Neutral Citation No. [2016] IEHC 313

THE HIGH COURT

[2012/10389P]

BETWEEN

ELIZABETH NOLAN, ANN NOLAN, PATRICIA NOLAN, JOHN NOLAN, RAYMOND NOLAN, SEAMUS NOLAN, NOEL NOLAN, BRENDAN NOLAN, RICHARD NOLAN, KEVIN NOLAN, JOAN NOLAN JUNIOUR, OLIVER NOLAN, SALLY NOLAN

AND

NOLAN TRANSPORT

PLAINTIFFS

ALLIED IRISH BANKS PLC.

DEFENDANT

AND

BYRNE WALLACE SOLICITORS

THIRD PARTY

JUDGMENT of Mr. Justice Haughton delivered on the 9th day of June, 2016

Introduction

1. The plaintiffs seek various remedies against the defendant ("AIB" or "the bank") arising from alleged breaches of a number of loan transactions ("Loan Facilities") between the parties relating primarily to the development of two hotels, a complex in Dublin 1 ("the Isaacs Hotel") and Lismore House Hotel, Co. Waterford ("Lismore Hotel").

2. Remedies sought by the plaintiffs include but are not limited to damages for breach of contract and/or negligence and/or breach of fiduciary duty; damages for breach of banking codes and/or breach of statutory duty; damages for misrepresentation and/or negligence; equitable rescission of a number of agreements entered into between the parties; rectification of certain guarantees; a declaration of invalidity of a deed of mortgage concerning the Lismore property; an order restraining AIB from taking steps to enforce repayment of monies allegedly owing under the Loan Facilities and/or to enforce its security on foot of security instruments relating to same; and an order restraining AIB from appointing a receiver over properties charged pursuant to said security instruments.

3. AIB counterclaims that the monies under certain of the Loan Facilities are due and owing, and seeks judgment against the 1st-13th plaintiffs ("the Nolan Family"), jointly and severally, on a number of bases – on foot of Facility Letter dated 28th September, 2009 in the sum of €7,653,704.50; in the Nolans' capacity as members of the Beresford Partnership, in the sum of €4,361,019.17 arising from Facility Letter dated 22nd August, 2006; in the Nolans' capacity as partners of the Lismore Partnership on foot of Facility Letter dated 11th May, 2007 in the amount of €6,004,295.27; and on foot of Facility Letters dated 22nd August, 2006 and 28th September, 2009 in the sum of €4,992,434. AIB also seeks interest on all sums claimed as well as specific performance of certain security instruments relating to the Beresford properties, or damages in lieu of specific performance, among other remedies.

4. The proceedings were commenced by way of Plennary Summons dated 17th October, 2012 and admitted to the Commercial List on 12th November, 2012. On 29th April, 2013 an application was granted for AIB to serve a third party notice joining Byrne Wallace Solicitors to the proceedings. Byrne Wallace had acted for AIB on a number of the Loan Facilities, operating at the time as BCM Hanby Wallace. By way of a Third Party Statement of Claim, AIB seeks certain remedies against Byrne Wallace in the event that the court finds against AIB. These include but are not limited to a declaration that Byrne Wallace must indemnify and/or provide a contribution in relation to any liability and/or damages which AIB must discharge in favour of the plaintiffs; damages for breach of contract, negligence, breach of duty (including statutory duty) and breach of warranty.

5. A number of preliminary issues for determination by this court were set down by order of Cooke J. on 4th June, 2013. The issues are as follows:-

> "1. Whether it was a term of the agreements for the loan facilities pertaining to the Isaacs Hotel (or any phase thereof) and/or the Lismore Hotel that:
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> (i) the Defendant would ensure and supervise the maintenance of an adequate sinking fund by Mr Evans and Mr Good with the Defendant for the purpose of safeguarding the capacity of Mr Evans and Mr Good to obtain finance from the Defendant and to perform under the Option Agreements (as identified further below) when called upon to do so; and/or
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> (ii) the Defendant would upon the exercise of the options in the Option Agreements effect a debt transfer of any residual debt from the Plaintiffs to Mr Evans and Mr Good; and/or
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> (iii) the Defendant would provide finance for the exercise by Mr Evans and Mr Good of the options in the Option Agreements when called upon to do so.
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> 2. Whether the Defendant, its servants or agents represented that:
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> (a) it would ensure an adequate sinking fund would be put in place by Mr Evans and Mr Good which would be supervised and maintained by the Defendant with the express intent and purpose that it would safeguard the capacity of Mr Evans and Mr Good to obtain finance from the Defendant and to perform their contractual obligations under the put and call options under the Option Agreements; and/or

(b) such an adequate sinking fund would be supervised and maintained by the Defendant; and/or

(c) the exercise of the options under the Option Agreements would operate as a debt transfer from the Plaintiffs to Mr Evans and Mr Good; and/or

(d) it would provide finance for the exercise of the options under the Option Agreements.

3. If the matters referred to at paragraph 2 were represented to the Plaintiffs (their servants or agents) by the Defendant (its servants or agents), whether the Plaintiffs relied on same and were thereby induced to enter into the agreements for the loan facilities pertaining to the Isaacs Hotel (or any phase thereof) and the Lismore Hotel and/or whether the Plaintiffs were thereby induced to enter contracts for the purchase of the Isaacs Hotel (or any phase thereof) or the Lismore Hotel and/or to guarantee the loan facilities of Mr Evans and Mr Good pertaining to the Isaacs Hotel (or any phase thereof) and/or to enter into the security relating to the Isaacs Hotel (or any phase thereof) or to the Lismore Hotel or to additional miscellaneous properties set out by the Plaintiffs in their statement of claim.

4. If the matters referred to at paragraph 2 were represented to the Plaintiffs (its servants or agents) by the Defendant (its servants or agents), whether the Plaintiffs relied on same and were thereby induced to enter the agreements for the loan facilities pertaining to 1 & 2 Beresford Place (the Beresford Facility) and whether the Plaintiffs were thereby induced to enter into contracts for the purchase of 1 and/or 2 Beresford Place.

5. If the matters referred to at paragraph 2 were represented to the Plaintiffs by the Defendant (its servants or agents), whether the Plaintiffs relied on same and were thereby induced to enter the agreements for the loan facility pertaining to the Personal Facility 7 as further identified below.

6. If the matters referred to at paragraph 2 were represented, whether they constituted misrepresentations of fact and/or negligent misstatements."

6. These matters were set down for hearing on 2nd December, 2014. The evidence was heard by this court over 31 days ending 24th June, 2015. Written closing submissions were exchanged and final argument was heard on 24th July, 2015.

The Facts

7. The Nolans operate a successful transport business through the 14th named defendant Nolan Transport, at Oaklands, New Ross, Co. Wexford which is an Irish registered company, and the successor in title to Nolan Transport (Oaklands) Ltd. ("Nolan Transport").

8. Between 1995 and 2011, Nolan Transport participated in property investments relating to the Isaacs Hotel which encompassed properties at 5 and 6 Freeman's Lane and 21, 21A and 22 Store Street, Dublin 1 and the Nolan Family participated in developments at the properties at 20 Store Street (the Damp Store), 23-23C Store Street and 1 and 2 Beresford Place, Dublin 1. The investments were promoted by Messrs Basil Good and Richard Evans, who were to operate the hotel. The investments were designed to allow the participants to benefit from capital allowances available at the time for specific categories of business, including hotels popularly known as Business Expansion Schemes (BES). The development of nearby 1 and 2 Beresford Place, Dublin 1 was somewhat different in that it was based around claiming building allowances on listed buildings as opposed to the particular tax driven incentives of the previous phases.

9. In 2005, the plaintiffs agreed to participate in a further property investment, the Lismore Hotel, with Mr. Evans and subsequently Mr. Good, again purportedly for tax purposes.

10. In relation to the Lismore Hotel, the property was to be developed by the "Lismore Partnership", a special purpose vehicle in which the Nolan Family had a 75% stake, Mr. Evans who held a 20% stake, and a Mr. Michael Foley held 5%. In 2008, Mr. Good replaced Mr. Foley and the interests were reconfigured such that the Nolans then held 55% and Messrs Evans and Good both held 22.5% each.

11. Similarly, the loan taken out to develop 2 Beresford Place in 2006, which included a refinancing loan for 1 Beresford Place, was taken out by the "Beresford Partnership" in which the Nolans and Messrs Evans and Good were party. Messrs Evans and Good held a 70% interest in the partnership while the Nolans held a 30% interest.

12. Nolan Transport and the Nolan Family were first introduced to Mr. Good and Mr. Evans by Mr. Padraig Fitzgerald, the accountant for Nolan Transport and advisor to the company and the Nolans. Mr. Fitzgerald also introduced the plaintiffs to AIB who became lenders to Nolan Transport, refinancing the loan which had previously been provided by ACC Bank to Nolan Transport for development of phases I and II of the Isaacs Hotel. The refinancing loan from AIB also encompassed lending for the development of phase III of the Isaacs Hotel – the Isaac Butt licensed premises. Loans were then approved by AIB in 2003, 2005, 2006 and 2009 for development of phases IV and V of the Isaacs Hotel, Lismore Hotel and 1 and 2 Beresford Place, respectively.

13. Of particular note is the fact that Ms. Ann Nolan acted as solicitor for both Nolan Transport, and the Nolan Family in respect of a number of these developments under the name Nolan & Co. Solicitors. The practice then merged with another firm, Thomas J. Kelly & Sons Solicitors, on 1st October, 1999 from which point in time as a partner in that firm she continued to represent the plaintiffs until mid 2005 when due to ill health she left the practice. That firm merged in 2005 with James B. Coughlan & Co. to become Coughlan Kelly Solicitors. In 2006 she retired from acting as a solicitor altogether. Ms. Joan Nolan and Ms. Sally Nolan also had a large part to play in the developments as they dealt with the financing end of the projects, Joan more so than Sally. Of the plaintiffs, these three communicated most frequently with AIB. Ms. Ann Nolan also corresponded with Byrne Wallace in relation to the preparation and execution of the various Loan Facilities in respect of the projects and the securities provided for them.

14. As indicated, Isaacs Hotel was developed in a number of phases:-

Phase I: 5 and 6 Freeman's Lane

Phase II: 21, 21A and 22 Store Street

Phase III: Ground floor and basement of 22 Store Street, the Isaac Butt Licensed Premises

Phase IV: 20 Store Street (The Damp Store)

Phase V: 23, 23A, 23B and 23C Store Street

15. Nolan Transport participated in phases I-III for tax purposes. It was then deemed to be more tax efficient for the Nolan Family to personally participate in the subsequent phases.

16. The matters at issue relate particularly to the phases of the Isaacs Hotel in which the Nolans became personally involved, phases IV and V, 1 and 2 Beresford Place, the Lismore Hotel, and the Loan Facilities concerning these developments.

17. According to the plaintiffs, the "Isaac Hotel tax scheme" was to operate as follows. Phases of the Isaacs site were acquired by Nolan Transport, later the Nolans, which developed the properties, and then leased to tenant hotel operators, which were connected to or controlled by Mr. Evans and/or Mr. Good, so that the hotel generated an income. The rental income was to be used by the Nolan Family to service their borrowings for the development of the properties. The leasehold interests in the Isaacs Hotel were ultimately held by Dublin Tourist Hostel Limited which was owned and controlled by Messrs Evans and Good for phases I, II, IV and V, and by Mr. Evans for phase III.

18. The interests of the plaintiffs in the Isaacs Hotel were the subject of "put and call" options such that their respective interests were to be bought out at the expiration of the relevant tax allowances. Thus, for phases I and II for example, put and call options (created on 30th November, 1995 and 14th December, 1998, respectively) were to be exercised by Messrs Evans and Good in March, 2004. This was purportedly to result in the repayment of the AIB refinanced loan and sale of Nolan Transport's interest in the properties relating to phases I and II to Messrs Evans and Good. They then transferred a 30% interest of the freehold title to the Nolan Family, leaving them with a 70% freehold interest. They would then be responsible for repaying the debt on phases I and II. AIB later provided finance to Messrs Evans and Good via Facility Letter dated 8th November, 2004, the full amount of which (€4.13 million) was guaranteed by the plaintiffs, and the put and call options for phases I and II were put into effect in May, 2005.

19. As a means of reducing the risk on the exercise of the put and call options, a sinking fund was put in place with ACC Bank which comprised endowment policies, and was secured by way of assignment of said policies and collateral property at 57 Lower Gardiner Street, Dublin. When the put and call options were exercised, the endowment policies were to be encashed and the proceeds were to be credited as part of the consideration or option price payable by Messrs Evans and Good. According to the Nolan Transport Loan Facility of 24th November, 1999 with AIB, a "bullet repayment" of IR£1.15 million was to be made from the proceeds of the put and call option to be exercised in relation to phase I. Security on this Loan Facility included first fixed charges over the Isaacs Hotel, and the Isaac Butt licensed premises (phases I-III), assignment over the put and call options over phases I-III, assignment over a life policy in respect of Mr. Evans, and assignment over a life policy in respect of Mr. Good.

20. The plaintiffs assert that they envisaged that similar provisions would be included in subsequent Loan Facilities relating to the development of the Isaacs Hotel and the "tax scheme", and scenarios akin to that described above for phases I and II would play out with each new phase of the development of the Isaacs Hotel.

21. Loan Facilities were later entered into between the Nolans and AIB on the remaining phases of the Isaacs Hotel, Beresford Place and Lismore Hotel, the details of, and the events surrounding which shall be considered further below as they relate more directly to the preliminary issues to be determined.

22. The order of Cooke J. dated 4th June, 2013 and a subsequent order of Cooke J. dated 30th July, 2013 varying the order of 4th June, 2013 provide a number of schedules summarising and grouping the AIB Loan Facilities into various categories and the relevant option agreements on the properties. For convenience's sake these are outlined below:-

Schedule 1 – "the loan facility agreements pertaining to the Isaacs Hotel"

No.	Borrower	Date of Letter of Sanction
1	Nolan Transport	24 November 1999
2	Nolan Transport	12 October 2000
3	Nolan Transport	21 December 2004
4	Nolan Transport	3 April 2006 (1)
5	Nolan Transport	27 October 2009 (2)
No.	**Borrower**	**Date of Letter of Sanction**
1	Nolan Family Members	28 November 2000
2	Nolan Family Members	20 December 2002
3	Nolan Family Members	30 October 2003
4	Nolan Family Members	14 February 2005
5	Nolan Family Members	22 July 2005
6	Nolan Family Members	3 April 2006 (3)
7	Nolan Family Members	22 August 2006 (4)
8	Nolan Family Members	28 September 2009 (5)

(1) Facility 3 only

(2) Facility 3 only

(3) Facility 3 only

(4) Facility 2 only

(5) Facility 3 only

Schedule 2 – "the loan facility agreements pertaining to the Lismore Hotel"

No.	Borrower	Date of Letter of Sanction
1	Lismore Partnership (the Nolan Family Members and Richard Evans and Michael Foley)	7 May 2005
2	Lismore Partnership (the Nolan Family Members and Richard Evans and Michael Foley)	13 March 2006
3	Lismore Partnership (the Nolan Family Members and Richard Evans and Michael Foley)	3 April 2006
4	Lismore Partnership (the Nolan Family Members and Richard Evans and Michael Foley)	22 August 2006
5	Lismore Partnership (the Nolan Family Members and Richard Evans and Michael Foley)	11 May 2007

Schedule 3 – "the loan facility agreements pertaining to 1 & 2 Beresford Place"

No.	Borrower	Date of Letter of Sanction
1	Beresford Partnership (the Nolan Family Members and Richard Evans and Basil Good)	22 August 2006

Schedule 4 – "the loan facility agreements relating to the Personal Facility 7"

No.	Borrower	Date of Letter of Sanction
1	Nolan Family Members	22 August 2006 (6)

Schedule 5 – "Option Agreements"(7)

No.	Agreement Type	Grantor	Grantee	Date	Phase
1	Option Agreement	Jerry Hallinan and Anthony Doyle	Richard Evans and Basil Good	15 July 1994	Phase I
2	Option Variation Agreement	Jerry Hallinan and Anthony Doyle	Richard Evans and Basil Good	30 November 1995	Phase I

3	Assignment of Option Agreement	Jerry Hallinan and Anthony Doyle	Nolan Transport (Oaklands) Limited (now known as Nolan Transport)	30 November 1995	Phase I
4	Option Agreement	Nolan Transport (Oaklands) Limited	Richard Evans and Basil Good	14 December 1998	Phase II
5	Option Agreement	Nolan Transport (Oaklands) Limited	Richard Evans and Basil Good	2 September 1999	Phase III
6	Letter of Variation	Nolan Transport (Oaklands) Limited	Richard Evans and Basil Good	11 February 2008	Phase III
7	Option Agreement	Nolan Family Members	Richard Evans and Basil Good	22 October 2003	Phase IV
8	Rectification and Variation Agreement	Nolan Family Members	Richard Evans and Basil Good	13 September 2006	Phase IV
9	Letter of Variation	Nolan Family Members	Richard Evans and Basil Good	30 April 2008	Phase IV
10	Option Agreement	Nolan Family Members	Richard Evans and Basil Good	30 August 2005	Phase V
11	Rectification and Variation Agreement	Nolan Family Members	Richard Evans and Basil Good	13 September 2006	Phase V
12	Settlement Agreement	Nolan Family Members and Nolan Transport	Richard Evans and Basil Good	20 August 2010	Phase III, IV and V
13	Option Agreement	Lismore Partnership	Richard Evans and Basil Good	28 June 2008	Lismore House Hotel

(6) Facility 7 only

(7) This schedule sets out those relevant agreements of which the Defendant is aware. The Defendant reserves its position regarding the existence of any further relevant agreements which may be in existence.

Schedule 6 – the loan facilities of Mr Evans and Mr Good pertaining to the Isaacs Hotel

No.	**Borrower**	**Guarantors**	**Letter of Sanction**
1	Richard Evans and Basil Good	Nolan Transport and Nolan Family Members	8 November 2004
2	Richard Evans and Basil Good	Nolan Transport and Nolan Family Members	18 April 2005
3	Richard Evans and Basil Good	Nolan Transport and Nolan Family Members	28 September 2009
4	Richard Evans and Basil Good	Nolan Transport and Nolan Family Members	9 February 2011

23. Difficulties began to arise between the plaintiffs and AIB from mid 2009 when repayments on various Loan Facilities in relation to the Lismore Hotel and Beresford Place diminished or ceased as the operating companies controlled by Messrs Evans and Good failed to pay rent, and put and call options were not subsequently exercised on phases IV and V of the Isaacs Hotel in 2010 and 2011. Reservation of rights letters were sent by AIB on 18th October, 2010 to the members of the Lismore Partnership relating to the €5.7 million loan provided under the Facility Letter dated 11th May, 2007, and the Beresford Partnership concerning the €4.554 million loan provided under the Facility Letter dated 22nd August, 2006. A letter of demand was later issued by AIB to the Nolan Family on 15th October, 2012 seeking repayment of €12,780,147.15 arising from certain loans under Facility Letters dated 22nd August, 2006 which encompassed personal loans outside of the Isaacs Hotel or Lismore developments, and 28th September, 2009 which included the funding provided for phases IV and V of the Issacs Hotel in addition to other personal financing.

24. The plaintiffs contend that under the arrangement or "tax scheme" as described above, AIB were to provide the funding to Messrs Evans and Good when exercising the various put and call options to take over the loans, and the plaintiffs were then to be removed from any liability once the tax allowance periods expired and options exercised. Alternatively, they contend that this was to be effected by a debt transfer of any residual debt from the Nolans to Messrs Evans and Good.

25. The plaintiffs also assert that AIB were to ensure the maintenance and supervision of a sinking fund to be built up by Messrs Evans and Good besides that provided for phases I and II. The plaintiffs argue that AIB breached its obligations under the Loan Facilities by failing to follow through with these commitments. They further contended that arising from these commitments and business relations between the Nolan Family, AIB and Messrs Evans and Good, a tripartite agreement had formed between the various parties and that AIB were in breach of same by failing to meet the commitments outlined above.

26. AIB denies that it was aware of any such "tax scheme", that any such arrangements were in place, and that any representations were made to the effect that such arrangements were to be put in place. It also argues that if such representations were in fact made, it denies that the plaintiffs relied upon them whether in the manner alleged or at all.

The Law

27. The law as it applies to the areas of contractual interpretation and construction, misrepresentation and negligent misstatement were not points of contention between the parties and can be summarised as follows. In relation to distinguishing a mere representation from a contractual term, *Chitty on Contracts* (2012, 31st edn., para. 12-003) states that:-

> "The question whether any particular statement is a mere representation or a contractual term is frequently a difficult one for the court. In reaching a conclusion it will take into account the following considerations: the importance of the truth of the statement; the time which elapsed between the making of the statements and the final manifestation of consensus; whether the party making the statement was, vis-à-vis the other party, in a better position to ascertain the truth of the statement; and whether the statement was subsequently omitted when the agreement was embodied in a more formal contract in writing. But none of these criteria is conclusive and the true test would seem to be whether there is: 'evidence of an intention of one or both parties that there should be contractual liability in respect of the accuracy of the statement.' Such intention is to be ascertained objectively."

28. It has long been accepted that a contract can be contained in a number of documents and may be in oral, or written form, or a combination of both – *Duke of Bolton v. Williams* (1793) 2 Ves 138; *Smith v. Chadwick* (1882) 20 ChD 27. *Chitty's* comments as to collateral contracts (at para. 12-004) are also of import as such contracts are alleged by the plaintiffs to have arisen in the circumstances of this case:-

> "It may be difficult to treat a statement made in the course of negotiations for a contract as a term of the contract itself, either because the statement was clearly prior to or outside the contract or because the existence of the parol evidence rule prevents its inclusion. Nevertheless, the courts are prepared in some instances to treat a statement intended to have contractual effect as a separate contract or warranty collateral to the main transaction. In particular, they will do so where one party refuses to enter into the contract unless the other gives him an assurance on a certain point, or unless other promises not to enforce a term of the written agreement."

29. The approach to be taken by the courts in interpreting the terms of a contract was outlined by Lord Hoffman *in ICS v. West Bromwich BS* [1998] 1 WLR 896 at pp. 912-913 which has been adopted by the Supreme Court on a number of occasions – *Analog Devices v. Zurich Insurance* [2005] 1 IR 274; *ICDL v. European Computer Driving Licence Foundation* [2012] 3 IR 327; and *McMullan Brothers Ltd. v. McDonagh* [2015] IESC 19:-

> "(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
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> (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
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> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
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> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax…
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> (5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law

does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera S.A. v. Salen Rederierna A.B.* [1985] AC 191, 201:

"if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.""

30. Cartwright defines liability for misrepresentation in *Misrepresentation, Mistake and Non-Disclosure* (3rd edn., 2012, para. 2-01) as liability for false statements and adds that:-

"…although 'misrepresentation' includes more than false statements made through the medium of words: it will cover cases in which the defendant is responsible for a falsehood communicated to the claimant, whether by words or conduct, and whether made by the defendant or by his agent, or by a third party in circumstances where the defendant is responsible in law for it."

Cartwright notes at para. 2-02:-

"The enquiry as to whether a duty of care is owed in the tort of negligence by a person making a pre-contracted careless misrepresentation addresses questions different from those which are relevant if the claim is for rescission of the contract or even for damages for the tort of deceit. All three claims may be based on the same statement; but when considering the tort of negligence it is not normal to ask whether the statement was one of fact (by contrast with, say, a statement of opinion); whereas for the remedy of rescission of the contract the fact/ opinion issues is regularly addressed."

The misrepresentation must "be communicated to the claimant; and this can be done by his interpretation of the defendant's actions as well as by his hearing or reading the defendant's words" (Cartwright at para. 3-04). It is also accepted that silence may constitute a misrepresentation in certain circumstances. Gilligan J. summarised this position in *Carey v. Independent Newspapers* [2004] 3 IR 52:-

"In principle, the Irish courts have accepted that silence or non-disclosure regarding facts or changes in circumstances not known to the other party can give rise to an obligation to disclose such facts and circumstances and such failure to disclose will constitute a misrepresentation. In *Pat O'Donnell & Co Ltd v. Truck and Machinery Sales Ltd* [1998] 4 IR 191 at 202, O'Flaherty J remarked:

"In general, mere silence will not be held to constitute a misrepresentation. Thus, a person about to enter into a contract is not, in general, under a duty to disclose facts that are known to him but not to the other party. However, in certain circumstances, such a party may be under a duty to disclose such facts. A duty of disclosure will arise, for example, where silence would negate or distort a positive representation that has been made, or where material facts come to the notice of the party which falsify a representation previously made."

This approach was later approved by Laffoy J. in *Keegan Quarries Ltd v. McGuinness & Anor* [2011] IEHC 453.

31. In relation to the assessment of communications relied upon for the purposes of misrepresentation, Mance L.J. in *MCI World Com Intl Inc v. Primus Telecommunications* [2004] EWCA Civ 957 noted that the test is objective in nature:-

"…whether there is a representation and what its nature is must be judged objectively according to the impact that whatever is said may be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee."

32. Clarke J. in *Raiffeisen Zentralbank Osterreich AG v. Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm) outlined a number of applicable principles in this area:-

"82 In the case of an express statement*, "the court has to consider what a reasonable person would have understood from the words used in the context in which they were used": IFE Fund SA v Goldman Sachs International [2007] 1 Lloyd's Rep 264*, per Toulson J at [50] (upheld by the Court of Appeal at [2007] 2 Lloyd's Rep 449). The answer to that question may depend on the nature and content of the statement, the context in which it was made, the characteristics of the maker and of the person to whom it was made, and the relationship between them.

83 In the present case the representations alleged are said to be implicit in what was expressly said in the Information Memorandum. In the case of an implied statement, "*the court has to perform a similar task, except that it has to consider what a reasonable person would have inferred was being implicitly represented by the representor's words and conduct in their context": ibid*.

84 Silence by itself cannot found a claim in misrepresentation (fraudulent or otherwise). But an express statement may impliedly represent something. A possible implication of a statement may be that what has been expressly stated is complete, i.e. covers everything material or relevant on a particular matter such that something which has not been referred to does not exist. It is, however, necessary to distinguish between what a document does not say and what it impliedly represents.

85 The essential question is whether in all the circumstances it has been impliedly represented by the defendant that there exists some state of facts different from the truth. In evaluating the effect of what was said a helpful test is whether a reasonable representee would naturally assume that the true state of facts did not exist and that, had it existed, he would in all the circumstances necessarily have been informed of it: *Geest plc v. Fyffes plc [1999] 1 All ER (Comm) 672, at 683* (per Colman J)."

33. A plaintiff claiming misrepresentation must be able to show reliance on the misrepresentation, and that such reliance resulted in loss to the plaintiff. It is accepted in common law that where a representation is material in the circumstances of the case, an inference of fact arises that the representee relied upon it. Jessel M.R. in *Mathias v. Yetts* (1882) 46 LT 497 states:-

"If a man has a material misstatement made to him which may, from its nature induce him to enter into the contract, it is an inference that he is induced to enter into the contract by it. You need not prove it affirmatively. The man who makes the material misstatement to induce the other to enter into the contract cannot be heard to say that he did not enter into it, to some extent, at all events, on the faith of that statement, unless he can prove one of two things: either in

fact that the man did not rely upon it, and made inquiries and got information which showed that the misstatement was untrue, and still went on with the contract, that is one thing; or else that he said, expressly or impliedly. 'I do not care what your representations are; I shall not enquire about them. I shall enter into the contract taking that risk."

34. This position was reaffirmed by Morrit L.J. of the English Court of Appeal in *Barton & Ors v. County NatWest Ltd* [1999] All ER (D) 782 in addition to what he considered was likely to be necessary to rebut the presumption:-

> "57 The principal issue between the parties is what must be shown to rebut the presumption. Counsel for the Guarantors submitted that for the representor to rebut the presumption it was necessary for him to show that the representee (i) never knew of the statement until after he had entered into the contract; (ii) discovered before he entered into the contract that the statement was false; (iii) showed by words or clear conduct that the statement did not influence his decision. Counsel for the Bank submitted that the question of inducement was one of fact so that if, as in this case, the representee gives evidence the presumption has no part to play and the judge, like a jury, must determine the issue on all the evidence.
>
> 58 In my view the differences between counsel are more apparent than real. First the presumption is one of fact and capable, like any other such presumption, of being rebutted. It would be dangerous in connection with any issue of fact to suggest that it may only be proved in certain specified ways. Similarly it would be wrong to suggest that as a matter of law the presumption can only be rebutted by proof of certain specified matters. But given that the presumption is that the representation did induce the act or omission in question it is hard to imagine facts sufficient to rebut it which do not fall within any of the categories to which counsel for the Guarantors referred. But my inability to imagine them is no ground for limiting the facts sufficient to rebut the presumption. However I do not accept the submission of counsel for the Bank that once the representee gives evidence the presumption no longer has any force. The effect of the presumption is to alter the burden of proof; the alteration remains unless and until the presumption is rebutted whether or not the representee gives evidence."

35. It is also accepted that it is sufficient if the statement relied upon is one of a number of factors bearing upon a party's decision to contract, it need not be the sole influence – *Edgington v. Fitzmaurice* (1885) 29 CH D 459.

36. In *Carey v. Independent Newspapers* Gilligan J. examined the varying degrees of influence which a statement might have on a person's decision to enter into a contract. He reasoned at p. 70 that:-

> "The next question is the *degree* of inducement necessary to satisfy the requirement of inducement. There are four possible scenarios. In the first situation, the significance of the truth to the plaintiff of what turns out to be a misrepresentation may be such that, if the plaintiff representee appreciated the true position, they would not have entered the contract at all (see *Horry v. Tate & Lyle* [1982] 2 Lloyd's Rep. 416 at p. 422, *per* Pain J.). This obviously meets the standard required for a legally effective inducement. The second situation is where, depending on the circumstances, a representation may be material to the decision of the plaintiff representee to enter into the contract without being decisive: if the representee had known the truth, the representee would still have been willing to conclude the contract, but perhaps on different terms. This will also suffice to meet the requirement of inducement: the best example of this in Irish law is *Donnellan v. Dungoyne Ltd.* [1995] 1 I.L.R.M. 388.
>
> The third situation is where, despite the relevance of the misrepresentation to the eventual contract, if the plaintiff representee had known the truth, the plaintiff would still have concluded the contract. This will not meet the standard of an operative inducement. The fourth possibility lies somewhere between the second and third possibilities: it cannot be said for certain whether the misrepresentation induced the plaintiff to enter the contract or not, but it might be said that the misrepresentation *might* have been material, if not decisive, to the decision to enter the contract.
>
> In an action for negligent misstatement, the law requires that any loss be caused by the misstatement or misrepresentation. In other words, the effect of the misrepresentation (which constituted the inducement) must be causal in the sense of decisive (see *Edington v. Fitzmaurice* (1885) 29 Ch. D. 459 at p. 483, *per* Bowen L.J.). The plaintiff who has been misled by the representation must have relied upon the representation in the sense that but for the misrepresentation, the plaintiff would not have made the contract at all, or at least not in the same terms: in short, the first and second situations of inducement outlined above."

37. In circumstances such as the present case where the plaintiffs seek rescission on the basis of misrepresentation, there is no onus on the plaintiffs to show that they were not at fault in failing to discover the fact that the misrepresentation was untrue if the court finds that such a misrepresentation was made. Jessel M.R. in *Redgrave v. Hurd* (1881) 20 Ch.D 1 CA at p. 21 reasoned:-

> "The person who has made the misrepresentation cannot be heard to say to the party to whom he has made that representation, 'You chose to believe me when you might have doubted me, and gone further. The representation once made relieves the party from an investigation, even if the opportunity is afforded."

Cartwright puts it succinctly at para. 4-35:-

> "The question is always whether he relied on the statement. If it can be shown that in fact he did rely on it he can rescind even though he might have been expected to discover the truth of the statement."

38. Many of the legal principles outlined above for misrepresentation also apply to negligent misstatement. Arising from the line of authority since *Hedley Byrne & Co. Ltd v. Heller & Partners Ltd* [1964] AC 465 in which Lord Atkin outlined the 'neighbour' principle, and the duty of care owed to those whom it is foreseeable may be impacted by one's acts or omissions, liability can lie for negligent misstatement. The elements of the tort are:-

(i) a 'special relationship' between the parties giving rise to a duty of care owed by the defendant to the claimant;

(ii) a misstatement made by or on behalf of the defendant which amounts to a breach of the duty of care;

(iii) reliance by the claimant on the misstatement, in circumstances where it was reasonable for him to rely upon it; and

(iv) financial loss suffered by the claimant by reason of his reliance on the misstatement.

39. The test as to whether a duty of care exists and liability for economic loss arising from a failure of such a duty was outlined by Lord Wilberforce in *Anns v. Merton London Borough Council* [1978] AC 728, comprising of two parts, namely:-

> (i) Whether, as between the alleged wrongdoer and the person who has suffered damage there is sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter – in which case a prima facie duty of care arises;
>
> (ii) If the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty of the class of person to whom it is owed or the damages to which a breach of it may give rise.

In *Caparo plc v. Dickman* [1990] 2 AC 605 at p. 617 Bridge L.J. altered the test somewhat, providing an additional element allowing for a more nuanced approach to cases of negligence:-

> "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 in 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."

The test as provided in *Anns* was cited with approval by the Supreme Court in *Ward v. McMaster* [1988] IR 337 while the Court later preferred the test as laid out in Caparo in *Glencar Exploration plc. v. Mayo County Council No.2*) [2002] 1 IR 112. This court shall utilise the latter test where appropriate.

Lending Relating to the Isaacs Hotel

40. Under this heading the court shall consider the evidence provided during the proceedings concerning the various phases of the Isaacs Hotel, and examine same in the light of the preliminary issues set down in issues 1 and 2 of Cooke J.'s order dated 4th June, 2013 above.

(i) Meeting in December, 2002 between the Plaintiffs and AIB

41. The kernel issues in the proceedings arise from around 4th December, 2002 when staff from AIB, a Ms. Michelle Kierans and a Mr. Stephen Clarke of the hotel section in AIB Bankcentre, met with Ms. Elizabeth, Ms. Ann and Ms. Joan Nolan, Mr. Fitzgerald and Messrs Evans and Good at the Isaacs Hotel premises to discuss funding for further development. Ms. Joan Nolan stated that it was held at the hotel to give AIB a feel for the scheme. She averred that while the provision of funds to the Nolans was discussed, the focus of the meeting was a discussion on how AIB would participate in the broader tax scheme, and how the scheme would operate going forward. This was disputed by AIB, Ms. Kierans, witness for AIB, provided in her witness statement at para. 9 that "the principal focus of the meeting was the [Nolan's] request for a loan to provide €9.5m to the Nolan Family partnership…".

42. Ms. Joan Nolan further stated that the tripartite agreement emanated from the meeting on 4th December, she said that "the tripartite agreement evolved. It wasn't necessarily whose idea was it. It was what evolved at a particular point in time" (Day 3, p. 128). She further stated that "…as regards whose exact idea it was it wasn't the Bank but they turned up for the idea, for the meeting" (Day 3, p. 129).

43. Prior to this meeting, Mr. Fitzgerald prepared "A Development Perspective", outlining the development of the Issacs Hotel in addition to the funding required for the development of phases IV and V. This was provided to Mr. Clarke on 19th November, 2002 in the form of a loan application, and was the basis of discussions at the meeting. The document provided details on phases I-III including the security over the phases as well as the put and call options to be exercised on each of these phases, when they were to be exercised and their values. It also provided information on the financing and cost of the proposed development of phases IV and V.

44. No notes appear to have been taken by or on behalf of the parties during this meeting. As such, recollections of what exactly was discussed, particularly with regard to possible sinking funds and what was to occur upon the exercise of the various put and call options were vague.

45. Ms. Joan Nolan and Mr. Fitzgerald also referred to a second meeting between the Nolans, Mr. Fitzgerald and AIB concerning other lending requirements relating to interest free loans between companies in the Nolan Transport group and payment of capital gains tax arising from the sale of company shares. Messrs Evans and Good were not present. This additional funding request later became part of the Loan Facility dated 30th October, 2003. These additional funding requirements arose from a meeting on 28th November, 2002 between Mr. Kevin Warren, Mr. Fitzgerald, Ms. Joan, Ms. Elizabeth, Ms. Ann and Ms. Sally Nolan. Ms. Kierans, witness for AIB, disputed that a second meeting in fact took place, she said that these items were discussed at the meeting on 4th December but not in the presence of Messrs Evans and Good.

46. After careful consideration of the evidence, it is clear that the meeting on 4th December was the first face to face meeting between the hotel section of AIB Bankcentre and the Nolan Family in relation to funding for phases IV and V of the Isaacs Hotel. The court accepts that the timeline provided in evidence illustrates that the meeting was arranged at relatively short notice and did not provide the AIB staff present at the meeting, particularly Ms. Kierans being the senior representative, with sufficient time to fully familiarise themselves with the Development Perspective provided in the loan application to Mr. Clarke.

47. However, I am satisfied that at the very least Ms. Kierans would have acted as any reasonable bank staff member would and reviewed AIB's previous interactions with the Nolan Family and Nolan Transport which would have unearthed the refinancing of the Nolan Transport loan with ACC on phases I and II of the Isaacs Hotel. Ms. Kierans herself while unable to recollect specifically whether she did this, stated that it would have been her practice to do so.

48. Even so, the court concludes this information would only have provided Ms. Kierans with a general idea of how the project had developed previously and the direction discussions at the 4th December meeting might take. I do not accept, as it was put to Ms. Kierans, that the review "would give you the information that would allow you to make a reasoned judgment of what you're getting into" as put by counsel for the plaintiffs. As is plain from a reading of the refinancing Loan Facility and the Development Perspective there was a distinct variation between the lending for the previous phases and that proposed for phases IV and V, this being that the Nolan Family were now coming into the development project as opposed to Nolan Transport. Also of importance is the fact that it was decided after the AIB refinancing loan for the Nolans to retain 30% ownership of the relevant phases, another disparity between what

had been proposed previously and what the Development Perspective outlined. This feature is not one that is usually present in tax driven developments as averred by the defendant's witnesses and accepted by the court.

49. As such, the court accepts that these were somewhat uncharted waters for the development and thus, while AIB may have had a general view of the intended construction of phases IV and V and what had occurred previously, the meeting could only have been "exploratory" in nature – AIB were simply there to learn more about the project and to view the hotel, how the development would be implemented, to meet the potential clients and gauge the Nolan Family's requirements as to funding. The meeting was simply a "fact finding mission" in order for AIB to come away with the necessary information to form a proposal for its Credit Committee. The court is therefore satisfied that Ms. Kierans could not have engaged with the subject matter of the meeting to the extent averred by Mr. Fitzgerald and Ms. Joan Nolan.

50. I accept Ms. Kierans evidence that while general elements of the developments may have been discussed with her, she would have been unable to "comment to any meaningful extent" on the project due to the fact that she was learning of the plans for the first time at the meeting. It is therefore unlikely that Ms. Kierans would have made any commitments at the meeting as to setting up sinking funds or any underwriting of future buy-backs as envisioned under the option agreements.

51. It appeared to the court that the witnesses for the plaintiffs attempted to downplay the role that the Nolan Family took at the 4th December meeting, stating instead that AIB were there to develop relations with Messrs Evans and Good and that lending to the Nolan Family was nearly "incidental". I however do not accept this proposition. The loan application was provided by Mr. Fitzgerald who was the Nolan Family's financial advisor – he was not advisor to Messrs Evans and Good; the meeting was also arranged by him. AIB were thus there to meet with the Nolan Family on their proposal and request for funding. The Development Perspective which I accept formed the basis of the meeting also focused on the lending required for the development of phases IV and V which were owned by the Nolans and the borrowing for which was to be the responsibility of the Nolans.

52. As to the contention that a tripartite agreement was formed on the basis at least in part of commitments purported to have been made during the meeting of 4th December, I find no support for this contention. In this I prefer the evidence of Ms. Kierans. In coming to this conclusion the court again applies the reasoning set out above in this instance to conclude that AIB approached the meeting tentatively and merely engaged in discussions relating to the part Messrs Evans and Good were to play in phases IV and V.

53. I also take particular note of the fact that the plaintiffs' evidence on this issue was inconsistent. While they averred a repeated general belief in their witness statements and direct evidence that AIB said during this meeting that they would fund Messrs Evans and Good and that there would be a debt transfer, this contention fell away under cross examination. It was accepted by Mr. Fitzgerald under cross examination that the Development Perspective made no mention of a second sinking fund or that AIB, by agreeing to fund the Nolan Family, also agreed to fund Messrs Evans and Good some time in the future.

54. Mr. Fitzgerald could not provide an answer as to the role AIB were to have in the scheme, rather he stated that AIB went away to prepare their own proposal on the project. In addition, the court notes Ms. Joan Nolan's contradictory evidence on this point. Although she at first averred that the tripartite agreement and representations emanated from the 4th December meeting she went on to say that the idea never came from AIB and that representations were actually made later in the process.

55. The court accepts Ms. Kierans' evidence that while she may have been receptive to any new relationship that could have developed with Messrs Evans and Good, such a relationship at this point was embryonic at best. I also accept that Ms. Kierans could not have formed a substantial view on such a relationship due to her lack of knowledge of Messrs Evans and Good's requirements prior to the meeting and her lack of information on Messrs Evans and Good themselves outside of what could be gleaned from her review of AIB documentation on Nolan Transport's refinancing Loan Facility.

56. No evidence was put forward to suggest that AIB were aware prior to the meeting of 4th December that Messrs Evans and Good would look to AIB for the funding of the put and call options on the earlier phases of the Isaacs Hotel, or that the Nolan Family and/or Messrs Evans and Good intended to set options up for phases IV and V and would require funding for same. Ms. Kierans could not therefore engage with Messrs Evans and Good to the extent suggested by the plaintiffs. While Messrs Evans and Good's requirements may have been discussed generally, AIB staff would not have had sufficient information about the scheme to make any form of commitment with regard to transferring debt or funding Messrs Evans and Good.

57. As noted the loan application/Development Perspective formed the basis of the meeting. Only put and call options concerning phases I-III and the split ownership on these phases were outlined in that document. Thus, although put and call options were discussed at the meeting, there could not have been concrete information relating to those options relating to phases IV and V. As such, the role that Messrs Evans and Good were to play in phases IV and V was vague and inchoate at this point; the only clear information available arising from the evidence was that relating to the Nolan Family's proposed funding.

58. With regard to the €1.5 million available from Messrs Evans and Good for a sinking fund, the court concludes on balance that this figure was provided to Ms. Kierans by Messrs Evans and Good because they would have reasonably been the only persons with this information at the meeting on 4th December. The court also accepts that Ms. Kierans was unaware of the origins of this money, particularly as to whether it already formed part of security for the earlier phases of the project.

59. Finally, as to the possibility of a second meeting concerning funding relating to the capital gains tax and inter-company loan matters, the court concludes that there is insufficient evidence for the court to find in favour of either party. It is clear however that these issues were indeed discussed around this time and that they formed part of the purposes for funding under the Indicative Heads of Terms and the October, 2003 Loan Facility.

(ii) Debt Level and Repayment Analysis Schedules December, 2002

60. Arising from the meeting on 4th December, 2002 Ms. Kierans and Mr. Clarke prepared a series of Debt Level and Repayment Analysis schedules, and a mark up report that went to the Credit Committee in December, 2002.

61. The first Debt Level and Repayment Analysis was sent to Mr. Fitzgerald around 10th December, 2002 which he then sent to the Nolans on the 10th. The first draft of a Debt Level and Repayment Analysis outlined the proposed indebtedness of both the Nolan Family and Nolan Transport to AIB over a period of years spanning 2002-2010. It also set out the proposed repayment schedule, indicating how the indebtedness would be paid off through this eight year period. Of importance for present purposes the schedule indicated marked reductions were to be made in 2004 and 2005 arising from a "€1.5m Reduction" of the Nolans' debt in 2004, and exercise of the put and call options and buy-backs of phases I and II in 2004 and 2005, respectively, repaying all the Nolan Transport debt. These latter payments were to be in the amount of €1.450 million in 2004 and €3.4 million in 2005. The €1.5 million payment

reducing the Nolan Family's debt was to come from Nolan Transport. Finally, in 2010 a payment of €4.456 million was to be made in relation to the "Buyback [of] Damp/Store St", reducing the Nolans' debt to €453,000. This payment in 2010 is said by the plaintiffs to be a representation from AIB to the effect that AIB would fund Messrs Evans and Good to allow for this payment to be made in 2010, thereby removing the Nolans from the debt relating to phases IV and V of the Isaacs Hotel.

62. Ms. Joan Nolan said that there were a number of errors in the document. She said that she alerted Ms. Kierans to the amendments to be made by way of a telephone call between the 10th and 13th of December during which she indicated that the existing loan amount as at 2002 (€1.9 million) should not have been included in the schedule as it was to merge with the €9.5 million loan which was the only lending to be considered by the analysis. The existing loan had been provided for the site cost of phases IV and V, and was going to be "paid off by the new loan". Ms. Nolan also requested the removal of the €1.5 million from the 2004 column of the Repayment Analysis relating to the Nolans' debt as this would create a considerable tax liability were it to occur.

63. Ms. Joan Nolan also requested that the "Buyback [of] Damp/Store St" in 2010 be increased from €4.456 to €6.365 million. There were no other material changes. These alterations were then included in the Debt Level and Repayment Analysis dated 13th December, 2002, referred to in the email considered below of Ms. Kierans to Mr. Fitzgerald sent on the same date.

64. The court is satisfied on the evidence that the figures and information contained in the analyses were simply to illustrate how the Nolans proposed to make the repayments on the funding sought, that they should not be considered terms of the facility or representations from AIB on how the financing would progress over time. This is clear for a number of reasons.

65. First, the substantive information contained within the analyses stemmed from the Nolan Family or their representatives – from the Development Perspective and arising from discussions during which I have concluded no representations by AIB were made or terms entered.

66. Secondly, of particular note is the phone call which I accept occurred between Ms. Joan Nolan and Ms. Kierans in which Ms. Nolan set out a number of amendments to the spreadsheet of 10th December which were then included in the analysis of 13th December. These amendments were made it would appear without any meaningful engagement or contribution from AIB and there was no evidence provided to contradict this assessment. Ms. Joan Nolan merely dictated these changes to Ms. Kierans in order to correct the proposal to AIB. There was no evidence that Ms. Kierans attempted to gainsay any of these alterations to what the plaintiffs would have the court believe were the bank's commitments, or sought to introduce any of her own amendments. Of particular importance is the removal of the payment by Nolan Transport of €1.5 million approx. on the Nolan Family debt in 2004 which increased the amount repaid in 2010 from €4.456 million to €6.365 million. This made the proposal a much riskier venture as a substantial amount more was set out to be repaid at one point in time yet there was no evidence that AIB objected to or engaged in any meaningful extent on this alteration.

67. As such, while AIB may have set the data out in these tables, it was merely a means of ensuring that the documentation provided to the Credit Committee was an accurate portrayal of the Nolan Family proposal. These documents therefore constituted a consolidation or refinement of the representation from the Nolan Family on how they saw the funding would be repaid.

68. Regarding the possibility of a tripartite agreement between AIB, the Nolan Family and Messrs Evans and Good, the court has already concluded that no such agreement had been reached prior to these Debt Level and Repayment Analyses. The witnesses for the plaintiffs contended that such an agreement arose from these tables and placed particular emphasis in their witness statements and direct evidence on the fact that the buy-backs were outlined in the tables, that the plaintiffs were under the impression from a reading of the tables that they were only responsible for the non buy-back amounts, that repayment was over a 15 year period and that repayments were interest only according to the notes on the 13th December analysis.

69. The contention that AIB agreed to fund Messrs Evans and Good because AIB had entered figures relating to same in the analyses does not stand up to scrutiny. First, as reasoned above, the information contained in the analyses originated from the Nolan Family and their representatives and not from AIB. The Nolan Family informed AIB that a large part of the repayments would come from the operation of put and call options and buy-backs in 2004, 2005 and 2010 and the tables merely demonstrate what AIB understood the Nolan Family proposal to be from representations made by the latter. They were therefore still only part of early discussions on proposed funding.

70. Secondly, it was accepted by Ms. Joan Nolan and Mr. Fitzgerald that just because the buy-backs appear in the analyses does not necessarily mean that AIB had committed to funding these buy-backs. In particular, Mr. Fitzgerald agreed with counsel for AIB that the 13th December schedule did not represent any form of commitment by AIB to fund anything, that it just showed how the loan was to be repaid, not where the funding for these payments was to come from. Ms. Joan Nolan made similar concessions to the effect that there was no guarantee in either schedule or commitment made by AIB during the conversation she had with Ms. Kierans. I therefore accept Ms. Kierans' evidence in this regard that no such commitmtments arose from this aspect of the document.

71. Thirdly, although I accept that future option agreements relating to phases IV and V were discussed prior to these schedules, they did not come into existence until much later in the process, not until October, 2003, and on the evidence any information available on the options at the time these tables were created was vague at best. In Ms. Joan Nolan's own words "nothing had been agreed". Mr. Fitzgerald himself stated that a concluded tripartite agreement had not been reached on 13th December, he could not provide a date for its conclusion. There were at this point merely early discussions on creating and putting in place put and call options between the Nolans and Messrs Evans and Good. From the evidence, the parties had not even reached the point of negotiating the terms of the option agreements. The court does not therefore believe that a bank acting prudently and reasonably, which I consider AIB to have been from the evidence thus far before the court, would make such a commitment at such an early stage in the genesis of these options, and does not believe it likely that AIB did so at this particular juncture. I accept Ms. Kierans' evidence that AIB would not provide such a guarantee on such nebulous understandings.

72. Similar reasoning applies in relation to the plaintiffs' averments concerning the two notes on the analysis dated 13th December on the 15 year period of the loan and interest only payments for 2002 and 2003. On the latter note, while it is accepted that interest only payments were to be made for these years, the court can find no basis on the evidence outside of the plaintiffs' mere assertion that this extended to the entirety of the repayment period. The document only states that payments in 2002/2003 were to be on the interest; the necessity to highlight such a feature indicates that repayments in the other years during the period were to be treated differently from those in 2002/2003.

73. The connected claim made by the plaintiffs that they were only responsible for repayment of the Non-Isaacs Hotel element of the funding, that is the €3.2 million payments and the interest on the entire loan, shall be considered below. In summary, for present purposes I do not accept this contention.

74. In conclusion therefore the court finds that from an objective point of view these correspondences, whether by email or telephone between the parties, and schedules were up to this point only part of the early discussions relating to the proposal and any comments even if they had been made would not have been supported by the necessary level of intent that they should have been relied upon. They did not form any representation or contractual term by AIB.

(iii) Email from Ms. Kierans to Mr. Fitzgerald dated 13th December, 2002

75. The plaintiffs placed reliance on an email from Ms. Kierans to Mr. Fitzgerald dated 13th December, 2002. In it Ms. Kierans highlights a number of issues that remained to be resolved to the satisfaction of AIB before any loan could progress further. The email provides as follows:-

> "I have discussed your proposal up line here today and have broad indicative support on the basis that I can get comfort around three areas. In this regard, I am going to get Stephen to fax out to you again the debt/repayment tables (updated) so you can understand where I'm coming from. The following are the area I need to discuss and agree with you:
>
> 1. Our debt tables show debts reducing based on the buybacks as discussed. Is it possible to get a view from you on whether or not Basil [Good] and Richard [Evans] have a sinking fund in place in this regard and how comfortable you are around their ability to come up with the funds etc.
>
> 2. Based on our tables, there is a significant shortfall between rental income received on the hotel/pub and the loan repayments. You will see a peak deficit in 2004 of E848k. We would like to know your thoughts on same and that you're happy that the family understand that there is a shortfall to be serviced from personal resources.
>
> 3. Finally, in 2005, phases 1 & 2 will now be 30% owned by Nolan family. Our debt to them at that stage will be say E6m. Effectively the hotel at that point is in joint ownership which from our point of view would be hard to enforce (assuming a worst case scenario).
>
> I'll talk to you on this…."

76. The plaintiffs averred that the email indicated that AIB was "going ahead with" the loan, that there would be a sinking fund in place for both phases I and II and phases IV and V and that by requiring cross security, it had agreed to fund Messrs Evans and Good. I however cannot accept these contentions.

77. First, I accept Ms. Kierans' averment that the email was as she put it "just clarifying points with the borrowers". It was not "putting to bed" any terms of a loan facility. I further accept her evidence which was not contested that she spoke with an individual "up the line" to try to corner off issues that might be a cause for concern before the Credit Committee, these concerns then formed the basis of the email. Although there was broad indicative support for the proposal, I do not accept the contention put by counsel for the plaintiffs that it was "*a fait accompli*" before being presented to the Credit Committee.

78. If this were the case it would lead to the conclusion logically that the Credit Committee would merely be rubber stamping the proposal and provide little or no supervisory function in the lending process, a suggestion that cannot be accepted by this court. The role of a Credit Committee is to grant approval for such lending, and to do this they must have effective oversight over proposals coming to them and filter out those they deem unsustainable. There was no evidence that the Credit Committee acted in a contradictory manner. It was not therefore a given that the Nolan Family's loan request would be accepted arising from the prior discussion and correspondence with Ms. Kierans or Mr. Clarke.

79. Regarding point 1 of the email, I find it extraordinary that the comments relating to the ability of Messrs Evans and Good to raise the necessary funds for the buy-backs did not raise alarm bells with either Mr. Fitzgerald or Ms. Joan Nolan, if as they aver, a binding tripartite agreement and acceptance of a loan transfer style operation was or about to come into existence. These remarks clearly indicate an understanding on the part of AIB that funding for the buy-backs was not settled and was thus raised as a point of concern by Ms. Kierans. It is at odds with the interpretation of the agreement propounded by the plaintiffs which they say existed at this stage of the process. It was accepted during cross examination by witnesses for the plaintiffs that this understanding by AIB is inconsistent with their claim.

80. The witnesses for the plaintiffs accepted under cross examination that they could not point to any agreed terms relating to a tripartite agreement highlighting acceptance of the commitments the subject of these proceedings arising from either this email alone or in conjunction with the Debt Level and Repayment Analysis. Mr. Fitzgerald who provided the main evidence for the plaintiffs on this email stated that a guarantee to fund Messrs Evans and Good was not a done deal at this stage, that there were a lot of extra stages to the proposal. He called it "the starting point" and that AIB were positioning themselves to fund Messrs Evans and Good. These comments all clearly indicate that there was no binding agreement at this stage and that the process was still at the discussion stage.

81. Point 2 of the email raises the concern that Ms. Kierans wanted to ensure that the Nolan Family were aware that personal funds would have to be used to meet projected deficits in payments during the repayment period. As already concluded, the Debt Level and Repayment Analysis spreadsheets outlined the manner in which the Nolan Family saw the debt being repaid and where the repayments would come from which included hotel rental income and the buy-backs (but not the source of the funds for the buy-backs).

82. The court is satisfied that the meaning of point 2 is clear, that is that where a shortfall arose during the repayment period as a result of rental income not meeting the expected repayment in a particular year, the Nolan Family would have to meet it from their personal finances. Mr. Fitzgerald accepted this meaning of point 2 in evidence.

83. The court is also satisfied on the balance of probabilities that this personal recourse also logically extended to any shortfall arising during the repayment period which includes lower than expected rental income and the worst case scenario of a failure to either implement or exercise the necessary put and call options for phases IV and V. On balance, there was no evidence of a contrary intention on the part of AIB from an objective reading of the documentation before the court. The requirement to make repayments from personal funds was a very real risk arising from point 2 of the email.

84. The court is also unable to agree with the averment made by the plaintiffs in relation to point 3 of the email that due to the nature of the split ownership of the Isaacs Hotel which was to come into existence in 2005, AIB had committed to funding Messrs Evans and Good by the mere fact of requiring security over the entire interests in the hotel. One does not necessarily follow the other

and this contention repeatedly made by Mr. Fitzgerald and Ms. Joan Nolan is a leap in logic that cannot be maintained. The actions of AIB I am satisfied were merely those of a bank acting prudently and reasonably in attempting to safeguard its interests to ensure that it had security over an entire project and not only particular phases of a development.

85. The Nolan Family's own actions contradict their assertion that only AIB could have banked the project. As further outlined below, the Nolan Family were successful in obtaining substantially lower interest margin rates in March/April 2006 on a range of its AIB facilities, including the phase IV and V loan. The Nolan Family were successful in this endeavour because they informed AIB that they were being offered reduced margin rates from other financial institutions if they moved their business to them. This was not contradicted in evidence. Thus, it would appear that in 2006 at least, when the split ownership over the Isaacs Hotel development between Nolan Transport, the Nolans and Messrs Evans and Good had already begun upon the exercise of the options on phases I and II in 2004/5, it was entirely possible that the Nolans and Messrs Evans and Good could have refinanced the entire project with another institution.

86. Furthermore, while I accept that it would have made it far more difficult for Messrs Evans and Good to raise the required finance when exercising the options if they decided to seek funding from another bank where their interests and those of the Nolan Family in the Hotel were all tied up with AIB, that does not mean that that option was not available to them or that it would have been impossible for them to do so. In this respect, the court takes particular note of the AIB Credit Committee meeting dated 3rd July, 2003, appendix 4 of which indicates that the both Messrs Evans and Good were men of substantial means at the time and had equity in a large number of properties. It was even suggested to them by AIB around that time that they could free up the equity in the Isaacs Hostel to fund the buy-backs on the Isaacs Hotel. However, they declined this option and instead they sought to borrow against the hotel as an asset. As stated, the Hostel could have been an avenue for funding from other credit institutions. Although the Nolans may not have been aware of AIB suggesting this security option, I consider it very likely that they would have been aware that Messrs Evans and Good were men of substantial means though they may not have been aware of the details of same.

87. On the basis of the evidence and reasoning outlined above the court concludes that there was no statement or representation at this stage of the process amounting to a term upon which the plaintiffs could rely to the effect that AIB were going to finance Messrs Evans and Good or effect a debt transfer. The whole application process was still at the discussion stage, it was preliminary in nature, and I am satisfied that remarks if any made by Ms. Kierans in relation to funding Messrs Evans and Good would not have been accompanied by the necessary intent to create a contractual term or for the Nolan Family to rely on same.

88. One feature of the dispute between the parties is that the plaintiffs argue that two sinking funds were to be put in place, one already in existence for phases I and II as well as a new sinking fund that was to be set up for phases IV and V. The defendant refutes this, claiming that there was only ever one sinking fund in place which was to be used in the course of all the buy-backs.

89. The court concludes that there is insufficient evidence before the court to make a determination on whether Ms. Kierans was referring to a general or second sinking fund in the email of 13th December. It is unclear which phases of the development and which buybacks Ms. Kierans refers to the sinking fund. Although the reason for the email was to raise three concerns with Mr. Fitzgerald which could affect the success of the proposal for funding for phases IV and V before the Credit Committee, the email does not solely refer to phases IV and V. This is clear from the inclusion of the point on split ownership of phases I and II in 2005 although point 2 does concern the lending for phases IV and V. Also, the debt tables in point 1 of the email to which Ms. Kierans refers encompasses both the proposed lending to the Nolan Family and Nolan Transport and thus the buy-backs relating to phases I and II in addition to phases IV and V.

90. Despite this inability at this stage to determine whether AIB had indeed raised the issue of a second sinking fund, it is clear that a sinking fund, whether it was a second or a general sinking fund, was under discussion. It is also evident from the wording of the email that Ms. Kierans was asking whether Messrs Evans and Good had a sinking fund already in place, however it is unclear whether she is referring to a generic sinking fund or a new sinking fund already established. It is also self-evident from the ordinary meaning of this wording that Ms. Kierans is not saying on AIB's behalf that it would create a sinking fund or was making any representation to that effect. Mr. Fitzgerald's averment that the email signified that "there was a sinking fund in place for Phases 1 and 2 and there would be a sinking fund in place for Phases 4 and 5" contradicts the plain meaning of the email.

91. As to the effect that the sinking fund was to have, I agree to a certain extent with Mr. Fitzgerald that it acted as a comfort to the parties involved in the transaction as there was a sum of money to be available when Messrs Evans and Good were to undertake the buybacks, which buybacks however remains to be seen and cannot be determined from the evidence considered thus far. However, as already explained the court has found that the only parties involved in negotiations for a transaction up to this point in time are the Nolan Family and AIB. Also, the court finds that the risk which the shortfall was to offset was that faced by the Nolans. I place particular emphasis on the exchange between Mr. Fitzgerald and counsel for the plaintiffs. Mr. Fitzgerald accepted that the sinking fund would facilitate the exercising of the put and call options but importantly he also stated that it was reducing the risk if the put and call options weren't fulfilled and the Nolan Family were required to repay the money to AIB.

92. However, if a guarantee to fund the buybacks was in place there should not have been any such risk to the Nolans. This is so because according to the plan outlined by the plaintiffs AIB were going to effect a debt transfer or fund Messrs Evans and Good come what may, which logically would even include the situation whereby certain of the prerequisites might not be carried out such as would occur were there to be a failure to exercise the options in the first place, obviating the need of Messrs Evans and Good for finance. Thus, regardless of circumstances, the end result would be that Messrs Evans and Good would owe AIB debt over phases IV and V. Consequently, the Nolans should not have had any concern regarding a sinking fund based on the logic of their argument. This state of affairs therefore represents a further inconsistency with the narrative submitted by the plaintiffs which they allege was in being at this time.

(iv) Mark up for Credit Committee Meeting dated 18th December, 2002

93. As previously highlighted, Ms. Kierans produced a mark up in the form of a Discussion Paper from her discussions and correspondence, including the Debt Level and Repayment Analysis spreadsheets, with representatives of the Nolan Family and Messrs Evans and Good. Ms. Kierans created this document in conjunction with Mr. Clarke and a Mr. J.B. Heffernan, Senior Lending Manager, Ms. Kierans' manager. This document was then provided to the Credit Committee meeting on 18th December which after discussions approved the €9.5 million funding.

94. The court will only briefly consider the documentation relating to the Credit Committee meeting of 18th December, 2002 as it is plain that the Discussion Paper/mark up was not furnished or otherwise communicated to the Nolan Family and could not thus have formed the basis of any representation to the plaintiffs. The court shall simply make findings of fact as to AIB's understanding of the proposal as of 18th December. In this regard the court accepts the Discussion Paper as a representation of what AIB understood the

proposal to be at this point in the relationship and may contain potential terms already discussed or representations made. There were no notes or memoranda from the Credit Committee meeting itself before the court so the court is unable to determine how the meeting progressed.

95. It is clear that the main focuses of the Discussion Paper are the Nolan Family and Nolan Transport, their current borrowings and the proposed new funding. Messrs Evans and Good do not feature in the profile of the borrowers or funding sought, either existing or requested, nor does the purpose of funding the exercise of the put and call options for the buy-backs appear. Messrs Evans and Good do appear in the "Security" section of the paper but just in relation to the security that had previously been provided for phases I-III. They also appear in appendix 4 titled "Nolans and Evans & Good Scenario Appendix 4" to which the "Repayments" section refers.

96. From the evidence provided by Ms. Kierans and the manner in which it was given, the court considers Ms. Kierans to be a very professional, experienced banker both now and at the time these events took place. I therefore conclude on balance that if representations had been made regarding funding Messrs Evans and Good, both the funding request and Messrs Evans and Good would have featured much more prominently in this section of the Discussion Paper as averred by Ms. Kierans. Even if representations were not made, but an actual request had arisen through discussions prior to the creation of this document for AIB to fund Messrs Evans and Good, this would have featured more prominently and have necessitated greater detail on the financial position of Messrs Evans and Good similar to that provided for the Nolan Family and Nolan Transport outlined in the first few pages of the document. I also make similar findings and apply like reasoning in relation to a debt transfer.

97. Although counsel for the plaintiffs argued that the Discussion Paper indicated a high level of certainty as regards funding Messrs Evans and Good and an understanding on the part of AIB that there would be a transfer of debt, particularly of Nolan Transport debt concerning phases I and II, the court does not agree for numerous reasons. First, the Discussion Paper is merely a proposal to the Credit Committee providing information and points for discussion sufficient for it to come to a decision. I accept in particular Ms. Kierans' evidence when she stated that:-

> "This is a document presenting a proposal to the Bank's committee outlining the terms of the loan that was being sought and how it was going to be repaid. Assumptions obviously have to be made in doing that, they don't always come to pass, but you have to start somewhere in terms of working out how the Bank is going to be repaid." (Day 18, p. 138)

The Paper thus does not represent a concrete course of action that AIB or the plaintiffs in fact would take. This is merely indicating in part for example how it is proposed by the plaintiffs, not agreed, that monies would be repaid. This understanding and purpose of the Discussion Paper must therefore be borne in mind when considering its contents and as such, it cannot be said that AIB understood that it had committed to any course of action simply arising from the inclusion of certain points of information in the Discussion Paper.

98. Secondly, the Discussion Paper outlines only some elements of the proposal in definite terms but these do not relate to either the funding of Messrs Evans and Good or a debt transfer. The Paper identifies the future split ownership of the Isaacs Hotel and the authors express this in very certain terms keeping in mind Ms. Kierans' averment, which the court accepts, that assumptions are made but some may not come to pass. The authors state that "in 2004/2005, Put & Call options…will be exercised"; and that AIB "will be getting a Guarantee from [Nolan Transport] to capture their interest in the existing Isaacs hotel/pub property". The Paper also states that "residual proceeds [from the 2004/2005 buybacks for phases I and II] will be lodged against the personal debts"; and that the loan "will continue to amortise over a 15 year term but will be cleared in full by 2010 upon receipt of funds from buyback of property now being developed at Store St/Damp Store".

99. The wording in relation to funding Messrs Evans and Good for the buy-backs relating to phases I and II under "Debt Retirement/Security Cover" however couch this facet of the proposal in somewhat less certain terms than that averred by the plaintiffs. The document uses terms and phraseology such as "We have also assumed that in 2005, Messers Evans & Good will require a level of funding to complete the buybacks."; "If this is the case"; "we may still have a residual debt to Evans & Good"; and "…if AIB banked Messers Evans & Good as outlined". I note that this does not refer to the later buy-backs preliminarily set for 2010 for the options to be on phases IV and V. This does not show an understanding on the part of AIB that this element was set in stone, that this was a course of action that was definitely going to happen. Ms. Joan Nolan accepted that AIB were operating on the basis that there was some doubt whether AIB would bank Messrs Evans and Good and that this was inconsistent with the plaintiffs' contention that this element of the proposal was already a done deal.

100. Thirdly, although a buyback in 2010 is outlined under "Debt Retirement/Security Cover" and details of put and call options are provided for phases IV and V which would be the basis for funding for Messrs Evans and Good as outlined in appendix 4, these put and call options were not at that point in time in existence and would not be until late 2003. Although these put and call options were to follow the general approach taken with previous options and provide for split ownership, the values provided for these options could only have been projections. I therefore find that these put and call options and their values were mere assumptions on the part of AIB for the purposes of the Credit Committee provided to Ms. Kierans and Mr. Clarke during prior discussions with representatives of the plaintiffs and Messrs Evans and Good.

101. Fourthly, on inspection of appendix 4 of the mark up, particularly the 2010 column of the analysis, while it illustrates a buy-back resulting in the complete repayment of the Nolan Family's debt, there is neither a corresponding increase in the debt owing by Messrs Evans and Good nor are there any calculations outlining the funding Messrs Evans and Good would require for the put and call options for phases IV and V. This is in contrast to the details provided in the analysis concerning the operation of the put and call options for phases I and II. Under the 2004 and 2005 columns Nolan Transport debt reduces arising from payments received from the exercise of put and call options but also there is a corresponding increase in Messrs Evans and Good debt and calculations relating to same. It would therefore appear from the document that no consideration outside of general discussions had at that point been given to funding requirements for the 2010 buy-back to a sufficient degree to enter figures on the analysis, or at the very least, AIB did not have an understanding that they were to fund the 2010 buy-back and transfer the debt to Messrs Evans and Good.

102. Fifthly, the Debt Level and Repayment Analysis provided in appendix 4 is described as the "Nolans and Evans & Good Scenario" (emphasis added). On the face of it and taken in conjunction with the preceding wording in the document outlined above on funding Messrs Evans and Good, the document therefore merely outlines how borrowings may reduce and repayments may be made based on information provided in earlier discussions and correspondence. Although the document details Messrs Evans and Good being provided funding and making repayments, a breakdown of the funding they would need and that their loan of €2.75 million would amortise over 15 years at 5%, these figures must be coloured by the fact that the analysis is merely a scenario. I do not accept the argument made by counsel for the plaintiffs that this was not merely a scenario but was in fact how AIB saw the borrowings being paid off, in particular that there was no other scenario detailed in the Discussion and that thus this was the only approach that would be taken by AIB and therefore they were aware that they would be funding the buy-backs for Messrs Evans and Good and transferring the

debt.

103. This proposition does not bear up to scrutiny. It is clear from the wording of the Discussion Paper and the evidence given by Ms. Kierans that this was the *optimum* approach to be taken if all the assumptions came to pass which included as highlighted above put and call options being exercised, split ownership resulting from their exercise, Messrs Evans and Good seeking funds from AIB for the buy-backs and AIB providing it to them. The court is satisfied that it was AIB's understanding that they would have recourse to the Nolan Family's personal finances should a shortfall arise; this is plain from the point in the Paper that "we have full personal recourse to the family members for the €9.5m debt, and for any shortfall in repayments going forward". This would also explain in part why there is so much detail as to the net worth of the plaintiffs, particularly the Nolan Family.

104. The court is satisfied on the evidence that this, while not explicitly noted, was, as AIB understood it, the alternative scenario that may arise should certain assumptions not be carried through; the worst case scenario would then be the necessity to realise the various securities.

105. Sixthly, the statement that AIB had full personal recourse to the Nolan Family for the €9.5 million is at variance with both the contention that the loan monies were to be divided into the Isaac and the Non-Isaac loan amounts and that there would be a debt transfer of the Isaac amount. If AIB understood such a division was in fact in operation, there would be no reason for the authors to note that they had recourse to the Nolan Family for the full amount of the borrowing, and it would be entirely wrong and misleading for AIB to do so. Also, I accept Ms. Kierans' evidence that had limited recourse to the borrowers been discussed at meetings prior to the creation of this document she would have entered such information into the Discussion Paper. Joan Nolan herself accepted that this phrase was inconsistent with the plaintiffs' claims.

106. Thus, on an objective examination of the text and appendices both on individual bases and in the context of the Paper as a whole, the court is satisfied that it does not provide any evidence to support the contention that AIB understood that it would fund and/or transfer the debt to Messrs Evans and Good, or that they had agreed to such terms. Rather, the court finds on balance that AIB understood at the time that the primary scenario was that laid out in appendix 4 – that Messrs Evans and Good would exercise the put and call options on phases I and II, that they would request funding from AIB and pay Nolan Transport and that these monies would then be used to pay off the borrowings by the plaintiffs in 2004/2005. A similar scenario could be said to be anticipated for phases IV and V arising from appendix 2 and 4 of the markup. The authors believed that where certain of these assumptions did not come to pass AIB would have recourse to the Nolan Family for any shortfall that arose.

107. The sinking fund shall now be considered separately. There is slim evidence on this matter arising from the Discussion Paper. The authors state "[w]e are also advised that Messrs Evans and Good are building up their sinking fund to fund buybacks as they arise (currently this is at €1.5m)." There is no linkage evident either explicitly or implicitly between this statement and the life policies of Messrs Evans and Good utilised as security for phases I and II which mirrors the evidence provided by Ms. Kierans that she was unaware that these matters were related. The €1.5 million sinking fund is outlined in note 3 of appendix 4 of the Paper in which the calculations are shown indicating the level of funding Messrs Evans and Good required for Put and Call options on phases I and II in 2004/2005.

108. Both sets of put and call options, those already in place and those to be put in place for phases IV and V, are considered in the "Background to Request" section which states "Messrs Evans & Good will also enter into a Put & Call option agreement to buy back 70% of the interest in the property at the end of the lease. As with the other Put & Calls relating to the hotel, this will essentially give Evans & Good a 70% share in the entire hotel/pub complex, with the Nolan Family retaining the other 30%." The put and call options for all phases are outlined in appendix 2 of the Discussion Paper. The sentence quoted above on the sinking fund then appears in the subsequent section.

109. Given its natural meaning and considering the evidence on the matter, particularly that of Ms. Joan Nolan's acceptance that the Paper does not discuss the "missing sinking fund" on her reading, the court is satisfied on the balance of probabilities that the sentence regarding the sinking fund indicates that the sinking fund Messrs Evans and Good were building up was for the totality of the buy-backs. The sentence follows swiftly on from the comments highlighting both sets of put and call options yet there is no such distinction made here, the fund relates to more than one buy-back, it refers to more than one put and call option. Although the sinking fund is provided in the calculations relating to put and call options 1 and 2 under note 3 of the Debt Level and Repayment Analysis in appendix 4, this does not contradict the natural meaning of the sentence as the sentence says that the sinking fund was for use with buy-backs as they arose.

110. On the balance of probability therefore, the court finds that AIB at this point in time were of the understanding that there was only one sinking fund in place. If AIB understood that a second sinking fund was in place the court is satisfied that it would have been included in the Discussion Paper. Information on phases IV and V was included in the Paper such as the buy-back in 2010 in appendix 4 and the put and call options for phases IV and V despite the fact that they were not in existence at that time. As such, it would stand to reason that if AIB staff understood that they were responsible for the maintenance of a second sinking fund, the fact that there is no mention of a second sinking fund is a telling indicator of AIB's understanding at the time.

111. The court does not accept Mr. Fitzgerald's evidence that the sinking fund mentioned in appendix 4 was only for buy-backs relating to phases I and II as the Paper does not indicate any such limitation. As the court has already found, funding for Messrs Evans and Good for phases IV and V was not considered in the Paper. Consequently, just because the put and call options on phases IV and V do not appear in the calculations does not necessarily mean that the sinking fund does not also apply to them. Mr. Fitzgerald's claim would contradict the natural meaning of the highlighted sentence and Ms. Kieran's evidence which supports this natural meaning.

112. On being asked about information relating to the sinking fund outlined in the Paper and commitments relating to same Ms. Kierans stated:-

> "Neither the Nolans nor Evans and Good ever requested the Bank to set up and oversee a formal sinking fund. The only reference to a sinking fund that I was aware of was this one and a half million that had been pre-advised to me at the meeting and which I understand were life policies that were already in existence for Messrs. Evans and Good." (Day 18, p. 20)

She further stated:

> "I was told that Evans and Good had already got one and a half million available through these life policies, or these policies, that they were going to effectively use to reduce that borrowing requirement when the time came." (Day 18, p.

She also said that note 3 which is outlined under the Debt Level and Repayment Analysis at appendix 4 was the only reference to a sinking fund.

113. Ms. Kierans asserted under cross examination that the Discussion Paper "never said where the 1.5million was going to come from other than policies and that's why the Bank sought evidence of the policies".

114. Whether this situation arose because the second sinking fund was never raised or as a result of a miscommunication of some form or another cannot be determined as there is insufficient evidence on that front to make a determination.

115. This finding is neither supported nor contradicted by evidence on previously considered matters as there was insufficient evidence to determine the issue. Whether this understanding is in fact consistent throughout the rest of the chronology of events or is in fact altered or varied arising from future interactions between the parties remains to be seen and shall be examined in due course.

(v) Indicative Heads of Terms dated 20th December, 2002 relating to Phases IV and V

116. The Indicative Heads of Terms were produced by the Credit Committee and finalised by Ms. Kierans and Mr. Heffernan in the ordinary course of business and signed by the Nolans on 23rd December, 2002. They were the terms upon which the Credit Committee were willing to provide the funds to the Nolan Family, setting out the requirements and conditions they had to fulfil before funding would be provided. Ms. Kierans stated that she had no authority to make any amendments to the terms that were to be the basis of the Indicative Heads of Terms. She stated that:-

> "Sean Heffernan, who was the senior lending manager at the time, had some [authority] but not for amounts of money and not for anything radical. You know, he might be able to amend something minor in the pre-condition or to vary it a little bit but nothing major….anything major, you would not be able to amend it without getting a re-approval [from the Credit Committee]. You certainly wouldn't be able to amend the amount of money, the interest rate and the security provisions without going back." (Day 18, pp. 66-67)

Thus, it is clear that the Indicative Heads of Terms came down from the Credit Committee and any major alteration made to the security, lending amount or interest rate had to be re-approved via a formal procedure/request to the Credit Committee to permit such amendment. Mr. Heffernan and certainly Ms. Kierans could not remove or alter any such term without prior approval.

117. The legal status of Indicative Heads of Terms was considered by Finlay Geoghegan J. in *AIB v. Galvin Developments (Killarney) Ltd. & Ors* [2011] IEHC 314 wherein she reasoned that:-

> "99. …The Heads of Terms is a commercial agreement and must be construed objectively in accordance with the principles in Analog Devices B.V. The Heads of Terms were not intended to constitute an [unconditional] binding agreement between the parties to make available or take the facilities referred to therein. Neither, however, construing them in accordance with their terms in the relevant factual matrix were they intended to be devoid of contractual effect. AIB were aware at the time that the Heads of Terms were being sought for the purpose of the Galvin Brothers taking further steps to enter into a co-ownership agreement with Mr. Shee and Mr. Hanrahan and for the purpose of permitting the joint venture parties enter into an agreement to purchase the lands in question. The joint venture parties needed to know that facilities would be made available. Each of those steps took place prior to the issue of letters of sanction. The final paragraph of the Heads of Terms states:
>
> "The facilities, and Terms and Conditions attaching, as outlined in this Term Sheet, are subject to formal approval by the Bank and the issuance of a Formal Letter, including the Bank's standard Terms and Conditions, for acceptance by the Borrower."
>
> 100. The Heads of Terms, in my judgment, were a representation by AIB that subject to two conditions, it would make facilities available, on the terms and conditions indicated or any variation agreed to the five named persons as joint venturers in the Coolegrean project for purchase and development. The two conditions were formal approval by AIB and the issuance of a formal letter of sanction. The representations were intended to induce the potential borrowers to continue in negotiations with AIB to obtain the facilities referred to therein."

118. Finlay Geoghegan J. based this position on the law relating to collateral contracts. She said:-

> "97….I am using 'collateral contract' in the sense explained by Cooke J., in the Supreme Court of New Zealand in *Industrial Steel Plant Ltd. v. Smith* [1980] 1 N.Z.L.R. 545, at p. 555, quoting with approval from Cheshire and Fifoot on Contracts (5th N.Z. Ed. 1979, 53-54):
>
> "The name is not, perhaps, altogether fortunate. The word 'collateral' suggests something that stands side by side with the main contract, springing out of it and fortifying it. But, as will be seen from the examples that follow, the purpose of the device usually is to enforce a promise given prior to the main contract and but for which this main contract would not have been made. It is rather a preliminary than a collateral contract. But it would be pedantic to quarrel with the name if the invention itself is salutary and successful."

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

> 98….The finding of a collateral contract may also be guided by policy considerations. Counsel for GDK and the Galvin Brothers drew attention to the statement in McDermott *'Contract Law'* at para. 6.42:
>
> "Whether or not a collateral contract will be found to exist is often guided by policy considerations. For example, in *Industrial Steel and Plant v. Smith*, Cooke J. stated that 'there is some room for judicial discretion here, but that is often the case with suggested collateral contracts …' In his seminar article on collateral contracts, Lord Wedderburn also focused on the element of judicial discretion involved in the process:
>
> "The frequency with which such 'collateral contracts' make their appearance … depends upon the extent to which the courts are willing to spell them out of a situation where this is a possible, but not a necessary analysis. Their increasing

> tendency to favour such a view in cases where justice is promoted by so doing, gives added importance to the 'collateral contract'.""

119. I find that *Galvin* applies to the current proceedings. It is clear that AIB regarded the Indicative Heads of Terms as a collateral contract - €2 million was paid out in January, 2003 on foot of the Heads of Terms – and it regarded itself as bound by it if and when the conditions outlined therein were satisfied. Ms. Kierans' evidence reflects this. On the 14th March, 2003 letter from Mr. Fitzgerald to Ms. Kierans, considered below, Ms. Keirans stated:-

> "…the Bank at the time wanted to get all of the preconditions of the nine and a half million sorted out first before they moved on to the next stage of looking at…another proposal….the Bank would have been happier knowing that all of that was sorted, before we b[r]ought forward another proposal for any further lending." (Day 18, pp. 28-29)

120. Also, in the attendance of a meeting examined below between AIB and Byrne Wallace on 8th May, 2003, Mr. Ronan Egan, solicitor in Byrne Wallace recorded in an attendance note the following comment by the AIB staff present at the meeting which included Ms. Kierans:-

> "The entire transaction was completed before the end of last year and the Nolans were given a cash bridging facility in relation to same….The current arrangement is that there is €7.5 million retained on deposit and only €2 million of the actual loan has been drawn down which has been utilised to re-finance the existing Nolan family borrowings."

121. Although the distance in time between the signing of the Heads of Terms and the Facility Letter is greater than that in *Galvin*, I find that this does not materially affect this finding.

122. It is also clear the Nolan Family treated the Indicative Heads of Terms as contractual in nature which is evident from both their oral evidence before this court and documentation produced at the time. Although Mr. Fitzgerald in the letter of 14th March, 2003 mistakenly referred to the Indicative Heads of Terms as "the letter of loan offer", I find that this illustrates the importance he and by extension the Nolan Family attached to the Indicative Heads of Terms. Accordingly, I find that the plaintiffs were only willing to go ahead with the development works on phases IV and V once the Indicative Heads of Terms came into being, as this gave them the knowledge and comfort that once the conditions were met the remaining €7.5 million held on deposit would be released to them, €4.3 million of which was earmarked for the Isaacs Hotel development.

123. As I have found above, although there were general discussions around the later participation of Messrs Evans and Good prior to the Indicative Heads of Terms, there was certainly no tripartite agreement with legal responsibilities or consequences arising between three sets of individuals. Rather, there were two distinct relationships involved in the development of phases IV and V at this point– firstly, that between the Nolan Family and Messrs Evans and Good concerning the operation of the hotel and the put and call options to be put in place; and secondly, the proposed relationship between AIB and the Nolan Family in relation to the loan sought. There was also no commitment, whether in terms or by way of representation, prior to the Indicative Heads of Terms on behalf of AIB to fund Messrs Evans and Good or to transfer Nolan Family debt to them. In addition, I have found that AIB had not made any commitment thus far to maintain or create a sinking fund (the issue of whether AIB represented that there was to be one or two sinking funds is yet to be determined).

124. Turning to the Indicative Heads of Terms itself, on the natural meaning of the words used there is no mention either explicitly or impliedly of a tripartite agreement between the parties to these proceedings and Messrs Evans and Good. I place particular emphasis on Ms. Joan Nolan's evidence on this point. Ms. Nolan was vague and contradictory on this issue, eventually averring that the schedules in early December were the basis for the tripartite agreement, distancing herself from earlier comments indicating that Mr. Fitzgerald's Development Perspective was in fact the basis. Her general assertion that it arose from a number of documents and was in place prior to signing the Indicative Heads of Terms does not stand up to scrutiny based on the reasoning above where I have found that the early December schedules and other documentation and correspondence did not contain any bases or terms, including the averred commitments, for a tripartite agreement.

125. Taking a similarly objective standpoint as to the claim that a debt transfer was evident from the Indicative Heads of Terms itself, this averment does not on the evidence pass muster. Again, there is no basis for this contention on the natural meaning of the text either impliedly or explicitly. The repayment section provides:-

> "Loan will be structured on a 15-year amortisation schedule, with interest to be paid in advance for each year and equal yearly capital repayments of €633,000 thereafter. A Put and call option will be exercised in 2005 on the Isaacs Hotel complex and the surplus funds from this, after repaying loan relating to this development, are to be lodged as an out of course repayment of the loan herein of c. €2.155m. In 2010 another Put and Call option will be exercised for €6.366m, this is to be used in full to clear the residual loan balance at this time."

126. In particular, the wording of the repayment section indicates that certain lump sum payments are to be received on the loan which would clear it by 2010. As with the early December Debt Level and Repayment Analyses that is all the section provides, there is no statement or commitment that AIB would fund these buy-back payments.

127. Mr. Fitzgerald conceded under cross examination that there was no mention of AIB funding the buy-backs and Ms. Joan Nolan did not disagree with counsel for the defendant's contention that on a reading of the repayment section that this did not exclude the possibility of the Nolan Family having to make the buy-back payments. Although she averred that she understood from this section that AIB would engage in a circular transaction, that the section illustrated the transfer of the debt, I find that there is no reasonable foundation upon which to base this interpretation when the evidence relating to the background and previous documents and correspondence are taken into account.

128. The mere fact that cross guarantees were to be provided by "Nolan Transport Limited for €9.5m, restricted to its interest in Isaac's Hotel and Isaac's Butt Licenses Premises", did not mean that this was required by AIB in contemplation of any form of tripartite agreement or that AIB required it because it was going to fund Messrs Evans and Good (my reasoning for same is outlined below). AIB sought this security because of the split-ownership between Nolan Transport and the Nolan Family. Cross guarantees are often provided by third parties on borrowings to shore up any weaknesses in the lending proposal. In this case, the guarantee was required because of the fact that AIB was afraid that it would only be able to enforce on part of a hotel which in practice may be difficult. As found previously, this did not have the consequence that AIB then by necessity became the only bank that could fund Messrs Evans and Good.

129. Mr. Fitzgerald's acceptance of the fact that a bank would not make funding available without a contemporaneous investigation

of the potential borrowers is also telling and I consider would be a reasonable approach to be taken by a prudent bank in lending substantial monies. While, as counsel for the plaintiffs pointed out, an investigation of the net worth of Messrs Evans and Good did in fact take place, this did not occur until around July, 2003, and was in relation to a lending proposal concerning the put and call options on phases I and II which went through its own application process and did not concern lending for phases IV and V; it was not an element of the current application and was not therefore entered into the Indicative Heads of Terms. As I have found above, although general discussions had been had relating to the involvement of Messrs Evans and Good on the development of phases IV and V, these had not crystallised to a sufficient degree to include any potential lending to them or a commitment to do so on the part of AIB in the Indicative Heads of Terms.

130. Moving on to the sinking fund, Special Condition 6 contains a clause on the sinking fund:-

> "Evidence of funds of €1.5m in respect of Evans and Good sinking fund to be provided to the Bank prior to drawdown."

131. The wording of Special Condition 6 appears clear at least in respect of any potential commitment on the part of AIB at this point to maintain or supervise a sinking fund. The Condition only seeks "*evidence of funds*" to the value of €1.5 million held by Evans and Good in a sinking fund. There is no mention either explicitly or impliedly of any commitment on the part of AIB in relation to any such fund. Also, considering this provision in the proper context arising from the documented correspondence, oral evidence and the court's findings thus far, no such commitment was contemplated.

132. Concessions and points accepted by the plaintiffs' witnesses are important to consider on this issue and further strengthen this interpretation. It was accepted by Mr. Fitzgerald that there was no commitment or duty on AIB arising from the Special Condition relating to a sinking fund. Ms. Joan Nolan in particular also accepted that there was no such requirement and that at this point in time the Nolan Family were responsible for providing evidence on the €1.5 million sinking fund. This element of the claims made regarding the sinking fund matter is the primary issue because if the court accepts that AIB have not and never agreed to maintain or supervise any sinking fund, the issue as to whether there was to be one or two sinking funds becomes immaterial and the importance of same falls away.

133. Turning then to this issue of whether there was just one sinking fund or whether arising from the Indicative Heads of Terms a second fund was required as the plaintiffs claim, it must be recalled that up to the Discussion Paper of 18th December, 2002, I have found that there was insufficient evidence before the court to make a determination on this issue. Although I have found that on the balance of probabilities AIB understood there was just one sinking fund for the options as they arose, this came from a purely internal document. Such an understanding has not to the satisfaction of the court been shown to have been provided to the Nolan Family prior to the Indicative Heads of Terms. This however does not necessarily mean that the internal document has no evidential weight.

134. Special Condition 6 is the only part of the Indicative Heads of Terms that relates or refers to a sinking fund. The condition refers to "Evans and Good sinking fund". The ordinary meaning of these words used in the Condition does not indicate whether it refers to an already existing or new sinking fund. The court considers that the Condition on balance relates to the requirement of "evidence" of a sinking fund and not the provision of a sinking fund itself prior to drawdown. While I have found that the AIB Discussion Paper is to be interpreted as indicating that there is just one fund to be used for all the options as they arise, the Condition itself is not clear on this on an objective view, particularly when the Discussion Paper was not seen by the Nolan Family to inform their understanding of the Condition. The Condition is open to a number of interpretations.

135. One such interpretation is that the Condition only requires evidence of the sinking fund already in existence which accords with AIB's understanding and which might be the more reasonable one to take. The ordinary and natural meaning of the Condition is much more in line with this averment repeatedly contended for and maintained by the defendant, particularly Ms. Kierans. It also accords with the meaning I have found to arise from the Discussion Paper of 18th December. Although I place no weight on that document as a *representation* to the plaintiffs of AIB's understanding, it does have some evidential importance as it has a bearing on the consistency of AIB's claims concerning its understanding of the requirements relating to the sinking fund.

136. Despite this, I find that it cannot be discounted that the Condition could be interpreted as permitting the Nolan Family to have a separate sinking fund established prior to drawdown for this new loan and provide evidence of that fund as a means of fulfilling the requirement. Such fund however would have to have amounted to €1.5 million before drawdown could occur.

137. I do not accept the evidence provided by Mr. Fitzgerald that the Condition can be interpreted as requiring evidence prior to drawdown of how a new and separate fund was to be built up over time prior, during and/or after drawdown which contention would necessarily lead to the conclusion that such funds did not have to be in place prior to the release of funds. Mr. Fitzgerald's and by extension the plaintiffs' interpretation is in sharp contradiction with the natural meaning of the Condition which requires as I have found evidence of a sinking fund in the amount of €1.5 million having already been set aside prior to drawdown and not a mechanism to build up to that amount.

138. If the Condition was meant to require the creation of a new sinking fund that was to be built up over time, which would have involved legal work and gathering of funds, it would have been quite a significant feature of the Indicative Heads of Terms, and if such was the case I believe on balance that it would have been clearly outlined in the document. If in fact a new and distinct fund was to be built up for phases IV and V, this would have required Messrs Evans and Good to build up a substantial amount of money in a space of time which was relatively short when one considers that the fund was to be €1.5 million and evidence of same had to be provided before drawdown.

139. It is also important at this juncture to consider the plaintiffs' claim that there are two separate loans, that being the non-Isaac loan relating to €3.2 million concerning capital gains tax and inter-company loans, and the Isaac loan relating to €6.3 million which included €4.3 million for the development of phases IV and V and €2 million for the purchase of the Damp Store and 23 Store Street. The plaintiffs continually averred that they were responsible for repayment of the interest on the entirety of the loan and capital only on the non-Isaac loan.

140. On an examination of the evidence thus far, particularly the Debt Level and Repayment Analysis spreadsheets of early December and the Indicative Heads of Terms, I do not find that any such distinction was in fact in existence up to and including 20th December, 2002. As with the issue relating to the second sinking fund, I find on balance that the plaintiffs have read these elements into documents and correspondence as well as into discussions with the defendants in circumstances where there is no basis for such an interpretation on an objective reading and evaluation of the evidence.

141. First, there is no such distinction evident from the Indicative Heads of Terms which is the first point in time when potential terms of lending are reduced to writing. There is in fact only one overall loan facility or "Loan Account" contemplated by the document; two

Loan Accounts are not provided for. The terms outlined in the document, the interest, repayment, special conditions and security terms relate to the entire proposed lending facility, the entire €9.5 million. Although a number of purposes are outlined in the document and it is possible to divide them into two groups, these are simply indicating how the €9.5 million loan will be used. The Indicative Heads of Terms does not limit the application of any of the terms to one particular purpose or another, it does not detail separate sets of terms for either the "non-Isaac" related purposes or the "Isaac" purposes.

142. Although the repayments section of the Indicative Heads of Terms may appear to indicate a difference in treatment between the purposes, this falls away when one considers the evidence to this stage on the plaintiffs' allegation of a debt transfer commitment. In particular, the schedules of early December indicate only that out of course payments would be made, they do not indicate where the funds for same would come from, they do not show that AIB intended to provide the funding. The plaintiffs' witnesses themselves accepted that the schedules did not contain any such commitment on the part of AIB, only that they showed the Nolan debt going to zero. As stated previously, the contention that the annual deficits outlined on the 13th December schedule which rent from the hotel would not cover were the only payments the Nolan Family would have to make does not stand up to scrutiny as the schedule highlighted the *predicted shortfall* that they would have to meet. By logical extension this then applied to shortfalls in general that arose during the term period and thereby included any possible shortfall arising from issues relating to the buy-backs. It could not be denied that it was possible that the Nolan Family might have had to come up with the funds.

143. There is also no indication passed bare assertions that such a distinction was in being. In this I prefer Ms. Kierans' evidence that no such distinction arose from discussions or correspondence between the parties as the evidence before the court, particularly the contemporary documentary evidence, corroborates this contention. In particular, no such distinction arises from correspondence from the plaintiffs, the early December schedules, and the Indicative Heads of Terms which the Nolan Family signed.

(vi) March-October, 2003

144. Various correspondence passed between the parties and between the parties and Messrs Evans and Good during this period. As already stated, the arrangements under the letter of sanction dated 20th December, 2002 had already been undertaken and €9.5 million made available on deposit. Release of these sums, apart from the €2 million which AIB advanced to the Nolan Family, was dependent upon conditions in the Indicative Heads of Terms being met. Much of the correspondence and notes taken during this period related to the putting in place of the security required.

145. In relation to the Nolan Transport loan concerning phases I-III, a Position Paper dated 4th March, 2003 indicates that release of a guarantee from Mr. Good was being sought by the "client's solicitors" being Ms. Ann Nolan. In an email dated 24th March, 2003 Mr. Clarke notified Mr. Egan of Byrne Wallace that "Kelly & Sons" solicitors, which I take to be Thomas J. Kelly & Sons, had requested that the letter of guarantee be released. The guarantee was in the sum of €634,000 supported by 56/57 Gardiner St., Dublin 1. The Paper, which was authored by Mr. Clarke and Ms. Kierans, states that "historically [AIB] placed no monetary value on [the guarantee]." The plaintiffs stated in evidence that they were aware of the release of this guarantee.

146. The guarantee and thus the property at 56/57 Gardiner St. was later released. Nothing of dispute arose on this Paper. I find that this release was sought so that the €634,000 could be used to part finance an option on the Isaacs Hostel evidenced in a proposal before the Credit Committee dated 3rd July, 2003 which also detailed funding requests by Messrs Evans and Good for options on phases I and II of the Issacs Hotel. My reasoning for this is outlined further below.

147. The next piece of correspondence of particular import for these proceedings is a letter sent by Mr. Fitzgerald dated 14th March, 2003 to Ms. Kierans providing a number of documents required under the special conditions and security issues in the Indicative Heads of Terms. The letter provides in particular:-

> "Dear Michelle
>
> I refer to your letter of loan offer and enclose the following:
>
> …
>
> 4. Copy of letter from Scottish Provident. As you appreciate encashment values are poor at present.
>
> …
>
> As the initial Put & Call options are only 1 year away we should be looking at the re financing of this now. Both Nolans and Richard & Basil are amenable to this.
>
> Yours sincerely…"

The copy of the email before the court included the following annotation next to the final paragraph from Ms. Kierans: "Lets get €9.5m put to bed + then relook".

148. I accept Mr. Fitzgerald's evidence that this letter arose from discussions with Ms. Ann Nolan and that he sent the letter and enclosed documents to Ms. Kierans in order to fulfil certain of the conditions in the Indicative Heads of Terms.

149. The plaintiffs argued that the sinking fund referred to in the letter was in fact the first sinking fund as the policies provided related to phases I and II when Mr. Fitzgerald had asked Mr. Evans and Mr. Good to provide information on the second sinking fund as per the requirements in the Indicative Heads of Terms. AIB averred that the sinking fund referred to in that letter was the only sinking fund ever raised with AIB and evidence of a second sinking fund was never sought. It was also claimed by the plaintiffs that the annotation by Ms. Kierans was evidence that she sought to finalise the funding at an early stage. This was also denied by AIB.

150. As to the first point, I find on balance that the manner in which evidence was provided on this matter indicates that there was only one sinking fund in place for the purposes of the buy-backs. First, Mr. Fitzpatrick had asked Messrs Evans and Good for evidence of the sinking fund as required under the Indicative Heads of Terms and was provided with a letter from Scottish Provident by Mr. Evans. This letter provided a number of policy numbers and their value, one of which at least is evident in the Facility Letter dated 24th November, 1999 arising from the refinancing of phases I-III with AIB. Thus, it is clear that this policy had been assigned to AIB for these earlier phases and acted in part as the sinking fund for those phases. The provision of evidence of the same policy by Mr. Evans arising from a request from Mr. Fitzgerald is indicative of the fact that there was only one sinking fund in place.

151. Mr. Fitzgerald's evidence concerning the letter further strengthens this point – he said that he had asked for evidence of the sinking fund to be used with the new facility and soon to be arranged option agreements and was provided with information relating to what he thought was the fund for the previous phases. He says this specifically in his witness statement – he passed "on information as to the value of the life policies it was proposed would be part of that second sinking fund" which I take to be the contents of this letter as there is no evidence as to any other correspondence Mr. Fitzgerald sent enclosing information relating to a fund. There would and could not have been any reasonable justification for Mr. Fitzgerald to seek information on sinking fund 1 where he had written to Messrs Evans and Good in relation to the Indicative Heads of Terms of December, 2002 on phases IV and V. Although it does not appear that Mr. Fitzgerald grasped the ramifications of Mr. Evans' evidence as to the life policies for the sinking fund, the Nolan Family ought reasonably to have been aware that a life policy in this letter which was evidence of the contents of the sinking fund for the new lending, was also assigned to AIB in the Nolan Transport refinancing loan's Facility Letter which was freely available to the plaintiffs.

152. As to the final paragraph of Mr. Fitzgerald's letter to Ms. Kierans, I am of the view that this letter illustrates that there was no agreement in place that AIB was to fund Messrs Evans and Good when it was written. This finding is based particularly on the evidence provided by Mr. Fitzgerald and Ms. Kierans.

153. Mr. Fitzgerald accepted and conceded on numerous occasions under cross examination that no deal was done at this point in time and possibly not until 2005 when AIB approved the loan to Messrs Evans and Good but "everything was leading up" to it, "discussions had taken place". Mr. Fitzgerald accepted that he was aware that Messrs Evans and Good had not yet obtained funding from AIB, and that they had not obtained funding for 2010. He also states that he was aware that Messrs Evans and Good would have to apply for the loan and that AIB was entitled to say no if there were issues with the application.

154. These admissions are in sharp contrast to the case made by the plaintiffs. If AIB had indeed committed to funding Messrs Evans and Good, it is illogical at best and nonsensical at worst that Messrs Evans and Good would need to apply for funding and that AIB could turn down their application. The fact that this very scenario was borne out in July, 2003 emphasises this point. Mr. Fitzgerald's comment that "I just put a little reminder there as the initial Put and Call is only a year away, we should be planning for that" is also illuminating as it indicates that this point was forward looking and that the issue of funding Messrs Evans and Good was not settled, that there was no commitment by AIB to fund them.

155. Ms. Kierans' handwritten note beside the last paragraph – "Lets get €9.5m put to bed + then relook" – is also supportive of the court's interpretation. Her note is in accord with the comments emphasised above by Mr. Fitzgerald in that Messrs Evans and Good would have to apply for funding. It also indicates that the issue was not settled and that no commitment had been made by AIB as it contemplates AIB entering discussions about another proposal only after, as Ms. Kierans put it, getting "all of the preconditions of the nine and a half million sorted out". I accept Ms. Kierans averment however that this position was not set in stone and that it was open to AIB to enter discussions prior to the finalisation of the conditions on €9.5 million.

Meeting between AIB and Byrne Wallace dated 8th May, 2003

156. The next evidence to consider is that concerning the meeting between Byrne Wallace and AIB on 8th May, 2003 which was the first point in time that Byrne Wallace became involved in the loan transaction for phases IV and V.

157. Byrne Wallace were contacted on 13th January, 2003, when Ms. Kierans emailed Mr. James Moran, a solicitor who had previously worked on the refinancing loan for phases I and II which included funding for phase III. Mr. Moran then forwarded this email the following day to Mr. Egan, another solicitor within Byrne Wallace.

158. A typed attendance of the meeting on 8th May, 2003 was made by Mr. Egan following the meeting that same day. Mr. Egan also made hand written notes both prior to and during the meeting.

159. As with the internal AIB papers examined above, this was an internal meeting between AIB and its solicitors and the attendance or contemporaneous handwritten note of the meeting were not accessible to the Nolan Family. As such, it cannot form the basis of any representation to the plaintiffs. However, the meeting, the attendance, handwritten notes taken by Mr. Egan and the viva voce evidence surrounding same may have evidential weight in that they may, as with the AIB internal documents, have a bearing on the consistency with which AIB held its position as claimed in these proceedings or may disclose that representations were previously made or terms entered with the Nolans.

160. Both witnesses for the defendant and the third party were largely in agreement as to the contents of the attendance note and that it closely followed how the meeting progressed. Two main issues arose from the attendance and the handwritten notes by Mr. Egan and were considered in detail during proceedings, these being matters relating to residual debt to Messrs Evans and Good and the likelihood of financing them in addition to the sinking fund issue. The plaintiffs claimed that the evidence illustrated the intention that there was to be a second sinking fund and that the parties discussed the commitment to fund Messrs Evans and Good. These contentions were disputed by the defendant.

161. As to the first matter, I do not accept, as was put to witnesses by counsel for the plaintiffs, that there was discussion of any form of commitment on the part of AIB to fund the residual debt to Messrs Evans and Good or that there was any evidence of same.

162. The meeting attendance provides on this matter:-

> "Michelle thinks that there is some mechanism whereby on the day the options are exercised the property is transferred to Evans & Goode and the next day a 30% share in same is transferred back to the Nolans.
>
> …
>
> In relation to the repayments clause, it was agreed with the Nolans that the previous loan to the transport company would be repaid first out of the proceeds of the existing Put and Call Options. There may be a difficulty with the surplus funds in that it is intended that these will be utilised to redeem the new loan to the individual family members but this will be in breach of Section 31. Therefore, a fresh proposal is required from the Nolans in relation to the terms of repayment required.
>
> The reference to interest in advance in the repayments clause is correct as a full interest payment was made at the end of 2002 at the Nolans' request. In effect, this is a 15 year term loan with a reducing scale but the aim is that it is fully repaid by 2010. The repayment is to be effected by utilisation of the proceeds of the Options and in the meantime, the capital amount will be reduced accordingly.

…

> It was agreed that there should be an element of cross security in that the existing loan to the company should be cross secured by a Guarantee and first charge from the individuals in respect of the two new properties. This is important in light of any default by one of the borrowing parties in relation to the relevant facility letter."

163. I cannot accept the plaintiffs' contention regarding evidence of a commitment to fund Messrs Evans and Good. While it is clear that AIB were aware of how it was anticipated the phase IV and V loan would be repaid, i.e. via the proceeds from the exercise of the options, there is nothing to suggest that AIB had any pre-existing plan to lend monies or transfer debt to Messrs Evans and Good to ensure that those options were exercised. The note states that Ms. Kierans only "thinks" that there is a mechanism at the end of the transaction to transfer a 30% interest to the Nolans. This is not evidence of the sort one would expect if an agreed procedure was already in place.

164. It was repeatedly rejected by Mr. Egan that the issue formed any major element of the meeting, that it was only mentioned effectively in passing by Ms. Kierans. He stated in clear and frank terms that he was never instructed by AIB that they had reached agreement to fund Messrs Evans and Good at any point until October, 2004. I accept his evidence that it was anticipated that such an approach would be made by Messrs Evans and Good but that nothing had been agreed at that point. If it were in fact the case that such an undertaking was provided by AIB, the court considers that it would have featured much more prominently and in a different fashion to that outlined by Mr. Egan in the note.

165. I accept Mr. Moran's evidence that "it would have been understandable that the Bank would consider funding Evans and Good in the circumstances of the transaction." This is so as AIB would "have an involvement with the ongoing loans of Nolan Transport and [the Nolan Family]" and the particular circumstances of the split ownership between Nolan Transport, the Nolan Family and Messrs Evans and Good. However, this cannot lead to a conclusion that simply by reason of the raising of the the residual debt that AIB was accepting or acknowledging some form of commitment on its part to fund Messrs Evans and Good or to transfer the Nolan Family debt.

166. In addition, this is entirely consistent with the findings that I have already made on the matters examined above.

167. The court considers, after examining the attendance note, the handwritten note, the witness statements and the viva voce evidence given during the proceedings, that there was some divergence between AIB and Byrne Wallace on the question of a further sinking fund for lending for phases IV and V of the Isaacs Hotel. The court is satisfied that the meeting on 8th May is the first time that the issue of a further sinking fund was clearly raised, and that it was raised by Byrne Wallace.

168. It is apparent that there was a lack of clear understanding during this meeting as to the circumstances surrounding the sinking fund issue, whether there was to be a second sinking fund, and this confusion was carried through into correspondence between AIB and Byrne Wallace during the work on the Facility Letter. This will become clear from the examination of the later correspondence and documentation conducted below. However, lack of clarity on this issue is separate from the issue of whether AIB represented to the Nolan Family that it would maintain and supervise a fund at some point up to this stage or had entered terms to that effect. The court also bears in mind that the evidence relates to matters arising over 10 years ago, and while contemporaneous documents may assist recollection it is inevitable that further lack of clarity will result from memory fade with the passage of time.

169. A reading of both the attendance and Mr. Egan's handwritten notes taken during the meeting make it apparent that the possibility of two sinking funds was considered. This was accepted by Mr. Egan, Mr. Moran and in particular Ms. Kierans who importantly were all present at the meeting. I accept Ms. Kierans' position that the matter was not raised by her but by Byrne Wallace. However, confusion arose on the evidence as to Mr. Moran and Mr. Egan's views regarding whether there was a requirement of a second sinking fund arising from the Indicative Heads of Terms or whether they were of the opinion that a second sinking fund should be sought to provide AIB with a more secure position beyond the requirements of the Heads of Terms. It is also unclear what Mr. Moran and Mr. Egan were told by AIB's staff regarding the assets to make up the fund.

170. The attendance note and handwritten note would appear to be at odds on one interpretation. The attendance states:-

> "In relation to the Special Conditions, the details of the sinking fund of Evans & Goode which is apparently in place to pay off/exercise the options in place needs to be reviewed and the Bank should consider taking security over same. In addition money should also be set aside regarding the present options to be put in place. It was agreed that we would raise the issue of the option arrangement with Ann Nolan." [Emphasis added]

171. The handwritten note taken by Mr. Egan similarly states:-

> "? Conditions ? Evans + Goode ? sinking fund to pay off/exercise first options in place ? sinking fund details required.
>
> - Monies also need to put aside regarding the present sinking fund + security over sinking fund."

172. The use of the word "should" in the attendance note necessarily implies that the raising of a fund had not been carried out or already agreed with the plaintiffs and that the sentence is forward looking, pointing to a fund being additional to the Indicative Heads of Terms. Although the handwritten note indicates similarly that money also needs to be put aside, it was with regard to "the present sinking fund" which it could be argued illustrates that there was an understanding that there was to be a second sinking fund arising from the Heads of Terms.

173. The witness statements and oral evidence provided during the proceedings illustrates a contradiction in and a lack of understanding arising from a deficiency of information provided to Mr. Moran and Mr. Egan on the sinking fund issue during the meeting.

174. It was put to Mr. Moran in cross examination that reference in the attendance note to "details of the sinking fund of Evans and Good which is apparently in place to pay off or exercise the options in place", referred to phases I and II. Mr. Moran replied:-

> "I can't say for sure that that's the case because when there's a reference -- And I do accept that it could be read in a context of – When it says "in place to pay off or exercise the options in place….the Bank should consider taking security over same", certainly the context there was the current transaction in terms that the Bank should consider taking security."

175. Mr. Moran in his direct evidence said:-

> "We made the point to the Bank in the course of that meeting that we felt they should take security in relation to whatever sinking fund that was to be provided." (Day 23, p. 135)

176. Mr. Egan in his witness statement said:-

> "We advised that the Bank should consider taking security over the sinking fund which we were told was already in existence to fund the exercise of the options in place at that time. We also advised that funds should also be set aside regarding the options to be put in place pursuant to the loan facilities to [the Nolan Family] being discussed at the meeting."

177. Mr. Egan further stated when giving his oral evidence:-

> "I suppose at that point in time there were two strands to the sinking fund requirement. We would've envisaged obviously the previous phase 1 and 2 loans that were already in place -- the phase 1 and 2 loans that had completed and the security in place. So there would obviously have been a sinking fund requirement in respect of those loans and those phases and we recommended that we should get, I suppose, information regarding that sinking fund. And then there was the second issue of the present loan facility, which was obviously the loan facility we were dealing with during the course of that meeting, the 2003 facility to the Nolan family partners. And there was the additional requirement, which was as per the indicative heads of terms, that there was to be a sinking fund put in place for that particular facility as well."

178. Despite the above confusion I find that the sinking fund already in existence was that which was considered to be outlined in the Indicative Heads of Terms in this meeting. The oral evidence that has been provided on this aspect of the meeting from witnesses for Byrne Wallace was vague, perhaps understandably due to the passage of time, and uncertain. I therefore attach greater weight for the basis of this finding to the objective meaning of the handwritten note, which was taken contemporaneous to the meeting on 8th May, 2003, and the attendance note, which was completed later that day by Mr. Egan with the benefit of the handwritten notes and Mr. Egan's recollection of the events of the meeting.

179. My conclusion on this issue stems from the fact that it is quite clear from both the attendance note and the handwritten note that the sinking fund which Mr. Egan relates to the Special Conditions of the Heads of Terms is the fund concerning the options already in place. In both sets of notes the second sinking fund is dealt with on a different line and on a separate basis from the "Conditions" or "Special Conditions" which are references to the Indicative Heads of Terms.

180. The notes also highlight the lack of information available to Byrne Wallace and AIB regarding the sinking fund for the options already in place as Byrne Wallace were not aware that security was already taken over the policies making up the fund, more particularly that the policies were already acting as security for the earlier lending to Nolan Transport in 1999 for phases I-III.

181. Mr. Moran stated for instance that at this time:-

> "…we still didn't know what the detail was and I don't recall at this stage whether it was going to be by way of a policy….I was here and I recall Michelle Kierans evidence and her saying she had been informed that there was such an amount available."

182. I accept the evidence provided by the witnesses for the third party that in providing their advice they sought to ensure that AIB would hold the most secure and risk averse position it could when the loan was finalised. The provision of such advice is the role of a prudent, experienced lawyer which I find Mr. Moran and Mr. Egan to be, and it is up to the client, in this case AIB, whether they wish to follow through on that advice.

183. The court finds that Ms. Kierans did not consider security over any sinking fund to be necessary for the reasons she provided in evidence, namely the net worth of the borrowers, the current and projected performance of the hotel and the proposed security over the hotel. Despite this, the court concludes that Mr. Moran and Mr. Egan did in fact leave the meeting with the impression they could seek information on the value of the first sinking fund and evidence of funds for a second sinking fund and security over same in furtherance of their role to protect the interests of their client. Although I accept that Mr. Kierans told Byrne Wallace that it was not a key issue for AIB, the impression formed by Mr. Moran and Mr. Egan was not denied by witnesses for AIB. This finding is also corroborated by the correspondence between the various parties from May up until the end of September as AIB did not contradict Byrne Wallace's solicitation of information from Ms. Ann Nolan relating to a second fund, particularly when AIB staff were copied on emails to Ms. Ann Nolan or received copies of correspondence.

Progression of the Lending Application through to October, 2003

184. The Court shall first examine the evidence relating to the sinking fund matter and then move to consider the evidence relating to a debt transfer and funding of Messrs Evans and Good for phases I and II of the Isaacs Hotel.

Sinking Fund

185. Arising from the meeting of 8th May, Byrne Wallace wrote to Thomas J. Kelly & Sons on 12th May, 2003 requesting certain information for the purposes of drawing up a facility letter. A copy of that letter was not received at Thomas J. Kelly & Sons until 21st May, 2003. A copy was also sent to Ms. Kierans and Mr. Clarke via email on 12th May.

186. The letter provides in the introductory paragraph:-

> "We understand that AIB has agreed, subject to finalising the terms of the loan facility agreement, to make available loan funds in the amount of €9,500,000.00 to your clients, of which the amount of €2,000,000.00 has already been drawn down, and we have been instructed to finalise the facility letter and put in place all required security on foot thereof.

In order to draft the appropriate facility letter, certain information and documentation is required for review and we would be grateful if you would respond on the following…"

187. Various matters of concern to these proceedings, relating to the phase IV and V lending and existing loans, were raised in the letter:-

> "6. **SINKING FUND** - Please let us have details of the sinking fund arrangements or any alternative arrangement put in place by the proposed grantees of the Put and Call Options on foot of the present facility. The Bank requires security over any such account in place.

…

10. **EXISTING LOAN TO NOLAN TRANSPORT (OAKLANDS) LTD.**

…

b. Please let us have details of the sinking fund put in place by Richard Evans and Basil Goode in order to fund the exercise of the existing Options in place in respect of the Isaacs Hotel complex and to purchase the interest on foot thereof. Please advise regarding the levels of the said sinking funds."

188. It would have been primarily Ms. Ann Nolan but also Mr. Fitzgerald who progressed the loan application up to mid 2003, corresponded with AIB and Byrne Wallace, and met the necessary conditions. Unfortunately, due to medical issues Ms. Ann Nolan is unable to recall to any great extent this period of time. As to her ability to recall events she stated as follows:-

> "…short term memories are not converted to long-term memory….I simply, I just cannot remember events. But if I am reminded no, sorry, I can't say I don't blank not remember…events. It can happen that I can simply not remember occurrences or events and if that is so well then that is so. Some things I remember, some things I don't."(Day 13, pp. 8-9)

She also said:-

> "I don't remember a lot separately from my documents [of the period 2002-2003]. My documents are my memory in large parts." (Day 14, p. 18)

189. Ms. Ann Nolan further stated:-

> "I'm not a stranger to these documents. This is why I speak to my documents. Like, I think as has already been tried to be explained, I have visual recognition….And I have visual recognition of documents, but I cannot talk to you in blank. I mean, I can't talk to you about this…without visually referring to it." (Day 13, pp. 35-36)

190. On the issue of the sinking fund, Ms. Ann Nolan placed a number of marks beside the various paragraphs on a copy of the letter of 12th May which she faxed to Mr. Fitzgerald and Mr. Evans on 2nd July, 2003. She said that adjacent to para. 6 titled "Sinking Fund" she wrote the initials of Mr. Fitzgerald, Mr. Evans and Mr. Good and stated during the proceedings that para. 6 referred to the sinking fund for the phases IV and V loan. Para. 10(B) is only initalled for Mr. Egan's and Mr. Good's attention. It was not disputed by any of the parties that para. 6 and para. 10(B) referred to two separate sinking funds, the dispute rather centred around the interpretation to be applied to these points. The plaintiffs argued that Byrne Wallace informed Ms. Ann Nolan that AIB required evidence of the second sinking fund that was to be put in place and that AIB wanted security over it. Conversley, AIB argued that Bryne Wallace were seeking evidence of any sinking fund in place, not that a second sinking fund was required.

191. Messrs Evans and Good applied for funding from AIB in late June or early July, 2003 for the sum of €4.13 million in relation to exercising the put and call options on phases I and II of the Isaacs Hotel. This was approved in principle when the Credit Committee met on 3rd July with the caveat that a 'security road map' be prepared outlining how AIB's interest would be fully protected throughout the various ownership phases. This was completed by October, 2003 and full approval was granted. This matter shall be further considered separately below.

192. On 7th July, Mr. Evans provided details on the matters marked for his attention by way of a letter to Ms. Nolan. In that letter, using the same numbering as that utilised in the 12th May letter, Mr. Evans wrote the following:-

> "6. Basil has given details of the Sinking Fund to Michelle Kierans. He is obtaining an up-to-date Valuation from Maiden & Co., which we will forward on.
>
> 10(b) See reply to Paragraph 6 above."

193. Ms. Ann Nolan did not provide Byrne Wallace with a response to the information requested in the 12th May letter until 24th July, 2003. Utilising the same paragraph numbering as that in the 12th May letter, Ms. Ann Nolan wrote as follows:-

> "(6.) All details in relation to the Sinking Fund have been dealt with directly between Basil Good and A.I.B.'s Michelle Kierans. At the moment, he is obtaining an up-to-date valuation from Messrs. Maiden and Co., which will be forwarded.
>
> Presumably, you are referring to the Put Call Option [relating to phases IV and V] at (5) above. If not, please clarify and indicate the security being suggested.
>
> …
>
> (10) …
>
> (b)
>
> (c) Reply (6) above…."

194. In the 7th July letter from Mr. Evans, the plaintiffs averred that Mr. Evans was referring at para. 6 to "sinking fund 2" because he was responding to the original para. 6 which related to a fund for the new lending for phases IV and V, and sinking fund 1 at para. 10(B) because he was responding to the original para.10(B) which related to the lending to Nolan Transport relating to phases I and II. Ms. Ann Nolan stated that in her letter to Mr. Egan on 24th July she was merely quoting Mr. Evans' letter. It was accepted that 10(c) was in fact a response to Mr. Egan's request at 10(B) in his letter of 12th May. AIB however were of the opinion that Ms. Ann Nolan and therefore Mr. Evans only referred to one sinking fund in their responses. AIB further argued that even if the sequence of correspondence referred to two sinking funds, there was no evidence of a commitment by the bank to supervise or maintain a fund, that evidence was only ever sought of a sinking fund.

195. Ms. Kierans stated that although it appeared from the correspondence that she had discussions with Mr. Good regarding policy valuations, she could not recall the details of those conversations.

196. Correspondence relating to the other various outstanding conditions from the 12th May letter passed between Byrne Wallace and Thomas J. Kelly & Sons which are not of any particular relevance to the question to be answered in these premilinary issues. A further letter dated 26th August, 2003 would appear to have been posted by DX by Ms. Ann Nolan in Thomas J. Kelly & Sons to Byrne Wallace, the purpose of which was to provide Byrne Wallace with an update as to the outstanding matters from Byrne Wallace's 12th May letter. Ms. Ann Nolan again quoted Mr. Evans responses from his 7th July letter at para. 6 and para. 10(B).

197. Mr. Egan however was of the belief that he did not receive this letter according to Byrne Wallace's files and he did not respond to it in any form. Furthermore, Mr. Egan sent an email to Mr. Clarke on 10th September stating that he had "heard nothing from the borrower's solicitor for nearly three weeks". He also noted that some elements of the letter of the 26th August were incomplete – a date was left out of point 2(b). The letter also refers to a licensing application that it says was already completed when in fact it was not listed for hearing until 23rd October, 2003.

198. Correspondence between AIB and the plaintiffs was sparse until 17th September, 2003 when Ms. Kierans emailed Ms. Joan Nolan stating that she believed that "the only 2 items outstanding from a security perspective" were a legal charge over the property at 20 Store St. and a letter of guarantee from Nolan Transport restricted to its interest in the Isaacs Hotel. The email was copied to Mr. Moran and Mr. Egan. On 19th September, responding to the 17th September email from Ms. Kierans, Ms. Joan Nolan in part requested AIB to issue the letter to have it signed – "Can you issue the letter of loan offer so I can have it signed up for you".

199. Mr. Egan then met with Mr. Clarke of AIB on 24th September, 2003 to discuss the phase IV and V loan transaction. Mr. Egan prepared an attendance note of that meeting in which it is noted that Mr. Egan was to prepare a letter for Ms. Ann Nolan and copied to Ms. Joan Nolan setting out the outstanding issues and that he should begin preparing a draft Facility Letter.

200. Mr. Egan then prepared a letter to Thomas J. Kelly & Sons also dated 24th September, 2003 for the attention of Ms. Ann Nolan. As to the sinking fund issue, Mr. Egan wrote:-

> "Sinking Fund. The Bank requires security over the Sinking Fund to be put in place by the proposed grantees of the put and call options in respect of Numbers 20, 23a, 23b and 23c on foot of the present facility. We will ask the Bank for the details regarding same."

201. This letter was then copied to Ms. Kierans and Mr. Clarke. Handwritten notes were made by Ms. Kierans on her copy indicating that the sinking fund issue was for her to attend to. She also wrote "Evans + Good ? Life policies" and "Brokers" next to the paragraph on the sinking fund issue. On a copy maintained by Byrne Wallace, a note was made by Mr. Egan beside the same paragraph stating "€700k ? coming in as part of the policies".

202. Mr. Fitzgerald contended under cross examination that although AIB was requiring a sinking fund to be put in place, the Nolans also required it. Ms. Joan Nolan commented that AIB and Byrne Wallace appeared to be "out of step" at this point – Ms. Kierans had informed her that there were only two issues to be dealt with while Mr. Egan informed Ms. Ann Nolan that there were eight. Ms. Kierans denied this. The plaintiffs claimed that they interpreted this letter as meaning that there would be a second sinking fund relating to phases IV and V. AIB contended that even if a second sinking fund was evidenced in the letter, it was only to be for the bank's benefit and that it could have released the fund as security at any time without notice to the Nolans. It was further averred that the contents of the letter concerning a sinking fund did not constitute a commitment by AIB in any form.

203. Mr. Egan stated under cross examination by counsel for AIB in relation to his reference to "700k" as coming from certain policies, he was not aware of the fact that AIB had valuations from Mr. Good outlining a value of €700,000 on life policies. Mr. Egan however agreed that the only assets identified for the phases IV and V were these life policies with a value of €700,000.

204. In June/July, 2003 a figure of €762,000 from two life policies had been put forward by Messrs Evans and Good as the sinking fund for their lending application to facilitate their exercise of the option agreements on phases I and II of the Isaacs Hotel. Ms. Kierans averred that Mr. Egans' notations on the 24th September letter referred to this fund and these sources.

205. It would appear from a letter also dated 24th September, 2003 from Byrne Wallace to AIB that Mr. Egan sought to give Ms. Kierans and Mr. Clarke an update as to outstanding requirements relating to the Isaacs development, a request for same having arisen in an earlier conversation, and that he would work on a draft Facility Letter. In that 24th September letter, Mr. Egan specifically makes reference to the sinking fund issue:-

> "One issue that I would like you to check is whether the sinking fund arrangements to be put in place by the proposed grantees of the put and call options on foot of the present Facility have been furnished to you and that you are happy with same."

206. The sinking fund issue then came to a head between AIB and Byrne Wallace at a meeting on 30th September, 2003 attended by Mr. Egan, Ms. Kierans and Mr. Clarke. Mr. Egan produced draft provisions for the Facility Letter on 30th September which provided under "Legal Pre-conditions" *inter alia*:-

> "5. The Bank and the Bank's Solicitor to be furnished with evidence of the sinking fund arrangements currently in place or to be put in place by the proposed Grantees of the Put and Call Options in respect of the First Premises and the Second Premises and to be satisfied with the levels of same."

An addition was subsequently made by Mr. Egan at the end of point 5: "and to be satisfied that no withdrawal will be made from the said fund without the consent of the Bank." Security provisions were also outlined in the draft, including cross guarantees from Nolan Transport for the €9.5 million loan and from the Nolans for the loan out to Nolan Transport, and appeared as those in the final Facility Letter dated 30th October, 2003 with one exception. At point 5 of the draft security measures Mr. Egan provided for a charge over a sinking fund:-

> "A first fixed charge over the sinking fund to be put in place by the proposed Grantees of the Put and Call Options in respect of the First Premises and the Second Premises."

This was later removed arising from the meeting on 30th September.

207. In an attendance prepared by Mr. Egan of the meeting on 30th September between AIB and Byrne Wallace it is noted:-

> "I produced the draft provisions for the facility letter which we went through during the course of the meeting and the

provisions were approved save and except for the following:-

> (a) The Bank do not require a first fixed charge over the sinking fund to be put in place by Evans & Good in respect of the Put and Call Options. They are satisfied that the appropriate provisions are in place and they have been told by Evans and Good that there are certain life policies which will be encashed and these will provide the funds for the exercise of the first options. It was agreed that a pre-condition should be inserted stating that the Bank must be satisfied with the levels of the sinking fund."

208. The plaintiffs argued that the sinking fund being discussed was that relating to phases IV and V only.

209. Ms. Kierans then provided an update on 1st October, 2003 to Ms. Joan Nolan via email and copied it to Mr. Egan. Ms. Kierans stated in evidence that she had previously rung Ms. Joan Nolan to discuss Mr. Egan's letter of 24th September with her. Ms. Kierans states in the first paragraph of the email:-

> "This is a quick update of where we are at vis a vis our discussions last week. I refer in particular to the letter from BCM [Hanby] Wallace which we discussed dated 24th September 2003 as follows…"

210. Point 5 of that email states "There will not be a provision in the Offer Letter re a sinking fund. This issue relates anyway to Messrs Evans & Good and we will attend to same." Ms. Joan Nolan averred that she understood from this email that the Nolans did not have to concern themselves with the sinking fund issue, "it was the first time they said to me they were looking after this part of the security." Ms. Nolan further contended that she was alarmed because it was her understanding that AIB were seeking to remove the sinking fund from Facility Letter and the Isaacs Tax Scheme and that she notified Ms. Ann Nolan and Mr. Fitzgerald of this development.

211. In response in part to these fears the plaintiffs claim that Ms. Ann Nolan wrote letters on 10th October and 28th October and had a telephone conversation with Mr. Egan on 28th October, evidenced in a note of the conversation. This aspect of the evidence was heavily contested and shall be considered separately below.

212. After the meeting on 30th September and receipt of the email from Ms. Kierans to Ms. Joan Nolan on 1st October, Mr. Egan consulted with Mr. Moran on the sinking fund issue. Mr. Egan emailed Ms. Kierans on 10th October, 2003 after these discussions providing her with an update on the progression of the loan. Mr. Egan suggested that:-

> "at the minimum, you should retain some control over the sinking fund…by seeking a commitment that the fund will be maintained at an acceptable level from time to time and that there is a restriction on withdrawals from the fund without the consent of the Bank."

213. Various further correspondence was sent between the various parties through October. Ms. Kierans then on 30th October sent the Facility Letter along with a Booklet on AIB's General Terms and Conditions to Ms. Joan Nolan.

214. As is evident from the correspondence and evidence provided to the court, there was a lack of clarity and communication during this period surrounding the number of sinking funds to be in place right up to and during October, 2003. I accept that Byrne Wallace, in their pursuit of protecting AIB's interests, wanted to seek evidence and did seek evidence in the 12th May letter to Thomas J. Kelly & Sons of a separate sinking fund on the new facility being drawn up and security over same. The fact that the 12th May letter considered two separate funds was accepted by all of the witnesses. I accept as Ms. Kierans put it that "the Bank's solicitor wanted to make further enquires and the Bank didn't have an issue with that."

215. This position emerges clearly from a reading of the letter, particularly points 6 and 10(B) which make a patent distinction between the sinking fund in place relating to the "exercise of the existing Options" (10(B)) and the sinking fund for the "present facility" (6).

216. The court's impression of the evidence provided by Mr. Moran and Mr. Egan was that Byrne Wallace were operating with the understanding after the meeting of 8th May that there was money in the amount of €1.5 million already set aside for the new facility being contemplated. Mr. Moran stated for instance:-

> "we were basing the meeting on our initial discussions on the indicative heads of terms that had been produced and that made specific reference to a sinking fund in respect of the new facilities to the Nolan family partners so paragraph 6 was specifically designed to deal with that requirement and then paragraph 10B was designed to deal with the sinking fund that was referable to phases 1 and 2." (Day 27, pp. 94-95)

217. It is however also apparent that Byrne Wallace and AIB were not aware of the circumstances of the sinking fund for the existing options and whether or not the policies linked to same were also those to which AIB were referred in the December, 2002 meeting for the new facility and whether the monies were also those relating to the earlier phases. Byrne Wallace conducted a "look-back" which they were requested to conduct during the 8th May meeting by AIB relating to the option provisions and not elements of the security on the existing loan. Mr. Moran stated that "…the focus of the look-back was on the options and the phases of development that had been dealt with as opposed to, let's say, the security document per se" (Day 24, p. 96). Ms. Kierans also stated that she was not aware that the specific policies mentioned to her that were to form the fund were already acting as security for the earlier lending for phases I and II.

218. On the interpretation of point 6 on the sinking fund for the new loan facility, Byrne Wallace did not look for information on a sinking fund that was to *be put in place* by Messrs Evans and Good in the 12th May letter but rather looked for information on "sinking fund arrangements or any alternative arrangement *put in place*"; they also stated that the "Bank requires security over any such account *in place*" (emphasis added). Such detailed letters are drafted carefully and this specific letter was produced by an experienced solicitor. I therefore find it significant that the natural meaning of the words used indicate that Byrne Wallace were concerned about any arrangement or fund Messrs Evans and Good had in place at that point in time in relation to the present facility, not one that was to be set up.

219. Byrne Wallace through this letter was seeking to determine how things stood at that time, this being the first substantive correspondence from them to the borrowers' solicitor on the borrowing. As such, the terms of point 6 are much wider than that of the Indicative Heads of Terms to capture any and all information that could be of relevance, particularly when they were exploring an additional level of protection for AIB, i.e. a separate sinking fund, and I accept that Byrne Wallace came away from the 8th May meeting with the impression that they could seek this information and additional security which was beyond what was required by the

Indicative Heads of Terms. Evidence of the fund itself, from a reading of point 6, need not have been in the form of an amount of money/account/assets to the value of €1.5 million; "arrangements" includes the possibility for instance of a mechanism being in place to raise an amount of €1.5 million. It is clear however that it did not relate to the creation of a future mechanism, the letter contemplated arrangements or a fund already in place.

220. Although Byrne Wallace were seeking information on two sinking funds, the provision did not go so far as to say that they, as agent of AIB, were stating that there was to be a second sinking fund in place, they were merely enquiring about any such fund or arrangement and to be provided with evidence of same if it existed. There is no form of acceptance or acknowledgement on the part of Byrne Wallace that they understood AIB to have agreed or that they were agreeing on behalf of AIB to maintain or supervise any additional sinking fund. It must be remembered that Ms. Joan Nolan accepted under cross examination that the responsibility at the time in relation to the sinking fund was the Nolan Family's.

221. I accept that the notations made beside point 6 by Ms. Ann Nolan in or around 2nd Julyin the faxed copy of the 12th May indicated that Mr. Fitzpatrick was to contact Messrs Evans and Good to get them to provide the necessary information to AIB. I also accept that Ms. Ann Nolan saw a difference in treatment between point 6 and point 10(B) because Mr. Fitzpatrick's initials were not placed beside the latter provision on the sinking fund in place for the options already in place. Although the reason for this distinction is likely to be because Mr. Egan treated the sinking fund issues in the letter separately, I would like to reiterate that point 6 was a speculative search for information and did not make the sinking fund discussed at point 6 a requirement.

222. The interpretation of 10(B) was less contentious and was largely accepted by the parties. The paragraph is more explicit and direct than point 6 and seeks details of the sinking fund in place to fund the existing options.

223. Much turns on the interpretation to be given to the letter of 7th July from Mr. Evans to Ms. Ann Nolan in response to the fax she sent of the 12th May letter and the subsequent letter from Ms. Nolan to Byrne Wallace on 24th July.

224. I consider that the objective interpretation of Mr. Evans's letter must necessarily inform the objective meaning of the letter of the 24th, particularly when under cross examination it was accepted that Ms. Ann Nolan was simply quoting "Mr. Evans' response to me as having been the result of his initial reply to me based on me having faxed this letter to him…".

225. On an objective reading of the letter, while the possible existence of two separate sinking funds was contemplated by the 12th May letter, and although the wording of the 7th July letter could have been clearer, on balance the court finds that the answers provided by Mr. Evans to 6 and 10(B) should be interpreted as meaning that there is just one sinking fund.

226. I do not take the meaning as proffered by the plaintiffs that Mr. Evans is saying that Mr. Good is providing details on two separate sinking funds and seeking valuations on two separate funds from Maiden & Co. Although the 12th May letter made queries about sinking funds relating to two separate loans, I find that Mr. Evans is not merely referring back to the same process being undertaken by Mr. Good but is in fact referring back to the sinking fund concerned in point 6. This accords more with the natural meaning of the information Mr. Evans has provided. If there were two sinking funds relating to two separate loan facilities, I find on balance that Mr. Evans would have referred to them separately and fully, and would not have referred to his previous reply at point 6. The fact that he deals with 10(B) in such a cursory manner also leads one to believe that the information provided actually relates to the one fund as, due to the complex financial and legal nature of the proposed development, I consider that Mr. Evans would have provided greater detail in relation to point 6 had the setting up of a second fund been contemplated. I find that if a second fund was to be set up, it would have been at a different stage of creation than that of the fund for the earlier phases and it would therefore be unlikely that details relating to both funds would have been outlined in the same manner and dealt with by such cursory means.

227. In addition to this objective interpretation, the court is satisfied on the evidence before it that the only sinking fund in existence at the time for which Mr. Good could have obtained a valuation was the sinking fund for the earlier phases although this information may not have been available to either AIB, Byrne Wallace or the Nolan Family. It was therefore within the contemplation of Mr. Evans that there would be a single sinking fund in place to deal with the exercise of the options as they arose.

228. Whether Ms. Ann Nolan grasped the full import of Mr. Evans's letter is of little consequence because she was at this point an experienced solicitor, and as such she should at the very least have sought further clarification from Mr. Evans on this point because it does suggest, contrary to the plaintiffs' arguments, that the Nolan Family's understanding and that of Messrs Evans and Good might not be in accord on this issue. It was also in the Nolan Family's interest to obtain this information from Mr. Evans due to the fact that they were relying on Messrs Evans and Good exercising the options and providing them with the money for the bullet payment in 2010, and a second fund would have been of great assistance; but this was not done. This illustrates a certain lack of concern on the part of the plaintiffs and their solicitor as to what sinking fund amounts were to be raised. I agree with Ms. Kierans on this aspect that Ms. Ann Nolan's response in the 24th July letter on this aspect was "cursory" and that she simply repeated the contents of Mr. Evans's letter "without any regard for the substance of the issue".

229. Notwithstanding the court's conclusion as to the interpretation of the 7th and 24th July letters, I conclude that Mr. Egan did in fact come away from a reading of the 24th July letter with the belief that there were to be two separate funds. He did so based on the limited information before him and not on the more detailed evidence now before the court. This accords with Byrne Wallace's later understanding which can be gleaned from the documentation during this period in that reference is continually made in correspondence from Byrne Wallace to the "sinking fund to be put in place" or the "fund…for the present facility".

230. Regardless of this inconsistency, I do not accept that around this time AIB were agreeing or had agreed to creating, maintaining and/or supervising a fund, or that Byrne Wallace had done so on its behalf or that any such representation was provided – at this point both were looking for evidence as to what sinking funds were available. Mr. Fitzgerald stated that he was not sure when this obligation on AIB as claimed arose. Ms. Joan Nolan herself accepted that any obligation relating to the sinking fund was on the Nolan Family to provide information around the time of 7th July when Mr. Evans sent his letter to Ms. Ann Nolan. The letter of the 24th is merely the Nolan Family attempting to fulfil this obligation. From this point in time, the Nolan Family left the responsibility of satisfying AIB as to the sinking fund to Messrs Evans and Good.

231. It is unfortunate but understandable that Ms. Kierans is unable to recall exactly what information was provided to her by Mr. Good as this would have helped to establish whether there were one or two sinking funds in existence. It is also unfortunate that the documentation provided to Ms. Kierans as evidence of the level of the sinking fund was not identified. Neither party saw fit to call Mr. Good, but of course the onus lies on the plaintiff to prove their case.

232. From this point, the Nolan Family stood back from this obligation, having effectively passed it to Messrs Evans and Good, and do not seem to have concerned themselves with the details of the information provided to AIB by them as is evident from the

correspondence and the lack of any evidence indicating that they sought such information from Messrs Evans and Good. In addition, AIB were not forthcoming with the sinking fund information to Byrne Wallace and this led to further confusion on the issue as things progressed into September and October. This is also indicative of AIB's lack of concern for the sinking fund condition.

233. The email of 17th September from Ms. Kierans to Ms. Joan Nolan and the letter of 24th September from Byrne Wallace to Thomas J. Kelly & Sons highlight the lack of communication between AIB and Byrne Wallace on the sinking fund security issue. Although Ms. Kierans highlighted two items from a security perspective in her email which did not include security over a sinking fund, Byrne Wallace stated that security was to be taken over a sinking fund "to be put in place" (emphasis added) for the present facility. Confusion as to this element was largely due to AIB not providing details of the sinking fund to Byrne Wallace which had been supplied by Mr. Good and would have cleared up this issue. I do not accept averments by Ms. Kierans that AIB and Byrne Wallace were not out of step at this time.

234. While previously it had been outlined to Ms. Ann Nolan that AIB would require evidence and security over funds/arrangements in place for the present facility, the letter of 24th September was I find the first time that the requirement of security over new and not pre-existing funds and/or arrangements was brought to the Nolan Family's attention. This went a step further again beyond the requirements of the Indicative Heads of Terms in respect of providing a more secure position to AIB.

235. I do not agree with Ms. Kierans' evidence that Mr. Egan's letter of the 24th September did not concern security issues when she stated that "Mr. Egan's subsequent letter…dealt with a number of matters outside the sphere of security". On the contrary, point 5 of Mr. Egan's letter of 24th September deals specifically with the issue of security over the sinking fund "to be put in place".

236. Although considering the letter objectively, one is led to conclude that Byrne Wallace on behalf of AIB were discussing a new sinking fund for the loan on phases IV and V, it does not go so far as to state, either explicitly or impliedly, that AIB or Byrne Wallace on its behalf were taking on the obligation of creating or maintaining such a fund, nor can the letter be construed as a form of acceptance of same. It is still the case at this point that Byrne Wallace were seeking evidence and security over a fund which the Nolan Family were responsible for ensuring was provided. I note in particular that when it was put to him under cross examination Mr. Egan did not accept that AIB were to revert to him on the sinking fund which might have led one to the conclusion that AIB were in charge of it. He said that his statement in the 24th September letter to Thomas J. Kelly & Sons that "We will ask the Bank for the details regarding same" arose from the fact that Ms. Ann Nolan had previously written to him on 24th July, 2003 indicating that Messrs Evans and Good were providing the information directly to Ms. Kierans. Notwithstanding this knowledge, on an objective view, the comment merely indicates that AIB had information regarding the sinking fund for the new facility, it does not go that step further such that it had this information because AIB had taken charge of the fund.

237. The comments written on the copy of the 24th September letter received by Ms. Kierans, "Evans + Good ? Life policies" and "Brokers", and the copy that came to light on discovery from Byrne Wallace, "€700k ? coming in as part of the policies", are significant. These notes I find on balance for the following reasons relate to the same fund provided by Messrs Evans and Good for the pre-existing options adverted to above and examined in more detail below. First, it is significant that the original value of the claimed second sinking fund in December, 2002, €1.5 million, mirrored that provided for the existing options at that point and that this figure was reduced around the same time in the processes for funding Messrs Evans and Good and the new facility to a value approximating each other, that is €762,000 in the Credit Committee paper dated 3rd July, 2003 relating to Messrs Evans' and Good's loan application connected to phases I and II and €700,000 handwritten on the 24th September letter. It is also of note that both amounts arise from similar sources, that is life policies.

238. Second, no other fund approximating €700,000 was raised in evidence or put before the court during the proceedings. It is therefore likely that the funds are one and the same.

239. This finding has no direct bearing on any representation that may have been made to the Nolan Family as the handwritten notes were internal to AIB and Byrne Wallace, but it does further strengthen the position held by AIB in that it is consistent with the stated position held by AIB from the beginning of the lending process in December, 2002. It however also points to the level of disinterest that AIB had in this aspect because although the figure "700k" was provided to Byrne Wallace, the position on the sinking fund issue must not have been clarified to Mr. Egan because he continued to maintain his understanding of two sinking funds in later documentation.

240. From this point, the Nolan Family were being told two very different things – Ms. Joan Nolan was being informed by Ms. Kierans that there was no security issue relating to the sinking fund left to be considered and Ms. Ann Nolan was told by Byrne Wallace that security over the fund to be put in place was still to be provided. This reflects the contradictory views held by both AIB and Byrne Wallace on security over the sinking fund which stems from the first meeting on the substantive issues in the case on 8th May. AIB were continuing to allow Byrne Wallace to seek this additional level of security despite seemingly having come to the decision that such additional security was not required. It also highlights the lack of communication from AIB to Byrne Wallace requesting them to move away from this additional security measure and its failure to clarify the matter of whether there were one or two sinking funds.

241. The Nolan Family should have been aware from the point in time when Ms. Ann Nolan received the 24th September letter from Mr. Egan that the requirements as to security over the sinking fund were not settled or at least there was confusion as to the condition, and that clarification was desirable. However, this lack of clarity does not affect the fact that AIB up to this point were only seeking evidence of a €1.5 million fund, and Byrne Wallace only evidence and security over a fund, they at no stage had intimated that AIB would establish or maintain a sinking fund. This was clearly outlined to the plaintiffs in a number of documents and correspondence to this point in time.

242. I do however consider that although there was only in fact one fund and although AIB and Messrs Evans and Good were of the view that there was one fund, the objective meaning of the phrase in the 24th September – "Sinking Fund to be put in place by the proposed grantees of the Put and Call options in respect of Numbers 20, 23a, 23b and 23c on foot of the present Facility" – does in fact indicate that there was to be an additional sinking fund required for the facility. As I have stated however, this originated not from correspondence from AIB or Byrne Wallace but from the mistaken interpretation of Mr. Evans's letter of 7th July to Ms. Ann Nolan and the 24th July letter from Ms. Ann Nolan to Byrne Wallace. This belief does not go so far as to mean that AIB or Byrne Wallace on AIB's behalf were stating that AIB were or were going to be in charge of setting up and/or maintaining such a fund. These were still the borrowers' obligations and it cannot be construed objectively whether in isolation or in context as transferring some form of obligation from the Nolan Family to AIB.

243. Byrne Wallace then repeated its belief in relation to the sinking fund in the letter to AIB on 24th September in which it queried whether AIB was happy with the details of the sinking fund arrangements to be put in place. This letter highlights the fact that Byrne Wallace had not been provided with full information on the sinking fund which had been provided to AIB. This situation was also

emphasised by witnesses for Byrne Wallace.

244. The 30th September meeting between AIB and Byrne Wallace is of particular import because it at least resolved one issue between them upon which they had previously held differing positions – it was confirmed that security over the sinking fund for the new facility was not required. This is clear from a reading of point (a) of the attendance note. The note and evidence on same however highlight a lack of clarity on the number of sinking funds for the development despite AIB's repeated claims that it was consistently of the view that there was only one fund relating to the phases of the hotel.

245. The attendance note, taken by Mr. Egan, refers at point (a) to the sinking fund "to be put in place", indicating a new and separate sinking fund. I also find that on the face of it, point (a) refers to two separate issues, referring on the one hand to the fact that AIB are of the opinion that "appropriate provisions" are in place for the funding; and on the other that AIB were told that Messrs Evans and Good were to use certain life policies for funding the exercise of the first options which I believe to be the options relating to phases I and II. Mr. Egan's need to differentiate these two elements also indicates that it was his understanding that that was to be the case.

246. If AIB were of the consistently held view that there was a pre-existing fund and that it was to cover the options generally, it is surprising that this sizeable difference of opinion between AIB and Byrne Wallace would not have come up at the meeting on which the attendance is based and that AIB would not have disavowed Mr. Egan of his misinterpretation. This is further evidence of AIB's lack of concern for the sinking fund issue and the fact that they were relying on other security and the net worth of the borrowers as comfort and security.

247. The evidence provided on the 30th September meeting by both Ms. Kierans and Mr. Egan further obfuscates the matter. Mr. Egan stated in relation to the reference to encashment of life policies:-

"that aspect wasn't particularly clear as to whether that was dealing with Phases 1 and 2 or dealing with Phases 4 and 5. Certainly my focus at the time was a precondition in respect of the loan facility letter for Phases 4 and 5." (Day 27, p. 164)

248. Ms. Kierans provided evidence on this period that was at variance with her earlier averments that the fund discussed in December, 2002 was a fund that was to be used as the options arose which I understand to mean a general fund for the operation of all the options on the different phases of the Isaacs Hotel. Ms. Kierans on point (a) stated:-

> "[m]y reading of that paragraph, and maybe I misread it when it was given to me, but my reading of that paragraph is that we're talking about the same fund of 1.5 million that it's life policies that are going to be encashed and they will be used in the exercise of the first option and they were. That's what happened at the end." (Day 19, p. 52)

She also stated under cross examination:-

> "I said and agreed yesterday that the purpose of the facility was primarily to buy Phases 4 and 5 but the terms of sanction that supported it was 1.5 that related to the first two buybacks which is consistent with the mark up and consistent with the documentation that went out afterwards."

249. While I accept that AIB have consistently to this date been of the view that there was just one sinking fund, I do not agree with Ms. Kierans' averment that her position on how the sinking fund was to be used did not alter. Her quoted statements have an entirely different meaning to those provided when she spoke of the Indicative Heads of Terms. Although she repeatedly stated previously that the fund was a general one for the options that arose which would include its use with options for phases I and II and phases IV and V when they were created, although in reality the sinking fund was likely to be and was in fact used in its entirety for phases I and II, the limitation of its use only to options for phases I and II was not highlighted. This I find is also indicative of the confusion surrounding the sinking fund issue at this time.

250. The disparity of opinion between AIB and Byrne Wallace was made more apparent to the Nolan Family when Ms. Kierans emailed Ms. Joan Nolan on 1st October and stated that there would not be a provision relating to the sinking fund in the Facility Letter.

251. I accept on balance that the email merely provided details of discussions held the week before the email and provided an update as to where AIB and the Nolan Family were as regards the requirements for the lending, particularly with regard to the contents of the 24th September letter. The email did not introduce new information, it merely provided a summary to Ms. Joan Nolan.

252. As to the meaning of point 5, particularly the first sentence, I consider it likely that Ms. Kierans was writing of the fact that there was not to be a *security provision* in the Facility Letter for the sinking fund. This is so when one considers that at the meeting of 30th September, AIB similarly informed Byrne Wallace that there would not be a charge over the sinking fund and that the evidence before the court indicates that AIB never wanted or sought security over a sinking fund.

253. Notwithstanding this, I am not persuaded that this meaning was adequately portrayed to Ms. Joan Nolan and that therefore certain other interpretations could apply to point 5 on an objective basis including that provided by the plaintiffs and suggested by Mr. Moran in evidence – in essence that there would be no provision whatsoever concerning the fund in the Facility Letter. The wording of point 5 is not very precise and when read in isolation would indeed have the meaning averred by the plaintiffs, that is that there would be no provision in the Facility Letter relating to a sinking fund. Referral back to point 5 in the 24th September, 2003 letter to Thomas J. Kelly & Sons would not have provided assistance to the Nolan Family. It is only with the background information provided in court which would not have been available to Ms. Joan Nolan that I have come to the conclusion that point 5 referred to security and not the whole sinking fund condition. Ms. Joan Nolan would probably not have been aware of the contents of correspondence, or conversations between AIB and Byrne Wallace. There are also no notes or evidence as to the contents of the discussions had between Ms. Kierans and Ms. Joan Nolan to inform the court of how exactly they progressed. Thus, it is entirely possible that Ms. Joan Nolan could have read point 5 and understood it to mean that there would be no provision whatsoever and I accept that she may have made that assumption.

254. I consider this email, particularly the second sentence of point 5, "This issue relates anyway to Messrs Evans & Good and we will attend to same" to be the main basis upon which the plaintiffs claim that AIB had agreed to take on the setting up and supervision of a sinking fund. Prior to this email I have found that AIB and Byrne Wallace had only sought evidence of a sinking fund, and had not indicated on any objective basis that AIB were going to maintain a fund or had represented same. However, I cannot accept the plaintiffs' contention.

255. First, this sentence is quite revealing as regards AIB's position on whether a tripartite agreement was in fact in being. The

sentence clearly illustrates that AIB viewed the progress of the lending to the Nolan Family and to Messrs Evans and Good as two entirely separate lending transactions even though they related to the one development. It is also revealing that this understanding is evident so late in the progress of the Nolan Family lending. The court can only come to the conclusion arising from this that AIB did not have an understanding that there was a tripartite arrangement between the parties, the basis of which is supposed to be the averred commitments.

256. Secondly, as to the interpretation to be applied, I believe the phrase "we will attend to same" is far too vague a statement to have the meaning as averred by the plaintiffs and the consequent effect of placing such onerous and detailed obligations on AIB as claimed by the plaintiffs, and not one that could reasonably have had that meaning or effect.

257. From the evidence it would appear that the plaintiffs were operating under the incorrect assumption that based on their averred understanding that Ms. Kierans was removing the sinking fund as a condition of the Facility Letter, the sinking fund was also being entirely removed from the tax scheme. If it were the case that the sinking fund was being removed from the facility, leaving aside the fact that evidence of same was required by the Credit Committee, this does not follow as a matter of course.

258. The lack of concrete information on whether there was to be one or two sinking funds and the fact that Byrne Wallace were still unaware of exactly what was happening on that front is also evident in the email sent by Mr. Egan to Ms. Kierans on 10th October. Although Byrne Wallace had previously written to both AIB and the Nolan Family in relation to a sinking fund "to be put in place" in the 24th September letter, Mr. Egan retreats from this level of certainty and instead writes "the Sinking Fund to be put in place (or already in place)". It is quite clear from this that Mr. Egan was not aware of the situation in relation to the sinking fund, that AIB had not provided him with sufficient information as to the circumstances surrounding the fund – Mr. Egan is not aware of whether a second fund has at this point been put in place or whether, and if so what, steps were still outstanding in that regard. Although one could interpret the phrase in isolation as meaning that Mr. Egan did not know whether there was to be a new fund or whether reliance was being placed on one general fund, I do not take this to be the case. This is so because in his witness statement he refers to a separate sinking fund that was to be put in place and referred in his direct evidence to a fund "for the present facilities".

259. The email of 10th October from Mr. Egan to Ms. Kierans and oral evidence on same also illustrate AIB's lack of information as to what exactly was held as security or the monies amounting to the sinking fund for the earlier phases of the Isaacs Hotel. Mr. Egan states in the email "I know you made the point that you do not have a charge over the Sinking Fund in respect of the security already held and the properties affected thereby". This passage highlights in stark terms the fact that even at this late point in the process AIB were still unaware of exactly what constituted the sinking fund which it considered to be the only fund in operation. Furthermore, Ms. Kierans stated in cross examination for example:-

> "the Bank was advised that Richard Evans and Basil Good were going to come up with 1.5 million to fund put and call options 1 and 2. And I have completely said this. I did not look to the existing security as being the same as the 1.5. They were to provide evidence of the 1.5. They said it was policies. That's what I have repeatedly said."

260. Mr. Egan's 10th October email is also the first time it is mentioned that the option of entering a clause in the Special Conditions of the Facility Letter to the effect that there would be a "commitment that the fund will be maintained at an acceptable level from time to time" and that there would be "a restriction on withdrawals from the fund without the consent of the Bank".

261. To summarise therefore I find that in relation to the sinking fund issue although there was just one sinking fund, confusion arose from Mr. Evans's response to Ms. Ann Nolan on 7th July and although the court considers that Mr. Evans indicated that there was only one sinking fund, Mr. Egan's interpretation of the letter from Ms. Ann Nolan to Byrne Wallace on 24th July was that there were two sinking funds and that arising from this he continued to seek evidence and security on a second sinking fund.

262. I also find that although AIB had permitted Byrne Wallace to seek security over a sinking fund, AIB came to the decision that it would not require same but did not inform Byrne Wallace of this. This is illustrative of the lack of communication on the sinking fund issue and AIB's lack of concern for the sinking fund as a condition of the Facility Letter; it also led to further confusion for the Nolan Family.

263. Although these aspects of the sinking fund issue were opaque, the same cannot be said for the claim put by the plaintiffs that AIB had agreed or had represented to take control of and maintain the sinking fund for this facility. This claim does not stand up to scrutiny upon an objective consideration of the evidence. At no point did AIB or Byrne Wallace on its behalf intimate that AIB were going to take this course of action. It was accepted on numerous occasions that the Nolan Family were under an obligation to provide evidence of the €1.5 million fund and I find that this never shifted to AIB. The Nolan Family left the evidence requirement to be completed by Messrs Evans and Good and did not concern themselves with it after the July 24th letter to Byrne Wallace, something which, if they considered it a crucial element as averred, they should have done. Although at one point Ms. Kierans did state that "we would attend to same" in relation to the sinking fund in the 1st October email to Ms. Joan Nolan, this is too vague to create the expectation or representation that AIB were going take control of the sinking fund and supervise it as claimed by the plaintiffs.

Debt Transfer and Commitment to Fund Messrs Evans and Good

264. The court will now turn to the issues of the debt transfer and funding of Messrs Evans and Good during this period from March to October, 2003. I have found that up to the beginning of this period there were no representations from AIB or that it entered into terms indicating that there was a tripartite agreement, that there was to be a debt transfer or that funding Messrs Evans & Good was a foregone conclusion.

265. In the letter from Byrne Wallace dated 12th May, 2003 to Thomas J. Kelly & Sons after the 8th May meeting with AIB, Mr. Egan sought the following relevant information in addition to the sinking fund matter:-

> "5. **OPTION** - …We understand that Messrs Evans & Goode will enter into a Put and Call Option Agreement to purchase the freehold interest in the property which option can be exercised within a defined period. Please let us have details of the arrangements to be put in place with Richard Evans and Basil Goode in this regard and please let us have a draft of the appropriate Put and Call Option Agreement.
>
> …
>
> 7. **BUY-BACK OPTION** - Our client has been informed that upon the exercise of the various options in place in respect of the entire property (when fully developed), the Borrowers will retain a 30% interest in the premises. In effect, our clients have been informed that there is a proposed option in favour of the Borrowers in relation to the buy back of 30% of the premises from Richard Evans and Basil Goode. We have reviewed the documentation in place in respect of the earlier loans

and this arrangement is not reflected in same and, in particular, in the Option Agreements executed previously. Please clarify the position.

8. **REPAYMENT** - In relation to the proposed repayment of the present facility, we understand that it was agreed with the Borrowers that upon the exercise of the existing Put and Call Option agreements in place in respect of the Isaacs Hotel complex, the existing loan to Nolan Transport (Oaklands) Limited would be repaid first out of the proceeds of same. It was intended that the surplus funds would be utilised to redeem the new loan to the Borrowers but any such redemption would appear to be in breach of Section 31 of the Companies Act 1990. Therefore, a fresh proposal is required from the Borrowers in relation to the terms of repayment.

9. **COMPANY GUARANTEE** - As part of the security, the Bank will require a Guarantee from Nolan Transport (Oaklands) Limited for the full amount of the present advance but limited in recourse to the Company's interest in the Isaacs Hotel and Isaac Butt's licensed premises. We understand that all the borrowers are Directors of this company and, in order to validly put in place this security, the validation/whitewash procedure which is provided for in the Company Law Enforcement Act 2001 must be implemented….

10. **EXISTING LOAN TO NOLAN TRANSPORT (OAKLANDS) LTD.**

a. In view of the fact that the freehold ownership of the entire premises will vest partly in the transport company and partly in the borrowers, it is also necessary for the existing loan to the company to be cross secured by a Guarantee from the individual borrowers for the full amount of the previous loan to the company but limited in recourse to the properties at 20 and 23 Store Street. If there is default under either loan facility, then the Bank must be in a position to realise its security in respect of the entire premises and, therefore, you will appreciate the need for this cross-security to link the two separate facilities."

266. The requirements in the 12th May letter as to cross guarantees correspond with Ms. Joan Nolan's understanding of the cross securitisation of both the loan facility for phases I-III and the new funding (para.s 81-83 of her witness statement):-

"[The Nolan Family] gave two guarantees in respect of the borrowing by Mr Evans and Mr Good. The guarantees [were] a requirement by AIB and AIB said they were necessary in order to maintain their 100% security over the properties given that [the Nolan Family] was to hold a 30% interest in the properties.

Both guarantees were limited in recourse to the interest (30%) that [the Nolan Family] held in the phase 1 and 2 properties and the 100% interest [the Nolan Family] held in the phase 4 and 5 properties.

[Nolan Transport] gave a guarantee in respect of the Mr Evans and Mr Goods AIB loan limited in recourse to its interest in the Isaac Butt Licensed premises comprised in phase 3."

267. There was evidence of further correspondence and discussions progressing the above requirements through to October, 2003. Both parties were largely in accord in relation to the cross security aspect when this letter was issued, what was required and how these progressed during this period. The dispute on this aspect of the lending related to the meaning to be attached to requiring such securitisation. In summary, the plaintiffs claimed that this was the beginning of the cross securitisation process and that by beginning this process, AIB were representing that they were going to fund the various lending requirements for the development as they were the only bank that could fund the entire development once this process began. Witnesses for AIB contended that cross securitisation was necessary to protect the bank's position arising from the split ownership. Upon careful review of the evidence before the court I accept the position held by AIB on this matter.

268. First, AIB had not provided any representation prior to Byrne Wallace preparing this letter of 12th May committing to fund Messrs Evans and Good or effect a debt transfer. Secondly, I do not consider that AIB were necessarily the only bank that could fund the various loans; my reasoning on this conclusion is outlined further below. Thirdly, a reading of para. 10(A) of the letter of 12th May makes AIB's motivations clear as to the requirement for the Nolan Family to cross guarantee the Nolan Transport loan. It was due to the fact that the freehold interest in the Isaacs Hotel development would be vested partly in the transport company – owner of phases I-III – and the Nolans – owners of phases IV and V – that cross guarantees were required. Should a default event occur on either loan AIB had to ensure that it would be able to realise its security over the entire premises. This understanding should have been plain to Ms. Ann Nolan, an experienced solicitor, either from a reading of the letter or leaving aside this letter, by the mere fact of the split ownership itself.

269. In parallel to these developments concerning the lending for phases IV and V, Messrs Evans and Good applied for funding in relation to the put and call option agreements in place for phases I and II. On 18th June, 2003 Messrs Evans and Good met with Mr. Clarke and Ms. Kierans of AIB to discuss arrangements for the buybacks.

270. Mr. Clarke in a faxed document to Messrs Evans and Good after the meeting stated:-

"Many thanks for taking the time to meet with Michelle and Myself earlier today to discuss the arrangements for the Buyback. As requested I have attached a schedule on the €4.13M facility for your reference, based on the cost of funds today of 2.1% and a margin of 1.5%.

I also spoke with our dealers and got a few fixed rate indications for you. If you assume drawdown of funds in say July next year, fixing €4.13m then for 3 years of a 15 year facility would result in a cost of funds of 3.1% applying a margin of 1.5% this would give an all in figure of 4.6%.

Similarly fixing for 5 years of a 15 year facility would result in a cost of funds of 3.51%, applying a margin of 1.5% this would give an all in figure of 5.01%.

Should you require anymore figures from us over the coming days, please feel free to call."

271. It was put to Ms. Kierans that the fax did not indicate what courses might be taken in relation to the lending to Messrs Evans and Good but rather the fax illustrates that the actual arrangements for the buybacks were discussed. She responded that Messrs Evans and Good had looked for indicative repayment terms and Mr. Clarke was providing a number of options.

272. I find the defendants explanation of the fax and its genesis on balance to be the more probable. The meeting upon which the fax

was based was preliminary or introductory. The only figures that were determined in the meeting was the value of the loan sought and the margin to be applied of 1.5%. Mr. Clarke's provision of a number of varying costs of funds and fixed term periods clearly illustrates that the interest rate and time period for which the loan would be fixed, quite basic elements of lending, were not decided. I accept that this was in response to a request from Messrs Evans and Good for "indicative repayment terms" as stated by Ms. Kierans. Furthermore, Mr. Clarke's discussion with AIB's dealers did not occur until after the meeting and therefore he did not have this information to hand during the meeting.

273. The main evidence on funding Messrs Evans and Good and the debt transfer during this period was based largely on the Credit Committee mark up dated 3rd July, 2003 on Messrs Evans and Good's proposed borrowing and the correspondence relating to same. I do not place much weight on a remark documented in the 30th September attendance note taken by Mr. Egan at the meeting with AIB on that date which stated that Messrs Evans and Good had been approached with regard to this lending. Rather, the fact that a Credit Committee meeting was held for the lending to Messrs Evans and Good strongly contradicts the claims made by the plaintiffs that AIB had represented that it would fund Messrs Evans and Good and effect a debt transfer with the necessary implication that this would be done without the need for some form of application by them and approval for said funding.

274. As with other internal documents considered above, the Nolan Family would not have seen this mark up. However, the mark up of 3rd July, 2003 is significant as it provides an insight into AIB's understanding of the development and whether this had changed since the Discussion Paper of 18th December, 2002 and possibly whether representations as claimed by the plaintiffs were made prior to the creation of the 3rd July mark up.

275. The 3rd July mark up represents the first time approval and/or confirmation is sought for the borrowing of the three sets of parties involved in the development considered by AIB and the second time that Messrs Evans and Good are considered in a Debt Level and Repayment Analysis, the first being that attached to the Discussion Paper 18th December, 2002 examined above.

276. The information provided in the 3rd July mark up is largely similar to that provided in the mark up and Debt and Repayment Analysis in the Discussion Paper dated 18th December, 2002 with a small number of alterations and updates, particularly in relation to the lending to be provided to Messrs Evans & Good which is the focus of the mark up. These amendments are largely due to the provision of more accurate information and a change in circumstances particularly arising from the release of the €635,000 guarantee in March, 2003 procured by Nolan Transport. As with the 18th December Discussion Paper it was accepted by Ms. Kierans that there is no conditionality to the mark up but that this results from "a statement of fact as it had been presented to the Bank." I believe this to be the case and therefore place no weight on this aspect of the mark up and my reasoning outlined above on the non-conditionality of the 18th December Discussion Paper is also applicable here.

277. Having examined the 3rd July mark up, I find that there is no mention whatsoever either impliedly or explicitly of AIB having already agreed to or accepted a debt transfer or commitment to fund Messrs Evans and Good.

278. The report is quite detailed and highlights the interconnectedness of the Nolan Family, Nolan Transport and Messrs Evans and Good. In the "Purpose" section for instance it states that the term loan to Nolan Transport on the earlier phases was:-

> "[t]o refinance Term Loan facilities with ACC Bank in relation to Isaacs Hotel and Isaac Butt licensed premises, in 1999. Now to be cleared from proceeds of sale of P&C options [to Messrs Evans and Good outlined] above."

279. The more detailed "Proposal" section of the mark up provides:-

> "• Put & Call options 1&2 relate to the original 55 bedrooms and restaurant in the Hotel and are due to be exercised in March (P&C1) and October 2004 (P&C2). The total cost will be €4.892m to exercise. To date E&G have accumulated a sinking fund of €761k (Proceeds of life policies). The proposal to hand will see E&G borrowing the difference, €4.12m, (84% financing) to be repaid over a 15 year term.
>
> • E&G will continue to be the operators of the Hotel. However the NFM are retaining 30% interest in the Hotel property. They have already paid E&G in advance, 30% of the combined cost of P&C 1&2, re this part of the Hotel. This cash has been utilised by E&G to develop other business projects."

280. Neither the "Purpose" nor "Proposal" sections go so far as to say that the lending to Messrs Evans and Good arose from any pre-arranged agreement between AIB and the plaintiffs and/or Messrs Evans and Good. There is no indication that AIB had agreed to an obligation of the form claimed by the plaintiffs relating to a debt transfer or made such a representation.

281. The "Repayments" section is also of note. Regarding the Nolan Family's repayment it states summarily that it would "[c]lear in full by 2010". On the Nolan Transport loan, the mark up states that it would "[c]lear in full by 2004 from bullet repayment on drawdown of [the funding by Messrs Evans and Good]." As with the "Purpose" section, this section does not indicate that any element of the debt owed by the Nolan Family would be transferred to Messrs Evans and Good. The more detailed examination of the parties in the "Repayment Capacity" section also does not go this far. The section provides in part:-

> "• Repayment on the €9.5m loan of €836k pa will be serviced in the main from rental paid out by Isaacs Hotel to the NFM of €616k. However there will always be a deficit, peaking at €367k in 2004. This will be serviced from each of the *individuals substantial net worths*. The loan will clear in full by 2010.
>
> • In relation to the proposed debt of E&G, upon exercising the buybacks, they will service repayments of €356k from rental savings of €402k (previously paid to NTL in respect of Phases 1&2). E&G also have a *substantial net worths*…which affords extra comfort around repayment capacity." [Emphasis added]

282. Emphasis is thus placed on the fact that there is recourse to the net worth of both the Nolan Family and Messrs Evans and Good which would be necessary to meet deficits in the repayment amounts. Both sections refer to the Debt Level and Repayment Analysis attached at appendix 2.

283. The section also indicates that it is AIB's understanding that *separate* and *new* obligations are to be created and placed on Messrs Evans and Good arising from the funding the latter would receive for use in exercising the option agreements; there is no indication that the repayment obligation on Messrs Evans and Good is to in any way arise from a transferral of a debt obligation from Nolan Transport to Messrs Evans and Good. If there was to be a transfer of the debt simpliciter, funding for Messrs Evans and Good would not be necessary in the first instance because the amount of the indebtedness would simply move to being the responsibility of Messrs Evans and Good from Nolan Transport to make repayments on the original 1999 refinancing loan. It would appear from this

section that AIB was of the understanding that the transactions it was considering in the 3rd July mark up were in the ordinary course of business, that they were simply ordinary loans being sought and granted to borrowers albeit that they were seeking monies as part of a joint venture.

284. If contrarily AIB understood that there was to be a debt transfer arising from representations made on its behalf as claimed by the plaintiffs, I believe that it would have been the focus of the mark up or at the very least it would have had to have been mentioned either explicitly in or arise implicitly from a reading of the repayment sections of the mark up. This is particularly when a debt transfer would be a peculiar aspect of this set of banking transactions. I note specifically in this regard the evidence provided by Mr. Moran in his witness statement that in all his years as a solicitor he had never seen:-

> "a situation where a bank agreed to lend substantial funds to a borrower and also enter into a contractual commitment at the same time to transfer this loan to a third party at some future date, or a contractual commitment to lend substantial sums of money to a customer on a future date in excess of five years from the time the original proposal was being considered/offer made."

This statement would seem to accord with common sense in business transactions.

285. It is also noteworthy that Mr. Fitzgerald accepted under cross examination that funding for the 2010 buy-backs was not considered in the mark up dated 3rd July, 2003 and that as of July, 2003 AIB understood that the Nolan Family were liable for the €9.5 million loan:-

> "Q. It is clear from that, I think, that as of this stage the Bank felt that they were entitled to have access to Nolan family wealth for the entire debt. Isn't that right
>
> A. Well 9.5.
>
> Q. Yes, 9.5 million. Isn't that right?
>
> A. Yes.
>
> Q. And not 9.5 million less some guaranteed buyback, but the full 9.5 million. Isn't that right?
>
> A. Yes." (Day 10, p. 136)

286. Furthermore, it is clear that only agreement in principle was provided by AIB. The Credit Committee concluded: "Disposed in Principle to Support- No Commitment to be made pending ReSubmission with clear Roadmaps on Move from Current Exposures + Security to New/Proposed Exposures and Security". The difficulty with the structure as proposed and the complexity of the ownership strucutre once ownership over the development became further divided with the introduction of Messrs Evans and Good was highlighted in the "Security Cover" section:-

> "•Currently we have debts of €12.8m against Isaacs hotel/pub store st properties worth €12m which is less than 1:1 cover. If we advance a further €4.13m to E& G, these funds will be ultimately used to reduce existing debts with NTL and reduce the €9.5m debt in NFM, leaving a net position of €11.7m against security e/v €12m which slightly improves our security cover. These loans will continue to amortise over 15 year terms, however NFM loan will clear in full by 2010 from proceeds of buyback of Store St. properties. We will have a residual debt of €2.8m to E&G in 2010 against their 70% share of the property.
>
> • We propose to obtain cross-Guarantees from all interested parties in the Isaacs Complex in order to perfect our security and we have retained [Byrne Wallace] in this regard.
>
> • We have continued to place full value on the property as security and accept that this is very much a joint venture between landlord and tenant who have a very strong relationship. In our view, if anything was to ever go wrong, they would work together to resolve matters.
>
> • In addition we have full personal recourse to the NFM for the €9.5m debt and any shortfall in repayments going forward. We also have full personal recourse to E&G for the €4.1m debt.
>
> • On this basis, security cover is considered satisfactory."

287. Full approval was withheld, until October, 2003, when the security "road map" was in fact provided to the Credit Committee highlighting how AIB's interests would be protected through the various stages. The fact that approval was needed in the first instance and that full approval was not granted until three months after the 3rd July mark up also contradicts the plaintiffs' claims that a representation was made by AIB regarding a debt transfer or that they would fund Messrs Evans and Good in the future. If such representations had been made and AIB were of the views averred by the plaintiffs, approval of the Credit Committee application whether in principle or otherwise would not be required and could not hold up the provision of funds when it would appear to have done so for approximately three months.

288. Appendix 2 to the mark up is of importance because it outlines in detail the loans to Nolan Transport, the Nolan Family and Messrs Evans and Good and how repayments are to be made during the course of each respective repayment period. It is the first time that the three parties are included in the one analysis and shows AIB's understanding at this time as to its responsibility relating to funding Messrs Evans and Good. It shows the introduction of the €9.5 million debt under the Nolan Family's heading in 2003 which gradually reduces by €836,000 per annum until 2010 when in addition to that payment a bullet payment of €6.366 million is made to clear the debt owed by the Nolan Family. This is said to be the proceeds from the buy-backs on phases IV and V. As with previous analyses the repayments largely come from hotel rental income though there is a deficit each year which the Nolan Family have to meet personally.

289. The analysis also shows the clearing of the Nolan Transport debt in 2004 on its loan for the phases I-III of the hotel by way largely of the buybacks of phases I and II, to be exercised by Messrs Evans and Good. There is then also a corresponding increase in the indebtedness of Messrs Evans and Good of €4.13 million arising from the exercise of the options on those phases which also gradually decreases by €356,000 annually.

290. I do not take this appendix to outline any form of debt transfer or commitment to fund, or to be illustrative of any such representation made by AIB. There is no sufficiently substantive alteration to the analysis sheet in the Discussion Paper dated 18th December, 2002 to dissuade me from applying the reasoning and findings concerning that analysis. The figures provided in both mark ups and thus the inferences that should be drawn from same should largely be of a similar nature. The most significant alteration is in fact the sinking fund amount outlined in notes relating to the analyses – €1.5 million in relation to the 18th December Discussion Paper and €762,000 in relation to the 3rd July mark up – and thus the level of funding required by Messrs Evans and Good. This however does not indicate an alteration in the approach to be taken by AIB.

291. As with the 18th December Discussion Paper, it is noteworthy that although according to the analysis a bullet payment of €6.366 million is to be received in 2010 to clear the Nolan Family debt, there is no corresponding additional amount or increase of funds being owed by Messrs Evans and Good in that year. It is also a fact that while there was a clear intention to enter into options agreements for phases IV and V to be exercised in 2010, they had not been created at this point, and it is the case that AIB and Byrne Wallace were still looking for drafts of the agreements up to and including September, 2003, two months after the date of this mark up. Furthermore, Mr. Fitzgerald agreed that there was no "suggestion [in the mark up] that anybody is even contemplating the 2010 funding, funding the 2010 buybacks."

292. As to the sinking fund relating to the lending to Messrs Evans and Good for phases I and II, I find that the Nolan Family were aware that its value had reduced, this was accepted by Ms. Joan Nolan and Mr. Fitzgerald and AIB were also aware. The Nolan Family had applied in March, 2003 to release a guarantee provided by Mr. Good to the value of €634,000. I find it highly significant that the value of the guarantee released is very similar to the amount utilised as a sinking fund for the Isaacs Hostel in the lending application dated 3rd July, 2003, and I find it likely that this is in fact the same amount of money. As such, this lends strength to AIB's argument that they were told in December, 2002 that Messrs Evans and Good had a fund set aside to meet their obligations vis-à-vis the various option agreements they had entered. The hostel option relates to an entirely separate property and development, it did not relate to the options for the hotel development to which the €1.5 million was provided as a fund in December, 2002, yet as I have found, Messrs Evans and Good sought a reduction in the general sinking fund to meet the Isaacs Hostel option.

293. Of the documents considered so far this mark up is the furthest that the idea of a tripartite arrangement can be put in that there is acceptance that there is a joint venture between the plaintiffs and Messrs Evans and Good but it does not say nor is there any implied indication on a reading of the document that there was any form of tripartite agreement between them and AIB or commitment to fund Messrs Evans and Good or to effect a debt transfer. There does not appear to be any change in this document from the understanding and position held by AIB evident in December, 2002.

294. Particular issue was made of the comments in an internal email of 4th July, 2003 from Ms. Kierans to Ms. Murray where Ms. Kierans states that "we have to tie in all other interested parties in the hotel to deal" and the fact that securities and cross guarantees were being sought from the Nolan Family and Messrs Evans and Good. It was argued that this was indicative of a tripartite agreement. First, this could not have been a representation to the plaintiffs because it was an internal email. Secondly, neither the email nor the quoted sentence in particular indicate that a tripartite agreement was either in being or contemplated. Rather, I believe this observation to be the bank looking to protect its position, and the reasoning applied on this issue above on the interpretation of the cross securitisation has similar application here.

295. The plaintiffs did not call either Mr. Evans or Mr. Good in support of their contentions in relation to the commitment to fund Messrs Evans and Good and debt transfer. I draw no adverse inference from that because were Messrs Evans and Good to have given evidence supportive of the plaintiffs' claims, it would have been against their own interest. However, it is of particular significance that despite the great breadth of discovery made in this case, counsel for AIB referred to it being greater in volume than the classic *War and Peace*, no document that could be described as a tripartite agreement, let alone one suggesting such an agreement to be in existence, emerged on discovery. Equally no document amounting to agreement for debt transfer or to fund Messrs Evans and Good emerged on discovery. For the bank to have committed or been willing to commit to such radical contractual arrangements, I would have expected such documentation to have come into being. The fact that it didn't supports the conclusion that no such agreements were made. Nor does anything in the materials considered thus far in the judgment or evidence provided by the various witnesses before the court lead me to any other conclusion, or lend argument for any representations upon which the plaintiffs can place any reliance.

296. To conclude on the debt transfer and commitment to fund issues, I am not persuaded by the claims made by the plaintiffs arising from the weight that must be attached to the manner in which the documentation has to be interpreted. Although they make averments as to verbal terms and/or representations, there is insufficient evidence of same for me to go against what is provided in the documents.

297. As previously stated, draft security terms were produced by Mr. Egan and raised at the meeting of 30th September with AIB. The draft terms, particularly those relating to the cross guarantees are in identical terms to those provided in the Facility Letter dated 30th October, 2003. I shall therefore examine these terms under that heading.

(vii) The Disputed Letters and Attendance Note

298. The court shall now turn to consider the disputed letters that are alleged to have been sent by Ms. Ann Nolan on behalf of Thomas J. Kelly & Sons to Mr. Egan of Byrne Wallace on 10th and 28th October, 2003 and the telephone conversation which purportedly took place on 28th October, 2003 and corresponding attendance note.

299. These letters and the fact of the conversation and the note of same were disputed by both AIB and Byrne Wallace. Byrne Wallace say that they never received the correspondence and that Mr. Egan never had the disputed conversation as outlined and AIB claimed that they never received information from Byrne Wallace regarding these disputed correspondences. Much court time was spent on evidence relating to the office practices in Thomas J. Kelly & Sons around this time, evidence surrounding events relating to these disputed matters, as well as forensic evidence concerning the letters.

300. As a preliminary matter, the court considers that having reviewed the forensic evidence provided during the proceedings, these expert reports can only be of marginal assistance in coming to my decision. This is largely due to the limitation that the documents provided to both the experts and to the court are, at best, copies of the first copies of the original documents. Byrne Wallace's document expert, Ms. Giles with whom I find myself in agreement on this issue, in particular wrote:-

> "Each of the questioned documents…is consistent with the correspondence produced by Messrs Thomas J Kelly & Son at the relevant time in 2003. However, this does not amount to positive evidence that the questioned documents…were created at that time. The questioned documents…could have been created at any time later although this would be

dependent upon the availability of the letterhead paper and the relevant typestyle font. On this basis the evidence is inconclusive as to when the actual original Letters were created of which [the disputed] documents…are the "Best First Copy" documents."

My findings are thus largely based on other matters and arguments raised by the parties as these outweigh the evidential assistance the export reports can provide.

301. The court first turns to the disputed letter of 10th October, 2003 allegedly sent by Ms. Ann Nolan of Thomas J. Kelly & Sons to Mr. Egan of Byrne Wallace. The plaintiffs alleged that two letters dated 10th October, 2003 were sent to Byrne Wallace for Mr. Egan's attention while both AIB and Byrne Wallace asserted that only one letter was sent or at the very least sent and received. The plaintiffs contend that the disputed 10th October letter was sent either by itself or together with the undisputed 10th October letter. The uncontested letter of 10th October related to issues outstanding from the 1999 refinancing loan to Nolan Transport. Evidence before the court indicated that the letter was posted on 13th October, 2003 by registered post and the copy available to the court was date stamped by Byrne Wallace and was received on 14th October. It is important to note at this juncture that Mr. Egan was on annual leave from 10th-20th October and that during this period Mr. Moran received his post and reviewed it to determine whether items could be left for Mr. Egan's return or should be dealt with by Mr. Moran himself.

302. The disputed letter of 10th October provides:-

" Your Ref: RE/MMcK

Our Ref: 1013(AIB2)/AN

Date: 10th October, 2003

RE/ Your Client: Allied Irish Bank

Borrowers: /Our Clients: The Nolan Family Members ("the Nolans")

Premises: (1) No.s 23, 23A, 23B and 23C Store Stree ("23, Store Street)

(2) The Damp Store being No. 20 Store Street"

Dear Sirs,

We refer to our letter of 24th July last in this matter with particular reference to the manner of the Sinking Fund detailed at paragraph (6) therein. Your clients' Michelle Kierans has confirmed to our clients that the Bank will be implementing the Sinking Fund directly with Richard Evans and Basil Good and that nothing further is required from our clients in respect of same. We attach copy self explanatory letter dated 7th July last received by the writer from Mr. Evans, and as per our letter of 24th July last, all details of the Sinking Fund have been dealt with by Ms. Kierans directly with Mr. Evans and Mr. Good.

However, Ms. Kierans has now also informed our clients that there will not be a provision in the Offer Letter about the Sinking Fund. Our clients are concerned about this omission.

The objective of the Fund is strictly for Mr. Evans and Mr. Good to accumulate sufficient equity in unpledged assets and/or cash such that they can finance the exercise of the Put and Call Option Agreements. The Fund will also clearly reduce the amount of finance required to be advanced by the Bank to Mr. Evans and Mr. Good on the exercise of the Option Agreements thereby also reducing risk for your client. However, our clients are the principal beneficiaries of this Fund as its purpose is strictly to enable the buyback of the Premises by Mr. Evans and Mr. Good from our clients.

Given the above and the importance of the Fund to our clients, and while they continue to accept the Bank's covenant to be responsible for implementing the Sinking Fund, they cannot accept its removal from the Offer Letter as a loan provisions. We must therefore insist that you make the appropriate amendment to the Offer Letter.

We await your clients' Offer Letter."

303. A third letter dated 10th October, 2003 was addressed to Ms. Joan Nolan by Ms. Ann Nolan on behalf of Thomas J. Kelly & Sons. This letter is also disputed. It states:-

" Your Ref:

Our Ref: 1013(AIB2)/AN

Date: 10th October, 2003

RE/ Lenders: Allied Irish Bank plc.

Borrowers: The Nolan Family Members ("the Nolans")

Premises: (1) Nos. 23, 23A, 23B and 23C Store Street ("23, Store Street")

(2) The Damp Store being No. 20 Store Street.

Dear Joan,

Please find attached copy self-explanatory letter of even date to B.C.M. Hanby Wallace in the above-mentioned matter

for your attention.

As soon as the Offer Letter will have been received, I will contact you in furtherance."

304. The evidence relating to the computer systems in place at the time in Thomas J. Kelly & Sons provided by Ms. Ann Nolan and Ms. O'Neill, a secretary in Thomas J. Kelly & Sons at the time, indicates that Ms. Nolan had a laptop that was not connected to the firm's computer network and that it could well have been that Ms. Ann Nolan typed this letter on the laptop instead of her desktop. There is insufficient evidence for the court to determine upon which device the letter was prepared and therefore the results arising from the searches conducted by Mr. Lawlor and Ernst & Young ("EY") are not of much assistance in this particular respect. The document could well have been prepared on the laptop which has not been discovered.

305. However, for the reasons outlined below I find that this letter was, as a matter of probability, not sent to Byrne Wallace and as a matter of near certainty not received by Byrne Wallace.

306. For similar reasons to those expounded above relating to the forensic evidence on the disputed letters, although reference was made throughout the proceedings to punch marks and clip marks on letters and particularly the letters not in dispute prepared by Ms. Ann Nolan either by herself or with assistance from secretarial staff, the court can only attach limited evidential weight to these matters in determining whether the letters were indeed sent and received. Although they may incline one to believe that they were in fact created at the indicated time, that they may have been sent and that they appear in the copy documents maintained by Ms. Ann Nolan and in the proper order, the markings form relatively weak support for these contentions in that we are still dealing with at best copies of first copies which do not clarify when or if the letters were created let alone sent to or received by Byrne Wallace.

307. As to the sending of the disputed letter of 10th October, 2003, it was entered into evidence late in the day by Ms. Ann Nolan that it was her belief that she would have sent the undisputed letter dated 10th October, 2003 and the disputed letter of the same date to Byrne Wallace together in the same envelope because they related to the same property and were addressed to the same addressee. However, I do not consider this at all likely to have been the case. If the disputed 10th October letter had been sent, it would have been sent to Byrne Wallace separately based on the evidence before the court. Although these letters dealt with the same overall development there were a number of facts that distinguished the two transactions quite distinctly. Although the letters were both addressed to Mr. Egan, they dealt with two separate loan transactions, two different though related clients and the monies were provided in relation to two distinct sets of property, the previous loan to 5 and 6 Frenchman's Lane, 21, 21A and 22 Store St., Dublin 1 and the later loan transaction to 20 and 23-23C Store St., Dublin 1.

308. If the loan transactions had been contemporaneous to one another and were at a similar stage I would be more inclined to accept the proposition repeatedly asserted by the plaintiffs on this point but they were not. Each loan transaction was at a very different stage – the loan referred to in the undisputed letter was provided in 1999/2000 and the letter provided closing out documentation relating to same, while the disputed letter refers to a 2003 loan of which the loan offer letter had yet to be finalised let alone signed.

309. Furthermore, a diary ledger was discovered during the proceedings which meticulously maintains the certificates of registered posting for each letter sent during this period by way of registered post and these are attached to the particular day on which they were sent. It is clear from a review of this ledger that there was a practice in place in the Thomas J. Kelly & Sons to maintain a comprehensive record of all registered post. As such, I consider this ledger to be convincing evidence of what post was sent via registered post and the date upon which it was sent, and by inference, compelling evidence of what letters or documents were not sent by registered post.

310. As noted above, Ms. O'Neill provided evidence on the postal, filing and secretarial systems in the firm at the time. Her evidence was that letters would have been sent together if items were addressed to the same addressee. This evidence does not dissuade me from my finding that it is more likely to have been sent separately because the system in Thomas J. Kelly & Sons evidenced in the book containing the registered post certificates illustrates that matters being sent to the same addressee were, at the very least, frequently sent individually to an addressee via registered post and that therefore it is entirely possible that the disputed and undisputed letter of 10th October to Byrne Wallace were also sent in a like manner.

311. There are several examples in that book, contrary to Ms. O'Neill's evidence, where items were sent separately to the same addressee. These include, as was pointed out to the court, documents to Lidl (Ireland) on 1st April, 2003, Fon Roche Haulage Ltd. on 19th June, 2003, David Flynn Ltd. on 30th June, 2003, the Land Registry on 21st July and 12th November, 2003, the Stamp Office in the Revenue Commissioners on 10th September, and 12th November, 2003, and a Bank of Ireland branch in Wexford on 23rd October, 2003. More importantly however are letters sent to fellow solicitors' firms which included Nolan Farrell & Goff Solicitors on 4th March, 2003, O'Connors Solicitors on 4th July and 19th November, 2003 and Byrne Wallace on 23rd July, 2003.

312. Following this reasoning, there is no evidence in the ledger containing the certificates of registered post that the disputed letter was sent to Byrne Wallace on 10th October. In fact the only registered letter sent on that date was sent to a completely unrelated third party. As stated, the undisputed letter dated 10th October was sent on 13th October and was the only letter to be sent to Byrne Wallace on that date. The next letter sent to Byrne Wallace by registered post was on 15th October, 2003. There is no indication whatsoever that any of these certificates related to the 10th October disputed letter. As such there is no evidence of the letter having been sent from the office of Thomas J. Kelly & Sons to Byrne Wallace.

313. Further, if the disputed letter of 10th October had been sent, I consider that it would have been found by the administrators in Byrne Wallace dealing with the post upon receipt of the undisputed letter, and that it also would have been found by both Mr. Moran and Mr. Egan. Reasoning as to this finding is set out more fully below.

314. A further reason for my decision that the letter was not likely to have been sent is that, despite there being a number of further letters relating to the phase IV and V loan transaction from Ann Nolan to Byrne Wallace, there is no reminder outside of the other disputed documents requesting a response from Byrne Wallace on the "covenant" issue. The matter is not raised in a letter of 15th October from Thomas J. Kelly & Sons to Byrne Wallace which provided a number of documents to the firm or in a letter of 22nd October concerning a request for original title deeds.

315. An element of this aspect of my reasoning is that no reminder was sent by the plaintiffs for approximately two weeks despite the claim that the issue of the sinking fund was said to be a matter of great concern to the plaintiffs in that the sinking fund would help to ensure the smooth transition of ownership in the Isaacs Hotel from the plaintiffs to Messrs Evans and Good, and that it was a cause of some anxiety when, according to their averred understanding of Ms. Kieran's email of 1st October, there would be no term in the Facility Letter relating to the sinking fund. If such letter had been sent and if the sinking fund matter was indeed as serious a

concern as the plaintiffs claim, the matter would have been raised at least in the form of an "awaiting response" reminder on the "covenant" issue well in advance of the date of the disputed phone call or letter of 28th October, 2003.

316. Moving to the claim by the plaintiffs that the letter was received by Byrne Wallace, if, as I accept, that the disputed 10th October letter was never sent then it necessarily follows that the letter was never received.

317. Furthermore, even if it had been received either by itself or together with the undisputed 10th October letter, I am satisfied that it would have been discovered by Byrne Wallace personnel. The system for post in the firm was described as follows by Mr. Moran whose evidence I accept as truthful and reliable:-

> "In the morning the post was collected by an administrator in our office from the post office. Along with that the registered post was also collected at the same time and signed for by an administrator in our office. It was taken back to our office. The post is opened in a post room. It was stamped. It was usually done by about two people and it was supervised by a partner. There was a partner rota at the time in relation to the opening of post. When the post was then ready for collection, there was an email communication to the various departments to say 'Post ready for collection.' Then the post was collected from the post room by a representative of each team or group or department and taken up….The post would not always have been brought to me but if a colleague was absent, that person's post would have been brought to me if that was a person within my team, yes….The individual letters would have been stamped in the post room, yes, and then the collection of those would have been presented to me." (Day 24, pp. 11-12)

318. Mr. Moran further stated that:-

> "I think the practice in terms of the opening of the post -- people would have been very much directed to ensuring that envelopes were checked when letters and communications were being taken out. The firm's practice was quite extensive in the area of property development. We would've had a huge number of new residential house sales and in many of these [house sales] there were contracts coming back signed with deposit cheques or bank drafts, so there was a significant onus on people opening the post to ensure that envelopes were checked to ensure there was no loose cheque or bankdraft left in an envelope and that's something that people would have been conscious of. I think the prospects of a four-page letter going missing or perhaps going into a bin is highly, highly unlikely." (Day 24, p. 13)

I find that this system would have been wholly adequate to uncover the letter if received and as Mr. Moran commented it is "highly, highly unlikely" that receipt of the disputed letter of 10th October would have been missed, whether sent separately or together with another letter.

319. Additionally, I consider that if the letter had been sent with the undisputed letter that it would as a matter of high probability have been either placed in the envelope on top of the undisputed letter and its related enclosures or beneath these documents. It would not have been inserted amongst the undisputed letter or its enclosures as for an experienced solicitor's firm to do so, either Thomas J. Kelly & Sons in sending the letter or the post staff in Byrne Wallace upon opening of letters, makes no rational sense. The disputed letter itself is also four pages – two pages itself plus the two pages of the letter that was said to have been attached to same – it would have been easily identifiable. This four page correspondence would thus have been found by the administrative staff, and subsequently by Mr. Moran and later by Mr. Egan.

320. Mr. Moran received as part of the post during this period for Mr. Egan the undisputed 10th October letter on 14th October. He reviewed it and responded on 15th October as follows:-

> "We acknowledge receipt of your letter of 10th October by registered post enclosing certain documentation in relation to the above matter.
>
> Ronan Egan who is dealing with this matter is out of the office this week and we will leave the papers for Ronan to deal with on his return.
>
> We also note from another file relating to proposed loan facilities from AIB and members of the Nolan family that a list of outstanding issues was submitted by Ronan on 10th October 2003 and we look forward to receipt of your replies in order to progress that particular transaction."

321. It was put to Mr. Moran that he may not have reviewed Mr. Egan's letters as he was merely holding them over for Mr. Egan and as such may have missed the disputed 10th October letter. Although I accept the evidence provided in cross examination by Mr. Moran that the letter he wrote to Ms. Ann Nolan in relation to the undisputed 10th October letter on 15th October, 2003 was a "holding letter" and a "reminder letter", I accept that Mr. Moran would have at the very least conducted a cursory review of the undisputed 10th October letter and the enclosures with it, as with every other piece of correspondence he would have received on behalf of Mr. Egan while Mr. Egan was on annual leave, to determine if it referred to anything of priority. Even if this review was cursory in nature, I believe with certainty that the letter would have been discovered by Mr. Moran.

322. As I have found with a high degree of certainty that Mr. Moran would have discovered the letter, I conclude that he would have discerned the potential risk to AIB arising from the "covenant" mentioned in the letter. Consequently, I further believe Mr. Moran would have raised this with Ms. Kierans as a matter of priority either by way of telephone, by email or both, and as an experienced solicitor, most certainly would have kept a note of any interactions of importance in relations to this claim. He similarly would have raised it with Mr. Egan upon his return. Mr. Moran stated in evidence:-

> "as an experienced lawyer, when you see another firm making a particular comment that you feel might raise a risk issue for your client you'll certainly hone-in on that and bring it to their attention. And in that respect I'm talking about the reference to a covenant in the second page of that letter….That's the type of language that certainly would've caught my eye in the context of a potential issue for our client, the Bank. That needed to be responded to and I would have been saying to the Bank 'Under no circumstances are you giving any covenant to anybody on this issue, so let's get clarity on what your position is in relation to this letter'." (Day 24, pp. 6-11)

323. As there is no such evidence of correspondence with Ms. Kierans and/or Mr. Egan, this tends to corroborate Byrne Wallace's contention that this letter was never received.

324. For similar reasons and with a similar degree of certainty, I consider that Mr. Egan would have discovered the disputed letter if it had been received after a stricter review than that carried out by Mr. Moran of the correspondence received while he was away. I

also believe as Mr. Egan stated that he would have raised the issue of the covenant with Mr. Moran and then with Ms. Kierans, whether to seek clarity on the matter or for instructions, and that he would also have made a note of any correspondence relating to the issue.

325. I consider that both Mr. Moran and Mr. Egan would have carried out their duties in this fashion because of their sensitivity to the issue of the sinking fund as they were on uncertain ground concerning the terms and conditions relating to same. They did not have a clear view of this matter from either Ms. Ann Nolan or Ms. Kierans largely because the latter was dealing with Messrs Evans and Good directly on the issue of the evidence of funds set aside for the sinking fund. As such, if this letter was sent, the attention of both Mr. Moran and Mr. Egan would have been directed to this "covenant". They most certainly would have raised this at the very least with Ms. Kierans for instructions and to give advice, and probably also with Ms. Ann Nolan seeking to clarify the matter in later correspondence. As there is no such correspondence, this is highly indicative of the fact that this letter was never received.

326. A separate letter dated 10th October, 2003 in the form of an undertaking in relation to a licence application to take place on 23rd October, 2003 which was not stamped by Byrne Wallace on receipt, was raised and the argument was made that this was an example of Byrne Wallace receiving a letter without a copy being retained by them or stamped "received". The basis for this claim was that the letter was found during the discovery process on the part of AIB and thus would most likely have had to pass from Byrne Wallace to AIB for AIB to have it in its discovery. However, I accept, as argued by counsel for Byrne Wallace, that it was in fact an enclosure in the letter dated 15th October, 2003 from Ms. Ann Nolan to Byrne Wallace, and that this latter letter would have been forwarded to AIB without the enclosed 10th October letter of undertaking being stamped or a copy retained. This was because it was an original letter of undertaking that was required by AIB and which it was appropriate for them to retain.

327. Dealing with the later correspondence during this important period, as stated it is very significant that neither Mr. Moran nor Mr. Egan raised the issue of the "covenant" in those correspondence with either Ms. Ann Nolan or Ms. Kierans after alleged receipt of said letter. It is indicative of the fact that the disputed letter (whether sent separately or combined with another letter) was never received. I accept the assertions of both AIB and Byrne Wallace that, following appropriate searches in accordance with their discovery obligations, no evidence of correspondence or discussions has arisen from an examination of their respective files concerning the loan transactions. As outlined above, Mr. Moran replied to Ms. Ann Nolan on 15th October, 2003 which letter was received by Thomas J. Kelly & Sons on 16th October, 2003 in which he acknowledged receipt of Ms. Ann Nolan's letter of 10th October, the undisputed letter, and that Mr. Egan would deal with the matter upon his return. Significantly, Mr. Moran included a reminder concerning outstanding matters concerning the phase IV and V loan transaction. This would have been the moment to raise the issue of the "covenant" with Ms. Ann Nolan in the disputed letter of 10th October, 2003 had the letter been received, but it was not raised at all.

328. Similarly, Mr. Egan wrote to Ms. Ann Nolan on 28th October in relation to correspondence received in the firm during his annual leave, particularly the letters received on 14th and 15th October, 2003. This letter of 28th October was received in Thomas J. Kelly & Sons on 29th October, 2003. In that letter, Mr. Egan refers specifically to the Nolan Transport loan transaction and the corresponding documents received with the letter received on 14th October, along with outstanding matters from that letter. He also refers to the loan transaction on phases IV and V and provides an update on requirements, referring to both Mr. Moran's letter dated 15th October, 2003 and a letter dated 10th October to Thomas J. Kelly & Sons prepared by Mr. Egan. This would have been another opportune moment to raise the issue of the "covenant" if the disputed 10th October letter was received either separately or with the undisputed 10th October letter, 2003.

329. Furthermore, the emails and/or correspondence between Byrne Wallace and Ms. Kierans do not raise the "covenant" matter identified in the disputed 10th October letter. These include the email from Mr. Egan on 23rd October seeking authority to release original title deeds. Neither is it raised on 28th or 29th October by Mr. Egan when he emailed Ms. Kierans providing her with inter alia updates on the file.

330. As a consequence of the conclusion above that the disputed letter was not sent to Byrne Wallace, it must follow that the disputed letter to Ms. Joan Nolan also dated 10th October, 2003 was not received. Neither the original nor any first copy of the letter was discovered by the plaintiffs. As Ms. Ann Nolan stated that as there was only a copy on her file, I would have expected Ms. Joan Nolan to have retained the original copy of the letter sent to her. However, Ms. Joan Nolan stated contradictorily that she would not have retained the original as it was Ms. Ann Nolan's practice to keep all correspondence. I believe that the original of such a letter if it had been brought to Ms. Joan Nolan's attention as indicated would have been retained amongst the plaintiffs' documentation on the loan transaction, whether by Ms. Ann Nolan or Ms. Joan Nolan, as it purports to deal with an issue the importance of which to the plaintiffs' case was affirmed repeatedly during the proceedings.

331. Furthermore, despite the fact that that letter indicates that Ms. Joan Nolan was provided with a copy of the disputed 10th October letter to Byrne Wallace, which copy was also not discovered, Ms. Joan Nolan stated that the first time that she saw this letter was in 2012 after Ms. Ann Nolan had discovered a bundle of documents amongst her effects either at home or in the Nolan Transport office. This contradictory evidence cannot stand against the weight of the evidence and counterarguments raised by AIB and Byrne Wallace.

332. Moving to the disputed phone call of 28th October, 2003, the plaintiffs contended that Mr. Egan made a number of commitments to Ms. Ann Nolan relating to the phase IV and V debt transferring to Messrs Evans and Good and to maintain and supervise a sinking fund. The corresponding attendance note which is said to have been made by Ms. Ann Nolan provides:-

> "File No. Phoned Ronan Egan Date 28/10/03
>
> …
>
> Address RE/ISAACS Attendance Per 1013 (AIB2)
>
> …
>
> About my 10/10/03 letter
>
> - the issue of AIB loan offer to Nolans + Sinking Fund?
>
> - Ronan Egan understands where Nolans coming from
>
> - Bank aware of our concerns & wants Nolans to understand them/where they are coming from

- We need to complete ASAP

=> Loan Offer must issue

- As to Sinking Fund – we don't have to worry about this cos Nolans will be exiting – it's a loan transfer + [therefore] not our concern

- Bank will be transferring Nolan's loan to Evans & Good when E & G exercise the Put + Call

- SF will fund it/will be set against new loan.

That's a matter for E & G + the Bank

- Not for Nolans – Not Nolans' Business

Bank can't disclose customer info to a third party – that's confidential

As to size of SF?

Don't worry about it – Again, not our concern.

Anyway, Bank can't disclose details

It's part of the transfer of the loans from Nolans to E & G

- It's AIB who supervise the SF

- Its amount

- Its accumulation

- Confirmed that AIB ensure that will only be used for transfer of loan.

- there will be a ref. to SF in Loan Offer but no ref. to confidential details.

SF's only use is for loan transfer from Nolans to E & G

- AN ? seemed reasonable/acceptable

AN to write to RE to confirm agreement

RE said that he was writing to AN re Melcroft

- AN wants urgent drawdown so that can complete

Re agreed – wants to finalise too"

333. The plaintiffs further claimed that Ms. Ann Nolan prepared a letter dated 28th October, 2003, the second disputed letter allegedly sent to Byrne Wallace, outlining the contents of the disputed conversation and note. Byrne Wallace disputed these assertions, stating that the letter was never received and the call never made along the lines outlined in the note. AIB agreed with Byrne Wallace's contentions. The letter provides:-

" Your Ref: RE/MMcK

Our Ref: 1013(AIB2)/AN/EW

Date: 28th October, 2003

RE/ Your Client: Allied Irish Bank plc.

Borrowers /Our Clients: The Nolan Family Members ("the Nolans")

Premises: (1) Nos. 23, 23A, 23B and 23C Store Street ("23, Store Street"

(2) The Damp Store being No. 20 Store Street

¬¬¬¬¬¬¬¬¬¬¬¬_____

Dear Sirs,

Further to the writer's telephone conversation of even date with your Mr. Egan herein, we write to confirm the arrangements regarding the Sinking Fund and how our clients wish to proceed with same.

Mr. Egan explained during his discussion with the writer that he understood our clients' concerns as detailed in our letter of 10th inst. and that as a result of having discussed the matter with your client, the Bank also understands those concerns.

Mr. Egan explained that upon exercise of the Put and Call Options by Richard Evans and Basil Good, our clients' loan will be transferred by the Bank to Mr. Evans and Mr. Good and that our clients' loan will be redeemed in full. On Mr. Evans and Mr. Good thereby reducing the loan to a level acceptable to the Bank. It is because of the application of the Sinking Fund to Messrs. Evans' and Good's loan that aspects of the Fund must remain confidential as between the Bank and its

borrowers, Messrs. Evans and Good. Said aspects include the opening quantum, the supervision and the accumulation of the Fund.

It was confirmed by Mr. Egan that:-

(1) in compliance with our request, your client will include a reference to the Sinking Fund in the Offer Letter. Such reference will not refer to any of the confidential details;

(2) the Sinking Fund will be accumulated under the supervision of the Bank to a level determined by the Bank to be appropriate and adequate to provide for the transfer of our clients' loan to Mr. Evans and Mr. Good; and

(3) the Sinking Fund will not be used by the Bank for any purpose other than the transfer of our clients' loan by the Bank to Mr. Evans and Mr. Good unless otherwise agreed with our clients.

We confirm that the writer has now discussed the matter with our clients, that our clients are satisfied with these arrangements and that they agree to proceed strictly on this basis."

334. Although it was stated by both the plaintiffs and Byrne Wallace that a telephone conversation may have occured between Ms. Ann Nolan and Mr. Egan on 28th October, I find with some certainty and accept both AIB's and Byrne Wallace's averments that a conversation along the lines outlined in the attendance note of Ms. Ann Nolan did not in fact take place for a number of reasons.

335. First, the manner in which the note is written is in contrast to a number of other writing examples, including handwritten fax sheets but more importantly another telephone attendance note Ms. Ann Nolan made while working as a solicitor taken on 19th August, 2003 which was before the court. These writing examples, particularly the telephone attendance note, are truncated, almost "telegraphic" as counsel for AIB described it. There are no full sentences, they are largely in point format and the handwriting style evident in the 19th August attendance illustrates an effort to hastily write down the points of the conversation with little consideration out of necessity to maintaining a neat hand. Contrarily, the disputed attendance note is neatly written, a greater level of detail is provided and much of the more contentious aspects of the note relating to the covenant issue are written in the style of almost full sentences. I do not consider this note to have been made in the same manner as that of the 19th August, 2003 note. If it was written on 28th October, it was not made simultaneous to the telephone call as Ms. Ann Nolan first asserted in her evidence.

336. Ms. Ann Nolan proferred for the first time at the start of Day 14 of the proceedings (and after questioning on the previous day that suggested the note was not contemporaneous) that the attendance note may not have been the note taken contemporaneous to the telephone call; that it could have been a later iteration made after the telephone call and could be a composite of both her recollections of the phone call at the time and the contemporaneous notes taken during the telephone call. She stated:-

"…I was reciting [the note's] contents to the Court, I think, and I just want to make it clear to the Court that this was not necessarily my first simultaneous writing down while…I had my phone to my ear while I was writing. It was not necessarily that, I can't specifically say. It could well have been the case that after the phone call, I may well have produced a tidier version using my original notes as I took them down and preparing this as my proper record of the phone call and then from which, using the combination of everything that I had, producing and sending the letter to him of the same date and if I had other notes in relation to this phone call, I can only say that these are my notes of the phone call. I don't have any other notes. If I did have other notes of the phone call, I would have done what I always did with notes that I no longer used, I would have simply shredded them and this would have been, or is, my file note of that." (Day 14, p. 8)

The evidence provided by the plaintiffs is thus at best inconsistent on this point. It is important to note that I attach only marginal weight to this aspect of my reasoning due to the medical issues relating to Ms. Ann Nolan's memory loss, nevertheless it is a factor taken into account.

337. Secondly, as to the contents of the disputed note I find that it is largely inconsistent with the manner in which events developed both prior to 28th October, 2003 and after that date.

338. Regarding events prior to the 28th October, it is important to remember, as I have accepted, that Byrne Wallace were in the dark as to any specifics relating to the sinking fund. I believe that Mr. Egan could not have understood where the Nolans were "coming from" because he did not have an understanding himself of the circumstances surrounding the sinking fund issue. He also did not have knowledge of their concerns because Byrne Wallace I have found had not received the disputed 10th October letter which was the only previous *inter partes* correspondence, disputed or otherwise, to raise the issue. I therefore accept that Mr. Egan was not aware of any concerns of the Nolan Family regarding the sinking fund issue. This element of the disputed note could not therefore have arisen.

339. It necessarily follows from this finding that Mr. Egan could not have informed AIB of the Nolan Family's concerns. I also accept AIB's evidence that it was not aware of any such issues regarding this matter and Ms. Joan Nolan's evidence that she did not raise the sinking fund with AIB after the 1st October email received from Ms. Kierans. AIB were therefore not informed of the Nolan Family's concerns from another source independent of Byrne Wallace. As such, AIB could not have communicated to Mr. Egan that they wanted "Nolans to understand them/where they are coming from".

340. As to the particular obligations evidenced in the disputed note that the plaintiffs claim AIB covenanted to undertake, aside from the disputed 10th October letter which I have found was not sent and certainly not received, the court is unable to discern from the evidence before it any discussion or correspondence up to this date indicating that AIB agreed to take on responsibility for the sinking fund. Witnesses for the plaintiffs were also unable at any time during the proceedings to point to any specific point in time when any such covenant was made by AIB even in general terms or by Byrne Wallace on its behalf. I therefore believe that if this conversation did take place that it was the first time that this matter would have come to the attention of Mr. Egan.

341. As such, I cannot accept that if this telephone conversation did in fact take place, that Mr. Egan would have accepted the contention that such a covenant was entered into by AIB or that he would do so on its behalf without seeking prior instruction based on the evidence before me. If such a covenant was raised with him I believe with certainty that the conversation would have developed in a completely different manner to that outlined in the disputed note. At the very least he would not have made any such commitments or accepted that AIB had done so, particularly when he had no knowledge of developments, agreed or alleged, relating to the sinking fund.

342. I also conclude that Mr. Egan did not have the authority to make any such representations to Ms. Ann Nolan on behalf of AIB. I am of the view that Mr. Egan was well aware of the limitations of his authority as regards this transaction and as a result he would not have made any such representations. He states in his witness statement at para. 38 that he "sought the instructions of the Bank in relation to any material issue that arose in the course of this loan transaction." He further states that he "was well aware of the absolute requirement for authority from the Bank in order to provide confirmations on its behalf of any material nature". Ms. Kierans states in her witness statement that she "never authorised him to make commitments of this nature on the banks behalf", a further contention which I accept. The limited nature of Mr. Egan's authority and the fact that he was aware of same can be discerned from the interactions between Thomas J. Kelly & Sons, Byrne Wallace and AIB relating to the original title deeds requested by Ms. Ann Nolan on 22nd October, 2003.

343. On that particular occasion Ms. Ann Nolan requested by fax the return of original title deeds for a related licensing application for the Isaac Butt bar. Mr. Egan then emailed Ms. Kierans on the morning of 23rd October, 2003 setting "out the details of the request for the release of the title documents and requested the authority of the Bank to do so." This consent was then received via email from Ms. Kierans on the same day and the requested documents were released. This exchange of correspondence illustrates the minimal level of authority Mr. Egan had to act on AIB's behalf; he could not in fact act on this matter without prior instruction from the bank. It also indicates that Mr. Egan's authority to act on AIB's behalf was far below the level necessary to permit him to bind the bank to such obligations as those indicated in the attendance note.

344. As such, the manner in which Mr. Egan is claimed to have relayed the covenant obligations would have required him to act without prior instructions as the court accepts that Byrne Wallace did not have instruction on this particular matter from the evidence of Ms. Kierans, Mr. Moran and Mr. Egan. I am of the firm belief that Mr. Egan would not have acted in this manner, particularly when he himself had previously sought authority for the release of specific original documents and when there was no evidence that this aspect of the relationship with AIB had changed prior to 28th October.

345. If such a conversation had taken place and Ms. Ann Nolan had raised the sinking fund covenant with Mr. Egan, I am certain that Mr. Egan would have conducted himself as he had done previously and sought instructions on the matter and written confirmation to proceed. However, no such correspondence exists in either AIB's file or Byrne Wallace's file relating to the loan transaction leading me to believe that no such covenant or any of its constituent elements were discussed.

346. An attempt was made to undermine Mr. Egan's credibility during the proceedings by reference to his involvement in circumstances which led to other litigation concerning Byrne Wallace. That litigation was entirely unrelated to the matters being litigated here, and in any event upheld his personal integrity. I found him to be a good historian, and that he gave rational and truthful evidence throughout, that was not adversely impacted by cross examination. In short I found him to be an entirely credible witness.

347. With regards to mention of the "loan transfer" in the note, I accept the evidence of both Mr. Egan and Mr. Moran that throughout their careers as solicitors they have never come across such a concept in the banking sphere. I would like to reiterate at this point my previous finding that the concept of a loan transfer was not in contemplation prior to October, 2003. Mr. Egan stated in quite emphatic terms that "I had never encountered and I have never since encountered a "loan transfer" in such circumstances or in any circumstances or in any circumstances between a bank and different borrowers."

348. Evidence was further provided which I accept by a Mr. Rory O'Donnell, consultant in Eversheds, in an independent witness statement on the loan transaction on this issue. He was the Senior Partner in Eversheds for a number of years up until 31st January, 2009, and arising from his involvement in the Law Society and Bar Association, provided voluntary assistance to solicitors in relation to conveyancing problems for over 35 years. Mr. O'Donnell specialised in conveyancing, planning and construction law for over 35 years. I accept that he is an expert in these areas.

349. Mr. O'Donnell stated that:-

> "I have never seen a case where the bank made a commitment at the commencement of such a scheme to provide finance for the buyback. In my experience, banks do not and never commit themselves so far in advance without any review of the value of the asset and the financial situation of the borrower at the time the loan is likely to be made. This applies to Banks lending to business generally and not just in projects like this one….It is simply not correct to say that the put and call option had any effect on the liability of the tax entity to the Bank. I have never known or heard of a Bank agreeing to transfer loans in this way either in a project like this or in any other type of business transaction.
>
> In my opinion and based on my experience this transfer of loans just does not happen. Banks will not in any circumstances approve a loan five years in advance. Also Banks like AIB have processes in place for the approval of loans. There must be a loan application, an approval by it's credit committee and a loan approval which takes the form of a written loan approval or facility letter."

350. I also accept Ms. Kierans evidence that:-

> "there was never any conversation around a transfer of a loan, ever. The Bank doesn't transfer loans in any event. It refinances loans by clearing one party and possibly lending to another party. But that was never discussed with the Bank. And in fact, around that time, or just prior to October, Evans and Good had come to the Bank for the very first time seeking approval for a new loan. So Evans and Good knew they had no commitments from the bank. We had never advised the Nolans that any commitment had been made to transfer loans." (Day 18, pp. 58-59)

351. As such, the concept of a loan or debt transfer and its application in the present circumstances would have been completely alien to Mr. Egan, particularly when I have found that the concept had not been discussed previously by any of the parties, including the plaintiffs. Although there was a general understanding of how the plaintiffs wished to proceed with the development in that they were going to repay the majority of the loan by way of proceeds from an option agreement to be exercised by Messrs Evans and Good, neither the term "debt transfer" nor the concept was in use prior to 28th October, 2003.

352. I also accept the evidence of Mr. Moran at para. 42 of his witness statement that:-

> "I had and have never come across a situation where a bank agreed to lend substantial funds to a borrower and also enter into a contractual commitment at the same time to transfer this loan to a third party at some future date, or a contractual commitment to lend substantial sums of money to a customer on a future date in excess of five years from the time the original proposal was being considered/offer made. In my experience, a commitment to lend money in the

long term by a financial institution to a borrower in the manner described above simply did not happen."

353. The inherent risk in such a covenant is self-evident – parties could be in very different and negative financial positions from when such an obligation is entered into to when the loan is transferred. Consequently, I am firmly of the view that Mr. Egan would not have allowed the bank to have given such undertakings or entered into the covenant on the bank's behalf in circumstances where such a concept was so foreign to him and the risk to the bank so self-evident, without taking prior instruction on the matter. As there is no evidence whatsoever of Mr. Egan having done so from either Byrne Wallace's discovery or that of AIB or the recollections of either Mr. Egan, Mr. Moran or Ms. Kierans, I am of the view that the concept of a "loan transfer" did not arise in any conversation that may have occurred between Mr. Egan and Ms. Ann Nolan on 28th October, 2003.

354. The disputed note also indicates in a number of instances that the details of the sinking fund and how it would operate was "Not Nolans' business" and that the "Bank can't disclose customer info to a third party – that's confidential". The disputed letter of 28th October, 2003 which it is alleged confirms the details of the telephone conversation, states that this confidential information included "the opening quantum, the supervision and the accumulation of the Fund".

355. Having reviewed the evidence up to 28th October, 2003 I find that there was no reason to believe that confidentiality was an issue and that there was no reason for Mr. Egan to raise the issue of confidentiality with Ms. Ann Nolan or even to discuss it in the disputed telephone conversation in the manner identified in the disputed attendance note. I have particular regard to point 5 of the email of 1st October, 2003 from Ms. Kierans to Ms. Joan Nolan which it is claimed was the impetus for undertaking the disputed correspondences. Whatever interpretation is applied to the statement at point 5 of the email regarding the sinking fund, on an objective reading and taking it in the context of the other evidence, it cannot be said and does not go so far as to state that the sinking fund issue is a confidential matter between AIB and Messrs Evans and Good. It simply referred to AIB seeking evidence of funds directly from Messrs Evans and Good.

356. I take particular notice of the comments made by Mr. Moran in direct evidence where he stated:-

> "There was also a reference to confidentiality in the context of the sinking fund arrangement. I mean, I absolutely don't understand how there could be anything of a confidential nature in relation to the sinking fund arrangement. The sinking fund is designed to support the put and call option. The put and call option at that very time was being negotiated between the Nolans and Evans and Good. It was an automatic follow-on, or ought to have been, that they would also negotiate the terms of the sinking fund arrangement." (Day 24, p. 20)

357. Both the Nolan Family and Messrs Evans and Good entered into this venture together and had worked closely in relation to it for a number of years. It is clear that information relating to the sinking fund was provided to and raised with the Nolan Family from the beginning of this entire loan transaction process. The Indicative Heads of Terms highlight that AIB were seeking evidence of a sinking fund to the value of €1.5 million which figure arose from the meeting held in early December which members of the Nolan Family had attended. They were clearly aware of the quantum of the fund. They were also informed of updates regarding the sinking fund by Mr. Evans in a letter to Ms. Ann Nolan dated 7th July, 2003 wherein he provided that Mr. Good had provided certain information to Ms. Kierans and that an updated valuation was being sought. At no point in these documents is the issue of confidentiality raised either explicitly or impliedly.

358. On the evidence before the court, the fact that the Nolan Family were not provided with further information regarding the sinking fund is not down to any issues of confidentiality made by either Messrs Evans and Good, AIB or Byrne Wallace but arises from their failure to seek any such information. Consequently, references to confidentiality and of matters being none of the Nolans' business is a significant inconsistency in the disputed attendance note with events prior to same.

359. Another aspect of the covenant raised in the note is the specific obligations relating to the supervision and maintenance of the fund. Aside from the bare assertion by the plaintiffs that AIB had covenanted so to act, I find no evidence of any such undertakings prior to this letter. I accept Ms. Kierans assertion when she stated that:-

> "There was never a discussion with the Bank about -- that would suggest that there was a formal arrangement going to be put in place where a fund of a certain period of time, by a certain amount of lodgements, or wherever funds were going to come from. That was never discussed with the bank and the Bank never covenanted to actually, to do that, or to maintain a fund. There's no actual written evidence of any detail of anything like that with the Bank." (Day 18, p. 58)

360. There is no written evidence in any form concerning the supervision or maintenance of a fund. Although it was argued that the email of 1st October from Ms. Kierans to Ms. Joan Nolan indicated that AIB "would attend" to the sinking fund, I have already expressed my interpretation of and findings relating to the 1st October email above which I find cannot objectively or reasonably be interpreted as confirmation on AIB's part to take on the general responsibility for the sinking fund or the specific undertakings to supervise the fund, to oversee its accumulation or to determine the size of the fund. Similarly, there is no record of a meeting or conversation whether in person or by telephone wherein these specific aspects of the sinking fund were raised, let alone that AIB had agreed to undertake same. These would have been important developments in negotiations on this loan and having considered the evidence provided by witnesses for AIB and Byrne Wallace, I consider it most likely that any such commitments would have at the very least been referred to in writing.

361. As to matters post the disputed phone call and attendance note, there are similar inconsistencies, I accept that the note refers to the fact that Mr. Egan was to write to Ms. Ann Nolan regarding Melcroft and the conveyance of no. 20 the Damp Store from that company to the Nolans, which did occur, and that it was agreed during the proceedings that the general feeling of urgency for drawdown was correct. However, leaving aside the 28th October letter from Ms. Ann Nolan to Mr. Egan as I do not consider it likely that this was either sent or received (my reasoning for which is outlined below), the note conflicts with later events.

362. It was claimed by Ms. Ann Nolan that the disputed telephone conversation had to have occurred early enough in the day to allow her the time to draft the disputed letter. If that were the case the telephone conversation would very likely have had to have occurred prior to the email Mr. Egan sent to Ms. Kierans on 28th October sent late in the afternoon at 16.44 to which was attached a draft of the Facility Letter. It would therefore have to be that despite this (alleged) agreement between Ms. Ann Nolan and Mr. Egan, the obligations as to the sinking fund are not reflected in this draft of the terms and conditions of the loan offer or in the Facility Letter dated 30th October, 2003 itself.

363. Special condition 5 expressly refers to the sinking fund "currently in place or to be put in place by the proposed Grantees of the Put and Call Options". Any responsibilities relating to setting up the sinking fund therefore fall on Messrs Evans and Good to complete, the Nolan Family being the grantors. This is in stark contrast to the meaning of the undertakings outlined in the disputed telephone

conversation. The quote also illustrates that the sinking fund is one that is "currently in place or to be put in place". This makes no guarantees as to the creation of a new sinking fund, let alone that AIB would be responsible for it in any way.

364. Similarly, the use to which the sinking fund was to be put evidenced in the 28th October draft and the 30th October Facility Letters contradicts the disputed note. The latter provides that it is "[c]onfirmed that AIB ensure that will only be used for transfer of loan" and that "SF's only use is for loan transfer from Nolan to E&G". In contrast to these remarks, the draft and Facility Letter provide the "Bank and the Bank's Solicitor…to be satisfied with the levels of same and to be satisfied that no withdrawals will be made from the said fund without the consent of the Bank." This can only be interpreted as allowing the funds to be used for much wider purposes than that outlined in the disputed note – in fact there is no limit, so long as approval from AIB is obtained beforehand.

365. The level of active engagement by AIB and/or Byrne Wallace with the sinking fund is also minimal. The clause states the "Bank and the Bank's Solicitor to be furnished with evidence" and "to be satisfied with the levels of same". The first element gives AIB and Byrne Wallace only a passive role, they are to receive said evidence, they are not required to actively search for and gather this evidence, that falls to Messrs Evans and Good. As to the second element, I do not consider this to go so far as to say that AIB are going to actively supervise and maintain the sinking fund throughout the period, a meaning which one may take if this part of the clause is read in isolation. This section of the clause cannot be read separately from the first part of the clause as they are linked by the conjunctive "and". I therefore consider that this second element, reading it in the context of the entire clause, bears the meaning that, based on the evidence furnished to AIB and Byrne Wallace, they are happy with the details of the sinking fund as to the level of funding and the arrangements regarding a mechanism preventing withdrawal without AIB's consent.

366. These inconsistencies between the draft and October, 2003 Facility Letters with the telephone call, if it did occur, would mean that Mr. Egan had reneged on a number of undertakings given by him on behalf of AIB or that AIB itself reneged on same by that time, of which there is also no evidence. This is something that I cannot accept, having regard to the evidence in the case, Mr. Egan's evidence in particular as to his approach to his work and having observed him in the witness box. I have already found him to be entirely credible. I believe he conducted himself in a diligent and cautious manner while processing this loan transaction and reneging on such an undertaking would be out of character.

367. Thirdly, it was Mr. Egan's evidence that "It is and was my practice at that time to record any telephone conversation of significance that may take place in respect of an ongoing file or transaction by way of typed or written attendance note or by way of subsequent written communication to a third party." An example of this can been seen in a letter from Mr. Egan to Ms. Ann Nolan on 18th November, 2003 wherein he refers to the earlier telephone conversation which was in part the subject matter of the letter. As the correspondence note deals more explicitly with the constituent obligations of the covenant raised in the disputed 10th October letter to Byrne Wallace, this conversation, if it occurred, would have been highly significant and would have raised "alarm bells" with Mr. Egan due to the consequences for his client. As such, I accept that had any conversation of this nature taken place, Mr. Egan would have made such a note or referred to it in later correspondence, however no note was discovered on the file which consequently leads me in part to the conclusion that it did not in fact take place.

368. The above reasoning relating to the contents of the note must also apply to the disputed letter of 28th October, 2003 as it is purportedly sent as confirmation of the points raised in the earlier telephone conversation. It is also in part for these reasons I find that the letter of 28th October was not sent and that the letter was certainly not received.

369. A number of additional grounds for my decision as regards the disputed 28th October letter must be outlined. First, the 28th October disputed letter refers to both the disputed 10th October, 2003 letter having been received and the disputed telephone call, both of which I have found did not occur. This is inconsistent with what I find to have most likely occurred during October, 2003.

370. Secondly, the letter indicates that it was prepared at some point by a secretary, Ms. Eileen Waters now Ms. O'Neill referred to above, in Thomas J. Kelly & Sons due to the inclusion of her initials in the reference maintained by Thomas J. Kelly & Sons "1013(AIB2)/AN/EW" on this disputed letter. The evidence was that where a secretary's initial's appeared on a piece of correspondence that this was prepared via dictation by Ms. Ann Nolan to a particular secretary. The evidence was also that where a letter was prepared by a secretary that this was saved on the computer network. Ms. O'Neill stated in her witness statement:-

> "Ann Nolan prepared her correspondence either by dictation and then gave the tape to a secretary for typing or typed it herself. When Ann used a secretary the letter was referenced with Ann's initials followed by the secretary's initials and the file number. These letters would then be saved by the secretary to the system except for example when it was accidentally deleted after the letter was sent for printing."

It was further stated by Ms. O'Neill in her witness statement that:-

> "The practice in Thomas J Kelly & Son was to back up the computer system overnight on a daily basis but this would not have included Ann's laptop, which was not connected to the system. Before Ann left the practice in 2005 she handed to me some back up tapes for safe keeping. I placed these in the back of a drawer in the office. I thought nothing more about these tapes until the recent enquiries were made and I located these tapes in the same drawer as I put them in in 2005."

371. In direct evidence Ms. O'Neill said:-

> "All our letters were typed day by day so when we were doing our dictation we open a folder, say, for that particular day, type letters one after another….So we typed them, saved them, printed them and put them on a physical file." (Day 31, p. 9)

More specifically on the procedure for saving files, Ms. O'Neill said:-

> "…every day we would have had opened a file, saved it as the date, typed our letters one after another, saved them, printed them, put them on the file and again the documents would have been done separately from the letters."
>
> She further stated that on occasion secretaries may not have saved a particular letter, they may have clicked 'no' when the 'save' window populated. She further commented, "if letters were gone it was never an issue because the files were actually our physical files. So, say, not if we done it, the way we work now we'd have to retype them again but back then we didn't."

372. Mr. Lawlor of Coghlan Kelly was required by non-party discovery order to examine the computer systems in the firm to determine

if the disputed letters appeared on the network. It was accepted that this examination did not turn up the disputed letters.

373. Regarding the back up tapes Ms. O'Neill further said:-

> "Every evening before I left the office I used to change the back up tape so there was a little cartridge and put it in the computer, the server computer and it was to back up the system overnight." (Day 31, p. 16)

374. EY were selected to complete an examination of the computer network in Coghlan Kelly after primary searches found a number of further documents from 2003. EY examined archived materials and the case management system in Coghlan Kelly and they concluded that they did not find evidence of the disputed letters existing in the archive.

375. A further examination was conducted by EY on the back up tapes identified by Ms. O'Neill and was provided as agreed evidence in an affidavit of discovery by Mr. Lawlor. In the report update EY states that:-

> "We outsourced the collection and recovery of the backup tapes form the offices of Coghlan Kelly to backup tape recovery specialists known as Critical Data Services Ltd. The latter used their specialist tools to index, extract and provide to us, the recovered data from the tapes."

EY then entered this information into their own search tool, conducted a targeted search for the disputed letters and found that the analysis of the information retrieved from the back up tapes "did not reveal any evidence of" of the disputed letters.

376. I consider that, although Ms. Ann Nolan may or may not have undertaken further work on preparing the final draft of the letter and may not have removed the secretary's initials, at the very least the practice was for the earliest iteration of such letters to be saved on the firm's computer system. It is therefore likely that had such a letter been prepared, it should have appeared on the system examined by both Mr. Lawlor of Coghlan Kelly and EY. I note that Ms. O'Neill provided evidence that it happened on occasion that a letter having been prepared by a secretary and printed, would inadvertently not be saved and thus deleted and that this letter would not have been redrafted on the computer because a paper based filing system was in operation in the firm. I find that this would have occurred only infrequently and that on balance if the letter had been prepared by a secretary, it would have appeared in the examinations of the computer system analysed by Mr. Lawlor and EY and/or back up tapes conducted by EY. As no such letter is evidenced on the system or tapes, it leads me to believe that it was not prepared in the first instance at that time.

377. Thirdly, for the reasons identified above relating to the postal system in Byrne Wallace I find with some certainty that the disputed letter 28th October, as with the 10th October letter, would have been discovered upon receipt. Furthermore, Mr. Moran stated that upon receipt of copies of the disputed 28th October letter in 2012, a review of the relevant file was conducted and no copy of the 28th October letter was found.

378. Fourthly, the contents of the 28th October disputed letter are highly significant, more so even than the 10th October, 2003 disputed letter to Byrne Wallace, because it outlines very specifically what the Nolan Family say AIB had agreed to undertake. As such I consider, as with the 10th October disputed letter, that Mr. Egan would have raised the covenant issue with Mr. Moran had it been received and would have sought clarification and instructions from Ms. Kierans in AIB, particularly when Byrne Wallace was in the dark on developments relating to the sinking fund. Correspondence with Ms. Kierans would particularly have been evidenced in writing consistent with Mr. Egan's practice up to this point, in the form of an email or an attendance note of a telephone call or meeting. However no such evidence arises from the materials before the court.

379. The correspondence after 28th October from Byrne Wallace likewise does not raise either the disputed telephone call or 28th October, 2003 letter with either Ms. Kierans or the Nolan Family, particularly Ms. Ann Nolan. The email Mr. Egan wrote to Ms. Kierans at 16.44 on 28th October, 2003 attaching the draft Facility Letter also provided Ms. Kierans with an update on developments regarding the loan transaction and a soft copy of a letter to Ms. Ann Nolan sent on that date. The telephone call is nowhere mentioned in this email, the contents of which would have been a very significant update on the loan transaction. Similarly, the telephone conversation is not raised with Ms. Ann Nolan in the letter sent by Mr. Egan and received in Thomas J. Kelly & Sons on 29th October, 2003. Mr. Egan simply refers back to his letter sent on 10th October, 2003.

380. Mr. Egan sent a number of further emails on 29th October, 2003 to Ms. Kierans providing her *inter alia* with another update, this time in relation to developments as to the Melcroft issue. This would have been an opportune moment to raise the disputed telephone conversation and the disputed 28th October letter if it had been received. No particular date was provided to the court as to when this letter was said to have been received. Similarly, a further letter was sent on 30th October by Mr. Egan to Ms. Ann Nolan concerning drawdown of €2,000,000 which was permitted by AIB for a capital gains tax liability but again there is no acknowledgment of either the disputed telephone conversation, receipt of the disputed 28th October, 2003 or their content.

381. In summary therefore I find that no representations were made by either AIB or Byrne Wallace on its behalf up to or during October, 2003 leading up to completion of the Facility Letter dated 30th October, 2003 as to claims raised by the plaintiffs relating to a debt/loan transfer, commitment to fund Messrs Evans and Good, the existence of a tripartite agreement or supervision and maintenance of a sinking fund. Furthermore, there were no terms in the loan agreements up to this point relating to these matters.

(viii) Facility Letter dated 30th October, 2003

382. Before examining the Facility Letter itself it is necessary to outline some further pertinent background facts. Ms. Kierans issued the final version of the Facility Letter and a copy of the General Terms and Conditions to Ms. Joan Nolan on 30th October, 2003. A number of emails then passed between Mr. Egan and Ms. Kierans after that date, indicating that they had received no response from the Nolan Family until around 14th November. Mr. Egan had not up to this point received a response to his letter of 29th October to Ms. Ann Nolan outlining the elements yet to be resolved in the transaction and Ms. Kierans had not at that point received the signed 30th October Facility Letter from the borrowers.

383. The loan transaction was then completed on 19th November, 2003 at a meeting between *inter* alia Mr. Egan and Ms. Ann Nolan. However, a number of security and special conditions were not in place at that point in time. Despite this, funds were released to meet the Nolans' capital gains tax liabilities adverted to above. It is clear from the evidence that a Mr. Tommy Hopkins who, per Ms. Kierans, "would at times have been the Chair of the Credit Committee" approved the request for the withdrawal on 29th October, 2003.

384. The pertinent elements of the Facility Letter dated 30th October, 2003 are as follows:-

"**BORROWER**..

We are pleased to advise that the Board of Allied Irish Banks plc ("the Bank") has sanctioned the following facility ("the Loan Facility") to the Borrowers subject to the following terms and conditions:-

FACILITY: Loan Account

AMOUNT: €9,500,000 (Nine Million and Five Hundred Thousand Euro)

PURPOSE: • €4.3m to develop the Damp Store (20 Store Street, Dublin 1) 23 Store St. Dublin 1 properties into additional 33 bedrooms/bar/restaurant. Total cost of development €4.3m.

• €2.0m to pay Capital Gains Tax arising from the sale of shares in Brittany House (UK) Ltd.

• €1.2m to repay inter-company loan to Movin ON (UK) Ltd.

• €2.0m to repay current Nolan Family Members loan (including accrued interest).

INTEREST: Prime rate plus 1% per annum varying (currently 4.5% per annum).

REPAYMENT: Loan will be structured on a 15-year amortisation schedule, with interest to be paid in advance for each year and equal yearly capital repayments of €633,000 thereafter. A Put and call option will be exercised in 2005 on the Isaacs Hotel complex and the surplus funds from this, after repaying loan relating to this development, are to be lodged as an out of course repayment of the loan herein of c. €2.155m. In 2010 another Put and Call option will be exercised for €6.366m, this is to be used in full to clear the residual loan balance at this time.

…

SECURITY: 1. A first fixed Mortgage over the property known as the Damp Store, 20, Store Street, Dublin 1 ("the First Premises") with the benefit of full planning permission for alterations to same to constitute a café bar/restaurant together with hotel bedrooms and all work in progress on the First Premises.

2. A first legal mortgage over the property at 23, 23A, 23B and 23C Store Street, Dublin 1 ("the Second Premises") with the benefit of full planning permission for the erection of a five storey over basement extension to the Isaac's Hotel and all work in progress on the Second Premises.

3. Full company guarantee from Nolan Transport (Oaklands) Limited…for not less than €9,500,000 and limited in recourse to its interest in the Isaac's Hotel and Isaac Butt licensed premises, Store Street, Dublin 1 supported by a first legal mortgage over the property known as the Isaac's Hotel and Isaac Butt licensed premises, Store Street, Dublin 1.

4. A first ranking security assignment over the benefit of the Put and Call Option Agreements to be entered into by the Borrower in relation to the First Premises and the Second Premises.

…

9. As security for the existing loan to Nolan Transport (Oaklands) Limited a Guarantee from the Borrowers for the full amount of the said loan but limited in recourse to the Borrowers' interest in the First Premises and the Second Premises.

SPECIAL 1. Title to the First Premises and the Second

CONDITIONS: Premises to be forwarded to the Bank's

Solicitors, BCM Hanby Wallace, Solicitors, 1 High Street, Dublin 8 for investigation and the Bank's Solicitors to be satisfied that the title is good and marketable.

…

5. The Bank and the Bank's Solicitor to be furnished with evidence of the sinking fund arrangements currently in place or to be put in place by the proposed Grantees of the Put and Call Options in respect of the First Premises and the Second Premises and to be satisfied with the levels of same and to be satisfied that no withdrawals will be made from the said fund without the consent of the Bank.

6. The Bank's Solicitor to be satisfied with the terms and conditions of the Lease and Put and Call Options to be put in place in respect of the First Premises and the Second Premises.

…

8. The Bank's Solicitor to be satisfied that the provisions of the security by Nolan Transport (Oaklands) Limited as detailed and provided in this loan facility letter and the repayments of the existing loan facilities made available by the Bank to Nolan Transport (Oaklands) Limited and to the Borrower will not contravene the provision of Section 31 of the Companies Act 1990 (as amended by the Company Law Enforcement Act 2001) and that the appropriate Auditor's report is furnished on behalf of Nolan Transport (Oaklands) Limited as part of the validation/whitewash procedure provided for in the Company Law Enforcement Act 2001.

…

GENERAL TERMS In addition to the specific terms and conditions set

and CONDITIONS out herein, the Loan Facility is subject to the conditions specified in the Bank's General Terms and Conditions Governing Business Lending, a copy of which is enclosed herewith. Unless expressly excluded or varied by the terms herein, these General Terms and Conditions shall apply to the Loan Facility. If there is any conflict between the

specific terms herein and the General Terms and Conditions, the specific terms herein shall have precedence and shall prevail.

…

This agreement supersedes any previous agreement between the parties in relation to the matters dealt with herein."

385. Much turns on the interpretation to be given to the 30th October, 2003 Facility Letter, particularly in relation to the Repayments clause and condition 5 of the Special Conditions. These terms, the plaintiffs argue, taken in conjunction with the terms and/or representations they aver were made by AIB or its agent Byrne Wallace, are consistent with their understanding of the loan transaction that there was an Isaacs loan and a non-Isaacs loan, that there would be a loan transfer, that cross guarantees were only given by the Nolan Family and Nolan Transport on this basis that AIB would fund Messrs Evans and Good and that there would be a sinking fund maintained and supervised by AIB.

386. I turn first to consider the plaintiffs' averment that there was an understanding that the Nolan Family were to pay interest only on the Isaacs Loan and interest and capital on the non-Isaacs Loan. These terms are used to categorise the various purposes outlined in the Facility Letter.

387. In considering this the court must initially examine the natural meaning of the Repayment clause on an objective basis in isolation and then move to consider how this sits within the Facility Letter as a whole and also within the context of the factual background. The court also takes this approach with subsequent clauses considered.

388. The natural meaning of the first part of the Repayment clause is clear and stated in bald terms. The Nolan Family are required to make interest payments on a single loan in advance each year and yearly capital repayments of €633,000 which is structured over a 15 year term. Similarly, the second element of the clause refers to "out of course" repayments of "the loan" or "the residual loan balance" arising from the exercise of put and call options in 2005 and 2010, indicating quite clearly that there is only one loan. These payments are to assist in clearing the loan by 2010.

389. This interpretation is at once at variance with the plaintiffs' claim that there was a difference in treatment in terms of repayment between a Non-Isaacs Loan and an Isaacs Loan. This latter understanding does not arise explicitly from the clause and cannot be implied because to do so would be to stretch its meaning beyond reason. It would involve reading into the clause a number of extra elements of a complex scenario that cannot arise from its simple, ordinary meaning.

390. I am further convinced that this natural meaning is the correct interpretation to apply to the Repayment clause as it does not conflict, and is in fact in harmony, with the manner in which the Facility Letter must be interpreted as a whole. In this regard the reasoning I applied to the Indicative Heads of Terms on this aspect is also applicable here. In summary, the Loan Facility provided by AIB is for a single Loan Account facility, it does not refer to two separate loan facilities relating to Isaacs and non-Isaacs funding. Furthermore, the Facility Letter makes no reference to a distinction in treatment either explicitly or impliedly to repayment of funds for the various purposes. The Facility Letter does not provide for the application of particular terms only to purposes relating to the Isaacs Hotel development and not to the Nolan Family's personal purposes or vice versa. The entire €9.5 million was provided in fact on the same terms.

391. There is no conflict between the interpretation of the Repayment clause and the Facility Letter as a whole and the wider factual background. There is no evidence aside from bare assertion that a division in treatment of Isaacs and non-Isaacs funding was ever contemplated to this point in time. It does not arise from any of the correspondence or documentation already considered between AIB and Byrne Wallace, or correspondence or documentation from the plaintiffs in particular to either of the other parties to these proceedings. As such, the weight of evidence is firmly against any such interpretation of the Repayment clause.

392. The plaintiffs' averments that AIB were to effect a loan/debt transfer, thereby shifting the liability for the €6.3 million approx. to Messrs Evans and Good, and that AIB had agreed to fund Messrs Evans and Good in 2010 shall now be considered. These assertions, the plaintiffs argue, are additional reasons why there was to be a difference in treatment between the funds for the development of the Isaacs Hotel and the funds for the Nolan Family's personal use. Such an understanding however does not arise on an objective reading of the Repayment clause when considered in isolation. There is no explicit mention of any such steps, of Messrs Evans and Good being responsible for such payments or that AIB would fund Messrs Evans and Good in 2010 in order to exercise the put and call option at that point. Furthermore, these purported representations cannot be inserted by way of implication because the clause provides only for obligations on the part of the Nolan Family as borrowers to ensure that surplus funds from the 2005 exercise of put and call options are paid in and that funds from a second Put and Call option to be exercised in 2010 are paid in. The clause goes no further. It places no obligation in any form on AIB. To read into the clause an obligation on AIB to either ensure a debt transfer or a commitment to fund Messrs Evans and Good would again do violence to the natural meaning of the clause.

393. This interpretation does not conflict with the Facility Letter when read as a whole. There is no term or clause that explicitly states or can be construed to imply that AIB was to effect a loan transfer at any point in time or that it committed to fund third parties at a future point. Aside from mention of the "Grantees" of the option agreements Messrs Evans and Good are not adverted to in the Facility Letter. The Facility Letter and the terms therein are between AIB and the borrowers, the signatories to the letter, not to third parties; obligations arise between AIB and the Nolan Family, not between AIB and a Messrs Evans and Good either at the date of signing or some later time in the future.

394. Furthermore, although there is no consideration as to whether there was to be limited or full recourse to the borrowers and whether the loan was to be repayable on demand in the Facility Letter itself, the Facility Letter incorporates AIB's "General Terms and Conditions Governing Business Lending" ("the General Terms and Conditions") which contains a number of clauses dealing with these aspects. The clause in the Facility Letter dealing with the application of the General Terms and Conditions provides "Unless expressly excluded or varied by the terms herein, these General Terms and Conditions shall apply to the Loan Facility." As there is no such exclusion or variation in the Facility Letter, these General Terms and Conditions are applicable to this particular Facility Letter.

395. The second element of this clause provides that if "there is any conflict between the specific terms herein and the General Terms and Conditions, the specific terms herein shall have precedence and shall prevail." Thus, even though the General Terms and Conditions are applicable, the specific terms of the Facility Letter will trump same where a contradiction arises between the two documents. Ms. Kierans stated in the email of 30th October, 2003 that she provided Ms. Joan Nolan with a copy of these terms when she issued the Facility Letter.

396. It is important to note that the €9.5 million loan facility is categorised as a "Loan Account" facility in the Letter as this has a

bearing on the applicable General Terms and Conditions. The terms relating to "Loan Account" facilities in this booklet provide for "Repayment on Demand":-

> "3.1.1 Loan account facilities are repayable on demand. However, in normal circumstances, the Bank expects that the loan will be available as stated in the letter of sanction.
>
> 3.1.2 Without prejudice to the Bank's right to demand repayment at any time, the happening of any of the events set out in clause 4.2 may lead to the Bank making demand for payment, with or without notice to the Borrower."
>
> Clause 4.2 provides as follows:-
>
> "4.2 A term loan though expressed to be repayable over or within a specified period may be terminated by the Bank and the Bank may demand early repayment at any time with or without notice to the Borrower upon the occurrence of any of the following events:
>
> (i) On the failure by the Borrower to make any repayment of principal or interest on the date it is due…."

397. Clause 3.1.1 is particularly pertinent here as it deals with any inconsistencies that might arise between the repayment terms in a Facility Letter and AIB's right to repayment at any time upon the occurrence of certain events leading to default. The clause explicitly states that the Facility would be available as outlined in the letter of sanction. AIB thus expects and it is the preferred option that repayment would follow along the lines as detailed in the Facility Letter but clause 3.1.1 clearly allows for AIB to seek repayment outside of the terms of repayment at any time and upon the occurrence of an event of default. Such events include as stated above "the failure by the Borrower to make any repayment of principal or interest on the date it is due." There is thus no conflict between the Facility Letter and the General Terms and Conditions.

398. Furthermore, the right to repayment on demand necessarily implies that the borrowers are liable for the full amount of the borrowing which clearly contradicts the claim that there was to be a debt transfer, that the Nolan Family were not responsible for repayment of the funds earmarked for the Isaacs Hotel development. The General Terms and Conditions create additional rights and obligations between the signatories to the Facility Letter and the bank. Specifically, the right of AIB to seek repayment on demand at any time and upon an event of default is against the Nolan Family as signatories to the Facility Letter, not Messrs Evans and Good. The clause does not limit the right to demand repayment in any way to certain amounts or in this case to funding provided for non-Isaacs purposes.

399. Clause 3.5 further outlines that any "residual balance" outstanding at the end of the repayment period becomes immediately due and payable by the borrower "unless the Bank, in its absolute discretion, agrees to other repayment arrangements with the Borrower."

400. Dealing with the interpretation of the clause with the Facility Letter in isolation first and leaving aside for the moment the representations that are said to have been made prior to the signing of the Facility Letter, no such arrangements are evident in the Facility Letter on an objective and reasonable reading of the Letter and particularly the Repayment clause. Thus, even the obligation to repay any residual balance, according to the Facility Letter, was on the Nolan Family as borrowers.

401. I further consider that there are no inconsistencies between the above interpretations and the findings I have previously made that there were no terms or representations entered or made by AIB regarding transferral of the loan, commitment to fund Messrs Evans and Good or that there would not be full recourse to the Nolan Family members. I take particular note of the evidence provided by witnesses for Byrne Wallace and AIB and the agreed elements of the statement of independent evidence of Mr. O'Donnell which emphasised that such loan transfers and commitments to fund third parties at some point into the future did not occur either in property, conveyancing or banking generally. Also of importance in this regard is the fact that Messrs Evans and Good had to enter an application in June, 2003 for funding eventually provided in 2005 and that full approval was withheld by the Credit Committee until it had an indication that AIB would have satisfactory security throughout the lending period.

402. In coming to this decision, I am cognisant of the fact that the general understanding was that the monies to be used for bullet payments in 2005 and 2010 were to come originally from Messrs Evans and Good arising from the exercise of put and call options to purchase particular properties encompassing the Isaacs Hotel. However, this does not alter the fact that the legal obligation to make repayments for the entire €9.5 million arising from the Facility Letter always remained with the Nolan Family. The general understanding did not go so far as to create legal obligation to that effect between the parties.

403. It is convenient to consider the cross guarantees in the Facility Letter at this juncture. It is the plaintiffs' case that the cross guarantees provided by Nolan Transport and the Nolan Family required by AIB were an indication to them that the bank was "endorsing" the tax scheme and that they were committed to funding Messrs Evans and Good into the future. As I have reasoned above, I consider that the cross guarantees were sought by AIB to ensure that it had adequate security over the Isaacs Hotel during the various changes in ownership. This is clear from the fact that before full approval was to be provided for the loan to Messrs Evans and Good, the Credit Committee were looking for a security "road map" on the development. This was also outlined to Ms. Ann Nolan by Mr. Egan quite clearly in his letter dated 12th May, 2003 which letter outlined the necessary legal requirements on this loan transaction.

404. In summary, on the above assertions relating to the Repayment clause the court considers that the concept of a debt transfer as propounded by the plaintiffs at its simplest entails the shifting of liability to repay a particular Loan Facility from the original signatory to some third party. The Repayment clause in the Facility Letter and the earlier documents, particularly the Indicative Heads of Terms and the Debt Repayment and Analysis Spreadsheets of late December, 2002 provide for no such procedure. What these documents actually illustrate, and what I accept was the case, was that the Nolan Family took out the €9.5 million loan and that they were to make yearly capital and interest repayments. Payments were then to be made to the Nolan Family by Messrs Evans and Good in 2005 and 2010 from funding they were to raise via separate funding that had no legal connection to the €9.5 million loan. There was no commitment from AIB to fund Messrs Evans and Good in this regard.

405. These monies were then to be used by the Nolan Family to repay the remainder of their loan which it was expected would be covered by these bullet repayments. This was the anticipated means by which the Nolan Family's debt would be significantly reduced. The Nolan Family loan would then be cleared and Messrs Evans and Good would be liable to repay *distinct loan facilities of their own*. Thus, liability for repaying the €9.5 million loan remained with the Nolan Family and they were not relieved of same until the loan was repaid and cleared.

406. Turning to Special Condition 5, the first element of this condition, the "Bank and the Bank's Solicitors to be furnished with

evidence of the sinking fund arrangements currently in place or to be put in place by the proposed Grantees of the Put and Call Options in respect of the First Premises and the Second Premises", places no obligation on AIB. It highlights that those responsible for the sinking fund concerned in the condition are the grantees of the put and call options on the first and second premises and not AIB and that it is the ultimate responsibility of the borrowers to ensure that AIB are furnished with the required documentation. It also illustrates that the sinking fund is one that is either "currently in place or to be put in place". The Condition cannot be interpreted as clearly requiring the creation of a second sinking fund and would seem to indicate that AIB were still unsure as to the arrangements for this fund.

407. I conclude that the "First Premises" and "Second Premises" are references to no. 20 the Damp Store at Store St. and 23, 23A, 23B and 23C Store Street, respectively. Although this inclines me to believe that the sinking fund was that relating to phases IV and V, the condition does not say that the fund is necessarily limited to these phases. The grantee of those options was in fact Messrs Evans and Good.

408. As to the second element of Condition 5, the "Bank and the Bank's Solicitor…to be satisfied with the levels of same and to be satisfied that no withdrawals will be made from the said fund without the consent of the Bank", this places a more than passive role on AIB. It requires the bank to assess the material received regarding the level of funding to determine whether it was at a sufficient level in proportion to the amount of funding provided to the borrowers. It also requires that the bank satisfy itself that monies cannot be taken out of the fund without its prior approval, that there are mechanisms in place to prevent withdrawal without their consent, effectively providing the bank with a veto.

409. There also appears to be no limit on the use to which the fund may be put, so long as prior approval for a withdrawal is granted by AIB.

410. I conclude that any review that AIB was to undertake was limited in duration and confined to an examination of the materials which the borrowers were ultimately required to ensure were provided. There is no requirement for a continual assessment of the sinking fund or an obligation to maintain and/or supervise the fund on an objective reading. This is the natural meaning of the clause arising from the use of the conjunctive "and" linking the review of materials provided on the sinking fund arrangements to AIB with the bank being satisfied as to the level of the fund and that there is an inability to withdraw monies from the fund without prior approval.

411. Condition 5, along with the other terms in the Special Conditions, are conditions precedent. They must be fulfilled prior to the full drawdown. AIB must therefore be satisfied before funding is provided, unless giving authorisation to provide partial drawdown, as to the levels of the fund and that there would be no withdrawals without the consent of AIB. In addition, the fact that the clause states that AIB is to be satisfied that "no withdrawals *will* be made" indicates that the assessment is a forward looking assessment of the arrangements in place. It is not a requirement to ensure that no withdrawals *are* made from the fund without AIB's consent which would suggest that the bank could be required to effectively undertake some form of "spot checks" during the loan repayment period.

412. The only continuing requirement in Condition 5 is that consent must be sought from AIB before any monies can be withdrawn from the sinking fund. This requirement is stated in very clear terms and as such it could not be implied that there was any such parallel requirement to seek the consent of the Nolan Family – to do so would clearly be inconsistent with the natural meaning of this final part of the clause.

413. This interpretation, particularly that of the consent element of the clause, leads me to conclude that Condition 5 is solely for the benefit of the bank and that if the bank were so minded they could allow reduction of the sinking fund to nil regardless of the use to which the withdrawals were to be put. AIB could do so, on the ordinary meaning of the clause, in complete contradiction to the Nolan Family's wishes if such a scenario arose.

414. This reading of the condition does not conflict with the Facility Letter when it is considered as a whole. The Special Conditions and the Security outlined in the document are for the bank's benefit. The borrowers must meet these requirements in order to be provided with the full €9.5 million. The purpose of these terms and conditions, along with the General Terms and Conditions, is to ensure that the bank has sufficient information and security measures before it to be satisfied that its interests are protected if the need arose to enforce the terms against the borrowers if they defaulted on the loan.

415. Also of import is the clause in the Facility Letter which states that "This agreement supersedes any previous agreement between the parties in relation to the matters dealt with herein." This clause is particularly broad in its scope. It causes the October, 2003 Facility Letter to override previous agreements including collateral contracts and representations relating to not just the particular Facility Letter but the loan transaction generally. This clause necessarily means that the terms contained in the Indicative Heads of Terms can no longer be relied upon by the parties. Whether or not this term could affect purported representations or terms made outside of the Facility Letter does not need to be considered as I have found that no such representations or terms were created or entered into prior to the provision of the Letter to the Nolan Family. Even if such terms were entered or representations were made, the clause would override them because it is so broad in its scope.

416. The court's conclusions are also supported by the general context within which Condition 5 was drafted. I accept Mr. Moran's evidence when he stated that:-

> "it is possible that in the context of Special Conditions there could be a negotiated provision that is a matter that's agreed between both parties that might continue as a contractual commitment post drawdown. But in this particular instance, as I view it, all of the Special Conditions are effectively preconditions to the drawdown. This meant that the Bank was entitled not to permit the drawdown until such time as these preconditions were met. But in my experience banks will occasionally permit a certain amount of the drawdown without certain preconditions being met and in some instances they may be permitted to draw down without any preconditions being met and in other instances it may be done in stages." (Day 26, p. 63)

417. I consider that the requirement of evidence of a sinking fund was always a condition precedent. Evidence of a €1.5 million fund was stated in the Indicative Heads of Terms that evidence was to be provided "prior to drawdawn" and this is not contradicted by Condition 5 in the 30th October, 2003 Facility Letter. I also note that while the evidence on the sinking fund was being provided by Messrs Evans and Good the responsibility still rested with the Nolan Family, as borrowers, to ensure that sufficient information was made available to AIB.

418. It is also clear that the Nolan Family took a rather laissez faire approach with regard to the sinking fund; the Nolan Family did not engage with AIB on the issue after the letter of 24th July, 2003. This is particularly so where I have found above that the disputed letters dated 10th October 2003, 28th October, 2003 were probably not sent and certainly not received, and the disputed call did not

likely occur. In fact Condition 5 was formulated, particularly the latter part of the clause stating that AIB was to be satisfied as to the levels of the fund and that no withdrawals would be made without its consent, in and around late September/early October between AIB and Byrne Wallace.

419. The latter part of the Condition was entered at the behest of Byrne Wallace to protect the bank's interests. This is clear from the evidence in the note taken at the meeting of 30th September, the draft terms amended by Mr. Egan, the email dated 10th October from Mr. Egan to Ms. Kierans and the oral evidence provided during these proceedings.

420. Mr. Moran said in direct evidence that after a combination of the meeting on 30th September and the email of the 1st October from Ms. Kierans, Mr. Egan came to him with his concerns regarding the lack of security over the sinking fund:-

> "what I recommended to Ronan was… write back to the Bank and recommend that they put a provision in the facility letter that still deals with their issue of requiring to be satisfied, but also adding a provision that the sinking fund be put into a particular account and that there be no withdrawals from the account without the consent of the Bank. In that way, while it was not a security it was some form of security to the bank that insofar as those funds would be with the Bank that no person would be in a position to withdraw them during the period of the loan facility." (Day 23, pp. 140-141)

421. As outlined above, Mr. Egan wrote to Ms. Kierans on 10th October, 2003 advising her to consider AIB retaining some control over the sinking fund to ensure that appropriate levels were maintained and that withdrawal from the fund could not occur without the bank's prior approval. On this particular element of the email Mr. Egan stated that "we were concerned that…if the Bank didn't want to take a charge…we wanted to suggest an alternative safeguard to the Bank that we were recommending at the time." (Day 26, p. 143)

422. I also accept Mr. Egan's evidence that as the Condition was solely for AIB's benefit, they could simply choose not to rely on the term, that they could waive it if they so wished. There was no continuing obligation in the Condition on AIB's part that was to benefit another party. Any benefit that the Nolan Family derived from the clause was merely coincidental in nature. They could – and perhaps – should have sought to protect their position regarding the sinking fund via parallel contractual obligations with Messrs Evans and Good.

423. The plaintiffs averred that they signed the document in haste due to pressure arising from the need for funds to cover a capital gains tax liability due at the end of October, 2003 and that the Facility Letter itself was also "rushed" due to this urgent need for funds. They stated that it was for this reason that they signed the document despite inconsistencies but that in any event Ms. Ann Nolan was satisfied with the resolution reached after the disputed telephone call on 28th October which was outlined in the disputed letter of 28th October, 2003 as this they argued reflected the actual situation regarding the loan, specifically with regards to the loan transfer and sinking fund.

424. I however cannot agree with these claims. Although I accept funds were urgently required to meet the tax liability at the end of October, these were provided upon approval by AIB as a partial drawdown despite the fact that a number of conditions were not as of yet satisfied and the Facility Letter was not signed by the borrowers at this point. This therefore removed the level of urgency. This conclusion is supported by the fact that the final completion meeting for the loan transaction was not held until 19th November, 2003, two and a half weeks after the Nolan Family were provided with the Facility Letter; Ms. Joan Nolan herself stated that although the document is dated 31st October, 2003 on the signature page not all the signatories would have signed by that date, it was sometime after. This would have provided the Nolan Family with sufficient time to consider the Facility Letter and note in particular any inconsistencies. I also conclude that had such inconsistencies been present if the disputed telephone call had taken place, Ms. Ann Nolan, being an experienced solicitor, would likely have sought to have the letter varied so as to reflect the actual terms agreed, this being the most secure position to protect her clients' interests. The fact that this was not done and the fact that the letter was signed and completed by 19th November indicates that these were the actual terms upon which the €9.5 million was lent to the Nolan Family.

(ix) Lending to Messrs Evans and Good for Put and Call Options on Phases I and II

425. It is convenient at this point to examine the finance provided to Messrs Evans and Good for the purposes of exercising the options on phases I and II of the Isaacs Hotel before moving on to consider subsequent Facility Letters on phases IV and V of the Isaacs Hotel and the Lismore and Beresford Place transactions.

426. Although approval was given for lending to Messrs Evans and Good in October, 2003 after the security outline or 'road map' was created to reassure the Credit Committee, the options relating to phases I and II were not exercised until 2004.

427. Ms. Kierans emailed Ms. Joan Nolan on 6th May, 2004 seeking information on the "buyout of phase 1 and 2." It was later agreed on 16th September, 2004 in a meeting between representatives of the Nolans and Messrs Evans and Good that the put and call options on phases I and II would be exercised not later than 31st October, 2004. Mr. Evans also suggested that "Basil and myself should probably now meet with Michelle to discuss the said financing of Phases 1 and 11." This latter matter was raised with Ms. Kierans and a Mr. Declan Curley of AIB on 19th October, 2004. Mr. Curley became involved with the lending to Messrs Evans and Good and additional funding to the Nolan Family on the phase IV and V loan in 2005. An agenda for that meeting indicates that Messrs Evans and Good would require €4.89 million to fund the exercise of the options on phases I and II but that with sinking funds of €762,000 to support the lending, the loan required was reduced to €4.13 million. On the evening of 19th October, Mr. Curley emailed Mr. Good indicating in part that a Facility Letter would be issued "over the next 24 hours" sanctioning a loan of €4.13 million.

428. In a file note dated 19th October, 2004 Mr. Egan wrote:-

> "In light of the fact that a 70% interest only will be acquired by Evans & Good, Richard Evans has suggested that a mechanism could be sorted out whereby the bank take a charge over the entire property and the Nolans will be a party to the charge in question and there can be some form of secondary arrangement between Evans & Good and the Nolans in respect of the split of ownership in a property."

He further noted that Ms. Kierans asked him "to consider the best method of proceeding with the taking of security." Mr. Curley forwarded Mr. Egan a draft copy of the Facility Letter on 21st October with a similar request.

429. Mr. Egan then emailed Mr. Moran on 28th October, 2004 seeking his assistance with reviewing a draft Facility Letter, attaching the draft Letter and two file notes on the circumstances surrounding the split ownership and request for funding from Messrs Evans and Good.

430. Mr. Egan responded on 2nd November to Ms. Kierans indicating that the two guarantees and supporting charges outlined in the draft Facility Letter from Messrs Evans and Good and the Nolans to capture their respective interests in phases I and II would be appropriate. Furthermore, cross guarantees from Nolan Transport and the Nolans for the Messrs Evans and Good loan would be necessary because of their ownership of the remaining phases of the Isaacs Hotel.

431. Mr. Egan wrote to Ms. Ann Nolan in Thomas J. Kelly & Sons on 5th November, 2004 informing her of a number of further requests for information as she was to represent Messrs Evans and Good on this transaction. In that letter, Mr. Egan outlined the various forms of security "envisaged by the Bank". These included a first fixed mortgage over the 70% interest that Messrs Evans and Good would hold in phases I and II of the the Isaacs Hotel; cross guarantees from the Nolan Family supported by a charge limited to their 30% interest in phases I and II and 100% interest in phases IV and V; a guarantee from Nolan Transport supported by a charge limited to its 100% interest in phase III; and a cross guarantee and charge from Messrs Evans and Good for the Nolans' €9.5 million loan limited to their 70% interest in phases I and II. He also noted that the Nolans would have to provide an additional charge over their 30% interest in phases I and II for their €9.5 million loan.

432. Mr. Evans wrote to Mr. Curley on 5th November, 2004 in which he indicated:-

> "[a]s regards the security I would propose that the Nolan Family Partnership consent to Basil and myself giving the Bank a Mortgage over the entire property. We can indemnify the Nolan Family Parternship in this respect…."

433. Mr. Curley then emailed Mr. Egan on 8th November, 2004 requesting his comments on Mr. Evan's proposal. Mr. Egan responded that Messrs Evans and Good could not give such a charge because they would only own a 70% interest in the property. He emphasised that the Nolans would have to give security over their 30% interest to ensure AIB had satisfactory security in place. Ms. Kierans outlined these requirements to Mr. Evans on 9th November in response to his letter of 5th November.

434. The Credit Committee met in early November and approved the lending to Messrs Evans and Good based inter alia on the condition that certain security measures would be obtained. The mark up also highlighted which items were outstanding:-

> "Nolan Transport (Oaklands) Limited:
>
> …
>
> Letter of Guarante from NFM limited to their interest in the Damp St. & Store St. properties. [Held approved]
>
> Letter of Guarantee from E&G limited to their interest in Phase 1&2 of Isaac's Hotel. [Offered & outstanding]
>
> …
>
> Nolan [Family] Membership:
>
> …
>
> Letter of Guarantee from NTL for €9.5m, restricted to its interest in Isaac Butts Licensed Premises. [Held approved]
>
> Letter of Guarantee from Evans and Good restricted to their 70% interest in Phases 1&2 of Isaac's Hotel. [Offered & outstanding]
>
> …
>
> Richard Evans & Basil Good:
>
> Cross Guarantee from the NFM's capturing their 30% interest in Isaac's Hotel and 100% interest in the properties at 20 (Damp Store), 23, 23A & 23B at Store St., Dublin 1. [Offered & outstanding]
>
> Guarantee from NTL for the full amount of the loan limited in recrouse to its interest in Isaac Butts Licensed Premises…." [Offered & outstanding]

435. The mark up further noted that Nolan Transport had decided not to use the funds it would receive from Messrs Evans and Good to clear its AIB loan for phases I-III. Rather, for tax purposes it would reduce its loan from €3.48 million to €1.7 million and utilise the remaining proceeds for other purposes. The €1.7 million was then to clear in 2010 via proceeds from a buy-back option on phase III – the Isaac Butt bar – to be exercised by Mr. Evans and Mr. Good. The Credit Committee approved this alteration and a Facility Letter to this effect dated 21st December, 2004 formalised this sanctioning of funds. Cross guarantees supported by charges from the Nolans and Messrs Evans and Good relating to their respective interests in the Isaacs Hotel were also a requirement of this loan.

436. A copy of the Facility Letter dated 8th November, 2004 addressed to Mr. Good was handed in to court and in particular provided the following on the cross guarantees provided by the Nolan Family and Nolan Tranpsort:-

> "2. Cross Guarantee from the Nolan Family Members for the full amount of the loan plus interest and costs thereon to be supported by a charge limited in recourse to the 30% interest in the Isaacs Hotel, Store Street, Dublin 1 to be acquired by the Nolan Family Members together with the 100% interest of the Nolan Family Members in the property known as the Damp Store, 20 Store Street, Dublin 1 and the property at 23, 23A, 23B and 23 Store Street, Dublin 1.
>
> 3. Guarantee from Nolan Transport (Oaklands) Limited for the full amount of the loan plus interest and costs thereon supported by a charge limited in recourse to its interest in the Isaac Butt Licensed Premises, Store Street, Dublin 1.
>
> …
>
> 6. As security for the existing loan in favour of the Nolan Family Members, a guarantee from the Borrowers for the full amount of the said loan together with interest, costs and expenses thereon supported by a charge strictly limited in recourse to the Borrowers 70% interest in the Isaacs Hotel, Store Street, Dublin 1 to be acquired."

The Facility Letter also states that a "copy of this letter of sanction is being forwarded to Richard Evans".

437. The requisitions which Mr. Egan in his letter dated 5th November, 2004 sought from Thomas J. Kelly & Sons were not received by Byrne Wallace until 16th March, 2005 due it would appear to an earlier letter dated 24th December, 2004 from Ms. Ann Nolan having "gone astray" according to her letter of 15th March, 2005.

438. A second Facility Letter dated 18th April, 2005 was later signed by Messrs Evans and Good incorporating a one year moratiorium on capital repayments which had previously been approved by the Credit Committee on 20th December, 2004.

439. The plaintiffs contended that the manner in which AIB dealt with the Messrs Evans and Good loan transaction during this period illustrated its commitment to the tripartite agreement, to effect a debt transfer and/or to fund Messrs Evans and Good. However I cannot accept this contention. It is clear that the €4.13 million loan at issue in the meeting on 19th October, 2004 and which was raised in Mr. Curley's email of the same date to Mr. Good was already approved arising from the Credit Committee meeting of 3rd July, 2003 although a Facility Letter didn't issue until November, 2004. There was nothing automatic about the funding for Messrs Evans and Good.

440. As outlined above, the 3rd July, 2003 mark up resulted in approval in principle to fund Messrs Evans and Good with the condition that a security 'road map' be approved before full approval was granted. This was approved in October, 2003. A "Position Paper: addendum to markup dated 3/7/03" dated 17th June, 2004 indicates that a limit of €4.637 million was already approved by this point. This was corroborated by both Ms. Kierans and in particular Mr. Curley who stated in relation to the Position Paper dated 17th June, 2004:-

> "Where it says "balance zero" you can take it there's no loan drawn and where there's a limit it means there's an agreement by a previous Committee or previous presentation which allows that borrower avail of that facility, and we are re-seeking the same amount again." (Day 20, p. 161)

441. An examination of the 3rd July, 2003 mark up indicates that this limit was comprised of €4.13 million for the phase I and II options and €507,000 in relation to part finance of a put and all option on the Isaac's Hostel. Continuation of these facilities was recommended in further mark ups in November, 2004 and on 20th December, 2004. This however was all contingent upon the necessary security conditions being met. There was no further commitment to provide funding to Messrs Evans and Good evident on this mark up or any further mark ups before the court. Furthermore, Messrs Evans and Good did not seek any further funding relating to any subsequent options.

442. Counsel for the plaintiffs raised the argument with Mr. Curley in cross examination that the mark up dated 20th December, 2004 illustrated AIB's understanding of how funding for the various options would proceed, that cross guarantees would be required, that they would fund Messrs Evans and Good and that they would effect a debt transfer. Mr. Curley, with whom I am in agreement, denied that there was such an understanding evident in the mark up:-

> "All that says is that the Bank has committed to funding 4.13…million to fund the first two buybacks. There is no commitment there to fund any further buybacks. It's not represented anywhere in that document that the Bank has made that commitment and it's not represented in any documentation that the Bank made that commitment. If Richard Evans and Basil Good had been looking for a commitment at that point it would have been reflected under 4 under "*sought*", a new commitment or whatever. It's not there."

If AIB were aware of the triparte agreement as averred by the plaintiffs, the requirement for further funding would have appeared either in this mark up or the various other mark ups, particularly those in 2009 by which time the 2010/2011 deadlines for the put and call options were on the horizon. However this was not the case and is a noteworthy fact against the plaintiffs' assertions.

443. The plaintiffs contended that the cross guarantees for the lending to Messrs Evans and Good were a continuation of discussions they had had with AIB evidenced in the mark up of 18th December, 2002:-

> "…when discussed with clients, their response was that if AIB banked Messers Evans & Good as outlined, we would continue to capture both interest in the property as security (subject to satisfactory Cross Guarantees) for each debt going forward."

The plaintiffs asserted that the fact that AIB were financing Messrs Evans and Good was a representation that the bank was also agreeing to fund Messrs Evans and Good for all subsequent options relating to the Isaacs Hotel development. It was only on the basis of this belief that they provided AIB with the cross guarantees from the Nolan Family and Nolan Transport.

444. This contention however does not bear up to scrutiny upon an examination of the evidence before the court. First, I have concluded that the discussions in December, 2002 were merely preliminary in nature and could not form the basis of representations by AIB which by extension also applies to the Nolan Family and any offer they may have made at that point in time.

445. Secondly, as with the motivation behind the request for the previous Nolan Transport guarantee, it is apparent upon an examination of the evidence on the Evans and Good Facility Letters dated 8th November, 2004 and 18th April, 2005 that the motivation behind AIB's request for cross guarantees was to ensure that they had sufficient security over the Isaacs Hotel should the worse case scenario arise. Their requirement was not evidence of AIB entering a deal to fund Messrs Evans and Good for the remaining options.

446. In his letter to Ms. Ann Nolan in Thomas J. Kelly & Sons on 5th November, 2004, Mr. Egan noted:-

> "You will see from the security provision that a Cross Company Guarantee and charge is required from the Borrowers for the loan previously made available to the Nolan family members limited in recourse to the Borrowers' 70% interest being acquired. This reflects the change in ownership from Nolan Transport (Oaklands) Limited to Evans & Good. Similarly, in respect of the 30% interest being acquired by the Nolan family members, an additional charge will be required by the Bank to support/secure the family members' loan to take in this 30% interest now being acquired from the transport company. The Bank will require an amending facility letter in this regard and will be in contact directly with the Nolan family members…".

447. Furthermore, in response to Mr. Evan's letter of 5th November in which he raised the option of AIB obtaining a charge over the entire development, Ms. Kierans wrote in her email of 9th November:-

> "2. Security for your facility will have to incorporate a Guarantee from Nolan Family capturing their interests in the Isaacs

> Hotel/pub premises and one from Nolan Transport Ltd likewise. This will also mean we need to capture two new charges, one from yourselves regarding your 70% interest in Phases 1&2 and one from Nolans regarding their 30% interest. I don't believe that you and Basil can give a charge over the full title in this respect, hence it is structured this way.
>
> 3. You and Basil will also have to now give a Guarantee to the Nolan F[a]mily in respect of their existing loans on the premises as the ownership of Phases 1 & 2 is moving from the Transport company to this 70/30 arrangement…."

448. There is every likelihood that Ms. Ann Nolan would have been appraised of the contents of this email arising from the fact that she acted as the solicitor for Messrs Evans and Good in this transaction. She would likely therefore have been aware that Mr. Evans' offer of a mortgage over the entire property was rejected because of the new split ownership arising from the sale of Nolan Transport's interest. She would also likely have been aware that the cross guarantees from the Nolan Family and Nolan Transport's were necessitated to ensure AIB's continued security over the entire Isaacs Hotel as held prior to the sale of phases I and II from Nolan Transport to Messrs Evans and Good.

449. Arising from these two pieces of correspondence, it should have been apparent to Ms. Ann Nolan that AIB were seeking the cross guarantees as a requirement of the lending to Messrs Evans and Good as well as the Nolan Family and Nolan Transport arising from the fact that the Isaacs Hotel development was to be owned by three separate parties instead of two, that the new arrangement as to cross securitisation was merely a continuation of the cross securitisation already held. That was the only purpose behind the requirement. There was no secondary motive relating to a possible earlier proposal that the Nolan Family would provide the securities if AIB funded Messrs Evans and Good. AIB had come to the decision to seek cross guarantees independent of this proposal.

450. It is also apparent that the Nolan Family were aware of the reason behind AIB seeking these security items. Ms. Joan Nolan states in her witness statement at para.s 81 and 85 that:-

> "NFP gave two guarantees in respect of the borrowing by Mr Evans and Mr Good. The guarantees [were] a requirement by AIB and AIB said that they were necessary in order to maintain their 100% security over the properties given that NFP was to hold a 30% interest in the properties….The cross guarantees and the 100% security over the Isaacs Scheme. They were an extension of the discussions with Ms Kierans when we were finalising the NFP facility in October 2003 and I understood that they were necessary to protect the bank given the split ownership that it was financing."

Ms. Sally Nolan gave similar evidence:-

> "So at this time the Phase 1 and 2 option had just completed, and in order to complete that the Bank insisted that Nolans had to guarantee, or had to give their security to the Evans and Good facility on the AIB loan, and then equally when it came to the Nolan loan, Evans and Good had to give their interest in their part of the asset to the Nolan loan." (Day 7, p. 19)

451. That however was the extent of the representation, there is no evidence that AIB sought these guarantees in relation to a commitment to fund future put and call options. As reasoned above, reliance on the schedules attached to the 18th December, 2002 mark up or on comments in Ms. Kieran's email of 1st October, 2003 relating to the guarantee provided by the Nolan Family for the Nolan Transport phase I-III loan was misplaced. I see nothing on the evidence to dissuade me from adopting the above interpretation. In particular, evidence relating to undocumented oral representations on this matter was too vague or uncertain to alter my decision.

452. The frailty of the plaintiffs' evidence was put succinctly by Ms. Sally Nolan under cross examination in relation to the requirement for cross securitisation:-

> "Q. …I think you are telling the Judge that because you saw the cross-securitisation provisions, you were confident that the Bank was committed to funding Evans and Good in 2010. Is that correct?
>
> A. Well it was a further, it was a further point that we believed showed the commitment on everybody's part, because in 2005, when everything got interlinked, Nolans had nowhere to go in 2010, because they didn't have any security because it was on Evans and Good's facility letter."

There was thus no actual or inferred representation either by way of a communication from or conduct by AIB staff that they were committing to funding the subsequent options. The plaintiffs unreasonably extrapolated from a straight forward request for security that such was the case, even when the request is considered in the context of the factual matrix of these proceedings.

453. The plaintiffs referred to and relied in part on their inability to seek funding from another bank in 2010 for the project as a basis for their contention that AIB were the only bank that could fund the development. However, this is not a reasonable basis upon which the plaintiffs can interpret the motive behind AIB's actions in 2005. As matters stood in 2005, although it would have been more difficult for the plaintiffs to seek alternate funding, it was still possible. In particular, as examined below, the evidence before the court was that in March, 2006 the Nolan Family argued successfully for a considerable margin reduction on the phase IV and V loan based on the fact that they informed AIB at the time that they were receiving offers of more competitive rates if they moved their entire facilities to another banking institution. I therefore consider that it was both legally and commercially possible for another bank to fund the project.

454. The interpretation adopted by the court is corroborated by documentation internal to AIB and sent between AIB and Byrne Wallace although these would not have been seen by the plaintiffs. There was no secondary motive behind requiring these cross guarantees, they were simply sought to perfect AIB's security. Mr. Egan's email to Ms. Kierans and Mr. Curley on 2nd November, 2004 states as follows:-

"…please see my comments above in relation to the recent extension to the Hotel premises which is vested in the name of the Nolan Family membership. If this forms part of the overall structure, the security to be taken here will be flawed and incomplete as the Bank's security for the present loan will only be in respect of part of the hotel premises. Therefore, in a default situation when the Bank may seek to enforce its security and sell the premises over which it holds security, it will not be able to do so as it will constitute part only of one overall building. If my understanding of the situation is correct, I think that the bank should consider looking for cross security by way of Limited Recourse Guarantee and Mortgage from the Nolan Family Members in respect of the extension to the hotel premises."

455. The advice provided by Mr. Egan which Ms. Kierans received prior to responding to Mr. Evans on 9th November was as follows:-

> "…A consent from the Nolan Family Members to Evans and Good giving a mortgage over the entire property, coupled with an appropriate indemnity is not sufficient in my view if a 30% interest vests in the Nolans then Evans and Good cannot give a charge in respect of the entire property – they can only charge the extent of their interest in the property (i.e. 70%). A separate charge needs to be given by the Nolans and I think that the way the security is structured as per my e-mail last Friday is the appropriate way to proceed. This fully secures the Bank's interest…."

456. The Credit Committee mark up dated 20th December, 2004, in which Messrs Evans and Good sought a five year capital moratorium but the Credit Committee only approved a one year moratiorium, further indicates that "We [(AIB)] will be obtaining cross guarantess from all interested parties in the Isaac's complex in order to perfect security".

457. It is therefore clear from an examination of these passages that AIB's only focus was on ensuring that they had adequate security arising from lending to Messrs Evans and Good in 2005 and the nature of the subsequent split ownerhip. This is further substantiated by the fact that the Credit Committee mark ups do not contemplate an increase in the indebtedness of Messrs Evans and Good to AIB arising from the exercise of options in 2010 until the mark up dated 14th August, 2006.

458. Furthermore, I do not accept the contention put by the plaintiffs during the proceedings that they did not receive any benefit from providing the guarantees – the various facilities were contingent on the receipt of these cross guarantees. They were necessary to ensure that the plaintiffs continued to benefit from the tax allowances and could bring the development to completion in which the Nolan Family would retain 30% interest.

459. The above analysis equally applies to phase III of the Isaacs Hotel. The fact that AIB continued to seek cross securitisation on the loan after the options on phases I and II were exercised was not a representation that AIB were going to later fund Mr. Evans and Mr. Good in relation to the option agreement on phase III. There were no commitments of this nature or that AIB would effect a debt transfer from Nolan Transport to Mr. Evans and Mr. Good in 2010 when the option was to be exercised.

460. Finally, the refinancing loan with AIB relating to phases I and II, which also incorporated funding for phase III, was entered in 1999, a number of years prior to the point in time when the commitments were said to have been made by AIB. Even if commitments were made by AIB, they were made subsequent to this lending and in relation to an entirely distinct loan transaction with legally separate borrowers; the commitments could not therefore have had any bearing on this lending to Nolan Transport. It was also accepted by the plaintiffs that Nolan Transport's refinancing loan with AIB was an ordinary loan transaction, that the averments concerning a tripartite arrangement and the various commitments did not arise in the context of the Nolan Transport loan.

461. It is important to note that when the Nolan Family made the lending application to AIB in relation to phases IV and V in late 2002, when they entered negotiations with AIB on this lending and when they signed the October, 2003 Facility Letter, they did so in their personal capacity, not as representatives of Nolan Transport. Thus, even if I was to accept that commitments had been made during late 2002 and 2003 they would have been made to the Nolan Family in their personal capacities, it was never in fact made to the Nolan Family as agents of Nolan Transport. This assessment applies equally to the options on phases I, II and III.

(x) Subsequent Facility Letters for Phases IV and V

462. Having come to the conclusion that there were no contractual terms of the sort claimed by the plaintiffs in these proceedings and no representations of similar content made to the plaintiffs by AIB or Byrne Wallace prior to or arising from the 30th October, 2003 Facility Letter, the plaintiffs could therefore not have relied upon any such representations or contractual terms in subsequent Facility Letters and more particularly, the Facility Letters dated 22nd August, 2006 and 28th September, 2009 upon which AIB relied in the Letter of Demand dated 15th October, 2012 and in its counterclaim in these proceedings.

463. However, in the event that I am wrong in coming to the above conclusion, the court shall consider the alternative scenario as outlined by the plaintiffs that commitments were made by AIB as to the sinking fund, debt transfer and funding of Messrs Evans and Good and incorporated into the Facility Letter dated 30th October, 2003. In particular, the court shall consider whether these commitments continued to be in effect through subsequent Facility Letters up until AIB issued its demand letter dated 15th October, 2012.

464. There were no developments of particular significance to the phase IV and V Isaacs Hotel loan during 2004 aside from the Nolan Family providing cross guarantees for the funding obtained by Messrs Evans and Good for phases I and II which has been dealt with above.

465. The next documents of importance to be considered are the Facility Letters dated 10th January, 2005, 14th February, 2005 and 22nd July, 2005 which were all on similar terms. The Facility Letter dated 10th January, 2005 was principally entered in order to ensure that AIB captured by way of cross guarantee the interests of the Nolan Family, Nolan Transport and Messrs Evans and Good in the entire Isaacs Hotel development for the €9.5 million loan. Whether the taking of this security was acceptance by AIB of contractual terms that it would fund Messrs Evans and Good or effect a debt transfer or amounted to representations to the same effect has been more fully dealt with above.

466. These cross guarantees continued to feature as security in subsequent Facility Letters. The Facility Letters dated 14th February and 22nd July, 2005 were entered in response to further requests for funding by the Nolan Family as the cost of developing the Isaacs Hotel increased. The loan increased to €10 million in February, 2005 and then €11.3 million in July, 2005.

467. Having carefully considered the evidence arising from this period of time, I do not feel it necessary to enter into an examination here of the correspondence between the parties prior to the signing of the 22nd July, 2005 Facility Letter. The court comes to this conclusion because I find that by accepting the Facility Letters dated 10th January, 14th February and 22nd July, 2005, the Nolan Family agreed that upon the signing of each Facility Letter, the respective Letter contained the only contractual terms upon which AIB was lending money to the Nolan Family, and that each new Facility Letter replaced any prior agreement relating to the transaction.

468. This is so arising from the fact that each of these Facility Letters contains a clause stating that the agreement "supersedes *any previous agreement* between the parties *in relation to the matters dealt with herein*" [emphasis added]. As stated previously, this clause causes each Facility Letter to override previous agreements including collateral contracts and representations relating to the loan transaction. The July, 2005 Facility Letter goes further and states explicitly that "This letter replaces the previous Letter of Sanction dated 14th February 2005." Thus as of 29th July, 2005, being the date upon which the July, 2005 Facility Letter was signed by the Nolan Family, even if AIB had contractually agreed or represented to the Nolan Family that it was going to act as claimed by the plaintiffs prior to this Facility Letter, the terms upon which the parties had agreed to conduct themselves were varied as outlined

in the Facility Letter dated 22nd July, 2005. As such, it is only necessary to consider the Facility Letter dated 22nd July, 2005 at this juncture.

469. Of considerable importance for the purposes of these proceedings is the Repayment clause in the July, 2005 Facility Letter which provides:-

> "The loan is repayable on demand. However, without prejudice to the Bank's right to demand repayment of the loan in full at any time, it is the Bank's present intention that the loan will be repaid as follows:
>
> Capital reductions of €200,000 per quarter commencing end of first quarter 2005 to continue with the remainder to clear in full by 2010. Interest to be met as it falls due. Revised capital reductions to be agreed between the Bank and the Borrowers by 30th September 2005 to ensure residual balance to clear in full by 30th September 2010."

470. The plaintiffs contended that despite the fact that the Repayment clause in this Facility Letter states in bald terms that the "loan is repayable on demand", as in the previous Facility Letters dated 10th January and 14th February, 2005, the next section of each clause outlining AIB's intentions as to repayment supported their claims as to the debt transfer and commitment to fund Messrs Evans and Good and that the loan was in fact a term loan. This stance however is untenable.

471. The wording of the Repayment clause is clear – although it is intended that the loan would be repaid by quarterly capital and interest payments with the remainder being repaid in its totality in 2010, AIB could in fact seek repayment of the debt in full at any time. The court cannot accept the evidence of either Ms. Sally Nolan or Ms. Joan Nolan that they did not assign any significance to that part of the clause or that the clause did not have this meaning. This is the only understanding one can glean regardless of whether there was a pre-existing contractual term or representation as averred by the plaintiffs concerning a debt transfer and/or commitment to fund Messrs Evans and Good. The clause is clearly contrary to any such understandings. Consequently, acceptance of same overrode any previous terms or representations in the present proceedings relating to similar matters which would have included, if they had occurred, a commitment to transfer the debt to Messrs Evans and Good and a commitment to fund same.

472. The Repayment clause in the July, 2005 Facility Letter does not refer to Messrs Evans and Good in any respect. As with previous Facility Letters, the clause does not distinguish between the various purposes to which the funding was to be put and my reasoning outlined above relating to same necessarily applies. The Nolan Family were thus responsible for repaying the totality of the loan.

473. Furthermore, the General Terms and Conditions were incorporated into the Facility Letter. The General Terms and Conditions applicable at the time relating to term loans only permit AIB to seek payment on demand upon the occurrence of particular events of default. The General Terms and Conditions do not allow the bank to seek payment on demand outside of these particular events. However, the wording of the Facility Letter clearly indicates that this loan provided to the Nolan Family was more in the nature of a "Loan Account" rather than a "Term Loan" facility.

474. The fact that the facility is described as a "Loan Account" in the Facility Letter dated 22nd July, 2005, as in previous Facility Letters, is also of import as this has a particular bearing on the correct set of General Terms and Conditions to be applied to the loan. Clause 3.1.1 of the General Terms and Conditions relating to loan account facilities provides that the "Loan account facilities are repayable on demand" but that "in the normal circumstances, the Bank expects that the loan will be available as stated in the letter of sanction." Clause 3.1.2 states "Without prejudice to the Bank's right to demand repayment at any time, the happening of any of the events set out in clause 4.2 may lead to the Bank making demand for payment, with or without notice to the Borrower". Clause 4.2 sets out the events of default applicable to both term loans and loan account facilities.

475. The wording of both clause 3.1.1 of the General Terms and Conditions and the Repayment clause of the Facility Letter dated 22nd July, 2005 bear similar if not identical interpretations, indicating that the loan was in reality a Loan Account facility.

476. Thus, even if such terms or representations existed as that claimed by the plaintiffs, by signing this document the Nolan Family agreed to effectively amend the contract between the parties, removing any such terms or representations.

477. As to the sinking fund issue, the 22nd July, 2005 Facility Letter incorporated the Special Conditions contained in the October, 2003 Facility Letter which included Condition 5 relating to evidence of a sinking fund. As per the reasoning outlined above on the 30th October, 2003 Facility Letter, this condition could not on an objective, reasonable basis have the meaning ascribed to it as contended by the plaintiffs. However, even if it were the case that the October, 2003 Facility Letter contained a commitment relating to the supervision or maintenance of a sinking fund by AIB which was incorporated into the 22nd July, 2005 Facility Letter, it was removed from the agreement between the parties by the Facility Letter dated 3rd April, 2006. This is dealt with further below.

478. Through the period from July/August, 2005 to April, 2006 AIB reviewed the plaintiffs' facilities which culminated in a mark up put to the Credit Committee at its meeting on 9th March, 2006 and a Facility Letter dated 3rd April, 2006. In this review AIB sought *inter alia* clarification and final figures relating to the various rental incomes and the option price for phases IV and V. The mark up dated 9th March, 2006 provides in particular:-

> "These two properties [(the Damp Store and 23-23C Store Street)] are subject to a Put & Call Evans & Good for €10.514m, to be exercised in 2010…
>
> …
>
> Clients have requested that the repayment schedule on this facility be amended to €1.0m in capital & interest payments per annum until November 2010. Based on this revised repayment structure the residual debt (following the exercising of the P&C Option in 2010) will be c.€1.2m. This would be secured against the NFM's 30% share in Isaac's development…"

Under "4.6 Repayment Capacity" the mark up states that "Client's repayments will be €1.0m p.a., which will be partially serviced from rental income of €0.814m p.a. with the deficit of €0.816m coming from personal resource of the Nolan Family Members."

479. As regards the Put & Call options the mark up provides the following outline:-

> "**Phase 4: 23 Store St/Bar & Night-club, cost €3.398m, (Inc €812k for property)**
>
> P&C: Option in 2010 for €10.514m (Phase 4&5 together)

Rent: €217k p.a. payable to NFM.

P&C: With Evans & Good for 100%, then Nolans buy back 30% immediately.

Phases 5: Damp Store, 15 Bedrooms/Restaurant, cost €3.122m, (Inc €1.245m for property)

P&C: Option date 2010 for €10.514m (Phase 4&5 together)

Rent: €148k payable to NFM.

P&C: With Evans & Good For 100%, then Nolans buy back 30% immediately."

480. As with previous mark ups, the March, 2006 version does not disclose any understanding of AIB that it was under obligations arising from the various commitments asserted by the plaintiffs in the present proceedings. There is similarly no evidence of any such prior commitments. In particular, although a "Debt Retirement Schedule" attaching to the mark up indicates that in 2010 a repayment would be received from the Nolan Family of €7.359 million which it states would arise from "Sale proceeds from P&C Options 4&5", there is no corresponding increase in total debt owed by Messrs Evans and Good. This was similarly observed in earlier mark ups. This clearly indicates that while AIB were in accord with the Nolan Family as to how the loan would be cleared by the end of 2010, that is from the proceeds of the options, AIB's understanding went no further – AIB was not of the view that it was going to fund Messrs Evans and Good or that there would be a debt transfer. The mark up is also silent on the issue of a sinking fund.

481. There would appear from the evidence to be a break in the continuity of the Facility Letters in that the 3rd April, 2006 Facility Letter states that it "replaces the Letter of Sanction dated 13th March, 2006" but it would seem that the latter Facility Letter may not have been signed by the Nolan Family. The evidence around the 13th March, 2006 Facility Letter was brief and somewhat unclear. Mr. Curley was cross-examined on this issue as follows:-

"Q. Could I now ask you to go forward to…a letter of sanction dated 3rd April 2006. At the third line down, Mr. Curley, it says:

"*This letter replaces the letter of sanction dated 13 March 2006*."

Can you tell me, what is that letter of sanction? Is it a typo or is there some other letter of sanction that we haven't seen?

A. I can't answer that. I can tell you what it clearly states. That we must have issued a facility letter on 13th March 2006, and I can only assume it was the same facility but a slightly higher interest rate. Do we have it?

Q. I don't have it. Sorry, I understand it's in the discovery but it wasn't signed.

A. It might have been signed by the Bank and not accepted by the borrower. Does that help?

Q. I'm not informed enough about it at present, Mr. Curley, so I will come back to it if I can.

Anyway, that unsigned letter or what we say is an unsigned letter…Unaccepted. It is being replaced by this letter dated… 3rd April 2006….

A. That would make sense to what I was commenting. It was an issued letter by the Bank ready for signing but unaccepted by the borrowers, and I would say the difference is that it has a higher interest rate attached to it. This is around the time where the Nolans were threatening to move all of their business and we came to a lower interest rate. You will see at the bottom of page 444 where the primary variable was 0.5%. So it's the all-in rate of 1%." (Day 20, pp. 141-143)

482. Mr. Curley's understanding was not contested by the plaintiffs and is borne out by the evidence. It is outlined in the mark up dated 9th March, 2006 that:-

"The Nolan family have requested margin reductions on all of their existing facilities (NTL, NFM, Redcourt & Lismore). Margins are currently 1.5% p.a. Sector team propose to reduce margins to 1.25%/1.2%."

Furthermore:-

"Clients have advised both Branch and Sector Team on separate occasions that they are constsantly being approached by the competitor Banks with a view to providing full Banking facilities. In addition we have been verbally advised that margins of 1% are being quoted, although we have no evidence of this.

Currently facilities are on a 1.5% margin, for all arrangements. Sector Team are proposing to reduce the facilitities in respect of 'Isaacs'to be a margin of 1.2%, based on the project now being fully complete and open for trading, and placing a margin of 1.25% of all other existing facilities, recognising that these still carry an element of trading/property development risk."

The mark up recommmended:-

"Currently these facilities [relating to the Isaacs Hotel] are at a margin of 1.5%. Given the net worth of clients, and the fact that the Isaacs development is now comlete, Sector Team are recommending a margin reduction to 1.2% for facilities in respect of Isaacs.

Facilities of €16.80m are being made available to Nolan Family Members, for a mixture of development schemes; €5.5m Redcourt…and €5.5m (Lismore Hotel). These developments are not without risk…but Sector Team are confident that each of the projects will be successful in time. A margin of 1.25% is being recommended for these facilities.

The Nolan family are demanding clients, particularly in respect of margins. In addition they are currently multi-banked and

would see this as their way of doing business into the future, with each lending proposition being tendered amongst a number of the main banks."

483. The interest rate attaching to the €11.3m Isaacs Hotel loan in the April, 2006 Facility Letter which is stated as 0.5% in the Letter is markedly below the 1.2% rate recommended in that mark up. It would therefore appear and I consider it likely as Mr. Curley stated that the 13th March, 2006 Facility Letter was not signed by the Nolan Family because of the margin rate recommended by Sector Team due to more competitive rates they say were available to them at the time from other banks; a second Facility Letter dated 3rd April, 2006 was approved by AIB with *inter alia* a more competitive interest rate on the Isaacs Loan.

484. The April, 2006 Facility Letter does not expressly state that it replaces the 22nd July, 2006 Facility Letter which is the last Letter to incorporate the Special Conditions outlined in the October, 2003 Facility Letter. However, it is plain from the context and evidence that the parties intended the 3rd April, 2006 Facility Letter to replace the previous written agreement at the time of signing, being the July, 2005 Facility Letter, which I have found became the only terms upon which the loan was granted to the Nolan Family as of 29th July, 2005. This was not contested by either the plaintiffs or AIB during the proceedings although the Nolan Family continued to try to rely on the commitment outlined in the October, 2003 Facility Letter. The fact therefore that the April, 2006 Letter refers to the 13th March, 2006 Facility Letter as opposed to the 22nd July, 2005 was probably a mutual mistake, and it should be read as referring to the previous written agreement, being the July, 2005 Facility Letter.

485. Turning to the terms of the April, 2006 Facility Letter, it is the first Letter grouping the Nolan Family's various loans in their sole name in one Letter of Sanction. The Repayment clause relating to the Isaacs Hotel is in near identical terms to that outlined in the 22nd July, 2005:-

> "The loan is repayable on dmeand. However, without prejudice to the Bank's right to demand repayment of the loan at any time, it is the Bank's present intention that he loan will be repaid as follows:
>
> • Capital & interest reductions of €250,000 per quarter commencing January 2006 and to continue with the remainder to clear in full by 2010. Any residual balance will be repayable at the end of the repayment period."

486. The quarterly repayment figure increased from €200,000 in the July, 2005 Facility Letter to €250,000 because it was acknowledged by witnesses for the plaintiffs that despite there being an obligation to make quarterly payments of capital and interest, only one was made in May, 2005. As such, in order for the loan to be repaid by the end of the repayment period, increased quarterly payments were required.

487. My reasoning and findings relating to the Repayment clause in the 22nd July, 2005 Facility Letter and the applicability of General Terms and Conditions concerning loan accounts are also germane to this Facility Letter. In summary, it could not be said that the Facility Letter contained a contractual term to the effect that there was to be a debt transfer or a commitment to fund, nor could it be construed as a representation upon which the Nolan Family could rely.

488. As already adverted to, the Special Conditions provided in the October, 2003 Facility Letter were not incorporated into the April, 2006 Facility Letter, contrary to previous Facility Letters. The reason behind their removal was not made clear by witnesses for AIB, though it would appear on the evidemce provided by Mr. Curley that it was removed because the various matters outstanding in those Special Conditions had been completed. An examination of the 9th March, 2006 mark up to the Credit Committee similarly does not provide any clarity on the issue.

489. However, as previously stated the Special Condition relating to the sinking fund was solely for the benefit of AIB. I do not consider that the Special Condition was entered into the October, 2003 Facility Letter either solely or in part for the benefit of the Nolan Family; any benefit to them could only be considered to arise incidentally. AIB were thus entitled to remove the Special Condition unilaterally if they so wished.

490. In addition, it is clear that despite the fact that the 3rd April, 2006 Facility Letter did not contain any Special Conditions and in particular that the Special Conditions of the October, 2003 Facility Letter were removed from the agreement, the Nolan Family signed the Facility Letter thereby agreeing to its terms. There was also fresh consideration in that the Nolan Family benefited from a significant cut in interest rate on the Isaacs Hotel loan. From the evidence it is clear at the very least that Ms. Joan Nolan and Ms. Sally Nolan reviewed the Facility Letter. If they were unsatisfied with the contents of the Letter and indeed if they were concerned about the sinking fund and that it was no longer part of the agreement, it was at that time before signing that the Nolan Family should have raised their concerns. The fact that they did not do this until March, 2011 when Mr. Piggott, Ms. Joan Nolan's husband, met with AIB and broached the subject of the sinking fund illustrates again their lack of concern for this issue.

491. Thus, even if the three commitments were made as contended by the plaintiffs and had been incorporated into the 30th October, 2003 Facility Letter, all reference to same, either by way of contractual term or representation, were removed from the agreement between the parties relating to the Isaacs Hotel loan from the time the April, 2006 Facility Letter was signed by the plaintiffs.

492. As such, the requirement as per preliminary issue 6 for the court to consider whether these representations amounted to misrepresentations or negligent misstatements does not arise because even if the representations had been made (which I have found they were not), they would have been removed from the Nolan Family's loan agreements concerning the Isaacs Hotel from April, 2006. Subsequent Facility Letters, being those relied upon by AIB in its counterclaim, did not contain these alleged representations, or wording such as that related to the sinking fund, upon which the Nolan Family based their arguments.

493. This is the last point in time that the court need concern itself with the claim that there was a commitment to maintain and supervise a sinking fund as the plaintiffs did not raise any further instances in which AIB could have made any such commitment whether by way of representation or contractual term. As stated, the next point in time that the sinking fund was raised was during the discussions between Mr. Piggott and AIB in March, 2011. In these discussions and *inter partes* correspondence the plaintiffs sought to raise this issue by reference to alleged representations and terms arising prior to April 2006, but not in relation to any acts or events after that date.

Contractual Terms/Representations – Evidence January, 2006 Onwards

494. What is left to be considered is whether any separate contractual terms were created between the parties or representations made relating to the Isaacs Hotel loan for phases IV and V subsequent to the 30th October, 2003 Facility Letter providing the Nolan Family with the understanding that there would be a sinking fund maintained and supervised, that there would be a debt transfer and/or that AIB would fund Messrs Evans and Good.

495. The court shall not enter into a re-examination of events prior to the Facility Letter dated 3rd April, 2006 with this purpose in mind as my findings dealing with that period under the alternative scenario are equally applicable here. As of the April, 2006 Facility Letter therefore there were no new contractual terms entered between the parties or representations made to the plaintiffs. The court need only concern itself in this examination with potential commitments to effect a debt transfer and/or to fund Messrs Evans and Good subsequent to the April, 2006 Letter.

496. The plaintiffs rely on a number of documents and correspondence arising from interactions between Ms. Sally Nolan, Ms. Joan Nolan and AIB from May to August, 2006.

497. Ms. Sally Nolan emailed Mr. Curley on 31st May, 2006 seeking an alteration to the agreement such that the Nolan Family would make interest repayments at a fixed rate to the date of the exercising of the options on phases IV and V and only then begin to repay the residual balance. Ms. Nolan also sought clarity on the amount that would be outstanding at that time. Mr. Curley replied on 1st June, 2006 "with a rough estimate of how the E11.3m loan will be structured, based on the application of E1.0m per annum to capital & interest and then the lumpsumpayment of c.E7.359m in November 2010. Based on the above I will seek to have a range of fixed rates for you, over 3 and 5 years." Mr. Curley did not consider an interest only repayment structure. The attached estimate is as follows:-

"Assumptions:

€11.3m Loan facility in name of Nolan Family Members re Isaccs Hotel.

Interest rate applied – 'all in' 4.000%"

Qtr	Repayment	Interest	Capital Repayment	Loan Balance
Opening Balance				11,300,000
Mar-06	250,000	113,000	137,000	11,163,000
June-06	250,000	111,630	138,370	11,024,630
Sep-06	250,000	110,246	139,754	10,884,876
Dec-06	250,000	108,849	141,151	10,743,725
Mar-07	250,000	107,437	142,563	10,601,162
Jun-07	250,000	106,012	143,988	10,457,174
Sept-07	250,000	104,572	145,428	10,311,746
Dec-07	250,000	103,117	146,883	10,164,863
Mar-08	250,000	101,649	148,351	10,016,512
Jun-08	250,000	100,155	149,835	9,866,677
Sep-08	250,000	98,687	151,333	9,715,344
Dec-08	250,000	97,153	152,847	9,552,497
Mar-09	250,000	95,625	154,375	9,408,122
Jun-09	250,000	94,081	155,919	9,252,203
Sep-09	250,000	92,522	157,478	9,094,725
Dec-09	250,000	90,947	159,053	8,935,673
Mar-10	250,000	89,357	160,643	8,775,029
Jun-10	250,000	87,750	162,250	8,612,780
Sep-10	7,359,000	86,128	7,272,872	1,339,907
Dec-10	0	13,399	-13,399	1,353,306

498. It was averred by the plaintiffs that this email and attached spreadsheet indicated that the loan was not repayable on demand, that it would go to term and that the Nolan Family were only responsible for the quarterly payments and the residual balance at December, 2010. It was also claimed that Mr. Curley provided Ms. Sally Nolan with an understanding that the debt would transfer during a conversation on the contents of the spreadsheet around this time. I cannot however accept this interpretation of the email and spreadsheet or that Mr. Curley gave Ms. Nolan that understanding.

499. First, it is important to note that Mr. Curley provided the shreadsheet detailing the repayments structure as a "rough estimate… based on the application of E1.0m per annum to capital & interest and then the lumpsumpayment of c.E7.359m in November 2010." Thus, although Mr. Curley's email would appear to say in certain terms how repayment of the loan would progress, it is clearly only an approximate guideline. It could not be considered to be sufficiently certain to form the basis of a representation and does not illustrate an intention that it should be relied upon.

500. Secondly, the email outlines that the structure detailed in the attached spreadsheet and the residual balance at December, 2010 was conditioned upon annual repayments of €1 million and the lump sum payment of €7.359 million. As it was averred that the document was created by AIB, the origins of the latter figure is of particular relevance.

501. It was accepted by the parties and is clear from the evidence before the court that the option price for phases IV and V was in flux during 2005 arising from the increased cost of the development. On 3rd February, 2005, prior to the Facility Letter dated 14th

February, 2005 which increased the loan by €500,000 to €10 million, Ms. Joan Nolan informed Ms. Kierans by way of email that "If Isaacs goes over budget then the buy back figure will also increase and we have to review these. Allowing for this we will encorporate [sic.] repayments same as before and end up with property paid for before."

502. A review meeting was held on 10th January, 2006 relating to Nolan Transport between Ms. Joan Nolan, Ms. Elizabeth Nolan and Mr. Doyle for Nolan Transport and Mr. Curley, Ms. Anita Gahan and Mr. Laffey for AIB. It is stated in a file note of the meeting:-

> "Awaiting the following information from Joan Nolan in order to progress the review:
>
> …
>
> 3. Details of rental incomes and buyback figures for Isaacs, (in order to agree a repayment schedule for the 11.3m loan in NFM)".

It is therefore clear that as of the date of this meeting AIB were seeking details from the Nolan Family as to the buy-back price for phases IV and V arising from the increase in the loan to €11.3 million. It was not something that was within the bank's knowledge.

503. This information is provided by Ms. Joan Nolan to Mr. Curley in a letter dated 6th February, 2006 in which at point 5 it is noted:-

"Buy Back Figures – 70% of total cost

Store Street €6,780,469.09 (70%) €4,746,328.30

Beresford €1,855,850.04 (70%) €1,299,095.00

Damp Store €3,733,610.57 (70%) €2,613,527.00

(100%) €12,369,930.00 (70%) €8,658,950.00"

If one removes Beresford from the calculation as it does not relate to the loan provided for phases IV and V of the Isaacs Hotel, one comes to a figure of €10,514,077.96 for 100% of "Store Street" and "Damp Store". 70% of this figure is €7,359,854.57.

504. Mr. Curley then emailed Ms. Sally Nolan on 16th February, 2006 seeking an "outline [of] how the option price was arrived at". This again illustrates that AIB staff, importantly in this case Mr. Curley, did not have within their knowledge the details of the cost of the development, the figure of the option price and therefore the 70% figure of the buyback. Rather, this information came from within the knowledge of the Nolan Family. Mr. Curley was therefore not informing Ms. Sally Nolan that the option price would be €7.359 million in 2010 in his email of 1st June, the figure was provided to Mr. Curley by the Nolan Family.

505. Third, arising from the above considerations I do not believe it likely that Mr. Curley would have made assurances in a conversation with Ms. Sally Nolan that there would be a debt transfer, that the Nolan Family would only be responsible for the residual balance regardless of future events or that the loan was a term loan.

506. Furthermore, Mr. Curley was closely involved with the creation of the Facility Letter dated 3rd April, 2006, the most recent agreement prior to the creation of this spreadsheet. He was a signatory to the Letter on behalf of AIB and participated in its drafting. He implicitly refers to the Letter in his email of 1st June, 2006 as that was the only Letter in which the Nolan Family were required to make quarterly repayments of €250,000, annual payments being €1 million; Mr. Curley also stated this when giving his evidence. I therefore find that he created the spreadsheet with this Facility Letter in mind. He would therefore have been mindful of the fact that the Repayment clause in that letter stated explicitly that the loan was repayable on demand and that as the facility was described as a "Loan Account" the applicable General Terms and Conditions also stated that the loan was repayable on demand. As such, I find it highly unlikely that Mr. Curley would have spoken to Ms. Sally Nolan in a manner wholly inconsistent with that Facility Letter or AIB's internal documentation before the court which do not illustrate any understanding besides that evidenced in the April, 2006 Facility Letter. In addition, the mark up which followed this conversation dated 14th August, 2006 is inconsistent with the contention that Mr. Curley provided Ms. Sally Nolan with the relevant commitments.

507. Mr. Curley then sent Ms. Sally Nolan an email later on the morning of 1st June, 2006 with a number of indicative fixed rates. He stated "As per my earlier e-mail, the rates are based on an initial 4 year loan facility – up to Nov 2010, when the lump sum reduction will be applied and a residual balance c.E1.3m will outstand". Ms. Sally Nolan stated that this was another assurance upon which the she relied. This contention however does not stand up to scrutiny. It is clear that the rates were provided on the basis as outlined in his previous email which I have found was insufficiently certain and was not accompanied with the necessary level of intention that it could be relied upon by the plaintiffs. It was merely for indicative purposes.

508. Ms. Sally Nolan then provided evidence in relation to a conversation she says occurred on 11th July between herself and Mr. Curley about an increase to the loan of €700,000 bringing it to €12 million and a possible moratorium on capital repayments until post 2010. She stated that this conversation occurred prior to a meeting between AIB and the plaintiffs on the phase IV and V loan which the plaintiffs believe occurred on 12th July. She claimed that during this conversation he assured her that €7.9 million of the loan would transfer to Messrs Evans and Good arising from the exercise of the options in 2010, and that the Nolan Family would only be responsible for the residual amount. She said he also set out how the 30/70 split was to happen on each phase of the project.

509. Ms. Nolan referred to a copy of the schedule dated 11th July, 2006, sent to her on 1st June, 2006 by Mr. Curley and a "Balance Sheet" dated 5th July, 2006. Ms. Sally Nolan had sent the Balance Sheet as an attachment to an email to Mr. Curley on 6th July outlining the increased cost on 23 Store Street and that 70% of the buyback was to increase to €7.923 million after his request for information on the increased spend on phases IV and V. Both of these documents contained annotations by Mr. Curley which Ms. Nolan relied upon as evidence of the contents of and were in line with the conversation she had with Mr. Curley. Ms. Nolan said on numerous occasions that the conversation on 11th July was not one she had forgotten and was reminded of subsequently. She said that it was one of which she had a clear memory with or without Mr. Curley's notes.

510. Notwithstanding this I am more inclined to believe the evidence as provided by Mr. Curley on this matter. Although he accepted that a conversation may have occurred on 11th July, 2006, he did not believe that one of the type, complexity and duration necessary to discuss the matters as outlined by Ms. Nolan could have occurred.

511. First, Mr. Curley provided various pieces of evidence indicating that the meeting with the Nolan Family evidenced in various emails occurred on 11th July and not 12th July as averred by the plaintiffs. Extracts from his personal diary for the 11th would appear to indicate that a meeting set for 11:00am was cancelled, it is struck out in the diary, and a meeting was set at 12:00pm with "Nolans @ New Ross". An email sent by Ms. Sally Nolan on 12th July, 2006 providing Mr. Curley with the updated costs including an increase of €355,000 relating to the Isaac Butt bar is instructive on this point which was raised for the first time at that meeting by Ms. Joan Nolan on the plaintiffs' evidence. That email was sent at 11:08am. If the meeting was entered incorrectly into 11th July, 2006 in the diary instead of 12th July, it would mean that the email was sent just over 50 minutes prior to the meeting which could not be possible.

512. Furthermore, Mr. Curley's personal diary indicates as corroborated in evidence by Mr. Curley that he was having flooring installed between 8:00am and 10:00am on 12th July and his work diary indicates that Mr. Curley had a meeting unrelated to the plaintiffs at 1.30pm that day. Mr. Curley also stated that he was meeting with a different hotel client later that afternoon, this latter element of both his personal and work diaries was redacted. He also pointed to an expense claim in which he claimed mileage expenses for a trip to New Ross on 11th July, 2006.

513. The court's attention was further brought to a printout from "AA Route Planner" dated 11th July detailing the travelling directions from Dublin to New Ross. Mr. Curley stated that he printed this for a Ms. Melissa Dursely, a fellow AIB staff member, who was also travelling to New Ross for the meeting.

514. Arising from this evidence I do not believe that a conversation of the type outlined by Ms. Sally Nolan could have occurred. The Route Planner indicates that the journey from Dublin to New Ross would take approximately 1 hour 46 minutes. Mr. Curley would therefore have had to leave his office at approximately 10:15am at the latest if not earlier to reach New Ross at that time, let alone the Nolan Transport premises at which the meeting was conducted.

515. Even if Mr. Curley's travel time was shorter than that, he would have been driving for a large part of the morning in any event to New Ross. As such, I do not believe this would have been conducive to Mr. Curley having a long and complex conversation with Ms. Nolan. The fact also that Mr. Curley was meeting with Ms. Joan Nolan that same day also leads me to the conclusion that Mr. Curley would not have had the type of conversation with Ms. Sally Nolan as averred by the plaintiffs as it would have been largely unnecessary.

516. Secondly, I do not consider the annotations of Mr. Curley on the Balance Sheet dated 5th July, 2006 or those on the copy of the schedule dated 11th July, 2006 to be indicative of a conversation with Ms. Nolan. Turning first to the handwritten notes on the Balance Sheet, I believe these to have been taken at the meeting with Ms. Joan Nolan that day in New Ross. It contains the final figure of the loan – €12.355 million – which Ms. Sally Nolan stated was provided not by her but by Ms. Joan Nolan at that meeting for the first time.

517. As to the notes on the schedule dated 11th July, 2006, I do not believe these were taken during a conversation with Ms. Sally Nolan. She accepted that she was unsure when the handwritten notes were made. The notations and particularly the table is neatly laid out when compared with those on the Balance Sheet which were entered haphazardly. The former indicates that Mr. Curley took his time preparing the note in a careful manner while the latter indicates that he was being dictated information and sought to write down as much of it as possible in a short space of time.

518. Furthermore, I do not consider it likely that the annotations are a record of the conversation prepared after the conversation on the 11th July. Due to the time contraints already outlined above, Mr. Curley's ability to have the conversation of the type averred in the first place on the 11th July was quite restricted, let alone to have the conversation and then take the time to prepare this note before beginning his journey.

519. Rather, I believe this note to have been prepared early that morning but as a means of preparing for the meeting to be held at 12pm that day, not as a result of a conversation with Ms. Sally Nolan.

520. I find that the note was likely created arising from an email sent by Ms. Sally Nolan on 6th July, 2006 at 10:40 in which she wrote:-

> "We require an additional 700 K bringing to loan from 11.3 to 12M.
>
> This extra 700K is for works done to basement bar – A breakdown of costs are attached in addition to email from the QS Con Shanley showing final construction contract value…
>
> We want to amend the loan to an interest only fixed loan facility to run in line with buybacks in Nov 2010 – At this time 70% of the overall project costs will be paid back which I calculate to be 7.923M
>
> At this date approx 4M will be outstanding of a loan to the NFP over which the bank will still have security of 30% of the appreciating asset – which will be worth at least 12M – (based on value of 40M)"

521. Handwritten notes are evident on the email document provided to the court which appear to be a skeletal outline of the table provided in the annotations on the schedule dated 11th July, 2006 at issue. The latter provides:-

> "Now proposed
>
> Debt of €12.0m
>
> Int only until Nov 2010
>
> €12.0m
>
> €7.92m re 70% buy back
>
> €4.077m Residual debt
>
> (secured against 30% of building)

(also have to pay 30% of €2.25m Re P.3 ie €0.675m)

The Building… secured E&G… NFM…

P1&2 1.45 1.015 0.435

3.42 2.394 1.026

P3 2.25 1.575 0.675

P4

P5 11.319 7.923 3.3957

OMV

Re BuyBack… 18.439 12.9073 5.53"

522. There is a direct correlation between the manner in which each new detail of the proposal is written in the note and the sequence through which the details of the proposal are revealed to the reader of the email sent by Ms. Nolan.

523. I find that the details relating to phase III and the various phases in the table were outlined by Mr. Curley to reveal the total debt that would be secured by the Nolan Family's 30% interest in the Isaacs Hotel development in 2010 as per the proposal put by the Nolan Family. I consider it likely that Mr. Curley prepared this table arising from documents within AIB's own possession. This becomes plain when one examines appendix 5 to the mark up for the Credit Committee meeting dated 9th March, 2009 which outlined the various options and their values. This information was originally provided to AIB by the Nolan Family. The appendix outlines the options prices for the phases as follows:-

"Phase 1:…Option exercised for €1.45m in May '05.

...With Evans & Good for 100%, then Nolans buy back 30% immediately.

…

Phase 2:…Option exercised for €3.42 in May '05

...With Evans & Good for 100%, then Nolans buy back 30% immediately.

…

Phase 3:…Due to be exercised in 2010 for €2.25m

…

...With Evans & Good for 100%, then Nolans buy back 30% immediately.

…

Phase 4:…Option in 2010 for €10.514 (Phase 4&5 together)

…

...With Evans & Good For 100%, then Nolans buy back 30% immediately."

Ms. Sally Nolan informed Mr. Curley that the total cost of phases IV and V and therefore the option price had increased to €11.319 million in a "Balance Sheet" detailing the cost of phases IV and V and the increase to the buy-back attached to the email dated 6th July, 2006.

524. I find that Mr. Curley's belief that the Nolan Family would be responsible for 30% of the phase III loan was on the basis of this appendix and others of its ilk attached to previous mark ups. The fact that he later repeated this understanding in early August in a number of tables emailed to Ms. Joan Nolan (examined below) and that Ms. Nolan indicated that this understanding was erroneous shortly thereafter further leads me to conclude that Mr. Curley prepared this document with the information available to him at the time within AIB. I consider it unlikely that Mr. Curley consulted with the Nolan Family on this table, particularly for present purposes Ms. Sally Nolan in a conversation, either before or after producing it as his understanding would clearly have been shown to be incorrect and the table would have been rectified.

525. I therefore consider that the table and the annotations themselves do not represent a decision on the part of Mr. Curley as to how the loan was going to be retired, or that they illustrated that AIB were committing to fund Messrs Evans and Good. Rather, they were an illustration of the information that he and AIB were provided by the Nolan Family on various occasions as to how the Nolans proposed the phase IV and V loan would be repaid. It must be noted that witnesses for AIB provided evidence that AIB were conducting a review at this time since early 2006, which was accepted by witnesses for the plaintiffs, for the purposes of going to the Credit Committee. I consider the table on the 11th July schedule was prepared in furtherance of this review.

526. Turning to the email dated 8th August, 2006 and attached spreadsheet, Mr. Curley emailed Ms. Joan Nolan, copying Ms. Sally Nolan amongst others, requesting her to "give me a call in connection with the enclosed spreadsheet, as we are seeking clarification on the process for the put and call options and ancitipated residual loan balances on the Isaacs Hotel Complex". The spreadsheet comprised three tables illustrating the debt on the Isaacs Hotel in August, 2006 and September, 2006 and what was to occur upon the exercise of the various options:-

" Aug-06

Name Debt

Nolan Family Members €11,300,000 Re Phase 4 & 5 at Store Street

Nolan Transport Limited €1,700,000 Re Phase 3 at Store Street (Pub)

Evans & Good €4,130,000 Re Phase 1 & 2 at Store Street

Total €17,130,000

Sept-06

Name Debt

Nolan Family Members €11,300,000 Re Phase 4 & 5 at Store Street

Nolan Family Members €700,000 Re Spend on Bar

Nolan Family Members €355,000 Re Spend on Rooms at Phases 1 & 2

sub-total €12,355,000

Nolan Transport Limited €1,700,000 Re Phase 3 at Store Street (Pub)

Evans & Good €4,130,000 Re Phase 1 & 2 at Store Street

Total €18,185,000

Put & Call Options

Nolan Family NTL Evans & Good

Phase 4 & 5 €3,396,000 €0 €7,923,000 Split NFM @70%

and E&G @30%

Expenditure on

Bar (€700k) €210,000 €490,000 Split NFM@70%

and E&G@30%

Expenditure on

Rooms Phase 1&2

(€355k) €108,500 €248,500 Split NFM@70%

and E&G@30%

Phase 3 – Buy Bar

(€2.25m) €675,000 €1,575,000 Split NFM@70%

and E&G@30%

Existing Debt €4,130,000

Total €4,387,500 €0 €14,366,500

Total Debt on Hotel

Complex €18,754,000

527. Errors were however contained in the spreadsheet relating to the "Put and Call Options" table and thus, after a telephone conversation with Ms. Joan Nolan, a second spreadsheet was sent to her on 8th August, 2006, copied to Ms. Sally Nolan and Ms. Dursley. This table then provided:-

"Put & Call Options Nolan Family NTL Evans & Good

Phase 4 & 5 €3,396,000 €0 €7,923,000 Split NFM @30%

and E&G @70%

Expenditure on

Bar (€700k) €210,000 €490,000 Split NFM@30%

and E&G@70%

Expenditure on

Rooms Phase 1&2

(€355k) €108,500 €248,500 Split NFM@30%

and E&G@70%

Phase 3 – Buy Bar

(€2.25m) €0 €2,250,000 Split NFM@30%

and E&G@70%

Existing Debt €0 €0 €4,130,000

Total €3,712,500 €0 €15,041,500

Total Debt on Hotel

Complex €18,754,000"

528. The plaintiffs rely on both spreadsheets as a representation by AIB of how the debt would be transferred to Messrs Evans and Good upon the exercise of the option agreements. The court however cannot accept this contention.

529. First, as previously stated AIB had been conducting an annual review from early 2006. Ms. Sally Nolan stated that these two spreadsheets were "an extension of the discussions we had been having from June" and Ms. Joan Nolan accepted that the annual review of the plaintiffs' facilities "starts off in '06 but it actually doesn't end until August." She further stated that "He's asked us for information and yes, we're providing him information at a meeting." Mr. Curley's email sent on 8th August itself provided that AIB were seeking clarification on the options process come 2010. Examination of the two spreadsheets cannot be read in isolation, they must be read in this context.

530. I accept the evidence provided by Mr. Curley that the emails dated 8th August, 2006 and their attachments were sent to the Nolan Family in order to further AIB's annual review and to obtain their assistance as AIB were seeking clarity on certain matters. It could not reasonably be maintained in this context that AIB could have intended the spreadsheets to be relied upon, they were merely seeking information. Similarly, it cannot be argued that one could place reliance on either spreadsheet in the manner averred by the plaintiffs when one considers the matrix of fact within which the spreadsheets appear.

531. Second, it is plain that AIB were not clear on the details of the options process because there were a number of errors in the first attachment sent to Ms. Joan Nolan. The third table titled "Put & Call Options" indicated incorrectly that the Nolan Family would obtain a 70% interest on each phase and Messrs Evans and Good would acquire a 30% interest. It also erroneously provided that the payment of the option price on phase III would be divided between the Nolan Family and Messrs Evans and Good. As Ms. Joan Nolan telephoned Mr. Curley to highlight these errors and provide him with corrections, it could not reasonably be argued that the Nolan Family relied upon the first spreadsheet sent to Ms. Joan Nolan even if it could be viewed as a representation from AIB concerning a debt transfer.

532. Thirdly, I conclude that the second spreadsheet which included the corrections to the "Put and Call Options" table was not a representation from AIB to the Nolan Family, in particular Ms. Joan Nolan or Ms. Sally Nolan; the spreadsheet is in fact a representation from the Nolan Family to AIB despite the fact that Mr. Curley prepared it. As with the December, 2002 Debt Level and Retirement Analysis, Ms. Joan Nolan provided information to AIB staff, in this instance Mr. Curley, to bring the "Put and Call Options" table in line with their understanding of what the outcome would be of the options process as represented in the second spreadsheet. Mr. Curley appears on the evidence before the court to have corrected the table without argument, as I found Ms. Kierans had done in December, 2002. This would be inconsistent with Mr. Curley having given an assurance as he would be permitting Ms. Joan Nolan to alter his commitment to suit their needs.

533. One must also read the second spreadsheet in conjunction with Mr. Curley's first email of 8th August, 2006 in which he stated that he was sending Ms. Joan Nolan a spreadsheet in order to seek clarification on matters. They are clearly directly related. I find that Mr. Curley emailed Ms. Joan Nolan the second spreadsheet for that purpose and to ensure that the table corresponded with the information she had provided during their intervening conversation.

534. As regards the contents of the spreadsheets, particularly the table titled "Put & Call Options", Ms. Joan Nolan stated that Mr. Curley was seeking "clarification on how the debt transfer was going to happen. That's what we understood."

535. I also do not consider the spreadsheets to be in such certain terms based on the fact that Mr. Curley's email to which the first spreadsheet is attached sought clarity on the "Put & Call Options and *anticipated* residual loan balances on the Isaacs Hotel Complex" [emphasis added]. The word "anticipated" should have made it plain to the Nolan Family that AIB did not have an understanding that the division of the debt would occur with absolute certainty or that it was set in stone. It should have been clear that there was no such concrete commitment from AIB and that AIB were not making a represention as such.

536. From a reading of the third table in each of the spreadsheets and the email, the court finds it likely that the table relates to the manner in which debt on each phase of the hotel was expected to be divided between the Nolan Family and Messrs Evans and Good. Mr. Curley disagreed with counsel for the plaintiffs on this point when under cross examination, stating that the table "doesn't talk about debt there. It talks about P4 and P5, 7.923, which is an exercise in the first place. There's no debt mentioned on that page."

537. However, I do not consider it unreasonable that the Nolan Family could understand the tables to illustrate by way of implication that the debts outlined would be owed to AIB in 2010. Looking at the spreadsheets it is clear that the first two tables, the "Aug-06" and "Sep-06" tables, refer to debt owed to AIB by the Nolan Family, Nolan Transport and Messrs Evans & Good. Although the third table in each spreadsheet does not indicate that the figures provided for phases III, IV and V are debts, by describing the final figure of €18,754,000 as "Total Debt on Hotel Complex" it is necessarily implied that the figures outlined previously in the the third table are debts. Indeed, Mr. Curley on another occasion, referred to the figures as debts and stated under cross examination that the table is "a working assumption that it could be owed to AIB". The fact that the "Debt Retirement Schedule" attached to the mark up dated 24th August appendixed to the mark up for the Credit Committee meeting dated 14th August, 2006 provides a total debt owed to AIB by Messrs Evans and Good in 2010 of €15.041 million also supports this interpretation. It mirrors the figure in the third table of the

corrected spreadsheet.

538. As reasoned previously however, the tables must be read in the light of the email in which the residual balances contained in the tables are demarcated as being anticipatory amounts. The tables can therefore only reasonably be considered working assumptions maintained by AIB and not representations that the division of debt would occur as outlined come what may.

539. It was argued by the plaintiffs that AIB did in fact operate in August, 2006 under the understanding that it was committed to funding Messrs Evans and Good and transferring debt. They rely on the "Debt Retirement Schedule" and the fact that the Schedule shows a direct correlation between the payment of lump sums by the Nolan Family and Nolan Transport on their loans in 2010 from sale proceeds from put and call options 4 and 5 and from put and call option 3, respectively, and the increase in the debt owed to AIB by Messrs Evans and Good in 2010. The schedule also indicates that in 2010, "E&G loan Repayments based on a facility of E15.041m".

540. They also rely on the following comments in the "Repayment Capacity" section of the mark up:-

> "Nolan Family Membership:
>
> • In 2010, P&C options 4/5 will yield a lump sum of €8.647m (70% of Put & Call Option – total €12.353m) leaving a residual debt of €3.706m on Isaac's in the name of Nolan Family Members.
>
> …
>
> Evans & Good:
>
> • In 2010 upon exercising of the P&C Options 3,4&5, Sector team estimate that Evans & Good may have a residual debt of €15.041m…Clients recognise that this projected level of debt is unsustainable and have indicated to Sector team that they will undertake the disposal of assets at that point to reduce the level of peak debt."

541. I do not accept this contention. First, comments under "Evans & Good" in the Repayment section of the mark up states that upon the exercise of the options they *may* owe AIB a residual debt of €15.041 million. It is certainly not clear that AIB would be funding those options and the ensuing words demonstrate AIB's understanding that Messrs Evans and Good would fund this by selling assets. Similarly, a table directly following the repayment capacity comments relating to the Nolan Family and Messrs Evans and Good, is titled "Proposed/Potential Long-term Debt on Isaac's" in which the Nolan Family Members are outlined as owing €3.706 million and Messrs Evans and Good €15.041 million. Although therefore the quotations appear in certain terms in the comments section, the figures outlined are only estimated or anticipated, they are not a recognition by AIB of any commitment to transfer debt or fund Messrs Evans and Good. As stated previously, I also do not attach weight to the fact that the wording used in mark ups is not conditional. This is merely the style adopted when drafting same and does not indicate a committed intention on the part of AIB.

542. Secondly, and more fundamentally, the mark up explicitly states that "The proposed long-term debt outstanding on Isaac's *assumes* that the Bank funds 100% of Put and Call Options 3,4 & 5 although *no commitment is given in this regard* and Evans & Good recognise that asset disposal/equity input will be required to complete the Put & Call Options in 2010" [emphasis added]. These comments are clearly inconsistent with any understanding that a commitment was made to either transfer debt or to fund Messrs Evans and Good.

543. Thirdly, the mark up states explicitly that AIB have personal recourse to the Nolan Family. The mark up provides under the Recommendation section:-

> "Taking into account the full personal recourse in respect of the facilities Sector Team are recommending the following:-
>
> - Decline of deferring capital repayments on facility 2a & 3 – Isaacs hotel Complex (Total Facilities €16.483m).
>
> …
>
> - All other facilities sought."

544. This understanding of AIB is inconsistent with a commitment on its part to transfer debt to Messrs Evans and Good or to provide them with funding. As averred by the plaintiffs, the commitments implied that the loan would go to term and Messrs Evans and Good would then be responsible for the debt. As such, had there been any such commitments in place, there would have been no necessity to look to the personal resources of the Nolan Family as they would have been removed from the debt come 2010.

545. Ms. Dursley emailed Ms. Joan Nolan on 14th August, 2006 to inform her that the Credit Committee had provided approval that morning on the increase to the loan for phases IV and V by €1.053 million, increasing the loan to €12.353 million. The email also explicitly states *inter alia* that the loan was being approved "with full recourse to the Nolan Family". Ms. Dursley also informed Ms. Nolan that the cross guarantee provided by Nolan Transport on the loan limited to its interest in the Isaac Butt Pub was to increase to €12.353 million from €11.3 million. She also wrote that the "Capital Moratorium requested on this facility was not recommended and this facility – requires a capital and interest repayment schedule to commence as previously agreed."

546. The plaintiffs contended that although Ms. Dursely's email on 14th August was alarming and inconsistent with their understanding, in that it stated that the Nolan Family were personally liable, Ms. Dursely's email dated 15th August, 2006 in response to Ms. Joan Nolan's email of 14th August alleviated their fears. In replying to Ms. Dursley's email of 14th August, Ms. Joan Nolan sought clarity on "what loan repayments are expected on this facility and forward a copy of loan repayment schedule…". Ms. Dursley's response on 15th August was as follows:-

> "Euro 12.353m Facility in the name of Nolan Family Members – assuming that the P&C Option is exercised for €7.923m by Evans & Good – that will leave a residual debt of Euro4.430m in Nolan Family Members that has to be between now and 2010.
>
> Using current rates (which may fluctuate) – this would equate to 48 Months – Capital & interest Repayments of c.Euro 100,421.38 per month – which would equate to approx. Euro 1,205,056 per annum."

547. The plaintiffs contended that this illustrated to them that the Nolan Family were only responsible for €4.43 million in 2010. This contention however does not stand up to scrutiny. The use of the word "assuming" clearly highlights that the €4.43 million residual

debt was contingent on the options being exercised by Messrs Evans and Good in 2010. This word cannot be ignored. It is by no means a certainty that that residual debt would be the only amount for which the Nolan Family would be liable in 2010. There were thus no new representations or contractual terms entered prior to the subsequent Facility Letter dated 22nd August, 2006 based on the evidence before the court.

548. AIB rely upon the 22nd August, 2006 Facility Letter in its counterclaim and relied upon it in its Demand Letter dated 15th October, 2012. The court notes that the Letter "replaces the Letter of Sanction dated 22nd April, 2006". I interpret this as referring to the 3rd April, 2006 Facility Letter – indeed the parties conducted the proceedings on that assumption. The August, 2006 Facility Letter therefore became the only agreement between the parties relating to the phase IV and V loan when the Nolan Family signed the document.

549. The August, 2006 Facility Letter again combines the various facilities granted to the Nolan Family in their sole name into one document and increased the funding available to the Nolan Family to the peak figure of €12.353 million. It incorporates AIB's General Terms and Conditions dated March, 2006 and includes a Repayment clause in very similar terms to that provided in the April, 2006 and previous Facility Letters:-

> "The loan is repayable on demand. However, without prejudice to the Bank's right to demand repayment of the loan at any time, it is the Bank's present intention that the loan will be repaid as follows:
>
> • Annual Capital Repayments of €1,107,500, €276,875 per quarter commencing September 2006. Interest to be met as it falls due.
>
> • Loan to clear in full by 2010 via the exercising of the Put and Call Option of €7,923,000 and any residual balance will be repayable at the end of the repayment period."

550. My reasoning outlined above in relation to the repayment clause of the April, 2006 and the July, 2005 Facility Letters and the applicable General Terms and Conditions necessarily apply. The ordinary meaning of the clause as averred by the defendant and which I accept is that the €12.353 million loan is repayable on demand but, notwithstanding this, AIB permits repayment of the loan as indicated. The second bullet point of that clause must be read in this light which is a new addition to the clause.

551. The plaintiffs contended they understood from the clause, particularly that part relating to the exercise of the €7.923 million option, that AIB were setting down that the loan would clear by way of the exercise of the option and that they were only responsible for the annual repayment figure and any residual amount. In particular, Ms. Sally Nolan stated that this clause corresponded with both discussions and correspondence between her, Ms. Joan Nolan and Mr. Curley in June and August earlier that year.

552. However, that repayment method is only indicated as AIB's favoured means of repayment at that time and does not prevent AIB from seeking repayment from the Nolan Family at some earlier point in time or indeed after where, as in this case, the option was not exercised. I cannot accept Ms. Sally Nolan's evidence that she understood the loan to be a term loan despite the phrase "without prejudice to the bank's right to demand repayment of the loan at any time". This should have directly impacted upon her understanding that the loan was to go to 2010 and should have caused her some concern. Ms. Nolan stated that her understanding arose from her discussions with Mr. Curley however I have found that Mr. Curley's correspondence and attached documents or discussions with Ms. Nolan could not reasonably bear that interpretation.

553. The Facility Letter also increased the cross guarantees provided by Nolan Transport and Messrs Evans and Good from €11.3 million to €12.353 million in order to secure the increased level of funding granted to the Nolan Family. As with the April, 2006 Facility Letter, the August, 2006 Letter does not incorporate the Special Conditions provided in the October, 2003 Facility Letter.

554. It was also accepted in evidence that the Facility Letter was signed by the Nolan Family without concerns being raised in relation to the Repayment clause, in particular that the loan was repayable on demand or in relation to the absence of any reference to a sinking fund. This is a clear acceptance by the Nolan Family of the terms of the Facility Letter and in particular the Repayment clause.

555. Loan Account 6 of the Facility Letter dated 22nd August, 2006 granted the availablility of €500,000 to the Nolan Family for "personal purposes". Ms. Sally Nolan states in her witness statement that this facility was required to purchase a 30% interest in 1 Beresford Place, the lending relating to same is examined below. It was contended by the plaintiffs that they were induced to seek this loan and that granted to the Beresford Partnership arising from the representations made in relation to the phase IV and V loan to the Nolan Family. This aspect of the case is another preliminary issue, issue 5, that the court must consider. However, as I have concluded that no representations were made by AIB or its agents concerning commitments to fund Messrs Evans and Good, to maintain and/or supervise a sinking fund and to effect a debt transfer prior to the Nolans' signing of the August, 2006 Facility Letter, this averment falls away. The Nolan Family were not so induced into seeking and accepting Loan Account 6 of the August, 2006 Facility Letter.

556. The Nolan Family made a further request for interest only payments in a meeting on 16th February, 2009, for a period of two years. A draft of a Credit Committee mark up dated May, 2009 indicates that Sector Team would have declined the request. I consider this to be a draft because unlike previous mark ups before the court there are a number of instances where text appears to be highlighted and certain references are not entered, instead they are demarcated with an "XXX" or some variant of same.

557. As with previous mark ups, the May, 2009 document indicated that there was personal recourse to the Nolan Family. It also considered a scenario in which the put and call option over phases IV and V would not be exercised. Both these entries are inconsistent with an understanding that AIB were going to fund Messrs Evans and Good and transfer the debt to them from the Nolan Family.

558. Under the "Repayment Capacity" section it was noted that "Sector can take comfort from the fact that…any shortfall could be met from personal recourses, given the significant net worth of the family." Under "Security Cover", the mark up categorises the various loan facilities out to Nolan Transport, the Nolans, Lismore Partnership and Beresford Partnership under the respective borrower's name. Thus, the loan facilities out to the Nolan Family in their name only are grouped together which includes the loan relating to phases IV and V of the Isaacs Hotel. In its evaluation of the security cover on these loans the mark up drafters note that "Security Cover of 79% is deemed adequate given the personal recourse to the Nolan Family Members and the clients are high net worth". The conclusion then notes in part:-

> "• Should the Put and Call options not be exercised by the various Parties the Hotel shall go to the open market for sale whereby the Bank facilities shall be redeemed in full."

559. A Debt Retirement Schedule which was attached to the mark up must therefore be read in this light. As with the mark up for the Credit Committee meeting on 14th August, 2006, the Schedule demonstrates a clear correlation between the buybacks on phases III, IV and V in 2010 and the increase in the debt owed by Messrs Evans and Good. Taking the above comments from the Sector Team into account, the Schedule merely indicates the proposed manner in which repayment of the loan would be made, it is by no means a certainty from AIB's perspective that repayment would occur in this fashion.

560. The Credit Committee did not sit to review the Nolan Family's "interest only" request, which was to be applied to May, 2010 when the option on phase IV was to be exercised, until 17th August, 2009. The reason for the delay in going to the Credit Committee stage would appear to be that AIB were seeking to have arrears on the various loan facilities to the Nolans, Lismore Partnership and Beresford Parnership, which had been accruing, paid up to date before moving forward with the request. Ms. Dursley stated as such in an email to Ms. Sally Nolan dated 20th July, 2009. During this period Ms. Sally Nolan had been seeking to have Dublin Tourist Hostel, the operator of the Isaacs Hotel, meet its rent arrears on the various phases of the Hotel and notified Messrs Evans and Good and Ms. Breslin of Ms. Dursley's comments in relation to loan repayment arrears on 21st July, 2009.

561. A meeting was held on 18th August, 2009 in New Ross and was attended by Ms. Joan Nolan, Ms. Dursley and a Mr. Thomas Curran of AIB. Ms. Nolan was informed at this meeting that the Credit Committee had declined the "interest only" request the previous day. Ms. Joan Nolan stated on this meeting:-

> "I think it was the first time AIB was starting to mention to us that we were personally on the hook for these loans and they didn't seem to know anything about any buybacks or any obligations. They weren't really interested in any commitments they may have made to us in '02, '03 and '06." (Day 3, p. 62)

I do not consider this to be the case as, arising from my findings above, no such commitments were made by AIB either by way of contractual term or representation. AIB were consistent in their discussions and correspondence with the Nolan Family, that is that repayment by way of sale proceeds from various options was the preferred method but that there would always be personal recourse to the Nolan Family should these not materialise. This is particularly evident from the various Facility Letters signed by the Nolan Family.

562. A further Facility Letter dated 28th September, 2009 was signed by the Nolan Family in which the loan relating to the Isaac's Hotel is dealt with among other facilities. This is the second Letter upon which AIB relied in its Letter of Demand dated 15th October, 2012 and in the counterclaim in these proceedings. The loan at this time had reduced from €12,353,000 to €9,037,843. The Repayment clause no longer explicitly provides that the loan is repayable on demand or that AIB have a right to demand repayment at any time. Rather, the clause merely provides:-

> "Continuation of Capital repayments of €276,875 per quarter and interest to be funded as it fall[s] due. Facility to clear in full from exercise of the Put & Call option of €7,923,000 in 2010."

563. Despite the intention of the clause that repayment would be made in full by way of the put and call option, one must also bear in mind the General Terms and Conditions which, as with previous Facility Letters, were incorporated into the Letter. Although the clause would appear to have more in common with a term loan in that it no longer states that the loan is repayable on demand, the loan is still in fact designated as being a "Loan Account" facility which bears some weight. The relevant terms relating to Loan Accounts in the General Terms and Conditions are identical to those outlined above. Accordingly, my reasoning relating to the General Terms and Conditions applicable in earlier Facility Letters also applies to this Letter.

564. In particular, clause 3.1.1 provides:-

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

Thus, the Repayment clause must be read with the caveat in mind that the loan is always repayable on demand and that the method of repayment outlined in the Facility Letter is simply the anticipated means by which the loan would clear, it is not the only method. This is so despite the fact that a later mark up dated 19th November, 2010 described the loan as a term loan – this was incorrect.

565. Also of import is that the Letter is not described as a replacement to the August, 2006 Facility Letter which had been the case with all previous Letters. I therefore consider it likely that this was a deliberate omission. Accordingly, the terms of the August, 2006 Letter must continue to operate. In this context, the Repayment clause in that Letter which provided that the loan was repayable on demand was and is still applicable. I do not consider the Repayment clause in the former Letter to replace that in the latter Letter desite the inconsistency in the wording of those clauses because the General Terms and Conditions applying to those clauses are identical and the interpretation to be applied to is the same.

566. The Security clauses in the September, 2009 Facility Letter are the same as the terms outlined in the previous Letter dated 22nd August, 2006 with a small number of exceptions. Whether in error or not, the guarantee from Messrs Evans and Good dated 30th August, 2005 limited in recourse to their 70% interest in the Isaac's Hotel, Dublin 1 was not altered as required in the Facility Letter dated 22nd August, 2006 to be for not less than €12,353,000 which was sought by AIB to cover the increase in the value of the loan. The amount of the guarantee is still stated to be €11,300,000. The court however is not tasked with considering the consequences of this in the present proceedings.

567. While the evidence after this date was instructive as to the manner in which the dispute arose and how matters devolved between the parties, I do not believe it necessary to consider same as they are extraneous to the preliminary issues which this court was tasked with adjudicating upon under preliminary issues 1 and 2 viz. whether it was a contractual term of the relevant loan facilities and/or that a representation was made to the plaintiffs that AIB would ensure the supervision and maintenance of a sinking fund, that it would effect a debt transfer and/or fund Messrs Evans and Good for the purposes of exercising particular options.

568. I come to this conclusion arising from the fact that the September, 2009 Facility Letter was the last written agreement signed and accepted by the Nolan Family and because I do not take the plaintiffs to have relied upon any further potential representations or collateral contractual terms after the September, 2009 Facility Letter. Any reference in discussions or correspondence between the parties after this date to commitments of the type in dispute in these proceedings related back to events prior to the September, 2009 Facility Letter.

569. In conclusion therefore I find in relation to the loan concerning phase IV and V of the Isaacs Hotel which also encompassed monies for various other phases of the Hotel that it was not a contractual term of the agreement between the parties that there would be a sinking fund supervised or maintained by AIB or that AIB would effect a debt transfer to Messrs Evans and Good or that AIB would fund Messrs Evans and Good for the purpose of exercising the option agreements on phases IV and V.

570. I make similar findings in relation to potential representations by AIB or its agents to the Nolan Family that a sinking fund would be supervised or maintained by the defendant or that AIB would fund Messrs Evans and Good or effect a debt transfer.

Lending Relating to Lismore Hotel and Beresford Place

571. The Lismore Hotel, a 31-bedroom hotel situated in Waterford, was first proposed to Ms. Joan Nolan by Mr. Evans in May, 2005 and first raised with Ms. Kierans by Ms. Joan Nolan towards on 17th May, 2005. Ms. Joan Nolan provided that the project was to proceed in a similar manner to that of the Isaacs Hotel and was entered for similar tax purposes. An investment vehicle was set up – Lismore Partnership – in which the Nolans held a 75% interest, Mr. Evans held a 20% interest and a Mr. Foley held a 5% interest. The hotel was to be operated by a company owned by Mr. Evans. The loan was to be serviced from the rent that was to be received from Mr. Evans' company. Once the capital allowance benefits had been obtained by the Nolans they would be bought out by way of a buy-back option. A Facility Letter dated 7th May, 2005 was issued and the sale completed in June, 2005. In 2008, Mr. Foley was removed from the Lismore Partnership as he had failed to provide his share of the funds that the Partnership was to use in conjunction with the AIB loan to develop the Lismore Hotel. Mr. Good was brought in to the Partnership upon Mr. Foley's removal and the interests held by each party in the Partnership were reconfigured – Nolans now held 55% and Messrs Evans and Good both held 22.5% each.

572. The Lismore Partnership's borrowing increased to €5.5m in April, 2006 and then to €5.7m in August the same year. In 2007 AIB rejected a futher request for funding and the partners put in an extra €1.7m from their own resources.

573. 1 and 2 Beresford Place were listed buildings and specific tax reliefs were available. Messrs Evans and Good had bought 1 Beresford for IR£1.833m in 1999 using finance from ACC Bank. The Nolans paid for the refurbishment of 1 Beresford in 2002-2003 at a cost of IR£2.138, claiming significant building allowances on this outgoing between 2004 and 2007.

574. In 2005 the plaintiffs paid Messrs Evans and Good €550,000 for a 30% share of 1 Beresford Place, in keeping with the 70/30 split ownership between Messrs Evans and Good and the Nolans proposed for the Isaacs Hotel. In 2006 2 Beresford Place came up for sale and was acquired by the Beresford Partnership, the overall acquisition cost being €3.5 million. The intention was to integrate the property into the Isaacs Hotel. The sale completed in or around September/October, 2006. The Nolan Family held a 30% share in the Partnership with Messrs Evans and Good holding the remaining 70% interest.

575. In July, 2006, Ms. Sally Nolan applied to AIB for a total amount of €5,043,580 for a term of five years. This five year term the plaintiffs stated was to tie in with the buy-back of the Isaacs Hotel phases III, IV and V in 2010 and 2011. A loan of €4,554,000 was later approved for Beresford Partnership and a Facility Letter dated 22nd August, 2006 was signed by the members of the Partnership. The purpose of this loan included refinancing of Messrs Evans and Good's ACC loan on 1 Beresford Place as well as the cost of purchasing 2 Beresford Place. As stated above, a further facility, Loan Account 6 of the Nolan Family Facility Letter dated 22nd August, 2006, granted the Nolan Family a loan of €500,000 for personal purposes which Ms. Sally Nolan said was to be used to fund the Nolans' purchase of the 30% interest in 1 Beresford Place.

576. On 5th November, 2009 AIB sent letters to both the Lismore Partnership and Beresford Partnership indicating that both loans were in default. The plaintiffs averred that this arose from the non payment of rent by companies owned by Messrs Evans and Good which leased and operated the properties from the respective Partnerships. It was asserted by the plaintiffs that a payment of rent in the sum of €133,211 was made on or about 5th November, 2009 by Messrs Evans' and Goods' company, Dublin Tourist Hostel, in relation to Lismore Hotel. It was also averred that a sum of monies was paid to cover rent arrears relating to the Beresford Place properties. They further averred that these payments derived from a €250,000 loan from AIB to Messrs Evans and Good in 28th September, 2009.

577. This facility along with a further €250,000 facility in that Letter were granted inter alia on the security of the cross guarantees of the Nolan Family and Nolan Transport which had previously been provided in relation to the lending for the Isaacs Hotel development. The plaintiffs asserted that they were not made aware that their guarantees were being extended to cover these additional loan facilities. The two €250,000 loans were continued by way of a Facility Letter dated 9th February, 2011 which also contained as security cross guarantees and supporting charges of the Nolans and Nolan Transport. Finally. It was averred that on 15th October, 2012 AIB issued letters of demand to the Nolans in their capacity as guarantors of the 9th February, 2011 Facility Letter. While these matters fall outside the preliminary issues in these proceedings, I would like to make some comments in relation to these claims.

578. A copy of the Facility Letter dated 28th September, 2009 addressed to Mr. Evans indicates that three facilities were granted to Messrs Evans and Good. The first related to the loan granted in 2005 which they required to exercise the options on phase I and II of the Isaacs Hotel, the second provided €250,000 purportedly to fund "capital expenditure at Hotel Isaacs"; and the third made available to Messrs Evans and Good the sum of €250,000 purportedly to "repay in full individual loans totalling €0.250m in the the [sic.] names of Richard Evans and Basil Good." The May, 2009 draft mark up indicates that facility 3 of the 28th September Facility Letter encompassed two loans in the sum of €125,000.

579. As part of the security for this Facility Letter cross garantees dated 19th April, 2005 from the Nolan Family and Nolan Transport were required "for the full amount of the loan plus interest and costs thereon" to be "supported by a charge limited in recourse to" their respective interests in the Isaacs Hotel development. The September, 2009 Facility Letter does not distinguish the applicability of the various security items to particular facilities identified in the Letter; they apply to all three "Loan Account" facilities.

580. The General Terms and Conditions applicable to that September, 2009 Facility Letter, the June, 2009 version, includes at clause 7.9.10 the following:-

> "If the security includes a guarantee, the Bank must notify the terms of the facility, and any changes in those terms to the guarantor."

581. The Facility Letter dated 28th September, 2009 was attached and sent to Ms. Joan Nolan on 25th January, 2011 by a Mr. Gerard Buckley of AIB who was working on the connection at the time. Ms. Joan Nolan had requested on 4th January, 2011 copies of the Facility Letters to Messrs Evans and Good in the Nolan Family's capacity as guarantors as they had not been receiving copies up to that point. She had previously discovered that copies of the Nolan Family's Facility Letters were being provided to Messrs Evans and

Good as guarantors. A copy of an email which Mr. Buckley sent later that day to his superior, Mr. Colm Madden who also worked on the Nolan Family connection, provides as follows:-

> "When Joan sees this and then sees that we are asking for E&G to sign her letter as guarantors and the Nolans didn't have to sign this, she might be throwing it back at us – only take is that on previous Nolan letters E&G didn't sign either, plus any letters going forward for E&G will have to also be signed by the Nolan Family? Or at least they should be.
>
> Persume you've thought of it anyway but just the major thing that stuck out at me from our end."

582. It would thus appear that the cross guarantees provided by the Nolans and Nolan Transport were increased and extended without their knowledge, prior notice or consent, to additional funding of €500,000, €250,000 of which would seem to concern personal lending to Messrs Evans and Good not related to the Isaacs Hotel development. It would also appear from the averments of the plaintiffs that part of this lending was used to pay down rent owed to the Lismore Partnership which was used in turn to pay arrears on the Lismore Hotel loan. This came to light they say in a liquidator's report prepared in 2012 on Dublin Tourist Hostel after it went into liquidation. In addition, it seems that staff within AIB (at least Mr. Gerard Buckley and Mr. Colm Madden) were aware of potential difficulties with the September, 2009 Facility Letter, arising from the email of Mr. Buckley. The above evidence leaves the court with concerns as to the legality of the lending in the sum of €500,000 to Messrs Evans and Good arising from loan facility 2 and 3 of the Facility Letter dated 28th September, 2009. However, as these matters fall outside the preliminary issues before this court, I do not make any determination on these matters in this judgment.

583. On 17th October, 2012 AIB issued Letters of Demand to both Lismore Partnership and Beresford Partnership, having previously on 15th October, 2012 issued a Letter of Demand to the Nolan Family concerning the phase IV and V loan.

584. The plaintiffs asserted that they were influenced to enter the Lismore and Beresford Place developments arising from the manner in which the Isaacs Hotel development was progressing. In particular, the plaintiffs contended that they only became involved in these projects and sought lending from AIB because of the manner in which the lending on Isaacs Hotel was structured and because of the commitments which they say AIB had made. They stated that had AIB not made the commitments in dispute in these proceedings, they would never have signed the Facility Letters relating to Lismore Hotel and 1 and 2 Beresford Place. These issues are set down as preliminary issues 3 and 4 of Cooke J.'s order dated 4th June, 2013.

585. AIB denied that these developments and/or loans were entered on the basis of commitments having previously been made by AIB. The defendant also asserted that these loans were entirely separate from the Isaacs Hotel loans and thus, even if commitments had been made, they could have no have no legal bearing on these later lending transactions.

586. In addition, the plaintiffs argued that both the Lismore Partnership and Beresford Partnership loans were to be provided on the basis of proportionate liability, i.e. liability for the loan was to be based on the interests held in each Partnership. As such, the plaintiffs contended that the Nolans should only have been responsible for 70% reducing to 55% of the Lismore loan and 30% of the Beresford loan. However, the Facility Letter relating to these transactions provided for joint and several liability. The plaintiffs said that it was their understanding that arising from discussions held prior to signing the Facility Letters that AIB were aware and had agreed that the loan was to be on the basis of proportional liability.

587. The plaintiffs further argued that the Facility Letter relating to 1 and 2 Beresford Place burdened them with repayment of Messrs Evans and Good's refinanced ACC loan on 1 Beresford Place which was not the intention of the parties at the time.

588. I can deal with these specific matters in relatively short order.

589. First, as I have found that there were no representations made or contractual terms entered into between the parties concerning averred commitments to fund Messrs Evans and Good, to effect a debt transfer, and to maintain and/or supervise a sinking fund, the plaintiffs could not therefore have relied on same, or been induced by same to enter into the transactions relating to 1 and 2 Beresford Place or Lismore Hotel.

590. Secondly, I must conclude that even had commitments of the sort outlined been made by AIB either by way of contractual terms or representations, it could not be said that they in any way represented the manner in which the Beresford Place or the Lismore Hotel transactions would proceed or that the commitments extended to those transactions. The commitments would have related soley to phases IV and V of the Isaacs Hotel.

591. The loans were entirely separate lending transactions to that of the phase IV and V loan. On the plaintiffs' own evidence, the Lismore Hotel development proposal was first put to the Nolan Family by Mr. Evans in May, 2005 and the proposal was first put to AIB in a fax from Ms. Joan Nolan to Ms. Kierans dated 17th May, 2005. The Beresford Place development was first raised with AIB by the Nolan Family in early February, 2006. Thus, the applications for lending were made a number of months and years subsequent to the October, 2003 Facility Letter for phase IV and V prior to which these commitments were said to have been entered.

592. The Beresford Place and Lismore Hotel developments were therefore not even contemplated by the Nolan Family let alone AIB at the time the phase IV and V Facility Letter was accepted by the Nolan Family. It could not reasonably be suggested therefore that in making the commitments in this alternate scenario, AIB or the plaintiffs had in mind that they should have a bearing on how the Beresford Place and Lismore Hotel transactions would proceed.

593. Furthermore, the Nolan Family Partnership was the only party to whom the alleged commitments would have been made when they sought lending for phases IV and V whereas lending was sought by the Beresford Partnership and the Lismore Partnership, respectively, in respect of Beresford Place and Lismore Hotel. Lismore Partnership and Beresford Partnership are separate legal entities and have a different composition to that of the Nolan Family Partnership. The interests held by each of the sub groups in each of the Lismore and Beresford Partnerships in the various properties were also different to that evident for the properties concerned in the phase IV and V loan when the loans were first approved by AIB.

594. The Nolan Family Partnership owned 100% of phases IV and V of the Isaacs Hotel. As outlined above however, with regard to the Beresford Partnership, the Nolan Family Partnership's interest only comprised 30%, 70% being owned by Messrs Evans and Good. In relation to the Lismore Partnership, the Nolan Family Partnership's interest was originally 75% with 20% interest owned by Mr. Evans and 5% by Mr. Foley. When Mr. Foley was removed from the Lismore Partnership and Mr. Good entered, the Nolan Family Partnership's interest reduced to 55%. Thus, it is evident from this analysis and the fact that both Lismore and Beresford Partnerships are separate legal entities, the borrowers were different and distinct in each lending application. It cannot therefore reasonably be argued that commitments made to one borrower who owned 100% of a development property could extend to or create the

expectation that similar commitments would be made when in subsequent developments those same borrowers were only one sub group holding an interest in those separate legal entities. This is particularly so in respect of the loan to the Beresford Partnership in which the Nolans only held a minority interest.

595. As to the evidence concerning proportional liability in relation to the Beresford Place and Lismore Hotel lending transactions and that the Beresford loan burdened the Nolans with Messrs Evans' and Good's refinancing loan for 1 Beresford Place, these matters fall outside the remit of the preliminary issues set down by Cooke J. and as such the court will not engage in an examination of these issues.

Summary of Findings on the Preliminary Issues

596. In summary, my conclusions on the various preliminary issues set down by Cooke J. for these proceedings are as follows:-

1. It was **not** a term of any of the loan facility agreements pertaining to the Isaacs Hotel (or any phase thereof) and/or the Lismore Hotel that:-

(i) the defendant would ensure and supervise the maintenance of an adequate sinking fund by Messrs Evans and Good for the purpose of safeguarding the capacity of Messrs Evans and Good to obtain finance and to perform under the Option Agreements when called upon to do so; or

(ii) the defendant would upon the exercise of the options in the Option Agreements effect a debt transfer of any residual debt from the plaintiffs to Messrs Evans and Good; or

(iii) the defendant would provide finance for the exercise by Messrs Evans and Good of the options in the Option Agreements when called upon to do so.

2. The defendant, its servants or agents did **not** represent that:-

(i) it would ensure an adequate sinking fund would be put in place by Messrs Evans and Good which would be supervised and maintained by the defendant with the express intent and purpose that it would safeguard the capacity of Messrs Evans and Good to obtain finance and to perform their contractual obligations under the put and call options under the Option Agreements; or

(ii) such an adequate sinking fund would be supervised and maintained by the defendant; or

(iii) the exercise of the options under the Option Agreements would operate as a debt transfer from the plaintiffs to Mr Evans and Mr Good; or

(iv) it would provide finance for the exercise of the options under the Option Agreements.

597. As examination of preliminary issues 3, 4, and 5 are dependent upon an affirmative conclusion in relation to representations having been made to the plaintiffs their servants or agents of any of the matters (a) to (d) described in Preliminary Issue 2, and as the court has found that there were no such representations, these issues of reliance on representations and inducement to enter loan facilities or contracts do not arise.

598. Similarly as preliminary issue 6 is dependant on an affirmative finding that representations were made in relation to any of the matters identified in preliminary issue 2, and as I have found that there were no such representations, it follows that there were no statements constituting "misrepresentations" or "misstatements". Accordingly the issue of "misrepresentation" and the alternative issue of "negligent misstatement" simply do not arise.

Dated 9th June, 2016

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The Hon. Mr. Justice Robert Haughton