[2020] IEHC 185

THE HIGH COURT
COMMERCIAL

[2018 No. 5922 P]

BETWEEN

ULSTER BANK DAC, PAUL MCCANN AND PATRICK DILLON

PLAINTIFFS

AND

BRIAN MCDONAGH, KENNETH MCDONAGH AND MAURICE MCDONAGH

DEFENDANTS

JUDGMENT of Mr. Justice Twomey delivered on the 6th day of April, 2020

SUMMARY

1. This is a case in which the first named plaintiff, Ulster Bank (referred to herein both as "the Bank" and "Ulster Bank"), is seeking judgment jointly and severally against the three named defendants, who are brothers, (the "McDonaghs") in the sum of €22,090,302.64. This amount is sought in respect of a loan taken out by the McDonaghs in connection with the purchase of approximately 82 acres of land in Kilpeddar, Co. Wicklow (the "Kilpeddar site"), intended to be used as a data centre.

2. There are two key issues for resolution. The first relates to factual disputes between the parties regarding alleged breaches of a Compromise Agreement entered into by the parties for the writing-off of approximately €20 million of that loan. These disputes are resolved by, *inter alia*, the credibility of the claims made by the McDonaghs and an analysis of contemporaneous documents.

3. The second issue is a legal issue concerning s. 17(2) of the Civil Liability Act, 1961 (the "1961 Act"). This arises because as well as suing the McDonaghs for the repayment of the loan of €22 million to buy the Kilpeddar site, Ulster Bank previously sued CBRE for an alleged negligent valuation of that site at a value of €56 million, which proceedings were settled for a figure of €5 million. An issue arises as to the effect, pursuant to s. 17(2) of the 1961 Act, of that settlement with one alleged concurrent wrongdoer (CBRE) on these proceedings by Ulster Bank against the other alleged concurrent wrongdoer (the McDonaghs). In particular, the McDonaghs claim that as the Bank settled with one alleged concurrent wrongdoer (CBRE), it must be identified with CBRE for the purposes of its proceedings against the other alleged concurrent wrongdoer (the McDonaghs) and so cannot claim from the McDonaghs the difference between the settlement sum (€5 million) it agreed with CBRE and the full amount of the claim (€22 million). For its part, the Bank claims that the provisions in the 1961 Act regarding concurrent wrongdoers have no application to debt collection claims such as this one.

Background to the dispute

4. The dispute between the Bank and the McDonaghs arises on foot of the alleged breach of a Compromise Agreement (the "Compromise Agreement") dated 13th March, 2013 pursuant to which the borrowings of the McDonaghs were to be written off in the sum of approximately €20 million by Ulster Bank. This write-off was in return for the sale of certain properties owned by the McDonaghs, including the Kilpeddar site, which they had

purchased for €22 million in August 2007 with the assistance of borrowings from Ulster Bank.

5. Under the terms of the Compromise Agreement, the Kilpeddar site was to be sold by the McDonaghs by 31st July, 2014 with the proceeds of that sale to be paid to the Bank. Of significance in these proceedings therefore, is the claim by the McDonaghs that the Kilpeddar site was in fact sold by them on the 13th June, 2014, a claim which is heavily disputed by the Bank. The McDonaghs allege that the Kilpeddar site was sold on this date for a sum of €1,501,000 in alleged compliance with the terms of the Compromise Agreement.

6. In broad terms, when account is taken of the value of the properties to be sold and some cash to be paid by the McDonaghs under the terms of the Compromise Agreement, the Bank was agreeing to write off the sum of approximately €25 million in return for its receipt of cash and the proceeds of the sale of certain properties, all of which were valued at the time of the execution of the Compromise Agreement at approximately €5 million. The Compromise Agreement therefore represented a very significant write-off of approximately €20 million by the Bank of the McDonaghs' borrowings. In this regard, the Compromise Agreement contained a term which required the McDonaghs to keep confidential the terms of the Compromise Agreement and so to keep confidential, *inter alia*, the fact that they were getting a €20 million debt write-off from the Bank. This obligation to keep confidential the debt write-off arrangement was contained in Clause 5.1 of the Compromise Agreement which stated that all information in the agreement was to be keep "*strictly confidential*" and was not to be disclosed to any other person absent the "*prior written consent"* of the Bank.

7. The auctioneer initially engaged in July 2013 by the McDonaghs to sell the Kilpeddar site, Mr. Gabriel Dooley ("Mr. Dooley") of Dooley Auctioneers, valued the lands at that time at approximately €900,000 on the basis that they were being valued as agricultural land. In this regard, it is to be noted that while in March 2011 Wicklow County Council had granted planning permission for a data centre to be developed on the Kilpeddar site, that decision to grant planning permission was overturned by An Bord Pleanála. However, in January 2013, as a result of a successful judicial review taken by Ecological Data Centres Limited (a company owned by the first named defendant, Mr. Brian McDonagh) against An Bord Pleanála's decision, the original grant of planning permission for a data centre on the Kilpeddar site was reinstated by the High Court (*Ecological Data Centres Ltd v. An Bord Pleanála* [2013] IEHC 34). This decision was appealed by An Bord Pleanála to the Supreme Court. In a judgment dated 10th December, 2013 the decision of the High Court was upheld by the Supreme Court (*Ecological Data Centres Ltd v. An Bord Pleanála & Ors*. [2013] IESC 61). As a result, at the date of the Compromise Agreement (13th March, 2013), there was planning permission for a data centre to be built on the Kilpeddar site, *albeit* subject to an Appeal to the Supreme Court.

The Key Dispute

8. The key dispute in this case centres around that alleged binding contract for sale of the Kilpeddar site which is a one-page document dated 13th June, 2014. This alleged contract

is headed "*Heads of Agreement to Sell*", with the sub-heading "*Memorandum of Agreement*" (referred to herein as the "Heads of Agreement") and provides for the sale of the Kilpeddar site for €1,501,000. It was entered into by the McDonaghs, as vendors, with a company called Granja Limited ("Granja"), as purchaser.

The Bank's claims

9. Ulster Bank claims, *inter alia*, that the Heads of Agreement is not a legally binding contract to sell the Kilpeddar site and that the McDonaghs breached the Compromise Agreement in a number of respects. In particular, the Bank alleges that Granja is a front for Mr. Brian McDonagh, whereby he attempted to surreptitiously acquire the Kilpeddar site for €1.5 million from the vendors (himself and his two brothers). This, the Bank claims, was being done notwithstanding that the McDonaghs had bought the site for €22 million with borrowings from the Bank several years earlier, and notwithstanding that a sum of approximately €20 million was being written off by the Bank under the terms of the Compromise Agreement.

10. The Bank feels particularly aggrieved by what it claims occurred, since it claims that Mr. Brian McDonagh did not disclose that he had €1.5 million in cash to allegedly fund the Granja purchase of the site, which the Bank would have obviously considered very relevant in deciding whether, and to what extent, to write-off the McDonaghs' debts under the Compromise Agreement. Not only does the Bank claim that Mr. Brian McDonagh did not disclose these funds but it says that he then used this money to attempt to secretly acquire, through the medium of Granja, the Kilpeddar site, which the Bank was trying to sell to seek to reduce its losses on its €22 million to fund the purchase of that site by the McDonaghs.

11. For this reason, the Bank seeks to rely on the alleged breaches of the Compromise Agreement by the McDonaghs, including Mr. Brian McDonagh's alleged failure to disclose to the Bank this €1.5 million in cash, to seek judgment for the entire amount outstanding of the loans extended under the facility letter relating to the Kilpeddar site, without the McDonaghs receiving the benefit of the debt write-off.

12. The Bank relies on Clause 4 of the Compromise Agreement which, the Bank claims, provides that the loans, being written off under the Compromise Agreement, remain due and owing in the event of a breach of that Agreement. On this basis, the Bank claims that it is at liberty to take action against the McDonaghs in the event of there being a breach of the Compromise Agreement, which they allege occurred in this case. Accordingly, the Bank claims that the write-off of the McDonaghs' significant borrowings no longer applies and so a sum of approximately €22 million is now due and owing to the Bank.

The McDonaghs' claims

13. For their part, the McDonaghs claim that the Compromise Agreement was not breached by them, but that it was instead breached by Ulster Bank. They also claim that the Heads of Agreement constitute a legally binding contract for the sale of the Kilpeddar site by the deadline of 31st July, 2014 and thus that they complied with the terms of the

Compromise Agreement. They also claim that the Compromise Agreement is in full force and effect and therefore that they are entitled to the write-off of their debt to the Bank.

14. The key issues in dispute between the parties centre around the claim of the McDonaghs that the Heads of Agreement constitute a binding contract for the sale of the Kilpeddar site, the claim that the McDonaghs informed Ulster Bank that the Kilpeddar site was subject to that contract for sale and the claim that the McDonaghs did not breach the Compromise Agreement.

Importance of the credibility of witnesses to this dispute

15. Significant differences arise between the evidence of the Bank and the evidence of the McDonaghs in relation to what was stated at certain meetings and indeed the validity and existence of certain documents. In particular, there is evidence relating to whether certain documents to which Mr. Brian McDonagh was a party were forged and whether a letter sent by Mr. Brian McDonagh was a fake letter (in the sense of whether it was retrospectively created and put on his file). In this regard, Mr. Maurice McDonagh and Mr. Kenneth McDonagh expressly rely on these documents not being forged (at para. 18 of their Defence) and not being fake (see para. 40 of Mr. Maurice McDonagh's witness statement and para. 2 of Mr. Kenneth McDonagh's witness statement).

16. For this reason, a key issue in this trial is the credibility of the evidence of the McDonaghs and their witnesses on the one hand, and the evidence on behalf of the Bank on the other hand.

17. In considering the credibility of the evidence given on behalf of the parties, it is relevant to note that the case was initially listed to be heard for 12 days in the Commercial Court. However, it ran for five weeks (20 days) and it is this Court's view that part of this over-run was due to the evasive and obstructive nature of the evidence given on behalf of the McDonaghs (which is referenced in detail below).

Summary of the Court's findings

18. For the reasons set out below, this Court has concluded that much of the evidence provided in support of the McDonaghs' claims was inconsistent and unreliable. In particular, this Court found that Mr. Brian McDonagh was party to two forged Declarations of Trust and he put a 'fake' letter on his file. In addition, this Court concluded that Mr. Brian McDonagh gave incorrect sworn evidence, which he must have known was false. (Although it was not relevant to this Court's conclusions, it is worth noting that this is not the first time that Mr. Brian McDonagh's credibility has been called into question in the courts – as noted below, he was found to have misled the High Court on two separate occasions (McDermott J. and Keane J.) by his failure to disclose relevant evidence and the English High Court has found him to be an unreliable witness (Morgan J.)).

19. The forged Declarations of Trust, the fake letter and the false sworn evidence are factors, along with the other objective documentary evidence, in this Court's various conclusions, including that the Heads of Agreement are not a binding contract, that there was no sale of the Kilpeddar site and that the McDonaghs breached the Compromise Agreement. This

Court therefore concludes that the Bank is entitled to judgment, subject to what is stated below regarding the application of the 1961 Act.

GENERAL BACKGROUND

20. As general background to these proceedings, it is relevant to note that the driving force behind the plan to develop a data centre on the Kilpeddar site was Mr. Brian McDonagh, who lives in Delgany, Co. Wicklow. He is a qualified engineer, although he is self-described in his witness statement as a "*businessman*" with, what his brother, the second-named defendant Mr. Kenneth McDonagh, described as, a "*passion*" for data centres. Mr. Kenneth McDonagh also accepted that Mr. Brian McDonagh was "*obsessed*" with building a data centre. At the time the McDonaghs entered the Compromise Agreement, there was a grant of planning permission for a data centre on the Kilpeddar site. As previously noted, the three McDonagh brothers bought that site for €22 million in August 2007 with borrowings from Ulster Bank with a view to developing a data centre on the site.

21. The within dispute arose between the parties in the period between 13th March, 2013 (the date of the Compromise Agreement) and early October 2014 when Ulster Bank appointed the second and third named plaintiffs, Mr. Paul McCann and Mr. Patrick Dillon, as receivers over the Kilpeddar site (the "Receivers"). At the time of the execution of the Compromise Agreement, Mr. Kenneth McDonagh does not appear to have been as actively involved, as his two brothers, in property investment, since he gave evidence that he had three properties (inclusive of the Kilpeddar site) at that time. In contrast, Mr. Brian McDonagh had approximately 12 investment properties while the third named defendant Mr. Maurice McDonagh had approximately 26 investment properties at the time.

22. It is relevant to note that in these proceedings, Mr. Brian McDonagh is a litigant in person while Mr. Kenneth McDonagh and Mr. Maurice McDonagh are legally represented by the same legal team. However, it is clear from the pleadings of Mr. Kenneth McDonagh and Mr. Maurice McDonagh on the one hand, and the pleadings of Mr. Brian McDonagh on the other hand, that their respective positions in these proceedings are essentially the same, with only one exception. This exception is that Mr. Brian McDonagh has presented an alternative defence (to the claim that the McDonaghs complied with the Compromise Agreement) in these proceedings in his Supplemental Defence (i.e. that it was impossible to comply with the Compromise Agreement), *albeit* that, as noted hereunder, this alternative defence was not pursued with any degree of conviction as no expert evidence was provided to support it.

Mr. Brian McDonagh's obsession with data centres

23. Mr. Brian McDonagh's obsession with data centres extends to challenging the building of data centres in other parts of Ireland. Although he lives nowhere near Athenry, County Galway, in 2016 he challenged in the High Court the decision of An Bord Pleanála to grant planning permission to Apple Distribution Limited for a data centre in that town (the "*Apple* case"). This was a case which received a lot of publicity because of the possibility

of large scale employment arising from the opening of such a centre in Athenry. As it turned out, no data centre was opened in Athenry by Apple.

He fails to disclose evidence to High Court regarding Athenry data centre

24. In his judgment (*Brian McDonagh v. An Bord Pleanála* [2017] IEHC 586) relating to the judicial review brought by Mr. Brian McDonagh against An Bord Pleánala in the *Apple* case, McDermott J. found that Mr. Brian McDonagh had hidden relevant facts from the Court. At paras. 16 and 18 of that judgment it is stated that:

> "*The applicant did not disclose* in his grounding affidavit that he was the company secretary, director and shareholder of a limited liability company called Ecologic Datacentre Ltd. the registered address of which is the address which he furnished as his own in respect of these proceedings. Until November 2010 Ecologic Data Centre Ltd. was known as Ecolo Datacentre Ltd. Under that name it *was the beneficiary of a grant of planning permission from Wicklow County Council for the construction of a datacentre on [the Kilpeddar site] in Planning Ref: No. 10/2123.*
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> […]
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> It is clear from the evidence before the court and the exhibits contained in the affidavits of Mr. Griffin [the associate director of the company responsible for lodging the planning application for the datacentre on behalf of Apple] that Folios 36738F and 21790F set out the ownership of lands the subject matter of that planning permission [the Kilpeddar lands]. They indicate that the lands are in the ownership of Mr. Brian McDonagh, Mr. Maurice McDonagh and Mr. Kenneth McDonagh as sole owners as tenants in common of the lands. Mr. Griffin was advised by the applicant that the lands had been sold to a Malaysian property developer but this transfer was not at the time of the swearing of the affidavit reflected in the land registry folios. *I am satisfied that Mr. [Brian] McDonagh's position as owner of the lands, company secretary and advisor to the promoters of the datacentre were material facts which should have been disclosed to the High Court in the leave application*.
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> *Mr. Griffin avers that since early 2015 Mr. McDonagh sought to market his lands with benefit of planning permission to Apple to meet its datacentre requirements*. A number of emails were exhibited concerning this matter." [Emphasis added]

25. In light of what the Court now knows about Mr. Brian McDonagh's obsession with data centres, *per* his own brother Mr. Kenneth McDonagh, it is relevant to note that what he failed to disclose to McDermott J. was the issue which must have been very much at the forefront of his mind in taking the judicial review against An Bord Pleanála's grant of planning permission to Apple, namely the fact that he owned (or was selling to Granja, a company owned by his brother in law, on his version of events) a site in Kilpeddar with planning permission for a data centre.

26. For this reason, it is astonishing that Mr. Brian McDonagh thought that he could come into the High Court seeking leave on an *ex parte* basis to judicially review/quash the grant of planning permission for a data centre in Athenry, which was nowhere near where he lived and was a matter of huge significance for the town of Athenry, without being upfront with the Court. This is especially so given that an application for judicial review must be made in the utmost good faith and with full disclosure of all material facts. It is telling that when the *Apple* decision was opened to this Court in these proceedings, Mr. Brian McDonagh made no attempt to provide any reason or excuse for this blatant and significant non-disclosure to the High Court.

Mr. Brian McDonagh challenges planning permission for Arklow data centre

27. Mr. Brian McDonagh also sought to prevent the grant of planning permission for a data centre in Arklow, Co. Wicklow. An Bord Pleanála refused his appeal and the grant of planning permission for that data centre in Arklow was duly upheld. Mr. Brian McDonagh stated that his decision to appeal the grant of planning permission was based on his belief that "*there was only enough electricity in Wicklow to do either one or the other*", i.e. to build either the Arklow data centre or the Kilpeddar data centre. However, as noted by Mr. Brian McDonagh himself, his appeal of the planning permission for the Arklow data centre, was well after the Receivers were appointed and so well after June 2014 when he claims to have sold the Kilpeddar site to Granja (which company he denies is connected to him). As noted hereunder, it is curious, to say the least, that Mr. Brian McDonagh would have any interest in the electricity supply for a site that he now claims had already been sold to an unconnected third party.

Mr. Brian McDonagh as a litigant in related proceedings to the Heads of Agreement

28. While the foregoing proceedings challenging the building of data centres involved Mr. Brian McDonagh alone, he and his brothers, Mr. Kenneth McDonagh and Mr. Maurice McDonagh, were the subject of separate High Court proceedings (record no. 2014/10190P). This occurred when they were sued for specific performance as alleged vendors of the Kilpeddar site, by the alleged purchaser, Granja. Ulster Bank and the Receivers were also named defendants in those proceedings. However, it is relevant to note that Granja discontinued those proceedings against Ulster Bank and the Receivers, proceedings in which Granja was alleging that the Heads of Agreement were a legally binding contract for the sale of the Kilpeddar site. In addition, it is relevant to note that those same proceedings by Granja against the McDonaghs, as alleged vendors of the site, were struck out on consent between those parties. Nonetheless in this case, the McDonaghs, as the alleged vendors of the Kilpeddar site, are claiming that the Heads of Agreement are a binding contract for sale.

Mr. Brian McDonagh litigating against Ulster Bank's parent regarding other loans

29. In his own right, Mr. Brian McDonagh also brought proceedings in the High Court in England against the parent company of Ulster Bank, Bank of Scotland plc. (*Brian McDonagh v. Bank of Scotland plc & Ors.* [2018] EWHC 3262 (Ch)). In these proceedings, he made allegations of wrongdoing against the Bank, both in contract and in tort. Specifically, he alleged that the Bank had breached the terms of loan agreements entered into by him in 2007 and 2010, which loans had been advanced in relation to the purchase

of a property in Liverpool, known as 'Sony House'. He also alleged that he had entered one of these loan agreements as a result of intimidation and economic duress placed on him by the Bank.

Mr. Brian McDonagh gives unreliable evidence to English High Court (Morgan J.)

30. In a detailed and lengthy judgment, Morgan J. rejected Mr. Brian McDonagh's claims against the Bank and described his evidence in the following terms:

> "His evidence as to what had occurred and as to his state of mind was significantly at variance from the contemporaneous documents. Where his evidence differs from the facts as revealed by the contemporaneous documents I am satisfied that those documents are reliable and Mr McDonagh's evidence is not reliable. It is clear to me that Mr McDonagh has reconstructed the events which occurred to produce an account which he considered would be more helpful to his case as compared with the actual events."

Mr. Brian McDonagh's interim injunction in these proceedings before Keane J.

31. In addition, Mr. Brian McDonagh sought an interim injunction on an *ex parte* basis at a very early stage in this dispute, namely on the 1st October, 2014, which was a few months after the Heads of Agreement/'contract' had been allegedly signed and on exactly the same day as the Receivers were appointed by Ulster Bank over the Kilpeddar site arising from the alleged breach of the Compromise Agreement.

Mr. Brian McDonagh fails to disclose evidence to High Court again

32. In those injunction proceedings (*Brian McDonagh v. Ulster Bank Ireland Limited* [2014] IEHC 476), Keane J. found that Mr. Brian McDonagh had failed to disclose certain relevant facts in making his application and Keane J. stated that he was:

> "quite satisfied that [the non-disclosure of relevant facts] involved a culpable failure on the part of [Mr. Brian McDonagh]." [Emphasis added]

The non-disclosure in this instance was almost as significant as the one in the *Apple* case, since Mr. Brian McDonagh failed to disclose that the company (Granja) which had allegedly contracted to buy the Kilpeddar site under the Heads of Agreement, was closely connected to him. This connection being that one of its directors, Mr. Tian Su Ooi ("Mr. Ooi"), was in fact the brother of Mr. Brian McDonagh's wife/girlfriend, Ms. Yeoksee Ooi. The non-disclosure of this fact clearly was regarded as misleading by Keane J., since he described its omission (in concert with several other undisclosed facts) in the following terms at para. 30 of his judgment:

> "[I]t is difficult to conceive that those facts would not have affected the mind of the court."

Mr. Brian McDonagh's conduct was consistent with that of a shadow director

33. In addition, when Granja was being wound up in 2019, one of Granja's directors at that time was Mr. Brian McDonagh's wife, Ms. Yeoksee Ooi. This led to a claim that Mr. Brian McDonagh was acting as a shadow director of that company, so as to justify the appointment of an independent liquidator in place of a liquidator, who had previously

acted in the liquidation of one of Mr. Brian McDonagh's companies and who had been asked by Mr. Brian McDonagh to act as the liquidator of Granja. In his decision on this application by Ulster Bank and the Receivers, Haughton J. commented as follows in an *ex tempore* judgment delivered on 31st July, 2019 regarding Mr. Brian McDonagh's conduct:

> "[H]is conduct suggests a conduct consistent with the suggestion by Ulster Bank and their counsel that Mr. McDonagh is, in reality, a shadow director [of Granja Limited]."

In that same judgment, Haughton J. commented further that:

> "[I]n the case of Mr Brian McDonagh he is a person whose claimed indebtedness would be very much under investigation.
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> […]
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> There is also a substantial issue that will have to be addressed by the liquidator in this case, and that is the question of whether Brian McDonagh is a shadow director [of Granja]. […] It seems to me that that is a particularly compelling point." [Emphasis added]

On this basis, Haughton J. acceded to Ulster Bank's application for a court appointed liquidator to be appointed in the liquidation of Granja.

34. It is clear therefore that Mr. Brian McDonagh's reliability as a witness and his candour has been called into question by the courts on more than one occasion. When he was questioned before this Court as to why courts have passed negative comments about him and why they have had difficulty accepting his word, Mr. Brian McDonagh did not answer the question but gave, what this Court regarded as a baseless justification. He claimed that it was difficult in Ireland to take a case against a Bank. He then proceeded to give an equally baseless justification for the comments made by Morgan J. in the High Court of England and Wales which appeared to be to the effect that in England, the Banks represented the "*crown*", which is the "*establishment*", and that it is the "*crown*" which pays the barristers' and solicitors' fees. However, when pressed, Mr. Brian McDonagh could provide no justification for why this would impact on the ability of the High Court in England to hear and decide his case in a fair and impartial manner.

Previous judgments are not determinative of credibility in this dispute

35. The judgments and transcripts from the foregoing cases (in which Mr. Brian McDonagh and to a lesser extent his brothers have been involved) were opened to this Court in this case. While they do give some background to this current dispute and provide evidence of the lengths to which Mr. Brian McDonagh will go to pursue his obsession with data centres, it is important to note that these cases, and in particular the previous actions of Mr. Brian McDonagh in challenging other data centres and the various judicial pronouncements relating to the credibility of Mr. Brian McDonagh, are not determinative of the credibility issues before this Court.

36. The credibility of the McDonaghs must be determined by evidence produced before this Court. This evidence is considered at a later point in this judgment. Before that evidence is considered, some specific background will be given regarding the dispute between the parties.

SPECIFIC BACKGROUND

37. The McDonaghs entered a Facility Letter ("Facility Letter") dated 5th January, 2009 whereby they restructured a loan of €21,855,000 from Ulster Bank which they had taken out for the purposes of the acquisition of the Kilpeddar site on the 3rd August, 2007. A mortgage over the site dated 3rd August, 2007 (the "Mortgage") was entered into by the McDonaghs in favour of Ulster Bank as security for these borrowings. Due, *inter alia*, to the property crash in Ireland and the delays in obtaining planning permission for the Kilpeddar site, the McDonaghs failed to comply with their repayment obligations under the Facility Letter. This led to negotiations between the parties and eventually led to the Compromise Agreement dated 13th March, 2013. Clause 4 of that Agreement (in which the Borrowers are the McDonaghs) states:

> "Covenants by the Bank
>
> In consideration of, but subject always to, the due and continued absolute performance by the Borrowers of the covenants on their part and conditions herein contained:
>
> the Bank agrees that this Agreement is and will when fully implemented be in full and final settlement of the Accounts as between the Bank and the Borrowers.
>
> the Bank agrees not to institute proceedings against the Borrowers in respect of the Debt;
>
> *PROVIDED ALWAYS that in the event of a failure by or on behalf of the Borrowers to comply with the terms of the Agreement* or in the event of a breach of any of the covenants herein contained or, in the event that the Properties have not been disposed of by the Long Stop Date, *the Bank shall be at liberty, without notice to the Borrowers, to take whatever steps it shall, in its absolute discretion, deem fit on foot of the Finance Documents, at law or otherwise."* [Emphasis added]

This is a key clause in this dispute, since it clearly provides that if the McDonaghs fail to comply with the terms of the Compromise Agreement, Ulster Bank is entitled to enforce the Finance Documents, which include the Facility Letter and the Mortgage. As previously noted, the Compromise Agreement provided for the sale of, *inter alia*, the Kilpeddar site by the 31st of July, 2014.

38. In alleged compliance with the terms of the Compromise Agreement, the Heads of Agreement for the sale of the Kilpeddar site were allegedly executed by the McDonaghs and Granja on the 13th June, 2014. The execution of the Heads of Agreement is alleged to have taken place at the offices of Mr. Dooley in Delgany, Co. Wicklow, after a best bids process took place in those offices on that date. Since Ulster Bank claims that the

McDonaghs breached the Compromise Agreement, the Bank further claims that the write-off of the debt of approximately €20 million contemplated by the terms of the Compromise Agreement does not apply. Instead it claims that, pursuant to Clause 4 of the Compromise Agreement, the Bank was entitled to enforce its security rights over the Kilpeddar site, which it purported to do when the Receivers were appointed by Ulster Bank over the Kilpeddar site on the 1st October, 2014.

39. The day after the Receivers were appointed over the Kilpeddar site, on the 2nd October, 2014, Ulster Bank was notified (which, it says, was for the first time) of the existence of an alleged binding contract for the sale of the Kilpeddar site, i.e. the Heads of Agreement, which had allegedly been signed on the 13th June, 2014. This notification came in the form of an email from Ms. Avril Gallagher ("Ms. Gallagher"), the solicitor for Mr. Kenneth McDonagh and Mr. Maurice McDonagh. Ms. Gallagher was the solicitor for all three McDonagh brothers at the time of the alleged execution of the Heads of Agreement on the 13th June, 2014 but she ceased to act for Mr. Brian McDonagh shortly thereafter, so that by 2nd October, 2014, she was acting only for Mr. Kenneth McDonagh and Mr. Maurice McDonagh.

40. On the 1st October, 2014 Mr. Brian McDonagh made an *ex parte* application seeking an interim injunction to, *inter alia*, prevent the Bank from taking any steps to enforce the Compromise Agreement pending the application for an interlocutory injunction.

41. On the 3rd December, 2014, the alleged purchaser of the Kilpeddar site under the Heads of Agreement, Granja, issued specific performance proceedings (the "Granja Proceedings") against Ulster Bank, the Receivers and the McDonaghs seeking to enforce the Heads of Agreement. As previously noted, Granja is no longer claiming that the Heads of Agreement is a binding contract as it has discontinued these proceedings.

42. On the basis that the write-off of approximately €20 million no longer applied, as a result of the alleged breach of the Compromise Agreement, Ulster Bank issued letters of demand on 8th June, 2018 to each of the McDonaghs setting out the requirement for them to repay the then outstanding sum, of approximately €22 million, under the Facility Letter, which demands have not been met. On the 2nd July, 2018 the within proceedings were issued by Ulster Bank in which it seeks judgment for the outstanding sum under the Facility Letter of €22,090,302.64.

43. There is a considerable amount of other factual evidence relevant to the proceedings, but this can be more efficiently dealt with as part of the consideration of the key issues for determination in this case.

KEY ISSUES TO BE DETERMINED BY THE COURT

44. A central feature in this case is the volume of conflicting claims between the parties. These conflicting claims relate not only to what was said at various meetings but also relate to the validity and existence of certain documents. The credibility of the parties therefore plays an important role in determining which version of events is correct and therefore in deciding the factual issues in dispute between the parties.

45. In particular, there is a serious allegation by Ulster Bank that Mr. Brian McDonagh was party to two forged Declarations of Trust. The solicitor, whose signature is alleged to have been forged on both documents, is now deceased and so he cannot provide evidence regarding his signature.

46. There is also an allegation (implicit, if not explicit) by the Bank that Mr. Brian McDonagh retrospectively created on his file a letter dated 16th June, 2014 which is addressed to Ulster Bank. The letter refers to a 'contract' for the sale of the site and thus supports the McDonaghs' claim that the Heads of Agreement are a binding contract. However, Mr. J.P. Moore ("Mr. Moore"), who was a director in Ulster Bank until August 2015, put the matter bluntly in his evidence to this Court, when he stated that "*there is no letter*". Thus, the Bank seem to be claiming that the letter was never sent by Mr. Brian McDonagh to Ulster Bank and that it was fabricated and put on Mr. Brian McDonagh's file by Mr. Brian McDonagh in order to support the McDonaghs' claim that the Heads of Agreement are a binding contract for sale.

47. For these reasons, the credibility of Mr. Brian McDonagh (as well as that of Mr. Maurice McDonagh and Mr. Kenneth McDonagh) is a significant factor in this Court's determination of the factual issues in dispute. This is particularly so because both Mr. Maurice McDonagh and Mr. Kenneth McDonagh suggested in their evidence that they support the evidence of Mr. Brian McDonagh on the basis, *inter alia*, that blood is thicker than water. In particular, Mr. Maurice McDonagh confirmed in his evidence that the brothers had adopted "*an absolutely uniform approach*" to the proceedings. The fact that Mr. Maurice McDonagh and Mr. Kenneth McDonagh on the one hand and Mr. Brian McDonagh on the other hand clearly co-ordinated their approach in this litigation was also evidenced by the fact that Mr. Maurice McDonagh had signed the cheque for the viaticums for the attendance of witnesses subpoenaed by Mr. Brian McDonagh in these proceedings.

48. In this regard, it is to be noted that the only significant occasion when any of the three McDonaghs diverged in their approach to the case, was towards the end of the trial when Mr. Kenneth McDonagh admitted that, having heard all the evidence, he now believed for the first time, and contrary to Mr. Brian McDonagh's claims, that the funds to purchase the Kilpeddar site did in fact belong to Mr. Brian McDonagh.

49. Mr. Kenneth McDonagh also admitted in evidence that he did not know why Mr. Brian McDonagh set up (or to use his term, "*concocted*") Granja to purchase the Kilpeddar site, since in Mr. Kenneth McDonagh's view there was no explicit requirement under the Compromise Agreement that the sale by the McDonaghs of the site be to an arm's length purchaser. For this reason, Mr. Kenneth McDonagh believed that there was nothing in the Compromise Agreement to stop the sale of the Kilpeddar site to Mr. Brian McDonagh or a company owned by Mr. Brian McDonagh.

50. Of course, what there was in the Compromise Agreement was an explicit requirement under Clause 3.1 of that Agreement on the part of the McDonaghs to disclose to the Bank all their assets and cash in a Statement of Affairs (which was scheduled to the

Compromise Agreement), in return for the write-off of the debt owed by them to the Bank.

51. For this reason, it appears that it was not the fact that Granja was an alleged front for Mr. Brian McDonagh, which was the egregious breach of the Compromise Agreement from the Bank's perspective. Rather it was the fact that the €1.5 million funds (allegedly belonging to Mr. Brian McDonagh) for the purchase of the Kilpeddar site were not disclosed to the Bank by Mr. Brian McDonagh (in his Statement of Affairs).

52. As the credibility of the various parties and witnesses is crucial to the outcome of this case, this must be considered carefully by this Court in reaching its decision. Of necessity, this consideration is rather detailed and during the course of this aspect of the judgment, various findings of fact are made which are of relevance to the outcome of the case. In particular, findings are made regarding the veracity of allegedly forged Declarations of Trust which support the claims of the McDonaghs and regarding the Bank's claim that Granja was a front for Mr. Brian McDonagh.

A. MR. BRIAN MCDONAGH'S CREDIBILITY

53. The Court found Mr. Brian McDonagh to be an articulate but a very difficult and obstructive witness. This obstruction was most evident when Mr. Brian McDonagh sought to avoid answering questions during his cross-examination. He did this at times by replying to questions from counsel, with his own questions of counsel (even though he was repeatedly asked to refrain from so doing). He also sought to avoid answering questions by claiming that they were "*trick*" questions or that counsel was seeking to "*trip*" him up or "*trap*" him or "*catch*" him out, when this was not the case.

54. The Court also found Mr. Brian McDonagh to be a very evasive witness. He went to enormous lengths to avoid making any concessions which might in any way weaken his case, even when those concessions were blindingly obvious.

Mr. Brian McDonagh secretly recording conversations

55. In addition, Mr. Brian McDonagh was someone who appeared to this Court to be so obsessed with the possibility of developing and opening a data centre in Kilpeddar, that he would go to any lengths to seek to recover the Kilpeddar site from Ulster Bank, including acting in a manner that many might regard as underhand. For example, at the height of the dispute with the Bank in June of 2014, he surreptitiously recorded a number of conversations with Mr. Moore of Ulster Bank, something which Mr. Moore was understandably "*deeply unhappy*" to discover had occurred.

56. Mr. Brian McDonagh openly conceded in Court that he had secretly recorded Mr. Moore at a meeting on the 5th June, 2014 and also on two telephone conversations on the 3rd and 9th June, 2014.

57. More generally, this Court observed that, in order to avoid making any concessions which might weaken his case, Mr. Brian McDonagh came up with bizarre theories and justifications for various acts and omissions. It is not proposed to go through every

example of Mr. Brian McDonagh's evasive and bizarre evidence, as there were so many, but a few examples will suffice.

Examples of Mr. Brian McDonagh's evasive and bizarre evidence

58. The obstructive nature of Mr. Brian McDonagh's evidence is clear from his failure to accept the simplest of propositions which were set out to him by counsel for the Bank, sometimes in black and white.

59. For example, firstly, under the express terms of the Compromise Agreement it is clearly stated that the Kilpeddar site must be sold by the 31st July, 2014. Despite this fact, for a period of several minutes under cross examination, Mr. Brian McDonagh sought to deny this proposition, initially by stating that he was unable to read copies of documents put before him, that appeared easy to this Court to read and despite having pleaded these documents in his defence.

60. Secondly, although he is a person with considerable experience as a property investor, having held about 12 investment properties, he refused to accept the most basic of propositions if they might weaken his case. One such example is the occasion on which he, an experienced business man and property investor, refused to accept that an experienced conveyancing solicitor, such as Ms. Gallagher, would know the difference between an 'offer' and a 'contract'.

61. Thirdly, Mr. Brian McDonagh was asked to explain how Granja became aware of the terms of the Compromise Agreement in light of the McDonaghs' covenant to keep it confidential pursuant to Clause 5.1 of the Agreement. In an example of the type of bizarre answers he came up with to avoid making any concessions regarding his alleged breach of the Agreement, he suggested that the disclosure of the details in the Compromise Agreement could have been made by one of his three children, then aged between 8 and 11 years of age. In essence, he was suggesting that these children could have told Mr. Ooi or Mr. Gerard Fehilly ("Mr. Fehilly"), the directors of Granja at that time, of the contents of the Compromise Agreement. This was just one, but perhaps the most outlandish of the answers he gave to avoid making concessions which might weaken his case. Moreover, when given the opportunity to resile from this bizarre claim, Mr. Brian McDonagh made no attempt to provide clarification but rather repeated his contention that his children may have revealed the terms of the Agreement to the directors of Granja.

Contacting An Post for a copy of the envelope for the letter of 16th June, 2014

62. Fourthly, he was asked about the disputed letter dated 16th June, 2014, which he allegedly posted to Ulster Bank, and which, as previously noted, the Bank claim was never sent to the Bank but implies was retrospectively placed on Mr. Brian McDonagh's file to support his claim that the Heads of Agreement/'contract' was executed on 13th June, 2014.

Background to the letter of 16th June 2014

63. The background to this important letter is that there was evidence of numerous pieces of correspondence having been sent to, and received by, Ulster Bank in the three and a half

month period after the Heads of Agreement were allegedly signed on the 13th June, 2014.

64. Despite the fact that this allegedly binding contract for sale was claimed to have been signed on the 13th June, 2014, it is curious, to say the least, that all of this correspondence, sent by or on behalf of the McDonaghs, during this three and a half month period after the 13th June, 2014, makes no reference to a 'contract' having been concluded. On the contrary, this correspondence over a three and a half month period advises the Bank of an 'offer' having being received and makes reference to this 'offer' not being acceptable to the Bank and also references the possibility of a future sale of the site.

65. In all of this correspondence, there is no evidence of Ulster Bank ever having been notified of the existence of the Heads of Agreement dated 13th June, 2014, the alleged 'contract' for the sale of the site. Indeed there is no evidence of the Bank ever having been informed of any document relating to the alleged sale of the Kilpeddar site during this period.

66. In addition, during this three and a half month period there are no notes or evidence of conversations in which the Bank is alleged to have been notified of the alleged contract/Heads of Agreement. (There is of course the meeting of the 16th June, 2014, to which reference will be made below, between Mr. Kenneth and Mr. Maurice McDonagh and Mr. Moore of Ulster Bank. However, Mr. Moore denies that the two McDonaghs notified him of a binding contract for sale at this meeting).

67. Accordingly, the first independently recorded reference (in this context, a record of an email having been sent and received) to even the existence of the Heads of Agreement (let alone that the document constitutes a binding 'contract') by any of the parties to this dispute, is an email to Ms. Gallagher from Dooley Auctioneers on the 1st October, 2014 which is three and a half months after the alleged execution of the Heads of Agreement (and is by coincidence also the very day that Receivers are appointed over the Kilpeddar site).

68. For this reason, in this litigation, it is significant that that there *might* have been, all along, during this three and a half month period from 13th June, 2014 to 1st October, 2014, a letter which was sent to the Bank by Mr. Brian McDonagh on the 16th June, 2014, just days after the alleged execution of the Heads of Agreement, notifying the Bank not only of the existence of the Heads of Agreement, but also that they constituted a 'contract' (and not simply an 'offer').

69. Such a letter, if sent by Mr. Brian McDonagh and received by Ulster Bank would be significant, since it supports the McDonaghs' claim that there was not merely an 'offer', but rather a 'contract', for the Kilpeddar site. This in turn would support the McDonaghs' claim that they complied with the Compromise Agreement by selling the Kilpeddar site before the deadline of 31st July, 2014.

70. This letter, allegedly sent by Mr. Brian McDonagh to Mr. Moore of Ulster Bank, is dated 16th June, 2014 and it states, insofar as relevant:

> "Dear JP,
>
> This is just a quick note to confirm that we have finally concluded the sale of our lands at Kilpeddar last Friday. Dooley Auctioneers completed the best bids process and achieved a price of €1,501,000-00.
>
> […]
>
> For your files, I attach a copy of the contract signed by all three vendors and counter signed by the purchaser."

71. It was put to Mr. Brian McDonagh that if this was a genuine letter, i.e. if he had posted this letter at the time as he claimed, he would have sent it by recorded delivery or by email, rather than simply by ordinary post. In reply, he claimed that he had genuinely posted it to Ulster Bank. He suggested, as evidence of the *bona fides* of his claim that the letter had been posted, that he had contacted An Post to see if they had a copy of the handwritten envelope but that he had not been successful. The implication was that Mr. Brian McDonagh appeared to believe that his contacting An Post in this manner supported his claim that he posted the letter:

> BRIAN MCDONAGH: "[…] if you are trying to say that the letter wasn't sent on the 16th June because it wasn't emailed, it's incorrect. I have been on to An Post to find out whether I can have a copy of that because I would have handwritten the envelope."

Thus, Mr. Brian McDonagh appears to be suggesting that it might be the practice of An Post to retain copies of envelopes which pass through its system. This was a bizarre suggestion for an experienced business man to make and simply served to demonstrate the absurd lengths to which Mr. Brian McDonagh was willing to go in order to advance his case.

Mr. Brian McDonagh as a party to a forged document?

72. Apart from these examples of his evasiveness as a witness, it is also the case that Mr. Brian McDonagh's credibility as a witness was called into question as a result of his being party to an alleged forgery.

Background: who owns the money to fund Granja's proposed purchase of the site?

73. The background to this part of the proceedings is that the funds for the alleged purchase by Granja of the Kilpeddar site were sourced from two English incorporated companies Balcora Holdings Limited ("Balcora") and Cleverpeople Limited ("Cleverpeople").

74. Mr. Brian McDonagh accepted that he was a director of both companies and that he was also the sole shareholder of Balcora, the parent company of Cleverpeople. Accordingly, he was effectively the legal owner of both companies' assets, *albeit* indirectly through his shareholding in Balcora and Balcora's shareholding in Cleverpeople. He did not dispute UK

Companies Office records showing that he ceased to be a director of Balcora on the 22nd February, 2013, just prior to his execution of the Compromise Agreement.

75. Mr. Brian McDonagh also accepted that he transferred his entire shareholding in Balcora to his secretary, Ms. Sarah Byrne ("Ms. Byrne") on the 22nd February, 2013, just three weeks prior to the date of the Compromise Agreement. He willingly admitted that this transfer was done "*in preparation for the Statement of Affairs*" that was to be prepared in advance of the Compromise Agreement. He explained that he transferred the shareholding to Ms. Byrne as she was someone who could be trusted to do what she was told with the shareholding.

76. However, Mr. Brian McDonagh claims that while he was the legal owner of the entire shareholding in Balcora at the time of this transfer, he held that shareholding on trust for his brother in law, Mr. Ooi, a Malaysian obstetrician. Mr. Ooi has no apparent connection with data centres or indeed any connection with property investment in Ireland, and his only connection with Ireland appears to be the fact that his sister, Ms. Yeoksee Ooi, is married to Mr. Brian McDonagh. Even more peculiar, given his alleged involvement in the case (as the alleged owner of Granja, the alleged purchaser of the Kilpeddar site), is the fact that evidence was provided that no email (or indeed any correspondence) had ever been sent by Mr. Ooi relevant to these proceedings and furthermore, it appears that no attempt at all was made to contact Mr. Ooi in relation to his giving evidence in this case.

Funds into Granja's account

77. Evidence was provided to this Court that prior to the transfer of the €1.5 million into Granja's client account with Cathal L. Flynn Solicitors of Carrick on Shannon, Co. Leitrim, to fund the purchase of the Kilpeddar site, Balcora (which had been 'legally' (if not beneficially) owned by Mr. Brian McDonagh) had £274,340 in cash.

78. In addition, Mr. Brian McDonagh was listed as a creditor of Cleverpeople on its liquidation in the sum of £915,441. Evidence was provided that this sum was duly paid out by the liquidator of Cleverpeople. Although Mr. Brian McDonagh did not dispute that this sum was paid out by the liquidator, he denied it was paid to him, suggesting instead that it might have been paid to Mr. Ooi, even though Mr. Brian McDonagh was listed in the Companies House documentation as the creditor.

79. At the exchange rate applicable at the time, the combination of these two sterling sums came to just under €1.5 million, which Mr. Brian McDonagh did not dispute was the source of the funds in Granja's client account with Cathal L. Flynn Solicitors for the purchase of the Kilpeddar site. Thus, cash amounting to approximately €1.5 million from Balcora and Cleverpeople was the source of the funds in the Granja client account with Cathal L. Flynn Solicitors, to enable Granja purchase the Kilpeddar site.

80. In this regard, Granja is wholly owned by a trust called Kilpeddar Settlement Trust, whose trustee is Kimeon Trustee Services, which is a trustee service company operated by Mr. Feehily. Mr. Feehily is Mr. Brian McDonagh's accountant. The beneficiaries of this trust are stated to be Mr. Ooi and Mr. Ooi's other sister (i.e. not the sister married to Mr. Brian

McDonagh). Mr. Fehilly was a director of Granja at the time of the execution of the Heads of Agreement, along with Mr. Ooi.

Funds out of Granja's account

81. When the sale of the Kilpeddar site did not proceed, a considerable amount of the €1.5 million, in the client account in the name of Granja in Cathal L. Flynn Solicitors, was used to discharge barristers' and solicitors' fees, incurred, it seems, as part of the litigation engaged in by Granja in relation to the Kilpeddar site.

82. However, some €804,000 of the €1.5 million was paid to Kimeon Accountants (the accountancy firm of Mr. Fehilly, Mr. Brian McDonagh's accountant and a director of Granja), which accountancy firm then paid €608,000 of this amount to Mr. Brian McDonagh.

83. The only explanation which Mr. Brian McDonagh could provide for his receipt of this money, rather than the receipt of this money by the person he alleged was its beneficial owner (Mr. Ooi), was that Mr. Ooi was lending this money to Mr. Brian McDonagh and that this is why he, rather than Mr. Ooi, was in receipt of that amount.

84. However, not alone would this be a considerable amount of money for one individual to lend to another, it is the case that there is no documentation whatsoever to support Mr. Brian McDonagh's claim that this money represented a loan from Mr. Ooi. In particular, there was no document signed by Mr. Ooi, nor was there even an email or text sent by him to support this claim. This explanation for why Mr. Brian McDonagh received back the €1.5 million, after costs, which had been paid to fund Granja's purchase of the Kilpeddar site, amounts therefore to a bald assertion by Mr. Brian McDonagh of a loan from Mr. Ooi, without any corroborating evidence.

85. In this regard, Mr. Brian McDonagh did not deny that the money to fund Granja came from Balcora which had been legally owned by him (just prior to the execution of his Statement of Affairs for the Compromise Agreement) and from Cleverpeople (where he was listed as the creditor of the relevant sum). He also did not deny that he received the net proceeds of those funds (minus litigation and legal costs) from Granja, when the sale did not proceed.

86. Yet no plausible explanation was provided by Mr. Brian McDonagh for the flow of funds from him and to him, and to and from the client account in the name of Granja in Cathal L. Flynn Solicitors, both before and after the alleged 'contract' for sale of the Kilpeddar site.

87. The most that Mr. Brian McDonagh could come up with to deny the logical conclusion from these facts, that the money belonged beneficially to him, was his claim that any money that went, from him or to him, was either money he borrowed from Mr. Ooi (yet there was no loan agreement or other objective evidence to support this contention) or was money he held on trust for Mr. Ooi (yet there was no objective evidence to support this contention, apart from the allegedly forged Declarations of Trust). This is why the

existence of the Declarations of Trust and the allegation that they are forged is of such significance.

Relevance of the allegedly forged Declarations of Trust

88. In light of the foregoing movement of funds into and out of Granja's account, a key issue in this case is the true ownership of monies which funded the proposed purchase by Granja of the Kilpeddar site. Ulster Bank assert that Mr. Brian McDonagh's funds were used to allegedly purchase the Kilpeddar site to build the data centre, through the medium of Granja, a company beneficially owned by his brother in law, Mr. Ooi, pursuant to the terms of the Kilpeddar Settlement Trust.

89. However, to dispute the Bank's claim that he owned the €1.5 million which funded Granja's proposed purchase of the site, Mr. Brian McDonagh produced in evidence two Declarations of Trust, one dating from the year 2000 and one dating from 2007.

90. The first Declaration of Trust is dated 22nd February, 2000 (the "Balcora Trust"). This Trust states that the entire shareholding in Balcora (with its £274,340 in cash), although legally owned by Mr. Brian McDonagh, is actually held on trust by Mr. Brian McDonagh for Mr. Ooi.

91. The second Declaration of Trust is dated 9th April, 2007 (the "Cleverpeople Trust"). This Trust states that monies (amounting to £915,441) owed to Mr. Brian McDonagh by Cleverpeople, although legally owned by Mr. Brian McDonagh, were actually held on trust by Mr. Brian McDonagh for Mr. Ooi.

92. Mr. Brian McDonagh relies on, *inter alia*, these two Trusts, to claim that the €1.5 million, to fund Granja's purported purchase of the Kilpeddar site, was beneficially owned by Mr. Ooi.

93. On this basis, Mr. Brian McDonagh denies that he is the beneficial owner of the cash in these two English companies and thus he denies that Granja is a front for him to acquire the Kilpeddar site, as claimed by Ulster Bank.

94. However, in support of his claim that these were two valid trusts, there was absolutely no evidence presented to the Court that Mr. Ooi settled a trust (with a value of €1.5 million) or that Mr. Ooi regarded Mr. Brian McDonagh as his trustee. The first of these Declarations of Trust was allegedly executed in February 2000, twenty years ago. It is quite a significant claim for Mr. Brian McDonagh to make, that Mr. Ooi, his brother in law, knew him so well twenty years ago that he was happy for Brian McDonagh to act as his trustee. This is especially so in the absence of any evidence on behalf of Mr. Ooi that this was the position in February 2000.

95. In addition, the Declarations of Trust are signed only by Mr. Brian McDonagh and neither one is signed by Mr. Ooi. Furthermore, not one document signed by Mr. Ooi was produced to this Court. Mr. Ooi did not provide a witness statement, nor did he give evidence. His involvement in these court proceedings is a matter of curiosity, since while the Court assumes that he does exist, there was scant evidence of his existence provided to the

Court. Nor was any evidence provided of his alleged beneficial ownership (through Granja) of a data centre in Kilpeddar (apart from the word of Mr. Brian McDonagh).

96. Indeed, there is not one single objective piece of evidence (i.e. other than the Declarations of Trust signed only by Mr. Brian McDonagh, and Mr. Brian McDonagh's testimony) to support the claim that Mr. Ooi was the beneficial owner of the €1.5 million from Balcora and Cleverpeople and thus the alleged beneficial owner of the Kilpeddar site (under the terms of the Heads of Agreement).

97. There was not even an email or text produced to the Court to support Mr. Ooi's alleged entitlement to a beneficial interest in the Kilpeddar site. This is curious to say the least, if Mr. Ooi believes, as implied by Mr. Brian McDonagh, that he, Mr. Ooi, is the owner of the Kilpeddar site. This is particularly so when one considers that the Kilpeddar site is now a very valuable site. It appears to have a market value at the time of this hearing of €8 million, since evidence was provided to the Court that in December 2019, there was a sale agreed at this price.

98. The only support for the proposition that Mr. Ooi is the beneficial owner of the Kilpeddar site (under the alleged 'contract' for its sale) are the two Declarations of Trust signed only by Mr. Brian McDonagh which govern the entitlement to Balcora's cash of £274,340 and the debt of £915,441 on the books of Cleverpeople.

99. While there is no objective evidence connecting Mr. Ooi with Balcora or Cleverpeople or the funds in Granja's account, what evidence there is points to Mr. Brian McDonagh being, not just the legal owner, but also the beneficial owner of the £274,340 and the £915,441. This is the case without even considering the issue of whether the two Declarations of Trust are forgeries.

100. In this regard, reference is made elsewhere in this judgment to some of this evidence, but it includes the fact that "*in preparation*" for his completion of the Statement of Affairs, Mr. Brian McDonagh transferred the entire shareholding in Balcora to his secretary, Ms. Byrne, because he could trust her to do what she was told with the shares. It seems therefore that in order to avoid disclosing to the Bank that he was the owner of the entire shareholding in Balcora, a valuable asset, he transferred the shareholding to his secretary. If this shareholding was merely held by Mr. Brian McDonagh as trustee for Mr. Ooi at this time, as he claims, it is hard to see why Mr. Brian McDonagh would feel that he should transfer out of his name a mere nominee shareholding, prior to the execution of the Statement of Affairs.

101. In addition, in his Replies to Interrogatories sworn on the 18th October, 2019, Mr. Brian McDonagh admitted to offering the assets of Balcora as security for his borrowings. Yet, the use of those assets by him as security suggests that those assets were not just nominally owned by him but were beneficially owned by him.

102. However, perhaps the most important piece of evidence relates to the fact that on the two Declarations of Trust, which Mr. Brian McDonagh asserts are valid trusts, his

signatures are purported to have been witnessed by a solicitor, Mr. Earl Gollogly ("Mr. Gollogly"), who is now deceased and so cannot confirm his signature.

103. In particular, Ulster Bank claims that Mr. Gollogly's signature is in fact a forgery on both documents and if this is so, it raises further questions about, not only the status of the Declarations of Trust (as documents purporting to evidence that Mr. Brian McDonagh is not the beneficial owner of the £274,340 and the £915,441, respectively), but also, the credibility of Mr. Brian McDonagh.

Forged signatures of Mr. Gollogly?

104. The claim made by Ulster Bank is that the signature of the witnessing solicitor, Mr. Gollogly, is a forgery when he purportedly witnessed the signature of Mr. Brian McDonagh on the two Declarations of Trust executed by Mr. Brian McDonagh.

105. Mr. Brian McDonagh (and for that matter Mr. Kenneth McDonagh and Mr. Maurice McDonagh) claim that these are two valid Declarations of Trust. Mr. Brian McDonagh claims that the two Trusts support his claim that the money used to fund Granja's alleged purchase of the Kilpeddar site, which came from Balcora and Cleverpeople, was not in fact his money, but was money beneficially owned by Mr. Ooi. On this basis, he claims that although he was stated to be the legal owner of the shares in Balcora (a company with £274,340 in cash) and stated to be the creditor of Cleverpeople (in the sum of £915,441), the combined sterling sum (equivalent to €1.5 million approximately) beneficially belonged to Mr. Ooi under the terms of the Balcora Trust and the Cleverpeople Trust.

106. When the sale of the Kilpeddar site did not proceed, this sum of approximately €1.5 million, which was paid to Granja's solicitor, Cathal L. Flynn Solicitors, for the purported purchase of the site, was paid back (not to Mr. Ooi) but to Mr. Brian McDonagh (less litigation and legal costs), by Granja's solicitor (via Mr. Brian McDonagh's accountant, Mr. Feehily).

107. Despite all of this independent and objective evidence, on the basis only of these Declarations of Trust, Mr. Brian McDonagh claims firstly that he was not in breach of Clause 3.1.1 of the Compromise Agreement by not disclosing to Ulster Bank (under his obligation to disclose all his assets) the fact that he allegedly owned the £274,340 and the £915,441 (since he claims that these two Declarations of Trust prove that these funds were held by him on trust for Mr. Ooi).

108. Secondly, he claims that Ulster Bank is incorrect to claim that Granja was funded by his money and thus was a front for him. This is because although this money did find its way from companies which had been legally owned by him (Balcora and its subsidiary, Cleverpeople) and then back to him from Granja's solicitors (less litigation costs), he nonetheless claims it was not his money, but was in fact money he held on trust for Mr. Ooi under the two Declarations of Trust.

109. Therefore, the Declarations of Trust are very significant documents in Mr. Brian McDonagh's defence.

110. It follows that any suggestion that they are forged documents puts in doubt whether this Court can rely on their alleged existence at the relevant times. The first relevant time is when Mr. Brian McDonagh entered the Compromise Agreement in or around March 2013 (since this is when he did not refer in his Statement of Affairs to his alleged beneficial ownership of the funds held by Balcora and Cleverpeople).

111. The second relevant time is when the money to fund Granja's proposed purchase of the Kilpeddar site went into (in April 2014), and then out of, the solicitor's client account of Granja (in March 2018). This is when Mr. Brian McDonagh says that, because of the two Declarations of Trust, he did not beneficially own the funds but Mr. Ooi did, and so Granja is not a front for him.

Death of Mr. Gollogly

112. Mr. Gollogly died on the 12th September, 2013. The dispute between the parties in this case arose in the summer of 2014. It follows that if somebody forged Mr. Gollogly's signature on the two Declarations of Trust as alleged by Ulster Bank after the dispute arose, and so after Mr. Gollogly's death, they might have concluded that there was no risk of Mr. Gollogly being produced as a witness to disprove his signature on the Declaration of Trust and thus no risk of a claim that the Declarations of Trust had not in fact been validly executed in 2000 and 2007.

113. However, it transpires that Mr. Gollogly was a director of an Irish registered company and, in that capacity, would have been required to sign publicly filed returns in the Companies Registration Office. As a result, although the Bank was unable to produce Mr. Gollogly to provide evidence of his signature, it was still possible for evidence to be provided by an expert in handwriting, Mr. Sean Lynch ("Mr. Lynch"), that the signatures of Mr. Gollogly on the two Declarations of Trust did not match the signatures in the Companies Office forms.

114. In this regard, Mr. Lynch gave uncontroverted evidence that that the seven signatures of Mr. Gollogly in the Companies Office forms over a period of years between 1996 and 2000 were all made by the *same* person.

115. Similarly, he gave evidence that the two signatures of Mr. Gollogly on the two Declarations of Trust were also made by the *same* person. However, crucially, Mr. Lynch gave uncontroverted evidence that, the person, who signed as Mr. Gollogly on seven occasions on the Companies Office forms, was not the same person, who signed as Mr. Gollogly on the two Declarations of Trust.

116. It is clear therefore that one of those sets of signatures (the Companies Office forms' signatures or the Declarations of Trust signatures) is a forgery.

Mr. McDonagh's response - Accountants forge signatures on Companies Office forms?

117. Mr. Brian McDonagh, when presented with this expert evidence, that the signatures of Mr. Gollogly had been forged on either the Companies Office forms or the Declarations of Trust, suggested that the forged signatures were the ones on the seven Companies Offices forms and not the signatures on the two Declarations of Trust. In support of this

contention, he gave what can only regarded as yet another bizarre theory, which called the professional reputation of all accountants into question. This is because to support his theory that the signatures on the Declarations of Trust were not forgeries, he suggested that it is a practice, with which he is familiar, for accountants to forge the signatures of their clients on Companies Office forms.

118. The clear contention being made by Mr. Brian McDonagh was that Mr. Gollogly's accountant had forged Mr. Gollogly's signature on seven occasions over a period of several years. This explained, in Mr. Brian McDonagh's view, why the true signatures of Mr. Gollogly are the ones on the Declarations of Trust and the forgeries are on the Companies Office forms.

119. Quite apart from noting that Mr. Brian McDonagh had no hesitation in traducing the reputation of accountants generally and Mr. Gollogly's accountant specifically in support of his claim, this Court did not find it credible that the same accountant on seven different occasions over a number of years had forged Mr. Gollogly's signature. Accordingly, this Court would have concluded on the balance of probabilities, on this basis alone, that the seven signatures, over several years on the publicly filed forms, as distinct from the two signatures in two separate years on the Declarations of Trust held privately by Mr. Brian McDonagh, were the true signatures of Mr. Gollogly.

120. In support of this conclusion this Court noted that in evidence before Haughton J. in relation to the Cleverpeople Trust in the Granja Proceedings, Mr. Brian McDonagh implied in his evidence to Haughton J. that the Gollogly signatures on the Cleverpeople Trust might have been on that document *before* Mr. Brian McDonagh signed it. This particular exchange between Haughton J. and Mr. Brian McDonagh took place as follows:

> "Q: MR. JUSTICE HAUGHTON: Did you swear the original of that document in the presence of Earl Gollogly?
>
> A: BRIAN MCDONAGH: I don't know whether I signed it before Earl or Earl signed that before me, I don't know, your Honour, that's ten years ago.
>
> Q: MR. JUSTICE HAUGHTON: Why would he sign a document before you signed it?
>
> A: BRIAN MCDONAGH: Perhaps you are right, I might have signed it first."

121. It follows that Mr. Brian McDonagh contemplated before Haughton J. the possibility that he could have signed a document that had been *previously* 'witnessed' by Mr. Gollogly (even though the *raison d'être* of the signature of Mr. Gollogly was to witness Mr. Brian McDonagh's signature and therefore Mr Gollogly should only have signed/witnessed the document *after* Mr. Brian McDonagh's signature).

122. In contrast to his uncertain evidence before Haughton J., Mr. Brian McDonagh alleges before this Court that Mr. Gollogly did in fact witness his signature. This highlights for this Court the inconsistency and unreliability of Mr. Brian McDonagh's evidence when he is in court.

123. Notwithstanding that this Court was prepared to conclude that the signatures of Mr. Gollogly on the Declarations of Trust were forged, this Court raised with the parties during the proceedings whether, as Mr. Gollogly is now deceased, there might be a copy of his executed will publicly available, which might confirm (or indeed possibly disprove) this Court's conclusion.

124. As a result of this request, a copy of Mr. Gollogly's will dated 28th April, 2005 was provided to the Court along with an addendum to the original report of Mr. Lynch, which addendum is dated 17th January, 2020. This supplementary evidence of Mr. Lynch is that the signature on Mr. Gollogly's will dated 28th April, 2005 was made by the same person as made the signatures on the Companies Office forms and not by the person who made the signatures on the two Declarations of Trust.

Conclusion that the signatures on the Declarations of Trust are forgeries

125. Thus, there exists seven signatures on Companies Office forms on seven separate dates, which are the same as the signature on the will, but which are completely different from the two signatures on the Declarations of Trust on two separate occasions. Accordingly, and in light of the handwriting expert evidence, this Court has little hesitation in concluding that the signature of Mr. Gollogly purporting to witness the execution by Mr. Brian McDonagh of the two Declarations of Trust is on each occasion a forgery.

126. In this regard, it is clear that Mr. Gollogly was well-known to Mr. Brian McDonagh. Mr. Brian McDonagh gave evidence that Mr. Gollogly acted as his solicitor for "many years" and that he would have meetings at Mr. Gollogly's house. When pressed on the issue in cross-examination, Mr. Brian McDonagh stated that "*it stands to reason*" that Mr. Gollogly witnessed his signature and that he signed the documents "*there and then*".

In light of this Court's conclusion that Mr. Gollogly's signature was forged and the foregoing evidence, including Mr. Brian McDonagh's claim that Mr. Gollogly witnessed his signatures "*there and then*", his inconsistent evidence before Haughton J. and his bizarre justification for the alleged forgery of the Companies Office forms, this Court concludes that on the balance of probabilities Mr. Brian McDonagh knew that the signatures on the Declaration of Trusts were forgeries.

Conclusion regarding the status of the forged Declarations of Trust

127. As regards the Declarations of Trust themselves, it is to be noted that the trusts, which these two Declarations of Trust purport to create, are over valuable assets. The Balcora Trust provides that Mr. Brian McDonagh, although the legal owner of the entire shareholding in Balcora, a valuable company at the relevant time with cash reserves of £274,340, is not in fact its beneficial owner. Instead the alleged beneficial owner under the Balcora Trust of the shareholding is Mr. Ooi.

128. Similarly, the Cleverpeople Trust provides that Mr. Brian McDonagh, although the legal owner of monies due to him from Cleverpeople in the sum £915,441, again is not in fact its beneficial owner, but again under this Trust it is alleged that the beneficial owner of these monies is Mr. Ooi.

129. Despite the value and significance of these assets (amounting to approximately €1.5 million), the only evidence of the creation of these trusts are these two forged documents consisting, in the case of the Cleverpeople Trust, of just one sentence, which states:

> "I, Brian McDonagh, of Dromin House, Drummin East, Delgany, Co. Wicklow hereby acknowledge and declare that all monies reflected as due to me in the books of Account in Cleverpeople Ltd (ID No. 02702359) are beneficially held and due in full to TIAN SU OOI."

130. It is to be noted therefore that this trust allegedly created over assets of over €1 million is a simple one sentence document signed only by Mr. Brian McDonagh and containing the forged signature of Mr. Gollogly.

131. The Balcora Trust consists of three short paragraphs to similar effect. This document is also signed only by Mr. Brian McDonagh and also contains the forged signature of Mr. Gollogly.

132. The McDonaghs stand to benefit considerably in these proceedings if the Declarations of Trust are held to be valid (since they support their claim that none of the McDonaghs breached the Compromise Agreement and thus support their claim to have their borrowings written off).

133. However, there is absolutely no objective evidence of the creation of these trusts, despite their value and their significance in these proceedings. The alleged beneficiary of the two trusts, Mr. Ooi, is an obstetrician in Malaysia with no connection with property investment in Ireland. While this Court assumes, as previously noted, that he does exist, there is no evidence to support this contention and in particular, he has given no evidence in this case (even though he is alleged to be the owner of a site now worth approximately €8 million). The Declarations of Trust are not signed by him. Indeed, not one document before this Court is signed by him. Despite the 20-30 lever arch folders of documentary evidence in this case, there does not appear to be one reference to any letter or email ever having been sent to Mr. Ooi or by Mr. Ooi regarding this alleged trust (or his alleged interest in Granja or the Kilpeddar site). To say that this is curious is an understatement. It is clear that there is not a whit of evidence to suggest that Mr. Ooi regards Mr. Brian McDonagh as his trustee.

134. Mr. Brian McDonagh was a director and shareholder of Balcora until 2013 yet in the twenty years since the trust over this shareholding was allegedly created (on the 22nd of February, 2000), there is absolutely no reference in the company's records to support the existence of this alleged trust.

135. It is also relevant to note that on the 22nd February, 2013 Mr. Brian McDonagh transferred the entire shareholding in Balcora which he held legally (but not, he claims, beneficially) to his secretary, Ms. Byrne. Yet she, as the legal owner of the entire shareholding in Balcora, which at that stage gave the holder an indirect entitlement to cash of £274,340, was not required by Mr. Brian McDonagh or Mr. Ooi, to execute a

Declaration of Trust in favour of Mr. Ooi. In this regard, Mr. Brian McDonagh gave evidence that Ms. Byrne *may* have met Mr. Ooi on just one occasion.

136. As there was no Declaration of Trust ever executed by Ms. Byrne, it was put to Mr. Brian McDonagh that Ms. Byrne must therefore be the legal and beneficial owner of the entire shareholding in Balcora. Mr. Brian McDonagh replied that he had transferred the shares to her as he would trust her "*with his life*" and she could be trusted to do "*what she was told*" by him with these shares. In this way, he was clearly suggesting that Ms. Byrne was being entrusted by Mr. Ooi, a person she *may* have met once, to be his trustee for a very significant amount of money, without any Declaration of Trust signed by her, or any document signed by Mr. Ooi, to support the arrangement. If this were true, it would be a most unusual approach for the beneficial owner of a valuable asset to take to the safekeeping of his assets.

137. In addition, it is to be noted that if Mr. Brian McDonagh did not beneficially own the shareholding in Balcora, as he claims, but was simply a trustee, there would be no logical reason (and no reason was given by him in his evidence) for Mr. Brian McDonagh not to remain on as 'trustee' and so no reason for him to transfer the shareholding "*in preparation*" for his executing the Statement of Affairs. It seems to this Court that if he beneficially owned the shareholding that there would be a good reason to transfer it to Ms. Byrne, in advance of the execution of the Statement of Affairs to be provided to the Bank. Thus, this is further support for the conclusion that Mr. Brian McDonagh beneficially owned the shareholding in Balcora.

Conclusion regarding the money trail

138. This Court concludes that in light of all of the evidence (of Declarations of Trust with forged signatures, alleged loan agreements without documentation, transfers of assets immediately prior to completion of the Statement of Affairs etc.), the €1.5 million paid to Granja to fund its purchase of the Kilpeddar site was money which was beneficially owned by Mr. Brian McDonagh and not Mr. Ooi. In addition, the net amount of these funds (after litigation costs) when paid back to Mr. Brian McDonagh, from Granja's client account with Cathal L. Flynn Solicitors, was also beneficially owned by Mr. Brian McDonagh and not Mr. Ooi.

Conclusion that Granja is a front for Mr. Brian McDonagh

139. All the objective evidence points to Mr. Brian McDonagh having, not just a legal interest in the funds for the purchase by Granja of the Kilpeddar site, but also a beneficial interest in those funds. Accordingly, this Court concludes that the Declarations of Trust are not evidence of a valid trust over the funds used to finance the proposed purchase by Granja of the Kilpeddar site.

140. If, as this Court is concluding, the Declarations of Trust are not valid, this is the same as saying that the money used to fund Granja's bid for the Kilpeddar site belonged to Mr. Brian McDonagh and it inescapably follows that Granja was a front for Mr. Brian McDonagh (or that he was the beneficial owner of the funds for the purchase of the Kilpeddar site and was to be the beneficial owner of that site to be purchased by Granja).

141. What evidence there exists regarding the ownership of Balcora (including the transfer by Mr. Brian McDonagh of the shares in Balcora to his secretary just before completing his Statement of Affairs, combined with the fact that the Balcora Trust has been found not to be a valid trust) supports a finding that the £274,340 was beneficially owned by him.

142. Similarly, what evidence there is regarding the £915,441 (including that there is no evidence of any alleged loan of this sum of £915,441 by Mr. Ooi to Mr. Brian McDonagh and this Court has concluded that the Cleverpeople Trust is not a valid trust), supports the conclusion that Mr. Brian McDonagh was the beneficial owner of the sum of £915,441.

143. Further support for this conclusion that Granja was a front for Mr. Brian McDonagh (or that Mr. Brian McDonagh owned or had an interest in Granja's funds of €1.5 million) can be gleaned from the following evidence:

Mr. Brian McDonagh, as vendor, tried to improve the alleged purchaser's (Granja's) title

144. The Heads of Agreement, which are set out in full hereunder, run to 14 lines of text. They are silent regarding title or right of way issues, yet the McDonaghs claim that this document constitutes a legally binding contract. This clearly means that under its terms, the McDonaghs would have to sell, and Granja would have to purchase, the site 'warts and all', i.e. regardless of any right of way issues, such as the site being land-locked.

145. In this situation, it would be curious, to say the least, for a vendor, after such an agreement is signed (allegedly on the 13th June, 2014), to have any concern regarding rights of way issues, since these would be a concern only for the purchaser. It is surprising therefore that, after this alleged binding contract came into existence, Mr. Brian McDonagh, the alleged vendor, was pursuing, in the months after the 13th June, 2014, the resolution of rights of way issues in relation to the Kilpeddar site to ensure that it was not land locked. If the alleged sale of the Kilpeddar site was to an independent third party purchaser, as the McDonaghs have alleged in this case, it would be most unusual that Mr. Brian McDonagh, as one of the vendors, would be concerned with the resolution of any rights of way issues for the benefit of that third party purchaser.

146. Since the alleged purchaser, Granja, could not insist on a right of way under the terms of the Heads of Agreement, one logical explanation for Mr. Brian McDonagh seeking to perfect the rights of way issues, is that, although he was a seller of the site as one of the McDonagh brothers, he also had an interest in Granja. This would explain why he wanted to ensure that Granja would have the benefit of a right of way attaching to the Kilpeddar site, even though as the seller, this should have been of no concern to him as Granja was obliged to purchase the site 'warts and all' (based on his claim that the Heads of Agreement were legally binding).

The purchaser, Granja, wanted to pay the vendors' professional fees

147. Another piece of objective evidence which supports the conclusion that Granja was a front for Mr. Brian McDonagh, is the fact that as part of the bidding process for the Kilpeddar site, Granja offered to, not only outbid the other bidders, but to discharge the professional fees owed to the architects by the McDonaghs in connection with the

planning permission which the McDonaghs had sought for the site, which was the considerable sum of €860,000.

148. The background to this issue is that the McDonaghs had incurred this amount of money in architect's fees in seeking planning permission for a data centre on the Kilpeddar site. However, these were liabilities of the vendor of the site, i.e. the McDonaghs, and there was no objective reason why a purchaser of the site, Granja, would agree to discharge the previously incurred professional fees of the vendor. A logical explanation is that there was in fact a connection between the proposed purchaser (Granja) and one or more of the vendors (the McDonaghs), since why else would an alleged independent third-party act to its financial detriment to such a considerable degree. In this regard, the extra sum offered, for no good reason, to be paid by Granja in respect of the architect's fees (€860,000) was over half of the purchase price Granja offered for the site (€1,501,000).

The most unusual nature of this offer was remarked upon by Mr. Robert Ganly ("Mr. Ganly") of Ganly Waters. Mr. Ganly was the estate agent who, in January 2014, Ulster Bank insisted join Mr. Dooley in jointly marketing the Kilpeddar site. In his email of 8th May, 2014 to the McDonaghs Mr. Ganly states:

> "[…] I am somewhat mystified as to why Granja would pay outstanding fees to McDonnell & Dixon [the architects] in relation to the purchase price when in fact it is nothing to do with Granja Ltd. I assume that you would require the consent of the bank to agree to any such terms."

The only logical conclusion which can be drawn from this proposal is that Granja was not offering to pay an extra €860,000 out of the kindness of its heart, but that Granja was in reality proposing to discharge its 'own legal obligations' to architects (or more accurately the legal obligations of its beneficial owner/the person for whom Granja was a front, i.e. Mr. Brian McDonagh).

Defendant, Mr. Maurice McDonagh, provides information to plaintiff, Granja

149. Reference is also made hereunder to a third objective fact in support of this conclusion, namely that Mr. Maurice McDonagh, when he was being sued (along with his two brothers) by Granja in the Granja Proceedings, disclosed to the party suing him (Granja) information to assist its case against him. Again, it is most unusual for a defendant to assist a plaintiff who is suing him and one logical explanation is that the plaintiff (Granja) was in fact a related company/a front for one or more of the defendants (the McDonaghs). In this way it should be recalled that in the Granja proceedings, Granja was suing not only the McDonaghs but also Ulster Bank and the Receivers, in order to enforce the alleged contract for sale of the Kilpeddar site. The fact that Mr. Maurice McDonagh disclosed information to Granja to assist it in its case against the McDonaghs and the Bank supports the conclusion that Granja was a front for one or more of the defendants (the McDonaghs).

Mr. Brian McDonagh seeks to sell the site to Apple in 2015 after he 'sold' it in 2014

150. In addition, as previously noted, McDermott J. in the *Apple* case notes in the extract from his judgment set out previously, that in 2015, Mr. Brian McDonagh was seeking to sell the

Kilpeddar site to Apple. However, on the McDonaghs' case, the Kilpeddar site had already been sold to Granja since 13th June 2014. Accordingly, this attempt by Mr. Brian McDonagh to sell the Kilpeddar site a year later in 2015 is also consistent with Granja being in fact a front for Mr. Brian McDonagh, since how else could he be purporting to sell the site to Apple at that stage, unless he and Granja were one and the same.

Mr. Brian McDonagh objects to planning permission for Arklow data centre

151. Finally, as previously noted, a considerable time after the alleged sale of the Kilpeddar site to Granja on 13th June, 2014, Mr. Brian McDonagh challenged the decision of Wicklow County Council to grant planning permission for a data centre in Arklow based on his alleged belief that "*there was only enough electricity in Wicklow*" to build either the Arklow data centre or the Kilpeddar data centre. However, since on the McDonaghs' case the Kilpeddar site had been sold to Granja in June 2014, there was no logical basis for him to be concerned after this date with whether the Kilpeddar site had enough electricity, unless of course he had an interest in Granja or it was a front for him.

152. For all of the foregoing reasons this Court concludes that Mr. Brian McDonagh was the beneficial owner of the funds which were to be used by Granja to attempt to purchase the Kilpeddar site and that Granja was a front used by him to seek to purchase that site.

False sworn evidence provided by Mr. Brian McDonagh

153. In addition to Mr. Brian McDonagh being an evasive and uncooperative witness, it is also the case that he gave false evidence under oath on several occasions.

(i) False sworn evidence regarding transfer of shares in Balcora

154. The background to the first false sworn statement is that Mr. Brian McDonagh accepted in evidence before this Court that less than one month prior to his execution of the Compromise Agreement he transferred his entire shareholding in Balcora to Ms. Byrne on the 22nd February, 2013. Yet Mr. Brian McDonagh swore on the 18th October, 2019 in his Replies to Interrogatories that he had *not* transferred this shareholding in Balcora to Ms. Byrne. This was plainly false testimony in light of his evidence to this Court.

155. Balcora was not only a valuable company (with £274,340 in cash) but it also played a key part in the funding of the alleged purchase by Granja of the Kilpeddar site. It is also clear from Mr. Brian McDonagh's oral evidence that he was somebody who was completely on top of the detail of this case, in light of his 'obsession' with the development of a data centre on the Kilpeddar site. For this reason, this Court concludes that Mr. Brian McDonagh could not have simply forgotten that he transferred this very valuable asset to his secretary, when he was swearing his Replies to Interrogatories on the 18th October, 2019.

156. Accordingly, this Court finds that this was a clear instance of false evidence being provided by Mr. Brian McDonagh on oath, which impacts on his credibility, since this Court concludes that, on the balance of probabilities, he must have known that this was false when he gave this evidence.

(ii) Two contradictory sworn statements that he was/was not a creditor of Cleverpeople

157. The background to the second false sworn statement is that Mr. Brian McDonagh accepted in evidence that he made a sworn Declaration of Solvency for Cleverpeople in his capacity as director of that company. In particular, he confirmed that he had sworn that he was a creditor of that company in the sum of £915,441.

158. Certain UK Companies House documents were put to Mr. Brian McDonagh, which he did not attempt to challenge, and those documents provided that he was a creditor of Cleverpeople in the sum of £915,441 and that he had received this sum. While not challenging the validity of the documents, Mr. Brian McDonagh did however deny receiving this sum.

159. Against this background, the second false statement under oath by Mr. Brian McDonagh arises because, in complete contradiction to the sworn evidence in the Declaration of Solvency, Mr. Brian McDonagh swore in his Replies to Interrogatories on the 18th October, 2019 that he was *not* a creditor of Cleverpeople.

160. Mr. Brian McDonagh either was, or was not, a creditor of Cleverpeople. Both of these sworn statements cannot be correct and so it is clear therefore that Mr. Brian McDonagh gave false sworn evidence on one of these occasions.

161. Mr. Brian McDonagh sought to deal with this conflict by claiming that he was not in fact the creditor of Cleverpeople, since this money belonged to Mr. Ooi as a result of the Cleverpeople Trust. However, even if this were correct, it does not explain why he swore in the Declaration of Solvency that he was owed this money. Despite his acceptance in evidence that there was a liquidator's report noting the repayment of this £915,441 by Cleverpeople to Mr. Brian McDonagh, Mr. Brian McDonagh denied receiving this sum and suggested it was paid to Mr. Ooi, on the basis it seems, of Mr. Brian McDonagh's claim that he had borrowed the money from Mr. Ooi and/or on the basis of the forged Cleverpeople Trust to the effect that it was beneficially owned by Mr. Ooi.

162. There was no evidence provided to the Court to support the suggestion by Mr. Brian McDonagh that the £915,441 (owed by Cleverpeople to Mr. Brian McDonagh and subject to the alleged Cleverpeople Trust) represented a loan from Mr. Ooi to Mr. Brian McDonagh. This Court has already concluded that the Cleverpeople Trust is not a valid trust and that this sum of £915,441 was beneficially owned by Mr. Brian McDonagh.

163. On this basis, this Court concludes that Mr. Brian McDonagh made false statements when he gave sworn evidence in his Replies to Interrogatories that he was not a creditor of Cleverpeople, which false sworn evidence impacts further upon his credibility.

(iii) Affidavit with claim that Bank did not consent to sale, which he now says is false

164. There is also a third occasion when Mr. Brian McDonagh gave false sworn evidence. In this instance, unlike in relation to the claim of being a creditor of Cleverpeople, he acknowledges that he gave sworn evidence which was false.

165. The background to this aspect of the case is that in these proceedings the McDonaghs claim that the terms of the Compromise Agreement *themselves* constitute the consent by Ulster Bank to the sale of the Kilpeddar site to Granja (or indeed to any third party).

166. On this basis, the McDonaghs claim that Ulster Bank consented in advance to the sale of the Kilpeddar site to any party at any price and they claim that this is implicit in the terms of the Heads of Agreement, by virtue of the fact that the Compromise Agreement contemplates the sale of the Kilpeddar site.

167. However, if this is truly Mr. Brian McDonagh's position before this Court, that position is completely inconsistent with the sworn evidence given by Mr. Brian McDonagh in his affidavit dated 30th September, 2014 in proceedings which he took against Ulster Bank seeking, *inter alia*, specific performance of the debt write-off under the Compromise Agreement and an injunction restraining the Bank from taking action to recover the debt owed by Mr. Brian McDonagh.

168. In that affidavit, Mr. Brian McDonagh swore that Ulster Bank *refused to consent* to the sale of the Kilpeddar site. Accordingly, that averment (which he now says is false) calls into question the reliability of his evidence generally. Indeed, that averment of 30th September, 2014, that the Bank *prevented* the sale of the Kilpeddar site, also completely undermines the claim that he is now making that the Heads of Agreement *constitutes a binding contract* for the sale of the site.

169. By making the claim before this Court that the Compromise Agreement is itself the consent to the sale of the site, Mr. Brian McDonagh is thereby acknowledging that he gave what, he must have believed to be, false sworn evidence to the High Court at an earlier stage in these proceedings.

170. When confronted with this blatant inconsistency, his only justification for giving testimony (that he must have believed to be false) is that there was a typo in the affidavit sworn by him on 30th September, 2014. However, this is not credible since this is not a case of one sentence being incorrect because of a typo, since the very proceedings themselves, seeking an injunction against the Bank in October 2014, were based on the assertion that the Bank had not consented to the sale of the Kilpeddar site. Accordingly, this Court concludes that this was not a case of a typo, but rather explicit sworn evidence (that the Bank did not consent to the sale of the Kilpeddar site), evidence that he now says is false. Accordingly, this further impacts upon his credibility in these proceedings.

Conclusion regarding the credibility of Mr. Brian McDonagh as a witness

171. For reasons set out above it seems clear to this Court that Mr. Brian McDonagh's memory in relation to past events cannot be relied upon, in the absence of corroborating evidence.

172. Although it has reached its conclusion completely independently of any other judges' conclusions and in reliance only on the evidence before this Court, it remains to be observed that this Court's conclusion is consistent with the experience of the previous

Irish and English High Court judges before whom Mr. Brian McDonagh has appeared, and in particular the conclusion of Morgan J. in the High Court of England and Wales that:

> "I am satisfied that [...] Mr McDonagh's evidence is not reliable. It is clear to me that Mr McDonagh has reconstructed the events which occurred to produce an account which he considered would be more helpful to his case as compared with the actual events."

B. MR. MAURICE MCDONAGH's CREDIBILITY

173. Mr. Maurice McDonagh confirmed that he supported completely the version of events which Mr. Brian McDonagh had given to the Court in that they had adopted an "*absolutely uniform approach*" to the proceedings and that "*blood is thicker than water*" even though it was clear to this Court that, at times, that version of events was implausible. In this regard, Mr. Maurice McDonagh gave evidence after hearing Mr. Brian McDonagh's evidence in full and he confirmed that it remained the position that the brothers had adopted an absolutely uniform approach to the proceedings. So implausible was Mr. Brian McDonagh's evidence at times that, despite the blood and water reference, even Mr. Kenneth McDonagh acknowledged that he did not believe his brother, Mr. Brian McDonagh, in relation to his denials of having any interest in Granja, as noted below. However, Mr. Maurice McDonagh, like his brother Brian, was a difficult and evasive witness. He sought to deny or avoid inescapable conclusions which were presented to him in evidence if those conclusions weakened his case. Often, he refused to acknowledge the plain meaning of words, by digressing to seek to deal with other issues. Just one or two examples of his self-serving evidence in this regard will be considered.

Fails to deal with inconsistent reference to Granja's 'offer' after alleged 'contract'

174. After the Heads of Agreement were allegedly signed on the 13th June, 2014, Mr. Maurice McDonagh's solicitor, Ms. Gallagher, was in contact by email with Ulster Bank on the 20th June, 2014, 15th July, 2014 and 19th August, 2014. Furthermore, during this three and a half month period after the 13th June, 2014 (until the 2nd October, 2014), Ms. Gallagher made no reference, in any correspondence sent by her, to the alleged 'contract' for sale, but instead referred to an 'offer' in this correspondence and did so on the express instructions of her clients at that time, Mr. Maurice McDonagh and Mr. Kenneth McDonagh (as she had ceased acting for Mr. Brian McDonagh in mid-June 2014). Of particular significance, is the email dated 15th July, 2014 sent to Mr. Feidhlim O'Hanlon ("Mr. O'Hanlon"), a senior manager in Ulster Bank. In that email Ms. Gallagher expressly noted, on behalf of her clients as follows:

> "Whilst we have had no formal response we must take it that *the offer of the buyer* to Mr. Gabriel Dooley *on the 13th June was not acceptable* to Ulster Bank." (Emphasis added)

Mr. Maurice McDonagh was asked again and again how he could reconcile, instructing his solicitor to refer to the 'offer', with his evidence to the Court, that he believed on the 13th June, 2014 that there was a binding 'contract' for sale of the site. It was clear that these two positions are wholly inconsistent. When faced with the plain meaning of text in

emails, he refused to answer the question or attempted to deflect this issue, like his brother Brian had done, by suggesting that counsel was "*playing with words*", when nothing could be further from the truth.

175. In a similar vein, when it was put to him that he could not have honestly believed that the Heads of Agreement were binding, instead of answering the question, he digressed, just as Mr. Brian McDonagh used diversionary tactics, by referring to the completely irrelevant evidence of the conveyancing expert called on behalf of the Bank, Mr. Patrick Sweetman.

Refusal to acknowledge plain meaning of words regarding the best-bids process

176. A more blatant example of Mr. Maurice McDonagh's attitude to the evidence he gave to the Court was in relation to his answers regarding an email dated the 29th May, 2014 from Ulster Bank to the McDonaghs, which related to the best bids process being proposed for the sale of the site.

Background to the best-bids process

177. The background to this particular email is that the best bids process was suggested by Mr. Dooley as a way to finalise the sale of the site whereby the bidders would be asked to put in their best bid in a sealed envelope by noon on 13th June, 2014 at the offices of Dooley Auctioneers. However, it is clear from the evidence before this Court that Mr. Ganly, the joint agent insisted upon by Ulster Bank for the marketing of the Kilpeddar site, did not agree with this approach suggested by Mr. Dooley. This is clear from the contemporaneous correspondence sent by Mr. Ganly to Ulster Bank and Mr. Dooley. Of particular relevance is a letter sent by Mr. Ganly to Mr. Dooley on the 29th May, 2014 in which he makes clear that his preference is for sale by Private Treaty:

> "[A Private Treaty sale] is actually my preferred option and that we negotiate with all parties who have an interest with a view to getting the best price possible following the advertising campaign in two weeks' time. The confusion here appears to be the use of the word 'Best Bids' as this implies a strict timeline and a date by which final bids must be received with evidence of funds which gives us no flexibility in the sales process. Once we are all agreed that we continue at the moment with a Private Treaty sale, with a view to having a conclusion by the 13th June, without necessity at this moment in time, agreeing that we are going to ask all parties to put in a final bid on that day, in writing, as I feel that that could be a risky strategy. The Private Treaty route for the moment gives us complete flexibility to agree to make a decision to move forward with whatever party are genuinely interested after the advertising campaign."

178. The other difficulty Mr. Ganly had with the sales process as proposed by Mr. Dooley, was that Mr. Ganly did not believe that one of the two main bidders for the site, Granja, had sufficient proof of funds. He was concerned that if Granja ended up being the highest bidder in the best bids process, that it would not be able to follow through with the sale, and the vendors might in the process lose the other bidder, which did in fact have sufficient proof of funds, Weighbridge Trust Limited ("Weighbridge"). Weighbridge had provided sufficient proof of funds in Mr. Ganly's view, since it had provided a bank

statement showing a bank balance to match its bid. Granja had not produced a bank statement, but rather a letter from a firm of solicitors (Cathal L. Flynn Solicitors) stating that it had sufficient funds "*in excess*" of €800,000 in its client account. While Mr. Dooley was happy that this solicitor's letter was sufficient proof of funds, Mr. Ganly did not agree that this letter was sufficient and wanted to see a bank statement confirming that Granja held sufficient funds for the purchase of the site.

It is also clear from the evidence that Ulster Bank did not wish to proceed with a best bids process for the sale of the Kilpeddar site unless *both* joint agents, Mr. Dooley and Mr. Ganly, approved of the process. In this regard, Mr. Dooley wrote to the Bank on 18th May, 2014 and stated:

> "We set out the criteria as follows for the 81 Acres BEST BIDS PROCESS
>
> We suggest that all of the above interested parties are invited to our office in Delgany, as all of the interested parties are from this area, we also suggest that the vendors are present, along with the solicitors, and the Joint Agent, all for transparency and arms length processes. On Friday 23rd May at 12 Noon with the following [details of, *inter alia*, proof of funds, 10% deposit, title examined *etc*.] We firmly believe that this method of closing this sale is by far the most beneficial to you as our client."

Mr. Dooley claimed that the failure of Ulster Bank to reply to this email amounted to the Bank consenting to the best bids process. This claim by Mr. Dooley amounts to an assertion that if a professional adviser recommends a particular course of action and the recipient of that advice fails to respond, that this amounts to the recipient of the advice agreeing to follow that advice. This Court concludes that this is a completely unsustainable proposition and therefore rejects the suggestion by Mr. Dooley that the Bank had consented to the sale of the Kilpeddar site being finalised by a best bids process on the 13th June, 2014.

179. It is also clear that the Bank did not want to finalise the sale without first having a national marketing campaign, i.e. in the national newspapers, which had not occurred (and never did occur) prior to the date of the alleged execution of the Heads of Agreement on the 13th June, 2014. The Bank made its position in this regard clear from as early as 17th October, 2013 when Mr. O'Hanlon wrote to Mr. Brian McDonagh stating that the Bank "*favoured a [marketing] approach with a wide (national) reach*". This position was reiterated in an email sent by Mr. O'Hanlon to the McDonaghs on the 16th May, 2014 in which he stated:

> "As mentioned before, it is our normal practice to have properties formally advertised and marketed for sale and we will require details of the marketing efforts and market feedback from both agents *before considering our consent* to any acceptance made by the property holders." [Emphasis added]

Mr. O'Hanlon again wrote regarding the marketing campaign to the McDonaghs' solicitor, Ms. Gallagher, on the 28th May, 2014 noting:

> "As previously advised, advertising the lands nationally is welcomed […]"

180. While it is clear from the foregoing that Mr. Ganly did not agree to the sale of the site being finalised by a best bids process on the 13th June, 2014, his involvement in the whole process was terminated on the 3rd June, 2014. This is because the McDonaghs effectively terminated Mr. Ganly's contract on that date, in the sense that his contract of appointment provided for its termination on the 31st May, 2014 and the McDonaghs gave him notice by email dated 3rd June, 2014 that they were not renewing his contract. This was despite the fact that this was less than two weeks prior to the proposed finalisation of the sale of the Kilpeddar site, in which he had acted as joint agent with Mr. Dooley.

The email of 29th May, 2014

181. Against this background, an email was put to Mr. Maurice McDonagh of the 29th May, 2014 from Mr. O'Hanlon of Ulster Bank to the McDonaghs which states:

> "However, I did not agree to the entire of Dooley's proposed marketing campaign as *there is no consensus yet in relation to how the sales process is to be finalised* (Dooleys have suggested a sealed bids/tender approach, GW [Ganley Walters] have suggested private treaty)." [Emphasis added]

182. This email, against the background of all the other correspondence, clearly provides that Ulster Bank is withholding its consent to a best bids process. Despite this, Mr. Maurice McDonagh in his cross examination denied that this email represented a withholding of consent. Like his brother, Mr. Brian McDonagh, he persisted with this bizarre position for several minutes of cross examination, rather than make any concession which might weaken his case, until finally conceding that the email did in fact constitute the withholding of the Bank's consent. This approach of Mr. Maurice McDonagh was representative of his general approach to the evidence he gave to the Court and impacted upon his credibility as a witness.

Denying the plain meaning of words regarding the Bank's consent

183. Similarly, in relation to an email from Mr. O'Hanlon of Ulster Bank dated 16th May, 2014 to the McDonaghs, it is clear from its terms that the consent of Ulster Bank had not been given to the sale of the Kilpeddar site, since the email refers *in the future tense* to the requirement upon the McDonaghs to obtain the consent of Ulster Bank to any sale of the lands:

> "As mentioned before, it is our normal practice to have properties formally advertised and marketed for sale and we will require details of the marketing efforts and market feedback from both agents *before considering our consent* to any acceptance made by the property holders." [Emphasis added]

Yet once again, in his evidence to this Court, Mr. Maurice McDonagh sought to deny that this was evidence that Ulster Bank did not believe it had consented to the sale of the site,

before, after further cross-examination, he finally and inevitably conceded that it was in fact evidence to that effect.

Refusing to acknowledge meaning of plain words in Heads of Agreement

184. Mr. Maurice McDonagh also refused to acknowledge the plain meaning of words used in the Heads of Agreement, if such an acknowledgement might weaken his case. One phrase used in the Heads of Agreement is the following sentence:

> "The Contract for Sale *to be signed* by both parties and exchange of Contracts *to be signed* simultaneously with 10% deposit *on signing*." [Emphasis added]

He was asked whether this indicated that the contract of sale had not yet been signed. Even though there could be no other meaning to these words, he replied in the negative. This is an example of how, in his evidence, Mr. Maurice McDonagh consistently was unable to acknowledge the truth of a situation or the plain meaning of words. For this and the other reasons set out herein, this Court concluded that he was not a credible witness in relation to the issues in dispute between the parties.

Absurd conclusions to avoid any weakening of his case

185. In order to support his alleged compliance with the Compromise Agreement, Mr. Maurice McDonagh sought to claim that the Bank had consented to the 'sale' of the Kilpeddar site to Granja on the 13th June, 2014.

186. This, he sought to do despite the documentary evidence to the contrary, for example, Ulster Bank's email of 29th May, 2014 which was sent two weeks prior to the alleged execution of the Heads of Agreement on the 13th June, 2014. In that email, Mr. O'Hanlon clearly sets out the position of the Bank as follows:

> "[…] I did not agree to the entire of Dooleys proposed marketing campaign as *there is no consensus yet in relation to how the sales process is to be finalised.* […] As discussed on the phone you should take up with [Ganly Waters] directly how many approaches have been made to them. We will be asking for evidence of this from both agents in any event." [Emphasis added]

187. It is relevant to note that the first recorded notification by the McDonaghs to the Bank of the existence of the alleged 'contract'/Heads of Agreement dated 13th June, 2014 is on the 2nd October, 2014. Thus, on Ulster Bank's case, it was unaware of there being any alleged 'sale', when it was discussing the consent of the Bank to a sale of the site between the 13th June, 2014 and 2nd October, 2014. Consistent with this position, Ulster Bank states in its email of 20th June, 2014, in clear terms, that its consent is "*withheld pending further consideration as to our next steps in this matter*".

188. Despite this evidence of the clear absence of any consent on the part of Ulster Bank in this email, Mr. Maurice McDonagh sought to claim that Ulster Bank had in fact consented to the 'contract' of 13th June, 2014. He did so by claiming that the Compromise Agreement itself amounted to consent. In support of this interpretation, he argued that by the very act of signing the Compromise Agreement (which contemplates the sale of

the Kilpeddar site by the McDonaghs), Ulster Bank thereby consented to the McDonaghs selling the Kilpeddar site to any party at any price, including €1. This is despite the fact that the site was clearly worth in the region of €1.5 million at that time, (based on the offers made), and that Ulster Bank was to get the proceeds of its sale in return for its write-off of €20 million of the McDonaghs' loans. As noted below, not only is this a commercially absurd proposition, but it also flies in the face of the express terms of the Compromise Agreement, Clause 3.6.1 of which states:

> "The Borrowers agree to dispose of all the Properties for the *best price reasonably obtainable.*" [Emphasis added]

189. When it was put to Mr. Maurice McDonagh that this Clause completely undermined his interpretation of the Agreement, that the McDonaghs could sell the site for €1, he refused to concede that the Compromise Agreement did not itself constitute a consent by Ulster Bank to the sale of the Kilpeddar site and maintained that the Compromise Agreement amounted to the Bank consenting to the sale of the site at a price as low as €1, to any party.

Refusal to acknowledge plain meaning of 'part with possession'

190. Mr. Maurice McDonagh's reliability as a witness was further called into question by his refusal to accept the literal meaning of words, just as Mr. Brian McDonagh had refused to do, if it might weaken the case he was making. In relation to Clause 5(c) of the Mortgage, he was asked to acknowledge as a matter of fact that the literal meaning of the expression "*part with possession*" would include 'selling' a property. Despite been given three opportunities to do so, he refused to acknowledge this as being the case.

Changing of story regarding the meeting of 16th June, 2014

191. In addition, it is to be noted that Mr. Maurice McDonagh changed his evidence to a significant degree during the course of the trial. This is because after the trial had been opened and during the cross-examination of Ulster Bank's second witness (Mr. Moore) regarding a meeting on the 16th June, 2014, counsel for Mr. Maurice McDonagh and Mr. Kenneth McDonagh stated that they would no longer be standing over the claims in their respective witness statements that Mr. O' Hanlon was present at that meeting and that they had showed Mr. Moore the Heads of Agreement and gave him a copy of it (*per* Mr. Kenneth McDonagh) at that meeting:

> "Q: COUNSEL: And they will say that to the extent – they concede to the extent that their witness statement suggests that Feidhlim O'Hanlon may have been in attendance, that they may be incorrect in that. And your point in evidence is they are incorrect; is that correct?
>
> A: MR. MOORE: Correct.
>
> Q: COUNSEL: We have already dealt with that.
>
> A: MR. MOORE: Yes.

Q: COUNSEL: And they will both say to the extent that one suggests that they showed you a copy of the Agreement and the other says that they handed you a copy of the Agreement, that in fact that didn't happen – they described the Agreement to you?

A: MR. MOORE: I don't recall that."

Counsel for the Bank categorised this withdrawal as "*the most extraordinary development in any Commercial Court case*". He also stated that the withdrawal called into question "*the credibility, the honesty and the trustworthiness*" of the entirety of Mr. Maurice McDonagh's and Mr. Kenneth McDonagh's witness statements. For this Court's part, it is of the view that this eleventh-hour withdrawal of averments made by Mr. Maurice McDonagh and Mr. Kenneth McDonagh in their witness statements, impacts on their credibility.

192. This is because this hugely significant withdrawal cannot be explained away as a typo or oversight which sometimes can occur with witness statements. This is because Mr. Maurice McDonagh confirmed that his witness statement was reviewed by his solicitor and some changes were made by her to the document prior to exchange of the witness statements between the parties.

193. Most significantly, the withdrawal of this sworn evidence was especially important, because the existence of the Heads of Agreement/'contract' is the cornerstone of the McDonaghs' case. Thus, it was hugely significant that there was a withdrawal of this averment (that Mr. Maurice McDonagh showed, and that Mr. Kenneth McDonagh gave, a copy of the Heads of Agreement to Mr. Moore of Ulster Bank at the meeting of 16th June, 2014). This is because the McDonaghs' claim, that they complied with their obligation under the Compromise Agreement to sell the Kilpeddar site by 31st July, 2014, is obviously dependent on the existence of the Heads of Agreement/'contract' on or prior to that date.

194. Accordingly, when Mr. Maurice McDonagh was finalising his witness statement on the 14th October, 2019, he knew that the McDonaghs' write-off of €20 million was dependent on the Heads of Agreement having been signed and binding as of the 13th June, 2014. He therefore must have known that it was a hugely significant fact, when he claimed in that witness statement, that the Heads of Agreement existed as of the meeting on 16th June, 2014 with Mr. Moore and more particularly his clear statement that he showed this crucial document to Mr. Moore at that meeting.

Background to the meeting of 16th June, 2014

195. It is common case that Mr. Maurice McDonagh and Mr. Kenneth McDonagh met with Mr. Moore in his offices at Ulster Bank at Suffolk Street in Dublin on the 16th June, 2014. However, in support of the McDonaghs' claim that they complied with the Compromise Agreement, Mr. Maurice McDonagh and Mr. Kenneth McDonagh allege that they advised Mr. Moore at this meeting of the sale of the Kilpeddar site, in the sense of there being a Heads of Agreement/'contract' for sale. More significantly, until the sixth day of the trial

of these proceedings, Mr. Maurice McDonagh and Mr. Kenneth McDonagh were alleging that Mr. Moore was shown/given a copy of the Heads of Agreement. They were therefore alleging that Mr. Moore could not have been under any illusion about the existence of a binding 'contract' for the sale of the site.

196. Mr. Moore disputes the version of events advanced by the McDonaghs as he says that the McDonaghs told him that they had an offer for the site, but not a binding contract for sale and he certainly was not shown or given a copy of the Heads of Agreement (which Mr. Maurice McDonagh and Mr. Kenneth McDonagh belatedly accept is correct with this last minute changing of their story in this regard).

A most crucial averment

197. Thus, the averment by Mr. Maurice McDonagh that he actually showed Mr. Moore what is alleged to be a binding contract for sale, i.e. the Heads of Agreement, on the 16th June, 2014 was one of the most crucial averments in his witness statement.

198. Now that Mr. Maurice McDonagh accepts that he did not show Mr. Moore the Heads of Agreement (which is consistent with Mr. Moore's evidence), it seems curious to say the least that Mr. Maurice McDonagh ever could have categorically remembered something happening that he now accepts did not happen, particularly something of such significance.

199. For this reason, the retraction by Mr. Maurice McDonagh of sworn evidence in his witness statement, is not, in this Court's view, a mere detail to be glossed over. Along with the other points regarding his unwillingness to concede obvious points if they weakened his case and the obstructive manner in which he gave his evidence, it does put into doubt his recollection of events in relation to not only this disputed meeting of 16th June, 2014 but more generally regarding his recollection of events at issue in this case.

200. It is also of relevance that there is a second sworn statement which Mr. Maurice McDonagh accepts may be wrong in his witness statement regarding this crucial meeting on the 16th June, 2014. On its own, this unreliable sworn statement would not be significant, since it is not a vital averment when considered in isolation. This averment is that Mr. O'Hanlon, as well as Mr. Moore, was at that meeting on the 16th June, 2014. However, both Mr. Moore and Mr. O'Hanlon gave evidence, and this Court found them both to be credible witnesses, that Mr. O'Hanlon was not at this meeting. In this Court's view, this further retraction in Mr. Maurice McDonagh's sworn witness statement in relation to this significant meeting adds to this Court's doubts about Mr. Maurice McDonagh's recollection of the events in dispute between the parties.

201. Of further significance from this Court's perspective is the fact that not just Mr. Maurice McDonagh, but also Mr. Kenneth McDonagh, provided a witness statement to categorically declare that that they showed a copy of the Heads of Agreement to Mr. Moore and that Mr. O'Hanlon was present at the meeting. In fact, in his witness statement, Mr. Kenneth McDonagh went further than his brother Maurice, and claimed that they not only showed, but gave, Mr. Moore a copy of the Heads of Agreement. It seems strangely coincidental,

to say the least, that both brothers could give evidence, whereby they both misremembered a crucial event in this dispute which they now accept did not happen (and also that they both may have misremembered the presence of a person at that meeting).

Other false sworn evidence given by Mr. Maurice McDonagh

202. It is also the case that Mr. Maurice McDonagh in his Replies to Interrogatories gave false sworn evidence regarding his ownership of property in Galway, and this is considered in detail below. This is yet a further factor which impacts upon the reliability of Mr. Maurice McDonagh's evidence to this Court and his credibility as a witness in these proceedings.

C. MR. KENNETH MCDONAGH'S CREDIBILITY

203. While Mr. Kenneth McDonagh was not a fully co-operative witness, he was not as evasive or as difficult a witness as Mr. Brian McDonagh or Mr. Maurice McDonagh.

204. However, it is to be noted that he could not explain, or chose not to explain, why, if he genuinely believed there was a binding contract for the sale of the Kilpeddar site, his instructions to his solicitor, Ms. Gallagher, were to write to Ulster Bank to say that they had an 'offer' or to refer to a 'highest bidder' for the period of three and a half months between the alleged execution of the Heads of Agreement on the 13th June, 2014 and the email of Ms. Gallagher to Ulster Bank on the 2nd October, 2014 attaching for the first time the Heads of Agreement.

205. These two positions (one an 'offer' and the other a 'contract'), separated by a period of three and a half months, were so inconsistent that they called for some explanation or clarification. However, the most that Mr. Kenneth McDonagh could say in response was that the reason for the inconsistencies was Mr. Moore's dissatisfaction with what he was told at the meeting of 16th June, 2014 and that the McDonaghs therefore instructed Ms. Gallagher to "*re-sell*" the Kilpeddar site, which quite apart from anything else, is a contradiction in terms. He sought to rationalise the various references to an 'offer' and a 'highest bidder' in Ms. Gallagher's emails by claiming that in order to have a contract one must first have an offer and so this might explain Ms. Gallagher's continued references to its previous status as an 'offer' even though it was now a 'contract'. These explanations provided by Mr. Kenneth McDonagh for the inconsistencies in the instructions given to Ms. Gallagher were simply not credible. In this regard, while Mr. Kenneth McDonagh was certainly a less evasive witness than his two brothers, his failure to provide any plausible response to this crucial inconsistency raised issues about the credibility of his evidence.

206. More significantly, in this regard, after the trial had commenced and during the cross-examination of Mr. Moore, Mr. Kenneth McDonagh's counsel made the same withdrawal as he had in relation to Mr. Maurice McDonagh's witness statement, of Mr. Kenneth McDonagh's evidence regarding his averments concerning the handing over by Mr. Kenneth McDonagh of a copy of the Heads of Agreement to Mr. Moore at the 16th June, 2014 meeting and the presence of Mr. O'Hanlon at that meeting. For the same reasons as set out for Mr. Maurice McDonagh, this change in Mr. Kenneth McDonagh's sworn

evidence does call into question the reliability of his recollection of the events in dispute between the parties.

207. At times however, Mr. Kenneth McDonagh gave evidence which was not evasive and which was not solely self-serving or supportive of his case, unlike Mr. Brian McDonagh or Mr. Maurice McDonagh (even when the evidence before them was irrefutable).

208. Perhaps the most significant example was his evidence that he was never told by Mr. Brian McDonagh who was behind Granja. He had believed up until the hearing in this Court that it was a totally unconnected company. He therefore was learning for the first time of the details about monies flowing in and out of Granja. He also confirmed that he had no idea of the methods used by his brother, Mr. Brian McDonagh, in this dispute, namely that Mr. Brian McDonagh was secretly recording conversations he was having with Ulster Bank.

209. Mr. Kenneth McDonagh did not try to avoid inescapable conclusions (which both Mr. Brian McDonagh and Mr. Maurice McDonagh had done). Accordingly, he admitted, based on the evidence which he had heard for the first time in Court, that he had reached the conclusion (which this Court believes is inescapable), that it was Mr. Brian McDonagh's money which funded Granja and that therefore it was Mr. Brian McDonagh who was attempting to buy the Kilpeddar site through Granja. On day 17 of the trial, during cross-examination, the following exchange occurred between counsel for the Bank and Mr. Kenneth McDonagh:

> "Q: COUNSEL: Are you seriously telling the Court that you believed the narrative of Brian McDonagh that Granja Limited is beneficially owned by Tian Su [Ooi]? Are you seriously telling the Court that?
>
> A: KENNETH MCDONAGH: Well, I know now – yes, that's what I'm telling the Court – *I know Brian had an involvement with Tian Su or Granja, but I didn't at the time*. And, as far as I was aware, that Granja, who I didn't know, were just buying the lands.
>
> [….]
>
> Q: COUNSEL: [Do you believe Brian McDonagh's story] about any of this, about the provenance of the monies that went to Cathal L. Flynn, that were in Cathal L. Flynn's account which were relied upon for Granja to bid, having come from Tian Su and not Brian McDonagh? Do you believe any of that?
>
> A: KENNETH MCDONAGH: Eh, no*, from what I hear in the court, some of the monies were Brian's.*
>
> […]
>
> Q: COUNSEL: And you know that all of this is central to the Bank's concern about the sales process for the Kilpeddar lands?

A: KENNETH MCDONAGH: Yes, but what I don't understand here*, I don't know why Brian – I don't know why Brian set up Granja and why Granja was set up when* – why he didn't just go, Brian McDonagh go and buy the lands because, as far as I'm aware in the Compromise Agreement, it didn't have to be arm's length transaction. So *I don't know why he concocted all*… [Interjection]" [Emphasis added]

To answer Mr. Kenneth McDonagh's own question as to why Mr. Brian McDonagh had "*concocted*" Granja, it was put to Mr. Kenneth McDonagh by counsel, that the primary reason Mr. Brian McDonagh used Granja, was not because it appeared to be an arm's length company, but because he had not disclosed to the Bank in his Statement of Affairs that he had approximately €1.5 million in cash to fund the alleged purchase by Granja of the Kilpeddar site. It was put to him by counsel that it was for this reason that Mr. Brian McDonagh had tried to purchase the Kilpeddar site using Granja, rather than purchasing it personally.

210. Again, rather than denying or using diversionary tactics to deal with this proposition (like Mr. Brian McDonagh and Mr. Maurice McDonagh had done in their cross-examination), Mr. Kenneth McDonagh accepted the irrefutable logic of the evidence before the Court:

"Q: COUNSEL: And do you not understand then why the Bank would be dissatisfied with the turn of events that we say has occurred here in which Brian McDonagh concealed assets from the Bank because he didn't include them in his statement of affairs? And he used those assets to bid to buy the Kilpeddar lands back, purporting to bid on behalf of the company when he, in fact, controlled the company. Can you see why the Bank would be dissatisfied with that turn of events, Mr. McDonagh?

A: KENNETH MCDONAGH: Yes."

D. WAS THE LETTER OF 16th JUNE, 2014 A FAKE LETTER?

211. Between the execution of the allegedly binding Heads of Agreement on the 13th June, 2014 and the appointment by Ulster Bank of the Receivers to the Kilpeddar site, on the 1st October, 2014, there was a period of three and half months when a considerable number of letters and emails were exchanged between the McDonaghs, their auctioneer (Mr. Dooley), the solicitor for Mr. Maurice McDonagh and Mr. Kenneth McDonagh (Ms. Gallagher) and Ulster Bank.

212. Considering that the McDonaghs are alleging in this Court that this one page Heads of Agreement document is a binding contract for the sale of the Kilpeddar site at the considerable sum of €1,501,000, and that the write-off of €20 million of debt is dependent on it being binding, it is astounding that during this three and a half month period, there is not one reference, in an email, letter, memorandum, text or any other document produced in evidence, to a completed 'contract' for the sale of the land (save for this one allegedly fake letter dated 16th June, 2014).

213. On the contrary, every single relevant document during this period between June and October of 2014 refers to 'an offer' or refers to arrangements needing to be made to

market the Kilpeddar site (the site which the McDonaghs are claiming was already sold since the 13th June, 2014).

214. It is not proposed to go through every single document during this period. However, one example of the documents exchanged during this period is the email from Ms. Gallagher, who, by this stage, had ceased to act for Mr. Brian McDonagh, to Mr. Brian McDonagh's secretary, Ms. Byrne. Mr. Brian McDonagh did not dispute that this email would have been seen by him. In this email dated the 20th June, 2014 Ms. Gallagher states:

> "[Mr Maurice and Mr Kenneth McDonagh] are of the view that the bank should be notified of the highest tender *offer* made last Friday. They have requested that Mr Gabriel Dooley would write to the bank to notify the bank of the highest *offer* that was achieved last Friday. […] The view of Mr Ken & Mr Maurice McDonagh is that the bank be notified of that *offer*. Let the bank formally reject that *offer*." [Emphasis added]

If the McDonaghs genuinely believed (as they are now claiming) that the Heads of Agreement are a 'contract', it is very significant that the solicitor for Mr. Kenneth and Mr. Maurice McDonagh, who, like any lawyer, would be acutely aware of the difference between a 'contract' and an 'offer', would state on four separate occasions in just one short paragraph of an email that the Kilpeddar site was subject to an offer, without any reference to there being a binding contract in place.

215. After this email, and numerous others like it (e.g. the email from Mr. Brian McDonagh to Ms. Gallagher on 10th September, 2014 to tell her that "*an unconditional contract can be drawn up"* for the Kilpeddar site) between the McDonaghs and their advisers during this three and a half month period to the effect that there was an 'offer' on the site, Ms. Gallagher issues a complete *volte face* to Ulster Bank on the 2nd October, 2014. It is hugely relevant that this *volte face* occurs the day after the Receivers are appointed to the Kilpeddar site. This *volte face* arises after Ms. Gallagher has met her clients, Mr. Maurice McDonagh and Mr. Kenneth McDonagh. In light of the *volte face* which she delivers in this email, it is perhaps not surprising that she would use the expression "*updated position*", in what can only be termed a considerable understatement, to describe the claims her clients are now about to make about the site, which she had previously and consistently described as being subject to an "*offer*".

216. In this email, she states that what this 'updated' position actually involves is that despite the numerous references to 'offers', 'highest bidder' and contracts to be completed etc. by her in correspondence over the previous three and a half months between the Bank and her clients (and indeed between her clients and their agents), there was in fact not merely an 'offer' for the site after all, but rather a binding legal contract for the sale of the Kilpeddar site which had been in existence since the 13th June, 2014.

217. This email of 2nd October, 2014 states, insofar as relevant, that:

"Following a meeting today with my clients Mr Maurice McDonagh and Mr Kenneth McDonagh please note *we wish to advise you of their updated position* in regards to the section of the Compromise Agreement that they exercise control and we reply as follows:

[…]

In relation to this section [Section 3.7 of the Compromise Agreement] please be advised that my clients have fully complied with this section and through the sales agent Dooley *Auctioneers the property was sold on 13th June 2014 to Granja Limited for a sum of €1,500,500.00. A booking deposit was accepted on that date* by Dooley & Co Auctioneers. We attach a copy Heads of Agreement which was entered into and signed by all parties at the offices of Dooley Auctioneers on that date. Gallagher & Company Solicitors were instructed *on that date to draw up a Contract between the respective parties* on foot of the terms of that agreement to sell. […]" [Emphasis added]

It is relevant for the purposes of this Court's determination of whether the Heads of Agreement are a contract (which is considered below), to note at this juncture that, even when delivering this *volte face* that a 'contract' has existed since 13th June, 2014, Ms. Gallagher acknowledges in this very same email that, arising from the Heads of Agreement having been executed on the 13th June, 2014, she was instructed on that date to draw up a 'contract'. This reference to the instruction to draw up a 'contract' does of course undermine the McDonaghs' claim that the Heads of Agreement were the 'contract', for the very reason that if this was the case there would be no need for Ms. Gallagher to draw up the 'contract' as stated by her in this email.

218. In the context of the alleged fake letter of 16th June, 2014, Ulster Bank not surprisingly claims that, if there was a contract for sale (which could lead to a write off of some €20 million in debt) or if the McDonaghs believed that there was such a binding contract for sale, it is astounding that the Bank was only being advised for the first time of its existence (and being provided with a copy of the Heads of Agreement for the first time) some three and a half months after its execution, which was coincidentally the day after the Receivers were appointed to the Kilpeddar site.

219. Not unlike how Mr. Brian McDonagh answered the Bank's reasonable claims regarding the money trail in and out of the Granja client account to and from him (where he produced the (forged) Declarations of Trust), to answer this reasonable claim by Ulster Bank, Mr. Brian McDonagh produced a copy of a letter which disputes that the 2nd October, 2014 was the first occasion that the Bank was notified of the Heads of Agreement/'contract'. This is a letter on his file which he claims he sent to Mr. Moore of Ulster Bank on the 16th June, 2014 the Monday after the 13th June, 2014, the date on which the Heads of Agreement were allegedly executed.

220. This letter purports to notify the Bank (not of an 'offer', like all the other correspondence between 13th June, 2014 and 2nd October, 2014) but rather of the signing of a binding contract for the sale of the Kilpeddar site. It states, insofar as relevant that:

> "This is just a quick note to confirm that we have finally concluded the sale of our lands at Kilpeddar last Friday. Dooley Auctioneers completed the best bids process and achieved a price of 1,501,000.00.
>
> I will be contacting Gallagher and Company Solicitors to organise the sending out of the contracts to the purchaser.
>
> […]
>
> For your files, I attach a copy of the contract signed by all three vendors and counter signed by the purchaser."

Mr. Moore of Ulster Bank was a credible witness and he gave unwavering evidence that this letter was never received by him and that he first became aware of its existence during these proceedings.

221. Not surprisingly, in view of Ulster Bank's claims regarding Mr. Brian McDonagh being a party to two forged Declarations of Trust and the instances of his giving false evidence under oath, this Court considered carefully the objective evidence to help determine whether this is a letter that was posted by Mr. Brian McDonagh to Ulster Bank on the 16th June, 2014, as alleged by him.

222. The following factors are relevant to the Court's determination of this issue:

(i) As a general point, and for the reasons set out above, Mr. Brian McDonagh's recollection of events regarding this dispute has not been reliable and so this Court treats with caution his uncorroborated recollection that this letter of the 16th June, 2014 was posted to Ulster Bank;

(ii) Somewhat peculiarly, the letter is addressed to Ulster Bank at a different address (at "*St Georges Quay, Dublin 2*") from that which letters had previously been received by Mr. Brian McDonagh from the Bank (i.e. 33 College Green, Dublin 2). It is also a different address from the address where Mr. Kenneth McDonagh and Mr. Maurice McDonagh met Mr. Moore (i.e. Suffolk Street, Dublin 2) that very same day as the letter was allegedly posted, the 16th June, 2014;

(iii) When challenged about the letter ever having been posted by him, Mr. Brian McDonagh, who is clearly an experienced business man, came up with, as evidence of the *bona fides* of his claim that he had in fact posted the letter, the nonsensical suggestion that he was willing to contact An Post to see if they had a copy of the envelope thereof in which the letter had been posted. How An Post could have a copy of the envelope in which he allegedly 'posted' that letter is beyond

comprehension. This bizarre answer, rather than supporting the *bona fides* of his claim, that he had in fact posted the letter, had the reverse effect;

(iv) It is also relevant of course that the contents of the letter, alleging as they do a 'contract', are completely inconsistent with every other single document in the following three and a half months, which refer merely to an 'offer'. The sending of a letter with these contents is therefore difficult to square with every other piece of correspondence (to which reference is made elsewhere in this judgment) sent by, or on behalf of the McDonaghs in the following three and a half months. In particular, Mr. Brian McDonagh's email of 10th September, 2014 to Ms. Gallagher (to which reference has already been made), in which he queries whether he should ask Dooley Auctioneers to make the 'offer' of the best bids unconditional, is completely inconsistent with him having sent the letter of the 16th June, 2014 to the Bank about the alleged 'contract'. This completely militates against a finding that this letter was actually sent at this time;

(v) Also significant is the fact that Mr. Brian McDonagh swore an affidavit on the 30th September, 2014 in his injunction proceedings against Ulster Bank seeking, *inter alia*, to enforce the debt write-off under the Compromise Agreement and to prevent the appointment of Receivers by the Bank over the Kilpeddar site. This letter of 16th June, 2014, if it had existed and had been posted by him at that time as he alleges, would have been a significant matter in his favour, in those proceedings. If it had existed on the 30th September, 2014, as alleged by him, it is astonishing that it would not have been referred to by him in that affidavit. Yet, there is no reference in this affidavit to this crucial letter which Mr. Brian McDonagh now claims he posted just a few months prior to his swearing of this affidavit;

(vi) Mr. Moore, who was a credible witness and whose recollection this Court has no reason to doubt, gave evidence that he never received this letter. In particular, it seems clear that if he had received this very significant letter he would have replied to it. This is because on Mr. Moore's own version of events, he was frustrated at hearing (at the meeting of 16th June, 2014 with Mr. Maurice and Mr. Kenneth McDonagh) that there was even a highest 'offer' for the site (let alone a contract). Thus, it seems clear that if he had received this letter on the 16th June, 2014 to say, not that there was merely an 'offer', but that there was a binding contract of sale he, or perhaps more likely the Bank's solicitors, would have written in the strongest terms to the McDonaghs. After all, this is exactly what Ulster Bank did when the first independently recorded notification occurs of Ulster Bank receiving the Heads of Agreement, i.e. by email of 2nd October, 2014. This is because after the injunction application by Mr. Brian McDonagh is dealt with by Ulster Bank in October 2014, the receiver appointed by the Bank writes to Granja's solicitors on the 7th November, 2014 telling them that Ulster Bank did not consent to the sale of the site. It seems clear therefore that the absence of any reply to the contents of the alleged letter of 16th June, 2014 supports the contention that Ulster Bank did not receive this letter of the 16th June, 2014. Furthermore, in a letter dated 17th

June, 2014 sent to Mr. Brian McDonagh by Mr. O'Hanlon, the McDonaghs are noted to be "*non-compliant*" with a number of clauses in the Compromise Agreement. In a subsequent email dated 20th June, 2014 sent by Mr. O'Hanlon to Ms. Gallagher he advises her that "*the Bank's consent to market [the Kilpeddar site] at this time is withheld pending further consideration as to our next steps in this matter*". These responses of Ulster Bank in the immediate aftermath of the alleged posting of the letter of 16th June, 2014 (which make no reference to an alleged sale and are premised on there being no such sale) clearly support the conclusion that the letter was not received by Ulster Bank and also provide support for the conclusion that it was not sent by Mr. Brian McDonagh;

(vii) Tellingly, despite the importance of this letter which Mr. Brian McDonagh alleges he sent on the 16th June, 2014, he did not send it by recorded delivery (whether by registered post or by email), so as to ensure that he could prove the receipt of this letter. If he did genuinely send it on the 16th June, 2014 and he wished to record this fact, he could have easily sent it by registered post or by email. He chose not to do so, despite the fact that the communication between Ulster Bank and the McDonaghs was generally by email and despite the fact that Mr. Brian McDonagh's engagement with the Bank, and indeed his engagement with other third parties in this dispute, was generally by email;

(viii) It is also relevant to note that when this obvious point was put to him, not for the first time, he appeared to be making up answers as he went along, since he said the reason he did not send it by email on the 16th June, 2014 was because "*I think there was a problem with our emails. […] It's five years ago. I'm not sure*." Yet, he had sent and received multiple emails around this time including an email sent by him to his secretary, Ms. Byrne, on 13th June, 2014, which was the business day just prior to his alleged posting of the 16th June letter. As it was five years ago, he implicitly acknowledged that he was involved in speculation ("*I'm not sure*") and for this reason, his answer that there was "*probably an issue with the emails*" at that time does not seem credible;

(ix) Most significantly of all perhaps, if this letter was sent by Mr. Brian McDonagh as he claims on the 16th June, 2014, it is curious to say the least that Mr. Brian McDonagh decided not to have 'proof' of receipt by Ulster Bank of this important letter. This is because Mr. Brian McDonagh was someone who appeared to distrust Ulster Bank to such an extent that he was very keen to have proof of matters when dealing with the Bank. His desire to have proof of his dealings with the Bank is epitomised by his secretly recording telephone conversations and meetings with Mr. Moore only days prior to this letter, on the 3rd, 5th and 9th of June. Thus, in complete contrast to his standard approach in having proof of his dealings with Ulster Bank, when it comes to this crucial letter which he claims to have sent on the 16th June, 2014, he decided to refrain from having any evidence to show that he sent it or that Ulster Bank received it. This cannot be easily explained. Instead, it seems that Mr. Brian McDonagh felt that he could rely on his file copy and the fact

that the file copy of the letter has "*c.c. Dooley Auctioneers (Gabriel Dooley)"* at the end of the page, as proof of postage to Ulster Bank. However, it is simply not plausible, in light of his mindset at the time regarding having proof of his dealings with the Bank, that if he did in fact send this letter to Ulster Bank on the 16th June, 2014 that he would not have ensured that he had a record of the sending and/or receipt of this important letter, grounding, as it does, his entitlement to a debt write-off of €20 million;

(x) The letter has on its face a cc to Mr. Dooley, the auctioneer for the sale of the Kilpeddar site. Mr. Brian McDonagh may have felt that this would support his claim that the letter was posted to Ulster Bank on the 16th June, 2014, i.e. if Mr. Dooley confirmed his receipt of the same letter then this might lead to the inference that Mr. Brian McDonagh posted it to Ulster Bank. (In this regard, Mr. Dooley gave evidence that he believes he received this letter around the 16th June, 2014). However, no such inference can be drawn from the insertion of the "*c.c. Dooley Auctioneers (Gabriel Dooley)"* on the letter. Firstly, it is worth noting that the letter is not even addressed to Mr. Dooley, as there is no address, but simply his name. Secondly, even if Mr. Dooley did receive the letter on or around the 16th June, 2014, this does not assist Mr. Brian McDonagh's claim that he posted the letter to Ulster Bank on the 16th June, 2014, since there is no connection between posting a letter to one recipient and posting it to another recipient. In any case, this Court believes that Mr. Dooley may be mistaken in his recollection of when he first received the letter. This is because:

a. Mr. Dooley was not a truly independent witness and this may inadvertently affect his recollection of documents alleged to have been sent to him and indeed his recollection of events generally relating to these proceedings. He has a direct financial interest in the Heads of Agreement being held to be a binding contract for sale. This is because he spent seven years heavily involved in this case and, as he pointed out in evidence, he was the only one in court "*not on the payroll*". He was clearly resentful of the considerable amount of time during that seven year period that he had spent on the 'sale' of the site, and the subsequent litigation, without any financial reward. In this respect, if the Heads of Agreement were held by this Court to be binding, it seems clear that he would receive either €15,000 or €30,000 as his 1% or 2% commission on that sale, so he has a considerable financial interest in the outcome of these proceedings. Indeed, in his own words, he had "*a huge monetary interest in the case*". Thus. he had a financial interest in this Court concluding that the letter of 16th June, 2014 was not a fake letter.
b. In addition, all the correspondence for three and a half months after the date of his alleged receipt of this letter on the 16th June, 2014, whether from Mr. Dooley, or to him (or indeed referencing him, such as the email from Ms. Gallagher to Ulster Bank on 15th July, 2014 mentioning the "*offer of the buyer to Mr Gabriel Dooley on the 13th June…*"), is completely inconsistent with the contents of this letter of the 16th June, 2014, since that

correspondence references an 'offer' or a contract to be executed in the future. To take another example, in the email dated 10th September, 2014 sent by Mr. Brian McDonagh to Ms. Gallagher and forwarded on the same date by Mr. Brian McDonagh to a Mr. Sean O'Reilly of Dooley Auctioneers it is stated that:

> "Should I ask Dooley auctioneers to ask the winner of best bids sale of June 13th last to make his *offer unconditional* and not subject to having an access?" [Emphasis added]

Thus, there is nothing recorded in what Mr. Dooley says or does in the three and a half months after the 16th June, 2014 (up to the 2nd October, 2014) which is consistent with the contents of the letter of the 16th June, 2014 (which references a binding contract). Rather all this correspondence is completely inconsistent with the contents of that letter (since that correspondence references an 'offer') and therefore is inconsistent with Mr. Dooley having received this letter on or about 16th June, 2014, despite his recollection to that effect.

c. Furthermore, when cross examined on when he received the letter, Mr. Dooley was far from clear and provided evasive responses. The most that Mr. Dooley could say by way of direct response was that:

> "I am assuming it came in on that date or the next day.
> […] I would recollect seeing it."

d. In addition, whether because of his financial interest in the sale of the Kilpeddar site or otherwise, Mr. Dooley was, like Mr. Brian McDonagh and Mr. Maurice McDonagh, a difficult and evasive witness. For example, he was presented with the Ulster Bank email to Mr. Dooley and Mr. Ganly dated 16th May, 2014 which refers in the future tense to the requirement upon the McDonaghs to obtain the consent of Ulster Bank to any sale of the lands since it states that the Bank will:

> "require details of the marketing efforts and market feedback from both agents *before considering our consent* to any acceptance made by the property holders." [Emphasis added].

Despite it being obvious, Mr. Dooley declined to admit that this meant that at the date of that email, Ulster Bank regarded the consent to the sale as being a future tense issue. Not unlike Mr. Brian McDonagh and Mr. Maurice McDonagh, Mr. Dooley refused to concede points which were blindingly obvious if they weakened the McDonaghs' case, to such an extent that one got the impression that the interests of the McDonaghs and Mr. Dooley were aligned. In relation to this email of 16th May, 2014 he was relentlessly evasive and refused to accept that the issue of consent was a future consideration for the Bank.

e. Similarly, when asked, as an experienced auctioneer, to comment on the extensive correspondence sent to him after this allegedly fake letter of 16th

June, 2014, which correspondence referenced an 'offer', he refused to comment. In particular, he refused to comment on the proposition that, in light of this extensive correspondence, he could not have genuinely believed at that time, that the Heads of Agreement were a 'contract'. Instead, he was evasive as he sought to hide behind the (incorrect) proposition that this was a matter for the Court, when clearly his "*genuine belief"* was only a matter for him and not a matter for the Court.

For all of these reasons, this Court concludes that the letter of 16th June, 2014 was never received by Mr. Moore at any stage. In addition, this Court concludes that on the balance of probabilities Mr. Dooley is incorrect in his recollection that the letter was received by him in or around the 16th June, 2014. Finally, this Court also concludes on the balance of probabilities that this letter was not posted by Mr. Brian McDonagh to Mr. Moore as he claims.

E. ARE THE HEADS OF AGREEMENT A LEGALLY BINDING CONTRACT?

223. This Court considers below the issue of when the Heads of Agreement were executed. However, regardless of when they were executed, an issue arises as to whether they are legally binding, which will be considered first.

224. To consider this question, it is relevant to set the Heads of Agreement out in full at this juncture:

"Day: Friday
Date: 13th June 2014
Time: 3pm

Re: 81 Acres at Kilpeddar, Co. Wicklow.

Heads of Agreement to Sell

Memorandum of Agreement

Vendors:	Brian McDonagh Drummond House Drummond East Delgany Co. Wicklow	Kenneth McDonagh 48 Charleston Road Ranelagh Dublin 6	Maurice McDonagh 50 Charleston Road Ranelagh Dublin 6
Purchasers:	Granja Limited Unit 2 Ballinteer Business Centre Ballinteer Ave Dublin 16		

This is to confirm that the Vendors of circa 81 Acres at Kilpeddar, Co. Wicklow, Folio Number 10117F part WW21790F and D2007KW011999J being part folios 1516F and 5204WW36738F, have agreed to sell the above lands to the said purchasers Granja Limited for the amount of €1,501,000.00 One Million Five Hundred and One Thousand Euros. The funding of this transaction is in cash. The proof of funds have been produced to Dooley Auctioneers from Cathal L. Flynn & Co. Solicitors in a letter of confirmation of monies in client account of Cathal L. Flynn & Co. Solicitors.

> The Contract for Sale to be signed by both parties and exchange of Contracts to be signed simultaneously with 10% deposit on signing.
>
> Dooley Auctioneers confirm that a booking deposit of €50K, Fifty Thousand Euros, has been received from Granja in the form of a bank draft this is to be held by Dooley Auctioneers until the closing of the sale.
>
> Please note the undertaking from Granja regarding the outstanding fees claim by architect has been taken into consideration in acceptance of their offer. Copy of same is attached with letter of offer best bids process signed." [Emphasis added]

This document lists the parties (Granja and the McDonaghs), the property (Folio 10117F) and the price (€1,501,000) and it is claimed by the McDonaghs to be a binding contract for the sale of the Kilpeddar site.

225. It is true to say that for a document to be a legally binding contract, it is a prerequisite that it should have, what are known as the three p's, i.e. the parties, the property and the price. However, it is not the case that any document that has the three p's is *ipso facto* a legally binding contract for sale. It is clear from the authorities that a document that has the three p's, but which at the same time indicates an intention that the parties not be bound, whether by the use of the phrase '*subject to contract'* or otherwise, will not amount to a binding legal contract. In relation to documents which are described as Heads of Agreement, the use of that term is not conclusive as to whether they are binding contracts or not. As noted by McDermott & McDermott, *Contract Law* (2nd ed., Bloomsbury Professional, 2017) at para. 2.221:

> "The use of the phrase 'heads of agreement' is not conclusive as to whether or not the parties actually reached a concluded agreement. For example in *R McD v McD* [1993] I.L.R.M. 717 at 721, Barron J. stated that: 'It seems to me that the heads of agreement were in fact just that. They were agreement as to the core of the matter but in relation to a number of other matters, were merely an agreement to agree subsequently'."

In contrast, *in Redfern Ltd v. O'Mahony* [2010] IEHC 253 at para. 67 *et seq*., McGovern J. noted that, for there to be a binding legal contract, the parties must intend to create legal relations, and that on the facts of that case, he concluded that the Heads of Agreement in that case were binding:

> "[T]he first legal issue to be decided is whether or not the Redfern Agreement was a legally binding agreement or merely Heads of Agreement. […] while there are some ambiguities and inconsistencies contained in the Agreement, it was intended to create legal relations."

In relation to the Heads of Agreement in this case, it is clear therefore that for there to be a binding legal contract, something more is required than a document with the three p's;

that something more is an intention to create legal relations, namely a clearly expressed intention by the parties to buy/sell the property in question such that a legally binding contract can be said to exist.

226. The document in this case contains numerous terms which indicate that the document is clearly not intended to be a legally binding contract for sale. To start with, it is described not as a '*contract for sale'* or indeed as an '*agreement for sale'*, but rather the title or first term of the document is that it is a '*heads of*' an agreement, rather than an agreement itself, although as noted above, this is not decisive.

227. However, what is decisive, in this Court's view, is the fact that, by its very terms, the document makes clear that it is not a contract for sale. It does so by referring to the fact that another document, which will be the contract for sale, is to be executed in the future, i.e. it states that:

> "The Contract for Sale to be signed by both parties and exchange of Contracts to be signed simultaneously with 10% deposit on signing."

The logic of this term referring to another document, called the Contract for Sale, to be signed in the future, can only be that the Heads of Agreement itself were not a contract for sale but merely an agreement to agree in the future. On this basis alone, this Court finds that the Heads of Agreement are not legally binding. However, there are other reasons for this conclusion to which the Court will now refer.

Payment of a booking deposit, and not a contractual deposit, by Granja

228. Evidence was provided that in the sales process for a property, there are usually a number of steps and one of these steps is that a booking deposit, of *circa*. 3% of the purchase price, is normally paid when properties become 'sale agreed' between a vendor and purchaser. At this stage of the sales process, the vendor and purchaser are not legally bound and so the 'booking deposit' is refundable to the purchaser if the sale does not proceed.

229. Evidence was also provided that after the 'sale agreed' stage, when legally binding contracts for sale are signed, a contractual deposit, which is not refundable, is normally paid by the purchaser and this usually amounts to 10% of the purchase price.

230. In this regard, Mr. Dooley gave evidence that when a booking deposit is paid, it is a sign of good faith, rather than being part of a binding contract and that such deposit is refundable if no contract is ultimately signed.

231. Against this background therefore, further support for the conclusion that the Heads of Agreement were not legally binding, but rather represented a non-binding agreement to sell, is that the Heads of Agreement themselves provided that when the "*Contract for Sale*" was signed, which was clearly intended to be at some stage in the future, a deposit of 10% would be paid.

232. Evidence was also provided that the 10% deposit was never received from Granja. This is entirely logical, since under the terms of the Heads of Agreement, such deposit was only payable upon the execution of the contract for sale which never occurred.

233. Furthermore, as is clear from the terms of the Heads of Agreement themselves ("*a booking deposit of €50K, Fifty Thousand Euros, has been received from Granja*"), a deposit of €50,000 (inclusive of VAT and outlays), i.e. approximately 3% of the purchase price, which was described as a booking deposit, was actually paid by Granja, which Mr. Dooley acknowledged was refundable. This payment of a booking deposit is consistent with the Heads of Agreement being a non-binding agreement to sell. There was also evidence given to the Court that this booking deposit was refunded by Mr. Dooley to Granja.

234. This all provides further support for the conclusion that the Heads of Agreement were a non-binding agreement for sale, rather than a binding contract for sale.

Terms which one would expect to see in a 'contract' for the sale of property

235. Quite apart from the terms of the Heads of Agreement themselves, it is also the case that the document is missing numerous terms which one would expect to see in this document if it was a legally binding contract for sale. For example, the one-page Heads of Agreement is silent regarding vacant possession. In this regard, the Kilpeddar site at the date of the Heads of Agreement was subject to a 5-year lease which had a remaining 4 years to run at a rent of just €3,095 per annum (less monies paid by the lessee for the upkeep of the land), as it was leased out to a local landowner. While not a determinative factor, it would be surprising if a purchaser of any property were to enter into a legally binding contract to pay what appears to have been market value for that property without any confirmation that he was going to get vacant possession.

236. Similarly, there is no reference in the Heads of Agreement to the purchaser acquiring the site free of any mortgage. If the Heads of Agreement were a legally binding contract for sale, as claimed by the McDonaghs, it would mean that the purchaser of the Kilpeddar site was obliged to pay what appears to have been full market value for the site, but it would *prima facie* be acquiring a site which had a mortgage in favour of Ulster Bank.

237. It is difficult to imagine any purchaser of a property intentionally entering a legally binding contract with this effect. This absence of clarity regarding the mortgage further militates against a finding that the Heads of Agreement are a legally binding contract.

238. Finally, while no evidence was provided on the part of Granja, it is nonetheless worth noting that it is common case that Granja, the alleged purchaser under the Heads of Agreement, took proceedings against Ulster Bank, the Receivers and the McDonaghs, but that it discontinued those proceedings against those parties, proceedings in which it had claimed that the Heads of Agreement were legally binding.

239. For all of these reasons, this Court has little hesitation in concluding that the Heads of Agreement are not a binding contract for sale.

F. WHEN DID THE HEADS OF AGREEMENT COME INTO EXISTENCE?

240. It is claimed by the McDonaghs that the Heads of Agreement were signed by Mr. Brian McDonagh and Mr. Maurice McDonagh and on behalf of Granja on the 13th June, 2014, with Mr. Kenneth McDonagh signing the document on the 14th June, 2014.

241. This Court has considerable doubts as to whether, after the best bids process that took place in Mr. Dooley's office on Friday the 13th June, a Heads of Agreement was actually signed on behalf of the McDonaghs at this time.

242. Firstly, if the Heads of Agreement were in fact signed by the McDonaghs on the 13th and 14th June, as they allege, and they believed the Heads of Agreement to be a binding contract, as they claim, then it was a hugely significant document for each of them. This is because a binding contract for the sale of the Kilpeddar site was a crucial pre-condition for the write-off of their debt of €20 million to Ulster Bank.

243. However, when one looks at all the emails and the letters and correspondence in the three and a half months after the alleged execution of the Heads of Agreement (up until the 1st October, 2014), the signed Heads of Agreement do not appear to be referenced anywhere, whether in correspondence by the McDonaghs with the Bank or correspondence between the McDonaghs *inter se* or between the McDonaghs and their solicitor or their auctioneer. There is one solitary reference during this period to a document (but only to one having been signed by Granja) in an email from a director of Granja (Mr. Feehily) to the auctioneer, Mr. Dooley on the 20th June, 2014:

> "I refer to the Best Bids Process held last Friday and Granja's signing of Memorandum of Understanding on being the successful bidder from the process.
>
> What is the update in regards to furnishing us with signed Memorandum of Understanding by the Vendors??
>
> When will draft contract issue to our Solicitors??"

This is the only evidence that comes anywhere close to possibly being a reference to the Heads of Agreement or indeed a Memorandum of Understanding. However, by its very terms this references the absence of any evidence of a document signed by the McDonaghs at this stage. Significantly, there appears to be nothing more as regards documentary evidence regarding the existence of the signed Heads of Agreement after this email during this entire three and a half month period. There is in effect complete 'radio silence' regarding the Heads of Agreement having been executed by the McDonaghs and complete radio silence regarding the existence of a signed contract for the sale of the site. It is as if the signed Heads of Agreement do not actually exist during this period. This is astonishing when one considers the importance of this document.

244. Then out of nowhere the signed Heads of Agreement make their first appearance (in the sense that they are referenced for the first time in a contemporaneous document). Most peculiarly of all is the date on which this happens. It happens the very day the Receivers are appointed to the Kilpeddar site.

245. When one considers this alleged coincidence along with the following facts, it calls into question whether the Heads of Agreement were executed by Granja and the McDonaghs on the 13th June, 2014 as alleged by the McDonaghs or if, in fact, they were executed as a desperate response by the McDonaghs, after the appointment of the Receivers on the 1st October, 2014, to thwart the Receivers from selling the Kilpeddar site.

246. These facts are:

(i) In his *ex parte* injunction proceedings on the 1st October, 2014 to prevent the Bank from appointing a Receiver to the Kilpeddar site and to restrain the Bank from enforcing the terms of the Compromise Agreement, Mr. Brian McDonagh swore an affidavit dated 30th September, 2014 in support of his claims. It is astonishing, if the signed Heads of Agreement actually existed since the 13th June, 2014 (and particularly since they are the linchpin of the McDonaghs' defence in these proceedings and thus would have been crucial in any claim to prevent the Receivers from selling the site in October 2014), that they would not have been referred to in this affidavit just a few months after their execution.

(ii) Not only does Mr. Brian McDonagh make no reference in this affidavit to the Heads of Agreement at all, or to the existence of a 'contract' for the sale of the site, he instead simply refers at para. 7 of his affidavit to the fact that:

> "the [McDonaghs] have secured a Purchaser for the Kilpeddar Lands by means of a best bids process."

Thus, consistent with the language of the emails and other correspondence in the three and half months after the 13th June, 2014, there is no reference in this affidavit to the site having been sold or to there being a contract for its sale. Instead there is language therein which is consistent with a mere offer or non-binding agreement for the sale of the site. Furthermore, he contends in this affidavit that Ulster Bank wrongly *refused to consent* to the sale of the site, and therefore that there was no sale. This is completely contrary to the case the McDonaghs are now making that the Heads of Agreement existed since 13th June, 2014 and that they constituted a binding contract for sale to which the Bank *had* consented. It would be astonishing, if the Heads of Agreement actually existed on the 30th September, 2014 when he swore this affidavit, that Mr. Brian McDonagh would not have made reference to it. This glaring absence from this affidavit supports the conclusion that the signed Heads of Agreement came into existence on or after the 30th September, 2014 but on or before the 1st October, 2014 (when they were first emailed to Ms. Gallagher). It seems likely that the trigger for their coming into existence was the appointment of the Receivers to the Kilpeddar site on the 1st October, 2014.

(iii) Similarly, it has been previously noted that it is also astonishing that, if the letter of 16th June, 2014 (referring as it does to the Heads of Agreement/'contract' and thus allegedly proving the existence of the Heads of Agreement) had actually existed at

the time when Mr. Brian McDonagh swore this affidavit on the 30th September, 2014, that it would not have been referred to, in that affidavit. The failure to make any reference to the letter of 16th June, 2014 in this affidavit provides therefore support for the conclusion (already reached by this Court) that not only did that letter not exist on the 16th June, 2014 (or at any time prior to the 30th September, 2014), but also that the Heads of Agreement (to which it refers and which was the *raison d'être* for the letter) also did not exist prior to the 30th September, 2014.

(iv) Mr. Brian McDonagh has little or no recollection of the meeting at Mr. Dooley's office on the 13th June, 2014 at which this most significant event is claimed to have occurred, i.e. the signing of the contract for the sale of the Kilpeddar data centre site. Considering that he had been pushing so hard for the sale of the site to be finalised (for example, see his email to Mr. O'Hanlon of 29th May, 2014 where he stated that he wanted the marketing campaign for the Kilpeddar site "*to proceed as quickly as possible")* and bearing in mind his 'obsession' with data centres, it is surprising that in his evidence he stated that he "*couldn't remember going to that meeting*" and also stated that he did not think that there was "*anybody present from Granja*" at the meeting.

(v) Ms. Gallagher says she briefly met with Mr. Maurice McDonagh and Mr. Kenneth McDonagh at her offices on 16th June, 2014 at approximately 8.40 a.m., just prior to their meeting with Ulster Bank, and that she was shown the signed Heads of Agreement at this meeting. She maintains in these proceedings that this document is a binding contract. If she was shown a Heads of Agreement signed by all the parties that she believed to be a binding contract (rather than say, a Memorandum of Understanding signed only by Granja), it is strange that, as the solicitor who was about to deal with the sale of the Kilpeddar site (based on this one-page binding contract shown to her on 16th June, 2014), she did not take a copy of this crucial document from Mr. Maurice and Mr. Kenneth McDonagh on that date. She suggested that this was because she was rushing out to court. This does not seem a particularly plausible answer, when one considers that one is talking about copying a one page document. In any case, this does not explain why, in view of the significance of this document, she does not appear to have any record of getting that document in the days or even weeks that followed. Instead, she receives this document for the first time at 4:41 pm on the 1st October, 2014 by email from Dooley auctioneers – the same day Receivers are appointed over the Kilpeddar site. Amazingly, this is the first record in all the voluminous documentation in this case of the signed Heads of Agreement even existing. It is then sent the following day, the 2nd October, 2014, by email by Ms. Gallagher to Ulster Bank.

(vi) In addition, of course, as previously noted, Ms. Gallagher's actions, after she recalls being shown the Heads of Agreement, which she says she concluded was a binding contract, are in fact inconsistent with her having been shown a 'binding' Heads of Agreement. As well as confirming to this Court that she believed on the 16th June,

2014, as she believes now, that the Heads of Agreement are a binding contract (despite the reference therein to a "*Contract for Sale to be signed*"), she also confirmed that between the 16th and 20th June, 2014 she provided the McDonaghs with legal advice on whether or not the Heads of Agreement were a binding contract. If both of these propositions are correct, it seems almost incomprehensible that she would (on the instructions of her clients) write several emails in June, July and August 2014 which in essence maintain the contrary position, by referring only to 'offers' and a future sale of the property. For example, in the email dated 15th July, 2014, a month after she claims she saw the 'binding' Heads of Agreement, Ms. Gallagher writes to Ulster Bank as follows:

> "Whilst we have had no formal response we must take it that the offer of *the buyer to* Mr Gabriel Dooley on 13th June was not acceptable to Ulster Bank." [Emphasis added]

Since Ms. Gallagher was acting on the instructions of her clients, it is clear that Mr. Maurice McDonagh and Mr. Kenneth McDonagh instructed their solicitor on the 15th July, 2014 to describe what happened on the 13th June, 2014 as an 'offer' for the Kilpeddar site, to which the Bank did not consent.

Similarly, they instruct their solicitor, Ms. Gallagher, to write to Ulster Bank on 19th August, 2014, which she duly does by email, stating that Mr. Maurice McDonagh and Mr. Kenneth McDonagh:

> "are anxious that the lands are sold as soon as possible."

Despite these unequivocal expressions of the legal position by the McDonaghs that the site was not subject to a contract for sale, one almost needs to keep reminding oneself that the McDonaghs are in this Court now claiming that the contrary was in fact the actual position, i.e. that the lands had been sold weeks/months earlier.

There is no logical explanation for these instructions, if the signed Heads of Agreement/'contract' existed at this time.

Ms. Gallagher suggests that this change in emphasis arose because Mr. Moore was so annoyed on the 16th June, 2014 when Mr. Kenneth McDonagh and Mr. Maurice McDonagh told him that there was a 'contract' for the site, such that to assuage him, they were prepared to, in the words of Mr. Kenneth McDonagh, 're-sell' the site even though this is a contradiction in terms and even though they now maintain there was a 'contract' for the sale of the site. Quite apart from the fact that this Court has concluded that Mr. Moore's evidence regarding what happened at that meeting is to be preferred (i.e. that he was told simply of an 'offer'), there is no evidence to support this *volte face* by the McDonaghs happening after the meeting of the 16th June, 2014, i.e. if this was true, then the McDonaghs should have contacted Granja to tell it that their 'contract' was being rescinded, which did not occur.

However, a logical explanation for these instructions to Ms. Gallagher to contact the Bank regarding the 'offer', is that the signed Heads of Agreement, upon which the McDonaghs rely to allege a contract exists, did not even exist when these emails were sent. This is because the contents of these emails are consistent with Ms. Gallagher having not been shown a signed Heads of Agreement at the meeting at her offices on the 16th June, 2014, but having been advised merely of a highest offer arising from the best bids process (or perhaps having been shown a Memorandum of Understanding signed only by Granja).

(vii) It is also relevant to note that after Ms. Gallagher claims that she saw the binding Heads of Agreement on the 16th June, 2014, she spent some considerable time during the summer of 2014 seeking to rectify right of way issues relating to the site. However, if Ms. Gallagher had seen a Heads of Agreement which she believed were binding, she would have seen a document that made no reference to rights of way or any other title issues. This would mean that Granja would have been obliged to buy the site even if it was land locked. On this basis, there was no need for Ms. Gallagher to spend any time on rights of way/title issues. Ms. Gallagher could not provide a plausible answer to this inconsistency. One way to explain the inconsistency is that Ms. Gallagher's recollection, that she was shown the Heads of Agreement on 16th June, 2014, may be incorrect. It should be emphasised that Ms. Gallagher is not being criticised for her recollection or indeed her failure to provide plausible explanations to the inconsistencies identified in the evidence. She was placed in a difficult position by her clients as their instructions were, at one stage, to claim that what happened on the 13th June was merely an 'offer' and at another stage to claim that what happened actually led to a 'contract'. In this regard, Ms. Gallagher cannot be faulted for following her clients' instructions. The responsibility lies with her clients who have to explain these blatant inconsistencies.

(viii) Finally, it is relevant to note that during the cross-examination of Mr. Moore counsel for Mr. Maurice McDonagh and Mr. Kenneth McDonagh informed the court that those two defendants had decided to withdraw their sworn evidence that they had shown (*per* Mr. Maurice McDonagh) or handed over (per Mr. Kenneth McDonagh) a copy of the Heads of Agreement to Mr. Moore of Ulster Bank on the 16th June, 2014. As previously noted, the showing or the handover of the Heads of Agreement on the 16th June, 2014, if it actually happened, would have been a crucial piece of evidence upon which the McDonaghs were relying to support their claim that they are entitled to have their €20 million debt written off. This Court has already commented (in the context of the credibility of the McDonaghs) on the fact that it is curious that both brothers would misremember such a crucial fact as showing/handing over a copy of the Heads of Agreement, which fact is clearly relevant to whether the Heads of Agreement ever actually existed on the 16th June, 2014. In this Court's view, this provides further support for this Court's reservations about whether the signed Heads of Agreement did in fact exist on 16th June, 2014 as claimed by the McDonaghs. It is also to be noted that the withdrawal of the claim by the McDonaghs that they showed or indeed gave a copy of the Heads of

Agreement to Mr. Moore on the 16th June, 2014 is consistent with them also not showing the Heads of Agreement to Ms. Gallagher earlier that same morning, contrary to Ms. Gallagher's recollection. This is because if they are withdrawing their claim that they showed or gave a copy of the Heads of Agreement to Mr. Moore on the morning of the 16th June, this must cast some doubt over their claim that they showed the Heads of Agreement to Ms. Gallagher only an hour or so earlier that same morning. As noted above, this conclusion also provides a logical explanation for the otherwise illogical emails from Ms. Gallagher to the Bank referencing an 'offer' in the three and a half month period after the 16th June, 2014.

247. For all of these reasons, this Court concludes on the balance of probabilities that the Heads of Agreement were never executed on the 13th June, 2014 as alleged by the McDonaghs. Instead, this Court concludes that on the balance of probabilities the Heads of Agreement were executed in or around the time when the signed Heads of Agreement were first referenced in contemporaneous documents, namely in the email of the 1st October, 2014 from Dooley Auctioneers to Ms. Gallagher. This Court concludes that the most logical and plausible way to explain the various inconsistencies in the evidence provided by and on behalf of the McDonaghs is that the Heads of Agreement were executed at this time in response to the appointment of the Receivers on the 1st October, 2014. Clearly, the obvious motivation for the McDonaghs to execute the Heads of Agreement at this time was as an attempt by them to thwart the sale of Kilpeddar site by the Receivers appointed by the Bank, in order to claim that the site had previously been sold by them in compliance with the Compromise Agreement.

G. WAS CONSENT OF BANK REQUIRED FOR THE SALE OF THE SITE?

248. The Compromise Agreement provides that the Finance Documents (which includes the Mortgage) relating to the McDonaghs' loans are reaffirmed as applying between the parties notwithstanding the execution of the Compromise Agreement. Clause 2 of the Compromise Agreement states:

> "The Borrowers, and each of them, hereby confirm and reaffirm the contents of the Finance Documents as if they were set out herein and repeated seriatim."

249. Clause 5(c) of the Mortgage over the Kilpeddar site granted by the McDonaghs in favour of the Bank states:

> "The Borrower shall not let or part with the possession or occupation of the Mortgaged Property or any part thereof nor shall the statutory Powers of leasing or agreeing to be lease be exercisable by the Borrower without the consent in writing of the Bank."

250. While the McDonaghs sought to argue that this clause prohibits only the leasing of the property, and not the sale of the property, the use of the disjunctive ("*the Borrower shall not let <u>or</u> part with possession…"*) makes clear that the Borrower is subject to a stand-alone prohibition on parting with possession of the property without the Bank's written

consent. Accordingly, this Court concludes that the McDonaghs required the written consent of the Bank to lease or sell the property (since this involves parting with possession).

Did the Compromise Agreement itself constitute a consent to the sale of the site?

251. The McDonaghs sought to argue that the Compromise Agreement itself was the Bank's consent to the sale of the Kilpeddar site. The context for this claim is that the Compromise Agreement provided for the write-off of approximately €20 million of borrowings by the Bank in return for the McDonaghs selling certain properties, one of the most valuable of which was the Kilpeddar site (which, as events transpired, appears to have had a market value of €1.5 million in June 2014).

252. However, as previously noted, the logic of the McDonaghs' argument, which they confirmed in their evidence, is that under their interpretation of the Compromise Agreement, the Bank granted the McDonaghs the right to sell the Kilpeddar site to any person at any price including a price of €1, and thereby get the multi-million euro write-off, in return for which the Bank were to get the proceeds of sale, in this example amounting to just €1.

253. On the McDonaghs' interpretation of the Compromise Agreement, this conclusion arose because the Agreement provided for the sale of, *inter alia*, the Kilpeddar site, by the McDonaghs. This, in their view, meant that the very execution of the Compromise Agreement by the Bank amounted to the Bank's consent in advance, to the sale of the Kilpeddar site to any party at any price, and it was not necessary for the McDonaghs to seek the consent of the Bank to the actual price obtained or the identity of the proposed purchaser.

254. Quite apart from the fact that this proposition, or anything close to it, is not explicitly stated in the terms of the Compromise Agreement, such a proposition runs contrary to any commercial sense. In this regard, Mr. Moore of Ulster Bank gave evidence that in executing the Compromise Agreement, the Bank was taking the full market risk on the sale of the assets (including the Kilpeddar site). His evidence was that, as the Bank was writing-off €20 million of the McDonaghs' loans, it wanted to have control over the marketing and sale of the assets to ensure that it was getting full and fair value for those assets. It also wanted to ensure that there was a comprehensive advertising and marketing campaign to ensure that the Bank got the maximum price for the site and mitigated its losses to the fullest extent possible. The suggestion by the McDonaghs that the Bank consented in advance to the sale of the Kilpeddar site at any price is completely inconsistent with this position. In this regard, commercial sense does have a role to play when a court is interpreting agreements between a bank and a commercial entity or commercial investors, as in this case. In *Fennell v. N17 Electrics Ltd. (in liquidation)* [2012] 4 I. R. 634, Dunne J. emphasised the importance of commercial sense in reaching a conclusion on whether a Bank had consented to a commercial lease over a secured property. In that case, Dunne J. noted as follows at p. 652 et seq.:

> "It is accepted the rent payable by the company to the borrower was in multiples of the figure set out in the business lease agreement*. It seems to be me to be inconceivable that the bank would ever have agreed to a lease of the various premises in those terms*. In addition, it is extremely unusual to have one lease of separate properties at different locations. *It would have been entirely contrary to the bank's interests*. There is nothing in the papers before me to indicate that any representatives of the bank conveyed to Mr. Naughton or the company in any way that it accepted the validity of the lease or that it was in any way binding on the bank.
>
> […]
>
> From the bank's point of view in this case, there was no commercial reality apparent in the business lease agreement. It is inconceivable that the bank would ever have consented to a lease in the terms of the business lease agreement had it been asked to do so." [Emphasis added]

In this case, one is dealing with the interpretation of the Compromise Agreement which was entered into by the Bank with commercial investors and therefore commercial sense is equally applicable, in this Court's view, to the interpretation which the McDonaghs are seeking to put on that agreement. In this regard, it would have been inconceivable and entirely contrary to the Bank's interests, to use Dunne J.'s expressions, for the Bank to have agreed in the Compromise Agreement to sell the Kilpeddar site to any party at any price as suggested by the McDonaghs.

255. Not only does the suggestion that Ulster Bank, consented under the terms of the Compromise Agreement to the sale of the Kilpeddar site at any price, run contrary to commercial sense, it also runs contrary to the intention of the parties which can be gleaned from the terms of the Compromise Agreement itself. For example, Clause 3.6.1(b) of the Compromise Agreement states:

> "The Borrowers shall instruct the Agents to dispose of the Properties within an agreed time frame and for an agreed fee and subject to such deductions for the costs of the sale, advertising or otherwise, as *shall first have been agreed in writing with the Bank.*" [Emphasis added]

This clause clearly requires the Bank's prior written consent to the time frame for the sale, the fees of the Agents and the expenses which were to be deducted from the sale price. The intention of this clause is clearly to ensure that the Bank would know what its net proceeds from the sale were going to be, *before* it agreed to that sale proceeding. For this reason, it defies logic to read into the Compromise Agreement a term to the effect that, Ulster Bank was consenting to sell the Kilpeddar site to any party at any price, including at a price of €1. This latter proposition runs completely contrary to a clause, such as Clause 3.6.1(c), which evidences the Bank's concern not to consent to a sale which might reduce its net proceeds to an unacceptable level.

256. Furthermore, it is clear from Clause 3.6.1 that the Bank wished to obtain the best price possible for the site, and this clause also runs completely contrary to the McDonaghs' suggestion that the Bank was consenting to the sale at any price. On the contrary, this clause states:

> "The Borrowers agree to dispose of all of the Properties *for the best price reasonably obtainable* by the [31st July, 2015] or such later date as the Bank in its absolute discretion may agree and to remit directly to the Bank, without deduction or set off, the entire proceeds of such sales net only of all taxes arising on such sales and such disposal costs as the Bank shall first have agreed in writing." [Emphasis added]

257. It is also the case that the express terms of the Compromise Agreement which deal with the sale of the site deal explicitly with the McDonaghs being authorised to *market* the site, with the *intent* of selling it. Clause 3.7.1 states:

> "On or before [31st July, 2013], the McDonaghs shall procure the engagement of the Agents for the purposes of marketing the Site for sale on the open market with the intent of having the sale of same concluded no later than [31st July, 2014]."

This clause is a long way from a clause which entitles the McDonaghs to sell the site to any party at any price and in particular this clause does not expressly or implicitly provide that the mortgage will be redeemed on such a sale.

258. In this regard, it is worth noting that the Heads of Agreement also make no reference to the alleged sale of the site to Granja being subject to a mortgage. Yet the interpretation, which the McDonaghs are purporting to put on the combined effect of the Compromise Agreement and the Heads of Agreement, is that there was to be a redemption of the mortgage securing loans of approximately €25 million on the Kilpeddar site on the transfer of the site to any purchaser at any price, even a price as low as €1. This Court can see no basis for such an interpretation.

259. It is also relevant to note that Ulster Bank made clear in its correspondence with the McDonaghs that its consent was required to any sale of the site, which is completely inconsistent with the interpretation now being suggested by the McDonaghs. For example, Mr. O'Hanlon of Ulster Bank wrote to the McDonaghs on 22nd May, 2014 in the following terms arising from the offer of €1.5 million which had then been received from Weighbridge for the Kilpeddar site:

> "The Bank has been advised of the improved offer of €1.5m which has now been received from Weighbridge Trust with proof of funds provided to Ganly Walters (20th May).
>
> In light of this, you will no doubt advise the joint agents how you want to proceed. Understandably you will want to understand how going to market with a national advertising campaign is likely to affect this new offer.

> Please discuss and agree with the joint agents now what the decision making mechanism for accepting any offers will be – timelines, best bid/private treaty/etc. *and ensure that the Bank is made aware of what the proposals are in order that we may consider them fully*.
>
> As I mentioned to you on Monday last, *any consent the Bank gives to the sale will be based on what is considered the best bid after satisfactory due process* has been followed and will be subject to proof of funds, deposit, confirmation of arm's length transaction, etc. While we wish to achieve the best possible sale value, the Bank would be minded to consent to a sale at this level, subject to our usual criteria." [Emphasis added]

In response to this email, there was no disagreement from the McDonaghs to the notion of the consent of the Bank being required. Equally, there was no response from the McDonaghs to the effect that the Compromise Agreement itself was the Bank's consent, as they are now claiming. Indeed, as previously noted, Mr. Kenneth McDonagh and Mr. Maurice McDonagh, through their solicitor, Ms. Gallagher, expressly acknowledged the need for the Bank's consent to the sale, when she stated in her email dated 15th July, 2014 that:

> "[W]e must take it that the offer of the buyer to Mr Gabriel Dooley on the 13th June was not acceptable to Ulster Bank."

260. For all of the foregoing reasons, this Court concludes that when the McDonaghs purported to sell the Kilpeddar site to Granja, they were required under the terms of the Mortgage and the Compromise Agreement to first obtain the consent of Ulster Bank and there is no basis for claiming that the Compromise Agreement itself constituted that consent.

H. WAS BANK'S CONSENT OBTAINED TO THE PURPORTED SALE?

261. The only evidence which was provided on behalf of the McDonaghs in support of their claim that the Bank consented to the purported sale of the Kilpeddar site was the Compromise Agreement itself, which they alleged constituted the consent. As noted above, this is not a tenable argument. Accordingly, there was no evidence provided of Ulster Bank consenting to the purported sale of the site. On the contrary, what evidence there is points to the absence of consent.

For example, Mr. O'Hanlon of Ulster Bank, who was a credible witness, gave evidence that the Bank never consented to the sale of the Kilpeddar site to Granja for €1,501,000. In addition, all the documentary evidence supports this proposition. Reference has previously been made to the letter from Ulster Bank dated 22nd May, 2014 regarding the prospective 'consent' which might be given by the Bank if it was satisfied with the sales process.

262. By 28th May, 2014, it was clear that Mr. O'Hanlon of Ulster Bank was not happy with the sales process as no agreement had been reached between the joint sales agents, Mr.

Ganly and Mr. Dooley, regarding how this was to be finalised. In his letter of that date to all three McDonagh brothers he stated:

> "I also understand that *both joint agents have not agreed to a sealed bids/tender approach* given only one bidder has proven funds to match their bid to date. Please advise us in writing, supported by your agents' recommendation, as to how the sales process will be closed out." [Emphasis added]

On the same day, Mr. O'Hanlon of Ulster Bank also wrote to the McDonaghs' solicitor, Ms. Gallagher, in terms which made clear that there was no consent from the Bank to any proposed sale:

> "Please *note the conditionality that will accompany any "consent to sell" provided by the Bank*. I outlined these terms in my letter of 22nd May to our clients and cc'd to you. Your clients will have to be cognisant of these conditions in considering how to close out this sale process." [Emphasis added]

263. On 29th May, 2014, Mr. Brian McDonagh records the difference of opinion between Mr. Ganly, who favoured a private treaty sale, and Mr. Dooley, who favoured a best bids/tender process, regarding how best to bring the sales process to an end. In this email to Ulster Bank on this date, Mr. Brian McDonagh states:

> "Ganly Auctioneers although they had in previous correspondence promoted the National Marketing Campaign, have had a recent change of mind and feel that a marketing campaign may result in the loss of his only reported interested party.
>
> Dooley Auctioneers however have been steadfast in their opinion that should the advertising funds be advanced, a National Marketing Campaign is the most favourable method in achieving the highest possible selling price with transparency and due process.
>
> […]
>
> It is noted that Ganly Auctioneers has reported that they have had only interest from one party, i.e. Weighbridge Trust Limited. It has recently come to our attention that other interest has been shown but not reported, e.g. lands were inspected by a surveyor on behalf of their client recently.
>
> […]
>
> Dooley Auctioneers are of the opinion that a National advertising campaign should achieve as many as twelve bids in this process. We would hope that Weighbridge Trust Limited and Granja Limited will be included and cannot see how a sealed bids process would not achieve the best arms length price."

264. As previously noted, after the 'binding' Heads of Agreement were allegedly signed on 13th June, 2014 and allegedly seen by Ms. Gallagher on 16th June, 2014, Ms. Gallagher sent

an email to Ulster Bank on 20th June, 2014 which is one of a number of her emails (based on her clients' instructions) which is completely inconsistent with there being a contract for sale. In this email she refers to the marketing and future sale of the site:

"Please note I have met with Mr Maurice and Mr Ken McDonagh yesterday. Please note that I am instructed to inform you that Mr Ken McDonagh and Mr Maurice McDonagh had understood that Mr Gabriel Dooley of Dooley Auctioneers would proceed with the marketing and advertising campaign he had submitted to Ulster Bank which had been approved by the bank. They were unaware that the approved marketing/advertising campaign had not been proceeded with by Mr Dooley of Dooley Auctioneers. They have since met with Mr Dooley and *they have informed Mr Dooley that they do require that the advertising campaign is to be carried out in accordance with the Submission which he had sent to you.* We note that you have approved and confirmed the marketing budget for same.

In addition we understand that they have had discussions with you regarding the appointment of a joint auctioneer with Dooley Auctioneers. They have given you the names of other Auctioneers for consideration. They wish to confirm that they Mr Ken and Mr Maurice McDonagh are instructing Dooley Auctioneers directly and they have directed Mr Dooley to commence the advertising campaign immediately and in full as per the submission approved by the bank. This means that the lands will be advertised nationwide in national newspapers. In addition *they have instructed Mr Dooley to submit to you the offer which they have received from the highest bidder last Friday.*

Mr Ken and Mr Maurice McDonagh wish to confirm that *they are anxious to remain compliant with the Compromise Agreement and wish to dispose of the lands in Kilpeddar to the highest bidder within the time frames agreed and discussed with the bank*. With this in mind their instructions to Dooley Auctioneers are a full but timely advertising campaign." [Emphasis added]

265. Mr. O'Hanlon of Ulster Bank replied to this email also on the 20th June, 2014 and referenced the fact that he has received no replies to his letters to the McDonaghs of 17th June, 2014 in which he highlighted their various breaches of the Compromise Agreement.

This Court has concluded in this judgment that Ulster Bank was not aware of the purported sale of the Kilpeddar site until 2nd October, 2014 (as it favours the evidence of Mr. Moore of Ulster Bank that he did not receive the letter of 16th June, 2014 from Mr. Brian McDonagh and that at the meeting of the 16th June, 2014 with Mr. Maurice and Mr. Kenneth McDonagh he was told only of an 'offer' for the site). Accordingly, in this email of 20th June, 2014 it is clear that Mr. O'Hanlon is referencing the consent of the Bank as something that has not been given in relation to a sale that has not happened:

> "For clarity, the Bank's consent to sell the property was based on a joint agent approach which applied at the time, and does not extend at this time. As various items of the Compromise Agreement remain outstanding (letter June 17th refers),

> the Bank's consent to market the property at this time is withheld pending further consideration as to our next steps in the matter."

Clearly, the purpose of this email is to suspend the marketing process in light of the failure of the McDonaghs to renew the joint agency agreement between Mr. Ganly and Mr. Dooley.

266. It is of course the case that if the first sentence of this paragraph were read in isolation from all the other documentation in this case, it could be argued that Mr. O'Hanlon was suggesting that the Bank had consented to the sale of the site on the condition that there was a joint agent involved, i.e. if on the 3rd June, 2014, Mr. Ganly had not been let go by the McDonaghs.

267. For his part, Mr. O'Hanlon claims that this first sentence, like the second sentence, is in fact dealing with consent to marketing, rather than consent to sell the property, which he says is clearly the purpose of the email. Whether this is in fact the case is not critical, since it is clear that when this first sentence is considered, not just in the context of the second sentence but also in the context of all the other contemporaneous documentation, one could not conclude that the Bank had ever actually consented to the sale of the site.

268. In this regard, on the 15th July, 2014, Ms. Gallagher emailed Mr. O'Hanlon in terms which make it quite clear that she is acknowledging, not only that the consent of Ulster Bank is still outstanding, but also that no binding contract for sale is in existence:

> "Whilst we have had no formal response we must take it that the offer of the buyer to Mr Gabriel Dooley on 13th June was not acceptable to Ulster Bank."

So at this stage, after the alleged 'contract' of 13th June, 2014, which this Court finds was just an 'offer', the McDonaghs continue to maintain in this correspondence that the consent of the Bank is required for the sale of the Kilpeddar site, something which they are now alleging was actually given by the Bank prior to the 13th June, 2014.

269. For all of the foregoing reasons, this Court concludes that it is quite clear that Ulster Bank did not consent to the purported sale of the site.

I. DID THE MCDONAGHS BREACH THE COMPROMISE AGREEMENT?

270. Clause 4 of the Compromise Agreement, which is set out in full above, states, *inter alia*, that:

> "[I]n the event of a failure by or on behalf of the Borrowers to comply with the terms of the Agreement […] the Bank shall be at liberty, without notice to the Borrowers, to take whatever steps it shall, in its absolute discretion, deem fit on foot of the Finance Documents at law or otherwise."

Clause 3.1.3 of the Compromise Agreement states:

"If it transpires that there is any inaccuracy in the Updated Statements of Affairs (other than unintentional typographical error that is subsequently rectified) this Agreement shall be at an end."

On the basis of these clauses, it seems clear that a breach of the Compromise Agreement will bring the Compromise Agreement to an end and/or mean that the debts of the McDonaghs are not compromised or written-off and that Ulster Bank would then be entitled to pursue the McDonaghs for those debts of over €20 million.

271. An important issue therefore is whether the McDonaghs breached the Compromise Agreement. It is clear from the evidence before the Court that the McDonaghs breached the Compromise Agreement in a number of respects. It is not proposed to go through every single breach, a few examples will suffice:

Failure to fully disclose assets in the Statement of Affairs

272. Under Clause 3 of the Compromise Agreement the McDonaghs were required to provide a statement of their assets which was true and accurate in all respects pursuant to Clause 3.1.1 of the Compromise Agreement. Mr. Maurice McDonagh failed to disclose in his Statement of Affairs his interest in a property at Coill Bhruacháin, Co. Galway. In his evidence to this Court, he sought to justify this breach of the Compromise Agreement by claiming that the plot of land was part of a bigger piece of land that had been sold and was of limited value. He claimed that he had forgotten about it and in any case he claimed that its exclusion was not significant.

273. However, the Compromise Agreement is quite specific. It does not leave it up to the borrower to decide which assets to disclose and which to not disclose. Furthermore, it requires the disclosure of all assets "*after all such prudent and diligent enquiries*" have been made.

274. In this regard, not only did Mr. Maurice McDonagh not make sufficient enquiries at the time of the execution of the Compromise Agreement to enable him disclose this property, it is also the case that even when the site in Galway was brought to his attention in the Interrogatories dated 4th June, 2019 (and it appears to have been the only property brought to his attention in this manner), he still failed to make any prudent and diligent enquiries, e.g. to check the land registry/registry of deeds. This is because on the 4th June, 2019, he was asked in the Interrogatories whether he held an interest in a plot of land at Coill Bhruacháin, Co. Galway to which he answered "*No*" in his sworn evidence.

It is accepted by Mr. Maurice McDonagh in his evidence to this Court that his Statement of Affairs and this Interrogatory are incorrect. His claim that he forgot about this site in County Galway does not assist him, since he breached the Compromise Agreement, not only by failing to disclose this site (since he is not entitled to exclude assets that he does not regard as significant), but also by failing to make "*such prudent and diligent enquiries*" as necessary to confirm his assets in March 2013 when signing the Compromise Agreement, something he failed to do again in June 2019, when giving sworn evidence, even after the Galway property was brought to his attention.

Failure to instruct the auctioneer to report to Ulster Bank

275. Under Clause 3.6.1(c) of the Compromise Agreement the McDonaghs were required to instruct the selling agent to:

> "liaise fully with and to report and disclose fully and frankly to the Bank all details of the sales process and any negotiations relating thereto."

Mr. Dooley confirmed in his evidence to this Court that the McDonaghs had not instructed him to liaise with Ulster Bank in the manner required by Clause 3.6.1(c) of the Compromise Agreement. However, Mr. Dooley claims that nonetheless the Bank were "*kept in the loop*" and that the Bank "*knew everything that was going on*".

276. Quite apart from the fact that Mr. Dooley's evidence has, for reasons already stated, to be treated with caution, it is clear that Mr. Dooley failed to disclose to the Bank perhaps the most significant event of all, i.e. that the McDonaghs had allegedly entered a binding contract (the Heads of Agreement) to sell the site on the 13th June, 2014 (if this had occurred, as he claimed).

277. In this regard, this Court prefers the evidence of Mr. Moore, who this Court found to be a credible witness, to the evidence of Mr. Kenneth McDonagh and Mr. Maurice McDonagh, regarding what happened at the meeting of the 16th June, 2014 in Ulster Bank. Accordingly, this Court concludes that all that Mr. Moore was told at that meeting was that there had been a best bids process with an offer for the site.

278. It follows therefore that the binding Heads of Agreement, if they existed, were not disclosed by Mr. Kenneth McDonagh and Mr. Maurice McDonagh to Ulster Bank. On this basis, this Court concludes that Mr. Dooley did not disclose all relevant matters to the Bank and that the Bank did not know everything that was going on as he claims, by virtue of his failure to disclose the signed Heads of Agreement, that he says existed on the 13th June, 2014.

279. In any event, the requirement under the Compromise Agreement is that the McDonaghs "*instruct*" Mr. Dooley to report to the Bank, which Mr. Dooley accepts did not occur. Accordingly, this amounts to a breach of Clause 3.7.2 of the Compromise Agreement. For this reason, this is first hand evidence of a clear breach of the Compromise Agreement by the McDonaghs.

Disclosure of Compromise Agreement in breach of confidentiality clause

280. Clause 5.1 of the Compromise Agreement states:

> "The Borrowers shall keep strictly confidential and shall not, without the prior written consent of the Bank, disclose to any person the terms of, or any information relating to, this Agreement or any other information supplied by or on behalf of any party under or in relation to this Agreement or the terms of any other document entered into, whether directly or indirectly, in connection herewith save as required to implement or enforce the terms hereof. The Borrowers hereby reaffirm the terms of the Confidentiality Agreement as if set out and repeated herein in full. Each

Borrower agrees that he/she will not, and will so instruct all advisors and employees of such advisors, not to disclose the fact of, or the terms of, this Agreement or that negotiations in relation thereto have occurred."

Mr. Maurice McDonagh admitted in evidence that he had disclosed the Compromise Agreement to Mr. Feehily, a director of Granja, in the lead up to the hearing of the Granja Proceedings.

281. On one level, this is an extraordinary admission by Mr. Maurice McDonagh since it involves Mr. Maurice McDonagh disclosing material helpful to the party that was suing him. In this regard, it is further support for this Court's conclusion above that Granja was not an unrelated company, but rather a front for Mr. Brian McDonagh.

282. This disclosure is also however a breach of the confidentiality clause in the Compromise Agreement. In his defence, Mr. Maurice McDonagh claims that the Compromise Agreement was listed in his affidavit of discovery which he swore on 7th October, 2016 in favour of Granja as part of the Granja Proceedings. However, this does not assist Mr. Maurice McDonagh because:

- The confidentiality clause is explicit in its terms. It does not provide for any exceptions. Mr. Maurice McDonagh could and should have sought the consent of the Bank to the disclosure of the Compromise Agreement. However, no consent was obtained from Ulster Bank to this disclosure. Failing his receipt of any such consent from the Bank, he could and should have obtained a court order to override the confidentiality clause, which he failed to do.

- Furthermore, in his affidavit of discovery, Mr. Maurice McDonagh did not aver that the Compromise Agreement was confidential which he should have done in light of the terms of Clause 5.1 of the Compromise Agreement.

- In any case, it is relevant to note that in Replies to Particulars dated 3rd May, 2016 in the Granja Proceedings, Granja refers therein to the Compromise Agreement in detail which details could only have been acquired from its possession of a copy of the Compromise Agreement (or its receipt of a very detailed disclosure thereof). Accordingly, it seems likely that the disclosure of the Compromise Agreement to Granja, which Mr. Maurice McDonagh accepts took place, took place many months prior to Granja's receipt of Mr. Maurice McDonagh's affidavit of discovery dated 7th October, 2016.

On this basis, this Court concludes that on the balance of probabilities Mr. Maurice McDonagh's disclosure of the Compromise Agreement, which he accepted occurred, breached the confidentiality clause of the Compromise Agreement.

Mr. Brian McDonagh's breaches of the Compromise Agreement

283. Mr. Brian McDonagh confirmed in his evidence that, contrary to Clause 3.6.4 of the Compromise Agreement, he failed to provide confirmation of insurance on the properties specified in that Agreement. He sought to justify this failure by claiming that the

properties were uninsurable. However, he provided no expert evidence to that effect and therefore this Court concludes that, as he did not dispute that he had not insured the properties, on the balance of probabilities, this also constituted a breach of the Compromise Agreement.

284. Similarly, under the terms of Clause 3.8.1 and Clause 3.8.2 of the Compromise Agreement, Mr. Brian McDonagh undertook to charge an apartment in Portugal in favour of Ulster Bank and deliver to the Bank the relevant title deeds. In his Replies to Interrogatories, Mr. Brian McDonagh confirmed his failure to charge the apartment and his failure to deliver its title deeds to the Bank. Mr. Brian McDonagh sought to justify this failure on the basis that if he had charged the apartment, which he jointly owned with his wife, this would have led to marital breakdown and divorce. However, the clause is explicit and does not require anyone's consent to the charging of his interest in the property. Under the terms of the Compromise Agreement he is obliged to charge his interest in the apartment, irrespective of his wife's displeasure. Accordingly, his failure to charge the apartment amounts to a breach of the Compromise Agreement. It is also relevant of course that Mr. Brian McDonagh knew at the time of the execution of the Compromise Agreement that the apartment was jointly owned by him and his wife. He nonetheless gave this commitment under the Compromise Agreement to the Bank to charge that property in favour of the Bank, in order, presumably, to get the commitment from the Bank that it would write-off his €20 million borrowings. He did not raise any issues at that time about being divorced by his wife if he complied with this commitment – and this is not something which he can now raise as a defence to the claim that he breached this commitment.

285. It is also the case that under Clause 3.8.5 of the Compromise Agreement, Mr. Brian McDonagh was obliged to sell a property called Dromin House in Delgany, Co. Wicklow, by 31st July, 2014. Mr. Brian McDonagh confirmed in his Replies to Interrogatories and in his evidence to the Court that he failed to do so. This was a further clear breach of the Compromise Agreement.

Failure to reappoint Ganly Walters as joint agents

286. Clause 3.6.1(a) of the Compromise Agreement states:

> "The Borrowers shall appoint the Agents for each of the Properties who shall, in the absolute discretion of the Bank and without requirement for giving reasons for its decision, be acceptable to the Bank."

It seems clear to this Court that the effect of this clause is that Ulster Bank had a veto over who the agent would be for the sale of the Kilpeddar site and that, if the Bank wished to exercise this veto by having a joint agent, it was entitled to do so. That the Bank would wish to have such a veto is not surprising since, although the sales agent(s) were formally appointed by the McDonaghs, the success or otherwise of the marketing of the site was not of any concern to the McDonaghs. However, it was of huge concern to the Bank, since it was the Bank which was taking all the market risk, i.e. it was receiving the proceeds of any sale of the site, not the McDonaghs.

287. Mr. Dooley, a local estate agent based in County Wicklow, was appointed initially by the McDonaghs as a sole agent on the 15th July, 2013 under the terms of an agreement of that date with the McDonaghs.

However, in exercise of its rights under the Compromise Agreement, Ulster Bank insisted on an estate agent with a national reach, namely Robert Ganly of Ganly Walters, as a joint agent with Mr. Dooley for the purposes of selling the property. Accordingly, the McDonaghs duly appointed Ganly Walters as a joint agent along with Mr. Dooley pursuant to an Agreement dated 7th February, 2014. This agreement with Mr. Ganly provided that it would last until 31st May, 2014.

288. As the 31st May, 2014 approached, the sales process was coming close to an end, since by that stage there had been several bids from various parties and Mr. Dooley had suggested a best bids process take place on the 13th June to finalise matters (*albeit* that Mr. Ganly had not agreed that the process should be finalised by a best bids process, as he favoured sale by private treaty).

289. Since Ulster Bank had insisted on Mr. Ganly being a joint agent with Mr. Dooley, and the sales process was only two weeks from being finalised (based on Mr. Dooley's recommended time-frame), one might have expected Mr. Ganly's appointment to be extended beyond 31st May, 2014 until the sales process had completed, particularly as he had played an active role in the bids process up to that point.

290. Quite apart from this expectation, it seems clear from the wording of Clause 3.6.1(a) of the Compromise Agreement, that Ulster Bank was entitled to insist on Mr. Ganly being the joint agent for the sale of the site, as this clause gave the Bank a veto over the identity of the sales agent.

291. Once the Bank became aware of the failure of the McDonaghs to re-appoint Mr. Ganly, it sought to exercise its right to have Mr. Ganly re-appointed as a joint agent with Mr. Dooley. This is clear from the secret recording by Mr. Brian McDonagh of his conversations with Mr. Moore of Ulster Bank on 5th June, 2014. In those conversations in relation to the future sale of the Kilpeddar site, Mr. Moore states at various intervals during the conversation:

> "Use Ganly Walters to facilitate [the best bids process for the sale of the Kilpeddar site]
>
> […]
>
> No I want Ganlys reappointed."

However in clear breach of the Compromise Agreement, the McDonaghs failed to reinstate Mr. Ganly despite being requested to do so by Ulster Bank and despite the terms of Clause 3.6.1(a) of the Compromise Agreement.

292. It was clear from the evidence of Mr. Maurice McDonagh that the reason the McDonaghs did not reappoint Mr. Ganly was because "*he was not doing what we asked him to do*."

This was because the McDonaghs wanted a best bids process, which was favoured by Mr. Dooley, to be held for the sale of the property, rather than a private treaty sale after more extensive national marketing, which was favoured by Mr. Ganly/Ulster Bank. This is clear from Mr. Ganly's letter of 28th May, 2014 to Mr. O'Hanlon where he stated that:

> "The lands should be advertised For Sale by Private Treaty and not for Tender less we receive satisfactory evidence of funds from Granja Limited this week."

Similarly, Ulster Bank stated in its letter of 28th May, 2014 to Ms. Gallagher that:

> "As previously advised, advertising the lands nationally is welcomed […]"

It seems clear that Mr. Ganly's professional opinion, on what would achieve the best price for the sale of the lands, was perceived by Mr. Maurice McDonagh as being an impediment to the McDonaghs' plans as to how the property should be sold (even though, it must be remembered, the McDonaghs had no interest in the price which was obtained, since the proceeds of sale were to be paid to the Bank). For this reason, it seems, and since Mr. Ganly did not change his professional opinion, the McDonaghs did not re-appoint him, despite Ulster Bank's insistence on same.

The failure of the McDonaghs to re-appoint Mr. Ganly, despite Ulster Bank's insistence on his re-appointment was a clear breach of Clause 3.6.1(a) of the Compromise Agreement, since that clause gave Ulster Bank a veto over the identity of the agent or agents for the sale of the site. It is no defence to this breach for the McDonaghs to claim that the reason for their failure to re-appoint Mr. Ganly was because he refused to change his professional advice to advice which suited the McDonaghs' plans.

293. For these reasons, this Court concludes that the failure of the McDonaghs to re-appoint Mr. Ganly as a joint agent amounted to a breach of the Compromise Agreement.

The reason Mr. Ganly was not re-appointed

294. It seems clear to this Court that the reason for this approach by the McDonaghs to Mr. Ganly was because firstly, Granja was a front for Mr. Brian McDonagh and secondly, that having a best bids process on the 13th June, 2014, without any further delay for a private treaty sale and without any advertising of the property in national newspapers, increased the chances of Granja (the front for Mr. Brian McDonagh) being the winning bid (which was exactly how events transpired).

295. This is because when Mr. Ganly and Mr. Dooley were joint agents, there were two main bidders for the site - Granja with a bid of €1.3 million and Weighbridge with a bid of €1. 5 million. At this stage in late May 2014, Mr. Dooley advised that the sales process be brought to an end on the 13th June with a best bids process. However, Mr. Ganly favoured a private treaty sale and Ulster Bank favoured the advertising of the site in the national newspapers.

296. When, on the 3rd June, 2014, the McDonaghs notified Mr. Ganly that they were not going to re-appoint him, this led to the other main bidder (Weighbridge) withdrawing from the bidding process because of its unease with this turn of events. In its letter of 9th June, 2014, Weighbridge stated:

> "*It was our understanding that Ganly Walters had been appointed at the request of the Bank* upon whose insistence the land is being sold and which we understand to potentially be facing a considerable loss on the facility made available to them to the vendors at the time of their original purchase. *With this in mind we find it disturbing that Ganly Walters has been dismissed.*
>
> In the above circumstances *we have lost confidence in the process* that is being employed to sell the land and so we hereby withdraw our offer of €1,500,00 (ONE MILLION, FIVE HUNDRED THOUSAND EURO).
>
> Would you please confirm safe receipt of this letter and that you have advised the necessary parties of the withdrawal of our offer." [Emphasis added]

Not surprisingly therefore, Granja ended up being the winning bid at the best bids process on the 13th June, 2014, with a winning bid (€1,501,000) which was only nominally greater (i.e. €1,000 greater) than the previous highest bid (€1,500,000) put in by Weighbridge before it withdrew from the process.

297. Thus, as a result of dispensing with Mr. Ganly, Granja, the front for Mr. Brian McDonagh, ended up being the best bid on the 13th June, 2014 and then allegedly entered a contract to buy the site for €1.501 million, a fraction of the €22 million which Mr. Brian McDonagh (and his brothers) had paid for the site, with the Bank arguably obliged to write-off some €20 million of Brian McDonagh's (and his brothers') borrowings in the process.

Conclusion regarding breach of the Compromise Agreement

298. For the foregoing reasons, this Court concludes that the McDonaghs breached the Compromise Agreement in a number of respects. In this regard it is relevant to note that the McDonaghs were notified as early as 31st March, 2014 that they were in breach of the Compromise Agreement. In that letter the Bank stated, *inter alia*, that they considered the McDonaghs to be "*non-compliant with the Agreement*" in relation to a number of matters and that the McDonaghs should be aware of "*the consequences for failing to comply with the terms of the Agreement.*" Specifically, in the letters sent to each of the McDonagh brothers on 31st March, 2014, they were informed that, at that stage, they were in breach of five separate clauses under the Compromise Agreement, including Clause 3.7 (that the McDonaghs must instruct the sales agents to keep the Bank informed of the sales process) and Clause 3.8 (setting out the full asset disposal programme for the sale of Mr. Brian McDonagh's various properties, including the Portugal Property and Dromin House).

299. On the 16th and 17th June, 2014, Ulster Bank outlined in separate letters the outstanding breaches of the Compromise Agreement. As well as noting the breach of the Compromise

Agreement, in its letter of 16th June sent to Mr. Brian McDonagh, the Bank explicitly requested that the McDonaghs *"reaffirm the appointment of Ganly Walters"*. The letters of 17th June sent to Mr. Brian McDonagh and Mr. Maurice McDonagh, set-out, in explicit terms, the outstanding breaches of the Compromise Agreement at that date. These included breaches of Clause 3.7 (the obligation for the sales agents to keep the Bank informed), Clause 3.8 (relating to the Asset Disposal Programme for Mr. Brian McDonagh's properties) and Clause 3.6.4 (confirmation of insurance details for the relevant properties). After sending these letters to the McDonaghs, informing them once again of the various breaches of the Compromise Agreement, on 20th June, 2014 the Bank took decisive action in relation to the marketing of the Kilpeddar site and emailed the McDonaghs to insist that the marketing efforts cease while the Bank considered its position. Despite being notified of these breaches, the McDonaghs did not reply to the Bank to claim they were in compliance with the Compromise Agreement, nor did they seek to remedy the breaches, which ultimately led to the letters of demand from the Bank to the McDonaghs and the appointment of the Receivers over the Kilpeddar site.

300. The McDonaghs have suggested that this email of 20th June, 2014, insofar as it prevented the McDonaghs from marketing the property, amounted to a breach of the Compromise Agreement by Ulster Bank. This Court does not accept that proposition since it is clear from the foregoing evidence that the McDonaghs had breached the Compromise Agreement (as early as its execution in 2013 by the failure to disclose assets) thus entitling Ulster Bank to pursue the McDonaghs for the entire debt pursuant to Clause 4 thereof.

301. In this regard, Recital B of the Compromise Agreement makes clear that the agreement of the Bank to compromise its debts due from the McDonaghs was based on the McDonaghs complying "in all respects with the terms of the" Compromise Agreement [Emphasis added]. Clause 4 of the Compromise Agreement states that the McDonaghs' debt write-off contained in the Compromise Agreement is subject to the:

> *"continued absolute performance by the borrowers of the covenants on their part and conditions herein contained."* [Emphasis added]

It is clear that the McDonaghs did neither.

It seems clear therefore that because of the multiple breaches of the Compromise Agreement and because of Clause 4 of the Compromise Agreement, Ulster Bank was not prevented from enforcing its security over the Kilpeddar site, which it did by appointing the Receivers, and it was not precluded from seeking judgment against the McDonaghs for all sums due from the McDonaghs, i.e. without the benefit of the write-off in the Compromise Agreement.

J. OTHER MISCELLANOUS CLAIMS

Entitlement of Ulster Bank, rather than Promontoria, to issue proceedings?

302. An issue was raised in these proceedings regarding the entitlement of Ulster Bank to pursue these proceedings against the McDonaghs.

303. The background to this issue is that on the 12th February, 2015 Promontoria (Aran) Limited ("Promontoria") acquired the economic interest in the Facility Letter and the underlying security. However, it is clear from the terms of a Declaration of Trust dated 12th February, 2015 (the "Declaration of Trust") which was executed by Ulster Bank on that same date, in favour of Promontoria, that Ulster Bank has retained the legal interest in the Facility Letter and the underlying security. This was also confirmed in evidence by Mr. Ted Mahon, a senior manager in Ulster Bank.

304. When Mr. Brian McDonagh sought to challenge the entitlement of Ulster Bank to take these proceedings, uncontroverted evidence was given on behalf of the Bank regarding the terms of the Facility Letter, the Mortgage, the Mortgage Sale Deed dated 12th February, 2015 and the due execution of the Declaration of Trust, which was not contradicted by any contrary evidence.

305. In particular, it is to be noted that Recital C of the Declaration of Trust between Ulster Bank and Promontoria states:

> "In consideration of the Parties accepting the rights and obligations pursuant to the Mortgage Sale Deed, the Parties have agreed that in relation to the Trust Assets, the legal title thereof or any equitable or beneficial title in relation to any Trust Assets shall not be transferred and that [Ulster Bank] shall hold such Trust Assets on trust for [Promontoria]."

Clause 2.1 of the Declaration of Trust provides that:

> "[Ulster Bank] hereby agrees and declares that on and from the Completion Date it shall hold the Trust Assets, all rights thereunder and all proceeds thereof on trust absolutely including as to both capital and income thereof, for [Promontoria] upon, with and subject strictly to the trusts, powers and provisions of this Deed."

It is clear that the Trust Assets referenced therein covers the Facility Letter and the Mortgage in this case and accordingly, this Court concludes that Ulster Bank retains the legal interest in the Facility Letter and underlying security and so is legally entitled to pursue this litigation as the legal owner of the Facility Letter and the underlying security.

Claim by Mr. Brian McDonagh that impossible to comply with Compromise Agreement

306. Mr. Brian McDonagh delivered a Supplemental Defence in this case in which he claims, it seems in the alternative to his claim that the he complied with the Compromise Agreement, that it was impossible to comply with that Agreement.

307. In particular, he claims that the Kilpeddar site was unsellable and therefore it was impossible for the McDonaghs to comply with their obligation under the Compromise Agreement to sell that site. This defence is inconsistent with his previously filed Defence which is to the effect that the Heads of Agreement constitute a binding contract for sale of the site and that therefore he complied with the Compromise Agreement.

308. Mr. Brian McDonagh's primary claim in his Supplemental Defence appears to rest on the fact that there were certain right of way issues affecting the Kilpeddar site which were not clarified until 10th September, 2014 and so not capable of registration until that date. However, Mr. Brian McDonagh failed to adduce any expert evidence to support his claim that the site was not sellable as a result of the non-registration of a right of way. Ulster Bank adduced the evidence of a conveyancing expert, Mr. Patrick Sweetman, which was to the effect that the site was saleable and that the mere fact of a delay in registering the right of way did not impact upon the title of the McDonaghs to the lands or their ability to sell the site.

309. On this basis, this Court concluded that the Supplemental Defence of Mr. Brian McDonagh was without foundation

Mr. Brian McDonagh's claim that he is owed €325,000 by Ulster Bank

310. Mr. Brian McDonagh claims that on the 27th March, 2013, Ulster Bank unlawfully debited the sum of €325,000 from his bank account. However, evidence was provided to this Court of a Letter of Set-off dated 23rd July, 2007 executed by Mr. Brian McDonagh in favour of Ulster Bank which entitled the Bank to set-off sums held in the bank account in which this sum of €325,000 was held, as security for Mr. Brian McDonagh's home loan borrowings from Ulster Bank. This letter of set-off from Mr. Brian McDonagh to the Bank states, *inter alia*, that:

> "Furthermore, you are authorised to set-off and apply such monies or any part thereof from time to time in or towards satisfaction of such liabilities entirely at your own discretion without further notice to the effect that such set-off will be a good and valid discharge of such monies so applied without the necessity of any further endorsement or authorisation from the undersigned whatsoever."

Although the Compromise Agreement is dated on its face 13th March, 2013, evidence was given that it was not signed by all the parties along with the initialling of certain hand-written changes, until the 29th May, 2013.

311. In this regard, it is to be noted that the sum of €325,000 was deducted by Ulster Bank in the exercise of its set-off on the 27th March, 2013, which is therefore before the Compromise Agreement was signed. Thus, as of that date, there was nothing in the Compromise Agreement (since it was not signed) or otherwise, to legally prevent Ulster Bank from exercising its clear right of set-off under the aforesaid Letter of Set-off, when it did.

312. Furthermore, Ms. Gallagher, the solicitor for Mr. Brian McDonagh at this time, wrote to Ulster Bank on the 28th May, 2013 seeking the basis for the withdrawal of these sums. Solicitors for Ulster Bank wrote to Ms. Gallagher on the 29th May, 2013 explaining that the Letter of Set-off was security for Mr. Brian McDonagh's home loan facility and that accordingly this was the legal basis for the withdrawal of the €325,000. Mr. Brian McDonagh can therefore have been in no doubt as to the right of Ulster Bank to withdraw this sum from his bank account. In addition, in that letter the Bank stated that if the

initialled Compromise Agreement and a cash payment of €400,000 (which was to be paid on the execution of the Compromise Agreement) were not received by close of business on that day the Bank would withdraw the offer of compromise contained in the Compromise Agreement. Not only did Mr. Brian McDonagh not object to the basis for the withdrawal of the €325,000, but he immediately returned the initialled Compromise Agreement that day together with the €400,000 payment and with no further query regarding the lawfulness of the debiting of the €325,000 by Ulster Bank.

313. In all of these circumstances, Mr. Brian McDonagh's claim that Ulster Bank unlawfully deducted this sum is without foundation.

Amount owed by the McDonaghs to Ulster Bank

314. Ulster Bank seeks judgment in the sum of €22,090,302.64, together with interest at a rate of €1,011.31 per day from 6th June, 2018. Uncontroverted evidence was provided during the course of the trial of the borrowings, the interest and the sums due by the McDonaghs to Ulster Bank. It is also relevant to note that in Replies to Interrogatories, the McDonaghs acknowledged the demand made by Ulster Bank and that they did not repay same.

315. Evidence was provided of the fact that this sum of €22,090,302.64 took account of the sum of €5,000,000 and costs of €350,000 received by Ulster Bank from CBRE in the settlement of a claim that CBRE was negligent in valuing the Kilpeddar site at €56 million, prior to the Bank's issuing of the loan to the McDonaghs.

316. Uncontroverted evidence was also provided that this adjustment to the outstanding loan took place some two years after the receipt of the settlement sums by Ulster Bank. However, evidence was provided that a credit was applied to the McDonaghs' loan account to take account of interest which would not have been charged, if the €5,000,000 had been applied in reduction of the outstanding loan in a timely manner.

317. For the foregoing reasons, this Court concludes that it has sufficient evidence to grant judgment in the sum sought by Ulster Bank, subject to what is said hereunder regarding the 1961 Act.

Injunction sought by Bank against McDonaghs to prevent interference with sale of site

318. Ulster Bank has sought injunctive relief preventing the McDonaghs from trespassing upon the Kilpeddar site. It based this application primarily on evidence of alleged trespass by the McDonaghs on the land. In this regard, reference was made to allegations that a "for sale" sign on the site was burnt down and that other signage erected by the Receivers was removed from the site. However, insufficient evidence was provided to this Court to enable it conclude on the balance of probabilities that the McDonaghs were behind these actions. On this basis therefore, this Court concludes that there is insufficient evidence to support this application for an injunction.

K. CLAIM AGAINST MCDONAGHS REDUCED TO ZERO UNDER 1961 ACT?

319. The McDonaghs claim, because of the settlement by the Bank of its proceedings against CBRE regarding the alleged negligent valuation of the Kilpeddar site, that the Bank's claim against the McDonaghs is reduced to zero under the terms of the 1961 Act. For its part, the Bank claims that while the 1961 Act applies to negligence and breach of contract claims it has no application to debt recovery claims.

Does the 1961 Act apply to debt collection cases?

320. The term 'concurrent wrongdoer' is defined in s. 11(1) as follows:

> "[…] two or more persons are concurrent wrongdoers when both or all are wrongdoers and are responsible to a third person […] for the same damage […]."

Section 2(1) defines the relevant terms as follows:

> ""damage" includes loss of property, loss of life and personal injury;
>
> "wrong" means a tort, breach of contract or breach of trust, whether the act is committed by the person to whom the wrong is attributed or by one for whose acts he is responsible, and whether or not the act is also a crime, and whether or not the wrong is intentional;
>
> "wrongdoer" means a person who commits or is otherwise responsible for a wrong."

On this basis and on the basis of the judgment of Finlay Geoghegan J. in the High Court case of *Histon v. Shannon Foynes Port Company* [2007] 1 I.R. 781, the Bank claims that the 1961 Act has no application to debt collection cases.

321. The *Histon* case involved a claim for unpaid debts by an employee against their employer. The employer sought to raise the defence of contributory negligence under the 1961 Act. Finlay Geoghegan J. held that the 1961 Act did not apply to a claim on a summary summons for debt. At para. 21 *et seq*., she stated:

> "The present claim of the plaintiff is brought on a summary summons and is a claim for a debt allegedly due by the defendant to the plaintiff. The plaintiff is not making any claim for damages in respect of loss or damage suffered by him by reason of an alleged wrong (*i.e*. tort, breach of contract or breach of trust) of the defendant. In so proceeding, the plaintiff may have limited his claim but it appears to me to follow that in making a claim against the defendant he has excluded the application of s. 34 of the Act of 1961 to the claim made."

However, it is significant to note that in reaching this conclusion, Finlay Geoghegan J. noted at para. 20 that "*[c]ounsel were unable to find any existing authority precisely on point*".

322. This is relevant because the case of *ACC Bank v. Malocco* [2000] 3 I.R. 191 was obviously not opened to Finlay Geoghegan J. in the *Histon* case. That is a case in which the High Court held that the provisions of the 1961 Act (in particular s. 17 of that Act) *did* apply to a debt recovery action. The issue in that case was whether a settlement by one debtor

with a bank would have the effect of eliminating or reducing the liability of the other co-debtor under s. 17 of the 1961 Act. At p. 201 of *Malocco*, Laffoy J. stated:

> "I have no doubt that the submission made by counsel for the plaintiff that the effect of the settlement between the defendant's wife and the plaintiff on the liability of the defendant on foot of the loan agreement falls to be determined by application of s. 17 of the Act of 1961 is correct. What s. 17 means in the context of a wrong which is a breach of contract in the form of non-payment of a debt for which two debtors are concurrently liable and of a settlement agreement with one of the debtors is that, if the settlement agreement indicates an intention that the other is to be discharged, the settlement agreement effectuates his discharge, but, if it does not, he gets the benefit of the settlement agreement and his liability is reduced accordingly."

323. More recently in the High Court case of *AIB v. O'Reilly & anor*. [2019] IEHC 151, which was an action taken by a bank against the guarantors of a loan, Barniville J. considered an application to join the borrower as a third party to the action, in order to seek contribution from that alleged concurrent wrongdoer, pursuant to s. 27 of the 1961 Act. Like Laffoy J. in *Malocco*, Barniville J. did not see any issue with the application of the 1961 Act to a claim for damage by the plaintiff, where that damage was in respect of the non-payment of a loan, *albeit* against a guarantor rather than the principal debtor. At para. 38 of the *O'Reilly* judgment, he stated:

> "In the case of a lender who has lent money to a principal debtor whose obligation to repay the lender is guaranteed by a guarantor, the damage suffered by the lender is the non-recovery or non-repayment of the loan advanced. In my view, the "*damage*" allegedly suffered by the Bank in the present case as a result of the failure by the Borrower to repay the loan is precisely the "*same*" as the damage the Bank has allegedly suffered as a result of the Defendants failing to pay the sum demanded under the guarantees. In each case it is the non-recovery by or non-payment to the Bank of the loan. While the amount for which it is alleged the Defendants are liable as guarantors may be lower than that allegedly due by the Borrower, having regard to the limit on the guarantees, it does not seem to me that this affects the nature of the damage allegedly suffered by the Bank, which is the principal focus of the definition of "*concurrent wrongdoers*" in s. 11(1) and s. 21(1) of the 1961 Act. The "*damage*" allegedly suffered by the Bank is, in my view, the "*same*" in the case of the Borrower's failure to pay the loan and in the case of the Defendant's failure to pay on foot of the guarantees."

It is this Court's view, consistent with the views of Laffoy J. and Barniville J. in the aforementioned judgments, that the 1961 Act applies to debt collection cases such as this one.

324. This Court reaches this conclusion for the following reasons. Firstly, quite apart from these two decisions, the wording of the 1961 Act itself makes clear that to be a wrongdoer, one must inflict "*damage*". It is clear from the express terms of s. 2(1) that

the "*damage*" caused by a defendant *includes* various types of loss. Thus, it includes, but is not limited to, loss of property. In considering what other losses are included in the term "*damage*", in addition to loss of property, it seems clear to this Court that where a defendant fails to repay a loan, the plaintiff on any meaning of that term suffers a loss. Thus, the defendant could, in this Court's view, be said to have suffered damage and on this basis, it is this Court's view that the term "*damage*" could be said to include loss of money.

325. Even if this were not the case, it seems to this Court that the loss of money, which is involved in the non-payment of debt, could in any case be said to be encompassed within the term "*loss of property*". This is because money is, in this Court's view, as much '*property'* as a piece of land. For example, when one refers to the protection of a citizen's property rights under Article 43 of Bunreacht na hÉireann, it is clear that the confiscation of money by the State is as much a breach of 'property rights' as the confiscation of land – see for example *Buckley v. Attorney General* [1950] I.R. 67.

326. Furthermore, under the 1961 Act, the "*wrongs*" with which the Act is concerned are defined as including a "*breach of contract*". In this case, the non-payment of monies is a breach of contract, since it is a breach of the Facility Letter, and so on this basis also, one can conclude that the non-payment of the loan by the McDonaghs amounts to a 'wrong' which is subject to the terms of the 1961 Act (if it is a concurrent wrong).

327. More generally, if the legislature had intended to exclude one type of 'civil liability' from the provisions of the 1961 Act, namely the liability of a borrower to repay an unpaid loan, this could have been easily achieved by suitable wording. This is not the case as the wording of a civil 'wrong' in the 1961 Act is defined in the widest possible sense, since it is defined as "*including*" loss of property etc.

328. In this regard, it is also relevant that, (as noted hereunder in the context of the *Defender* case), one of the aims of the 1961 Act is to encourage settlement of litigation where two or more people are liable for the same wrong. This is because where a plaintiff (P) sues two defendants (D1 and D2) for the same loss, the 1961 Act ensures, *inter alia*, that if D1 settles with P, and P subsequently sues D2 for the balance of the claim, D2 cannot thereafter sue D1 for a contribution. The 1961 Act does this by, *inter alia*, reducing P's claim against D2 by the settlement sum P got from D1.

    Bearing the rationale behind the 1961 Act in mind, there would appear to be no good policy reason why D2 should get the benefit of that settlement when he is subsequently sued by P if the 'civil liability' in question arises from negligence, but not if it arises from an unpaid debt.

329. For all these reasons, this Court concludes that the 1961 Act applies to debt collection cases such as the current one.

Are CBRE and the McDonaghs concurrent wrongdoers?

330. The Bank claims that CBRE and the McDonaghs are not concurrent wrongdoers. As already noted, the Bank received a sum of €5 million plus legal costs from CBRE in settlement of its claim against CBRE, arising from CBRE's allegedly negligent valuation of the Kilpeddar site at a value of €56 million.

331. It is common case that the settlement sum was used by the Bank in reduction of the Bank's current claim against the McDonaghs. On this basis, the McDonaghs claim that this is a case where CBRE and the McDonaghs are concurrent wrongdoers. This is because s. 11(1) of the 1961 Act defines concurrent wrongdoers as "*two or more persons*" who are "*responsible to a third person*" for "*the same damage*". The McDonaghs claim that the only logical basis for the Bank reducing the amount owed by the McDonaghs, by the settlement sum it received from CBRE, is that the Bank believed that CBRE and the McDonaghs are both responsible for the damage suffered by the Bank, namely the failure of the McDonaghs to repay the loan. Thus, the McDonaghs claim that the Bank clearly believed that the McDonaghs and CBRE are concurrent wrongdoers.

332. It is also relevant to note the terms of the Statement of Claim in the proceedings issued by Ulster Bank against CBRE, which proceedings were compromised by the payment by CBRE of €5 million to the Bank. It states, *inter alia*, that:

> *"Had the [Bank] been advised of the true value of the [Kilpeddar site] it would not have advanced the said sum of €20 million to the [McDonaghs].* In addition had the [Bank] been advised of the obstacles and difficulties to the proposed development of the [Kilpeddar site] it would not have advanced the said sum of €20 million to the [McDonaghs…] *The [Bank] is unable to recover the sums advanced together with the costs associated with the loan.* […] the value of the security provided is not sufficient to cover the monies in respect of the [Kilpeddar site]. As a consequence, the Bank has suffered significant losses." [Emphasis added]

It seems clear from this Statement of Claim that the Bank's claim was that CBRE was liable for the same damage as the McDonaghs, i.e. the non-repayment of the loan. On this basis and on the basis that the settlement sum was used by the Bank to reduce the McDonaghs' debt, it is arguable, to say the least, that CBRE was responsible for the damage caused to the Bank arising from the McDonaghs' failure to repay the loan in this case.

333. On this basis, this Court will assume (for the purpose only of the analysis hereunder) that CBRE was responsible, to some degree at least, for the damage caused to the Bank arising from the non-repayment of the loan.

334. This limited assumption is being made because until there is a court determination, whether in proceedings by the Bank against CBRE or contribution proceedings between McDonaghs and CBRE (whether actual proceedings, or arising from a hypothetical court determination under s. 17(2) which is referenced below), there can be no certainty as to whether CBRE is in fact responsible for the same damage as the McDonaghs. This is because settlements will sometimes be made even where a court might not have made a

finding of liability for the claimed damage, if the case had gone to trial. Accordingly, the making of a settlement, in this case by CBRE, is not the same as a finding by a court that CBRE is liable for any damage or indeed for damage to the tune of €5 million.

Application of s. 17 of the 1961 Act

335. On the assumption therefore that CBRE and the McDonaghs are concurrent wrongdoers, the McDonaghs rely on ss. 17 and 35(1)(h) of the 1961 Act to claim that this settlement with CBRE has the effect of reducing the Bank's claim against the McDonaghs to zero. These sections state:

> "17. (1) The release of, or accord with, one concurrent wrongdoer shall discharge the others if such release or accord indicates an intention that the others are to be discharged.
>
> (2) If no such intention is indicated by such release or accord, the other wrongdoers shall not be discharged but the injured person shall be identified with the person with whom the release or accord is made in any action against the other wrongdoers in accordance with paragraph (*h*) of subsection (1) of section 35; and in any such action the claim against the other wrongdoers shall be reduced in the amount of the consideration paid for the release or accord, or in any amount by which the release or accord provides that the total claim shall be reduced, or to the extent that the wrongdoer with whom the release or accord was made would have been liable to contribute if the plaintiff's total claim had been paid by the other wrongdoers, whichever of those three amounts is the greatest.
>
> 35. (1) "For the purposes of determining contributory negligence- […]
>
> (*h*) where the plaintiff's damage was caused by concurrent wrongdoers and after the occurrence of the damage the liability of one of such wrongdoers is discharged by release or accord made with him by the plaintiff, while the liability of the other wrongdoers remains, the plaintiff shall be deemed to be responsible for the acts of the wrongdoer whose liability is so discharged."

Under s. 17(2), the Court is required to hypothetically determine the contribution between wrongdoers for the damage caused ("*to the extent that the wrongdoer [..] would have been liable to contribute if the plaintiff's total claim had been paid by the other wrongdoers*"). Section 21(2) is the section which deals with contribution between wrongdoers and it states:

> "21 (2) In any proceedings for contribution under this Part, the amount of the contribution recoverable from any contributor shall be such as may be found by the court to be just and equitable having regard to the degree of that contributor's fault, and the court shall have power to exempt any person from liability to make contribution or to direct that the contribution to be recovered from any contributor shall amount to a complete indemnity."

336. In the High Court decision of *Arnold v. Duffy Mitchell O'Donoghue (A Firm)* [2012] IEHC 368, Hedigan J. noted that it is settled law that a compromise of an action amounts to a valid accord. At para. 6.18 of his judgment, Hedigan J. quotes from para. 22.013 *of Chitty on Contracts* (30th ed.) as follows in relation to what amounts to a valid accord for the purposes of the 1961 Act:

> "[I]t must be […] complete and certain in its terms and that consideration (satisfaction) has been given or promised in return for the promised or actual forbearance to pursue the claim. It is a good defence to an action for breach of contract to show that the cause of action has been validly compromised."

It seems clear therefore that the Settlement Agreement dated 22nd January, 2016 (the "Settlement Agreement"), in which the Bank compromised its proceedings against CBRE (regarding its claim that the valuation of the Kilpeddar site was negligent), amounts to an accord for the purposes of s. 17 of the 1961 Act.

337. Applying s. 17(1) to the present case, one can also conclude that no intention was indicated in the Settlement Agreement between the Bank and CBRE that the other wrongdoer (the McDonaghs) be discharged, since there is absolutely no reference to the McDonaghs in that Agreement.

338. It is clear therefore that since s. 17(1) does not apply, one must then apply s. 17(2) to the settlement. Pursuant to s. 17(2), the fact of the settlement by the Bank with CBRE means that the Bank is "*identified with*" CBRE for the purposes of 'deemed' contributory negligence on the part of the Bank, in the current claim by the Bank against the McDonaghs.

339. Thus, the Bank is deemed to be contributorily negligent in its claim against the McDonaghs to the extent of the higher of three amounts, i.e.:

(i) the amount of the settlement - in this case €5 million,

(ii) the amount by which the settlement provides that the total claim is to be reduced - in this case, there is no refence in the Settlement Agreement to the total claim being reduced, so this is zero,

(iii) the extent to which CBRE would have been liable to contribute if the total claim had been paid by the McDonaghs.

For present purposes therefore, the relevant amount is the higher of €5 million or the extent to which CBRE would have been liable to contribute to the McDonaghs, if the McDonaghs had paid the total claim, i.e. a sum of €22 million approx., to Ulster Bank.

The McDonaghs' interpretation of s. 17(2)

340. The McDonaghs in their legal submissions state:

> "It was clear that the bank witnesses accepted and in particular Mr O'Hanlon accepted that, had the CBRE claim been pursued to its full extent the indebtedness

of the McDonaghs would have been expunged. In those circumstances, Ulster Bank is identified with CBRE such that it cannot now claim the difference between what it did recover and could have recovered in the CBRE proceedings from the McDonagh defendants."

Thus, the McDonaghs' interpretation of s. 17(2) is that the '*identification with'* provisions mean that the Bank cannot now claim the difference from the McDonaghs between what Ulster Bank settled for and the amount of the full claim.

341. However, in this Court's view, this is not what the section states since the section does not 'oblige' P to pursue D1for the full amount, in the sense suggested by the McDonaghs, i.e. by penalising P in any subsequent claim against the other wrongdoer (D2), if P settled for an amount less than the full claim with D1.

342. If this were the case, every settlement by P with D1, which is for less than the full amount (which is likely to be the case in many settlements with concurrent wrongdoers), would release D2, even where this is not the intention of P or D1, and even where D2 might be 80% or 90% liable for the loss to P.

343. This runs contrary to the very *raison d'être* of this section which is to encourage settlements by ensuring that when P sues D2 after settling with D1 for less than the full claim, then D2 gets the benefit of that settlement with D1 (see *Defender v. HSBC* [2018] IEHC 706 at para. 126 *et seq*., which considers in detail the *raison d'être* for s. 17(2) of the 1961 Act).

344. The suggestion by the McDonaghs that s. 17(2) operates to relieve D2 of any liability (because P did not settle with D1 for the full amount of the claim) runs completely contrary to that *raison d'être*, which is in fact to encourage settlements by allowing D2 to benefit from D1's settlement by hypothetically apportioning liability between D1 and D2. The fact that s. 17(2) is concerned with fairly apportioning liability between defendants, where one defendant has previously settled with the plaintiff, is obvious from the wording (i.e. "*the extent that the wrongdoer… would have been liable to contribute*"), which is a key driver for the operation of the section.

345. If the McDonaghs' interpretation were correct, one would never have any fair apportionment between defendants of the liability for a claim if one defendant had previously settled with a plaintiff. Furthermore, if a plaintiff was to be deprived of an action against the other concurrent wrongdoer for the balance of his claim, as suggested by the McDonaghs, there would be no encouragement for a plaintiff ever to settle with the first concurrent wrongdoer.

The Bank's interpretation of s. 17(2)

346. The Bank's approach to the interpretation of s. 17(2) is to concentrate on the wording in the third leg of the section, i.e. "*if the plaintiff's claim had been paid in full by the other wrongdoers*" (i.e. by the McDonaghs) as the key driver for the operation of the section.

347. Applying this wording, the Bank concludes that if this occurred and the claim had been paid in full by the McDonaghs, then there would be no claim against CBRE. On this basis they conclude that the third leg of s. 17(2) leads to zero.

348. However, in this Court's view, this interpretation fails to appreciate that this part of the wording of the section is hypothetical. One is never dealing with a situation where one wrongdoer has *actually* paid the damages in full to P, since if this were the case, P would not be suing the other wrongdoer.

349. Rather s. 17(2) is simply positing a hypothetical situation, where D2 has paid P's damages in full, in order to justify the Court in determining the hypothetical contributions between D1 and D2, solely for the purpose of determining P's deemed contributory negligence in his extant claim against D2.

350. The Bank cannot take this hypothetical situation to claim that in such a situation, there would be no claim against CBRE and so the third leg of s. 17(2) leads to zero. This is because a key driver for this section is not the assumption ('*if*') the McDonaghs had paid the damages in full (since this is simply an assumptive pre-condition to be satisfied before the hypothetical apportionment of damages takes place). Rather a key driver for this section is the determination of the hypothetical lability of CBRE to the McDonaghs, if and only if, the McDonaghs had paid the Bank's damages in full.

351. This Court therefore rejects the interpretation of s. 17(2) put forward by the Bank because the very reason for this assumptive pre-condition (*if* the McDonaghs had paid the damages in full) is nothing to do with the Bank suing CBRE, but instead is to allow for the hypothetical contribution between CBRE and the McDonaghs. This may well lead to a figure which is *not* zero for CBRE, but this is a matter to be addressed on the facts of the case.

The Court's interpretation of s. 17(2)

352. Accordingly, this Court disagrees with the interpretations suggested by both parties. It seems clear to this Court that under s. 17(2), this Court is obliged to hypothetically determine the contribution (pursuant to s. 21(2) of the 1961 Act) between CBRE and the McDonaghs for the damage caused to the Bank, in order to determine that degree of 'deemed' contributory negligence on the part of the Bank in its claim against the McDonaghs.

353. This Court's interpretation of s. 17(2) is that the Bank's claim against the McDonaghs is to be reduced by the amount by which CBRE *would* have been liable to contribute to the damage suffered by the Bank, *if* there had been a contribution between CBRE and the McDonaghs.

354. If this percentage liability of CBRE under the third leg of s. 17(2) is greater, in monetary terms, than the €5 million reduction already made to the Bank's damage, then the judgment sum of approximately €22 million sought in these proceedings will have to be reduced accordingly.

355. If however, the percentage liability is less, in monetary terms, than €5 million, then there will be no reduction in the judgment sum sought by the Bank.

Examples of application of s. 17(2) to the facts of this case

356. Thus, without wishing to prejudge this issue and to take just an example, if CBRE were held by a court to be say 10% liable for the non-repayment of the loan because of its allegedly negligent valuation (and the McDonaghs were held to be 90% liable for that non-repayment), then under the 1961 Act, the Bank is deemed to be guilty of 10% contributory negligence (arising from its settlement with CBRE). On this basis, the Bank would only be entitled to recover 90% of the outstanding loan from the McDonaghs.

357. A finding of say 10% liability for CBRE might, for example, result from a court finding firstly that the valuation of the site was negligently high and secondly that a lower valuation of the site might have led to the Bank still lending to the McDonaghs but simply seeking greater equity from the McDonaghs, which was suggested by Mr. Moore but nonetheless a finding by a court that CBRE was partly responsible for the non-payment of the loan by the McDonaghs.

358. Applying this example, a reduction of 10% would therefore be the effect of the relevant provisions of the 1961 Act on this claim by the Bank against the McDonaghs. It is not, as suggested by the McDonaghs in their submissions, that the Bank's claim against the McDonaghs is automatically reduced to zero (unless of course CBRE were held to be 100% liable for the failure of the McDonaghs to repay the loan).

359. To take another example, if for the sake of argument, CBRE were found by a court to be 20% liable for the non-payment of the loan by the McDonaghs, and bearing in mind that the sum owed to Ulster Bank was €27 million in round terms (before any contribution from CBRE), this would mean that the claim against the McDonaghs should be reduced by 20%, i.e. from €27 million to €21.6 million.

360. However, the claim now before this Court has already been reduced by €5 million as a result of the settlement sum received from CBRE, leading to a net claim by the Bank against the McDonaghs of approximately €22 million.

361. So based on this hypothetical example, the judgment to be obtained against the McDonaghs would be reduced from €22 million to €21.6 million. Clearly this is simply a hypothetical example and the figures would be very different if CBRE were found to be say 50% liable for the Bank's loss arising from the non-payment of the loan by the McDonaghs.

362. In light of this Court's conclusions on the application of the 1961 Act, and in particular its finding that neither the Bank nor the McDonaghs are correct in their interpretation of that Act, if after considering the terms of this judgment there is no agreement between the parties on the effect of the 1961 Act on the judgment amount, then before final orders are made, it will be necessary to hear from both parties in detail on firstly whether CBRE is a concurrent wrongdoer and if so, whether it has a liability for the damage caused to

the Bank in monetary terms, in excess of the sum of €5 million (which has already been deducted from the Bank's loss).

CONCLUSION

363. This Court concludes that:

- the Heads of Agreement are not a binding contract for sale,
- the consent of Ulster Bank was required for the proposed sale of the Kilpeddar site under the terms of the Compromise Agreement and the Mortgage,
- the consent of Ulster Bank was not obtained to the proposed sale of the site, and,
- the McDonaghs breached the Compromise Agreement in a number of respects thereby entitling Ulster Bank to seek payment of all sums due from the McDonaghs to Ulster Bank under the Facility Letter, subject to what is stated regarding the 1961 Act.

Once the parties have had an opportunity to review this judgment, the Court will hear from counsel regarding final orders.