

**SCOPE OF THE SOLICITORS RETAINER:
LESSONS FROM LYNCH**

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Bankers, solicitors and their professional indemnity insurers will have raised two cheers at the outcome of the Lynch case¹. Mr. Justice Michael Peart delivered his judgment on 8 December 2011 finding against the Plaintiff Philip Lynch, a well known Irish businessman, and his family who had sued a lender and their solicitors for a declaration that they were not personally liable to repay a development loan. In what to many will seem like a throwback to the past, the judgment demonstrates the ease and informality with which large sums of money were borrowed by developers at the height of the Celtic Tiger in order to fund speculative land purchases. Although the judgment did not raise any new points of law, it provides a general commentary on the scope of the solicitor's retainer and duty of care.

The Facts

The case concerned the purchase of some 86 acres of land in County Waterford for €25 million to be funded by a loan from Allied Irish Banks ('AIB'). The land was bought in the expectation that it would be rezoned for development and sold on at a substantial profit, with or without the benefit of planning permission. The sale closed in February 2007. Values of development land started to fall rapidly thereafter and it became uneconomic to proceed with the proposed development. By the time of trial the land was valued at no more than €3-4m and the loan could not be repaid.

AIB sought summary judgment against all of the borrowers and the Lynch family in turn sought a declaration that the loan was a 'non-recourse' loan meaning that AIB had no recourse against the borrowers in the event of non-repayment and that its only remedy was to sell the lands against which the loan was secured. Alternatively, the Lynchs sought a declaration that either or both firms of solicitors involved were liable to indemnify them against any liability they might be found to have to AIB.

¹ Judith Whelan, Teresa Lynch, Philip Lynch, Eileen Lynch, Philippe Lynch and Paul Lynch –v- Allied Irish Banks Plc; Matheson Ormsby Prentice; and LK Shields Solicitors

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The development proposals had been put together by another developer, Gerard Conlon. Mr. Conlon had proposed a 50/50 partnership to Philip Lynch and Mr. Lynch in turn decided to involve his wife and children in the deal.

Mr. Conlon approached his own bankers AIB for funding. All negotiations between AIB and the borrowers were conducted by Mr. Conlon and his representatives although AIB was aware from an early stage of the involvement of Mr. Lynch. It transpired during the course of the proceedings that Mr. Conlon had over-extended his borrowing with AIB and AIB would not have made the loan to Mr. Conlon alone as sole borrower. That appears to have been the reason why the deal was proposed to Mr Lynch.

Matheson Ormsby Prentice (MOP) were Mr. Conlon's solicitors and were instructed by him and Mr. Lynch jointly to act in relation to the purchase. Mr. Lynch and his family had no direct dealings with MOP.

LK Shields (LKS) were initially retained by the Lynchs to advise on a co-ownership agreement for the development with Mr. Conlon. Shortly before the purchase closed, they took on a wider role which included preparing powers of attorney and acting as a conduit for information between MOP and the Lynchs. The extent of that role was unfortunately unclear and the scope of duty was the main issue in the case against LKS.

Arrangements for the loan were not finalised until the last possible moment and the case turned largely on events that took place on 7 and 8 February 2007 (when the sale closed). On 7 February 2007, a draft of the AIB facility letter included a clause that recourse was to be only against Gerry Conlon and Philip Lynch (i.e. not against the other Lynch family members who were named as borrowers). This clause was omitted from the final version of the facility letter which was signed on behalf of all of the borrowers. There was a factual dispute as to why the clause was omitted and who said what to whom (bearing in mind that there was no direct contact between AIB and either the Lynchs or LKS). MOP informed LKS of the amendment. The Court found that LKS misunderstood the effect of the amendment and in consequence wrongly advised the Lynchs by email that AIB no longer required recourse against any of the borrowers. In fact, the effect of the removal of the limited recourse clause was that in the event of default, AIB would have recourse against all rather than only some of the borrowers.

One of the curious features of the case was the absence of some of the key players from the trial. The Lynch family chose not to call Mr. Conlon or any of his representatives and AIB chose to adduce no factual evidence whatsoever even though a witness statement had been prepared by one of its

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officials. The judge was invited by both parties to draw adverse inferences from the failure of the other party to call particular witnesses but declined to do so.

AIB

The Plaintiffs' case against AIB was that it knew that they would not agree to a recourse loan and had misrepresented to them that the loan was to be non-recourse, primarily by removal of the recourse clause from the final draft of the facility letter without explanation. The Plaintiffs themselves accepted that they had had no direct contact with AIB, all dealings with AIB being through Mr Conlon and his advisers. In the circumstances, the Court had no difficulty in finding that AIB did not make the alleged misrepresentation and the case against AIB was dismissed with the result that AIB was entitled to judgment as against the Plaintiffs for the full amount of the loan and interest.

MOP

The Plaintiffs' case against MOP was essentially that it was negligent in failing to explain to the Lynchs and/or LKS that the loan as finally agreed was to be a full recourse loan: in particular, that it misrepresented the position to LKS on 7 February 2007 and that it failed to give any advice to Judith Whelan (who signed the facility letter on behalf of all of the Lynchs at the completion meeting on 8 February 2007) on the terms of the loan.

MOP's position was quite simply that it was not retained by the Lynchs to advise on the loan. The Lynchs themselves accepted that they did not seek advice from MOP in relation to the loan and were relying on LKS. In relation to what was allegedly said by MOP to LKS on 7 February, there was a conflict of evidence. MOP denied that it had misrepresented the nature of the loan to LKS and the Court preferred the evidence of MOP.

Unsurprisingly, the Court found that MOP owed no duty to the Lynchs to advise on the loan and dismissed the case against MOP.

LKS

The case against LKS turned on the advice given to the Lynchs on 8 February 2007 that the AIB loan was to be a non-recourse loan. That advice was found to be wrong.

Notwithstanding the error, the Court found that LKS owed the Lynchs no duty of care in respect of the erroneous advice. The Court came to that view primarily because it found that the Lynchs had not told

LKS that they would not complete the transaction if the loan was a full recourse loan. That may be regarded as a surprising conclusion given not only that the Lynchs were clients but also that they had asked for advice on that very question. However, the fact that the Lynchs did not explain the reason for asking the question was sufficient for the Court to find that it would not be just and reasonable to impose a duty of care.

The Court further found that even if there had been a duty of care, the loss suffered by the Plaintiffs was not reasonably foreseeably and therefore would not have been recoverable. This finding was made on a similar basis to the duty finding, viz. that LKS could not reasonably have foreseen that the Lynchs would be exposed to personal loss through LKS's advice as the Lynchs had not made clear to LKS that they would not proceed with the transaction if the loan was a recourse loan.

The finding on foreseeability also appears to be a surprising conclusion: the question asked by the Lynchs about the nature of the loan could hardly have been thought to be academic. It therefore comes as no surprise that the judgment is to be appealed.

Conclusions

What stands out from the judgment is the extraordinarily casual manner in which a substantial property transaction was handled. The Plaintiffs were prepared to leave the financing of the transaction entirely to Mr Conlon, had no direct contact with AIB and signed a facility letter for €25m with minimal scrutiny and (other than the fateful email from LKS on the morning of the completion meeting) no legal advice.

LKS, for its part, appears to have fallen unwitting prey to 'retainer creep'. It was retained to advise on one discrete element of the transaction (the co-ownership agreement) but it ended up giving erroneous advice on the terms of the loan agreement without obtaining full instructions from its clients. It seems at least possible that the case against LKS might never have been brought had it been clear as to the extent of its retainer.

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Beale and Company acts for solicitors and their professional indemnity insurers in Ireland and in England and Wales.