintiffs*

the nature of the loan facility proposed by AIB and associated lending and security arrangements"

Having referred to some of the email traffic and telephone conversations which occurred on the 7th and 8th February 2007 between MOP, LKS and the plaintiffs, which I have set out above, and which is said to have led the plaintiffs to believe that what they were signing up to on the gth February 2007 was a non-recourse land - recourse to be confined to the lands only - it is pleaded at paragraph 31 of the Statement of Claim:

> *"31. Either that representation was true and conflicted with lending and security documents, which must be rectified, or alternatively it was false, and in either event the plaintiffs apprehend that they will suffer loss and damage including an assertion of persona/liability. "*

It is accepted by the plaintiffs that they at no stage had any direct communication with AIB. They never themselves applied to AIB for any loan whatsoever, recourse or non-recourse, Mr Lynch having left the matter in the hands of Mr Conlon. There is no evidence that Mr Conlon ever made an application to AIB for a non-recourse loan, or informed AIB that Mr Lynch would not proceed with this transaction unless any facilities were non-recourse. In fact any internal documentation available from AIB's files in relation to this transaction indicates that at all times AIB were dealing with an application for normal recourse facilities. What Mr Lynch has stated is that from his conversations with Mr Conlon at the outset of this transaction he made it clear to Mr Conlon that he wanted non-recourse facilities, and that Mr Conlon was well aware of this position, including because he had withdrawn from Mr Conlon's Millennium project precisely because no such non-recourse facilities were being made available to him by his bank. He relies also on the telephone conversation with Mr Gunne on the 7th February 2007 while he was at Heathrow Airport, and the nature of changes made by AIB to the final facility letter, and submits that these can only have been made following a conversation between the Conlon side and Mr O'Shea on the evening of the 7th February 2007.

AIB's position is that the only application made for facilities was for a normal recourse facility, and that is what the plaintiffs got. AIB states also that neither the plaintiffs nor anybody on their behalf ever made an application for non recourse facilities, and that no evidence to the contrary has been adduced, and that in those circumstances there can be no basis for any contention by the plaintiffs that AIB is guilty of any misrepresentation.

AIB refers to the fact that the plaintiffs have seen fit not to call any witness from the Conlon side to support their belief that AIB was made aware that the Lynchs would not sign up to a recourse loan, and that this Court should infer therefore that nobody from the Conlon side would be in a position to support their assertions in this regard.

They refer to the evidence which I have set forth already to the effect that even as late as the evening of the 7th February 2007, less than 24hrs before the loan was drawn down by the plaintiffs, Robert Burns is noted by Mr Sulaiman as confirming that full joint and several recourse to all the Lynchs would not be a problem, indicating in their view that the Lynch side was well aware that the facilities applied for and on offer were at all times recourse facilities, and that this confirms that a non-recourse loan was never in contemplation or applied for by them or on their behalf, even up to the evening of the 7th February 2007.

The burden of proof of course rests with the plaintiffs to prove their case against AIB on misrepresentation, and on the balance of probabilities. In order to overcome an evidential deficit, the plaintiffs rely on the events of the afternoon and evening of the 7th February 2007 when changes were made to the facility letter by Derek O'Shea at AIB, and to the fact that the nature of these changes was not communicated and explained directly to the Lynchs by AIB.

They refer to the advices given by Alan Roberts of A&L to Derek O'Shea in AIB during the afternoon of the 7th February 2007 when he drew attention to possible enforcement difficulties if recourse was stated in the facility letter to against only two of the borrowers, namely Mr Conlon and Mr Lynch, and to the fact that he advised AIB that the recourse clause should state that recourse should be to "all the borrowers". They refer to the fact that this advice was not taken by Mr O'Shea who instead, and for some unexplained reason, decided to circulate a facility letter which left the recourse clause unaltered (i.e. to Mr Conlon and Mr Lynch only), and to the fact that later the recourse clause was simply removed altogether, again without explanation.

The plaintiffs have submitted that if Mr Roberts' advice had been taken, it would have been immediately apparent to any person on the Lynch side who read the facility letter before it was signed that it was clearly not a non-recourse loan, and that all the borrowers were liable for the repayment of the loan, and that in such circumstances they would simply not have signed up to it, and would have withdrawn from the transaction.

The plaintiffs say that the removal of the recourse clause completely was consistent with what they had been informed by LKS, namely that LKS had been informed by MOP that AIB at that point required recourse to the lands only, and that if AIB had unilaterally decided that instead of recourse being required only against Mr Conlon and Mr Lynch, they would effect a change which was intended to make not only Mr Lynch and Mr Conlon liable, but also the other plaintiffs, this ought to have been clearly communicated by wording such as that proposed and advised by Mr Roberts, rather than being effected simply by the removal of the recourse clause completely, and that a misrepresentation was thereby created.

AIB submit that the removal of the clause completely did not alter the nature of the loan being offered, since at all times a recourse loan had been sought, as reflected in earlier drafts of the facility letter, and the final facility letter was such a loan, and that the change effected was simply to address the enforcement difficulties pointed out by Mr Roberts, and for no other reason.

There appears to have been some communication between Mr Godsil on the Conlon side and Mr O'Shea of AIB during the evening of the 7th February 2007, but no evidence has been given as to the content of that communication. The result is that there is no evidence that even on that afternoon AIB had been requested to alter the nature of the loan to a non-recourse loan, save for what the plaintiffs seek to rely upon from an affidavit sworn by Mr O'Shea in other proceedings against Mr Conlon, and I will come to that.

AIB of course also refer to the fact that Mr McLoughlin does not agree that in his conversation with Mr Sulaiman (LKS) on the afternoon of the 7th February 2007 he informed Mr Sulaiman that the bank no longer required any recourse to the borrowers. They submit that if any such incorrect information was passed by MOP to LKS, or if correct information was misunderstood by Mr Sulaiman and passed on to the plaintiffs, there is no basis for a finding that AIB are guilty of any misrepresentation.

As I have just said, the plaintiffs have referred to and rely on certain of the contents of an affidavit sworn by Mr O'Shea of AIB in summary summons proceedings brought by AIB against Mr Conlon to recover the amount of this loan. He refers in that affidavit to the first version of the facility letter in which only Mr Conlon and Mr Lynch were named as the borrowers, and that he was subsequently informed by Mr Conlon that all the Lynchs should be included as borrowers also, and that this was done, albeit that the facility letter specified that recourse was to be only against Mr Conlon and Mr Lynch.

Mr O'Shea went on to refer to a telephone call from Mr Godsil (the Conlon side) when Mr Godsil queried why it was necessary for the facility to have any clause specifying joint and several liability at all, and apparently referred to the fact that no other loans by AIB had contained any specific recourse provision. He states that Mr Godsil "*in quite a light-hearted manner*" queried whether the fact that the draft facility letter for this particular loan contained a specific recourse provision meant that the others were not 'personal recourse' loans and that Mr Conlon was not obliged to repay them. He goes on to say that "*Mr Godsil did not believe that to be the position*", but "*lest any issue might arise concerning Mr Conlon's obligation to repay the previous loans, I decided that the draft sanction letter should be reworded to remove special condition 6*". He stated that accordingly the clause was removed and the revised draft facility letter was circulated by email at 10.36hrs on the 8th February 2007.

Mr O'Shea in that affidavit has not stated the timing of that conversation with Mr Godsil, but the plaintiffs say that it must have been after Mr O'Shea had circulated the draft sanction letter on the 7th February 2007 at 15.59hrs which contained joint and several recourse to Mr Gunne and Mr Lynch, and that this is consistent with Mr Lynch having contacted Mr Gunne from Heathrow Airport on the afternoon of the 7th February 2007 to tell him that he would not sign up to a recourse facility. They submit that this Court should be satisfied that during this call to Mr O'Shea, Mr Godsil told him that Mr Lynch required the removal of any recourse conditionality, and that as a matter of probability that was the purpose of that call, rather than as described by Mr O'Shea in his affidavit.

The plaintiffs refer also to the fact that the reason given by Mr O'Shea in his affidavit in those proceedings for the change is a completely different reason for the removal of the clause, since it has been stated in these present proceedings that the recourse clause was removed in order to avoid any enforcement difficulties. AIB submit that one way or another the removal of the clause did not alter the nature of the facility which had been sought on behalf of the plaintiffs at all times, even if there is some lack of clarity as to the precise reason for the change.

The plaintiffs submit that Mr O'Shea deliberately and for no explained reason ignored the advice which Mr Roberts gave on the 7th February 2007 that all borrowers should be included in the recourse condition, and that, instead, he circulated a draft facility letter which retained the clause making it joint and several recourse to only Mr Conlon and Mr Lynch. They refer to the fact that subsequently Mr Roberts again emailed Mr O'Shea at 16.40hrs that afternoon advising that the letter should state that "*the bank's recourse is to all borrowers for the full amount of loan plus interest*" even if it was the commercial intention of AIB that recourse should be confined to Mr Conlon and Mr Lynch. It is submitted that this advice was clearly indicating to Mr O'Shea that the bank's intention to make all the Lynchs liable for the loan needed to be explicitly drawn to their attention.

It is suggested that it must have been clear to Mr O'Shea that he had by this time put into circulation a draft letter making only Mr Conlon and Mr Lynch liable, and not the other Lynch family members, and that at no stage thereafter did he take any steps to ensure that the Lynch side were made aware that they were becoming liable for the loan, as happened by the removal completely of the recourse clause from the final facility letter on the morning of the 8th February 2007 at 09.36hrs when he emailed it t both Mr Roberts in A&L and to Mr McLoughlin in MOP.

In that email he had asked Mr McLoughlin to let him know "*when you hear from the Lynchs' solicitor that the letter of sanction is ok ...".* As I have already set forth, he did not hear back with that confirmation, though he did receive the drawdown request from Mr Burns.

In so far as Mr McLoughlin has stated in his evidence that he was informed by Mr O'Shea that the clause had been removed altogether on the advice of A&L, and since it is clear that the advice of A&L was different and was not followed, it is submitted that Mr O'Shea is guilty of deception by giving a reason for the removal of the clause which was manifestly untrue, and it is submitted that this has resulted in a misrepresentation to the plaintiffs, who were entitled to be informed of such a fundamental change in the character of the facility if they were to sign up to it the following day. I should add that it appears that Mr O'Shea did not inform Mr McLoughlin that he had had a conversation with Mr Godsil earlier.

While Mr O'Shea prepared a witness statement for the purpose of these proceedings, he was withdrawn as a witness, or at least a decision was taken not to call him, or indeed anybody else on behalf of AIB. In addition, Counsel for AIB submitted during the evidence being given by the fifth named defendant, Philippa Lynch, that Mr O'Shea's affidavit sworn in the summary summons proceedings against Mr Conlon should not be allowed into evidence on the basis of inadmissibility.

The plaintiffs submit that it should be admitted on the basis of its probative value for the contention that the explanation given by Mr O'Shea to Mr McLoughlin was false, and that it demonstrates that Mr Godsil had in fact contacted Mr O'Shea following a call to him by Mr Lynch from Heathrow Airport on the afternoon of the 7th February 2007 with a view to have the recourse condition removed at the instance of Mr Lynch in that call. They submit that the failure to call Mr O'Shea and the objection to the admissibility of his said affidavit demonstrates an attempt to prevent the establishment in evidence that the explanation was false and the fact that Mr Godsil had made that call to Mr O'Shea. It is submitted that Mr O'Shea's actions have directly led to a situation whereby all the Lynch family members have become personally liable on a full recourse basis without any of them realising that this was what they were signing up to, and also led to LKS advising the plaintiffs that they were entering into a non-recourse loan.

There was further discussion at the outset of Mr McDowell's legal submissions on Day 22 about whether the contents of Mr O'Shea's affidavit should be permitted to be relied upon by the plaintiffs, and it is fair to say that subject to some qualification as enunciated at the time by Mr Hennessy for AIB, no objection to its admissibility, or at last to the portions of same on which the plaintiffs seek to rely, was persevered with. Mr McDowell's submissions proceeded on that basis.

AIB does not accept the plaintiffs' evidence that if they had known that this loan was recourse, they would have refused to complete the purchase and would have withdrawn. It is argued that as a matter of law they were bound into the contract by the 8th February 2007, and were legally bound to complete. The plaintiffs do not agree, since the contract for sale was executed by Mr Conlon in trust and without any awareness on his part of who were to be the beneficiaries of that trust, since it had not been decided at that stage whether Mr Lynch himself would be the named co-purchaser with Mr Conlon, or whether it would be through a family partnership, or whether other individual Lynch family members would be named.

The submission that the plaintiffs were bound into the contract is made to support the Bank's submission that whether or not the loan was non-recourse the plaintiffs would have completed this transaction, since they had no choice but to complete it, and that in any event they saw it as a no risk transaction since at that time they were aware that there was already a very significant uplift in the value of the lands since the contract was signed, and that they would achieve a significant profit in any event on any re-sale or sale of part of the lands from which the borrowings could be repaid.

Both AIB and the plaintiffs ask the Court to draw adverse inferences from the fact that the other has not called certain witnesses who might reasonably be expected to be in a position to give relevant evidence as to what communications were made in relation to

the nature of the facilities being sought.

The plaintiffs note that AIB have failed to call Mr O'Shea, even though he prepared a witness statement in advance of the trial, and that the evidence which he was proposing to give was put to Philippa Lynch when she was being cross-examined by Mr Collins. They submit that the Court should therefore favour the plaintiffs' version of events, particularly in relation to the events of the afternoon of the 7th February 2007, namely that Mr Godsil did in fact communicate to Mr O'Shea the fact that Mr Lynch had informed him that unless the loan was a non-recourse loan he would not be proceeding with the transaction, and also that the real reason why the final change was made to the facility letter was to bring all the Lynchs into liability even though it had been earlier communicated that recourse would be to land only and without recourse to the borrowers. It is submitted that the plaintiffs have been significantly disadvantaged by the fact that AIB failed to call Mr 0'Shea as they have been deprived of an opportunity to cross-examine about what they say are crucial issues of controversy between the parties, and also as to the fact that unknown to the plaintiffs AIB would not have loaned on this transaction to Mr Conlon on his own since he was already heavily indebted to AIB on other transactions, and in fact way in excess of the Bank's own lending guidelines. It is suggested that this also constituted a reason why AIB ensured that the Lynchs were brought into full recourse- a reason not disclosed to the Lynch side at any time.

AIB on the other hand say that they are not obliged to call any evidence, and that in any event the plaintiffs have failed to adduce any evidence which requires any answer from it in relation to misrepresentation. That submission is made in spite of the fact that AIB chose not to make an application at the conclusion of the plaintiffs' evidence that the case against AIB should be dismissed.The plaintiffs submit that no adverse inference should be drawn by the Court from the fact that they did not call Mr Conlon, Mr Gunne or Mr Godsil. In that regard it is submitted that there are several reasons why it is perfectly reasonable and understandable why such witnesses could not be regarded by the plaintiffs as reliable witnesses, and why it might be advised by the plaintiffs' lawyers that they should not be called. For example, as evident from documents which are before the Court, Mr Conlon had indicated to the plaintiffs that whereas he did not believe that the loan was a non-recourse loan, he was nevertheless prepared to take the benefit of any decision by the Court that it in fact was non-recourse.

Another reason stated by Mr McDowell was that on the 10th June 2010 Mr Conlon had written to Mr Lynch stating, inter alia:

> *"The night before we closed the deal I received a call from Richard Godsil stating that Robert Burns had just confirmed that the loan was now recourse. "*

Robert Burns has said that this statement is not correct, and that no such conversation with Mr Godsil took place, and the plaintiffs did not seek to rely upon it in any way.

Mr McDowell also refers to the unsatisfactory way in which Mr Conlon is said to have dealt with the Lynchs' request to him that he obtain and make available to the Lynchs the MOP file when they were seeking that file in 2009.

He refers also to certain documents which have been disclosed which he submits evidence an exploitative approach to involving Mr Lynch in this transaction. Other aspects of these witnesses position were referred to also in submissions.

In all the circumstances, it is submitted that it was perfectly reasonable and understandable why these witnesses would not be called due to their general unreliability.

I am of the view that there are reasons, as given by Mr McDowell, why a decision was made not to call witnesses from the Conlon given what can be reasonably interpreted as a falling out at least between Mr Conlon and Mr Lynch, and given the matters to which he has referred to in that regard. I do not propose to draw any adverse inference from their failure to call them, though of course the plaintiffs are under a possible disadvantage in that regard, given the fact that they themselves had no direct contact with AIB at all from start to finish of this transaction, having handed that task over to Mr Conlon.

But equally, I am not inclined to draw adverse inferences from the decision by AIB not to call Mr O'Shea. While he did prepare a witness statement in contemplation of giving evidence, obviously a decision was made during the course of the hearing, and in particular at the conclusion of the plaintiffs' evidence, that there was no reason to call any evidence to rebut the plaintiffs' evidence, because in the view of AIB and presumably its advisers there was no evidence given by the plaintiffs which could result in a finding of misrepresentation against AIB. That is a tactical decision which it is always open to a party and its advisers to make as the hearing proceeds. There is always a danger that the Court may disagree with that position, but it is not always the case that the Court should draw adverse inferences from that failure to go into evidence. So I will proceed on the basis of not drawing such inferences against either side. Iwill decide the issues on the basis of what evidence has been given.

The plaintiffs allege that AIB negligently misrepresented to the plaintiffs that this loan was non-recourse by the manner in which amendments were made to the facility letter on the ih February 2007, and by not establishing with the Lynch side that they both understood the nature and effect of the changes made, and that they were acceptable to them. Reference is made to the fact that early on the morning of the 8th February 2007 the final version of the facility letter was emailed by Mr O'Shea to Mr McLoughlin(MOP) and to Mr Roberts (A&L) but not to the Lynchs directly or to LKS. But in his email to Mr McLoughlin he asked Mr McLoughlin to let him know as soon as possible "*when you hear from the Lynchs solicitor that the letter is okay ...* ". We know that Mr McLoughlin emailed that letter to Mr Sulaiman only at 12 noon on the 8th February 2007. We know also that Mr McLoughlin emailed Mr O'Shea at 14.05hrs that day to inquire if he had heard anything from the Lynchs to which Mr O'Shea responded by stating that he had heard nothing except that a drawdown request had been received from the Lynch side. The plaintiffs submit that Mr O'Shea ought to have contacted the Lynchs directly or at least LKS on their behalf to be certain that the terms of the facility letter were acceptable, and that by not doing so, they breached a duty of care to the plaintiffs in that regard, especially when the letter was circulated so close to the closing of the transaction in the knowledge that Judith Whelan was going to be executing the documentation on behalf of her family members under Power of Attorney. The plaintiffs refer to the fact that AIB's own solicitor, Mr Roberts, had requested that the facility letter be brought to the Lynchs' attention and that this did not happen.

AIB on the other hand deny any negligent misrepresentation. As I have said, they refer to the lack of any evidence whatsoever that a non-recourse loan was ever applied for. But they also rely on the fact that any negotiation in relation to this loan was left by the plaintiffs in the hands of Mr Conlon and his team, and that MOP were acting for the Lynchs in the conveyancing aspects of this transaction, and also that the facility letter in its final form was sent to that firm with a request that it be brought to the Lynchs' attention. Mr Collins has referred to the fact that Robert Burns also confirmed in his evidence that it was the Conlon side which was relied upon to deal with AIB in relation to negotiations for this loan (T.6, Qs. 513-515). Mr Lynch confirmed this also in his evidence (T.11, Qs. 560-563).

They submit also that there is no evidence adduced by the plaintiffs that Mr Godsil or anybody else on the Conlon ever indicated to it

that the Lynchs would not sign up to anything other than a non-recourse loan, even during the afternoon of the 7th February 2007. They submit that any duty of care owed to the Lynchs as to the nature of this facility was discharged by the furnishing of the facility letter to their solicitors, MOP, even if they were aware that LKS were dealing with the Co-ownership Agreement, and that they were not induced in any way to enter upon this loan by any representation by the Bank that this was a recourse loan.

In relation to any alleged misrepresentation by the Bank leading to all the plaintiffs becoming liable for the amount of the loan, rather than just Mr Conlon and Mr Lynch, AIB refer to the fact that it was specifically requested on behalf of the Lynchs that the children of Mr Lynch be named as borrowers, apparently as a result of tax advice obtained by them from Ernst & Young, and that this is reflected in the facility letter as ultimately circulated, and signed up to, even if up to a certain point the Bank was happy to have recourse only against Mr Conlon and Mr Lynch.

Michael Collins SC for AIB has referred to the sequence of events from the time in late December 2006 when the first Heads of Terms were circulated, up to the 8th February 2007 which I have already set forth in detail. He submits that for the plaintiffs to succeed they must establish that AIB made an untrue representation of fact which induced the plaintiffs to enter into the contract. He submits that there has been no evidence that this happened, even through the sequence of events on the 7th and 8th February 2007, since at all times the plaintiffs had sought a recourse loan, and that is what they got, and that there is no evidence that AIB was ever requested to do otherwise. He suggests that at all times the Lynchs were aware that the loan was a recourse loan, even as late as the evening of the 7th February 2007 when Mr Burns appears to have told Mr Sulaiman that joint and several recourse was not a problem for the Lynchs. He refers to the fact that Mr Lynch wanted to involve his children in this transaction in order to equalise benefit to them. It is submitted that there is no evidence that in so doing Mr Lynch or anybody on his behalf asked that there be no recourse against the Lynch children, and in fact that there is evidence that at some stage Mr Lynch may have been considering giving a guarantee in respect of his children if the Bank sought that, given the fact that it was known that the children would not have the means to fund the loan in question.

Mr Collins submits that the only evidence available as to the reason for the change to the final facility letter is that it was effected on foot of advice of AIB's solicitor, Mr Roberts who identified some potential difficulties for enforcement if recourse was stated to be limited to two borrowers only. It is submitted that even though the mechanism for addressing this problem suggested by Mr Roberts (i.e. specifying recourse to all the borrowers) was not adopted by Mr O'Shea, the fact that Mr O'Shea dealt with it by simply removing the then-existing recourse clause against Mr Conlon and Mr Lynch did not alter in any way the objective sought to be achieved by Mr Roberts, namely to remove the potential enforcement difficulty. Mr Collins submits that there is no evidence that the reason for the final change was other than to address that issue, and certainly none to suggest any improper motive on the part of Mr O'Shea to bring into liability the Lynch children by some subterfuge.

Mr Collins also refers to the evidence given by Judith Whelan to the effect that when she saw the penultimate facility letter which showed recourse only against Mr Conlon and Mr Lynch, she effectively ignored it on the basis that she would not be signing up to it because it was recourse, and she knew that her father would not agree to that. Accordingly it is submitted that this penultimate letter did not induce her to sign up to the loan. She did nothing when she saw that letter. She neither contacted LKS, nor MOP nor anybody in AIB to say that this facility letter was not acceptable. At that point she knew the loan was to be a recourse loan. Equally, the final facility letter was clearly a recourse loan and it is submitted that whatever may have been told to the Lynchs by LKS on the 7th and 8th February 2007, there is no question of AIB having made any representation to MOP to the contrary, and AIB refer to the evidence of Mr McLoughlin as to his understanding of the reason for the removal of the recourse clause completely. It is submitted that accordingly there is no evidence that AIB ever made a representation to anybody that this was now becoming a non-recourse loan at the last minute as alleged by the plaintiffs.

In this regard, Mr Collins has referred also to the evidence given by Judith Whelan when she stated that when she saw the final facility letter on the 8th February 2007, she understood the removal of the recourse clause to mean that the loan was non-recourse, given the advice received from LKS to that effect earlier, and to the fact that she went on to state that if that advice had not been given she would not have signed the facility letter. Accordingly, Mr Collins submits that even on the plaintiffs' own evidence it is clear that it was the advice from LKS which led her to sign the facility letter, and not any representation by AIB, and that therefore there was no reliance on anything said by AIB or contained in the facility letter which led her to sign it (T.2, Qs. 210- 212: and T.3, Q. 311). Mr Collins refers also to the confirmation given by Mr Lynch in his evidence that he had not actually seen the final facility letter, and that the plaintiffs had relied upon the evidence given by LKS (T. 13, Qs. 219-220), and further that this was confirmed by Mr Burns in his evidence. (T. 7. Qs. 37-50)

In so far as the plaintiffs suggest that during the course of the afternoon of the ih February 2007 Mr Godsil had contacted Mr O'Shea, and that given the amendments made to the facility letter thereafter Mr Godsil must have informed Mr O'Shea that the Lynchs required that the loan was non-recourse, Mr Collins has submitted that the plaintiffs have not brought forward any evidence to support this. He points to the fact that Mr Godsil has not been called by the plaintiffs to give evidence as to his conversation with Mr O'Shea, and submits that if Mr Godsil had anything to say in support of the plaintiffs' position he would have been called to give that evidence.

It is submitted that the change effected by Mr O'Shea to the facility letter by removing the recourse clause to Mr Conlon and Mr Lynch was never intended by AIB to alter the nature of the facility being offered, but rather to give effect to the advices of Mr Roberts relating to enforcement. Mr Collins has submitted that any suggestion to the contrary is unsupported by any evidence, and is merely speculation by the plaintiffs in order to support their position as to non- recourse.

Conclusions:
It is beyond any doubt that when Mr Lynch discussed getting involved in the purchase of these lands with Mr Conlon in 2006 and eventually agreed that he would, he left it to Mr Conlon to negotiate loan facilities with AIB, with whom Mr Conlon had an existing significant banking relationship. He at no time got involved in the financing arrangements, and never had any direct contact with AIB. It is also beyond doubt that even if he did say to Mr Conlon that he was prepared to get involved only if any loan was a non-recourse, that was never communicated by Mr Conlon or anybody else on the Conlon side to AIB. It is also beyond doubt that at no stage did Mr Lynch ever check with Mr Conlon that he had made his position known to AIB. As far as Mr Lynch is concerned, once he had made his views known to Mr Conlon he left it to him and trusted that what he wanted would be delivered.

I accept that Mr Lynch always assumed and believed that he could withdraw from the transaction at any time up to completion if the facilities on offer from AIB did not turn out to be non-recourse. That was his view. Mr Conlon had executed the Contract for Sale in trust. The beneficiaries of that trust were unknown at that stage as the Lynch side had not decided finally the basis on which any Lynch party would participate. Whether or not a withdrawal by Mr Lynch thereafter may have given rise to any claim by Conlon, or whether Mr Lynch may have had some difficulty recovering his share of the deposit from Mr Conlon does not alter the fact that subjectively at least Mr Lynch had it in his mind that he was not bound into the transaction and could decide at any point prior to

completion to withdraw from the transaction.

I do not have to decide whether or not he was as a matter of law justified in that belief. Neither do I have to decide what rights, if any, the Vendor may have been able to enforce against the Lynchs in the event that did not complete. Part of the argument against the plaintiffs is that they were bound into this contract anyway, and that they would have completed the sale even in the event that the only loan available was a recourse loan, simply because they had no choice but to do so. Mr Lynch did not feel so bound and believed that even up to the day of closing he could have withdrawn, whatever the consequences may have been as between him and Mr Conlon. I accept that, right or wrong, this was a genuinely held belief.

The probability is however that if Mr Lynch decided to withdraw from the transaction, Mr Conlon may not have been able to proceed on his own, since it has become clear that AIB needed Mr Lynch to be involved in the loan as Mr Conlon was already heavily borrowed with AIB, and to an extent that exceeded significantly AIB's own lending guidelines. Mr Lynch was unaware of that situation, but in my view it is not relevant to any issue which I have to decide, in spite of the plaintiffs' submission that AIB ought to have made that situation known to the Lynch side, and their suggestion that the need for AIB to have Mr Lynch involved in the transaction led Mr O'Shea to make an amendment to the loan facility letter on the 7th February 2007 which, while appearing to meet Mr Godsil's request that the recourse clause be removed completely, also ensured that Mr Lynch and the other Lynch parties were all jointly and severally liable with Mr Conlon for the entire amount of the loan.

There is no evidence that Mr O'Shea indulged in any deliberate attempt to deceive the plaintiffs in order to ensure that they were kept involved in the transaction. I would not consider that AIB was under any duty of care to Mr Lynch which extended to keeping him up to date as to the nature and extent of Mr Conlon's indebtedness to AIB.

AIB certainly was under a duty of care to the borrowers, including the plaintiffs, and that duty of care included a duty not to misrepresent to the plaintiffs the nature of the loan being offered. A body such as the AIB owes such a duty of care to its customer given, firstly, the relationship of proximity which exists between them, and secondly, the foreseeability that if, for example in this case, the bank negligently misrepresented the nature of the loan to the borrowers, and the borrowers acted in reliance upon what was stated, they may suffer losses. But the onus of establishing that a false representation was made, either deliberately or negligently by AIB, and that the plaintiffs were induced by it to act to their detriment, is firmly upon the plaintiffs.

Given the total absence of any evidence that the plaintiffs ever applied for a non-recourse loan, and that nobody on their behalf sought a non-recourse loan, and given also the absence of any evidence that the plaintiffs were ever told by directly by AIB or by their agent, Mr Roberts, that the loan was a non-recourse loan, the plaintiffs face a very difficult task when attempting to establish that any representation as to the non-recourse nature of this loan was made at all by AIB. This task is all the more difficult given the clear evidence given by the plaintiffs themselves that even up to the afternoon of the 7th February 2007 it was known by them that the loan being made available to them was a recourse loan, and given also that the final facility letter on its face was a recourse loan.

Faced with these difficulties, and the fact that they have not called any witness from the Conlon side to assist them in relation to anything which may have been said by AIB to them, the plaintiffs are forced to rely on the conduct of AIB in altering the facility letter by the deletion of the clause referring to specific recourse to Mr Conlon and Mr Lynch, and the fact that AIB did not directly make contact with somebody on the Lynch side in order to explain the nature of and reasons for the removal of the recourse clause, and make it clear to the plaintiffs that the final facility letter was a recourse facility in order to ensure that this was understood by all concerned.

It is submitted that this course of conduct amounted to a representation that the final facility letter was for a non-recourse loan, given the content of what they say was a conversation between Mr Godsil and Mr O'Shea during the afternoon or evening of the 7th February 2007. To so conclude I would have to be satisfied that Mr Godsil informed Mr O'Shea that the facility letter had to be altered to reflect non-recourse, and that they would not sign up to a recourse loan. I would also have to be satisfied that in the knowledge of that position Mr O'Shea removed the recourse condition with the intention of meeting that objection.

I am not satisfied that the evidence which has been adduced, even by reference to the affidavit of Mr O'Shea in the Conlon proceedings, goes anywhere near establishing that Mr O'Shea removed that clause in order to alter the nature of the facility letter from recourse to non-recourse. I cannot simply infer this from anything stated by Mr O'Shea in his affidavit in the Conlon proceedings, or from the fact that Mr Godsil had a conversation with Mr O'Shea on that afternoon.

There has been very clear evidence that Mr Roberts expressed concerns to Mr O'Shea about the fact that the penultimate letter showed recourse to just two of the borrowers, and advised what should be done to alter the letter in order to remove the problem which he saw as far as enforcement was concerned. He had advised that the letter should specifically state that there was recourse to all the borrowers, and that the only other option would be to have specific recourse language in both the facility letter and the mortgage documentation in order to reflect what he appreciated was the commercial intention of AIB that recourse would be to Mr Lynch and Mr Conlon alone.

The fact that Mr O'Shea did not follow that advice precisely, but rather amended the facility letter in a way which nevertheless reflected the basis for that advice, namely enforcement difficulties, by removing the clause altogether, does not mean that he was intending to alter the nature of the loan, particularly given the weak evidence in relation to what was said by Mr Godsil to him that afternoon. I am satisfied that this amendment was made by Mr O'Shea for no other reason than to avoid the enforcement problems referred to by Mr Roberts.

I am not satisfied either that he made that amendment knowing or intending that the facility letter would be read and understood by the Lynch side as a non recourse facility. There is no evidence that he was aware or was informed by anybody that suddenly on the afternoon of the 7th February 2007 a decision had been made by Mr Lynch that he would proceed only if the loan was non recourse. No such evidence has been called. In these circumstances AIB cannot be found to have made a false representation to the plaintiffs by its conduct.

I should add also that the evidence around Mr Lynch's telephone call to Mr Gunne on the afternoon of the 7th February 2007 is by no means clear. I accept that a call was made, but the content of that call is unclear. Inevitably perhaps, given the fact that it occurred more than four years ago, and was brief, Mr Lynch is unable to recall exactly what was said. It is also remarkable that after Mr Lynch spoke to Judith Whelan on the 7th February 2007 she took no step to alert anybody that there was a problem about recourse. She could have made contact with AIB directly if she had wanted to. She could have contacted MOP and/or LKS to tell them that recourse was a problem. She did none of these things on the basis that she knew her father's views and that they would not sign up to recourse. I find it extraordinary that she did nothing, if as she and Mr Lynch say, a decision had been taken that day

that ifthe loan was to be recourse they would not be proceeding. There must also be doubt about the accuracy of their recollections about these phone calls given Mr Sulaiman's note of his conversation by Mr Burns after he had landed at Dublin Airport at 18.05hrs on the ih February 2007 in which the latter confirmed that joint and several to everybody would not be a problem. I appreciate that Mr Burns cannot understand how that could have been said, since it was contrary to what he understood the position to be at that point. But Mr Sulaiman appears to have been a careful note-taker for his file. This was his habit. I must conclude as a matter of probability that he recorded accurately what Mr Burns had said to him.

I am satisfied that AIB was aware that MOP was acting for all the purchasers in relation to this transaction, even though it was the Conlon side which was negotiating the terms of the loan for all parties. In so far as AIB was aware that LKS were also involved, I am satisfied that this involvement was known to be in relation to the Co-ownership Agreement. That is not diluted by the fact that from time to time AIB copied LKS with emails being sent to MOP. AIB was entitled to assume that the Lynch side were being advised by a reputable and experienced firm of solicitors, and had no duty to communicate directly with the Lynch side, particularly since nobody on the Lynch side had ever made any direct contact with AIB in relation to the loan, having left that to the Conlon side. It was never indicated to AIB that there was any need for such direct contact. Mr O'Shea was entitled to presume that MOP would ensure that all their clients were appraised of and advised in relation to the final facility letter. That is not altered or affected by the fact that on the morning of the 8th February 2007 he asked Mr McLoughlin to let him know as soon as possible when he heard from "the Lynch's solr" that the Letter of Sanction was acceptable. It is a fact that in due course he received a drawdown request from the Lynch side, and could assume that this request would not have been made if anybody on the Lynch side was not satisfied with the terms on which the loan was being offered.

Finally, if there remains any doubt about whether AIB misrepresented anything to the Lynch side by words or conduct, the fact is, as confirmed by both Judith Whelan and Mr Lynch in their evidence, that they were not induced into signing the facility letter on the 8th February 2007 by anything said or done by AIB or the contents of the facility letter itself, but rather they signed up to it based on the advice which they were given by LKS that the loan was recourse to land only.

The plaintiffs also made the point that the change made to the facility letter on the 7th February 2007 brought Eileen Lynch and the Lynch children into liability under the loan, whereas the penultimate letter stated that there was recourse only to Mr Conlon and Mr Lynch, and that the Bank ought to have ensured that each of those parties was made aware that this was happening, and failed to do so in breach of a duty of care in that regard. But it has to be recalled that it was the Lynch side who informed AIB that they wanted all the Lynch parties to included as borrowers. Originally, the loan was sought in the names only of Mr Conlon and Mr Lynch. But when it was finally decided that the Lynch children would become involved in order to equalise benefits to them, the Bank was asked to name them all as borrowers. It was never stated at that time that while this should be done, it could only be on the basis that there would be no recourse to the children. It will be recalled that it was discussed on the Lynch side that Mr Lynch was willing to provide a guarantee in respect of his childrens' liability. But that was only if the Bank required it. But it was never specified by AIB as a requirement by the Lynch side. It follows therefore that it was always in contemplation on the Lynch side that the children would be borrowers and that a guarantee would be given only if the Bank required that. There is no evidence that AIB were ever asked if they required such a guarantee, and there was no communication with AIB to the effect that there should be no recourse to the children.

As far as AIB is concerned therefore, it was always clear to them that the children were to be named as borrowers in the normal way, and therefore the final amendment to the facility letter by the removal of the recourse clause did nothing which the Bank knew was not within the knowledge and the intention of the Lynch parties. The final facility letter named the Lynch children as borrowers as AIB had at all times been requested to do. There was no obligation on AIB to ensure that the Lynch side was aware that the facility letter did what they themselves had asked it to do by having the children included as borrowers.

I am satisfied that the claims made by the plaintiffs against AIB must fail, and that AIB, subject to proving the amount actually due to date on foot of this facility, are entitled to judgment against the plaintiffs for that sum.

The case against Matheson Ormsby Prentice:
MOP were retained by Mr Conlon to act on his behalf in relation to this purchase at a time when Mr Conlon was to sign the Contract for sale in trust. At a later stage Mr Conlon informed MOP of the identity of the other co purchasers, namely the Lynch family. Nobody on the Lynch side had any direct contact with MOP in relation to that firm acting for them also, save to the very limited extent that Robert Burns in January 2007 communicated with Mr McLoughlin in order to provide him PPS numbers for the Lynchs and to provide information as to the percentage split between the Lynchs to be included in the Deed of Transfer. But there is no doubt that once MOP was informed of the identity of the Lynch parties, they took on the role of acting for them also in relation to the conveyancing aspect of this transaction. The invoice raised by MOP in respect of their fees for so acting reflects this, and was discharged in equal parts by Mr Conlon and the Lynch side. MOP had no involvement in relation to advising Mr Conlon in relation to financing the transaction and were not asked by him to advise in that regard. Neither were they requested by the Lynch side to do so.

Judith Whelan both in her witness statement and when cross-examined by Michael Cush SC for MOP stated clearly that as far as the Lynchs are concerned it was LKS who was acting for them in the sense of advising them on all aspects of this transaction, including in relation to the facility letters, even if MOP was the firm actually handling the conveyancing aspects of the transaction. She has stated that she never met McLoughlin nor had any contact with him until she met him at the closing of the sale at the offices of A&L on the 8th February 2007 (T.3. Qs. 360-384). She also stated that at no time did she or anybody on the Lynch side inform MOP that what they required was a non recourse loan, and she also confirmed that at the closing of the sale on the 8th February 2007 she never raised with Mr McLoughlin any question or issue as to the nature of the facility to which she was signing up on that date on her own behalf or on behalf of her family members (T.3, Qs. 402-405).

Mr Lynch also stated that he had had no contact with MOP and had not informed MOP at any stage that he would proceed only on the basis of a non recourse loan (T.13, Qs. 481-484).

MOP have submitted that the fact that their retainer never extended to any matter in relation to the financing of the transaction and the terms of the facility letter is corroborated, if that be necessary, by the fact that when in early 2009 the Lynch side realised that an issue arose in relation to the nature of the 2007 facility, it was LKS and not MOP who were contacted by them in that regard.

Nevertheless, the plaintiffs submit and have pleaded that a duty of care was owed to them by MOP to advise them in relation to the financial aspects of this transaction, including in relation to the nature of any changes being made thereto. It is contended by the plaintiffs also that on the 7th February 2007 Mr McLoughlin (MOP) misrepresented to Mr Sulaiman (LKS) that the loan was to be non-recourse, and that MOP is thereby guilty of negligent misstatement.

While the following two matters have not been specifically pleaded by the plaintiffs nor included in their Replies to Notice for

Particulars, the plaintiffs have sought to allege negligence on the part of MOP firstly on the basis that "*in order to concentrate minds*" Mr McLoughlin informed the Lynch side that the sale had to be completed by the 8th February 2007, when they knew from the Notice of Completion served by the Vendor's solicitors that the 12th February 2007 was the date of expiry of that Notice; and secondly, that Mr McLoughlin failed to inquire of Judith Whelan at the closing of the sale at the offices of A&L if she understood and was content with the terms of the final facility letter which she was about to sign on her own behalf and on behalf of the other Lynch family members, and the mortgage itself. Perhaps the second allegation is within the broad plea at (c) below, but it was not particularised in any way, though evidence was led in relation to it, when Judith Whelan stated that at the closing the documents were not explained to her. But she accepted that she had not raised any issue in relation to them or asked for advice (T. 3, Qs. 402-406).

In their Statement of Claim, the plaintiffs set forth a list of contractual duties which they say, inter alia, MOP owed to the plaintiffs and which they are in breach of, as follows:

> *" (a) To exercise reasonable skill and care in and about providing advice and assistance including legal advice and assistance;*
>
> *(b) To ensure that all of the plaintiffs were aware of any steps which might cause or permit them to incur personal liability in respect of loans;*
>
> *(c) To advise and explain the nature of the agreements;*
>
> *(d) Not to misrepresent the nature of the agreements;*
>
> *(e) Not to misrepresent to the plaintiff's and cause them to believe that they were not personally liable for loans;*
>
> *(f) To warn the plaintiffs of risks which were reasonably foreseeable. "*

The MOP retainer:
There is no doubt that nobody on the Lynch side had any direct contact with MOP in relation to that firm being retained by the Lynch side. It is clear that just as Mr Lynch had left it to Mr Conlon to arrange the finance for the transaction, he left it also to Mr Conlon to liaise with MOP in relation to that firm acting also for the Lynch side in relation to the conveyancing. The identity of the Lynch family members and the percentage shares in which they would hold their interests in the lands were furnished by the Lynch side, but that is the extent of the contact. MOP's retainer by Mr Conlon never extended to advising on or being involved in negotiating the finance arrangements for this transaction, and MOP was never asked by or on behalf of the Lynch side to have any involvement in that area either. The evidence confirms this as I have set forth already.

The plaintiffs have set forth at great length in their written submissions, and to a lesser extent in oral submissions, certain case law which establishes that in some circumstances a solicitor's retainer can extend to a requirement to advise on matters of which they become aware, and which are outside the specific terms of that retainer, and which they ought to realise was important to make their clients aware of. They submit that the duty of care owed by MOP to them extended beyond the mere conveyancing aspects of this transaction, and included not giving misleading or incorrect advice or information as to the nature of this loan facility, when they became involved in changes being made by AIB in the facility letter on the 7th February 2007, since they knew or ought to have known that their clients, and in particular the Lynchs, would be making decisions reliant on such advice and information.

In so far as the evidence shows that Mr McLoughlin gave inaccurate or incorrect information to Mr Sulaiman on the evening of the 7th February 2007 as to the nature of and the reasons for the removal of the recourse clause from the penultimate facility letter, it is submitted that he was guilty of negligent misstatement or misrepresentation, and that the duty of care upon him extended to ensuring that he did not do so.

It is submitted also by the plaintiffs that by not communicating directly with the Lynchs on the evening of the 7th February 2007 about the fact that Mr O'Shea had removed the recourse clause completely, and instead contacted LKS in that regard, MOP acted negligently in breach of their duty of care which is submitted to have extended to ensuring that the Lynch side fully understood that by the removal of that clause all the Lynch family members were becoming liable for the amount of the loan. That submission was made by Mr McDowell even though he acknowledged at the time that Judith Whelan has stated that they regarded LKS as their solicitors for the purpose of advice in relation to the financial aspects of the transaction.

I have no difficulty in accepting that a solicitor's duty of care to his/her client may in some circumstances extend beyond the specific terms of the initial retainer in certain circumstances. If, for example, it was established in the present case that Mr O'Shea had informed Mr McLoughlin that this recourse clause was being removed in order to change the facility from a non-recourse loan to a full recourse loan, and if Mr McLoughlin was aware, or ought to have known, that this was a matter of importance to the Lynch side, he would be negligent if he failed to communicate that information to the Lynchs, either through LKS or to the Lynchs directly, or at least at latest at the closing of the transaction itself, even though MOP's specific retainer did not extend that far.

It might be negligent also if Mr McLoughlin had known or believed that until this change was made the facility was a non-recourse loan, and even in the absence of being specifically told by Mr O'Shea of the purpose of the change to the facility letter, he nevertheless believed that as a matter of law the change was altering the nature of the loan to recourse, and he failed to communicate that view to his clients even where he had not been retained in relation to giving advices in relation to financing aspects of the transaction, since it would be reasonable for him to appreciate that his clients needed to know.

But in the present case the facility was at all times a recourse loan. The change effected to the facility letter did not alter this as a matter of law, and nobody on the Lynch side had told MOP that only a non-recourse loan would suffice. In any event, the evidence given by Mr Sulaiman, when considered in the light also of the evidence given by Mr McLoughlin, does not in my view establish as a matter of probability that Mr McLoughlin gave incorrect information to Mr Sulaiman. I believe that as a matter of probability Mr Sulaiman misinterpreted what he was told by Mr McLoughlin. I believe that Mr McLoughlin informed Mr Sulaiman that the recourse clause was being removed in order to remove problems in relation to enforcement, as he has stated. His evidence is that at 18.49hrs on the 7th February 2007 he left a voicemail message for Mr Sulaiman stating that he had spoken to Mr O'Shea and that the joint and several clause was being removed completely.

Mr Sulaiman emailed his colleague in LKS, Mr Gollogly, some minutes later informing him of the message in those terms. He also appears to have spoken to Judith Whelan immediately after that, but there is no record of what was said. But at 18.59hrs, Mr

McLoughlin telephoned Mr Sulaiman, and they had a short conversation. Each disagrees as to what was said.

Mr McLoughlin has stated in his witness statement the following:

> *"On a subsequent short telephone call with Imdaad Sulaiman later that evening I again stated that the joint and several recourse clause had been deleted and also stated that AIB had deleted the clause on advice from A&L. I stated to him that the only property over which AIB required security was the property being acquired and that AIB did not require security over any other property. At no stage did I state to Imdaad Sulaiman that the loan facility, the negotiation of which I had no role in, was a limited or non-recourse facility, or a facility limited in recourse only to the property. I did state to Imdaad Sulaiman that the clause stating that the facility was joint and several recourse to Mr Conlon and Philip Lynch only had been deleted and the only security required for the loan was the property. "*

In his evidence, Mr Sulaiman stated that he could not remember that call, and that his recollection and evidence in relation to it is based on what he stated in his email to Mr Gollogly a short time after Mr McLoughlin's call. This seems clear from a sequence of questions at T.19, Qs. 120-123.

Mr Gallogly had asked him at 19.00hrs "*is the recourse limited to property then. MOP need to clarify*", to which Mr Sulaiman replied at 19.04hrs:

> *Just off the phone with Ronan - he confirmed that <u>it</u> [i.e. recourse] is to be limited to the security being the property - the confirmation of this will be evidenced by the revised facility letter which will have no mention of the joint and several recourse against the individual borrowers. " (emphasis added)*

His evidence in relation to his conversation with Mr McLoughlin per his witness statement is as follows:

> *"He stated that "it" (i.e. the recourse of AIB) was to be limited to AIB's security, being the Kilbarry property: confirmation of this would be evidenced by the revised Facility letter having no mention of joint and several recourse against the individual borrowers. As that information came from Ronan who had spoken to AIB; and as it was Ronan who was dealing with the financial aspects of the transaction directly with AIB, I naturally took Ronan's words to be corifirmation of what AIB had now agreed to. "*

It was the following morning, 8th February 2007, when Mr Sulaiman emailed Gillian Burdon (Lynch side), and copying it also to Robert Burns, stating:

> *"Further to our telephone conversation earlier this morning, I now attach the latest version of the AIB facility letter. Please note that a further version should be following later this morning. This is to reflect the fact that the bank now only require legal recourse against the property being their security for the loan - they no longer require any legal recourse as against Philip, Jerry or the Lynch children. "*

MOP submit that for a number of reasons the evidence of Mr McLoughlin is to be preferred to that of Mr Sulaiman.

Firstly, it is said that Mr McLoughlin actually recalls the conversation whereas Mr Sulaiman does not and is reliant on his email to Mr Gollogly for any knowledge of what may have been said. He stated this in his evidence in chief when he was asked by his Counsel, Mr Gleeson, if he could recall exactly what was said in the course of this telephone call with Mr McLoughlin to which he stated:

> *"Not beyond what's contained in that email from myself to Jim. So beyond that, no." (T.18, Q. 318; and T.l9, Q.46)*

Secondly, it is submitted that there has been evidence during cross-examination of Mr Sulaiman that his handwritten notes of a conversation may not be complete, as in some instances where he has taken a manuscript note, a later memo to file of that conversation contains more than was written down in the note, and in other instances where what was written down could not be understood, or where it was in fact contradicted by something recorded in a file memo. These matters were explored with him by Brian O'Moore SC of the plaintiffs on Day 19- see at pages 27 et seq. of the transcript for that day.

Thirdly, it is submitted that there was no reason why Mr McLoughlin would have referred to any change from recourse to non-recourse in that conversation, since the purpose of his call was simply to update Mr Sulaiman in relation to the changes made to the facility letter, and the reasons for same (i.e. enforcement problems), and to discuss the closing of the transaction. It is submitted that in such circumstances it is all the more unlikely that he would have incorrectly stated that the removal of the clause was for the purpose of altering the entire nature of the facility to recourse.

Fourthly, it is submitted that there is evidence from Mr Sulaiman that indicates that in fact he was confused or uncertain about, or did not appreciate the distinction between, the concept of recourse and the separate concept of security, and that at times he has conflated the two. An example of this is set forth above when he was asked by Mr Gollogly in an email whether recourse was limited to property, he replied that "*it [i.e. recourse} is to be limited to the security being the property*" - a reply, it is submitted, that does not make real sense. Another member of LKS when looking at this file in 2009 after the controversy had emerged read this email and interpreted it somewhat differently, and MOP say correctly, by stating to Robert Burns in an email dated 26th February 2009 that Mr McLoughlin had confirmed to Mr Sulaiman that "*the security was to be limited to the property and this would be evidenced by dropping the reference to the joint and several recourse*".

Further evidence of his confusing the two concepts is said to emerge from questioning on Day 18 and Day 19 when being questioned by Mr Cush - see for example the sequence of questions at T.19, Qs. 48-74.

Fifthly, reference is made to an email from Mr McLoughlin to Mr Godsil and Mr Gunne on the morning of the 8th February 2007 at 09.46hrs in which he stated:

> *"See below. The reference to Gerry and Philip only as being joint and several has been deleted as it may have caused issues on enforcement for AIB".*

It is submitted that this email sent early in the morning immediately following Mr McLoughlin's conversation with Mr Sulaiman is consistent with Mr McLoughlin's version of that conversation, and that it is highly improbable in these circumstances that he would have conveyed an inaccurate message to Mr Sulaiman.

Sixthly, improbability is also said to arise from the fact that at 17.50hrs on the 7th February 2007 Mr Sulaiman had been told by Mr McLoughlin that Mr Roberts of A&L wanted the facility letter to reflect recourse to all the borrowers, and yet, at 19.00hrs he has another conversation with Mr McLoughlin which he believes was to the effect that the loan was by then non recourse. MOP submit that such an *volte face* on the part of the bank must have seemed improbable and that this was not appreciated by Mr Sulaiman.

There is a clear conflict between what Mr Sulaiman says he was told by Mr McLoughlin, and what Mr McLoughlin says he told Mr Sulaiman during the course of the evening of the ih February 2007. I have to resolve that conflict on the basis of a probability. Ibelieve that Mr Sulaiman misinterpreted what he was told in this regard. He has shown a degree of confusion in his understanding of the difierent concepts of security and recourse, and appears at times to have conflated the two. This is apparent at least from the email which he sent to Mr Gollogly that evening, and it has to be borne in mind also that this is the only basis on which he can bring back to his mind the content of Mr McLoughlin's phone message and call. I agree also that the various matters referred to by Mr Cush in his submissions and which I have set forth above tend to support the fact that Mr McLoughlin's version of those communications is correct.

I am satisfied therefore that what Mr McLoughlin communicated was not mistaken, and it follows that he was not negligent in that regard.

I am also satisfied that Mr McLoughlin was not in breach of his duty of care to the Lynch clients by communicating this information to LKS, with whom he had been at all times dealing in relating to a number of issues such as the Co ownership Agreement. He knew that LKS was acting for and in regular contact with the Lynch side. He knew also that he had never been contacted by any of the Lynch side and had never met them. He was of course duty-bound to pass on information so that the Lynchs were made aware of the change to the facility letter as communicated to him by AIB, but it was perfectly reasonable that he could do so by means of LKS, rather than directly to the Lynch side with whom he had had no previous contact. Neither did Mr Sulaiman tell Mr McLoughlin that he should contact the Lynch side directly in this regard. He was entitled to presume that by doing so the correct and relevant information would be passed on to them.

He also had no reason to believe that a recourse loan would come as news to the Lynchs. That had been the nature of the facility from day one as far as he had been instructed, and nothing he was told by Mr O'Shea would have caused him to believe that there had been any change in that regard. Neither had he received any instruction to the contrary from the Lynch side, even though they seem to have made a decision earlier that afternoon that only a non-recourse loan would suffice.

Duties at closing:
Still in ignorance of the fact that the Lynch side had been told by Mr Sulaiman that the loan was non-recourse to the borrowers, Mr McLoughlin attended the closing of the loan transaction at the offices of A&L where he met Judith Whelan for the first time. He was aware by that time that a drawdown request has been received from Robert Burns by AIB, though he had not been specifically informed by anybody on the Lynch side or by Mr O'Shea in AIB that the final facility letter was acceptable to them. Judith Whelan confirmed in her evidence that she had never raised any issue in relation to the nature of the facility with MOP, and that at the closing she did not ask for advice or raise any concerns about the terms of the facility letter. She also stated that it was LKS on whom the Lynch side were relying for advice on those matters and other matters related to this transaction, and that in so far as MOP were acting for them, that was confined to the conveyancing. It was also Mr McLoughlin's understanding that LKS were acting for the Lynchs in relation to matters beyond the pure conveyancing aspects.

Nevertheless the question arises as to whether any duty of care was owed to the Lynch side by MOP such that Mr McLoughlin should himself have raised the question with Judith Whelan, and taken the precaution at the closing of ensuring that she understood that by signing this facility letter all the Lynch parties were signing up to personal liability for the amount of the loan.

First of all I have already concluded that the retainer of MOP was confined to the conveyancing for this transaction, and that they had never been asked to advise in relation to the financing of this transaction by either Mr Conlon or the Lynch side. Mr McLouglin was also aware that he had been specifically instructed by LKS that he was to ensure that all the Lynch children were named as borrowers in the facility letter.

That does not mean of course that if MOP had any reason to believe, as a result of anything said by Mr O'Shea or anybody else, that Judith Whelan was about to sign up to a facility which she did not fully understand, they would not be obliged as part of a general duty of care to bring hat to her attention. There can be circumstances in which a solicitor's duty of care to a client can extend beyond the strict confines of the retainer, as appears from certain case-law to which the Court has been referred. That is uncontroversial. But in the present case MOP had no reason to believe that the Lynch side had been told by Mr Sulaiman that the loan was non-recourse. I have already favoured Mr McLoughlin's account of his message and subsequent conversation with Mr Sulaiman on the previous evening. As far as Mr McLoughlin was concerned the facility was always a recourse facility, and it remained so according to final version. I appreciate on the other hand that he was aware that it had been received by the Lynch side only around midday on the gth February 2007, but he knew that it had been received by LKS because he had sent it through to LKS himself. He also knew that subsequently a drawdown request had been sent in to AIB.

I do not believe that in these circumstances his duty of care extended to raising the matter himself with Judith Whelan in the absence of her doing so. It would not be "just and reasonable" that his duty of care should be found to have extended that far.

The remaining issue is whether by informing the Lynch side that the deadline for completing this transaction was the 8th February 2007, and not telling them that the final day for doing so was in fact the 12th February 2007 they imposed upon them an unnecessary degree of urgency so that they were deprived of a sufficient opportunity to consider the contents of the final facility letter, and accordingly were in breach of their duty of care resulting in loss and damage to the plaintiffs.

There is no evidence that by so doing either LKS or the plaintiffs did not as a matter of fact understand the contents of the facility letter. It is clear from the evidence that they did, albeit that this understanding turned out to be incorrect. The advice from LKS was unequivocal. There has been no evidence that it was considered that further time was required before the letter could be understood, or that further time was required so that specific confirmation could be obtained from AIB. Nobody on the Lynch side gave any thought to the possibility that further confirmation should be sought from AIB, or from MOP for that matter, even though Mr Gollogly had said to Mr Sulaiman on the evening of the 7th February 2007 that MOP need to confirm that the loan was recourse to land only. Mr Sulaiman appears to have regarded the information which he received from Mr McLoughlin as sufficient confirmation. There is no evidence that it was considered that further time was needed in this regard.

In these circumstances, I do not consider that by specifying the 8th February 2007 as the deadline "in order to concentrate minds" Mr McLoughlin acted negligently. He did so as a precaution, and he had no reason to believe, and was not informed, that further time

was required.

The case against LKS:
As will be already clear by now, the case for negligence against LKS arises directly from the information given by LKS on the evening of the 7th February 2007, and the advice given the morning of the 8th February 2007 that the changes made to the letter meant that it was a non-recourse loan.

I have already concluded that on the balance of probabilities Mr Sulaiman misunderstood what he was told by Mr McLoughlin in relation to the removal of the recourse clause. I have already set out the contents of his email to Robert Burs in answer to the latter's question whether the loan was "now recourse to land only". I will for convenience set it out again:

> *"Further to our telephone conversation earlier this morning, I now attach the latest version of the AIB facility. Please note that a further version should be following later this morning. This is to reflect the (act that the bank now only require legal recourse against the property being their security for the loan - they no longer require any legal recourse as against Philip, Gerry or the Lynch children". (emphasis added)*

There is no room for doubt as to what he advised in this regard, and it was wrong.

Mr Burns had asked a very specific question to which he received a very clear reply. He was entitled to regard it as an unequivocal and clear answer to his specific question, and to believe thereafter, given what he knew of Mr Lynch's unwillingness to enter into a recourse loan, that by signing up to that letter Judith Whelan would be accepting a non-recourse loan, no matter how surprising that news must have been to him given the speed of the apparent change of position by AIB.

It is true of course that Robert Burns, who was experienced in matters of this kind, might himself on reading the facility letter be expected to have at least wondered if Mr Sulaiman's advice may be incorrect, and inquired further, but he was in my view entitled to rely on this clear advice, in spite of the fact that such a sudden *volte face* on the part of AIB should perhaps have seemed improbable. Whether or not the failure to raise that improbability with LKS or with AIB directly is something which may speak to contributory negligence, is a matter for possible consideration in due course.

LKS have submitted that in that email from Mr Sulaiman to Mr Burns he was merely passing on information to the Lynch side which had been given by MOP, who they believed were acting for the Lynchs in the transaction. It will be recalled that LKS was retained initially only for the purpose of reviewing the Co-ownership Agreement, and maintain that their retainer never extended to giving advice in relation to the financing of the transaction, the facility letters or the security documents.

By the time the transaction moved into the 7th and 8th February 2007 the role of LKS had expanded somewhat. They were providing some "administrative assistance" to MOP. They were seeking the facility letter from MOP, albeit that they needed it for the purpose of reviewing the Co-ownership Agreement. Mr Sulaiman had also discussed "*the joint and several to all*" possibility with Robert Burns, according to his note of his conversation with him at 18.06hrs on the 7th February 2007, even though Mr Burns does not recall that conversation, and in particular that he stated that this would not be a problem.

It was open to LKS to have taken a strong line on not getting involved at all in discussing such matters, and to say to their clients that as MOP were the firm dealing with these matters for them, they should consult that firm directly.

In my view the lines became blurred during these days. I believe that LKS became involved beyond the Co-ownership Agreement, but that does not mean that their retainer had become extended as far as advising in relation to the facility letter. They were never given any instructions as to the plaintiffs' requirements in that regard, and specifically that only a non-recourse loan would suffice. When the question was asked by Mr Burns on the morning of the 8th February 2007, Mr Sulaiman could have declined to answer to the question. That would have been a perfectly reasonable stance to take given MOP's known involvement. Alternatively, Mr Sulaiman could have suggested to Mr Burns that he make contact with MOP and/or Derek O'Shea directly at AIB for the answer to his question. However, that did not happen.

In so far as LKS submit that they were simply passing on information received from MOP, that submission is perhaps stronger in relation to the information, such as it is, that was passed on that evening by Mr Gollogly to Mr Burns, but the answer given to Mr Burns on the 8th February 2007 was to a very specific question put to Mr Sulaiman by Mr Burns, and constitutes advice as opposed to information..

This was a €25 million loan. A question by the borrower client on the eve of the completion as to whether the loan is "now" recourse to land only, in circumstances where at all times prior to that day it was known to be recourse, was clearly a very significant and important question for Mr Burns. But the importance or significance to the Lynch side of the question was not something shared with LKS. That is a very relevant and important fact in this case which affects the determination as to whether a duty of care was owed by LKS to the plaintiffs when giving the answer to the question asked, and whether LKS is to be liable to the plaintiffs for the consequences flowing from the incorrect answer given.

The question of causation, and whether the plaintiffs acted in reliance upon the information/advice they received, is also relevant i.e. whether, even if they had been given correct information by LKS and had not been disavowed of their pre-existing knowledge that the loan was a recourse loan, they would have proceeded to complete the transaction anyway.

In this regard, the plaintiffs refer to an extract from *Jackson and Powell on Professional Liability* (6th ed, 2007) at pages 806-807 where the authors state:

> *" Whether the claim is brought in contract or tort, it is first necessary to determine whether the solicitor's breach of duty was 'the cause' of the alleged damage. The burden of proof is on the claimant to prove causation. Clearly, the breach of duty was not the cause if the damage would have occurred in any event .....*
>
> *It is necessary for the claimant to prove that if proper advice had been given he would have acted differently, and it is not enough merely to prove that he relied on the solicitor's advice; however, where the solicitor negligently gave incorrect advice or information, it may be the case that the claimant need only show that he would not have acted as he did if he had not been given such advice, and he does not have to show that he would not have acted as he did if he had been given the proper advice. "*

LKS submit that for a number of reasons the plaintiffs would have completed the transaction with a recourse loan, despite any

reluctance by Mr Lynch to do so if his evidence in that regard is to be regarded as reliable in relation to his conversations on the 7th February 2007, and that it has not been established that it was only in reliance upon the advice given by Mr Sulaiman on the 8th February 2007 that they went ahead and drew down this recourse loan.

Firstly, LKS submit that at all times the Lynch side knew that the facilities were recourse, and that neither they nor anybody on their behalf had ever requested a non-recourse loan from AIB.

Secondly, it is submitted that contractually they were bound to complete the purchase there being no suggestion that the contract had been signed subject to any particular type of loan approval, and that even though the contract had been signed by Mr Conlon in trust and without identifying the other parties to be named in the subsequent Deed of Transfer, those persons were notified to the Vendor's solicitors around the 9th January 2007 and that thereafter all named purchasers could have been the target of specific performance proceedings by the Vendor if the purchase was not completed. Clause 30 of the Contract for sale is referred to in that regard.

Thirdly, it is submitted that given the belief at the relevant time that this was a very profitable transaction from which they stood to earn a profit in excess of €20 million and the plaintiffs foresaw no risk that the borrowings would not be repaid from any sale or partial sale of the lands, developed or otherwise, they would have completed this purchase even if the loan was known by them to be a normal recourse loan, and therefore the advice given to them was not causative of the losses complained of. In this regard LKS refer to the fact that at all times prior to the 8th February 2007 all the indications are that the plaintiffs were prepared to sign up to recourse facilities, and knew that the only facilities available were normal recourse in nature.

Fourthly, it is submitted that the real cause of any loss to the plaintiffs is the act or omission of their associate, Mr Conlon, who failed to communicate to AIB the plaintiffs' wish for a non-recourse facility, having entrusted that task to him. It is submitted that as their agent, it is Mr Conlon who is responsible, and that they are liable for his failure in that regard.

Fifthly, it is submitted that any losses incurred by the plaintiffs result from the collapse of the property market since 2008, and not as a result of reliance upon what they were told by Mr Sulaiman.

In my view, while it is true that prior to the 7th and gth February 2007 the plaintiffs were aware that the only loan available was a recourse loan, the plaintiffs were entitled, albeit very belatedly, to make a final decision that they would proceed only if the loan was non-recourse. Such a decision may have had consequences for them, such as the loss of their deposit and/or the prospect of specific performance proceedings, but nevertheless they were entitled to make that decision whether or not those risks were present. They may very well have been able to mount a defence to such proceedings on the basis that they were not bound to complete given that Mr Conlon signed the contract in trust, even though Clause 30 of the Contract for Sale may have presented a steep obstacle to their successful defence of the proceedings. I do not have to decide whether or not they would have been able to successfully defend such proceedings.

In my view also, a decision not to proceed unless the loan was non-recourse could reasonably be made even in the face of what was seen by them at that time as the prospect of an almost certain significant profit from the transaction. That prospect is not one which should militate against reliance upon the advice from LKS, even on a balance of probability. Mr Lynch appears to have become convinced by the ih February 2007 that he would involve his family in any risk on this transaction. On balance I accept that this is so. He certainly left it very late in the day to arrive at such a decision, but on the evidence which I have heard this seems to be the way in which he conducts himself in relation to business decisions. He seems to keep all his options open until the very last minute before making a final decision. He is entitled to operate in that way, even though it may speak to the question of contributory negligence and/or foreseeability particularly where he keeps his relevant advisers in the dark.

Equally, the fact that Mr Conlon does not appear to have made Mr Lynch's wishes for a non-recourse loan known to AIB does not seem to me capable of supporting a submission that the plaintiffs did not rely on the advices given by Mr Sulaiman on the 8th February 2007. Again, that fact may speak to contributory negligence given the fact that Mr Lynch does not appear to have made any effort to make sure that Mr Conlon was carrying out his instruction or request in that regard, and did not alert LKS to his wishes in this regard. But it does not speak to the question of reliance or causation.

Neither do I believe that the collapse of the property market as being the cause of loss to the plaintiffs can be relied upon by LKS. That collapse post-dated the decision to drawdown the loan on the 8th February 2007, and cannot speak to reliance on the advice at the time it was given, as it was that reliance which led directly to the drawdown of the recourse loan, which they believed was nonl recourse, having been so advised. It is that which has resulted in them now being subject to the recovery of the full amount of the loan, ameliorated by whatever may be recovered from any sale in due course.

Thus far I have concluded that the involvement of LKS had moved into matters beyond simply the Co-ownership Agreement. A relationship of proximity undoubtedly existed between the parties. But whether that duty of care is of such a scope as to extend to advice given in relation to the loan, once the question was asked as to whether the loan was recourse to the lands only, is something to be considered by reference to whether it is "just and reasonable" to extend its scope so far in circumstances where the plaintiffs never either before the ih February 2007, or on the 7th February 2007 or 8th February 2007 informed LKS in relation to their unwillingness to enter into a recourse facility, in spite of the apparent crucial nature of that information.

There is no doubt that the advice given on the 8th February 2007 was wrong. It is that advice which resulted in their personal liability for the amount of the loan, in spite of submissions made that the Lynchs would have completed this transaction anyway.

The question of whether it is just and reasonable that the duty of care owed by LKS to the plaintiffs on foot of their retainer extended as far as the information and advice given in relation to the nature of the facility letter is closely linked to the question of foreseeability, though they are separate and distinct.

In *Glencar Exploration Plc. V Mayo County Council* [2002] 1 IR. 84, Keane CJ at pp.133 et seq. examined the history and development of the law as to the scope of the duty of care in negligence from its genesis in *Donoghue v. Stephenson* [1932] AC. 562, and in particular the evolution of the 'neighbour principle' and the extent of the duty of care owed to persons in a relationship of proximity. Having referred to the two stage test of Lord Wilberforce in *Anns v. Merton London Borough Council* [1978] A.C. 728 for determining the scope of the duty of care, namely whether a relationship of proximity existed between the parties, and if so, "*whether there are any considerations which ought to negative, or reduce or limit the scope of the duty or the class of person to whom it is owed* ...", Keane CJ went on to refer to the doubts which were later expressed in relation to the universal applicability of such a test, and the development of a test which required an examination of whether it is just and reasonable that a duty of care of a particular scope be imposed on a defendant.

He particularly referred to that test by reference to the judgment of Brennan J. in the High Court of Australia in *Sutherland Shire Council v. Heyman* [1985] 157 CLR. 481, and that of Lord Bridge in *Caparo Plc v. Dickman* [1990] 2 AC 605, the latter stating at p. 617:

> *"What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and the situation should be one which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other. "*

In other words, the existence of proximity itself is insufficient to enable a plaintiff to recover damages for loss arising from a negligent act, even if it is that proximity which gives rise to a duty of care.

In so far as it may have been thought that in this jurisdiction, the two stage Anns test was the correct state of the law following the Supreme Court in *Ward v. McMaster* [1988] I.R. 337, the learned Chief Justice disagreed, and stated in that regard at p.138:

"Given the far-reaching implications of adopting in this jurisdiction a principle of liability in negligence from which there has been such powerful dissent in other common law jurisdictions, I would not be prepared to hold that further consideration of the underlying principles is foreclosed by the dicta of McCarthy J in Ward v. McMaster. "

He concluded at p. 139:

> *"There is, in my view, no reason why courts determining whether a duty of care arises should consider themselves obliged to hold that it does in every case where injury or damage to property was reasonably foreseeable and the notoriously difficult and elusive test of 'proximity' or 'neighbourhood' can be said to have been met, unless very powerful public policy considerations dictate otherwise. It seems to me that no injustice will be done if they are required to take the further step of considering whether, in all the circumstances, it is just and reasonable that the law should impose a duty of a given scope on the defendant for the benefit of the plaintiff, as held by Costello J at first instance in Ward v. McMaster ... Sutherland Shire Council v. Heyman ... and by the House of Lords in Caparo Plc v. Dickman .... As Brennan J pointed out, there is a significant risk that any other approach will result in what he called a "massive extension of a prima facie duty of care restrained only by undefinable considerations ... ".*

I note that in his judgment in Glencar, Fennelly J. expressed himself as being in full agreement with the judgment of Keane CJ on the issue of negligence, and indeed reiterated his agreement in his judgment in *Breslin v. Corcoran* [2003] 2 IR. 203 at pp. 207-208.

The facts in *Glencar* and those in *Breslin v. Corcoran* bear no relationship to the facts of the present case of course, but there is no reason why the duty of care to be attributed to the plaintiffs herein should not be guided by these principles, albeit in the context of negligent misstatement and professional negligence. They represent the present state of the law here.

As to liability for negligent misstatement the *fans et origo* is clearly the decision of the House of Lords in *Hedley Byrne & Co Ltd v. Heller & Partners Ltd* [1964] AC. 465. While in that case the plaintiff did not succeed, it was because when giving the negligent advice the defendant had disclaimed any responsibility for it. Nevertheless the speeches contain statements of principle which are of assistance in determining whether LKS owed a duty of care to the plaintiffs herein in relation to the advice given on the 8th February 2007.

In his speech, Lord Reid stated at p. 486:

> *" ... I can see no logical stopping short of all those relationships where it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave the information or advice when he knew or ought to have known that the inquirer was relying on him. I say "ought to have known" because in questions of negligence we now apply the objective standard of what the reasonable man would have done.*
>
> *A reasonable man, knowing that he was being trusted or that his skill and judgment were being relied on, would, I think, have three courses open to him. He could keep silent or decline to give the information or advice sought; or he could give an answer with a clear qualification that he accepted no responsibility for it or that it was given without that reflection or inquiry which a careful answer would require; or he could simply answer without such qualification. If he chooses to adopt the last course he must, I think, be held to have accepted some responsibility for his answer being given carefully, or to have accepted a relationship with the inquirer which requires him to exercise such care as the circumstances require". (emphasis added)*

This statement raises a question in the present case whether it was reasonable for Mr Burns to rely upon the answer given to him in circumstances where he knew that Mr Sulaiman was unaware, and had never been informed, that Mr Lynch would not be signing up to any loan other than a non-recourse loan, and whether those circumstances were insufficient to impose a duty of care in relation to the advice being given. A question arises whether a duty of care can simply be inferred in such circumstances.

Lord Pearse in his speech, and referring to the duty of care, stated at p. 539:

> *"... to import such a duty the representation must normally, I think, concern a business or professional transaction whose nature makes clear the gravity of the inquiry and the importance and influence attached to the answer. "*

In *Street on Torts*, Butterworths, 9th edition at p. 208, the author when commentating on *Hedley Byrne* states:

> *"The plaintiff to recover for negligent misstatements must establish that the statement was made within a relationship where the plaintiff could reasonably rely on the skill and care of the defendant in making the statement. He must show some special relationship with the defendant which properly resulted in the defendant undertaking responsibility for the accuracy of the statements made. " (emphasisadded)*

The same author at p. 209 comments in relation to the decision in *Caparo Industries v. Dickman* (supra):

> *"Four conditions must be met for a defendant to be liable for economic loss for negligent advice or information. (1) The*

> *defendant must be fully aware of the nature of the transaction which the plaintiff had in contemplation as a result of receipt of the information. (2) He must either have communicated that information to the plaintiff directly, or well knew that it will be communicated to him ... . (3) He must specifically anticipate that the plaintiff will properly and reasonably rely on that information when deciding whether or not to engage in the transaction in question. (4) Finally the purpose for which the plaintiff does rely on that information must be a purpose connected with interests which it is reasonable to demand that the defendants protect. " (emphasis added)*

Commenting on this aspect of Lord Oliver's speech in Caparo, *Clerk & Lindsell on Torts*, 18th ed. at para. 7-107, the authors state:

> *"It is clear that the imposition of a duty depends on the defendant knowing as opposed to merely foreseeing, that specific interests of the plaintiff are at issue ".*

These statements seem to me to emphasise the reasonableness of whether a duty of the scope claimed for is justified in all the circumstances of the case, and that not only should the person being asked for advice understand that the answer will be relied upon, but also the reason why it is being asked and therefore the foreseeable consequences for the inquirer if the answer is incorrect. This is consistent with the notion that a duty of care does not exist in *vacuo*. In the context of a solicitor/client relationship it arises on foot of instructions received. That is not to say that those instructions are confined to those received at the time the solicitor is first retained. Additional instructions may be received subsequently which extend the duty of care from the initial instructions and to those later matters also. But a solicitor must be given sufficient instructions in order reasonably to know the extent of his duty of care.

If a solicitor is asked a question, but is provided with no context for the question, and therefore does not know the significance of the question, why it is asked, and what reliance will be placed on the answer, and it relates to a matter about which he was not retained to advise upon, it is hard to see why it is just and reasonable that a duty of care extends to the answer given. The scope of the duty of care upon a solicitor is informed and delineated by the instructions which he/she is given, though not necessarily confined thereto. Simply because he/she is retained to do one thing and owes a duty of care in relation to that thing, does not mean that there is a general duty covering other matters beyond his original instructions, though it may be, depending on particular circumstances, as is evident from decisions such as that of Barron J. in *McMullen v. Farrell* [1993]1 IR. 123 where, inter alia, the learned judge stated at pp. 142-143:

> *"To follow instructions blindly is to turn himself into a machine. In my view a solicitor when consulted by a client has an obligation to consider not only what the client wishes him to do but also the legal implications of the facts which the client brings to his attention". (emphasis added)*

I note the reference to facts brought to the solicitor's attention.

In *Kennedy v. Allied Irish Banks Plc* [1998] 2 IR. 48, Hamilton CJ concluded that the case of *National Bank of Greece SA. v. Pinos Shipping Co*. (No. 3) [1988] 2 Lloyds Rep. 126 "... *clearly establishes that when parties are in a contractual relationship their mutual obligations arise from their contract and are to be found expressly or by necessary implication in the terms thereof and that obligations in tort which may arise from such contractual relationship can not be greater than those to be found expressly or by necessary implication in their contract*. "

As I said already, this question 1s related m ways to the question of foreseeability of damage.

The question of whether the defendant should have foreseen that if the advice given was wrong the plaintiffs would suffer loss must be informed in the present case by what they were told by way of instructions, and perhaps more importantly in the present case, what they were not told. It does not follow automatically that LKS is liable for loss, simply because an incorrect answer was provided by Mr Sulairnan. The question will revolve around whether it was reasonable to expect that Mr Sulairnan ought to have known that the advice which he gave was critical to the plaintiffs' decision to proceed or not, and that if the loan was a recourse loan they would not proceed.

They were never told that the plaintiffs had asked Mr Conlon to apply for a non-recourse loan. They knew that the plaintiffs were aware that the loan facilities on offer from January 2007 were at all times recourse facilities, and that as late as 18.05hrs on the 7th February 2007 that was not a problem according to Robert Burns. LKS were not in any way aware of anything which may have been discussed between Mr Lynch and Judith Whelan during the 7th February 2007, and neither were they aware of anything which may have been said by Mr Lynch to Mr Gunne during that afternoon. They were completely unaware that Mr Lynch had at the eleventh hour on the afternoon of the 7th February 2007 decided finally that he would proceed only on the basis of non recourse. They were kept in the dark in this regard. It is against that state of ignorance that Mr Sulairnan receives information from Mr McLoughlin that the recourse clause is corning out completely. Mr Sulairnan's interpretation of what he was told by Mr McLoughlin is first given to Mr Gollogly who, following learning that the clause is corning out completely, asks "*Is the recourse limited to the property then. MOP need to clarify*" to which Mr Sulairnan replied:

> *"Just off the phone with Ronan - he confirmed that it is to be limited to the security being the property - the confirmation of this will be evidenced by the revised facility letter which will have no mention of the joint and several recourse against the individual borrowers. "*

Mr Gollogly first mentions this to Robert Burns later that evening in an email at 19.17hrs which I have set out, but he ends by saying "*understand it may well be recourse to property only, which is a great help".* One might have expected that when this was received, Mr Burns would have replied stating that while it "may well be" recourse to property only, the fact was that *unless it was*, the deal would not go through, given what is supposed to have been stated by Mr Lynch that afternoon at Heathrow Airport. But he does not do that. Instead, on the following morning he emails Mr Sulaiman asking simply: "*Is the loan now recourse to land only*" (emphasis added). He does not explain why he wants to know that, and nor does he say that if it is not, this transaction is not going to be completed at noon that day at all. No concern at the possibility that the loan was not non-recourse was expressed at all. It was simply a question asked without a context, or without any capacity for Mr Sulaiman to know why the question was being asked. I have little doubt that if Mr Burns or anybody on the Lynch side had reacted to the situation by stating that they needed to make sure the loan was non-recourse, or to use the words in circulation at that time, that it was "recourse to the lands only", that being stated to be the only basis on which Mr Lynch was prepared to proceed, it would have put Mr Sulaiman on his guard to ensure that the information from MOP was correct. He would thereby have become aware of the great importance to the question being asked.

In circumstances where Mr Sulaiman had never been asked to advise on the nature of the facility, was aware that the loan at all times was a recourse loan and had never been told by anybody on the Lynch side that only a non-recourse loan was acceptable to

them, it is hard to see why it would be just and reasonable that his firm should be found to owe a duty of care such that they become liable to the plaintiffs in a sum of €25 million, less anything achieved on a sale of the lands. I would have to be satisfied that as a result of his clients' instructions, or as a result of what he ought reasonably to have known or inferred from those instructions, or even the transaction generally, it was foreseeable that if his answer was incorrect, the plaintiffs would sign up to a loan which he knew or had reason to believe they never intended. I fail to see how that was reasonably foreseeable given the fact that he had never been given the information that a last minute decision had been made that they would not sign up to a recourse facility. I do not believe that when looked at objectively by a reasonable bystander, properly and fully informed of all relevant facts, such a consequence should or could have been foreseen.

Foreseeability of damage or loss is usually considered after it has been established that a duty of care has been found to exist, since even where such a duty is found to exist it does not follow that all loss and damage which has been sustained by the plaintiff is recoverable. Only damage and loss which is a reasonably foreseeable consequence of the breach of the duty of care may be recovered. Following the overruling by the House of Lords of the decision in *In Re Polemis* [1921] 3 KB 560, by that of the Privy Council in *Overseas Tankship (UK.) Ltd v. Morts Dock & Engineering Co. Ltd (The Wagon Mound)* [1961] A.C. 388, the 'direct consequence' test is no longer applicable, and recovery can only be in respect losses which the reasonable man should have foreseen.

In the unusual facts and circumstances of the present case it has seemed to me to be central also to the first question as to whether it would be just and reasonable to impose a duty of care of such a scope upon LKS. I am satisfied that it would not be just and reasonable to extend the scope of the duty of care upon LKS that far,

However, even if I was satisfied that LKS owed a duty of care to the plaintiffs in the manner claimed, they would in my view not be entitled to recover damages for the loss resulting from the incorrect answer to the question asked since, for the very same reasons that I have found there to be no duty of care in relation to the question posed, since it was not reasonably foreseeable that by acting upon the answer given, the plaintiffs would be sign up to a facility the nature of which they were unwilling to accept, since LKS were kept in ignorance in that regard. That absence of reasonable foreseeability would be an obstacle to recovery.

Since I have concluded the issues in this way, it is unnecessary to reach any conclusions in relation to contributory negligence, though, if I had, it would have been necessary to attribute an unusually large portion of blame to the plaintiffs for all the reasons I have stated. But I am satisfied that taking all the facts and circumstances of this case into account, as I have done, the plaintiffs have only themselves to blame for the predicament in which they now find themselves. I make no distinction between the individual plaintiffs in this regard, though some obviously had a more peripheral involvement in the actual transaction than others. I treat them as one in so far as any instructions or information were not communicated to LKS, sufficient to create a duty of care in relation to the matters above. There is no doubt that it is Mr Lynch who controlled the decision-making in this transaction. The other plaintiffs relied upon him totally, and any decision whether to proceed or not to proceed depended on his decision in that regard.

Mr Lynch appears to have paid little attention to this transaction until very late in the day, even though he will inevitably have had conversations from time to time with Mr Burns, and in the very late stages with Judith Whelan after the 1st February 2007 when she took up her role in relation to the family's affairs. That is his style according to his evidence. It is unfortunate that he regarded such a large transaction as being a "*minor matter*" in the overall context of his business activities. If he had not relegated it to such a low level of importance he may have considered it wise, as the transaction was nearing the point at which a final decision had to be made to proceed or not, to communicate with Mr Conlon or somebody on the Conlon side to ensure that the loan requested and being approved was the type of loan which he says he had asked Mr Conlon to arrange. He might also have thought it prudent to ensure that either Mr Burns or Judith Whelan communicated sufficient information to LKS or even MOP or indeed AIB directly, that they would be proceeding with completion only if the loan facilities were non-recourse, so that all concerned were not labouring under any different understanding of the situation, as in fact occurred. Any of these steps would have avoided a situation whereby Judith Whelan unwittingly signed them all up to a loan which, I am satisfied, she genuinely believed on the basis of the information provided by LKS to be a non-recourse loan, and which all believed to be such until early 2009.

Having reached these conclusions, it follows that the plaintiffs have no defence, as pleaded, to the claim by AIB that they are entitled to judgment for the amount in due course proved to be outstanding in respect of this facility. That matter can be dealt with, it seems to me, either by way of the Counterclaim by AIB in these proceedings, or in the proceedings brought by way of summary summons by AIB against the plaintiffs, and which have been stayed pending the determination of the issues raised in these present proceedings which, if successful, would have provided either a complete defence to those proceedings, or alternatively an indemnity in respect of their liability to AIB against either the second or third named defendants or both.