THE HIGH COURT

COMMERCIAL

[2024] IEHC 240

Record No. 2021/4439 P

BETWEEN

BRIAN MCDONAGH AND MAURICE MCDONAGH

PLAINTIFFS

AND

FANE INVESTMENTS LIMITED, QUANTA CAPITAL INVESTENTS LIMITED, MEL SUTCLIFFE AND ULSTER BANK IRELAND DAC

DEFENDANTS

AND

RECORD NO. 2022/2174 P

FANE INVESTMENTS LIMITED

PLAINTIFF

AND

BRIAN MCDONAGH, KENNETH MCDONAGH AND MAURICE MCDONAGH

DEFENDANTS

JUDGEMENT of Mr Justice Twomey delivered on the 25th day of April, 2024.

INTRODUCTION

1. This case is the latest in a 10-year saga of litigation pursued by Mr. Brian McDonagh ("**Mr. McDonagh**"), who is *circa* €19 million in debt. Although Mr. McDonagh is now subject to an *Isaac Wunder* Order (vis-à-vis Ulster Bank), these proceedings were issued before the *Isaac Wunder Order* was obtained against him. The 10 years of litigation raises a number of points, which may be of more general application.

2. The first relates to the rights of *defendants*, which do not appear to receive as much attention as the rights of *plaintiffs*. This is understandable perhaps, because most cases focus on whether there has been an alleged breach of the rights of the persons who have instituted the proceedings in question. Accordingly, there tends to be a concentration on the rights of plaintiffs, firstly in having access to the courts and then on their right to damage for alleged breaches of their personal, property or contractual rights.

3. However, this case raises the question of whether the property rights of defendants are *adequately protected* by permitting plaintiffs with unmeritorious/misguided claims, to inflict significant and irrecoverable financial loss at will, often on multiple occasions, on any third party they choose to sue. This arises where those plaintiffs have insufficient resources to discharge a defendant's legal costs, when the defendant wins, and so those plaintiffs have nothing to lose.

Where does a 'winning' defendant, with irrecoverable legal costs, obtain justice?

4. Another way to put the issue, raised by this case, is that while a plaintiff *obtains justice* by accessing the courts and obtaining judgment (even if he loses), where does the successful defendant, with irrecoverable legal costs go, to *obtain justice*?

5. With the concentration on the right of a plaintiff to sue and to vindicate his rights, the rights of a defendant seem to get less attention. The reality is that such a defendant has nowhere to go and her 'justice' appears to be to simply accept the financial loss she has incurred in defeating an unmeritorious, misguided or vengeful claim. It is for this reason that one might ask whether there is an *effective* disincentive to the brining of unmeritorious, misguided or vengeful litigation, in order to adequately the property rights of defendants, with irrecoverable losses. After all, the plaintiff has the option of going to court or not; the defendant has no choice, yet she is the one ending up with the irrecoverable legal costs for 'winning' the case.

6. Over ten years ago in the Supreme Court case of *Farrell v. The Governor and Company of the Bank of Ireland* [2013] 2 ILRM 183 at para. 4.12, Clarke J. stated:

> "*If there were not provision requiring generally for the payment of costs to the successful party then there would be a real risk that the bringing or defending of proceedings could be used as a form of unfair tactic little short, at least in some cases, of blackmail*."

Since this statement is premised on the '*payment*' of costs by a losing party, it follows that where a plaintiff has insufficient resources to *pay* those costs, then the bringing of unmeritorious, misguided or vengeful proceedings can amount to a form of blackmail. Where the proceedings are issued in the High Court, the sums involved can be enormous, since the successful defendant is facing tens/hundreds of thousands of euro, if not more, in *irrecoverable* costs in order to defeat those claims.

7. The irony for a defendant in this situation is that, while a plaintiff is able to *seek justice* and take an *unmeritorious* case against her, there is nowhere for her, as a successful defendant, to *seek justice*, to recover her *merited* claim for legal costs, if the plaintiff has insufficient resources. She, it seems, is meant to be happy that her rights have been vindicated by the courts in dismissing the plaintiff's unmeritorious claim. However, this takes no account of the fact that tens/hundreds of thousands of euro of her property (i.e. money she has to pay in legal costs) has, in effect, been *appropriated*, by the actions of a plaintiff.

The '*need to prevent persons litigating on a consequence-free basis.'*

8. It was this type of situation which led the Supreme Court in *W.L. Construction Limited v. Chawke* [2019] IESC 74 at para. 67 (per O'Malley J.). to state five years ago, that there is a '*need to prevent persons litigating on a consequence-free basis.'* It seems to this Court that this need arises, whether the plaintiff is an individual, as in this case, or an individual behind a company, as happened in the *W.L. Construction* case. Yet, in the five years since that judgment, there are still no consequences for an individual plaintiff, with insufficient resources to pay the defendant's legal costs, taking unmeritorious/misguided and sometimes serial litigation against a defendant. For example, there is no requirement that even a relatively small amount of money (*i.e. relative* to the plaintiff's finances, but *sufficient* to act as a disincentive to bringing unmeritorious claims), is put up as security for costs. This would ensure that a plaintiff is not litigating on a '*consequence-free basis'* against a defendant, for whom the litigation is *full of consequence* (in terms of legal costs).

9. The irony of the current situation is that if a defendant is 'lucky' enough to be pursued by a company, with an unmeritorious/misguided claim, she is unlikely to be facing a financial loss when she 'wins', since the law provides for a 'level-playing' field, by entitling her to seek security for her costs from the plaintiff company, before it proceeds with the claim.

10. However, if she is unlucky enough have the exact same unmeritorious/misguided claim brought by an individual, there is no requirement for the plaintiff to put up even a small security for the defendant's costs. Thus, there is no level-playing field between plaintiff and defendant and so no effective disincentive to the bringing of that claim. This explains why the caselaw regarding vexatious and abuse of process claims in our courts is full of cases concerning individual plaintiffs, and rarely, if ever, corporate plaintiffs. This is because the requirement to provide security for costs appears to reduce considerably, if not eliminate, unmeritorious, misguided or vengeful litigation on the part of corporate plaintiffs. This is also evidenced by the fact that it is practically unheard of for a court to have to grant an Isaac Wunder Order against a corporate plaintiff for continuously bringing unmeritorious/misguided/vengeful litigation.

No level playing field between a defendant and certain plaintiffs

11. So long as there are no consequences for such plaintiffs, there will never be a level playing field between a defendant, who has *everything to lose* (in legal costs), and a plaintiff, with insufficient resources to pay the defendant's legal costs, and so with *nothing to lose* (in legal costs). Accordingly, the risk of blackmail, to which the Supreme Court in *Farrell* alluded, will continue for certain defendants.

12. The absence of any effective disincentive to unmeritorious litigation by plaintiffs with nothing to lose, begs the question of whether a defendant's property rights are adequately protected. This is because such plaintiffs continue to be allowed to take consequence-free unmeritorious litigation, and so can *inflict, at will, irrecoverable financial loss* on a defendant, despite the Supreme Court's call in *W.L. Construction* for an end to '*consequence-free'* litigation. This is as matter of significance to every person in the State, because, *any person,* at *any time,* can be subjected to tens/hundreds of thousands of euro in irrecoverable legal costs, by the simple expedient of a person (with insufficient resources to pay the defendant's legal

costs) deciding to institute unmeritorious, misguided or vengeful proceedings against that person.

Confirmation bias

13. The second issue of general application, which arises in this case, relates to the risk of confirmation bias in litigation, which was highlighted by Gearty J. in *Crumlish v. HSE* [2023] IEHC 194. Confirmation bias arose in that case in the context of a medical expert giving a medical opinion to support a claim of medical negligence. That case highlighted the risk of a medical expert, knowing that a cancer diagnosis had not been diagnosed, seeking out and relying only on evidence which *confirms his view*, that the diagnosis was negligently missed, rather than analysing the evidence, *without any pre-conceived outcome in mind*.

14. However, confirmation bias is a risk in all types of litigation, and not just in the context of experts giving their views in a personal injuries/medical negligence claim. This is because litigation, by its very nature, involves the giving of reasons by a litigant for acts or omissions *after the event* i.e. after the alleged negligence, after the alleged breach of contract, after the failure to meet a deadline (see *e.g. Glenman Corporation Limited v Galway County Council* [2023] IEHC 336 at para [50-52]). The risk arises because these reasons are given, usually with the benefit of legal advice, and invariably with the benefit of knowing what legal tests have to be satisfied for the litigant to succeed. It arises because once a litigant is viewing her past acts or omissions, with the knowledge of what legal test has to be satisfied, while believing (or hoping) that they satisfy that legal test, there *is a risk of confirmation bias* coming into play, i.e. of *searching for facts or evidence that confirms her bias*, rather than looking at all circumstances in the round, to see their true nature, i.e. before there was litigation and a legal test to be satisfied.

Confirmation bias in this case

15. This case highlights the need for courts to be alert to confirmation bias in litigation. It involves two sets of proceedings, which were heard at the same time as they both concerned a proposed data centre on a site in Kilpedder, County Wicklow, Folio 21790F and 36738F in the Land Registry ("**Site**"). The main protagonist in both sets of proceedings is Mr. McDonagh, who is the second plaintiff in the first set of proceedings ("**Specific Performance Proceedings**") and the first defendant in the second set of proceedings ("**Trespass Proceedings**").

16. There have already been at least 13 judgments, over a ten-year period, handed down regarding this Site, arising from Mr. McDonagh's unshakeable belief that a wide range of third parties have deprived him of his interest in the Site (even though it was he, who failed to meet the repayments on the loan to acquire the Site, which led to him losing all rights to the Site).

17. As noted in detail below, this Court finds that Mr. McDonagh, after receiving legal advice on how best to achieve his litigation goal (*i.e.* an interest in the Site), has been guilty of confirmation bias. This is because, instead of having regard to all the circumstances, he sought out the only evidence which appeared to support his claims and then viewed it in isolation to confirm his bias that he has been wrongfully deprived of an interest in the Site.

Ten years of litigation about the Site, the subject of these proceedings

18. While the first issue of general application (i.e. the absence of an effective disincentive to unmeritorious claims by plaintiffs, who will not be paying the defendant's legal costs) relates to the *private interests* of parties, the third issue of general application, is one of *public interest.* However, it also arises because of the absence of an *effective* disincentive to the taking of unmeritorious litigation, by a party, for whom the threat of a legal costs order is not a disincentive. It concerns the amount of time that Mr. McDonagh has spent litigating his unmeritorious claims regarding the Site.

19. This is because it is over ten years ago, since Mr. McDonagh first instituted proceedings regarding the Site. In *Brian McDonagh v. Ulster Bank Ireland Limited* [2014] IEHC 476 at para [34], the High Court found that Mr. McDonagh had failed to disclose certain relevant facts. In his judgment, Keane J. made it clear that he was '*quite satisfied'* that this non-disclosure '*involved a culpable failure on the part of*' Mr. McDonagh. Over ten years later the courts are still dealing with Mr. McDonagh's deception regarding the Site. This is because this year, in the Court of Appeal case of *Brian McDonagh & Ors v Ulster Bank Ireland DAC & Ors* [2024] IECA 10 at para 11, Meenan J. held that Mr. McDonagh (with his two brothers) had '*engaged in deception'*.

20. However, Mr. McDonagh is not just well known to the Courts in Ireland. For example, he was described by Morgan J. in the English High Court case of *Brian McDonagh v Bank of Scotland* [2018] EWHC 3262 at para 26 as follows:

> "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". (Emphasis added)

21. While reference is made to the foregoing Irish cases, to give a flavour for the *amount of court time* which Mr. McDonagh has monopolised over the last 10 years, it is important to note that in considering whether Mr. McDonagh's evidence in this case is unreliable, or whether he has been subject to confirmation bias in this case, reliance is only placed on the evidence heard by this Court in the Specific Performance Proceedings and the Trespass Proceedings.

Mr. McDonagh's unshakeable belief that he has been unjustly deprived of the Site

22. The background to all of these cases and the 13 judgements is Mr. McDonagh's failure to pay back a loan of over €20 million to Ulster Bank for his purchase of the Site. Mr. McDonagh had hoped to develop the Site into a data centre. The years of litigation involving

Mr. McDonagh arise from his unwavering belief, despite all the evidence, that the reason he is not able to benefit from the value of Site, which *he believes* could be worth €150 million, is because of various third parties (rather than his default on the loan). Mr. McDonagh appears to be so convinced that he is right, and that the other litigants he has sued, and all the judges, who gave those 13 judgments, are wrong, that he will continue to pursue this litigation at significant cost to those other litigants, unless prevented by a court from doing so.

23. In fact, it is clear from the evidence in this case, that Mr. McDonagh's litigation is not restricted to actions *directly* related to the Site and its use as a data centre. This is because one of the defendants, in these proceedings, ("**Mr. Sutcliffe**"), gave as one of his reasons for terminating his agreement with Mr. McDonagh, that Mr. McDonagh had judicially reviewed the grant of planning permission for a proposed data centre (and thus as competition to the Site), which was sought by *Apple* in Athenry, (see *Brian McDonagh v. An Bord Pleanála* [2017] IEHC 586).

24. Indeed, Mr. McDonagh's litigation concerning the Site does not yet seem to be at an end. This is because the day after this hearing ended, a judgment was issued by Bradley J. in yet another High Court case involving Mr. McDonagh, arising from his purchase of the Site and his failure to pay back the loan thereon. That was a case in which Mr. McDonagh's attempts to prevent an enforcement of the security for that loan was rejected – see *Promontoria v Brian McDonagh* [2024] IEHC 176.

Several months of court time and judicial time monopolised by Mr. McDonagh

25. One thing, however, is very clear from the 13 judgments which have been delivered by the High Court and Court of Appeal concerning Mr. McDonagh and the Site over the last 10 years. It is that he has taken up *several months of court hearing time and judicial time* (writing judgments) because of the numerous cases which he has taken, or which have had to be taken against him, over the Site.

26. The two cases, heard by this Court alone, took up approximately *a month and a half of court hearing time*. For the many parties who have been sued by Mr. McDonagh, or have had to sue Mr. McDonagh, over the Site, it is likely to have cost them hundreds of thousands/millions of euro in legal costs, which are unlikely to be recoverable from Mr. McDonagh (since, as noted, below, he has debts of €19 million).

27. In addition to the private interests of the parties who have a significant financial loss inflicted upon them, there is a public interest in the amount of court time, which has been monopolised by Mr. McDonagh regarding the Site. This is because, firstly, the court and judicial time which he has monopolised, is funded by the tax payments of the country's taxpayers. Secondly, it is a matter of public interest because, when one litigant monopolises court hearing time (and judicial writing time), other litigants, who are not monopolising court time, end up having their hearings delayed.

Isaac Wunder Order against Mr. McDonagh

28. The only power that a court has to prevent the abuse of the courts' processes is the issue of an *Isaac Wunder Order*. In this regard, Mr. McDonagh (along with his two brothers, Mr. Maurice McDonagh, the first plaintiff and Mr. Kenneth McDonagh ("**McDonaghs**")) is now subject to an *Isaac Wunder Order* preventing him taking any further litigation (unless approved by the President of the High Court) in relation to matters arising out of the loan granted by Ulster Bank to the McDonaghs in 2007 for the purchase of the Site (see *Ulster Bank Ireland DAC & Ors v Brian McDonagh & Ors* [2024] IEHC 36 (Quinn J) at para. [1]).

Weaponising of the legal system by Mr. McDonagh against other parties

29. However, as that *Isaac Wunder* Order was only made in 2024, after 10 years of unmeritorious litigation by Mr. McDonagh, the proceedings in this case, which were issued in 2021, were not caught by the Order. In addition of course, an *Isaac Wunder* Order is a very limited disincentive to unmeritorious litigation, since it only applies to the parties who obtained

that order (Ulster Bank and the Receivers). Thus, it does not stop Mr. McDonagh suing other parties over the Site, such as Fane, Quanta and Mr. Sutcliffe, or indeed other parties in the future.

30. Accordingly, this Court had to hear Mr. McDonagh, for a week and a half of court hearing time, regarding yet another aspect of his complaint regarding the Site. In this way, Mr. McDonagh has been able to weaponise, once again, the courts to inflict financial loss on the parties he decides to sue (through their expenditure of legal fees in the hundreds of thousands of euro, without any apparent prospect of recovering them, even when they win).

31. In this regard, counsel for three of the defendants in the Specific Performance Proceedings ("**Fane**", "**Quanta**" and Mr. Sutcliffe – for short counsel for Quanta) submitted that the threat of court proceedings was used improperly by the McDonaghs in order to block any development of the Site, without the McDonaghs being involved. This is because the McDonaghs believe that those three defendants and the fourth defendant ("**Ulster Bank**") denied the McDonaghs their rightful interest in the Site. Indeed, it seems to this Court that the McDonaghs have extracted revenge against those parties for the *perceived* wrong done to them. This is because the McDonaghs have forced those parties to expend hundreds of thousands in legal costs without, it seems, any prospect of recovery. Counsel for Quanta relied on the secret recording made by the McDonaghs of their conversation with Mr. Sutcliffe (CEO of Quanta). She did so to support her claim that the McDonaghs used these proceedings for an improper purpose, i.e. as a threat that they would litigate to *block* the development of the Site, if Mr Sutcliffe failed to allow the McDonaghs to have an interest in the Site, The transcript of the recording states:

> "[Maurice McDonagh] We can sit here and pretend that we are having conversations, making lots of things. The bottom line is either **we all work together to develop the**

site or you go off to do your own thing and we stay separate from it and **we just keep fighting and keep blocking it.**" (Emphasis added)

32. Just as the second plaintiff, Mr. Maurice McDonagh, predicted, in this secret recording, the McDonaghs did 'go *back to the courts'*, as they instituted the Specific Performance Proceedings. Thus, it is clear that they have '*blocked'* and are '*fighting'* all four defendants, at enormous expense to those defendants. It is clear to this Court that the McDonaghs have therefore weaponised the legal system against the defendants, as they did not get what they wanted (an interest in Site). As a result, this Court has had to allocate scarce court hearing time to this dispute about the Site, which has already used up several months of court hearing time (and judicial time in writing judgments) over a ten-year period.

Mr. McDonagh submits that Issac Wunder Order breaches his right of access to the courts

33. Mr. McDonagh submitted to this Court that, because most of the cases, to which he was a party, regarding the Site, were ones in which he was a defendant, rather than a plaintiff, the *Isaac Wunder* Order should not have been granted against him. He claims it breaches his constitutional right of access to the courts as he claims he was, in most of those cases, a *serial* defendant, rather than a *serial* plaintiff.

34. Ironically, however, Mr. McDonagh illustrated, in this very case, how a serial *defendant* can abuse court processes, such as to justify an *Isaac Wunder* Order. This is because counsel for Quanta noted that Mr. McDonagh was '*quite boastful'* about removing locks on the gated entrance to the Site and trespassing on the Site, which is owned by Fane. Indeed, Mr. McDonagh proudly stated to this Court that he had on 16 occasions cut the locks on the gated entrance to the Site. He also offered to bring the 16 locks into court to prove this point. Since Mr. McDonagh knew that Fane was the registered owner of the Site, by cutting these locks on those 16 occasions, Mr. McDonagh was, in effect, taking the law into his own hands and was effectively forcing Fane to institute proceedings against him for trespass, which Fane duly did.

These proceedings, which were caused by Mr. McDonagh's actions, amount to a complete waste of court time and thus an abuse of court process.

35. It seems to this Court therefore that Mr. McDonagh illustrated by his own evidence quite clearly how a *defendant,* can abuse court processes, so as to be subjected to an *Isaac Wunder Order*.

Mr. McDonagh submits that it all comes down to '*who the Court believes*'

36. The final point to be made about this case was the fact that, in his closing submissions to this Court, Mr. McDonagh stated:

> "I will let the Court decide on who the Court believes was telling the truth and who the Court believes were misleading the Court and telling lies, Judge. That's my final word on it".

37. This was an interesting submission by Mr. McDonagh, to say the least, considering the many instances, some of which were opened to this Court in evidence, of Mr. McDonagh's credibility being called into question. In addition to the statements of Morgan J., Keane J. and Meenan J., to which reference has already been made:

- McDermott J in *Brian McDonagh v. An Bord Pleanála* [2017] IEHC 586 found that Mr. McDonagh failed to disclose material facts to the High Court in his application seeking judicial review of An Bord Pleanála's decision to grant *Apple* planning permission to build a data centre in Athenry.
- In the High Court case of *McDonagh & Ors v Ulster Bank Ireland DAC & Ors* [2023] IEHC 242, the McDonaghs had argued that the agreement to sell the Site to Granja Limited ("**Granja**") was genuine. However, in the Court of Appeal ([2024] IECA 10 at para 11), Meenan J. noted that the McDonaghs had, in effect, acknowledged that they had been lying to the High Court, since they changed their

story in the Court of Appeal to claim that the agreement to sell to Granja was in fact a sham.

- This Court stated in *Ulster Bank DAC & Ors -v- McDonagh & Ors* [2020] IEHC 185 at para [54] that it:

> "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."

While it is curious that Mr. McDonagh chose to emphasise that this case comes down to his credibility, it is important to emphasise that, for the reasons set out below, regarding the evidence produced in *this* case (and not previous cases in which Mr. McDonagh has been involved), this Court reached its conclusions regarding the reliability of Mr. McDonagh's evidence.

BACKGROUND

38. The first set of proceedings, the Specific Performance Proceedings, is a claim by the McDonaghs seeking an order for specific performance of a Memorandum of Agreement ("**Agreement**") dated 5th December, 2017, which they, and Granja, signed with Quanta and Mr Sutcliffe**,** relating to the possible acquisition of the Site.

39. The McDonaghs had previously purchased the Site in 2007, but they failed to meet the mortgage repayments to Ulster Bank. As a result, joint receivers ("**Receivers**") were appointed by Ulster Bank to the Site in October 2014. The Receivers were advised that an offer had been accepted in September 2020 for the sale of the Site and the Site was duly sold to Fane in February 2021. This acquisition in 2021 of the Site by Fane (a special purpose vehicle/SPV set up by Quanta) led to the issue of these Specific Performance Proceedings. In these proceedings,

the McDonaghs seek to enforce, what they say is their right, under the Agreement, to acquire the Site with Quanta.

40. As part of these Specific Performance Proceedings, the McDonaghs are also suing Ulster Bank on the basis of a Mortgage Deed dated 3 August 2007 between the McDonaghs and Ulster Bank. The McDonaghs claim that, when the Site was sold in February 2021, Ulster Bank, as mortgagee in possession, failed to achieve a proper price for the Site.

The Trespass Proceedings

41. The Site is also the subject of the second set of proceedings, the Trespass Proceedings, which were heard by this Court. The plaintiff in those proceedings is Fane, the registered owner of the Site, and it is seeking an injunction against the McDonaghs (and Ms. Yeokse Ooi, the partner of Mr. McDonagh) arising from alleged acts of trespass on the Site.

42. It is clear that the key issue in the Specific Performance Proceedings is the status of the Agreement. However, the status of that Agreement also appears to be a key issue in the Trespass Proceedings. This is because the McDonaghs were litigants in person, so it was not absolutely clear, the nature of their defence to the action in trespass. However, it seemed to this Court that the McDonaghs were claiming that Fane, a subsidiary of Quanta, and the purchaser of the Site in February, 2021, could not maintain a trespass action against the McDonaghs, because the McDonaghs had, in December 2017, executed the Agreement with Quanta, with the aim of acquiring the Site.

43. This Court will first deal with the Specific Performance Proceedings, which took up the vast majority of the hearing time.

A. THE SPECIFIC PERFORMANCE PROCEEDINGS

As already noted, the key issue in the Specific Performance Proceedings is the status of the Agreement. A critical factor in this regard was the oral evidence of Mr. McDonagh and the conflicting evidence of Ms. Eithne Friel ("**Ms. Friel**") concerning what happened before and after the execution of the Agreement. For this reason, a logical manner to deal with the issues in this case is to firstly deal with the credibility of these two witnesses and then to go through the evidence in a chronological manner, but while doing so, to reach the conclusions which this Court needs to make regarding the relevant factual and legal issues in dispute.

The McDonaghs

44. Mr. McDonagh and Mr. Maurice McDonagh were litigants in person at hearing. However, they were represented by lawyers up to the eve of the trial. Mr. Kenneth McDonagh, who instituted the proceedings along with his two brothers, took no part in the trial. Mr. Maurice McDonagh had a limited role in relation to the key factual matters which had to be decided by this Court. For example, there was no claim that he had trespassed on the lands. Similarly, he had no role in the negotiation of the Agreement, which was negotiated by Mr. Brian McDonagh. Therefore, in both sets of proceedings, Mr. McDonagh was the main protagonist.

Mr. Brian McDonagh as a witness

45. In addition to Mr. McDonagh's evidence being the key evidence provided on behalf of the McDonaghs, it is also relevant to note that for both sets of proceedings, the McDonaghs only called two witnesses i.e. Mr. Maurice McDonagh and Mr. Brian McDonagh. Accordingly, this case turns on the evidence, primarily, of Mr. McDonagh. For several reasons, this Court did not find Mr. McDonagh's evidence credible, as he was a difficult witness and at times he

gave evasive or disingenuous answers to questions and also gave answers which this Court did not find credible. Some examples will suffice to illustrate this point.

Mr. McDonagh says he has no involvement with Mr. Fehilly

46. On the first day of the trial, Mr. McDonagh was questioned about a document entitled Proposed Heads of Terms ("**Proposed Heads of Terms**"), which this Court concludes, for the reasons set out below, he drafted (possibly in conjunction with Mr. Ger Fehilly ("**Mr. Fehilly**"), who this Court concludes was Mr. McDonagh's agent/adviser). In that document, there is a statement that:

> "Brian McDonagh is effective MD of Granja Limited but for presentation purposes, Ger Feehily will be shown as MD on paper."

47. Mr. McDonagh was questioned by counsel for Quanta about his connection with Mr Fehilly and this wording, which clearly states that Mr. McDonagh was to be the effective MD, with Mr. Fehilly as the ostensible MD:

> "**Q.** Well, you have seen what you said yourself, Mr McDonagh, in relation to Ger Fehilly and Granja effectively being just the ostensible MD, when it's you, really, that pulls the strings?
>
> **A .** No, Mr. Fehilly. I have no involvement with Mr. Fehilly. I never met his solicitors. He was Granja, he was the managing director of Granja. I had no involvement."(Emphasis added)

48. To consider what Mr. McDonagh is claiming in this response, it is necessary to refer to the case of *Ulster Bank v McDonagh* [2020] IEHC 185, which was opened in evidence to this Court. In that case, this Court heard several days of evidence (during a 20-day trial) regarding the very clear connection between Mr. Fehilly/Granja and Mr. McDonagh regarding the alleged sale of the Site by the McDonaghs to Granja on 13 June 2014.

49. This alleged sale arose, after the McDonaghs had defaulted on their loan from Ulster Bank, whereby the Site was to be sold as part of a compromise agreement with Ulster Bank (which agreement was breached by the McDonaghs). Based on the extensive evidence before this Court during that case, this Court concluded in that case that '*Mr. Fehilly is Mr. Brian McDonagh's accountant'* (at para 80) and that '*Granja was a front for Mr. Brian McDonagh'* (at para 140). This Court's conclusions were upheld on appeal and so this Court's decision in relation to these two findings of fact remain undisturbed.

50. In the current hearing before this Court, counsel for Quanta brought Mr. McDonagh through the conclusions of this Court in that *Ulster Bank v McDonagh* case. She also referred him to yet another case involving Mr. McDonagh and the Site, which was heard by the High Court and Court of Appeal, i.e. *McDonagh & Ors v Ulster Bank Ireland DAC & Ors* [2023] IEHC 242; [2024] IECA 10. In the High Court, in that case, the McDonaghs had argued that the agreement to sell the Site to Granja was genuine. However, in the Court of Appeal, Meenan J. noted at para 11 that the McDonaghs had, in effect, acknowledged that they had been lying to the High Court, since they changed their story in the Court of Appeal to claim that the agreement to sell to Granja was in fact a sham. At para 11, Meenan J states:

> "In the course of the hearing of this application in the court below, the [McDonaghs] acknowledged that this agreement was a '*sham*'".

51. Despite all of this evidence from previous court cases involving Mr. McDonagh, which was put to him in this Court, when asked about him being the person behind Granja, and about Mr. Fehilly's status as just an ostensible MD of Granja, Mr. McDonagh claimed that he had no involvement with Mr. Fehilly/Granja. His answer flies in the face of all the evidence that was put to him regarding Mr. Fehilly/Ganja (and indeed the other evidence produced at this hearing of the connection, referenced below,) and illustrates that Mr. McDonagh is not a reliable witness and so his evidence must be treated with caution.

52. While the foregoing is the most obvious example of why Mr. McDonagh is a disingenuous and unreliable witness, there were other examples.

Mr McDonagh's statements regarding the ownership of the horses

53. Mr. McDonagh challenged counsel for Quanta, in relation to the horses, which were grazing on the Site, by stating that:

> '*Well, you're saying that they are not my horses. I can bring to the Court tomorrow the passports, Judge, if that would help.'*

These two statements, firstly challenging a claim that the horses were not his, and his immediate offer to bring their passports to Court, could only be interpreted as implying that the passports would prove that *he was the owner*. However, despite this statement, a few minutes later he stated that '*I'm not the owner of the horses […] they are registered in my wife's name'*.

This exchange was typical of the unreliable evidence provided by Mr. McDonagh.

Mr. McDonagh's claim that a document was not drafted by him/his agent

54. Similarly, in relation to the Proposed Heads of Terms in this case (to which extensive reference is made below), Mr. McDonagh denied that he drafted them, instead claiming, at one stage, that a co-director of Mr. Sutcliffe's on the board of Quanta (Ms. Erin Madden ("**Ms. Madden**") was the person who produced the document. However, once again, he contradicts that evidence some minutes later by claiming that it was Ms. Friel, the financial adviser to Mr. Sutcliffe/Quanta who had produced this document.

55. Quite apart from the contradictory nature of this evidence, Mr. McDonagh never resiled from his claim that a document, which mis-spelt Mr. Sutcliffe's name as Mr "*Suthcliffe'* on two occasions and mis-spelt the law firm used by Quanta, was drafted by Mr. Sutcliffe's financial adviser of over 8 years (at the relevant time) or his co-director in Quanta. As noted hereunder, for this and other reasons set out below, it is absolutely clear that Mr. McDonagh (and/or in

conjunction with Mr. Fehilly) drafted this document, yet Mr. McDonagh continued to falsely claim that it was prepared by Ms. Madden, and then by Ms. Friel.

Mr. McDonagh's claim that a document was a sham/was not a sham

56. The unreliability of Mr. McDonagh as a witness was further evidenced in relation to his statements regarding the *'sham'* agreement to sell the Site by the McDonaghs to Granja, which was the subject of the proceedings in *Ulster Bank v McDonagh* [2020] IEHC 185. In yet another set of proceedings about the Site in the Court of Appeal, *Brian McDonagh & Ors v Ulster Bank & Ors* [2024] IECA 10 at para 11, Meenan J. noted that the McDonaghs had, in effect, acknowledged that they had been lying to the High Court. This is because they had changed their story in the Court of Appeal to claim that the agreement (of 13th June, 2014) to sell the Site to Granja was in fact a sham, after all. Yet, when this was put to Mr. McDonagh, he first stated that:

> "Well, I can say here openly in Court that the appellants never, ever, ever, once, agreed that the agreement, that's the same agreement that you mentioned a minute ago, 13th June 2014, was not a sham".

However, less than a minute later, having just said that the appellants, the McDonaghs, had in effect agreed that it was a sham, he contradicts this statement by saying that it is not a sham, since he states:

> "Yeah, and the agreement that you claim was sham is the document, yesterday, or the agreement yesterday, that you referenced so many times and it's not a sham; it was produced."

This exchange was typical of Mr. McDonagh's disingenuous and evasive evidence.

Ms. Friel as a witness

57. The contrast, between Mr. McDonagh's credibility and that of Ms. Friel, could not have been starker. In fact, this appeared to be obvious, even to Mr. Maurice McDonagh, since, in his closing submissions, the only witness on either side he complimented, was Ms. Friel, who he described her as a '*very genuine witness'.*

58. Ms Friel was a key witness for Fane, Quanta and Mr. Sutcliffe regarding the status of the Agreement, as she is an accountant and tax adviser, and Mr. Sutcliffe/Quanta is one of her clients. Unlike Mr. McDonagh, this Court found her to be a credible and reliable witness for a number of reasons.

59. Firstly, she came across as a conscientious accountant and tax adviser who asked a lot of questions and paid attention to detail in order to protect her clients' interests. Secondly, she did not provide answers which were not credible or illogical, as was the case with Mr. McDonagh. Thirdly, she was not a difficult witness or evasive witness who gave disingenuous answers, but instead gave straight, careful and credible answers to all questions.

60. In addition to being a credible witness, Ms. Friel was an important witness for two reasons. Firstly, it is because of her critical role in the negotiation and implementation of the Agreement. Secondly, it is because she was an independent witness, as she was not financially interested in the Agreement. This was not the position of the other witnesses, Mr. McDonagh, Mr. Sutcliffe and Mr. Coughlan who provided evidence regarding the execution and the implementation of the Agreement. No criticism is being made of the evidence of Mr. Sutcliffe or Mr. Eoghan Coughlan ("**Mr. Coughlan**") in this regard. It is simply that the evidence of an independent witness will, in some cases, carry more weight than a witness who has a direct financial interest in the outcome of a case.

61. For all these reasons, this Court gives significant weight to Ms. Friel's testimony (as well as the fact that, in many respects, her evidence was supported by documentary evidence and/or the evidence of Mr. Sutcliffe and Mr. Coughlan).

The status of the Agreement

62. Having dealt with the credibility of these two key witnesses, it is now proposed to consider the legal status of the Agreement. The Agreement was signed on 15th December, 2017 by the McDonaghs, by Mr. Fehilly, as a director of Granja, by Mr. Coughlan, as a director of Quanta and by Mr. Sutcliffe (who is a director of Quanta).

63. Ms Friel, as Mr. Sutcliffe's/Quanta's financial adviser, was involved in the negotiation of the Agreement and she dealt with Mr. Fehilly. Her evidence was that he is also an accountant and she dealt with him over a period of several weeks between 24th November, 2017 and 15th December, 2017, when the Agreement was executed, and also in early 2018. She gave compelling evidence that she was very clearly of the view that Mr. Fehilly was acting on behalf of Mr. McDonagh as he was Mr. McDonagh's accountant and/or financial adviser. This was also consistent with Mr. Coughlan's and Mr. Sutcliffe's evidence.

The Background to the negotiation of the Agreement

64. The McDonaghs wished to enter the Agreement because they had borrowed over €20m from Ulster Bank, to purchase the Site in 2007. Although they obtained planning permission to build a data centre on the site, they defaulted on the loan. This led to Ulster Bank appointing the Receivers (Mr. Patrick Dillon ("**Mr. Dillon**") and Mr. Paul McCann) over the Site in October 2014.

65. Then in February 2015, Ulster Bank sold the economic interest in the loan and security relating to the Site to Promontoria (Aran) Limited ("**Promontoria**"), with the legal interest remaining with Ulster Bank. Since Ulster Bank retained the legal interest, it was necessary for Ulster Bank to enter a Declaration of Trust ("**Declaration of Trust**") dated 12th February, 2015 in favour of Promontoria, in which it agreed to hold the Site on trust for Promontoria. Under the terms of this Declaration of Trust, Ulster Bank agreed to act in accordance with the

reasonable directions of Promontoria regarding the Site (Clause 3.2(d)) and not to sell the Site without the prior written consent of Promontoria (Clause 3.3(a)).

66. It is clear from the documentary evidence opened to the Court, including two draft Loan Sale Deeds between Ulster Bank, Promontoria, Promontoria (Finn) Ltd and Granja, that throughout 2017, Mr. Fehilly was negotiating the terms of a debt settlement, whereby the McDonaghs' loan of over €20m would be written down.

67. In the first draft of the Loan Sale Deed, the written down value of the loan was €5.525m and in the second draft of the Loan Sale Deed it was €5.677m. Both draft Loan Sale Deeds were conditional on the McDonaghs discontinuing the legal proceedings which they had with Ulster Bank during the course of 2017 and also conditional on the lifting by the McDonaghs of a *lis pendens* registered on the Site.

68. It is clear the McDonaghs failed to discontinue their proceedings or lift the *lis pendens*. This is because on 9th October, 2017 Mr. Conor Maher ("**Mr Maher**") of Capita Asset Services (now Link Asset Services), which was acting on behalf of Promontoria, stated in an email to Mr. Fehilly that:

> "Noting the last correspondence from Aoife on 19th Sept that you are unable/not willing to proceed with signing the loan sale agreement and lifting the proceedings, **I am now instructed the consent to the loan sale has been withdrawn** and my client will not be proceeding with same." (Emphasis added)

69. Thus, it is clear that by 9th October, 2017, which is several weeks before the negotiations for the Agreement began, the McDonaghs *did not have an agreement* with Promontoria to write down their loan of over €20 million. In particular they did not have an agreement that the loan would be written-off in return for the payment of €5.625 million plus €625,000 in respect of fees, and so a total of €6.25 million (including costs).

70. However, despite this being the state of the negotiations between the McDonaghs and Promontoria, Ms. Friel was '*100%*' clear that Mr. McDonagh, during the negotiations for the Agreement, represented to her and to her client (Quanta/Mr. Sutcliffe) that the McDonaghs had an agreement for the write down of their loan to a figure of €6.25 million (including costs). Mr. Coughlan and Mr. Sutcliffe gave evidence to similar effect. Mr. McDonagh denied making any such representation, but, as has been noted, he was not a credible witness and the evidence of Ms. Friel is to be preferred for this reason and for the other reasons set out herein.

71. Furthermore, there can be little doubt from all the documentary evidence and oral evidence provided to the Court (in particular by Ms. Friel) that Mr. Fehilly/Granja was acting on behalf of McDonaghs in the debt settlement negotiations with Promontoria (prior to the negotiation regarding the Agreement) and that Mr. Fehilly/Granja was acting for the McDonaghs in the negotiations of the Agreement. Accordingly, this Court preferred this evidence to Mr. McDonagh's claim that Mr. Fehilly was not his agent.

The negotiation of the Agreement

72. Mr. Sutcliffe gave evidence that he met Mr McDonagh in the Westbury Hotel with his accountant, Mr. Fehilly on 22 November, 2017, where Mr. McDonagh confirmed that he had reached a debt settlement agreement (with Promontoria) involving the McDonaghs and Granja and the payment of €6.25 million. This was consistent with the evidence of Ms. Friel and Mr. Coughlan. Mr. Sutcliffe also gave evidence that Mr. McDonagh told him that he needed €6.25m to complete the deal.

Meeting on morning of 24th November, 2017 in Harcourt Street

73. On 24 November, 2017 there was a meeting in Harcourt Street in the offices of *Byrne Wallace*, which firm acted for Quanta. This meeting was between Mr. Sutcliffe, Ms Friel, Mr.

Fehilly and Mr. McDonagh to discuss the terms upon which Quanta might provide funding to the McDonaghs.

74. While Mr. McDonagh, Mr. Coughlan, Ms Friel and Mr. Sutcliffe gave evidence around the negotiation of the Agreement and its operation, as already noted, Ms. Friel was the only *independent* witness, in the sense of not being directly financially involved in the Agreement. Accordingly, Ms. Friel's evidence is significant. She gave convincing evidence that the Agreement related to a proposed loan from Quanta to a SPV it would set up to assist the McDonaghs/Granja to fund a debt settlement agreement with their lenders, which would lead to a release in the security over the Site. The SPV was intended to provide for a 50:50 entitlement between Quanta and the McDonaghs/Granja in relation to the ownership of the Site. Ms. Friel also gave compelling evidence, as an experienced accountant and adviser to Quanta (itself a holder of a very large portfolio of properties), that the purpose of the Agreement was to allow the parties to enter into due diligence prior to the signing of the shareholders' agreement for the SPV. The documentary evidence is consistent with Ms. Friel's oral evidence, since Ms. Friel's understanding is reflected in Clause 12.4 of the signed version of the Agreement, as that clause refers to the Agreement being *'subject to'* a '*formal shareholders' agreement being entered into'*, to which reference is made below.

Email from Mr. McDonagh after the morning meeting on 24th November, 2017

75. After the Harcourt Street meeting, Ms. Friel received an email from Mr. McDonagh at 12:28 p.m., which has as its Subject '*Drafting of Heads of terms'* and states:

> "Dear Eithne/Mel,
>
> **Please refer to the attached**.
>
> Ger and I look forward to meeting again today at 2 PM.
>
> KR,

Brian/Ger" (Emphasis added)

The document to which Ms. Friel and Mr. Sutcliffe are being referred is the Proposed Heads of Terms, to which brief reference has already been made. It reads as follows:

"PROPOSED HEADS OF TERMS:

Agree Between: Mel **Suthcliffe**

Ger Feehily

Brian McDonagh

Venue: Westbury Hotel (bar)

Date/Time: 22nd November 2017, 3pm.

Mel **Suthcliffe** proposed an agreement in principal of an investment of €6.25m to purchase a 50% shareholding in Granja Limited for which thew (sic) rights would be a 50% interest in the land with 6 sites with full planning permission and a 20% interest in the land for 4 sites with no planning.

The €6.25m is to be used for Granja Limited to complete the debt settlement (previously proposed between Cerberus and Granja Limited) and to pay off some legal fees which have accrued.

Mel suggested that he would contact immediately Ms Eithne Friel to draft up Heads of terms for signing on Friday 23rd November 2017.

Mel suggested that Eithne would contact Mr Feehily prior to the meeting on Friday and mobile numbers were exchanged.

Following the meeting of 23rd of November at the offices of **Burn Wallace** solicitors at 9.00AM **Ger Feehily documents the following scenario to be further discussed at proposed 2pm** on 23rd November 2017:

- Funding required by Granja Limited of €6.25 million.
- Broken down into €5.625 million for debt settlement agreement between Promontoria and Granja Limited and €0.625m to discharge fees.

The €5.625m acquires the loan connection of the McDonaghs with underscoring assets of:

- The Kilpedder lands.
- Three residential properties (ancillary and incidental to the debt on the lands).

Currently binding agreement in place for Granja Limited to acquire the Kilpeddar Lands for €1.501m with full Planning for 6 x Data Centre Blocks.

Above agreement can be completed

OR:

A new contract entered into for the purchase of portion of Kilpeddar Lands with full Planning permission for 6 x Data Centre Blocks at current market value.

Going forward:

- **Brian McDonagh is effective MD of Granja Limited but for presentation purposes, Ger Feehily will be shown as MD on paper.**
- Brian McDonagh will drive Granja going forward with the primary objective to procure a tenant within 18/24 months for the six Data Centre Blocks.

- Any further funding required into Granja to enable procurement of a tenant is to be funded 50%/50% by the two shareholders." (Emphasis added)

76. Ms. Friel gave evidence that this document was drafted by Mr. McDonagh, possibly in conjunction with Mr. Fehilly, after the early morning meeting in Harcourt Street and that she received it from him by email at 12.28 pm on 24th November and that it set out a record of the first meeting on 22nd November, and so was in effect a record of that meeting. This oral evidence of Ms. Friel is consistent with the wording of the document since it states that:

> 'following the meeting at Burn (*sic*) Wallace Solicitors at 9.00 am Ger Fehilly Documents the following scenario to be further discussed at proposed meeting on 2pm on 23rd November 2017' [this date is clearly a typo and should be 24th November].

It is also clear from the heading of this document, referencing the three people at the meeting on the 22nd November in the Westbury Hotel, that the document is a minute, not just of the meeting on 24th November, but also of the meeting on the 22nd November, between Mr. Sutcliffe, Mr. McDonagh and Mr. Fehilly.

77. It is relevant to note that Mr. McDonagh signs off this email, from him enclosing minutes of a meeting discussing the acquisition of the Site by the McDonaghs and Quanta (and Granja), on behalf of himself and '*Ger*' (Mr. Fehilly). This sign-off therefore provides further evidence, which completely contradicts Mr. McDonagh's disingenuous claim that he has no involvement with Mr. Fehilly or that Mr. Fehilly was not acting for him in relation to the Agreement and the write down of the loan.

78. Upon receipt of the email from Mr. McDonagh, enclosing this minute/ Proposed Heads of Terms, Ms. Friel forwarded it by email at 12:36 pm to Mr. Sutcliffe, Mr. Coughlan and Ms. Madden.

Mr. McDonagh's evidence regarding the Proposed Heads of Terms

79. In his oral evidence, Mr. McDonagh contradicts the evidence of Ms. Friel as he claims that this minute/Proposed Heads of Terms was not drafted by him but was produced after the meeting in Harcourt Street by Ms. Madden. However, very shortly thereafter, he contradicts this evidence, as he claims that it was produced by Ms. Friel. Later again in his evidence, he says it was produced by Ms. Friel or Ms. Madden. Quite apart from the fact that this evidence was provided by an unreliable witness, that it was internally contradictory, that it was contradicted by a reliable witness (Ms. Friel), it also is completely undermined by the documentary evidence for several reasons.

80. Firstly Mr. McDonagh's claim that Ms. Friel/Ms. Madden handed him the Agreement is not credible because if this claim was correct, this would mean that, when he was sending, by email, a document, allegedly handed to him by Ms. Friel/Ms. Madden, he decided to type into the subject heading of the email '*Drafting of Heads of terms'*. Why would he insert *'drafting'* of heads of terms as a subject matter of an email for a document he claims he did not draft? The insertion of this subject matter supports the conclusion that he drafted the Proposed Heads of Terms.

81. Secondly, if Mr. McDonagh's claim was correct it would mean that Mr. McDonagh was asking Ms. Friel to '*please refer to'* Proposed Heads of Terms which were attached to his email, even though Ms. Friel (or Ms. Madden) had allegedly just given him that document that morning, an hour or so earlier. It is illogical that Mr. McDonagh would be asking Ms. Friel to *'please refer'* to a document which she (or Ms. Madden) had allegedly just given to him, but which he claims he was *sending back* to her. In addition, he did not suggest that he had amended the document and so he was sending her back the exact same version of the document that she allegedly had given him. This version of events, on the part of Mr. McDonagh, is therefore completely illogical.

82. Thirdly, this document is, in part, a minute of the meeting on 22nd November in the Westbury Hotel between Mr. Sutcliffe, Mr. McDonagh and Mr. Fehilly. The only logical people who might have prepared a minute of a meeting between those three people, is one of those three attendees. It is almost inconceivable that the person to draft the minute was Mr. Sutcliffe, since it is difficult to imagine him mis-spelling his own name twice. Accordingly, as the Proposed Heads of Terms is, in part, a minute of the meeting on the 22nd November, it must have been Mr. McDonagh/Mr. Fehilly who prepared it. Despite this compelling evidence, Mr. McDonagh continued to deny that it was he, in conjunction with Mr. Fehilly, who drafted the document.

83. Fourthly, the document also operates as a minute of the meeting on the 24th November which was attended by Ms. Friel and Ms. Madden. It is highly unlikely that Ms. Friel, as Quanta's/Mr. Sutcliffe's financial adviser of 8 years, at that stage, and Ms. Madden, Mr. Sutcliffe's co-director, could have mis-spelt Mr. Sutcliffe's name. Yet this is, in effect, what Mr McDonagh is claiming.

84. Fifthly, evidence was provided to the Court that *Byrne Wallace* acted for Quanta and for this reason that firm was happy to facilitate the meeting. Accordingly, and as Ms. Friel had advised Quanta/Mr. Sutcliffe for eight years, at that stage, and as Ms. Madden is a co-director of Mr. Sutcliffe's in Quanta, it seems unlikely that Ms. Friel or Ms. Madden would have drafted a document which mis-spelt, as '*Burn Wallace'*, the name of Quanta's law firm. It is much more likely that Mr. McDonagh/Mr. Fehilly misspelt the firm's name.

85. Sixthly, eight minutes after receiving this document, Ms Friel sent it to Mr. Sutcliffe, Mr. Coughlan and Ms. Madden. If Ms. Friel or Ms. Madden had produced this document to Mr. McDonagh after the Harcourt meeting, as Mr. McDonagh's claims, it is illogical that Ms. Friel would circulate, a document she or Ms. Madden had drafted and had given to Mr. McDonagh, immediately after receiving *the very same document* back from Mr. McDonagh.

The circulation of the document by Ms. Friel only makes sense if it was Mr. McDonagh who had drafted the document.

86. The cumulative effect of all these reasons means that it is absolutely clear to this Court that this document was drafted by Mr. McDonagh (and/or in conjunction with Mr. Fehilly), as claimed by Ms. Friel.

87. Yet, in the face of all this compelling evidence, Mr. McDonagh in his cross examination insisted that he did not draft this document and that he was given this document by Ms. Friel or Ms. Madden. Mr. McDonagh's insistence on this, in the face of the documentary evidence, further undermined his credibility and simply highlighted the lengths to which he would go, to seek to obtain what he believes is his entitlement.

Mr. McDonagh's evidence as a whole

88. It appears to this Court that Mr. McDonagh was a witness who would make no admissions, who would make statements which were false, or who would deny something which is blindingly obvious, in order to further his claim. It all appeared to arise from his unshakeable belief that he has been hard done by in relation to *his* failure to repay the loan on the Site, and that somehow (perhaps because he was the one who spotted the potential of the site as a data centre and obtained planning permission therefor), he has some entitlement to a site, which he believes could be worth €150 million.

89. However, like many property speculators over the years, Mr. McDonagh, spotted the potential of a site and invested time and money and intellectual capital in a project. However, because he failed to meet his repayments on the loan for the purchase of the Site, like so many other property developers, he lost all rights to that site. However, Mr. McDonagh has not moved on from this fact and he continues to believe that he has some entitlement to it and there is a conspiracy by others to deny him of what he believes is his entitlement.

90. Although the evidence which Mr. McDonagh gave to this Court in *Ulster Bank v McDonagh* was different, this Court would nonetheless adopt the same language as was used in that judgment at para [54], to describe Mr. McDonagh's evidence in this case i.e.:

> "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."

The contents of the Proposed Heads of Terms

91. As regards the contents of the Proposed Heads of Terms, which this Court has now held were drafted by Mr. McDonagh (or in conjunction with Mr. Fehilly), it is relevant to note Ms. Friel's evidence regarding this document and the background to it being drafted by Mr. McDonagh.

92. Firstly, Ms. Friel stated that she was '*100%'* clear that Mr. McDonagh (and/or his agent Mr. Fehilly) represented to her at the meetings on 24th November that the McDonaghs had an agreement in place for the write-down of their debt for €6.25 million. For this reason, she explained that she did not attach particular significance, in the minutes/Proposed Heads of Terms, to the sentence:

> "The €6.25m is to be used for Granja Limited to complete the debt settlement (**previously proposed** between Cerberus and Granja Limited) and to pay off some legal fees which have accrued" (Emphasis added)

93. This Court accepts this evidence as credible and in line with the documentary and other evidence in the case. This is because firstly this document was not a heads of terms, prepared by her, as alleged by Mr. McDonagh, and so she did not use it as a basis for drafting her document, which was discussed at the meeting on the 24th November, 2017 in the *Cellar Bar.*

Accordingly, she paid little attention to a document, which is clearly a minute of the meetings between the parties.

94. Secondly, and more importantly, it is accepted by this Court that it was represented to her by Mr. McDonagh/Mr. Fehilly on the 24th November, 2017 at the Harcourt Street meeting that a deal was in place for the write down of the loan. She also was very clear that she was never told by Mr. McDonagh or Mr. Fehilly, in advance of the execution of the Agreement, that the deal had been *withdrawn* (which she only learnt after the Agreement was signed). In these circumstances, this Court finds her evidence credible, when she states that the language in the minute/Proposed Heads of Terms, regarding the *'€6.25m…to complete the debt settlement (previously proposed…'* had no particular significance to her. In particular the use of the term *'previously proposed'* did not mean, nor could it be taken to mean, that the agreement for the loan write down, which *she had been told existed*, had been withdrawn.

Meeting on afternoon of 24th November, 2017 in *Cellar Bar*

95. The next step in the negotiation of the Agreement was the meeting on the afternoon of 24th November in the *Cellar Bar* on Merrion Street between Mr. Fehilly, Mr. McDonagh, Ms. Friel, Mr. Sutcliffe and Ms. Madden.

96. Ms Friel gave compelling evidence that at this meeting, they discussed the following heads of terms, which *she had drafted*:

"

- Newly formed SPV
- Shareholding 50:50 (50% Quanta nominee, 50% McDonagh/Feehily).
- Loan: Quanta nominee to advance loan of €5.625m, interest coupon 3% p.a.
- 1st legal charge on sites until loan repaid in full.
- 10 sites, 6 with planning permission, 4 with no planning permission.
- 3 residential properties to be retained by Brian McDonagh

- All residual costs/professional fees associated with planning – responsibility of McDonagh/Feehily connection.
- Debt forgiveness for McDonagh connection.
- Quanta nominee to hold a golden share until its initial investment is repaid.
- Normal pre-emption rights apply.

Roles:

- Operations Officer/Shadow CEO – Brian McDonagh. Ceo – Mel Sutcliffe.
- Directors – 2 Quanta Nominees, McDonagh/Feehily can nominate two directors.
- Mel Sutcliffe has the authority from the partnership to step in as negotiator with Cerberus."

Ms. Friel was clear that they did not discuss, as claimed by Mr. McDonagh, the minutes/Proposed Heads of Terms, which *he had drafted* containing Mr. Sutcliffe's name misspelt on two occasions. This Court accepts her version of events.

Meeting on 5th December, 2017 in *Merrion Hotel*

97. A further meeting was held on 5th December, 2017 in the *Merrion Hotel* between Mr. Sutcliffe, Ms. Friel and Mr. Fehilly. Regarding this meeting, Ms. Friel gave evidence that she outlined at the meeting the requirements for a golden share in the SPV, which was required for Quanta to advance the funds. Her oral evidence in this regard is consistent with Clause 5 of the signed version of the Agreement, which is set out below and deals with the golden share.

98. Ms. Friel gave evidence that after that meeting, she drafted the first version of the Agreement. Certain changes were made by Mr. Fehilly to that draft of the Agreement. For example, Clause 11 had provided that:

> "Mr. Mel Sutcliffe will have sole rights to negotiate with Cerberus on behalf of the McDonagh Connection the terms of settlement of the debt due to Cerberus by the McDonagh Connection and secured on the property"

It was amended by Mr. Fehilly to read:

> "Mr. Mel Sutcliffe will in consultation with Granja Limited negotiate with Cerberus on behalf of the McDonagh Connection the terms of settlement of the debt due to Cerberus by the McDonagh Connection and secured on the property"

99. It is relevant to note that a number of other changes were made to the draft Agreement by Mr. Fehilly, and it is clear to this Court from the oral and documentary evidence, that these changes were made by Mr. Fehilly on behalf of the McDonaghs. Thus, the Agreement, which was signed, was not a set of standard terms and conditions but rather an agreement which was freely negotiated between commercial parties.

The law regarding the *contra preferentum rule*

100. This is relevant because one of the legal claims made by the McDonaghs is that the Agreement should be interpreted in their favour, and against Quanta, on the basis of the *contra preferentum* rule. In *Danske Bank A/S t/a Irish National Bank v McFadden* [2010] IEHC 116 at para [4.1], Clarke J. stated that:

> "The so called, *contra proferentem* rule, is, of course, only to be applied in cases of ambiguity and where other rules of construction fail. As such, the rule can only come into play if the court finds itself unable to reach a sure conclusion on the construction of the provision in question…The origin and first purpose of the rule is to limit the power of a dominant contractor who is able to deal on his own *"take it or leave it"* terms with others".

In the Supreme Court case of *Analog Devices BV v Zurich Insurance* [2005] 1 IR 274 at p 282, Geoghegan J described the operation of the rule as follows:

"[I]f there is any doubt as to the meaning and scope of the excluding or limiting term, the ambiguity should be resolved against the party who inserted it and seeks to rely on it".

101. It is appropriate, at this juncture, to deal with the claim by the McDonaghs that the Agreement, as a document that was allegedly drafted by Quanta should have any ambiguity therein resolved against it. It is clear from the judgment of McDonald J. in *Brushfield Limited (t/a The Clarence Hotel v Arachas Corporate Brokers Limited & Anor* [2021] IEHC 263 at para [110](h) that the *contra preferentum* rule of interpretation is one of last resort, which applies primarily in the case of standard form contracts and where there is some ambiguity regarding the terms of the agreement. However, as is clear from the foregoing evidence, the Agreement is not a standard form contract, but it is one which was freely negotiated between commercial parties. In addition, as noted below, there is no ambiguity regarding Clause 12 of the Agreement, a key clause in determining this case. For this reason, this rule of last resort, does not assist the McDonaghs in this case.

The execution of the Agreement on 15th December, 2017

102. The final version of the Agreement, which was signed on 15th December, 2017 at the offices of *Margetson & Greene*, reads:

"**MEMORANDUM OF AGREEMENT**

THIS AGREEMENT is made on 15th December 2017

WHEREBY IT IS AGREED by and between the parties hereto as follows –

1. The Parties: Quanta Capital Investments Limited (hereinafter "Quanta Connection") and Brian McDonagh, Maurice McDonagh, Kenneth McDonagh, Granja Limited (hereinafter called the "McDonagh Granja Connection").

2. **The Property:** 10 sites (6 with planning for data centre, 4 without planning) consisting of circa 82 acres of land at Kilpedder, Co Wicklow (Folio Reference WW21790F and WW36738F).

3. **Funding:** Quanta Connection to provide funding by way of a loan up to €6m (the 'Loan') with a 3% annual coupon (rolled up) for a maximum term of 3 years to be secured by a first legal charge over The Property.

4. **The Legal Entity:** A newly formed SPV will be established to acquire the Property hereinafter called the "SPV".

5. **Shareholding:** Quanta Connection will own 50% shareholding in the SPV with the McDonagh Granja Connection owning the other 50% (divided amongst the McDonagh Granja Connection at their discretion). Quanta Connection will hold a golden share in the SPV entitling it to appoint a majority to the Board of the SPV until the Loan together with interest is repaid in full.

6. **Pre-Emption:** The Parties will have a right of first refusal/pre-emption rights on any proposed sale or transfer of shares in the SPV. A formal Shareholders Agreement is to be drafted and agreed between the parties.

7. **Directorships:** Quanta Connection will have the right to two directorship appointees on the board of the SPV (in addition to the golden share entitlement) with the McDonagh Granja Connection entitled to the same namely two directorship appointees.

8. **Security:** Standard for a transaction of this nature and in a form and substance satisfactory to Quanta Connection including without limitation a Debenture incorporating a first fixed charge over the Property and a floating charge over the other assets of the SPV.

9. **Non-Core Assets:** The 3 residential non-core assets (as set out in Appendix 1) charged to the current lender Cerberus will be released simultaneously with the transfer of the Property to the SPV.

10. **Professional Fees:** All costs incurred to the date are a matter for the McDonagh Granja Connection to resolve and discharge. Each of the parties namely the Quanta Connection and the McDonagh Granja Connection will pledge €50k each to cover professional costs for the next 6 months.

11. **Negotiations:** Mr Mel Sutcliffe in consultation with Granja Ltd to negotiate with Cerberus on behalf of the McDonagh Granja Connection the terms of settlement of the debt due to Cerberus by the McDonagh Connection and secured on the Property.

12. **Legally Binding:** This Agreement is intended by the Parties to be legally binding and is subject to the following:

12.1. Good marketable title to the Property, including all rights of access thereto and all consents and permissions necessary for the construction and the full use and enjoyment of 6 data centres thereon, being made available to the SPV;

12.2. Cerberus agreeing to release its security held on the Property on terms agreeable to the Parties;

12.3. A formal shareholders' agreement being entered into by the Parties and the SPV;

12.4. Resolution of court proceedings currently in being under record number 2014/10190P.

Signed

[Signed by Brian McDonagh, Maurice McDonagh, Kenneth McDonagh, Ger Feehily (Director, Granja Limited), Mel Sutcliffe and Eoghan Coughlan (Director, Quanta Capital Investments Ltd)]."

Clause 11 of the Agreement

103. In relation to Clause 11 of the Agreement, Ms Friel gave convincing evidence that the reason that she provided in the original draft that Mr Sutcliffe would have sole rights to negotiate the terms of settlement of the McDonaghs' debt, was in order to stack rights in favour of her client, Quanta/Mr. Sutcliffe. She was very clear that the purpose was *not* that Mr Sutcliffe was to negotiate the written down loan value with the lender. This was because it was 100% clear to her that the financial terms, *i.e.* the value of the written down loan, had been agreed by the McDonaghs at €6.25 million. Thus, it was clear to her that the expression, '*negotiate […] the terms'*, in Clause 11 was a reference to the non-financial terms. Thus, she was clear that this clause meant that Mr Sutcliffe/Quanta were to have full control over the auxiliary terms which had to be negotiated as part of that settlement, in order to protect Quanta's interests, e.g. the '*mechanics'* of splitting out the three residential properties (Clause 9), owned by the McDonaghs, which were also part of the security for loan owed to Promontoria. It is also to be noted that in the final version of Clause 11 in the signed Agreement, Mr Sutcliffe was obliged to negotiate those terms, in consultation with Granja, since, as previously noted, this was the change made by Mr. Frehilly. This Court has also concluded that Mr. Fehilly was acting for the McDonaghs. Thus, based on Ms. Friel's evidence, the McDonaghs wanted Mr. Sutcliffe to negotiate, in consultation with Granja, the auxiliary terms of the terms of settlement of the McDonaghs' loan.

104. When it comes to interpreting Clause 11, it is clear from McDonald J.'s judgment in *Brushfield* at para 110, that a contract must be interpreted:

> "by reference to the meaning which the contract would convey to a reasonable person having **all the background knowledge which would have been reasonably available to the parties** at the time of the conclusion of the contract
>
> The court, therefore, looks **not solely at the words used in the contract but also the relevant context (both factual and legal) at the time** the contract was put in place [..]
>
> [I]n order to ascertain the meaning of words used in the contract, it is necessary to consider the **contract as a whole and it is also necessary to consider the relevant factual and legal context**." (Emphasis added)

Applying these principles, this means that in interpreting Clause 11, a court does not look solely at the words '*negotiate…the terms of settlement of the debt'* in isolation. This is because a court must consider the factual context, including the fact that the security for the loan to buy the Site, was not just the Site, but also three residential properties (thus, supporting Ms. Friel's evidence that Mr. Sutcliffe might need to be involved in negotiating the mechanics of the terms for the write-down of the loan).

105. However the most crucial part of the factual context is that this Court has found that Mr. McDonagh told Quanta/Mr.Sutcliffe that *he had a deal for a €6.25m*. This figure, in the Proposed Heads of Terms *drafted by* Mr. McDonagh/Mr. Fehilly, is a very specific sum, as is the breakdown of that figure into two very specific sums (which clearly imply that they have been agreed by the McDonaghs), i.e. €5.625m in loan repayment and €0.62m in costs. This evidence supports the conclusion that Quanta/Mr. Sutcliffe had been led to believe that this very specific figure and its breakdown had already been agreed. Thus, it seems clear that, in these circumstances, the reference in Clause 11 that Mr. Sutcliffe is to '*negotiate […] the terms of settlement'*, is not a reference to Mr Sutcliffe negotiating the written down value of the loan, but rather to auxiliary terms regarding the settlement, including, but not limited to

ensuring that Quanta was not prejudiced by any terms dealing with the release of the security for the loan (other than the Site, i.e. the three residential properties).

106. Furthermore, the fact that the McDonaghs led Quanta to believe that it had agreed the written down loan value, was part '*factual context'* or '*background knowledge available to the parties'*, before the Agreement was signed, is also consistent with what happened after the Agreement was signed. This will be considered next.

Confirmation bias regarding Clause 11 of the Agreement

107. In particular, as noted hereunder, Quanta became aware on the 8th January, 2018, of the absence of any agreement between the McDonaghs and Promontoria for the write-down of the loan. Yet, it is crucial to note that there was never any suggestion by the McDonaghs at that stage, or indeed for years thereafter that Mr. Sutcliffe was *obliged* to negotiate the written down value of the loan.

108. In an example of confirmation bias, this claim, that Mr. Sutcliffe was obliged by Clause 11 to negotiate the written down value of the loan, only appeared when the proceedings issued and so after the McDonaghs obtained legal advice on how best to obtain an interest in the Site, which they believe they have been unjustly denied.

109. The absence, for several years, of any suggestion that Mr. Sutcliffe was obliged to negotiate the written down value of the loan, is consistent therefore with the true factual context, for the interpretation of Clause 11, namely the understanding on the part of Quanta/Mr. Sutcliffe that the McDonaghs had agreed the written down value of the loan, which was set out as a very specific sum, with a very specific breakdown of that sum, in the Proposed Heads of Terms drafted by Mr McDonagh.

110. Indeed, not only did the McDonaghs not seek to get Mr. Sutcliffe to negotiate the written down value of the loan after 8th January, 2018, but on the contrary, an email dated 18th of April 2018 shows that Mr. McDonagh was negotiating a further write down of the loan with

the lender from €6.25m to €5.5m. In this email, from Mr. McDonagh to Mr. Sutcliffe, it is stated:

> "My legal team are today in negotiations with the legal team for Ulster Bank/Cerberus[..]We believe that a deal may be achieved with an offer of €5.5m to include transaction costs"

In light of the foregoing, this Court interprets Clause 11 in its factual context and for this reason it interprets it, as not obliging Mr. Sutcliffe to negotiate the written down value of the loan, but rather to negotiate auxiliary terms. This is because, *inter alia*, this Court has compelling evidence to support its conclusion that Mr. McDonagh had represented, prior to the execution of the Agreement, that the written down value of the loan had been agreed by the McDonaghs with Promontoria.

111. However, even if this Court is wrong in this conclusion, it seems to this Court that little turns on the interpretation of Clause 11. This is because, as noted hereunder, the key factor in this case is that, whatever the obligation under Clause 11, the whole Agreement was expressly stated in Clause 12 to be a conditional agreement, i.e. it was subject to, *inter alia*, a '*formal shareholders' agreement being entered into'*. This condition never occurred and as noted hereunder, the Agreement was duly terminated.

112. As a general point, it is relevant to note that there is no provision in the Agreement saying that the obligation in Clause 11 (and the other obligations of the parties) could not be terminate or could only be terminated after a certain time. In addition, there is no provision in the Agreement specifying whether the termination of the Agreement had to be in writing or orally. Accordingly, there was no restriction on the manner, or the timing, of the termination, and, as noted hereunder, the Agreement was duly terminated orally, which was then confirmed in writing.

<u>After the Agreement was executed</u>

113. Chronologically, the next matter to consider is what happened after the execution of the Agreement. Ms. Friel gave evidence that the purpose of the Agreement was to permit due diligence by Quanta of the proposed project. On 8th January 2018, as part of the due diligence, she wrote to Mr Feehily requesting details of the business plan for the project. On that same day, Mr. Fehilly sent an email to Mr Sutcliffe attaching an email from Mr. Maher of the Link Group (the new name of Capita, who were acting on behalf of Promontoria). In that email, Mr. Maher referred to an email of 9th October, 2017 to Mr. Fehilly, terminating the discussions for a loan settlement, to which reference has already been made in this judgment. The email of 8th January 2018 states:

> "Ger,
>
> **My email of 9th Oct referred**. **The consent of the proposed loan sale was withdrawn by my client** and as such, there is **no longer an agreement agreed, be it in principle or otherwise**.
>
> Should you wish for an alternative proposal to be considered, noting the terms previously agreed to would no longer be acceptable to my client, a significantly improved offer would be required. I understand the hearing on this matter is listed for March 2018, although I am not directly dealing with same so if a revised and improved proposal is to be considered, I would suggest it is formally submitted this week supported by clear and unambiguous proof of funds." (Emphasis added)

Since this email is in direct conflict with what had been said to Ms. Friel, she requested a copy of the email of 9th October, which she had not seen previously. When she received it, this email confirmed that no agreement had been in place between the McDonaghs and Promontoria, despite Mr. McDonagh's representations to the contrary.

114. It is clear that some attempts were made by the McDonaghs/Mr. Fehilly, after this email of 8th January 2018, to resuscitate the deal with Promontoria. However, it is also clear from the email dated 26 January, 2018 from Mr. Maher to Mr. Fehilly, that these attempts were unsuccessful:

> "Ger
>
> I am no longer dealing with the case. The matter now rests with our team who deal with litigation cases. **I would restate however that there is no agreement to proceed, implied or otherwise on the part of my client.** Consent was formally withdrawn per previous correspondence referred to. I will forward your correspondence to our legal team who are dealing with the litigation and upcoming hearing." (Emphasis added)

These emails from Mr. Maher to Mr. Fehilly on 9th October 2017, 8th January, 2018 and 26th January, 2018, dealing with the negotiation by Mr. Fehilly of the write-down of the McDonaghs' loan, also completely contradict Mr. McDonagh's claim that Mr. Fehilly was not his agent.

Ms. Ooi's email of 10th April 2018

115. The next significant development was not until 10th April 2018. On that date, an email from Ms. Yeoksee Ooi ("**Ms. Ooi**"), Mr. McDonagh's life partner, was sent to Mr Sutcliffe in the following terms:

> Dear Mel,
>
> I contacted Eithne Friel earlier having received her mobile number from Ger Feehily. Eithne suggested I email you.
>
> Ger is unfortunately unwell as I write this email and is currently in hospital.

I am a Director of Granja Ltd and the partner of Brian McDonagh who was one of the three brothers who signed a Memorandum of Agreement with Quanta Capital Investments, Granja Ltd, Maurice and Kenneth McDonagh on 15th December 2017.

Granja have been in court recently seeking Specific Performance on a historic contract as mentioned in paragraph 12.4 of the MOA.

In essence the deal agreed on 15th of December 2007 with Quanta Capital Investments **is still available** from McDonagh Granja Connection as described in paragraph 1 of the MOA.

The legal team from McDonagh Granja Connection have spoken with Ulster Bank/Cerberus legal team with a view to settle case and it is for this reason that I write this email.

The Data Centre project in Wicklow has become more exciting with the shortage of power available in Dublin due to the enormous Data Centre planning permission recently granted to Amazon web services in Mulhuddart.

Wicklow has 2 x 200 kV and 2 x 100 kV power supplies and full planning permission for the step down transformer. Basically the site is "Shovel Ready".

If you are interested in the partnership as detailed on 15th December last, I would make myself available to meet you, Eoghan Coughlan and Eithne Friel for further discussions.

Kind regards,

Yeoksee Ooi. (Emphasis added)

116. It is important to note that quite a considerable period of time had elapsed between the email of 8th January, 2018 (which notified Quanta/Mr. Sutcliffe that there was no agreement on

the written down value of the loan) and this email from Mr. McDonagh's life partner to Mr. Sutcliffe. The McDonaghs made no attempt to suggest that this email was not sent on their behalf. Considering the interpretation which the McDonaghs are now attempting to put on Clause 11 of the Agreement (namely that Mr Sutcliffe *was obliged* to negotiate the amount of the written down loan), it is curious, to say the least, that after the email of 8th January, 2018 from Mr. Maher (saying that the loan write off deal was not available), that the McDonaghs did not contact Mr. Sutcliffe. After all, should they not have asked him to negotiate the write down value of the loan, if this is what they had allegedly agreed pursuant to Clause 11? This omission is further evidence of the factual context surrounding Clause 11 and in particular the fact that the McDonaghs never intended Clause 11 to oblige Mr. Sutcliffe to negotiate the value of the written down loan (since Mr. McDonagh ad told them Quanta/Mr. Sutcliffe that they had agreed same).

The Agreement as a conditional agreement

117. Indeed, in relation to the bigger issue of whether the Agreement is a *binding continuing agreement* (as now claimed by the McDonaghs), this email provides evidence that it is was understood by the McDonaghs to be a conditional agreement. This is because the McDonaghs' position is presented as one where Quanta has a choice ('*still available'* and '*if you are interested'*) of whether to engage with the McDonaghs in relation to the acquisition of the Site using a SPV. There is no reference to Quanta or Mr. Sutcliffe being under a binding obligation to enter into an agreement to acquire the Site with the McDonaghs, which is now their case.

118. This approach is consistent with the terms of the Agreement, as it is drafted as a conditional agreement or an 'agreement to agree'. In particular, Clause 12.4 states that:

> "This Agreement is intended to be legally binding and **is subject to** the following[….]

12.3 A formal shareholders' agreement **being entered** into by the Parties and the SPV." (Emphasis added)

Consistent with Ms. Friel's evidence, that the Agreement was signed, in order to permit Quanta to undertake its due diligence before entering a shareholders' agreement, this clause expressly makes the Agreement subject to the parties all entering a shareholders' agreement. There is no ambiguity regarding this clause, as implied by the McDonaghs. It is true, as claimed by the McDonaghs, that the Agreement is legally binding and so for example, when Clause 10 states that all costs incurred to date were to be discharged by the McDonaghs, this is a legally binding agreement. Thus, the McDonaghs were not entitled to have Quanta discharge its costs, even after the Agreement's termination. However, this does not assist the McDonaghs, since an agreement can be legally binding, but also conditional, as this one is. Thus, there can be no doubt that the Agreement, by the use of the terms '*subject to'*, is conditional on, *inter alia*, a shareholders' agreement being executed. However, it is common case that no shareholders' agreement was ever entered into by the parties. Thus, one of the conditions, to which the Agreement was subject, was never satisfied. Accordingly, at this juncture, it is proposed to consider the law on conditional agreements.

The law on conditional agreements

119. It is clear from the Supreme Court case of *O'Connor v Coady* [2004] 3 IR 271 at 281-283 and at 290, that where a contract is subject to a condition being satisfied, and where there is no date for that condition to be satisfied, it must be satisfied within a reasonable time. At p 281 of that judgment, Geoghegan J, in reference to this issue said:

"No express time limit was fixed for the performance of the condition but it was held, [in *Perri v Collangatta InvestmentsPty Ltd* (1982) 129 C.L.R. 537], as would be held in these courts, that it had to be complied with, within a reasonable time".

Based on the following evidence, it is clear that the Agreement was terminated orally by Mr. Sutcliffe and even if this Court is wrong on that, it is clear that it was also terminated in writing.

Oral termination of the Agreement by Mr. Sutcliffe in 2018

120. In Mr. Sutcliffe's witness statement he states that he had *'signalled'* to Mr. McDonagh *'[b]y March 2018'* that he was no longer interested in being involved in the data centre project, because of Mr. McDonagh's behaviour (including the fact that he had misrepresented that he had agreed the value of the written down loan). He also gave as a reason the fact that Mr. McDonagh had judicially reviewed (*Brian McDonagh v. An Bord Pleanála* [2017] IEHC 586) the grant of planning permission to Apple for the building of a data centre in Athenry, which Mr. Sutcliffe felt was damaging to jobs in Ireland.

121. Mr McDonagh refers to Mr. Sutcliffe's witness statement and in reply, he states in his witness statement that it:

> 'is correct to say that by mid-2018 Mr. Sutcliffe had signalled that he was no longer interested in being involved with the data centre project with the McDonagh brothers'.

Since there was no restriction on Mr. Sutcliffe/Quanta terminating the Agreement for the data centre project at any time, it seems to this Court that the effect of this evidence, regarding Mr. Sutcliffe indicating that he was no longer interested in pursuing that project, is that, by March 2018, at the earliest, and by mid-2018, at the latest, the Agreement had been terminated.

122. This is because in the months that passed since 15 December, 2017, when the Agreement was signed, there was no discussion, let alone, negotiation of the shareholders' agreement. It seems to this Court that the three months to March 2018 was a reasonable time, within which this shareholders' agreement should have been, if not signed, at least discussed/negotiated, particularly after Quanta discovered that the McDonaghs had not in fact agreed a written-down loan value. In line with *O'Connor v Coady*, this Court concludes that a

reasonable period of time for the shareholders' agreement to have been executed or at least in the course of being negotiated, was by March 2018, at the earliest, and mid-2018 at the latest. However, the failure for this to happen meant that the Agreement was capable of being terminated by Mr Sutcliffe/Quanta at this stage.

123. As noted by McCracken J. at p 294 of *O'Connor v Coady*, what is required, once a reasonable time has passed, without a condition (in a conditional agreement) being satisfied, is '*a clear notification that the relevant party is treating the contract as at an end'*. In this respect, Mr. Sutcliffe gave evidence that he signalled to Mr. McDonagh that he was no longer interested in being involved in the data centre. It seems to this Court that this is a clear notification by Mr. Sutcliffe (and indeed by the company, Quanta, of which he is CEO, founder and, in Mr. McDonagh's evidence, the principal shareholder), that he/it was treating the Agreement at an end. Thus, the failure of the parties to satisfy the condition in the conditional Agreement (regarding the execution of a shareholders' agreement within a reasonable time), followed by the clear notification to Mr. McDonagh that the contract was at an end, led to the termination of the Agreement. The only issue upon which there is conflicting evidence is whether this '*clear notification'* occurred in March 2018 or in mid 2018.

124. Bearing in mind that there is a conflict between Mr. Sutcliffe and Mr. McDonagh as to when the 'signal' that the Agreement was at an end, was given, it is necessary to consider the aftermath of Ms. Ooi's email of 10th April, to reach a conclusion on this issue. It is relevant to note that this email was sent during the month following the date when Mr. Sutcliffe said he '*signalled'* the end of the project, but two months before the dated when Mr. McDonagh say this '*signal'* was given.

Response to Ms Ooi's email

125. Mr. Sutcliffe responded to Ms. Ooi's email by sending a holding email dated 12th April, to which she replied on that same day, that:

"As per my email of 10th April, the **opportunity for** Quanta Capital is identical to that signed on the [Agreement] of 15th December, 2017." (Emphasis added)

Thus, it is relevant to note that, on 12th April 2018, an email is sent on behalf of the McDonaghs indicating, once again, that the Agreement amounted to an *'opportunity'*, and so a conditional agreement, as distinct from the binding obligation, that they now claim they have with Quanta.

Mr McDonagh's email of 19th April 2018

126. The next relevant step in the process occurs on 19th April 2018, when Mr. McDonagh wrote by email to Mr. Sutcliffe, as follows:

"Dear Mel,

My legal team are today in negotiations with the legal team for Ulster Bank/Cerebus. There is an opportunity for Quanta Capital to conclude the agreement in our MOA signed December 15th 2017.

My barrister will agree with the UB/Cerebus team where:

1. Cerebus will sell loans to a SPV
2. The SPV must be financed
3. It must provide evidence of unconditional funds by way of a commitment letter
4. This needs to be provided to progress negotiations as a sign of being capable of completing the transaction.

We believe that a deal may be achieved with an offer of €5.5m to include transaction costs.

All of the above will have to be on Quanta Capital letter head.

I am available to meet you this evening or tomorrow as the meeting is scheduled to take place tomorrow morning between the two sets of barristers.

Kind regards,

Brian McDonagh" (Emphasis added)

127. As a preliminary point, Mr. McDonagh refers to Cerebus in this email, but he was loose with his language in this regard, something which he acknowledged in his oral evidence, when he said '*Cerebus, or Capita, or whoever you'd like to call them'*. However, there can be no doubt that in this email, he is referring to the writing down of his loan for the acquisition of the Site. Once again, there is no reference to Mr. Sutcliffe having an obligation to negotiate the amount of the written down loan with Promontoria, since it is clear that it is Mr. McDonagh who is negotiating the writing down of the loan and so this is consistent with the obligation being *upon the McDonaghs* to agree the written down value of the loan (in line with Ms Friel's, Mr. Coughlan's and Mr. Sutcliffe's interpretation). This provides further evidence for the view that it was the interpretation of all parties of Clause 11, that Mr. Sutcliffe did not have any such obligation, and that his retrospective interpretation of that clause to impose such an obligation upon him, amounts to confirmation bias, on the part of Mr. McDonagh.

128. In this regard, it is relevant to note that the first time that the McDonaghs claimed that such an obligation existed on the part of Mr. Sutcliffe was three years later (on 8th July, 2021), when the McDonaghs, with the benefit of legal advice, instituted these proceedings, since at para [24] of the Statement of Claim, they claim that it:

"was an implied term of the said agreement, and understood as such by both parties, That's [Mr. Sutcliffe and Quanta] Would negotiate the settlement of all the [McDonaghs'] debt with Cerberys (*sic*) and/or [Ulster Bank] On behalf of both parties to the agreement"

129. In addition, it is relevant to note that in this email in April 2018, Mr. McDonagh treats the Agreement in the same manner as Ms. Friel and Mr Sutcliffe have always treated it, i.e. as a conditional agreement or an 'agreement to agree'. This is because he states:

> 'There is ***an opportunity*** *for Quanta Capital* ***to conclude*** *the agreement in our MOA signed on 15th December 2017"* (Emphasis added)

130. However, some three years later, and with the benefit of legal advice, Mr. McDonagh now claims in the Statement of Claim (at para [21]) that the Agreement is not a conditional agreement or an '*opportunity… to conclude'*, but rather '*a legally binding and enforceable agreement between the Parties'* (para [21] of Statement of Claim). In a good example of confirmation bias, he seeks out of any word or phrase (such as the term '*legally binding'* in Clause 12) which, in isolation might support his claim that he has an interest in the Site, but which when read in context (i.e. followed by the words '*subject to'*) provides no support for his claim.

131. It is also important to note that Mr. McDonagh in this email asks Mr. Sutcliffe to provide evidence of funding on the letterhead of Quanta. Mr Sutcliffe simply did not reply to this request *in April 2018* for a letter from Quanta regarding evidence of funds. This is relevant because it is consistent with the evidence that was given by Mr. Sutcliffe, that he had signalled to Mr. McDonagh *in March 2018* that Quanta would not be proceeding with the project with the McDonaghs, i.e. that the Agreement was terminated.

132. In addition, consistent with this termination of the Agreement having been received and so understood by Mr. McDonagh in March 2018, is the fact there was no complaint or reply to Mr. Sutcliffe, from Mr. McDonagh, when Mr. Sutcliffe ignored Mr. McDonagh's request for the evidence of funds. Instead, on 30th April, 2018, Mr. McDonagh sends an email to Mr. Coughlan querying the status of the letter evidencing funds, to which Mr. Coughlan replied:

"Hi Brian,

Unfortunately this is a chicken and egg scenario. **A letter of support cannot be provided where we are not aware of the terms or the agreed settlement figure**. In addition, the agreement was with Granja who now appear to have been removed from the negotiations. We are happy to attend the meeting with all legal parties for both the bank and yourselves during the negotiations on a without prejudice basis. This approach will allow us to understand the terms."

133. Once again, there is no reply by Mr. McDonagh to say that it was Quanta's responsibility to negotiate the '*terms or the agreed settlement figure'* or that he had an extant agreement with Quanta to provide the funds, since it is clear that at this stage that Quanta are not going to provide proof of funds. Thus, at this stage, it seems clear to this Court that the Agreement is over and there is no prospect of the Agreement being converted form a conditional Agreement into an unconditional Agreement. It also seems to this Court that Mr. McDonagh knows, or should know, that the Agreement was over, at this stage.

134. Although Mr McDonagh claims in this Court that the Agreement was, and remains an unconditional and binding agreement on the part of Quanta to jointly acquire the Site with the McDonaghs, his response to this rejection from Mr. Coughlan is telling.

135. He does nothing. He does not complain to Quanta or Mr. Sutcliffe or Mr. Coughlan that they have an Agreement with him to provide the funding. Instead, he treats the Agreement in exactly the same way as Quanta/Mr. Sutcliffe treat the agreement, namely as a conditional agreement, with no prospect of the conditions being satisfied, because there is no agreement with Promontoria on the written down value of the loan, and so an agreement which has been terminated.

136. In light of the conflicting evidence regarding the date when Mr. Sutcliffe orally terminated the Agreement with Mr. McDonagh, i.e. whether in March 2018 or mid 2018, it

seems to this Court, that the foregoing emails in April 2018 support Mr. Sutcliffe's version, namely that he terminated the Agreement in March 2018. This is because the acts and omissions of Mr. McDonagh in April, 2018 support the view that Mr. Sutcliffe had signalled to him in March 2018 (and not mid 2018, as Mr. McDonagh claimed) that he did not want to progress the data centre with the McDonaghs, i.e. that the Agreement was terminated.

Savills put the Kilpedder Site on the market in June 2018.

137. The next event chronologically is that in June 2018, Savills, on behalf of the Receivers, put the Site up for sale.

Meeting on 5th November, 2018

138. Thereafter, the next event to consider is a meeting on 5th November, 2018, between Mr McDonagh, Mr Sutcliffe and Ms Madden at Qanta's offices on the Long mile Road. Mr Sutcliffe gave evidence that at this meeting Mr McDonagh claimed that he had reached a debt settlement agreement with Capita (on behalf of Promontoria). Mr Sutcliffe gave evidence that he did not believe Mr McDonagh's claims and that he informed Mr McDonagh that the Agreement was terminated as he had been misled by Mr McDonagh's previous false claims that he had reached a debt settlement agreement with Promontoria.

139. While this Court has held that the Agreement was orally terminated in March 2018, if this Court were wrong in this conclusion, this is evidence of the oral termination of the Agreement on the 5th November, 2018.

Written confirmation of termination of Agreement in July 2019

140. Mr Sutcliffe gave evidence that he visited the Site in July 2019, when it was being marketed for sale by Savills and that after this visit, Mr. McDonagh contacted the office of the Receivers to claim that Quanta was his partner. This led to Mr. Sutcliffe sending Mr. McDonagh an email on 15th July, 2019 in the following terms

"Dear Brian,

"I am writing to you re a number of individuals who contacted me to ask if Quanta Capital or I are investors in connection with the Kilpedder lands, or had I ever invested with your good self or in a company connected with you.

My reply was 'absolutely not'; I had never invested with your good self or in a company that was interested in the Kilpedder lands.

For the record, I stated that you approached me in December 2017, informing me that you had a deal to purchase the land in Kilpedder, and enquiring whether we would be interested in raising the finance.

As you are well aware, I said I would, provided that it was straightforward. That is that it did not end up in the courts and that you would stop objecting to every data centre in the country.

Unfortunately, you could not help yourself from causing trouble and objecting to every related development in the country.

I assume the only agreement you are referring to was that of December 2017, and as stated, that was terminated to you in writing.

Therefore I call upon you to please stop referring to my good self or Quanta Capital as your investor. We are in no way connected.

Yours faithfully,

Mel

NB - **Do not contact me or anybody in Quanta**" (Emphasis added)

Thus, if this Court is wrong in concluding that the Agreement was terminated orally in March 2018 (or by mid 2018 or indeed in November 2018), then there is clear record of its termination on 15th July, 2019.

Negotiations for the purchase of Site in September 2020

141. Although the lands had been for sale since June 2018, they had not been sold by September 2020. This Court has held that the Agreement was terminated in March, 2018. It follows therefore that in September 2020, when the lands were still available for purchase, Quanta did not have an extant agreement with the McDonaghs regarding the acquisition of the Site.

Site sold to Fane on 1st February, 2021

142. Accordingly, when Quanta bid on the Kilpedder Site in September 2020, there was nothing to prevent Quanta pursuing that offer, in its own right, without any involvement by the McDonaghs. Thus, when that offer was accepted, Quanta used a SPV, which it had incorporated (Fane), to enter a contract for the purchase of the site, which was completed on 1st February, 2021.

143. As regards the price for the Site, Mr. Dillon, as one of joint receivers of the Kilpedder Site gave evidence to the Court that he was notified by Promontoria *"in or around August or September 2020"* that an offer of €4 million had been agreed for the Site. Subsequently, he was advised by Promontoria that a price of €3m, plus a deferred consideration of 25% of the profits of any future sale, if sold within 50 years, was agreed by Promontoria as the consideration.

144. Pursuant to the Declaration of Trust, Ulster Bank remained the legal owner of the Site and so Promontoria duly instructed Ulster Bank to execute the legal transfer of the Site to Fane and to enter a Profit Participation Agreement with Fane dated 1st February 2021, which reflected the deferred consideration.

Meeting of 5 February 2021

145. Mr. Sutcliffe invited the McDonaghs to a meeting on 5 February 2021 to advise them that Quanta had acquired the Site. The McDonaghs surreptitiously recorded this meeting, undoubtedly with a view to the recording being used against Mr Sutcliffe/Quanta. The McDonaghs sought to rely on a transcript that they made of this recording. Since the McDonaghs' recording of this meeting was not made available to the other parties, the accuracy of the transcript and/or its editing could not be relied upon by this Court, insofar as it sought to prove matters against the interests of those other parties.

146. However, bearing in mind what must have been the apparent motives for this surreptitious recording (i.e. to establish their interest in the Site), it is telling that nowhere in this transcript of this meeting in February 2021 do the McDonaghs take the opportunity to make the complaint to Mr. Sutcliffe (which they now make in court) that Quanta/Fane bought the Site, when Quanta had allegedly had a binding agreement with the McDonaghs to buy the Site together. Nor does their transcript have any evidence of their complaint, that they now make in court, that Mr. Sutcliffe failed to discharge his alleged obligation to agree the written down value of the loan.

147. Indeed, the transcript supports the contrary position, since this transcript is evidence of the McDonaghs making an offer to buy the Site off Quanta/Fane, the rightful owners, without any reference to the McDonaghs' alleged interest in the Site. In addition, Mr. Maurice McDonagh, instead of claiming at this meeting that Mr. Sutcliffe/Quanta was not entitled to buy the Site (without the McDonaghs' involvement), is quoted as saying that Mr. Sutcliffe/Quanta could '*go off to do your own thing*'. He does however threaten to keep blocking Quanta/Mr. Sutcliffe. In this, he has been true to his word, with his issue of the Specific Performance Proceedings, and Mr. McDonagh's trespassing on the Site necessitating the Trespass Proceedings. The relevant extract states:

"BMD Well, we just wanted to ask if you. Did really buy it?

MS If I didn't buy it, Im lying. So Im not lying

MMD basically, Mel, we are up to talk to you. Whether you did or didn't, whether you want to work with us. If you just want to go on your own that's fine, **we will just go back to the courts and that's the way**. We can sit here and pretend that we are having conversations, making lots of things. The bottom line is either we all work together to develop the site or **you go off to do your own thing** and we stay separate from it and **we just keep fighting and keep blocking it**."(Emphasis added)

Confirmation bias in the McDonaghs' analysis of the Agreement

148. Reference has been made to the numerous occasions immediately after the Agreement was signed when the McDonaghs, and Mr. McDonagh in particular, did not make any claim that they had a binding unconditional agreement with Quanta to acquire the Site or a claim that Mr. Sutcliffe was obliged to negotiate the value of the written down loan. It is relevant to note that this is also the position some three years later in February 2021, since as noted a secret recording (that was clearly intended to further the McDonaghs' interests in acquiring the Site) contains neither of these claims.

149. These two factual claims appear for the first time in these proceedings, which were issued on 8th July 2022. These claims therefore are completely out of keeping with the actions of the McDonaghs for four and a half years after the Agreement was signed, and only first appear, when the McDonaghs seek legal advice and presumably learn what is the best argument for them to make to support their claim that they are entitled to the Site. For this reason, these claims appear to this Court to have all the trademarks of a claim that is made, confirming their bias, that they are entitled somehow to the Site, rather than a claim that accurately reflects what

actually occurred or was the understanding of the parties or the shared meaning of their Agreement.

150. In particular, it seems to this Court that the McDonaghs have been guilty of confirmation bias in making their claims based on the expression in Clause 11 '*negotiate ..the terms of settlement of the debt',* and the words '*legally binding'* in isolation in Clause 12, to the exclusion of the factual context (where Mr. McDonagh had mispresented that he had agreed the written down value of the loan), the clear conditional wording of Clause 12 as a whole, and all their acts and omissions during the due diligence period, which clearly point to the Agreement being conditional and point to there being no obligation upon Mr. Sutcliffe to negotiate the figure for the write down of their loans.

151. Instead, in a clear case of confirmation bias, the McDonaghs have sought out any term, which could possibly be *retrospectively* interpreted as supporting their claims that they have been unjustly denied an interest in the Site (i.e. that the Agreement is binding and that Mr. Sutcliffe has obligation to negotiate the value of the written down loan), even though this interpretation flies in the face of the factual context and their *contemporaneous* acts and omissions.

152. It seems to this Court that this retrospective interpretation arises from their blind conviction that they have been done out of a fortune, not by their own failure to pay back their loans (which is the true cause), but by the actions of others, whether Ulster Bank, Promontoria, Quanta or other parties (since they appear to believe the Site will some day be worth €150 million). As a result it seems to this Court that they, and Mr. McDonagh in particular, will do anything (as evidenced by the fact that he has been subjected to an *Isaac Wunder* Order - *Ulster Bank DAC & Ors v Brian McDonagh & Ors* [2024] IEHC 36) to pursue their aim of capitalising on the value of the Site.

153. However, in relation to these two key issues in this case, this Court believes the matter could not be clearer, namely that the Agreement was terminated in March 2018 and so is not legally binding, as claimed by the McDonaghs, and that Mr. Sutcliffe never had an obligation to negotiate the written down value of the loan, as claimed by the McDonaghs.

Claim that McDonaghs were in partnership with Quanta/Mr. Sutcliffe

154. The McDonaghs also claim that they have a subsisting partnership with Quanta and Mr. Sutcliffe, which they claim (at para 30 of their Statement of Claim) was breached by Mr Sutcliffe's failure or neglect:

> "as the principal shareholder and Managing director of [Quanta], to ensure that [Quanta] complied with the agreement"

In particular, the McDonaghs claim (at para 21) that the parties, when signing the Agreement, '*agreed to formally enter into a Partnership'* which was *'consistent with the agreement already reached.'*

155. In relation to this claim of partnership, firstly the relationship of partnership is based on there being an agreement or contract between the parties (see ss. 1(1), 19, 35(b) and s 41 of the Partnership Act 1890 and the case of *DPP v McLoughlin* [1986] IR 355, where, at pg. 360, Costello J stated that

> "[I]n determining the existence of a partnership ... regard must be paid to the true **contract** and intention of the parties as appearing from the whole facts of the case" (Emphasis added).

156. The only contract/agreement which could be the basis of the partnership in this case is the Agreement, since no evidence was provided by the McDonaghs of any other agreement. This Agreement is a conditional agreement which was terminated in March 2018 and so as of that date, there was no basis for a partnership relationship.

157. Secondly, the Agreement clearly contemplates a special purpose company being incorporated with the parties as shareholders in that company. Under s 1(2)(a) of the Partnership Act 1890, the relation between members of a company is not a partnership. Accordingly, the relationship, which was contemplated by the parties to the Agreement, was that of shareholders in a company, and not that of partners in a partnership. At most, therefore the Agreement, was a conditional agreement to *become shareholders in a company*, not a conditional agreement to become partners.

158. Hence, the claims that the McDonaghs make based on the continued existence of a partnership are not sustainable.

B. CASE AGAINST BANK IN SPECIFIC PERFORMANCE PROCEEDINGS

159. As previously noted, Ulster Bank is not party to the Agreement. Thus, the fact that the Agreement has been found to have been terminated does not impact upon the claims by the McDonaghs against Ulster Bank.

Ulster Bank failed to get a proper price for the Site?

160. The key claim which was made by the McDonaghs against Ulster Bank is that it failed to get the best price for the Site. In this regard, the McDonaghs' focus at the hearing was on the fact that Promontoria, the beneficial owner of the Site, had agreed a price of €4 million for the Site, but that no binding legal contract was ever signed at this price. When the Site was sold, it was sold for €3m plus deferred consideration of 25% of any profit on the sale by Fane of the Site in the future. The McDonaghs submitted that this meant that instead of them having a residual debt of circa €18m to Ulster Bank/Promontoria (*i.e.* if their residual loan of over €20m had been reduced by a purchase price of €4m), they have a residual debt of *circa* €19m, with the possibility of it being reduced in the future, depending on the sale price of the Site in the future. It is important to note that if the Site were to sell at some future date at a significant profit, then the McDonaghs will have their residual debt reduced by 25% of that profit.

161. However, the case which the McDonaghs appear to be making against Ulster Bank was that because the site was not sold for €4m, the McDonaghs' residual debt to Ulster Bank is now *€1m more than it should be*. On this basis, the McDonaghs appeared to be claiming that Ulster Bank, as a mortgagee in possession, did not get a proper price for the Site.

162. The case of *Ruby Property v Kilty* (High Court, Unreported, 31 January, 2003, McKechnie J) was a case involving a receiver. However, it is clear from para 11 of the judgment that it equally applies to mortgagees in possession. It is also clear from that case that the burden lies on the McDonaghs to establish that Ulster Bank failed to get a proper price for the Site (para 13(d)).

163. In this regard, it is to be noted that at para [53] of the Statement of Claim it is stated that:

> "The plaintiff intends or proposes to offer expert evidence at the trial with such evidence to be from a property expert in relation to the value of the Mortgaged Property; and an accountancy expert in relation to the quantification of the plaintiffs' claim."

164. However, no such expert evidence was provided by the McDonaghs. Hence this Court had no evidence to support the McDonaghs' claim that a price of €3m plus deferred consideration was not a proper price for the Site. (It is true that the McDonaghs sought, on the first day of the trial to introduce a lever arch folder of evidence, which they claimed was expert evidence relating to the value of the Site. However, this Court held that the McDonaghs had plenty of time to engage expert witnesses if they had wished to do so. After all, as far back as their amended Statement of Claim dated 9th December, 2022, they had stated that they would be providing expert evidence. Accordingly, it was not appropriate on the first day of the trail to introduce alleged evidence of valuation, since this would prejudice the defendants and/or lead to an application for an adjournment, as the trial had already commenced.

165. In any case, it is relevant to note that Mr. Dillon gave evidence that the price which was obtained for the sale of the Site was reasonable. It is important to note that the McDonaghs never challenged Mr. Dillon on this evidence or even cross examined him on this issue. Thus, the uncontested evidence before the Court of an experienced receiver is that the price obtained for the site was a proper price.

166. It is clear that the McDonaghs, and their legal team (which they had up to the eve of the trial), had plenty of time to substantiate their claim that the Site was not sold at a proper price. However, they have failed to discharge the burden upon them to do so. Hence, this claim against Ulster Bank is dismissed.

Prior written consent of Promontoria to sale of Site by Ulster Bank?

167. Apart from the claim that Ulster Bank did not get a proper price, most of the hearing time, regarding the claim against Ulster Bank, was spent by the McDonaghs concentrating on the terms of the Declaration of Trust and in particular Clause 3.3. This provides that:

> ""Subject to Clauses 3.4 and 8.4 below in respect of the Trust Assets, [Ulster Bank] shall not:
>
> (a) sell, transfer or otherwise dispose of any of the Trust Assets in each case without the prior written consent of [Promontoria].

However, the alleged failure of Ulster Bank to obtain the prior written consent of Promontoria to the sale of the Site to Fane (and presumably the claim that the sale to Fane was therefore not valid), is not part of the McDonaghs' pleaded case against Ulster Bank and therefore this Court has no role in determining what happened in this regard, whether Ulster Bank obtained the prior written consent of Promontoria to the sale to Fane or whether it was instructed by Promontoria or on behalf of Promontoria to complete the sale or otherwise.

168. In any case, as noted below, in the context of the Trespass Proceedings, the registration of Fane in the register, maintained pursuant to the Registration of Title Act, 1964 ("1964 Act"), as the owner of the Site is *'conclusive'* evidence of that fact. Hence, even if it was part of the McDonaghs' case, that Ulster Bank had not got Promontoria's prior written consent to the sale, this does not impact on the ownership rights of Fane, since, as noted below, there is no evidence of this alleged failure, amounting to '*actual fraud',* as required by s. 31 of the 1964 Act.

C. THE TRESPASS PROCEEDINGS

169. While the hearing primarily concentrated on the status of the Agreement and in particular the claim by the McDonaghs seeking the specific performance of that Agreement, the hearing also dealt with separate proceedings taken by Fane, as the registered owner of the Site. These are the Trespass Proceedings against the McDonaghs and Mr. McDonagh's life partner Ms. Yeoksee Ooi. As with the Specific Performance Proceedings, the main protagonist in the Trespass Proceedings is also Mr. McDonagh

Defence to the trespass action based on the Agreement.

170. Mr. McDonagh appears to believe that the Agreement provides a defence to the trespass action. Thus, he seems to believe that his alleged rights under the Agreement with Quanta, to acquire an interest in the Site with Quanta, gives him a defence to any trespass action by Fane (Quanta's subsidiary).

171. However, as this Court has held that the Agreement was terminated in March 2018, Mr. McDonagh had no rights to the Site, thereafter under that Agreement or otherwise. Accordingly, when Mr. McDonagh entered the lands on 30 May, 2022 (as noted hereunder), he was not doing so pursuant to any rights under the Agreement and so this does not provide a defence to the trespass action.

Defence based on the Declaration of Trust

172. The other defence to the trespass action, which appeared to be relied upon by the McDonaghs, was one based on the terms of the Declaration of Trust, and in particular Clause 3.3(a) thereof. The McDonaghs appeared to be claiming that Clause 3.3 of the Declaration of Trust may not have been satisfied. It seems to this Court that the McDonaghs were arguing that prior written consent might not have been obtained by Ulster Bank from Promontoria for the sale to Fane. On this basis, they seemed to be arguing that the sale to Fane was not properly

effected. On this basis, they seemed to be suggesting that Fane was not the owner of the Site and so was not entitled to bring an action in trespass against the McDonaghs.

173. However, evidence was provided to this Court that Fane was the registered owner of the Site, i.e. Folio 21790F and 36738F and reference must therefore be made to the 1964 Act.

Fane is conclusively the owner of the Site in the absence of actual fraud

174. Section 31(1) of the 1964 Act provides that:

> "The register shall be **conclusive evidence of the title of the owner to the land** as appearing on the register and of any right, privilege, appurtenance or burden as appearing thereon; and such title shall not**, in the absence of actual fraud**, be in any way affected in consequence of such owner having notice of any deed, document, or matter relating to the land; but nothing in this Act shall interfere with the jurisdiction of any court of competent jurisdiction based on the ground of actual fraud or mistake, and the court may upon such ground make an order directing the register to be rectified in such manner and on such terms as it thinks just". (Emphasis added)

It is clear from this section that the register, which states that Fane is the owner of the Site, therefore operates as conclusive evidence of this fact, in the absence of actual fraud.

175. It is also clear from Edwards J.'s judgment in *Fennell v Slevin* [2013] IECA 177 at para 190 *et seq*, that actual fraud is not established by merely asserting fraud. It is also clear from that case that, to sustain an allegation of fraud, it must be pleaded with great specificity and be supported by highly cogent evidence. This is a case where there is no such specificity or highly cogent evidence. All there is, is a suggestion that prior written consent might not have been obtained to the sale to Fane.

176. It is not a sufficient defence to the trespass proceedings for the McDonaghs to simply raise doubts about whether '*prior written consent'* might have been given by Promontoria to

Ulster Bank. These queries which were raised by the McDonaghs during the hearing regarding whether prior written consent was obtained are very far removed from '*actual fraud'*, such as to result in the register, maintained pursuant to the 1964 Act, being held not to be conclusive evidence of Fane's ownership of the Kilpedder Site.

177. Accordingly, Fane is the registered owner of the Kilpedder Site and the queries raised by the McDonaghs regarding whether '*prior written consent'* was given to the sale of the Site to Fane, is not a defence to this trespass action.

Mr. McDonagh went onto Fane's lands

178. The next question is whether there have been acts of trespass. As previously noted, Mr. McDonagh is the main protagonist regarding almost everything concerning the Site, *albeit* that the loan for the Site was made to the McDonaghs. Thus, regarding the trespass, no evidence was provided of Mr. Maurice McDonagh or Mr. Kenneth McDonagh or Ms. Ooi trespassing on the site.

179. The position regarding Mr. McDonagh is very different. This is because, counsel for Quanta pointed out that, in the hearing before this Court, Mr. McDonagh was '*quite boastful'* about attending on the Site and removing locks on the gated entrance to the Site. In fact, Mr. McDonagh's attitude to '*taking the law into his own hands'* is exemplified by the fact that he proudly stated to this Court that he had on 16 occasions cut the locks on the gated entrance to the Site. Indeed, he offered to bring into court the 16 locks that he had removed, so as to show them to the Court. This Court did not take him up on his offer.

180. Similarly, Mr. McDonagh did not deny, when it was put to him, that he had sent an email on 2nd March 2021 to Mr. Sutcliffe, threatening to cut off the locks if Mr. Sutcliffe did not send him a copy of the transfer. In addition, Mr. McDonagh admitted in an email dated 30 May 2022 to MDM, solicitors for Fane Investments, that *'[I] was on my land today'* in a clear reference to the Site.

181. Thus, it is clear that Mr. McDonagh has knowingly trespassed on Fane's lands, whilst causing damage to Fane's property, for which he has no defence. Thus, there is no reason not to deny Fane an injunction preventing any future trespass.

182. Fane have also sought, what its counsel described as '*nominal*' damages for the trespass which occurred. This is because Fane has had to incur costs in travelling to the lands in County Wicklow, presumably on 16 occasions, to replace the locks, the costs of replacing those 16 locks and also the costs of installing CCTV to identify the person who was removing the locks (Mr. McDonagh). No evidence was provided by either party regarding the actual costs involved. In these circumstances, and as counsel has sought '*nominal'* damages, this Court proposes to award Fane damages against Mr. McDonagh of €2,000 (which, by definition, are nominal, since they are the limit of the Small Claims Court).

183. Since the evidence produced to Court concerned the acts of trespass of Mr. McDonagh alone, it is proposed that the orders sought in the trespass proceedings will be made against him alone.

CONCLUSION

184. The McDonaghs have been unsuccessful in the Specific Performance Proceedings, since this Court has concluded that the Agreement was a conditional agreement, whose conditions were never satisfied, and it was terminated in March 2018.

185. In the Trespass Proceedings, the Agreement, as it had been terminated, does not provide a defence to Mr. McDonagh's acts of trespass on the Site after March 2018, and which were not denied. As Fane is the registered owner of the Site, this is *'conclusive'* evidence of its title and any queries regarding the absence of '*prior written consent'* on the part of Promontoria, to the sale of the Site by Ulster Bank to Fane, do not constitute a defence to the action in trespass. Hence, the McDonaghs have also been unsuccessful in their defence to the trespass action.

186. This case will be provisionally put in for mention, at 10. 30 a week from its delivery, to deal with any final orders and costs (with liberty to the parties to notify the Registrar, if such a listing proves to be unnecessary, in the event of the parties agreeing all outstanding matters).