UNAPPROVED
THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 332
Appeal Number: 2018/000178

Faherty J.
Haughton J.
Murray J.

BETWEEN/

NEIL HEALY

PLAINTIFF/
APPELLANT

- AND –

ULSTER BANK IRELAND LIMITED AND PROMONTORIA (ARAN) LIMITED

DEFENDANTS/
RESPONDENTS

Judgment of Ms. Justice Faherty dated the 27th day of November 2020

1. At issue in this appeal is whether the appellant ("Dr. Healy") has a liability for loan facilities which were provided by the first respondent ("the Bank") to him and one Dr. Patrick Cullen ("Dr. Cullen"), jointly and severally, in respect of which the second respondent ("Promontoria") now claims entitlement pursuant to a deed of transfer effected between the Bank and Promontoria in 2014.

The background to the proceedings

2. Dr. Healy is a registered medical practitioner and at material times conducted a general practice in County Westmeath.

3. In 2006 Dr. Healy and Dr. Cullen were in partnership together and involved in the development of certain properties in Coole, County Westmeath. Their joint endeavours arose out of a business plan whereby they bought an old hospital premises with a view to establishing a state-of-the-art medical centre and commercial outlets (to include a pharmacy and physiotherapy centre) described as Phase 1 of the development. They also acquired a greenfield site for the purposes of developing residential properties. The business structure decided upon was that in the first instance Dr. Healy and Dr. Cullen became partners in their medical practice. Secondly, they established a property partnership to hold the assets that had been acquired for their development of Phase 1 and the proposed development of the greenfield site. Thirdly, they set up a company, Coole Property Holdings Limited ("CPHL") which was to be the development vehicle, with Dr. Healy and Dr. Cullen each becoming fifty percent shareholders in that company.

4. All of the monies for the development of Phase 1 and the acquisition of the greenfield site were provided by the Bank. Security for the loans was by way of a legal first charge over the lands at Coole.

5. Dr. Healy and Dr. Cullen successfully developed Phase 1. This allowed them to reduce their initial borrowings (in the order of €5.5m) to in or around €2.5m, with the greenfield site yet to be developed.

6. On 9 August 2006, they executed individual Guarantees underpinning the borrowings of CPHL and were at that stage intent on developing the greenfield site by building a residential development of twenty-two houses.

7. Subsequent to the execution of the Guarantees, a divergence of opinion arose between Dr. Healy and Dr. Cullen with regard to the development of the greenfield site.

Dr. Healy wished to sell the site while Dr. Cullen wished to develop it and then sell it on. Dr. Healy's desire to sell was predicated on anticipated difficulties in the property market. By early January 2007 it seems that Dr. Cullen was coming around to Dr. Healy's way of thinking but by late January 2007 he was again expressing his desire that the site would be developed. As a result of their differences, it became clear that Dr. Healy and Dr. Cullen could no longer practice medicine in partnership or advance their joint commercial interests together.

8. Dr. Healy and Dr. Cullen, and their respective representatives, duly met in February 2007. Two representatives of the Bank, a Mr. Alan Leech and a Ms. Breeda Finnegan, were also present albeit that they did not sit in on the entire meeting. The Bank's position at that time was that it wanted its loans repaid. This is clear from the contents of an internal Bank memorandum prepared by Mr. Leech on 3 September 2007. The dispute between Dr. Healy and Dr Cullen was not resolved at the February meeting. However, negotiations then took place between their respective representatives in relation to one party buying the other party out. The outline of an agreement began to emerge in April 2007 when it was agreed that Dr. Cullen would buy out Dr. Healy's interests, including that their medical partnership would be dissolved.

9. Funding for Dr. Cullen to buy out Dr. Healy was provided by Bank of Scotland Ireland (hereinafter "BOSI"). A copy of the BOSI loan facility letter to Dr. Cullen dated 18 June 2007 was duly sent to the Bank. The sequencing set out in that letter was as follows:

> "Loan A: To fund the acquisition of the Partners [Dr. Healy's] 50% interest in Medical practice for €2,660,000 including costs of €434,000;
>
> Loan B: to refinance loan A on the completion of the contract for the sale of 22 residential units and the redemption of Ulster Bank's facility in full."

10. On 21 June 2007, Ms. Finnegan of the Bank wrote to Messrs. Kennedy Fitzgerald Solicitors (the solicitors for Dr. Cullen) indicating that the Bank was consenting to BOSI taking a second legal charge over the property at Coole on the basis that the Bank was provided with written confirmation from Dr. Cullen's solicitor that an unconditional contract for the sale of the greenfield site was in place for €2,250,000 and a Solicitor's Undertaking to deliver the proceeds of the sale to the Bank without deductions. By letter of 22 June 2007, Messrs. Kennedy Fitzgerald responded stating, *inter alia*, "that all sale proceeds … shall be lodged to Ulster Bank".

11. The agreements reached between Dr. Healy and Dr. Cullen were given effect to on 19 July 2007 when contracts were signed.

12. The Agreement providing for the dissolution of Dr. Healy's and Dr. Cullen's medical partnership (hereinafter "the Medical Partnership Agreement") was executed on 19 July 2007 (the Cessation Date). Para. 6.2 provided as follows:

> "As and from the Cessation Date Dr. C shall assume sole and absolute personal responsibility and liability for all of the debts of the medical and surgical partnership including but not limited to the creditors listed in the Third Schedule to include all Coole Surgery practice accounts; all Coole Surgery equipment accounts; the Coole site account; all insurance premiums; all professional fees due including but not limited to all sums due to Connellan, Solicitors and to Mr. Gerry Cuddy and/or HC Financial Services Limited for professional services rendered up to the Cessation Date; all sums due to Lombard & Ulster Banking Limited whether on foot of leases or lease agreements including but not limited to Agreements numbered 2000197679 and 2000205447 and all sums due to Ulster Bank Ireland Limited."

13. Para. 6.4 provided:

Dr. C hereby covenants with and undertakes to Dr. H to fully indemnify him and to keep him fully and effectually indemnified from and against all claims, actions or causes of action (with the exception of claims for medical negligence against Dr. H personally), complaints, contracts, liabilities, agreements, promises, debts or damages, whether existing or contingent, and whether arising under statute, common law, equity or otherwise howsoever arising out of the forgoing for the periods before and after the Cessation Date."

14. The dissolution Agreement in respect of Dr. Healy's and Dr. Cullen's property partnership (hereinafter "the Property Partnership Agreement") was also executed on 19 July 2007. Dr. Cullen's assumption of liability in respect of that partnership was expressed in the following terms:

"6.2 With effect from the Cessation Date, Dr. C shall assume sole and absolute personal responsibility for all of the debts and liabilities, whether existing or contingent, of Coole Property Holdings Limited and the Partnership in respect of the period before and after the Cessation Date including but not limited to the Creditors listed in the Third Schedule hereto and including but not limited to all sums due to Ulster Bank Ireland Limited including but not limited to all sums due to that Bank on Accounts numbered 985430 02385039; 985430 02385112; 985430 02385385; 985430 02162164; 986130 36618141; 986130 36618067; 985430 02162081; the Coole site account; all insurance premiums; all professional fees due including but not limited to all sums due to Connellans, Solicitors and to Mr. Gerry Cuddy and/or HC Financial Services Limited and to Shelley Barrett, Architect for professional services rendered up to the Cessation Date and all sums due to Lombard & Ulster Banking Limited whether on foot of leases or lease agreements or otherwise howsoever."

15. Pursuant to para. 6.6, Dr. Cullen covenanted with and undertook "to fully indemnify [Dr. Healy] and to keep him fully and effectually indemnified from and against all claims, actions or causes of action, complaints, contracts, liabilities, agreements, promises, debts or damages, whether existing or contingent, known or unknown and/or costs howsoever arising in respect of the forgoing in respect of the periods both before and after the Cessation Date."

16. On the same date a contract for sale of the Coole site with planning permission for 22 residential units was entered into by Dr. Cullen with a third party, a Mr. Peter O'Reilly.

17. The consideration for Dr. Cullen's acquisition of Dr. Healy's interests was paid over to Dr. Healy's solicitor, Mr. Patrick Groarke. On 31 July 2007, Dr. Healy obtained a cheque representing these proceeds from Mr. Groarke. On the following day, 1 August 2007, Dr. Healy attended a meeting in the Mullingar branch of the Bank. He had an appointment to meet Mr. Leech. Dr. Healy was accompanied by his mother, Ms. Maria Healy.

18. On 1 August 2007 Dr. Healy deposited the sum of €2,213,607 (being the sum received from Mr. Groarke after certain deductions) with the Bank. There is no dispute but that the sum deposited represented the proceeds of the sale to Dr. Cullen of Dr. Healy's interest in the property partnership and the medical practice.

19. Dr. Healy claims that prior to depositing the said sum he was assured by Mr. Leech that he had no liability or exposure to the Bank in relation to the Coole project. He asserts that a specific representation was made by Mr. Leech as to the fact that he had no liability to the Bank. Dr. Healy asserts that he deposited his monies on foot of the representations and assurance of having no liability to the Bank.

20. It is common case that some twelve months later, on 13 August 2008, allegedly on foot of its rights pursuant to the Guarantee executed by Dr. Healy on 9 August 2006, the

Bank applied a set off of US$993,983.03, being the balance of the aforesaid deposit monies then standing in Dr. Healy's account, against what was asserted by the Bank at the time to be Dr. Healy's liabilities in respect of the Coole project. It is this action together with further demands made by the Bank of Dr. Healy that triggered the within proceedings.

The procedural history

21. The proceedings have a long procedural history. They were commenced by plenary summons dated 13 October 2008 against the Bank, the then sole defendant. Dr. Healy seeks, *inter alia,* the return of monies which were standing in his account in August 2008 which were set off by the Bank against alleged indebtedness on his part. He also seeks certain declaratory reliefs including that the Bank is estopped in equity from pursuing him in respect of the Coole indebtedness.

22. The proceedings were entered into the Commercial Court by Order of Kelly J. on 3 November 2008. Following the filing of a defence and counterclaim the matter progressed to hearing before McGovern J. in May 2009. Judgment was delivered on 17 July 2009. It was held that the representations said to have been made by Mr. Leech absolving Dr. Healy of liability to the Bank were not made. Dr. Healy duly appealed to the Supreme Court.

23. In advance of the hearing in the Supreme Court, Dr. Healy was advised by the Bank of a sale by it of loan facilities to Promontoria said to include Dr. Healy's loans and security. By motion dated 8 October 2015, the Bank sought to join Promontoria to the proceedings as a co-defendant and co-respondent to the appeal. By Order of the Supreme Court of 9 October 2015, Promontoria was joined as a co-respondent to the appeal with Dr. Healy to be furnished with the relevant documents by which the Bank had assigned its interest in loans connected with Dr. Healy to Promontoria.

24. The appeal was heard on 13 October 2015 and 7 December 2015, with judgment being delivered by Hardiman J. on 21 December 2015 allowing Dr. Healy's appeal. The Order of the High Court was duly set aside, and the matter remitted to the High Court for rehearing. At this juncture it should be noted that the effect and extent of the Bank's transfer of its interest in the loan facilities and security concerning Dr. Healy was not the subject of any determination by the Supreme Court.

25. By the time of its sale agreement with Promontoria, the Bank had instituted summary summons proceedings against Dr. Healy and Dr. Cullen concerning the loan facilities which had been extended in relation to the Coole project. These proceedings concerned the same loan facilities as the within proceedings.

26. On 21 January 2016, Promontoria served on Dr. Healy an amended summary summons in these proceedings now titled *~~(Ulster Bank (Ireland) Limited~~ Promontoria (Aran) Limited, Plaintiff v. Neil Healy and Patrick Cullen, Defendants* 2014/2318S (hereinafter "the Promontoria proceedings") and in which Promontoria had thus been substituted for the Bank as plaintiff. By way of Consent Order made on 11 July 2016, the Promontoria proceedings were struck out as against Dr. Healy, with Dr. Healy acknowledging that Promontoria was not precluded from taking any step in the within proceedings which to that point in time included the Bank's counterclaim in respect of the loan facilities which were the subject of the Promontoria proceedings. By Order of the High Court of 17 October 2016, Promontoria was joined as a co-defendant to the within proceedings for the purposes of prosecuting the counterclaim.

27. In summary, by his amended Plenary Summons, Dr. Healy claims as against the Bank:

(1) Damages for (a) breach of contract, (b) negligence, (c) conversion, (d) deceit, (e) breach of duty, including statutory duty, (f) negligent misstatement and/or misrepresentation;

(2) Judgment in the amount of €667,210;

(3) A declaration that the Bank was at all material times in breach of its fiduciary duty to him;

(4) Full accounts and enquiries;

(5) Payment of the sum of €667,210 as money had and received;

(6) A declaration that Dr Healy stands released from all liability to the Bank on foot of a guarantee dated 9 August 2006;

(7) A declaration that at all material times after 1 August 2007 and, in particular, prior to 13 August 2008, Dr Healy stood released of all liability to the Bank on foot of the guarantee of 9 August 2006;

(8) If necessary, a declaration that the Bank is estopped from denying the representations made to Dr Healy on or about 1 August 2007 that he had no further liability to the Bank on foot of the guarantee dated 9 August 2006; and

(9) Interest on all heads of loss and costs.

28. The Amended Statement of Claim, delivered on 3 November 2016 pleads, in summary, as follows:

- By contract between Dr. Healy and the Bank in consideration of the payment of fees at varying rates dependant on the transaction or service provided, Dr Healy and the Bank entered into a commercial relationship under which the Bank agreed to provide various services to Dr. Healy in the nature of "Wealth Management" services which included commercial investment and banking services.

- Following the commencement of the commercial relationship Dr. Healy placed €2,213,607 on deposit of which a portion thereof were thereafter utilised in a series of currency trades. The Bank acted as Dr. Healy's advisor/ broker in this regard and in the premises was under a duty of care to Dr. Healy.
- Prior to the commencement of the commercial relationship and Dr. Healy agreeing to place his funds on deposit, the Bank specifically represented to Dr. Healy that he had no pre-existing liability or exposure to the Bank on foot of the Guarantee executed on 9 August 2006.
- The Bank as banker to CPHL was at all times privy, on an ongoing and detailed level, to Dr. Healy and Dr. Cullen's negotiations for the buyout of Dr. Healy's interests and was fully apprised as to the ultimate terms under which Dr. Healy disposed of his interests to Dr. Cullen.
- The Bank specifically represented to Dr. Healy prior to the commercial relationship entered into between Dr. Healy and the Bank that following his disposal of his interests in the Coole development he stood discharged from all liability to the Bank, *inter alia,* on foot of the Guarantee dated 9 August 2006.
- Dr. Healy entered into the commercial relationship with the Bank acting in reliance on the representations and assurances of release from liability and was induced to enter the said relationship in consequence of the said representation.
- Contrary to its assurance to Dr. Healy that he was released from his liabilities, at the time Dr. Healy furnished his funds to the Bank it knew that it had not in fact facilitated his release from same.
- At no time after the commencement of the commercial relationship up to August 2008 did the Bank disclose the fact that it considered Dr. Healy still bound by his Guarantee.

- The Bank is estopped from denying the representations made to Dr. Healy on 1 August 2007 that he had no further liability to the Bank.
- Dr. Healy acted to his detriment in reliance upon the said representations.

29. The Bank's Defence was delivered on 22 November 2016. Insofar as the issues arising in this appeal are concerned, it can be summarised as follows:

- It is accepted that Dr. Healy was at the material times an account holder with the Bank and that it received monies from Dr. Healy on 1 August 2007 which were held out as being the proceeds of his disposal of his Coole interests to Dr. Cullen.
- The Bank acknowledges that subsequent to 1 August 2007 Wealth Management Services were provided to Dr. Healy.
- It is denied that there was any obligation to act in the best interests of Dr. Healy who had legal advisors and it is pleaded that it was the entitlement of the Bank to protect its interests in respect of liabilities which had accrued, and which Dr. Healy had not discharged. In the premises the Bank was entitled to exercise any set off in the absence of any express or implied agreement to the contrary.
- It is denied that the Bank or its servants or agents represented to Dr. Healy that he had no pre-existing liability or exposure on foot of the Guarantee or that Dr. Healy could have reasonably inferred from the conversation pleaded that he was so released.
- Dr. Healy took no steps (and has not sought) to procure the discharge of the Guarantee and arranged his affairs not on the basis of discharge of any liability but rather on the basis of an indemnity from his former partner.
- The Bank denies that it was privy on an ongoing and detailed basis to the negotiations between Dr. Healy and Dr. Cullen.

- It is denied that Dr. Healy entered into the alleged commercial relationship in reliance on any alleged representations or that he could have been under any reasonable belief that such communication as had occurred could have the effect of discharging his liability having regard to the express terms of the Guarantee and the failure of Dr. Healy's legal advisors to seek Dr. Healy's release from such security as part of the dissolution of the relationship between him and Dr. Cullen.
- The Bank denies that it is estopped from seeking to exercise the rights conferred on it by the Guarantee and the exercise of its general rights as Banker.

30. By way of Amended Counterclaim of 22 November 2016, Promontoria pleads that by letter of demand dated 24 November 2008, the Bank made due demand of Dr. Healy in respect of the latter's liabilities concerning named accounts and that Dr. Healy failed to repay the sums due and owing.

31. It pleads that by Mortgage Sale Deed dated 16 December 2014, Deed of Novation dated 12 February 2015 and Deed of Global Transfer dated 12 February 2015 made between the Bank and Promontoria, the Bank absolutely and unconditionally assigned to Promontoria all rights to, under or in connection with the loans advanced by the Bank under the facility letters dated 20 July 2006 to Dr. Healy and Dr. Cullen and all rights under the loan facility letter dated 20 July 2006 between the Bank and CPHL including all rights to, under or in connection with the individual Guarantees given by Dr. Healy and Dr. Cullen over the indebtedness of CPHL.

32. Promontoria thus claims (1) judgment against Dr Healy in the sum of €1,277,370.64 in respect of the liabilities on stated joint borrowings, (2) judgment against Dr Healy on foot of the Guarantee aforesaid in the sum of €1,064,222.75 (being the "un-set off" figure), (3) in the alternative, judgment against Dr Healy on foot of the said Guarantee in the sum

of €356,761.52 (being the residual post-set off amount), and (4) interest until payment or judgment and costs.

33. The matter came on for hearing before Barrett J. in July and December 2017. Judgment was delivered on 16 January 2018. Barrett J. dismissed Dr. Healy's proceedings and ordered that Promontoria recover from Dr. Healy the sum of €1,634,132.16. Costs of both the claim and counterclaim were awarded against Dr. Healy. The final Order is dated 9 March 2018 from whence Dr. Healy appeals.

The trial judge's findings on the representations said to have been made by Mr. Leech

34. A core issue at the original High Court hearing, the Supreme Court appeal and the retrial before Barrett J. was whether the claimed assurances were in fact given by Mr. Leech prior to Dr. Healy depositing his money. Following the original trial, McGovern J. found that not to be established. However, in the Supreme Court, the presence of Dr. Healy's mother (Ms. Maria Healy) at the meeting was central to the decision of Hardiman J. in allowing Dr. Healy's appeal of McGovern J's decision and remitting the matter for rehearing.

35. Following the re-hearing, Barrett J. ultimately held that the claimed representation that Dr. Healy was "in the clear; any worrying about the continuing arrangements at Coole is now for Ulster bank" was, in fact, made by Mr. Leech on 1 August 2007. Barrett J. was especially struck by the evidence of Ms. Healy whose evidence is recited in the judgment:

> *"'Ms Healy - …This was about 12:00, 12:30….[W]e parked the car - he [Dr Healy] parked the car somewhere at the back of the bank and he said 'I have to ring him [Mr Leech] and let him know' - or text him, I don't know which…and let him know that we are here.' So we went around into the bank and Neil went up to the reception and told her that he had an appointment with Alan Leech but he was expecting us. So Alan Leech came down the stairs and opened the door…I think, a*

glass door, and Neil [Dr Healy] said: 'This is my mother'. And I shook his hand and followed him upstairs…into an office. And as I said, he [Dr Healy] said: 'This is my mother' and 'this is Alan Leech'. And I remember saying to him: 'I'm delighted to meet you…to put a face on the name that I had heard so much talk over the last few months. You know, Neil would tell me "Alan Leech is doing this…" or "We are doing that and I'm meeting Alan Leech"….I was well tuned in to what was going on. So I told Alan Leech, I said: 'I'm delighted to meet you.' And then we sat down at a desk. The desk was in front of a window and we sat this side of it and Alan Leech sat over there and Neil said to him the closing had occurred and Alan Leech said - this is more or less what happened. And Alan Leech said 'I didn't realise it had closed already. I knew it was imminent or going to happen…'. And Neil said: 'Yes, it has.' And Alan Leech said: 'And have you your cheque?' And Neil said: 'Yes, I have my cheque here….Patrick Groarke [Dr Healy's then solicitor] told me that it is safe to come in here and lodge my money with you and that I have no liabilities to…Ulster Bank.' And Alan said: 'Yes, that's the way…it is with me as well.' Now they are words that are not, maybe, 100%. But he did say that. So Neil said: 'Well there is two things.' Alan Leech asked him: 'Are you going to lodge your money, Neil, with us now?' And Neil said: 'Well that's my intention coming in…' - and that was his intention – '…coming in here today.' 'But', he said, 'before I come to that…there are two things that I want to discuss with you, two important things, and the first thing is about the interest rates.' There was something about interest rates with…AIB and, you know, can you match these interest rates? And Alan Leech said: 'That shouldn't be a problem at all.' And I think at that stage he went out and he got some information on interest rates and he came back in and he said: 'I can do better than the AIB.' And Neil said: 'That's

grand.' And they were happy enough with that. But Neil said: 'The second and most important thing that I want to find out is that I have your assurances that my money is safe in the Ulster Bank, regarding the Coole project, regarding my liabilities with the Coole project.' And Alan Leech told Neil that his money was safe and he was giving his assurances that Neil's money was safe, that he was in the clear from Ulster Bank and let Alan do the worrying for…Ulster Bank after that. And Neil said to him: 'Well in that case, when I have your assurances, I'm happy to lodge my money with you.' …"I'm happy to lodge it, Alan, with you"."

36. In concluding that the representations were in fact made, Barrett J. also had regard to what Dr. Healy had averred to in his affidavit evidence:

"On 1 August 2007…I met with Mr Leech at the Defendant's Mullingar Branch Office. My mother accompanied me to this meeting. At this meeting I informed Mr Leech that the deal in relation to the sale to Dr X…of my interest in CPHL and my interest in the partnership…had closed the previous day and that I had secured payment of the sale proceeds from Dr Cullen. Mr Leech expressed surprise that the deal had closed indicating that he was aware the closing was imminent however he had not been aware that it had in fact taken place. I expressed my thanks to Mr Leech for his and Ms…Finnegan's assistance and support to me. Mr Leech commented that, now the deal was done and I had my cheque, I was not going to forget about him. I indicated that I would not. I advised Mr Leech that I intended to lodge the cheque representing the sale proceeds with him, but before I did, there were two things I wished to discuss with him. The first of these two issues I discussed with Mr Leech was whether the Defendant [Ulster Bank] would match the rates of interest which I would secure from other banking institutions. Mr Leech

assured me the Defendant would do so and he commented that I was not to worry and he will arrange a meeting with the Defendant's wealth managers.

The second issue I discussed with Mr Leech was that he give me confirmation that I was released from any liability to the Defendant in respect of CPHL and the partnership's liabilities. In response, Mr Leech replied that I was 'in the clear with Ulster Bank', that I had 'nothing to worry about' in that regard and that Mr Leech 'would now do the worrying for Ulster Bank'….Following my handing over the monies Mr Leech invited my mother and I for a celebratory lunch at a local restaurant Cons which invitation we accepted."

37. As to the extent of the representation, Barrett J. stated: -

"It is perhaps worth noting…that the case at hand is not one in which Dr Healy was assured that the guarantee, though subsisting would not be enforced. Rather, it is a case in which the representation of Mr Leech was to the effect that, as of that moment, Dr Healy was 'in the clear' with, *i.e*. had no liabilities, actual, contingent or otherwise, towards Ulster Bank." (at para. 36)

38. Barrett J. further found that Mr. Leech had authority to make the representations, stating: -

"Again, the court understands, from the submissions before it, that it is not disputed that, *inter alia*, Mr Leech in making representations (which representations were denied by the defendants but accepted by the court to have been given on 1st August, 2007, on the terms identified in the evidence of Dr and Ms Healy as quoted above) were acting with the authority of Ulster Bank. If, notwithstanding the tenor of the submissions before the court, this is disputed, the court concludes by reference to the foregoing considerations that Mr Leech was clothed with the ostensible authority to

bind the bank when it came to advising Dr Healy that he was 'in the clear' with, i.e. had no liabilities to, Ulster Bank." (at para. 47)

39. He concluded unequivocally that the assurance given by Mr. Leech extended to all liabilities regarding the Coole project.

40. At no point, either in the original High Court case before McGovern J., the Supreme Court or at the rehearing before Barrett J. did the Bank concede that the representations were in fact made.

41. It is very important to stress that Barrett J.'s findings that the assurances were in fact given are not the subject of any cross-appeal by the Bank.

The position post the representations

42. Before considering the findings of the trial judge that are in issue in the appeal it is instructive to set out the course of dealing as between Dr. Healy and the Bank in the period post 1 August 2007 to August 2008 which led Barrett J. to ultimately conclude: -

> "Subsequent to his meeting with Mr Leech on 1st August, 2007. Dr Healy proceeded, demonstrably proceeded, on the clear understanding that his deposit-money was safe with Ulster Bank and that there was no other debt, pursuant to a guarantee or otherwise, whereby that money could be taken from him." (at para.12)

43. It is common case that following the meeting of 1 August 2007, the Bank deployed the cheque monies as instructed by Dr. Healy, namely by placing the funds on deposit for a three-month period at rates at least matching AIB's interest rates.

44. Dr. Healy's own immediate action following the 1 August 2007 meeting was to write to Mr. Groarke, his solicitor, informing him that he had lodged his cheque to a deposit account with the Bank and that Mr. Leech had not been aware that the deal had been concluded with Dr. Cullen. When testifying, Dr. Healy explained that Mr. Leech's

surprise was not that the deal had concluded but rather that Dr. Healy was in funds as of 1 August 2007. Dr. Healy's letter to his solicitor went on to state:

> "I am keen to ensure that I am protected…and indeed that my name is removed from any shared accounts concerning the Coole project…perhaps we might seek a letter from UB confirming same."

45. In his judgment, the trial judge addressed this in the following terms:

> "With the benefit of hindsight, the court cannot but observe that Dr. Healy should perhaps have got a letter of release before leaving the bank and should not perhaps have relied on an oral assurance from a bank manager that all was in order; and it is perhaps even a little strange that he did not proceed as the Court has just indicated, but everyone acts unwisely from time to time." (at para. 13)

46. Dr. Healy then immediately emailed Mr. Leech advising that he had written to his solicitor. In the email, he repeated his desire that his name be removed from "any accounts associated with the project in Coole as I have [now] completed the sale of my interests therein".

47. In his affidavit evidence, Dr. Healy described the state of affairs that pertained in the period 1 August 2007 to August 2008 in the following terms:

> "…**Post 1 August 2007**
>
> Until August 2008 I heard nothing further from either Mr Leech, or any other employee or agent of [Ulster Bank]…in relation to the matter. At no time subsequent to my meeting with Mr Leech on the 1st August 2007 up to August 2008 did [Ulster Bank]…its servants or agents disclose to me the fact that it considered me still bound by the Guarantee or that I had any liability to [Ulster Bank]…
>
> **Dealings with sale proceeds**

> Acting on advice received by me from Mr Leech, I proceeded to open a money desk deposit account with [Ulster Bank]…for a fixed period of 3 months maturing on 7 November 2007…"

48. The term of the initial deposit of the monies was three months. Thereafter, Dr. Healy made further deposits, withdrew different sums, and made deposits from different sums on different terms.

49. On 24 September 2007, Dr. Healy wrote to a Miss Fox, then with the Bank, enclosing a copy of a bank statement in which his name appeared with that of Dr. Cullen and stating that he would be grateful "if you would remove my name from this account, and any correspondence letters in relation to Coole Practice should be for the attention of Dr. Cullen and forwarded to Coole Practice. If you have any queries please do not hesitate to contact me."

50. The trial judge found that these were not the actions of a man:

> "who wishes to steer clear of the bank or who believes himself to have anything to worry about. They are prudent actions, in effect asking that his name be cleared from accounts with which he is no longer associated, just *'ar eagla na heagla'* that some future issue might arise if he allowed his name to continue to be associated with the accounts. Notably, no response ever issued from the bank to indicate that there was some issue presenting of which Dr. Healy was unaware or that the bank's world-view as to how Dr Healy was positioned *vis-à-vis* Ulster Bank was different from what he so clearly understood it to be from and after the meeting of 1st August 2007 with Mr Leech." (at para. 14)

51. It appears that there was no immediate response to Dr. Healy's letter of 24 September 2007.

52. On 4 October 2007, on foot of Mr. Leech's recommendation on 1 August 2007 that he do so, Dr. Healy met with Mr. Garrett O'Brien, an investment advisor with Ulster Bank Wealth for the purpose of seeking investment advice. Mr. Leech was also present at this meeting. Dr. Healy's affidavit evidence describes the actions he took following that meeting:

> "…Acting on the advice of [the wealth manager], I furnished a cheque payable to Irish Life…with an application form to Ulster Bank Wealth for investment on my behalf. I subsequently dealt, by phone and email with…Ulster Bank Capital Markets in relation to my purchase of US dollars utilising part of the sale proceeds. In or around the 19 October 2007 I purchased from the Defendant US dollars to the value of 1,200,000 at an exchange rate of 1.4500. In or around 13 November 2007 I purchased from the Defendant US$885,000 at an exchange rate of 1.475."

53. These monies remained on deposit with the Bank on a three-monthly roll over basis subject to various transaction conducted by Dr. Healy over the course of the following eight months.

54. There is no doubt, but that Dr. Healy acted consistently with the belief that he was entirely at large to utilise his monies without fear of a continuing indebtedness to the Bank in respect of the Coole project.

55. As can be seen, a number of investment options were furnished to Dr. Healy by Mr. O'Brien following the meeting of 4 October 2007. Interestingly, the Wealth Management division's documents recorded Dr. Healy's liabilities at €1.15m., which, Dr Healy testified, had been outlined by him to Mr. O'Brien. This sum comprised mortgage indebtedness on three investment properties owned by Dr. Healy together with a mortgage on his family home. Dr. Healy stated that at the meeting of 4 October 2007 it had never been suggested to him that he had any other liability (i.e. the Coole indebtedness) to the Bank. Also

noteworthy is an internal Bank document dated 18 October 2007 compiled by a Ms. Tyrrell of the Bank together with Ms. Finnegan approving overdraft facilities for Dr. Healy and in which he is described as a "high income earner" with €2m. on deposit with the Bank's Money Desk Account. There was reference to his strong personal assets. There was no mention of any outstanding indebtedness connected to the Coole project or CPHL.

56. On 20 December 2007, Dr. Healy e-mailed Mr. Leech, copied to Ms. Fox, with reference to his overdraft facilities on his personal and business accounts and advising that he was "still getting statements with my name that are for Dr. Cullen and Coole." He went on to state:

> "Would you mind removing my name from these statements and sending them to Dr Cullen solely in Coole.
>
> Sorry about this, but I don't want any problems down the line."

57. On 21 December 2007, Mr. Leech replied as follows:

> " Done Neil. Will confirm in writing.
>
> Happy Xmas to you and a pleasant 2008."

58. By the time he received Mr. Leech's email, Dr. Healy had again written to Mr. Leech enclosing another bank statement he had received and again requesting that his details be removed from the Coole accounts "as it no longer applies to me". Dr. Healy's evidence to the High Court was that following those communications, no further statements were received by him.

59. In his evidence to the court below, Mr. Leech suggested that the "Done Neil" reference in his email of 21 December 2007 related to the overdraft arrangements which Dr. Healy had requested be put in place. This was rejected by the trial judge in the following terms:

"Mr Leech suggested in evidence that when he wrote 'Done Neil', he meant merely to refer to the overdraft arrangements and not to the removal of Dr Healy's name from the accounts. Even if this is what Mr Leech meant, it is, with respect, a strange way of communicating that message. It seems to the court that anyone who sent an e-mail in any business context saying "Please do A and B" and who received back an official e-mail saying 'Done' would reasonably proceed, as Dr Healy proceeded, on the basis that both A and B had been done, and would not understand that just one or other of A and B had been done. It is fanciful to suggest otherwise. Notable again is that there was in Mr Leech's reply no indication to suggest that there was some issue presenting *vis-à-vis* Ulster Bank of which Dr Healy was unaware, or to suggest that the bank's world-view as to how Dr Healy was positioned with regard to the bank was different from what he so clearly understood it to be from and after the meeting of 1st August 2007 with Mr Leech." (at para. 17)

60. The trial judge went on to state, at para.19:

"Curiously, in the course of this case, Ulster Bank failed to produce a single bank statement from the period of August 2007 to August 2008, in particular any bank statements or correspondence in any way relating to the Coole partnership or company after Dr. Healy requested that his name be removed from the accounts. The absence of any such correspondence, coupled with the failure by both Mr. Leech and Ms. Finnegan, between August 2007 and August 2008, to mention to Dr. Healy any liabilities relating to either the Coole partnership or company, despite acknowledged interactions between Dr. Healy and those parties, supports Dr. Healy's contention that on 1st August 2007 he was given an assurance that he had no liability to Ulster Bank. Additionally, in certain documents exhibited before the court that were submitted by Ms. Finnegan to Ulster Bank's credit team during this timeframe (on

> 18th October, 2007 and 8th April, 2008) there is no reference by Ms. Finnegan to any liability on the part of Dr. Healy *vis-à-vis* the Coole project. The only logical inference, it seems to the court, that can be drawn from these documents is that each of Mr. Leech and Ms. Finnegan (who, when Mr. Leech was absent from the office, would do necessary client-work for those Ulster Bank clients for whom Mr. Leech was responsible) personally considered Dr. Healy to have no liability to Ulster Bank. Again, this supports the version of events offered by Dr Healy and Ms Healy as to what occurred at the meeting of 1st August, 2007."

61. Thus, inasmuch as Dr. Healy was conducting his affairs in the belief that he had no liability to the Bank, as is evident from the foregoing, Mr. Leech and Ms. Finnegan also believed that to be the position, as reflected in internal Bank documentation of which more later in this judgment.

62. However, as other internal bank documents demonstrate, and as found by the trial judge, more widely within the Bank the view was taken that in fact Dr. Healy was still liable on foot of his Guarantee: the Credit function in the Bank was refusing to contemplate what was being suggested by Mr. Leech and was not prepared to release Dr. Healy. As noted by the trial judge:

> "…this was never indicated to Dr Healy. Until August 2008, he continued in the view instilled in him by Mr Leech at the meeting of 1st August 2007, and was allowed by Ulster Bank to continue thereafter in the view, even when Ulster Bank internally held an alternative view, that Dr Healy should, to paraphrase Mr Leech at the meeting of 1st August 2007, leave the worrying to Ulster Bank, that he had no need for further worry, and that his deposit with Ulster Bank was safe." (at para. 21)

63. The views being expressed internally within the Bank are considered later in this judgment.

The events of August 2008

64. As of August 2008, Dr. Healy had a sum of US$ 993.983.03 standing to his credit in his deposit account with the Bank. On 1 August 2008 he encountered a difficulty in making a cash withdrawal request on his account. On 4 August 2007, he e-mailed Mr. Leech asking that the position be checked. On 6 August 2008 he received an e-mail response from Mr. Leech which stated, *inter alia*: "There is a letter gone out to you regarding Coole which you are not going to be happy with. When you read it, give me a call and I will arrange to meet you."

65. By the time he received Mr. Leech's email, Dr. Healy had received the Bank's letter dated 5 August 2008. In relevant part, it reads as follows:

> "Re: Facilities in the name of Dr. Pat Cullen and Dr. Neil Healy and Facilities in the name of Coole Property Holdings Limited:
>
> The balance on the various facilities above currently equate to €2,251, 387 excluding accrued interest. It was understood that these facilities would have been repaid at this point from the sale of development land at Coole and other properties at Coole Medical Centre. This has not happened to date and Ulster Bank requires that the debt be repaid in the short term.
>
> The facilities provided in the joint names of Dr. Healy and Dr. Cullen were placed on a joint and several basis. The borrowings in the name of Coole Property Holdings Limited are also secured by a joint and several letter of guarantee dated 9th August 2006. Therefore I would appreciate if you could confirm to me by return your alternative repayment proposal for the above debt in the event that contracts for the sale of various properties do not proceed."

According to Dr. Healy's testimony, this was the first indication he received that he was "held on the hook for a guarantee of personal liabilities". It appears that a similar letter was sent to Dr. Cullen.

66. Internal Bank documents show that as of 7 August 2008, the Bank's Credit Risk department were directing Mr. Leech not to release any funds from Dr. Healy's US$ deposit account without the approval of the Credit department. On 8 August 2008, in the knowledge that the monies in Dr. Healy's accounts were reaching maturity on 14 and 15 August 2008 respectively the Bank's Risk department gave instructions that no transactions take place on the accounts. On 13 August 2008, the Bank effected a set off of the sums standing in credit in Dr. Healy's account against a debit balance outstanding in respect of the finances which the Bank had advanced to CPHL and in respect of which Dr. Healy was a guarantor. In its letter to him of the same date Dr. Healy was reminded that the Bank was awaiting a response to its earlier letter. As is clear from the letter of 13 August, in applying the set off the Bank relied upon Clause 5 of the Guarantee dated 9 August 2006 which Dr. Healy had signed. The Guarantee did not require that prior demand be made thereunder before a set off could be effected.

67. On 18 August 2008, Groarke and Partners, Dr. Healy's solicitors, wrote to Mr. Leech taking issue with the assertion that Dr. Healy had a liability to the Bank in light of Dr. Cullen having bought out Dr. Healy's entire interests in CPHL (of which, it was pointed out, the Bank were aware) and enclosing a letter of 2 August 2007 which they had furnished to the Bank in this regard in which reference was made to Dr. Cullen having furnished Dr. Healy with a full indemnity in respect of any outstanding liabilities to the Bank. The Bank was requested to confirm that it had complied with the instructions contained in the letter of 2 August 2007. Groarke and Partners further advised:

> "…we are instructed that, prior to depositing the funds…which were realised from the proceeds received by our client from Dr. Culen in respect of his interest in Coole Property Holdings limited, you personally advised our client that the Bank accepted that our client had no further liability whatsoever to Ulster Bank …in respect of the loan and overdraft facilities referred to in your letter of 13th August 2008."

68. The Bank responded on 25 August 2008 stating that the facilities granted remained outstanding and that while Dr. Healy might have entered into arrangements regarding his business affairs with his former partner "this did not impact on his liability to the Bank nor did it serve as a discharge of his liabilities, regardless of the terms he agreed with Dr. Cullen. The Bank was never party to any such agreement." It was further stated that whilst Dr. Healy may have been in regular communication with the Bank regarding his personal affairs, "there was no reason for the Bank to mention those outstanding liabilities for the simple reason that it was only in recent times that they went into arrears." The Bank also strenuously disputed that it advised Dr. Healy that he had no further liability and stated that it was satisfied that it was "entitled in law" to take the action it did in setting off a credit balance standing in Dr. Healy's account against his liabilities to the Bank.

69. On 28 August 2008 the Bank sought a proposal from Dr. Healy in relation to what was described as the balance outstanding on foot of the Guarantee given in 2006. On 29 September 2008, the Bank wrote to Dr. Healy making a formal demand for payment of €1, 047, 548.36 due from CPHL for which Dr. Healy was liable under his Guarantee.

70. It appears that the funds which the Bank set off on 13 August 2008 stood in a Guarantee Realisation Account within the Bank until 2014 when some €429,000 was applied by the Bank against costs incurred in relation to the original High Court case, with

the balance of approximately €300,000 used against Dr. Healy's personal accounts with the Bank. None of the funds was ever applied to any liability of CPHL.

The trial judge's findings

71. I turn now to the trial judge's consideration of Dr. Healy's contention that the Bank was estopped from pursuing him in respect of the Coole indebtedness.

72. Having determined that the representations alleged by Dr. Healy were in fact made, and having found that Mr. Leech had actual authority (or, if not, ostensible authority) to make such representations – all findings which were in favour of Dr. Healy – , the trial judge turned his attention to Dr. Healy's claim that the Bank was estopped from denying the representation and that he had no further liability to the Bank. He commenced his assessment under the heading:

"**Estoppel**

(i) Overview

48. It would be fair to say that to this point in its judgment, the findings of the court have broadly favoured Dr. Healy. However, as touched upon previously above, it is when one gets to the issue of estoppel that the tide turns and that the court finds itself coerced, as a matter of law, into concluding that Dr. Healy must fail in the case that he has brought. Before turning to the issue of estoppel, however, it is necessary to deal briefly with the issue of whether there was an enforceable contract between Dr. Healy and Ulster Bank whereby Ulster Bank agreed to release Dr. Healy from the partnership liabilities or the guarantee.

(ii) No enforceable contract to release Dr. Healy.

49. It is common case between the parties that as of 19th July, 2007, the date of the dissolution of partnership agreement between Dr. Healy and his then

medical/business partner, Dr. Healy was jointly and severally liable with that partner to Ulster Bank for the partnership liabilities and also under a related guarantee. The dissolution agreement obliged Dr. Healy's former partner to assume solely all of those debts and liabilities; it did not require him to secure Dr. Healy's release by Ulster Bank from his liabilities to same. So Dr. Healy's case, in essence, is that at or prior to the meeting of 1st August 2007, Ulster Bank resolved to release him from his liabilities, and that at the meeting of 1st August, 2007, Mr. Leech represented (and the court has found that he did represent) to Dr. Healy that he was now ‘in the clear’.

50. The court respectfully does not see how Dr. Healy can contend on the basis of the foregoing that there was an enforceable [contract] whereby Ulster Bank agreed to release him from the partnership liabilities or the guarantee. In the absence of consideration, there was no binding agreement whereby Ulster Bank agreed to release Dr Healy from the partnership liabilities or the liability under the guarantee. What presents instead is an informal, unilateral and, in truth, gratuitous undertaking by Ulster Bank which is not enforceable under contract law. The want of enforceability arises because Ulster Bank can of course pray successfully in aid the so-called rule in *Pinnel's case* (1602) 5 Co. rep. 117a, held to be a rule of continuing force in Irish law by Laffoy J. in *Barge Inn Ltd v Quinn Hospitality Irl Operations 3 Ltd* [2013] IEHC 387, para.62, following a consideration of relevant authority.

51. The rule in *Pinnel*'s case has the effect that if a liquidated sum is owed by A to B, a promise by B to take a lesser sum (here nothing) in satisfaction of the larger debt will not bind B. In the case at hand, there is not, to borrow from the terminology of Laffoy J. in *Barge Inn*, para.62, any ' *new element*' in ' *the relationship of the debtor*

and creditor', here that of Dr Healy and Ulster Bank that would remove the said relationship from the scope of the rule. Of course, as Laffoy J. moves on to note ' *The application of the doctrine of promissory estoppel may obviate an inequitable outcome to which the application of the rule in Pinnel's Case would otherwise give rise*'. But, as will be seen hereafter, the doctrine of promissory estoppel is of no avail to Dr Healy in the circumstances now presenting."

The estoppel findings

73. At paras. 52-55 of his judgment, under the heading "(ii) promissory estoppel", the trial judge noted that the "essential basis" of estoppel by representation as defined by Biehler's *Equity and the Law of Trusts in Ireland* 6th ed., (Round Hall, 2016, at p.826. 826) is "the making of a representation by a person whether by words or conduct of an existing fact which causes another party to incur detriment in reliance on this representation. In these circumstances, the person making the representation will not be permitted to act subsequently in a manner inconsistent with that representation." Barrett J. went on to quote Griffin J. in *Doran v. Thompson Ltd.* [1978] IR 223.

74. Barrett J. also noted the importance of establishing reliance on the representation, quoting extensively from *Bank of Scotland v. Kennedy* [2013] IEHC 420, a decision of McGovern J.

75. Having considered the aforementioned case law, and certain academic commentary, Barrett J. concluded that the estoppel plea was not available to Dr. Healy. He stated:

"56. The acts of reliance relied upon by Dr Healy are confined to the placing of monies on deposit, with the detriment complained of being the fact that Ulster Bank was able to effect set-off in respect of those monies by way of set-off when it 'called in' the partnership facilities and enforced the associated guarantee. Insofar as the placing of the monies on deposit *per se* is concerned, Dr. Healy does not contend that

he would otherwise have been able to obtain better deposit or foreign exchange rates in relation to the transactions entered into by him. Moreover, although during the course of the evidence and, more particularly in cross examination of Ulster Bank's witnesses, reference was made to the proposition that Dr Healy would have conducted his affairs differently had it been made clear to him that he remained liable to Ulster Bank, there is no pleaded case or evidence referable to this suggestion. In substance therefore, the alleged detriment relied upon is that the placing of the monies on deposit facilitated collection by the Bank of Dr. Healy's admitted liabilities. But how can this be detriment? Had Dr Healy not placed the monies on deposit with Ulster Bank or had Ulster Bank given Dr Healy notice that it was withdrawing its forbearance, in what respect would Dr. Healy's position be different? He would have had or, more accurately, perhaps he would have had, the monies on deposit in an account with another bank but that would not have impacted upon Dr Healy's legal position: he would still have been liable to repay the full amount of the partnership liabilities and the associated guarantee to Ulster Bank or its successor in title. The fact of the monies being on deposit (a) meant that, to the amount of those monies, Dr Healy was prevented from breaching his obligations to the Bank, but (b) did not affect the nature or scope of the obligations aforesaid."

76. In point of fact, earlier in his judgment, following a consideration of Dr. Healy's affidavit evidence as to why he sought assurances from Mr. Leech that he had no existing liability to Ulster Bank, the trial judge had already concluded that an estoppel plea was not available to Dr. Healy. His conclusion was derived from Dr. Healy's affidavit evidence. Dr. Healy had averred as follows:

"'The reason I sought Mr Leech's specific assurances that I had no existing liability to the Defendant in respect of CPHL's or the partnership's liabilities was because my

instinct was in fact not to lodge the sale proceeds with the Defendant. I have an uncle…resident in the US. [He]…is an individual with a high net worth and from whom I often seek advice on my business dealings….[My uncle] had sought to dissuade me from depositing the sale proceeds with [Ulster Bank]…as a direct result of an experience he himself had a number of years ago when monies held by him with an Irish bank was garnisheed by creditors. Unfortunately I chose to ignore my uncle's advice. The reason I did so is because I trusted Mr Leech and believed that I could rely on his assurances to me."

77. At para. 5 of his judgment, the trial judge addressed this evidence in the following terms:

"Though the court turns more fully to the issue of estoppel later below, it cannot but note in passing that it finds the just-quoted averment (and like evidence given by Dr Healy in the witness-box) to be (and to have been) as surprising as it is significant. What Dr Healy appears to be averring is that he would have taken means to defeat his creditors, and in particular Ulster Bank, if given the opportunity. So when he comes to court claiming an estoppel, what he is in effect claiming is an estoppel that would operate in such a manner as to permit him to act in a fundamentally unlawful fashion and in disregard of his lawful liabilities. It seems to the court to follow inexorably from the equitable maxim that 'He who comes to equity must come with clean hands' that for an estoppel to operate it must be an estoppel which relates to a *bona fide* intention, and when it comes to the reliance which yields the estoppel, that reliance must be for a proper purpose. Equity counters injustice that the law, un-tempered, might otherwise yield; it does not exist to obviate obligations that the law justly imposes."

78. Having rejected the estoppel plea, the trial judge then went on to reject the claims in tort which had been advanced by Dr. Healy. Albeit appealed, these findings were not pursued at the appeal hearing.

79. The trial judge next addressed the contention in Dr. Healy's written submissions that he entered into the Contract for Wealth Management Services with the Bank in reliance upon a representation that the funds deposited by him would not be susceptible to set off and that he was not otherwise indebted to the Bank. The trial judge concluded that the evidence did not bear out the version of events contended for. This was in circumstances where Dr. Healy had placed his funds on deposit with Ulster Bank on 1 August 2007. He noted that Dr Healy subsequently met with the Bank for the purpose of receiving financial planning advice in relation to his pension arrangements and that following that meeting, on 15 October 2007, the Bank wrote to Dr. Healy recommending that he take out a pension through Irish Life with a premium of €25,000 per annum. He found that the conditions referred to in that letter were solely referable to that advice. Accordingly, the trial judge held that the claim by Dr. Healy that he entered into a commercial contract with the Bank on 1 August 2007 and that the letter of 15 October 2007 set out the terms of that contract was without foundation.

Promontoria's Counterclaim

80. With regard to Promontoria's counterclaim, the trial judge was satisfied, firstly, that demand had been made of Dr. Healy by the Bank and that he had been given express notice of the Bank's assignment of the Coole indebtedness to Promontoria. He noted the "uncontroverted oral evidence" of Mr. John Burke, a director of Promontoria, that the company had acquired the five loans associated with the Coole project. The trial judge had regard to the documents exhibited to Mr. Burke's Witness Statements, being the Mortgage Sale Deed, the Deed of Novation and the Global Deed of Transfer. While he was satisfied

that Promontoria had established that it had acquired the Bank's interest in CPHL, the issue was whether or not the Bank had assigned the Guarantee executed by Dr. Healy on 9 August 2006. The Global Deed of Transfer listed the loan agreements between the Bank and CPHL, and between the Bank and Dr. Healy and Dr. Cullen in their own names. The trial judge accepted Promontoria's argument that there was no requirement to list the Guarantee separately in circumstances where it was clearly included in the assets transferred under the Global Deed of Transfer. The methodology employed by the trial judge to assist his conclusion in this regard, an issue in the within appeal, is considered later in this judgment.

81. Having heard from a Mr. Cotter of the Bank as to the amount owing in respect of the Coole loans, the trial judge granted judgment to Promontoria against Dr. Healy in the sum of €1,277,370.64 in respect of the liabilities on stated joint borrowings, and in the sum of €356,761.52 on foot of the Guarantee (being the residual post-set off amount) making a total of €1,634,132.16.

Dr. Healy's appeal

82. Arising from the parties' submissions, three issues fall for consideration in this appeal:

(i) Whether the trial judge erred in finding that there was no concluded contract between Dr. Healy and the Bank that Dr. Healy had no liability in respect of the Coole indebtedness;

(ii) Whether the trial judge erred in failing to find that the Bank was permanently estopped in equity from enforcing its rights against Dr. Healy;

(iii) Whether the trial judge fairly and properly concluded that Promontoria had acquired the loans in issue in these proceedings.

(i) The trial judge's failure to find that a concluded contract existed between Dr. Healy and the Bank

Dr. Healy's submissions

83. Dr. Healy asserts that the trial judge erred in fact and in law in failing to find a concluded contract between him and the Bank whereunder he was released from his liabilities. Counsel for Dr. Healy submits that the representations made by the Bank on 1 August 2007 had two legal effects, firstly contractual and, secondly, they invoked the doctrine of equitable estoppel. This was the case pleaded by Dr. Healy.

84. In aid of the contractual claim, counsel for Dr. Healy points to para. 7 of the Amended Statement of Claim where it is pleaded as follows:

> "The First Defendant its servants or agents specifically represented to the Plaintiff prior to the conclusion of the agreement as described hereinbefore that, following his disposal of his interest in the said commercial development, he stood discharged from all liability to the First Defendant, *inter alia,* on foot of the guarantee dated 9 August 2006. The Plaintiff entered into the commercial relationship with the First Defendant acting in reliance on the said representations and assurance of release from liability and was induced to enter into the said relationship in consequence of the said representation. The Plaintiff would not have entered into the said relationship nor would he have facilitated access by the First Defendant, its servants or agents to the said funds had the First Defendant, its servants or agents, informed him that he did not stand released from his obligations on foot of the said guarantee. The Plaintiff claims that at the time of furnishing the funds to the First Defendant, its servants or agents knew that, contrary to its assurance to him that he was released from his obligations on foot of the guarantee, they had not in fact facilitated his release from same."

85. It is asserted that the handing over by Dr. Healy of his cheque to Mr. Leech on foot of the assurances given created a commercial relationship, contractual in nature, and that same conferred a benefit on the Bank by reference to the fact that it stood to gain financially from the deposit of the cheque. Counsel further asserts that the Bank well understood the contractual claim as pleaded by virtue of its acknowledgment, at para. 1 of the Defence, that Wealth Management Services were provided to assist Dr. Healy in arranging his financial affairs. This, Dr. Healy contends, is the defendants' response to a claim in contract which arose on foot of the deposit of funds.

86. Counsel also points to para. 9 of the Defence where it is denied that Dr. Healy entered into the alleged commercial relationship in reliance upon alleged representations and assurances of relief. Reliance is also placed on para. 2 of Dr. Healy's Reply to Defence and Defence to Counterclaim where it is pleaded, *inter alia,* that the agreement in respect of the provision of Wealth Management services arose on foot of the representations made by the Bank and Dr. Healy's consequent understanding that the relationship that had formerly existed *qua* Dr. Healy as borrower or guarantor was at an end. Counsel contends that this pleading is underpinned by the contractual nature of the transaction. Reference is also made to the Replies to Notice for Further and Better Particulars wherein it is pleaded that Dr. Healy was entitled to a release from his liabilities on foot of the representations made by the Bank.

87. It is submitted that the trial judge's finding that there was no enforceable contract to release Dr. Healy, and instead only "an informal, unilateral and, in truth, gratuitous undertaking by Ulster Bank which is not enforceable in contract law" failed to have regard to the evidence or undisputed fact that the handing over of the cheque constituted consideration: the contractual case arose on foot of the assurances given to Dr. Healy by Mr. Leech in return for which Dr. Healy deposited his monies with the Bank. It is

asserted that the benefit which the Bank derived was the deposit of the funds and that the benefit which Dr. Healy derived was not merely the Wealth Management arrangement but also the entry into an advisory relationship *vis-à-vis* himself and the Bank. It is thus argued that the trial judge's conclusion that no contract existed was made without any reference to:-

(1) The fact that Dr. Healy deposited the sum of €2,213,607 with the Bank on 1 August 2007.

(2) The fact that Dr. Healy and the Bank entered into a commercial relationship on 1 August 2007 for the provision of Wealth Management services by the Bank to him in the context of which the Bank received the aforesaid sum.

(3) The fact that Mr. Leech and Ms. Finnegan personally considered Dr. Healy to have no liability to the Bank.

(4) The fact that the Bank dictated the sequencing of payments in relation to Dr. Cullen's buyout of Dr. Healy's position and consented to BOSI taking a second legal charge over the Coole property.

88. It is further asserted on Dr. Healy's behalf that the trial judge failed to find, as he should have, that the arrangements made as between the Bank and BOSI showed that the Bank was to be paid in full by BOSI and that consequently, the rule in *Pinnel's* case had no application as the sequencing constituted a *"new element"* of the type considered by Laffoy J. in *Barge Inn Ltd. v. Quinn* [2013] IEHC 387 such as to negate the rule in *Pinnel's* case.

The Bank's submissions

89. The Bank denies that a claim in contract of the nature now contended for was either pleaded or pursued at the trial and asserts that the issue which the trial judge addressed was the estoppel claim. It asserts that it is obvious from the judgment of Barrett J. that the

thrust of the case in the court below from the outset was an estoppel case and that Dr. Healy's claim was never really made or carried through in contract by reference to what is now being relied on in the appeal. It is submitted that Dr. Healy is seeking to make a case on appeal that was never made in the High Court.

90. It was never argued in the court below that the Bank's consent to BOSI's second charge on the Coole lands was consideration. The gravamen of Dr. Healy's evidence in the court below was that even prior to 1 August 2007 he had an entitlement to the release of his liabilities to the Bank and that such entitlement was there at the time of the conclusion of the agreement with Dr. Cullen. In this regard, the Bank points to Dr. Healy's testimony that his understanding by 1 August 2007 was that his solicitor already had a letter of release from the Bank and that what he was seeking from Mr. Leech was a further assurance, in addition to the letter of release, that he had no liabilities to the Bank. This evidence, counsel submits, belies the contention that a concluded agreement discharging him from his liabilities could ever have been in the contemplation of Dr. Healy when he met Mr. Leech on 1 August 2007.

91. There was no pleaded consideration for any agreement by Dr. Healy other than the Wealth Management issue, which itself could not constitute consideration for the claimed discharge on 1 August 2007 by the Bank of Dr. Healy from his liabilities. This is because the Wealth Management relationship between Dr. Healy and the Bank did not commence until October 2007. Moreover, Wealth Management as consideration was not, in any event, pursued by Dr. Healy's counsel to any great extent in the court below. It is also the Bank's case that it is not open to Dr. Healy at appeal stage to argue that the dictation of the payments set out in BOSI's letter to Dr. Cullen was a collateral advantage which surmounted the rule in *Pinnel's* case since that case was never pleaded and never made in the court below**.**

92. The Bank further contends that it was never identified to the trial judge that he should decide what exactly the consideration for the deposit of the monies was. Save for the Wealth Management contract issue which was abandoned at trial, consideration was not pleaded by Dr. Healy. Insofar as the dictation by the Bank of how the sequencing of payments were to be made is claimed to be a consideration and/or a new element or collateral advantage, that argument is only now being advanced to surmount the trial judge's decision that there was no concluded contract releasing Dr. Healy from his liabilities.

Discussion

93. While, undoubtedly, the issue of whether Dr. Healy's indebtedness to the Bank was discharged on foot of a concluded contract was briefly considered (and rejected) by the trial judge, I agree with the Bank's contention that the overall focus of Dr. Healy's claim at trial was on the estoppel issue and that the case advanced was on that basis and not on the basis of a concluded contract having been entered into on 1 August 2007. The gravamen of the case made in the court below was on the estoppel argument, as evident from the judgment of the trial judge. That the focus was on the estoppel issue is borne out not just by the evidence tendered by Dr. Healy, but also by the manner in which Dr. Healy's counsel opened the case to the trial judge.

94. It is noteworthy that in opening the case in the court below, and when referring to the events of 2014 when Promontoria is said to have acquired Dr. Healy's loans and securities, counsel for Dr. Healy apprised the trial judge that "should transfers be proven in a particular way, the consequences of those transfers, what choses actually transfer,…will fall away if [Dr. Healy succeeds] with regard to the estoppel claim that is… first to be determined". (emphasis added) Thereafter, counsel referred to the actions of Dr. Healy post 1 August 2007 following the "assurances" he had received from Mr. Leech and cited

examples of what were described as Dr. Healy's reliance on the assurances given. In essence, counsel's opening in the court below is replete with references to the nature of the representations made by Mr. Leech and the estoppel claim. The representations are detailed in Dr. Healy's Replies to the Bank's Notice for Particulars and, indeed, the Interrogatories exchanged between the parties. By way of example, Dr. Healy's plea at para. 7 of his Reply to Defence is instructive in showing that the focus of his pleadings was not on a contract having been concluded for his release from his indebtedness but rather the estoppel issue. Para. 7 pleads, in relevant part:

> "The Plaintiff claims that it was at all times solely within the gift of the Defendant to absolve the Plaintiff [sic] did reasonable conclude that he was released when the same was represented to him by the First Defendant."

95. Moreover, notwithstanding that a contract for the provision of Wealth Management services was pleaded in the Amended Statement of Claim, during his opening of the case counsel stated that he was not going to dwell on that aspect of Dr. Healy's and the Bank's relationship.

96. Similarly, in Dr. Healy's written submissions in the High Court, the focus is largely on the nature of the representations made by Mr. Leech to Dr. Healy and the estoppel issue.

97. I note that counsel for Dr. Healy also drew the trial judge's attention to the judgment of the Supreme Court which allowed Dr. Healy's appeal of McGovern J.'s dismissal of his proceedings. He commended to the trial judge Hardiman J.'s analysis of the law of estoppel. Counsel stated that Hardiman J.'s analysis "lent itself to the centralising of the discussion with which [counsel agreed] and it lent itself to, as it were, the determination of the rights and wrongs insofar as [Dr. Healy's] claim is concerned to the determination as to what was or wasn't said". I also note that in the original trial, McGovern J. summed up the

case being made by Dr. Healy by reference to there being *"really only one issue in this case and that is whether Mr. Alan Leech, on behalf of the defendant, made the representation contended for by the plaintiff, and if he did, whether the plaintiff acted on foot of the representation to his detriment."* (at para. 4)

98. All of this constrains me to conclude, as indeed is evident from the nature of the evidence given by Dr. Healy at the retrial, that the focus in the court below was on the estoppel argument and not on any contract having been concluded on 1 August 2007 whereby Dr. Healy was released from his liabilities. Absent any specifically pleaded case or specific reference as to what constituted consideration for the alleged discharge by the Bank of Dr. Healy's liabilities on 1 August 2007, or any specific evidence of such consideration having been advanced, there is no basis to find that the trial judge erred in concluding that Dr. Healy had not made out a case in contract for the discharge of his Coole liabilities.

99. Accordingly, Dr. Healy has not established that the case made in the court below was one based on contract or that the trial judge erred in concluding that there was no binding agreement entered into on 1 August 2007 to release him from the Coole liabilities or his liability under the Guarantee. Dr. Healy must fail in relation to this ground of appeal.

100. Furthermore, insofar as it is sought on appeal (and in truth I do not believe it was, given that the alleged contract for Wealth Management services is allocated only a cursory short paragraph in the submissions) to rely on the arrangements that were entered into in October 2007 between Dr. Healy and the Bank for the provision of Wealth Management services as the legal basis of the discharge of Dr. Healy's Coole liabilities, that cannot be so for the reasons set out by the trial judge at para. 64 of his judgment.

(ii) The alleged error of the trial judge in finding that Dr. Healy could not rely on and had not established promissory estoppel

101. For the reasons already outlined, the salient consideration in this appeal is whether the Bank is estopped in equity from pursuing Dr. Healy in respect of the Coole loan facilities and his Guarantee.

Dr. Healy's argument

102. Dr. Healy's position is that the trial judge erred in not finding that the Bank is estopped from pursuing him in relation to his erstwhile indebtedness. It is submitted that the trial judge fell into error in attributing the placing of the monies on deposit as the act of reliance relied on by Dr. Healy. Counsel contends that the deposit of the cheque did not and should not have informed the equitable considerations in this case. The pleaded case, as far as equitable estoppel is concerned, was that Dr. Healy acted to his detriment in relying on the assurances given by Mr. Leech – a case pleaded at para. 12 of the Amended Statement of Claim. Para. 12 provides:

> "The Plaintiff further contends that the First Defendant is estopped from denying the representations made to the Plaintiff on or about the 1 August 2007 that the Plaintiff had no further liability to the First Defendant on foot of the guarantee executed by the Plaintiff on 9 August 2006 in favour of the First Defendant. The Plaintiff claims that he had acted to his detriment in reliance upon the said representations."

103. It is contended that in concentrating on the deposit of the monies, the trial judge wrongly focused his attention on a reliance or detriment that Dr. Healy did not advance in the course of his evidence and failed to appreciate that it was specifically pleaded that Dr. Healy relied on the representations made by Mr. Leech. The reliance in issue for estoppel purposes was Dr. Healy's belief, arising from Mr. Leech's assurances, that he was in the clear as far as his liabilities to the Bank were concerned. It is further contended that the

trial judge failed to have regard to the actual nature of Dr. Healy's reliance on the representations made.

The Bank's argument

104. In opposition to the submissions advanced on behalf of Dr. Healy, the Bank contends that it is obvious from the decision of the trial judge that Dr. Healy's pleaded estoppel was that the placing of the monies on deposit on 1 August 2007, on foot of the assurances given by Mr. Leech, enabled the Bank to operate a set off and take those monies. The case made by Dr. Healy was that the reason he would not have put the monies on deposit with the Bank without the assurance given was that he did not want the Bank to have recourse to his monies. This case is consistent with what he pleaded at para. 7 of the Amended Statement of Claim.

105. Furthermore, this is what Dr. Healy testified to in the court below. The essence of Dr. Healy's pleadings, his submissions in the High Court, and what was carried through in Barrett J.'s decision, is that the placing of the monies on deposit was an act of reliance such as could give rise to an estoppel. The evidence tendered by Dr. Healy as to reliance on the promise made was his concern that the Bank would be able to garnishee the monies.

106. According to Dr. Healy, the detriment that flowed from the Bank's representation was that the Bank was able to garnishee the monies. It is submitted however that that alleged detriment did not however have sufficient quality to give rise to an estoppel. This is what was pleaded and argued by the Bank in the court below, namely that the burden was on Dr. Healy to establish estoppel, and the nature of Dr. Healy's reliance could not amount to an estoppel, arguments with which the trial judge agreed.

107. It is submitted that the sole consideration for this Court is whether the trial judge erred when he concluded that Dr. Healy's concern that the Bank would be able to garnishee the monies could not give rise to an estoppel. The trial judge found that that

could not amount to a sufficient act of reliance to give rise to an estoppel because the detriment relied on was that, had it been made clear to him by the Bank that he continued to be indebted, Dr. Healy would have been able to frustrate and/or delay the Bank's entitlement to recover monies that were lawfully due, a proposition which the trial judge considered to be fundamentally unlawful.

108. Thus, the trial judge was correct to find that the placing of money on deposit in circumstances where the assurance sought by Dr. Healy was to ensure that the Bank would not be able to garnishee the monies cannot amount to an act of reliance such as would render it unconscionable for the Bank to resile from the promise/assurance given to Dr. Healy.

109. It is submitted that Dr. Healy does not assert that the trial judge was wrong in his finding that the placing of the money on deposit could not be an act of reliance such as would render it unconscionable for the Bank to resile from the promise.

110. There was no case made in the court below that Dr. Healy would have conducted himself differently in the sense that he would have kept the monies on deposit available to meet the liabilities of the Bank or that he would not have taken the decisions he did. The height of Dr. Healy's evidence, which was not his pleaded case, was that he would have gone back to his solicitor, Mr. Groarke, to make sure a release was obtained. Yet, Dr. Healy's own evidence to the High Court was that as of 1 August 2007, *i.e.* before his meeting with Mr. Leech, he understood that a release had been obtained, namely that Mr. Groarke already had a letter from the Bank albeit Dr. Healy's evidence was that he had not discussed this matter directly with Mr. Groarke on 31 July 2007.

111. It was never suggested in the court below that had Mr. Groarke sought a letter from the Bank discharging Dr. Healy from the Coole liabilities prior to 1 August 2007 that same would have been forthcoming. Mr. Groarke's evidence to the High Court on behalf of the

Bank was that it was not his understanding that he was required to obtain such a letter as part of the closing of the transfers by Dr. Healy to Dr. Cullen of his interests in the medical practice and the Coole properties. Accordingly, against all of this backdrop, the submissions now being made as to what Dr. Healy might have done differently are unfair, not least because there is no cross-appeal. It is submitted that the appeal cannot be run on the basis of a case that was never made in the court below.

112. Other acts of reliance/detriment such as are now sought to be argued on appeal were not pleaded (as found by the High Court), contrary to counsel for Dr. Healy's contention that same were pleaded.

113. It is further asserted that Dr. Healy was obliged to plead both the promise made and the reliance thereon and demonstrate the reliance on the balance of probabilities. At all times it was for Dr. Healy to show that the Bank was estopped from relying on the promise.

Discussion

114. The modern definition of promissory estoppel was formulated by Denning J. in *Central London Property Trust Ltd v. High Trees House Ltd* [1947] K.B. 130. In *Kenny v. Kelly* [1988] I.R. 457, Barron J. had regard to the *High Trees* formulation, stating at p. 463:

> "*In Central London Property Trust Ltd v. High Trees House Ltd [1947] K.B. 130, the essence of promissory estoppel was said to be a promise intended to be binding, intended to be acted upon and in fact acted upon. In my view, the facts of the present case come within these principles. Each of the elements necessary to establish the estoppel is present."*

115. In *Doran v. Thompson Ltd.* (quoted by the trial judge in the within proceedings), Griffin J. defined promissory estoppel in the following terms at p. 230:

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

116. *Snell's Equity*, 32nd ed. (Sweet & Maxwell, London, 2010) contains the following statement on the principle of promissory estoppel at para. 12.009, pp. 370 and 371:

> "Where by his words or conduct one party to a transaction freely makes to the other a clear and unequivocal promise or assurance which is intended to affect the legal relations between them (whether contractual or otherwise) or was reasonably understood by the other party to have that effect, and, before it is withdrawn, the other party acts upon it, altering his or her position so that it would be inequitable to permit the first party to withdraw the promise, the party making the promise or assurance will not be permitted to act inconsistently with it."

I note that this *"modern formulation"* was expressly approved by Charleton J. in *National Asset Loan Management Ltd. v. McMahon* [2014] IEHC 71, [2015] 2 I.R. 385, as one *"which takes into account the variations in the case law which have tended to make that defence more flexible and in accordance with an appropriate review of the fairness of the situation." N.A.L.M. Ltd. v. McMahon* was quoted with approval by Haughton J. in *Sheehan v. Breccia* [2016] IEHC 67.

117. I turn now to the consideration of whether the factual matrix in the present case was such as to sustain Dr. Healy's claim that the Bank is estopped from pursuing him in relation to the Coole indebtedness.

118. Firstly, on any view of the representations made by Mr. Leech to Dr. Healy on 1 August 2007, they amount, in the words of Griffin J. in *Doran v. Thompson Ltd.*, to *"a clear and unambiguous promise or assurance"* that the theretofore legal relationship between Dr. Healy and the Bank pursuant to certain loan facilities afforded to CPHL and Dr. Healy's Guarantee was at an end, and that they meant and were intended to mean that Dr. Healy was discharged from all his liabilities. Indeed, the trial judge found that to be the scope of the representation. There is also no doubt in my mind that the assurances given by Mr. Leech were intended to affect the legal relationship between the Bank and Dr. Healy and were made on the understanding that they would be relied upon by Dr. Healy. I am satisfied that any reasonable person standing in the shoes of Dr. Healy who had just completed the series of transactions described earlier in this judgment and in respect of which the Bank, while not a party to those agreements, was nevertheless centrally involved, would have treated Mr. Leech's words as clearly representing that Dr. Healy's liabilities regarding the Coole project were at an end.

119. As the modern formulation of the doctrine demonstrates, however, the foregoing is not sufficient for promissory estoppel to be invoked. It is a central tenet of the doctrine that there has to be something in the way of conduct or action on the part of the party to whom the promise is made that would render it unconscionable for the promisor to resile from the promise.

120. Chitty on Contracts (33rd ed, 2018) addresses the reliance requirement in terms that the promise or representation must have influenced the conduct of the promisee.

121. In *Bank of Scotland v. Kennedy* (cited by the trial judge) Mc Govern J. opined that *"a fundamental ingredient in the defence of promissory estoppel"* was that a person asserting a plea of estoppel must show that he or she acted in reliance upon the representations to his or her personal detriment. As to the necessity for reliance, McGovern J. noted the *dictum* of Fennelly J. in *Daly v. Minister for the Marine* [2001] 3 I.R. 513:

> *"It is the fact that it would be unconscionable for one party to be permitted to depart from a position, statement or representation, upon which the other party has acted to his detriment, that justifies the courts in intervening to restrain him from doing so. If the recipient of a promise or representation, is to be dispensed from any obligation to demonstrate reliance, the doctrine would be more than exceptionally generous. It would be a virtually ungovernable new force affecting potentially not only equity but the laws of contract and property and, as here, the exercise of administrative powers."*

122. McGovern J. also cited Kinlen J. in *McGuinness v. McGuinness* (Unreported, High Court, 19th March 2002):

> *"The Court is satisfied having regard to all the authorities that the alleged detriment has not been proven. It must be pleaded and proved. It must be substantial although not necessarily confined to monetary considerations. It must be tested against the principle that it would be unjust or inequitable to allow the assurance to be disregarded."*

123. McGovern J.'s overview of the doctrine also considered English authority and the analysis set out in McDermott and McDermott *Contract Law* (2nd ed. Bloomsbury Professional, 2018) to the effect that the reliance required in the case of promissory estoppel need not be detrimental. The authors put the matter as follows at para 3.139:

"...In reality the distinction between detriment and reliance is probably more semantic than one of any real practical significance. This is because an estoppel can only be raised if it would be inequitable to allow the representor to go back on his representation. As Burrows has noted 'The point is that if the promisee's position has not changed at all as a result of the promise it will normally not be inequitable for the promisor to resile from it.' Mee makes the same point when he suggests that '[i]f one interprets acting to one's "detriment" to mean conduct which would make it unconscionable for the representor to withdraw the representation, then this difference seems to disappear'".

124. McGovern J. duly distilled the evolving principles into the following:

"It is clear, therefore, that whether one is to characterise it as 'detriment' or 'reliance', there must be conduct on the part of the party seeking to raise a promissory estoppel such as to render it unconscionable for their counterparty to resile from representations purportedly altering the state of legal relations between them. Indeed, the authorities opened by the plaintiff make it clear that it is incumbent upon the representee to demonstrate that his conduct on foot of the representation caused him a detriment that is, in the words of Kinlen J in McGuinness v. McGuinness, '…substantial although not necessarily confined to monetary considerations. It must be tested against the principle that it would be unjust or inequitable to allow the assurance to be disregarded'". (At para.19)

125. Albeit cited as an ingredient of promissory estoppel in *Doran v. Thompson Ltd.*, *Daly v. Minister for the Marine, McGuinness v. McGuinness* and *Bank of Scotland v. Kennedy,* detriment *per se* is not required for a plea of estoppel to be successful. As I have already alluded to, it is rather that the character of the reliance on the part of the promisee must be such that it would be unconscionable for the promisor to resile from the promise. This is

indeed patent from the *dictum* of Fennelly J. in *Daly v. Minister for the Marine* and McGovern J.'s distillation of the doctrine in *Bank of Scotland v. Kennedy.*

126. For the purposes of this case, Dr. Healy's reliance on the assurances given by Mr. Leech must be such that would render it unconscionable for the Bank to resile from its promise. It is Dr. Healy's actions (or inactions as the case may be) in reliance on the representations made by Mr. Leech that is the fulcrum of the present appeal. I will return to this in due course.

The trial judge's assessment of Dr. Healy's estoppel argument

127. The kernel of the trial judge's finding that no estoppel arose is found at paras. 5 and 56 of the judgement. In short, the conclusions of the trial judge were twofold. Firstly, he found that Dr. Healy did not come to court with clean hands, as the invocation of the doctrine of equitable estoppel behoved him to do. The trial judge found support for this conclusion in Dr. Healy's evidence that his "instinct" (informed by his uncle's advice) was not to deposit the sale proceeds with the Bank lest the monies might be garnisheed. The trial judge considered Dr. Healy's evidence as confirmation that he would take means to defeat his creditors, including the Bank, if given the opportunity. The trial judge stated that Dr. Healy was claiming an estoppel "that would operate in such a manner as to permit him to act in a fundamentally unlawful fashion and in disregard of his lawful liabilities".

128. Contrary to the respondents' submissions, the trial judge's comments in para. 5 of the judgment were not *obiter*. Rather, they were at the very heart of his reasoning as to why Dr. Healy was disbarred from being able to raise promissory estoppel.

129. In my view, however, the trial judge erred in concluding as he did. There was nothing unlawful or unconscionable on Dr. Healy's part to preclude a case being made on the principles of equitable or promissory estoppel. All he did on 1 August 2007 was to seek assurances from the Bank that he was in the clear in relation to his liabilities. He did so

against a backdrop which was known to the Bank and in which the Bank had participated albeit not as a party in the legal sense to the Agreements reached between Dr. Healy and Dr. Culen. By enquiring of Mr. Leech as he did on 1 August 2007 Dr. Healy was adopting a prudent course of action with a view to protecting his interests in case a dispute might arise in the future. It cannot be characterised as bad faith to marshal one's affairs in a manner that was nothing otherwise than prudent.

130. Notably, at para. 10 of his judgment in the Supreme Court appeal, and albeit his comments were *obiter* as the only issue before that Court was the factual one of whether the representations said by Dr. Healy to have been made were in fact made, Hardiman J., when reprising Dr. Healy's evidence that without Mr. Leech's assurances he would not have deposited his €2.2m. cheque, did not there find anything untoward on Dr. Healy's part in having given this evidence. Moreover, when reprising the Bank's submissions regarding McGovern J.'s factual findings Hardiman J. did not, by way of adverse comment or otherwise, consider it surprising that a professional man like Dr. Healy would make an enquiry of the Bank before placing his money on deposit. He stated:

> *"On the hearing of this appeal, Mr. Denis McDonald S.C. for the Bank was absolutely clear that his reliance was on the learned trial judge's factual findings. He did not dilute the strength of this submission by making any alternative or subsidiary point. He frankly conceded that there was on the transcript of the evidence certain material which supported Dr. Healy's point of view but he simply said that the learned trial judge had found against him and that was that. He said that this Court was not entitled to engage in speculation outside the findings of the trial court, on such issues as to why a professional man such as Dr. Healy would have made the lodgement without any assurance that it wouldn't be appropriated, as it indeed was about a year later, by set off."* (at para. 20)

131. Similarly, in the first trial of the action, although Mc. Govern J. held against Dr. Healy on the fact of the representations having been made, he did opine (at para.16) that if the representations were in fact made, Dr. Healy would be in a *"strong position"*. There was certainly no suggestion on the part of McGovern J. that if the representations said to have been made by Mr. Leech were to be accepted Dr. Healy would nevertheless be precluded from relying on the doctrine of promissory estoppel because he was coming to the court with "unclean hands".

132. To my mind, the trial judge was incorrect in law and in fact to assert that Dr. Healy did not come to the court with clean hands and so could not invoke equitable estoppel. In circumstances where Dr. Healy had sold his practice and interests in the Coole property to Dr. Cullen, where Dr. Cullen had agreed to take over Dr. Healy's liabilities to the Bank and where, as I have alluded to, while not a party to the arrangements between Dr. Healy and Dr. Cullen the Bank, it could be said, was very much involved (for the protection of its own interests) in dictating how the buyout of Dr. Healy's interests would be managed, it was not unconscionable for Dr. Healy to contemplate not putting his monies on deposit in the Bank if the Bank, despite all of the foregoing factors, considered him still to be indebted to it.

133. It is of note that the case actually made on the Bank's behalf in the High Court was not that Dr. Healy's claimed estoppel would permit him to operate in a fundamentally unlawful fashion, rather its position was that Dr. Healy's contention that if he had been told he was still liable to the Bank he could have avoided his creditors could not give rise to an estoppel. The Bank did not plead that it would be in any sense unlawful or unconscionable for Dr. Healy to put the monies beyond the reach of the Bank in the absence of an assurance.

134. Another notable feature of this case is that it was never pleaded by the Bank (nor advanced at the trial or on appeal) that Dr. Healy could not have relied on the assurances given by Mr. Leech on the basis that they were gratuitous or that they were incapable of having the legal effect contended for by Dr. Healy. Insofar as the trial judge may have concluded that the representations were incapable of having legal effect for the purpose of the doctrine of promissory estoppel, he erred in so concluding.

135. The second basis for the rejection of the estoppel claim is found in para. 56 of the judgment. The trial judge found that the act of reliance relied upon by Dr. Healy was the placing of monies on deposit, "with the detriment complained of being the fact that Ulster Bank was able to effect set off in respect of those monies". He found that that could not be detriment because had Dr. Healy not placed the monies on deposit with the Bank, that would not have impacted on Dr. Healy's legal position as he would still have been liable to the Bank in respect of the partnership liabilities and the associated Guarantee. While the trial judge acknowledged that during the course of the evidence, including cross-examination of the Bank's witnesses, reference had been made that Dr. Healy would have conducted his affairs differently if it had been made clear to him that he remained liable to the Bank, he found "no pleaded case or evidence referable to this suggestion".

136. I am satisfied, however, that the trial judge failed to take proper cognisance of the evidence given by Dr. Healy as to what he did post 1 August 2007 and what he would have done differently had he been made aware on 1 August 2007 that he was not released from his liabilities.

137. Albeit that Dr. Healy's pleadings with regard to specific acts of reliance may be somewhat sparse, there was ample evidence before the trial judge as to the nature of such reliance. Furthermore, I do not accept the Bank's argument that it is only at the appeal

stage that Dr. Healy makes the case that he would have acted differently had it been made known to him on 1 August 2007 that he was not released from his indebtedness.

138. While it was not a condition of the Agreements concluded between Dr. Healy and Dr. Cullen that the latter would seek the discharge of Dr. Healy's indebtedness from the Bank, I am satisfied that Dr. Healy reasonably understood that the import of Mr. Leech's representations on 1 August 2007 was that what had been signed up to by Dr. Healy and Dr. Cullen at paras. 6.2, respectively, of the Medical Partnership Agreement and the Property Partnership Agreement effectively gave rise to such discharge.

139. Dr. Healy's reliance on Mr. Leech's representations is manifest in the actions taken by him post 1 August 2007. The first thing Dr. Healy did was to correspond with his solicitor requesting that the latter write to the Bank for confirmation that his name had been taken off "any shared accounts concerning the Coole project."

140. Further evidence of action taken by Dr. Healy of foot of his reasonable belief that he stood discharged from the Coole loan facilities can be gleaned from his request on 24 September 2007 that his name be taken off bank statements referable to the Coole property indebtedness. He persisted with a similar request on 20 December 2007. Mr. Leech's response of 21 December 2007 to this request was "Done Neil".

141. More fundamentally, to my mind it is extremely unlikely that Dr. Healy would have arranged his affairs in the manner he did save for the unambiguous assurances given by Mr. Leech on 1 August 2007. Armed with the assurances received, Dr. Healy positively began to borrow more money from the Bank in order to fund his new medical practice and personal spend, thereby unknowingly enhancing what the Bank contends was a considerable pre-existing debt.

142. I now turn to Dr. Healy's evidence as regards actions he *might* have taken had he been made aware on 1 August 2007 that the Bank continued to regard him as liable for the Coole indebtedness.

143. Contrary to the Bank's contention, Dr. Healy made the case that the detriment he suffered post 1 August 2007 was the lost opportunity to manage his relationship with Dr. Cullen in a more prudent way. In evidence, he stated that if Mr. Leech's assurance had not been forthcoming, and if he had been advised that he was still at risk regarding his liabilities to the Bank, he would have immediately reverted to his solicitor. I do not accept the Bank's argument that this was a mere throwaway remark or an aside by Dr. Healy.

144. Dr. Healy's evidence in this regard was as follows:

> "Q. Had you known on the 1st, 2nd, 3rd [of August 2007] or whatever after the 1st that in fact the Bank had a different view of matters, would you have acted differently with regard to Dr. Cullen and his obligations on foot of that clause?
>
> A. Yes
>
> Q. What would you have done?
>
> A. I would have immediately gone to Patrick Groarke, my solicitor, and…
>
> Q. Can I ask you to pause for a moment? Now, sorry, we paused for the stenographer there, you were about to say, I think, what it was that you would have done differently had it been the case that you were aware.
>
> A. So, I would have gone back to Patrick Groarke, my solicitor, and asked him to sort out this issue of the liability.
>
> Q. Mm-hmmm
>
> Mr. Justice Barrett: This is after the letter has issued from the Bank, is it?
>
> Q. Mr. McEntagart: So after -I am asking the witness to reference the period after the 1st August 2007, being the date of the assurance, and the 13th August 2008

being the date upon which the set off occurred, and I am asking you to address what you would have done differently, if you want to put it like that.

A. Had I known that I had a liability on the 1st August -

Q. Yes.

A. – I'd have gone directly back to Patrick Groarke and asked him to sort this out.

Q. Vis-à-vis Dr. Cullen?

A. Precisely.

Q. But you didn't do that?

A. No."

145. Dr. Healy was further questioned by his counsel as to whether he would have managed his affairs in terms of his overdraft in the way he did had he known that the money that was sitting in his deposit account was about to be "swooped upon or utilised to defray a Coole Expense". The clear import of Dr. Healy's response was that had he known that the Bank considered him still to be indebted in respect of the Coole development he would not have incurred that overdraft debt.

146. In this respect, Dr. Healy's position is analogous to what occurred in *Avon C.C. v. Howlett* [1983] 1 W.L.R. 605 CA, a case referred to in Wilkins and Ghaly *"The law of Waiver, Variation and Estoppel"*, 3rd ed, (Oxford University Press, 2012). In that case the defendant was overpaid by his former employer, who represented that the payments had been correctly made. The defendant and his wife altered their budget accordingly. They increased their spending in accordance with their perceived income. The money was spent on a number of small improvements in their daily life. Although the defendant had received a benefit from the increased spending, the court held that to have required him to refund the overpayments would have been to impose an onerous and unexpected liability, which he would have been unable to meet. The position Dr. Healy found himself in on 13

August 2008, after the set off of his monies *ostensibly* against the Coole indebtedness, was that a financial cushion he would otherwise have had to offset his overdraft facility was removed from him.

147. To return now to the actions that might have been taken by Dr. Healy if he was told on 1 August 2007 that he remained indebted with regard to the Coole loan facilities. Given the factual matrix in this case, especially the arrangements entered into between Dr. Healy and Dr. Cullen and the financial arrangements made for Dr. Cullen's buy out of Dr. Healy's interests (known to the trial judge from the totality of the evidence adduced and the detailed Replies to Particulars), it is not illogical or unreasonable to conclude that had it been made known to Dr. Healy on 1 August 2007 (or indeed at any point immediately thereafter), in answer to his very direct question to Mr. Leech, that the Bank considered him to have an ongoing liability in respect of the Coole project, there were a suite of options open to Dr. Healy to address the position in which he would have then found himself. However, in light of the assurance given by Mr. Leech, Dr. Healy did not take any steps to enforce the assumption by Dr. Cullen of the indebtedness to the Bank as set out in the Agreements concluded in July 2007. He did not engage with Dr. Cullen or seek rescission of those Agreements – an option that might reasonably have been open to him had it been made clear on 1 August 2007 that the Bank considered that he remained indebted to it. It is reasonable to conclude that had he been advised on 1 August 2007 that his liability to the Bank endured Dr. Healy would have taken steps to safeguard his position.

148. Again, it bears repeating that all of this must be viewed in the context where the Bank was privy to the arrangements made between the doctors. This is clear from the evidence which was before the trial judge, namely that the sequencing of the payment arrangements as between the Bank and BOSI was dictated by the Bank, and the assumed

indebtedness on the part of Dr. Cullen to the Bank was to be discharged upon the closing of the sale of the residential greenfield site by Dr. Cullen to a third party, Mr. O'Reilly.

149. Indisputably, the Bank allowed Dr. Cullen to monetize its secured asset in order to obtain the €2.2m. ultimately paid by him to Dr. Healy. The Bank was aware that provision was made in the Agreements reached between Dr. Healy and Dr. Cullen that it would be repaid upon the sale of the residential site to Mr. O'Reilly. There was a Solicitor's Undertaking in this regard from Dr. Cullen's solicitors. It was against that backdrop that Dr. Healy requested and was given an assurance by the Bank that he had no further liability. Based on that assurance that he was "in the clear", he put his money on deposit with the Bank and did not thereafter engage with Dr. Cullen. In essence, he perceived no reason to further consolidate his legal position, based on Mr. Leech's representation.

150. Before this Court, counsel for the Bank did not demur at the suggestion that given the nature of the agreements entered into between Dr. Healy and Dr. Cullen, if it had been made clear to Dr. Healy on 1 August 2007 that the Bank considered him still to be liable for the Coole debts, Dr. Healy's solicitor would have at his disposal various mechanisms to bring to bear on Dr. Cullen which could well have prompted Dr. Cullen to obtain the release of Dr. Healy's indebtedness to the Bank. As I have already said, in the absence of co-operation from Dr. Cullen in this regard, Dr. Healy could have threatened to commence proceedings to actively rescind the July 2007 Agreements. He could reasonably have made the case that if he was going to lose the €2.2m he received from Dr. Cullen to the Bank, it would have been better if he had never entered into those Agreements in the first place.

151. Indeed, in the course of the appeal hearing it was accepted by the Bank that if Dr. Healy had been told on 1 August 2007 that he had a continuing liability he could have put together a case to unravel the Agreements made with Dr. Cullen, albeit that it was not

provided for as a condition in the Agreements that the Bank would release Dr. Healy from his indebtedness.

152. Dr. Healy's (entirely reasonable) reliance on the assurances given by the Bank had the effect of depriving him of the opportunity, in the immediate aftermath of the conclusion of his Agreements with Dr. Cullen, to take such steps as might have been necessary to safeguard or consolidate the state of affairs (i.e. that he was discharged from his liabilities to the Bank) that he believed had been achieved by the July 2007 Agreements. In failing to appreciate the significance of this loss of opportunity, the trial judge erred in a substantial regard.

The internal Bank debate post 1 August 2007

153. Documentary evidence which was before the trial judge established that a short time after the meeting with Dr. Healy on 1 August 2007, application was made by Mr. Leech internally in the Bank to achieve the state of affairs which (as the trial judge found) had been represented to Dr. Healy on 1 August 2007.

154. On 3 September 2007, Mr. Leech advised his colleagues in the Bank as follows:

> "…earlier this month BOSI drew down monies of €2.2m to fund the buy out of [Dr. Healy]. [Dr. Cullen] signed the contracts to sell the site for 22 houses and the purchaser Peter O'Reilly signed the contracts and paid his deposit of €250K. At this point [Dr. Healy] is no longer involved in the practice and has signed over all his interest in the property at Coole. He lodged €2m of the funds received on Money Desk Deposit with me and is currently setting up a practice in Mullingar.
>
> The sale of the site for 22 houses is due to close in the coming weeks…
>
> The purpose of this paper is obviously to update you regarding the above but also to seek approval for the following:

1. To zeroise the limit on Facility A1 in the name of [Dr. Cullen and Dr. Healy] and have the loan transferred into the sole name of [Dr. Cullen] at a level of €1.17m. This is effectively €935k to refinance the existing loan balance into the name of [Dr. Cullen]…
2. To zeroise the overdraft facility on the practice account in the names of [Dr. Healy and Dr. Cullen] and reinstate the facility on a practice account in the name of [Dr. Cullen] T/A Coole Surgery
3. To refinance all facilities in the name of Coole Property Holdings onto one loan account of €980k pending the closure of the sale of the site for 22 units. [ ]… is now taking over as director of this company from [Dr. Healy].
4. To zeroise all facilities in the name of [Dr. Healy] as he is no longer part of this connection. His accounts will be put up under a separate RMP connection."

155. Mr. Leech's proposals did not find favour internally within the Bank, as evident from communication to Mr. Leech from a Mr. Coyle of the Bank's Credit Section of 6 September 2007.

156. By 10 September 2007, Mr. Leech was reassuring Mr. Coyle that he had not amended the security details. However, he went on to state:

> "The position now is that [Dr. Cullen] has bought out [Dr. Healy's] entire interest in all the lands, the buildings and the practice at Coole. To do this [Dr. Cullen] raised the monies with BOSI who secured their exposure in the form of a second legal charge from [Dr. Cullen] over our security, i.e. all the lands and buildings at Coole. In order for BOSI to take a second charge from [Dr. Cullen], [Dr. Healy] had to sign over his interest in all the lands and property at Coole. Hence in order to expedite matters, the closing of the purchase of [Dr. Healy's] interest by [Dr. Cullen] for €2.25m and the transfer of [Dr. Healy's] interest in the various

> properties were both executed at the one meeting with all solicitors present. Hence all our security is now held by [Dr. Cullen] only. [Dr. Healy] effectively no longer has any liability to us and as I say he has signed contracts signing over any interest he had in all lands and property at Coole to [Dr. Cullen]. I have amended this on the security screen now. This can be changed back if not correct."

In this communication, Mr. Leech reproduced an email detailing the legal advice he had received from the Bank's solicitor, Mr. Ian Long. It reads as follows:

> "Alan, technically we can still rely on the FLM [First Legal Mortgage] in place as the remaining borrower remains fully liable for the entire mortgage debt. However, it may be that as a matter of policy or procedure the bank chooses to discharge the existing debt in the joint names and create a new mortgage account in the sole name of the remaining borrower. If so, a new FLM will be required to secure the new mortgage debt. Of course there will have to be a solicitor involved to put the title to the property in the sole name."

157. On 12 September 2007, Mr. Coyle wrote to Mr. Long outlining his understanding that the advice the solicitor had proffered to Mr. Leech was that the Bank could "rely on our present mortgage". Mr. Coyle's view of the matter was expressed in the following terms: Dr. Healy and Dr. Cullen had bought the Coole property in their joint names as tenants in common with a loan from the Bank. The Bank had taken a legal mortgage over each of their separate interests. None of the cash received by Dr. Healy from the sale of his interest to Dr. Cullen went to reduce the Bank's loan facility. The Bank continued to hold a mortgage over their respective interests. The loan contined to be in their joint names. BOSI had taken a mortgage over the entire of the property in Dr. Cullen's name. The BOSI mortgage consisted of a second legal charge over the original fifty percent interest owned by Dr. Cullen and "what looks like a first charge over the 50% conveyed by [Dr. Healy] to

[Dr. Cullen]" If the loan was transferred into Dr. Cullen's name only the Bank would continue to hold a legal mortgage over Dr. Cullen's interest only with BOSI having priority over the fifty percent interest previously owned by Dr. Healy.

158. On 3 October 2007, Mr. Leech wrote to Mr. Coyle advising, *inter alia*, that Dr. Cullen's solicitor had provided BOSI with an undertaking that she would provide them with a second legal charge over the Bank's security, i.e. the Coole property, with the exception of the site for 22 houses being sold by Dr. Cullen to Mr. O'Reilly. He advised that as the proceeds from that sale (which would be sufficient to discharge the liabilities to the Bank) were pledged to the Bank, BOSI did not see any point in taking a charge over the site for 22 houses. Mr Leech's letter continued:

> "It is agreed with BOSI that once our borrowings are repaid, their Second Charge will convert to a First Legal Charge. BOSI were aware that they were funding the buyout of [Dr. Healy] and were aware that we already held a FLC and any security provided to them would rank behind our charge. There is nothing else untoward here. Hence if we transfer the loan to [Dr. Cullen's] sole name we can seek a FLC…However in view of the fact that we are going to be repaid shortly, my view is that it makes sense for us to simply continue to hold the FLC in joint names, which Ian Long advises we can rely on, and also the undertaking over the sale proceeds from [Dr. Cullen's solicitors].
>
> …
>
> As yet I have not released [Dr. Healy] from any of his liabilities. I am happy to leave the company debt as is, in order to avoid complicating matters but the issue I have at this point in time is that [Dr. Healy] is looking for his name to be removed from all loans. I appreciate that matters were not handled as they should have been in this case, which was no fault of this office. Ideally we should have been given

the chance to transfer our security to [Dr. Cullen's] sole name before any money for the buyout changed hands. However we understand that matters escalated to a crucial point and [Dr. Healy] had to be paid off before he took matters to the Courts."

159. As of 10 October 2007, Mr. Coyle was again advising Mr. Leech:

"It is necessary to retain Mr. Healy's name on the loan. He did not approach us to have his name removed before now-this would have given us time to re-evaluate our security requirements. Of perhaps more importance, he did not use any of the funds he received from the sale of his share of the assets of the partnership to reduce any of the debt for which he continues to be jointly and severally liable. If and when the sale of the site with pp for 22 units goes ahead, repayment is then made and at that stage NH can be formally released. If the sale falls through for whatever reason the Bank would require the fallback of reliance on the security-something it would be forsaking if he was released."

160. At first blush, the approach being adopted internally by the Bank, as evident from the foregoing communications, was not an unreasonable one. The difficulty, however, was that the Bank's view was not shared with Dr. Healy who continued, post 1 August 2007, to be advised by Mr. Leech that he was in the clear (the communication of 21 December 2007 refers). Moreover, it appears that following the 21 December 2007 "Done Neil" email, no further bank statements were sent to Dr. Healy, further consolidating his belief that he was in the clear in respect of the Coole indebtedness.

161. In those circumstances, and having regard to the clear and unequivocal representation that had been made to Dr. Healy on 1 August 2007 against the background whereby the Bank had input (for the purpose of protecting its own interests) into how the purchase by Dr. Cullen of Dr. Healy's interest in the Coole property would be achieved,

the only reasonable conclusion that should have been drawn was that it would be inequitable or unconscionable to allow the Bank to renege or resile from the representations it made. Of course, the trial judge did not so find since he found (erroneously) that the sole reliance claimed by Dr. Healy was putting his money on deposit in the Bank. It is also the case that the trial judge's finding in this latter regard was preceded by the (erroneous) finding that that Dr. Healy himself was estopped from relying on promissory estoppel as he had not come to court with "clean hands". In those circumstances it is perhaps not surprising that the trial judge arrived at the conclusion he did. However, any reasonable assessment of the fairness of the situation with which Dr. Healy was presented in August 2008 mandated a finding that the acts and omissions of the Bank in the period 1 August 2007 to 5 August 2008 lent themselves to unconscionable behaviour on the part of the Bank. To my mind, this seems consistent with the words of Charleton J. in *N.A.L.M. v. McMahon* that the *"modern formulation"* of the doctrine of promissory estoppel requires that account be taken of *"the fairness of the situation".*

162. The unconscionability in this case rests with the Bank. It was unconscionable for the Bank, post 1 August 2007, to allow Dr. Healy to proceed for a period of twelve months utilising his monies in the belief he was free of the Coole indebtedness without disabusing him of that belief. It was unconscionable to then apply the set off on 13 August 2008 in the face of the assurances which had been given to Dr. Healy on 1 August 2007, assurances which were compounded by the Bank's actions on 21 December 2007, and absent any opportunity having been given to Dr. Healy to debate in advance (if necessary in a judicial forum involving Dr. Cullen) the claimed indebtedness. This is so particularly where the Bank had decided at any early stage that the debts due to it could be satisfied upon the sale by Dr. Cullen of the residential site and that BOSI could thereafter move to their position as a first legal mortgagee. It is indisputable that the Bank dictated this sequencing.

163. After so doing, in the knowledge that it had secured its primacy with BOSI, the Bank positively asserted to Dr. Healy that he was discharged from his liabilities. As already set out, even when numerous opportunities presented in the months following 1 August 2007 to apprise Dr. Healy that he remained indebted, the Bank decided not to do so, instead adopting an approach whereby Mr. Leech as late as 21 December 2007 assured Dr. Healy that steps had been taken to consolidate the promise given on 1 August 2007 while at the same time internally within the Bank the position was otherwise. Thus, it was unconscionable for the Bank to avail of a situation whereby they took Dr. Healy's money in circumstances where, post 1 August 2007, it never disabused him of his belief that he was in the clear, where they knew Dr. Healy had disposed of his property and practice interests, where by the time of the set off the Coole property had been charged to a third party/entity (BOSI) to which Dr. Healy had no recourse, and where some thirteen months or so had elapsed since Dr. Healy had concluded his Agreements with Dr. Cullen.

164. As is well established, this court is not entitled to substitute its view on the facts for that of the trial judge *(Hay v. O'Grady* [1992] I.R. 210 and *Doyle v. Banville* [2012] IESC 25, [2012] 1 I.R. 505) With due regard to the principles set out in that jurisprudence, there is, however, a clear basis for this Court to set aside the finding of the trial judge on the estoppel issue for the reasons set out above. The judge erred in fact and in law in failing to hold that the Bank was estopped from offsetting the funds standing in Dr. Healy's account and from pursuing him in respect of the Coole property indebtedness.

Promissory estoppel-suspensory only?

165. It is generally the case that the representation or forbearance giving rise to an estoppel will usually be temporary in nature, as confirmed by Haughton J. in *Sheehan v. Breccia*:

"…it is a principle of promissory estoppel that in general its effect is suspensory or temporary and can be withdrawn unless the promisee cannot resume his/her previous position." (at para.177)

166. The general suspensory nature of promissory estoppel was also considered by Laffoy J. in *Barge Inn Ltd. v. Quinn:*

70…[Learned commentators] are…ad idem on the effect of…[promissory] estoppel: it suspends, not extinguishes, the promisor's rights…its effect is to suspend not to give up altogether a legal right, the right to resile from the promise being available where reasonable notice is given….Applying the suspensory effect of the doctrine to the various circumstances which may arise is the most difficult aspect of the application of the doctrine. In the U.K. textbooks, the terminology used to describe the effect of the doctrine tends to be to describe it as being either temporary or permanent, depending on the factual circumstances.

71. For instance, in Spencer Bower on The Law Relating to Estoppel by Representation (4th Ed.), the editors stated (at p. 486) under the heading 'Relief':

'The effect of the doctrine of promissory estoppel can be either temporary or permanent depending on the terms of the promise and the detrimental reliance upon it. It is often said that the doctrine is suspensory or suspensive of rights and only exceptionally does it operate to extinguish rights altogether. But there can be an element of ambiguity in those terms….Again, where a landlord is held to have waived payment of rent in full for a specified period of time, the effect of the doctrine can be described

as either temporary or permanent. It is temporary in the sense that the concession is temporary and the parties must resume their former position. But it is permanent in the sense that the landlord may have waived payment of some part of the rent forever and agreed to accept a lesser sum in satisfaction of the whole. This position can be contrasted with the situation in which a creditor agrees to permit the debtor to pay in instalments. Here the effect of the promise is truly temporary because all that the creditor agrees to give the debtor is time.'

72. In Snell's Equity (32nd Ed.) the editors deal with the effect of promissory estoppel and, in particular, the relief which can be afforded when it is established as follows (at para. 12 - 014):

'The effect of the doctrine of promissory estoppel can be either temporary or permanent. But it is usually temporary. Where the promise or assurance is more than a temporary concession, [the promisor] will be entitled to withdraw the concession in accordance with its terms. Even where the promise or assurance cannot be construed as a temporary concession [the promisor] will usually be entitled to withdraw the promise on giving reasonable notice and the promise will only become final and irrevocable if [the promisee] cannot resume his or her former position. In this sense the doctrine of promissory estoppel has much in common with the principle of waiver of rights which permits a party to revoke any waiver upon reasonable notice to the other party.'

167. As the court below considered that Dr. Healy's arguments did not give rise to promissory estoppel, what was described by the trial judge as "the extraordinary longevity" of the estoppel contended for by Dr. Healy did not fall for consideration in that court.

168. In light of this Court's finding that the Bank is estopped from pursuing Dr. Healy for the Coole indebtedness, the matter must now be addressed.

169. When viewed against the guidance given by Laffoy J. in *Barge Inn Ltd. v. Quinn* that the estoppel may be *"either temporary or permanent, depending on the factual circumstances",* it seems to me that the factual matrix in the within case mandates that the estoppel to which Dr. Healy rightfully lays claim must be of a permanent nature. While estoppel will, as the extract from *Snell's Equity* cited by Laffoy J. makes clear, *"usually"* be temporary, this is a reflection of the fact that *"usually"* a representation is temporary in nature and the reliance placed upon it can be either terminated or reversed without consequent unfairness. Where, as in this case, the representation is itself directed to a permanent state of affairs (here that upon the taking of a particular step there will be no debt due) the position may be different. Whether this is so will depend *inter alia* upon whether the reliance placed by the representee on the statement in question can itself be reversed. In my view, the salient factor here is that the combined effect of the representations made on 1 August 2007 coupled with the Bank's failure between 1 August 2007 until 5 August 2008 to set the record (as it perceived it) straight is that Dr. Healy lost the chance to, at the earliest opportunity, resume his engagement with Dr. Cullen and/or take such action as might have been necessary to ensure that his legal position *vis-à-vis* securing his discharge from the Coole indebtedness was protected. At this remove it would be inequitable and unfair to require Dr. Healy to mount a legal challenge against Dr. Cullen to rescind Agreements made in 2007.

Assignment subject to the equities

170. Being satisfied that the Bank is permanently estopped from pursuing Dr. Healy in respect of the Coole indebtedness, the question that now arises is where that leaves Promontoria as the claimed successor in title to certain of the Bank's loan book including the Coole facilities.

171. The law, however, is well established in this regard. It was comprehensively addressed by Haughton J. in *Sheehan v. Breccia*:

> *"138. In considering the issue of equitable estoppel it is part of the plaintiff's case that IBRC/the Special Liquidators had become estopped from recovering surcharge interest before the loans and security were sold and transferred to Breccia, and that the assignment was 'subject to the equities' i.e. that Breccia was also bound by any equitable rights affecting IBRC's interest. This is a principle with a long pedigree. In Mangles v. Dixon (1852) 3 HL Cas 702, St. Leonards L.J. at p. 731 stated:-*
>
> > *'If there is one rule more perfectly established in a court of equity than another, it is, that whoever takes an assignment of a chose in action, which this charter-party was, for it is not assignable in law, although it is in equity, takes it subject to all the equities of the person who made the assignment.'*
>
> *And at p. 735 he stated:-*
>
> > *'The authorities upon this subject, as to liabilities, show that if a man does take an assignment of a chose in action he must take his chance as to the exact position in which the party giving it stands.'*

139. In the context of an assignment of debt Chitty on Contracts, Vol. 1, 31st Ed. (London: Sweet & Maxwell, 2012) states the law thus at para. 19-070:-

> *'Assignments normally take effect "subject to the equities". This was always so in equity…Thus, where a claim arises out of a contract under which the debt arises, and the claim affects the value or amount of the debt which one of the parties purported to assign for value, then if the assignee subsequently sues, the other party to the contract may set up that claim (including the right to set the contract aside) by way of defence against the assignee as cancelling or diminishing the amount to which the assignee asserts his rights under the assignment.' [Footnotes omitted]*

And at para. 19-074 Chitty notes:-

> *'…[a] further aspect of the idea that an assignee takes an assignment 'subject to the equities is the principle that an assignee cannot recover more from the debtor than the assignor could have done had there been no assignment.'*

140. In Technotrade Ltd. v. Larkstore Ltd. [2006] EWCA Civ 1079 the Court quoted the discussion in an earlier edition of Chitty and Mummery L.J. adopted and applied these principles.

Similarly Treitel's The Law of Contract, Peel (ed), 14th Ed. (London: Sweet & Maxwell, 2015) states at para. 15-067:-

> *'An assignee takes "subject to the equities", i.e. subject to any defects in the assignor's title and subject to certain claims which the debtor has against the assignor. He takes subject to such defects and claims whether they arise at law or in equity, and whether or not he knew of their existence when he took his assignment. And he cannot recover more than the assignor could have recovered. The object of these rules is to ensure that the debtor is not prejudiced by the assignment.' [Footnotes omitted]*

141. That the position is the same in this jurisdiction is reflected by McDermott in Contract Law (Dublin: Tottel, 2001) where the author states at para. 18.118:-

> *'An assignee takes subject to any equities that have matured at the time of notice to the debtor. The effect is that the debtor may plead against the assignor all defences that the debtor could have pleaded at the time when he received notice of the assignment.'"*

172. It follows, therefore, applying the principle set out above by Haughton J. that Promontoria as the assignee of the loans associated with the Coole development is bound by the representations made by the Bank on 1 August 2007 and that Dr. Healy acted on these representations to his detriment. Accordingly, it follows that Promontoria is estopped by reason of the Bank's conduct from pursuing Dr. Healy. Indeed, no argument was canvassed at the appeal hearing that the position would be otherwise were the Court to find that an estoppel arose.

(iii) Alleged unfairness in the trial judge's conclusion that Promontoria had acquired title to the loans and securities in issue

173. In his oral submissions to this Court, Dr. Healy canvasses a number of complaints pertaining to the trial judge's determination that Promontoria had established that the loans

in issue here had been assigned to it. He contends, firstly, that as it was not a bank, Promontoria could not rely on the Bankers' Books Evidence Acts to introduce the transfer documents in evidence. Secondly, Mr. Burke, Promontoria's witness, was not the author of or a signatory to the documents being relied on by Promontoria as evidencing the assignment of the loans. It is contended, therefore, that, as the documentation upon which Promontoria was relying was contested by Dr. Healy the obligation was on Promontoria to prove same.

174. It is further contended that at the trial in the court below Promontoria chose to rely on an undated "Mortgage Sale Deed" attached to the Witness statement of Mr. Burke and on a "Deed of Novation" dated 12 February 2015 which contained a series of redactions. Likewise, the "Global Deed of Transfer" dated 12 February 2015 sought to be relied on by Promontoria was heavily redacted. At trial, the case that was made by Dr. Healy was that there was no evidence of the Guarantee he had executed in August 2006 having been transferred to Promontoria as it was not listed in the schedules which attached to the Global Deed of Transfer.

175. This latter issue was pursued by counsel for Dr. Healy in cross- examination of Mr. Burke. Following that cross-examination, application was made by counsel for Promontoria to the trial judge to introduce a different version of the transfer document which contained less redactions. This was to address the issue which arose in relation to the Guarantee executed by Dr. Healy in 2006 and whether the obligations thereunder had transferred to Promontoria. As is evident from the trial transcripts, this application was the subject of considerable exchanges between counsel and the trial judge during which the trial judge commented that he did not have before him "the four corners" of the documents sought to be relied on.

176. Mr. Burke's Witness Statement contained the following: 'Finance documents' includes the 'security documents'. The definition of 'security documents' makes clear that this includes the guarantee documents…"

177. The Global Deed of Transfer, described by the trial judge as a "pivotal document", did not contain a definition of "finance document". However, a redacted part of the Global Deed of Transfer referred to the term "finance document" as being defined in the Mortgage Sale Deed. Counsel for Promontoria conceded to the trial judge that Promontoria's entitlement to judgment on foot of the Guarantee depended on the definition contained in the Mortgage Sale Deed having been imported into the Global Deed of Transfer. One of the matters that had been redacted in the Global Deed of Transfer which attached to Mr. Burke's Witness Statement was the following:

> "Words will have the same meaning in this document as they have in the mortgage sale deed which obviously precedes this document in time"

178. In the court below, Promontoria submitted that it would be unfair if it was to be cut off from making its argument on the proper construction of the documents in issue by reason of the fact that the above sentence was redacted in advance of Mr. Burke preparing his Witness Statement. It was argued that the unfairness arose in circumstances where Dr. Healy had always known that Promontoria, in claiming its entitlement to judgment in respect of the Guarantee, was relying on the definition attributed to "finance document" which included guarantees by reference to the definition of security documents.

179. Dr. Healy's submission to the trial judge was to the effect that as early as 2015, the Supreme Court had directed that he was to be furnished with the assignment documents "appropriately redacted". It was submitted that having carried out its redactions Promontoria could not therefore now seek to distance itself from the Supreme Court's direction.

180. The trial judge having considered the matter overnight ruled as follows:

> "Promontoria has put in evidence a series of redacted contractual documents whereby it seeks to establish [that it is the successor to the Bank]. Yesterday during cross examination by counsel for Dr. Healy, a director of Promontoria, it became apparent that in some respects the redacted documentation before the Court cannot be read in its redacted form in a manner that makes sense. After counsel for Dr. Healy completed his cross-examination counsel for Promontoria rose and asked that the Court allow a portion of the previously redacted commercial documentation now be admitted in unredacted form, in effect to deal with the comprehensibility issue that had been raised in cross- examination.
>
> …
>
> Counsel for Dr. Healy objected to the belated admission of previously redacted evidence.
>
> The foregoing presents a very real difficulty for the Court, and indeed for the proceedings. The previously redacted texts which it is now sought to admit may be relevant, admissible and material, but Promontoria through its actions has now placed the Court in a situation where the Court can no longer be assured that Promontoria's redaction of the contractual documentation is anything other than completely self-serving with redacted texts capable of being produced in unredacted form when it suits Promontoria.
>
> Counsel for Promontoria indicated that what has occurred is a genuine error, but it is a most serious error, the wider consequences of which cannot be ignored by the Court. Were other errors made as regards the text that was redacted? The Court does not know. Are there other portions of the excessively redacted documentation that might be of relevance? The Court does not know. Only Promontoria knows and

> it is the party that has excessively redacted to this point. So how is the Court best to ensure fairness of procedure in the within matter?
>
> It seems to the Court that two steps will best ensure continuing fairness of procedure, though it will accept further submissions in this regard if the parties have any submissions in this regard to make after hearing what the Court proposes.
>
> First, as the Trial Judge I am entitled to see all original documentation in order to determine if there is anything else of relevance therein to the trial of the proceedings at hand. In the unusual circumstances presenting I propose to require from Promontoria that I be furnished for my examination by close of business next Wednesday with entirely complete photocopies of the Promontoria Contracts that are presently in evidence before the Court. Those photocopied documents to be certified by the solicitors for Promontoria as true and complete copies of the originals.
>
> Second, the Court proposes that the unredacted text which it has sought to be admitted should now be admitted on the simple basis that a trial that does not proceed on the truth cannot, it seems to the Court, do justice between the parties. It is a regrettable consequence of the foregoing that this trial will fall still to be further protracted. This is a matter that may fall ultimately to be reflected in any order as to costs that issues from the Court.
>
> So if you have submissions to make I am happy to hear them."

Dr. Healy's counsel's response was that he was "fine" to proceed with the trial judge's ruling. He did not demur when the trial judge clarified that he wished to have sight of the entirety of the original transfer documentation.

181. In the immediate aftermath of the above ruling, counsel for Promontoria advised the trial judge that the version of the documents he was working off had the portion he wished

to rely on in unredacted form and that he had the previous day provided his version of the documents to Dr. Healy's counsel. He stated that matters were complicated by the fact that those versions of the documents had less redactions than the documents which had originally been furnished to Dr. Healy's legal team.

182. Counsel for Dr. Healy took umbrage at the implicit suggestion in Promontoria's counsel's submission that the focus of his argument (as put in cross -examination of Mr. Burke) that Promontoria could not establish itself as successor in title to the Bank in respect of certain matters had been conducted on a false premise because Dr. Healy's legal team were already aware of Promontoria's basis for asserting title to the Guarantee which Dr. Healy had executed. To diffuse this complaint, counsel for Promontoria's response to Dr. Healy's counsel's submission was that he accepted that what had been put in evidence by Promontoria was the redacted document that attached to Mr. Burke's Witness Statement and that Dr. Healy's counsel was not required to take account of the less redacted version that had been furnished to him on the day prior to the cross-examination of Mr. Burke.

183. Noting the parties' respective positions, the trial judge stated that the best way to proceed was on the basis of the documents that had been put in evidence by Promontoria, but that he would himself, as he had previously indicated, view the entirety of the documents in their unredacted form and that judgment would be given on that basis. Again, counsel for Dr. Healy did not demur in this regard.

184. Before this Court, counsel for Dr. Healy distilled the ground of appeal now being advanced as follows: the trial judge had arrived at his conclusion that Promontoria had established its entitlement to judgment in respect of the loans by having regard to material to which Dr. Healy and his legal team had not been privy. He asserts that consequent upon the trial judge's ruling a certified document was furnished to the trial judge as being representative of Promontoria's position. However, that document was not furnished to Dr.

Healy for appraisal, comment, review or otherwise prior to judgment being delivered. It is submitted that this flies in the face of fairness and due process particularly in circumstances where from the outset Promontoria had not properly complied with the Order of the Supreme Court that Dr. Healy be provided with the relevant transfer documents appropriately redacted.

185. It is submitted that the procedure adopted in the court below in terms of proving the documents upon which Promontoria sought to rely fell short of the requisite standard set out in *Vitgeson Ltd.v. O'Brien & Promontoria (Arrow) Ltd* [2019] IECA 184 and particularly the facility which had been provided by the trial court to opposing counsel in *Vitgeson.*

186. Counsel for Promontoria disputes any unfairness to Dr. Healy in the manner in which the trial judge satisfied himself that Promontoria had established title to the loans and securities in issue.

Discussion

187. I turn firstly to Dr. Healy's complaint that he did not have access to the transfer documents entirely unredacted, unlike the trial judge. It is accepted by Promontoria that the versions of the transfer documents which attached to Mr. Burke's Witness Statement were redacted differently (i.e. more restrictively) to the versions of the documents which had been furnished to Dr. Healy pursuant to the Supreme Court's 2015 Order. It is also acknowledged that this should not have occurred. Promontoria's argument however is that there was no element of surprise for Dr. Healy as far as the documents it sought to rely on are concerned. It is contended that this is in circumstances where Dr. Healy's counsel knew what was behind the redactions in the version attached to Mr. Burke's Witness Statement as he already had the less redacted version by reason of the Supreme Court Order, and in

circumstances where he had again been given the same redacted version prior to commencing to cross- examine Mr. Burke, save one minor amendment.

188. In the first instance, it is noteworthy that Dr. Healy's written submissions to this Court wherein reference is made to the fact that the trial judge sought unredacted versions of all the transfer documents for his appraisal do not allege unfairness or prejudice in the way the trial judge chose to address the unsatisfactory state of affairs which presented before him, and which arose from the fact that a portion of a document upon which Promontoria wished to rely had been redacted prior to that document being adduced in evidence. That observation aside, I am in any event satisfied that no prejudice in fact occurred in relation to this issue in circumstances where the portion of the Global Transfer document upon which Promontoria sought to rely was known to Dr. Healy from the discovery which Promontoria had made following the Supreme Court Order, and from the documented given to counsel shortly before Mr. Burke's cross-examination commenced.

189. Furthermore, and to my mind more significantly, in the court below counsel for Dr. Healy did not take issue with the trial judge's ruling, not even after it was made clear that the trial judge wanted the entirety of the documentation for his personal appraisal and not just the one portion upon which Promontoria's counsel wished to rely, and where the trial judge expressly invited submissions from counsel. Have failed to complain at the appropriate time, Dr. Healy's complaint now about alleged unfairness has no merit.

190. I turn now to the more overarching complaint advanced by Dr. Healy, at least in his written submissions to this Court, namely that the trial judge failed to consider Mr. Burke's status as a witness, his capacity to introduce evidence before the trial court or the admissibility of the evidence sought to be adduced. It is contended that this is in circumstances where Mr. Burke had only been a director of Promontoria since 2017 and, as

such, was not a signatory to any of the documents being relied upon and was not in a position to prove same.

191. Matters of this ilk were considered by the Court of Appeal in *Vitgeson.* In that case the appellants challenged, *inter alia*, the admissibility of the global deed of transfer which effected the transfer of the interests of NALM to Promontoria, relying on the best evidence rule as set in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 where O'Flaherty J. stated at p. 518:-

> *"It should be emphasised that documentary evidence needs to be proved in a court like every other evidence. While the general rules of evidence with regard to admissibility, i.e. relevance, hearsay, opinion etc. apply to documentary evidence, additional requirements include proof of contents and proof of due execution"*

192. Writing for the Court of Appeal in *Vitsegon*, McGovern J. opined that the best evidence rule had been significantly relaxed in recent times quoting Charleton J. in *Ulster Bank Ireland Ltd. v. O'Brien* [2015] IESC 96, [2015] 2 I.R. 656:

> *"The best evidence rule has, since that time [the 1870s], weakened and ultimately, it has ceased to exist in favour of a test as to whether the evidence offered is admissible or inadmissible. Whether there might be better evidence of an event or transaction merely goes to the weight that might be given to particular testimony…"* (at para. 53)

McGovern J. noted that the views of Charleton J. had been adopted by the Court of Appeal in *Healy and Spillane v. McGreal* [2018] IECA 78 where Irvine J. stated:-

> *"I am satisfied that there is no rule of law that required the trial judge to direct the production of the un-redacted Loan Sale agreement in the present case. There was, it would appear, very good reasons for its redaction. Clearly there was a commercial sensitivity to the information contained in it. Indeed, I would have*

taken a different view than that of the trial judge as to the entitlement of the receiver to rely upon the redacted document once satisfied that the matters redacted were not relevant to the matters at issue and that they had been redacted to protect issues of confidentiality. However, the Deed of Confirmation and Acknowledgment of the 14th July 2015, which was introduced into evidence…was more than sufficient admissible evidence to prove that the plaintiffs' loans had been transferred to Kenmare." (at para. 55)

McGovern J. then turned to the factual matrix which presented in *Vitgeson*:

"14. In this case Ms. Siobhan Hallissey gave evidence of due execution stating that at all material times she was employed by SFM, a corporate service provider for the second named respondent. She said she was familiar with the global deed of transfer and had received a soft copy of it in advance of its execution. She was present in a room at the premises of A&L Goodbody Solicitors when her colleague, Jonathan Hanley, signed a number of documents including the global deed of transfer. She confirmed that the copy provided to the court was a copy of the original document with certain borrower information redacted. This evidence was not challenged in cross-examination and it established that the global deed of transfer had been duly executed and that the appellants' loans and security had been transferred from NALM to PARL. While the schedule to the deed also contained redactions, the facility letters relevant to the appellants were clearly identified therein.

15. Furthermore Mr. John Burke, a director of PARL gave evidence that whilst he had not witnessed the execution of the global deed of transfer, the appellants' loans and securities had indeed been assigned by NALM and were now owned by PARL.

His evidence of PARL's ownership of the loans and security was not disputed or challenged in cross-examination.

16. But in any event it is, perhaps, worth pointing out that a chose in action is freely assignable under s. 28(6) of the Supreme Court of Judicature (Ireland) Act 1877 and does not require the mortgagor's consent nor does it require to be approved in writing. In my view the trial judge was correct in reaching his conclusions on the basis of the deed of transfer. But it was not necessary for him to do so and he could have reached the same conclusion on the basis of the oral evidence given by Ms. Hallissey and Mr. Burke and proof of the receipt by the appellants of the 'goodbye' letter and 'hello' letter. In short there is ample evidence of the sale of the loan. At para. 12 of the statement of claim the appellants admitted to having received a written notice of the assignment from NALM (the 'goodbye' letter). Ms. Catherine Mangan, a director of Vitgeson Limited and the partner of the second named appellant gave evidence in which she confirmed not only the receipt of the 'goodbye' letter but also the receipt of the 'hello' letter from PARL."

193. In the within case, Promontoria's position is that in the court below, Dr. Healy took no real issue with the transfer of the Bank's interests save in relation to the question of whether the Guarantee executed by Dr. Healy had been transferred. Separate to that submission, Promontoria argues, in any event, that the manner in which it proved the transfer documents was entirely within that permitted by *Vitgeson,* a case in which Mr. Burke had also testified on behalf of Promontoria. It is submitted that insofar as counsel for Dr. Healy lays emphasis on the fact that in *Vitgeson* another witness, a Ms. Hallissey, testified to the fact that she was present in the room when a colleague signed a number of

documents including the global deed of transfer, that distinction cannot assist Dr. Healy since, in *Vitgeson*, the necessity for Ms. Hallissey's testimony arose in circumstances where the appointment of a receiver was being challenged, which required a more rigorous burden of proof given the formalities involved when the powers of a receiver are being challenged.

194. Having regard to the parties' submissions and transcript of the proceedings in the court below, I take the view that the contention that the loan facilities *per se* had not been transferred to Promontoria was never expressly pursued by Dr. Healy. As is clear from the transcript of the proceedings, the focus of the cross-examination of Mr. Burke was that the Guarantee executed by Dr. Healy had not been transferred because it was not listed in the schedule which attached to Mr. Burke's Witness Statement, not that the loans *per se* had not been transferred. That the focus was on the question of whether the Guarantee had been transferred is also evident from Dr. Healy's counsel's opening of the case in the court below when he apprised the trial judge that "the very heart of this case [is] whether or not the guarantee was transferred". This is also clear from the exchanges between counsel and the trial judge during Mr. Burke's cross-examination which ultimately led to the ruling delivered by the trial judge as recited at para. 179 above.

195. The trial judge ultimately found that the Guarantee was properly transferred. For the reasons set out earlier in this judgment, I have found that it is now too late for Dr. Healy to complain about the methodology employed by the trial judge in arriving at this conclusion.

196. Albeit that Dr. Healy has not prevailed in relation to this ground of appeal, this cannot assist Promontoria's asserted right to pursue Dr. Healy for the Coole indebtedness in view of the findings I have made on the promissory estoppel issue.

197. The Court will hear from the parties as to the form orders to be made consequent on this judgment and on the issue of costs. I propose that Dr. Healy would have 14 days for

such submissions following which counsel for the Bank and Promontoria will have 14 days to respond.

198. Haughton J. and Murray J. have indicated their agreement with this judgment.