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**THE COURT OF APPEAL
CIVIL**

**Court of Appeal Record Nos. 2019/491, 2020/174 & 2020/175
Neutral Citation No. [2022] IECA 87**

**Murray J.
Collins J.
Pilkington J.**

BETWEEN

ULSTER BANK IRELAND LIMITED, PAUL MCCANN

AND PATRICK DILLON

Plaintiffs/Respondents

AND

BRIAN MCDONAGH, KENNETH MCDONAGH

AND MAURICE MCDONAGH

Defendants/Appellants

JOINT JUDGMENT of Murray J. and Collins J. delivered on 6th April 2022

BACKGROUND

1. In these proceedings, the First Plaintiff (*‘the Bank’*) seeks to recover judgment against the Defendants in the sum of €22,090,302.64. The liability is said to arise from a loan advanced by the Bank to the Defendants in July/August 2007 (*“the Loan”*). The Second and Third Plaintiffs (*“the Receivers”*) were appointed as receivers by the Bank on foot of security documents executed as a term of that loan agreement. The Receivers sought orders that they were validly appointed as joint receivers over the secured assets.
2. As the Facility Letter of 20 July 2007 recites, the initial amount of the Loan was €21,500,000, of which €20,000,000 was to part fund the acquisition by the Defendants of what was stated to be an 80 acre site at Kilpeddar Co. Wicklow (*‘the Kilpeddar Lands’*). In fact, the site extended to something more than 80 acres but nothing turns on that. The Loan was secured by a mortgage and charge over the Kilpeddar Lands executed on 3 August 2007 (*“the Mortgage”*). It was a condition precedent of the Facility Letter that the Bank would receive an *“independent valuation addressed to the Bank confirming a valuation of minimum EUR56,000,000”* and on 25 July 2007 the Bank received a valuation report from CBRE valuing the Kilpeddar Lands at €57,000,000.
3. The borrowing was restructured via a further Facility Letter dated 5 January 2009, for the somewhat higher amount of €21,855,000. It was not repaid.

4. On 13 March 2013 the Bank and the Defendants entered into an agreement (*'the Compromise Agreement'*).¹ This agreement arose in the context of the collapse of the property market, delays in obtaining planning permission for the development of a data centre on the Kilpeddar Lands site and the failure of the Defendants to comply with their repayment obligations under the Facility Letter of 5 January 2009.

5. The Compromise Agreement acknowledged that "*the Debt*" – all of the sums due pursuant to the Facility Letters and the Accounts specified in the Agreement – was lawfully due and owing to the Bank (clause 1) and the Defendants also confirmed the contents of the "*Finance Documents*" (the Facility Letters and associated security documents) (clause 2). It then provided that, subject to compliance by the Defendants with certain conditions, the Debt due by them would be written-off. These conditions were that the Defendants would make a payment of €250,000 in reduction of the Debt, that certain artwork would be transferred to the Bank with a view to its sale, with the proceeds to be applied in reduction of the Debt and that a number of properties (including the Kilpeddar Lands themselves) would be disposed of "*for the best price reasonably obtainable*" by 31 July 2015 "*or such later date as the Bank in its absolute discretion may agree.*" It was at the same time agreed that agents would be appointed by the Defendants to sell the site "*with the intent of having the sale of same concluded no later than*" 31 July 2014. The Defendants were to ensure that the Bank was at all

¹ There were two other parties to the Compromise Agreement. They appear to have been joined because they had an interest in certain of the properties which the Agreement required to be sold and in order to ensure that the commitments given to the Bank could be enforced. It will not be necessary to say anything further about those parties here.

times kept fully apprised as to all enquiries and interest shown in the site and were to direct and instruct the Agents to provide such information to the Bank as and when required by it. The Compromise Agreement identified a ‘*Long Stop Date*’ of 30 September 2015. Time was stated to be of the essence (clause 5.9).

6. The net effect of the Compromise Agreement was that the liabilities of the Defendants to the Bank – standing at the time in the region of €25,000,000 - were to be written off in return for a payment by the defendants of approximately €5,000,000. It was an express term of the Compromise Agreement that the Defendants would disclose to the Bank all of their assets in a Statement of Affairs scheduled thereto. Clause 3.1.3 provided as follows:

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

7. Clause 4 of the Agreement was as follows:

“PROVIDED ALWAYS that in the event of a failure by or on behalf of the Borrowers to comply with the terms of the Agreement or in the event of a breach of any of the covenants herein contained or, in the event that the Properties have not been disposed of by the Long Stop Date, the Bank shall be at liberty, without notice to the Borrowers, to take whatever steps it shall, in its absolute discretion, deem fit on foot of the Finance Documents, at law or otherwise.”

8. On 26 June 2013, the Bank instituted proceedings against CBRE alleging negligence in the preparation of the valuation of the Kilpeddar Lands. On 13 June 2014, the Lands were - according to the Defendants - sold by them to a company called Granja Limited (“*Granja*”) for €1,501,000. The document alleged to comprise the contract of sale comprised a single page which described itself as “*Heads of Agreement*”. Seven days later, in ignorance of the purported sale to Granja, the Bank withdrew its consent to the sale and ongoing marketing of the Kilpeddar Lands.
9. On 1 October 2014, the Bank appointed the Receivers as joint receivers over the Lands. On 22 January 2016 the Bank settled its action against CBRE for a sum of €5,350,000. This sum was subsequently credited to the Defendants’ loan account.
10. These proceedings were instituted by the Bank in July 2018 and came on for trial before Twomey J. on 3 December 2019 and following days. Including a further hearing on certain issues said to arise from the provisions of the Civil Liability Act, the case was at hearing for a total of 21 days in the High Court.
11. As explained by Twomey J. in his first and principal judgment, given on 6 April 2020 ([2020] IEHC 185 (“*the Judgment*”)) there were two broad issues in the case. The first was whether the Defendants had been in breach of the Compromise Agreement thereby entitling the Bank to treat the Agreement as at an end and/or to pursue the Defendants for the debt alleged to be due on foot of the “*Finance Documents*”. The second arose from the settlement entered into between the Bank and CBRE and the Defendants’ contention that the effect of the provisions of section 17(2) of the Civil Liability Act

1961 (*“the CLA”*) was that the Bank was - by reason of what was characterised as a compromise with a concurrent wrongdoer (CBRE) - precluded from claiming from the Defendants some or all of the debt.

12. Both of these issues having been determined against the Defendants, the High Court (by Order dated 23 July 2020) granted judgment against the Defendants jointly and severally in the sum of €22,947,202.85. The High Court also made two declarations. The first of these was to the effect that the Defendants were as of October 2014, and continued to be, in breach of the Compromise Agreement. The second was that the Receivers were, and continued to be, validly appointed as joint receivers over the Kilpeddar Lands.
13. The First Defendant represented himself at the hearing in the High Court but appeared by solicitors and counsel before this Court on appeal. The Second and Third Defendants were represented by solicitors and counsel throughout.

The High Court Judgments

14. In a careful and comprehensive Judgment (which he followed with a second judgment dealing with the implications of s.17(2) CLA), the Judge rejected the case advanced by the Defendants under these two headings. It is not necessary here to repeat the detailed analysis of fact undertaken by the Judge. His conclusions can be summarised as follows.

15. First, he held that as a matter of construction of the Compromise Agreement (and in particular Clauses 3.1.1 and 4), a breach of the provisions of that Agreement brought it to an end and/or meant that the debts of the Defendants were not compromised or written off. In consequence, he held, the Bank would thereafter be entitled to pursue the Defendants for those debts (Judgment, para. 270).

16. From there, he found that the Defendants did breach the Compromise Agreement. While observing that he did not propose to ‘*go through every single breach*’, he instanced the following (as found by him on the evidence):

- (i) The Third Defendant had failed to disclose his interest in a property at Coill Bhruacháin County Galway. (Judgment, paras 272-274)
- (ii) The Defendants had, collectively, failed to comply with their obligation under clause 3.6.1(c) of the Compromise Agreement to instruct the selling agent to liaise fully with and report and disclose fully and frankly to the Bank all details of the sales process and any negotiations relating to that process. (Judgment, paras 275-279)
- (iii) If heads of agreement with Granja existed, the Defendants were in breach of their resulting obligation to disclose them to the Bank (Judgment, para 278). In reaching that conclusion, the Judge specifically rejected the evidence of the Second and Third Defendants to the contrary.

- (iv) The Third Defendant had breached the confidentiality provision in the Compromise Agreement (clause 5.1) by disclosing the provisions of the Agreement to a Mr. Feehily, a director of Granja. (Judgment, paras 280-282).
- (v) The First Defendant breached the provisions of clause 3.6.4 of the Compromise Agreement by failing to provide confirmation of insurance on the properties specified in the agreement (Judgment, para. 283).
- (vi) The First Defendant breached the provisions of clauses 3.8.1 and 3.8.2 of the Compromise Agreement by failing to charge an apartment in Portugal owned by himself and his wife in favour of the Bank (Judgment, para. 284).
- (vii) The First Defendant breached clause 3.8.5 of the Compromise Agreement by failing to sell a property called Dromin House in Delgany by 31 July 2014 (Judgment, para. 285).
- (viii) Each of the Defendants breached clause 3.6.1(a) of the Compromise Agreement by failing to re-appoint Ganly Walters as joint selling agent following the lapse of their initial appointment on 31 May 2014, and despite being requested by the Bank to do so (Judgment, paras 286 - 293).

- 17.** In addition, it is manifest from the findings of the High Court in relation to the purported sale of the Kilpeddar Lands to Granja that there had been other significant breaches of the Compromise Agreement. In particular, the Judge held that Granja was a '*front*' for the First Defendant and that the monies proposed to be used by it for the purported acquisition of the site actually came from the First Defendant (Judgment, para. 152). That being so, the First Defendant was in breach of the Compromise Agreement by failing to disclose these funds in his Statement of Affairs.
- 18.** The effect of these breaches of the Compromise Agreement as found by the Judge was to entitle the Bank to proceed with its claim for monies due on foot of the Facility Letter of 5 January 2009 with appropriate credits for a sum of €325,000 set off from an account of the First Defendant and the sum of €5,000,000 received from CBRE on foot of the settlement of these proceedings.²
- 19.** It was that payment from CBRE which gave rise to the second issue which, in turn, depended on the effect of the provisions of the CLA on the Bank's claim having regard to this settlement. The Defendants contended that they and CBRE were '*concurrent wrongdoers*' for the purposes of Part III CLA. They then argued that had the claim against CBRE been pursued to its full extent their indebtedness to the Bank would have been expunged and argued that it followed from the combined effect of sections 17, 21(2) and 35(1) CLA that the Bank should be identified with CBRE so that it could not now pursue the Defendants for the shortfall arising from the settlement with CBRE.

² The settlement amount paid by CBRE totalled €5,350,000 but €350,000 was in respect of legal costs.

20. In that regard, it fell to the Judge to construe a number of provisions of the CLA. We will return to the detail of these provisions and the precise construction placed upon them by the Judge later in this judgment. However, at a general level his conclusion depended on three propositions. First, that if some defendants in a suit were alleged to be in breach of contract for failing to pay a debt, and others were responsible for that same loss on the basis of other wrongful conduct, then they were concurrent wrongdoers and the relevant provisions of the CLA applied. Second, that the Bank and CBRE were capable on this basis of being concurrent wrongdoers, the Court stressing that the Statement of Claim in the action against CBRE proceeded on the basis that it was liable for the same damage as the Defendants, that is the non-repayment of the loan. Third, it followed that (Judgment, paras. 353 - 355):

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

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

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

(original emphasis)

21. The Judge explained how this would operate as follows (Judgment, paras 356 - 357):

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

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

22. The matter was then listed for further argument, following which Twomey J. delivered his second judgment on 23 June 2020 ([2020] IEHC 311) (the “*Supplemental*

Judgment”). For the reasons set out in it, the Judge found that, if the Defendants sought to contend that the Bank was precluded from recovering the loan or any part thereof, the onus of proof was on them to establish that CBRE was negligent in relation to the issue of its valuation report, that the report was the cause of the non-repayment of the loan by the McDonaghs or the cause of more than 18% of the damage/loss suffered by the Bank as a result of the non-repayment of the loan (18% being the proportion of the overall indebtedness of the Defendants represented by the €5,000,000 paid by CBRE in settlement of the Bank’s claim against it), and that CBRE was sufficiently blameworthy relative to the Defendants for the non-repayment of the loan such as to justify a finding that CBRE should be held liable for more than 18% of the loss or damage (this being the ratio of the settlement amount to the outstanding loan) or indeed that CBRE should be liable for more than 100% of the loss or damage suffered by the Bank (Supplemental Judgment, paras 10 – 13). However, the Defendants had adduced no evidence on any of these matters and had accordingly failed to discharge that onus (Supplemental Judgment, paras 15-30). The Judge rejected a submission from the First Defendant to the effect that CBRE had a “*contractual liability*” for the debt due by the Defendants (Supplemental Judgment, paras 31-32). The Judge also rejected the First Defendant’s contention that CBRE should, “*because of its greater blameworthiness relative to the blameworthiness of the McDonaghs*”, be 100% liable for the non-repayment of the loan. Absent evidence that CBRE was a concurrent wrongdoer, that issue did not arise for consideration. In any event, the grounds relied on by the First Defendant all related to the conduct of the Bank rather than the conduct of CBRE (Supplemental Judgment, paras 33-42).

23. Subsequently, the First Defendant sought liberty to issue a motion in which he sought (*inter alia*) an order setting aside the declaration that he had breached the Compromise Agreement, an order “*voiding the entire effects of the Compromise Agreement*”, an order setting aside the judgment granted to the Bank “*for want of particulars*” and an order “*permitting a review of the Judgment*” of 24 April 2020. The basis for that motion was set out in a lengthy affidavit sworn by the First Defendant. In essence, he contended that he had been induced to enter into the Compromise Agreement by reason of misrepresentation/concealment of material facts, namely that, as of 13 March 2013 (when the Compromise Agreement was executed) the Bank had not succeeded in having its charge over the Kilpeddar Lands registered in the Land Registry (according to the First Defendant the charge was only registered in December 2013). On that basis, and having regard to the provisions of section 62(2) of the Registration of Title Act 1964, it was said by the First Defendant that the Bank had no interest in the Lands and were in breach of section 62(2) in demanding and procuring the consent of the Defendants to their sale.

24. The motion was debated before the High Court on 16 July 2020. The Bank objected to the attempt to re-open the Judgment. It relied on the decision of the High Court (Clarke J) in *In re McInerney Homes Limited* [2011] IEHC 25 as authority for the proposition that, where a party asked a court to revisit its judgment based on the presentation of additional evidence or materials, “*the new materials must be such that same would probably have an important influence on the result of the case, even if not decisive, and be credible*” and “*such new evidence will not ordinarily be permitted to be relied on if the relevant evidence could, with reasonable diligence, have been put before the court*”

at the trial” (para 3.12). According to the Bank, the First Defendant’s application did not satisfy either requirement. The Judge clearly accepted that submission, refusing to allow the motion to issue on the basis that the material on which the First Defendant sought to rely was material that was raised in the course of the trial or which could have been raised. In his view, therefore, there was no basis for revising the Court’s Judgment.³

³ Transcript of 16 July 2020, at page 30.

ISSUES ON APPEAL

25. The Second and Third Defendants helpfully reduced their grounds of appeal to five headings – (i) the application of the CLA to the Bank’s claim having regard to its settlement with CBRE, (ii) various issues of construction regarding the Mortgage, the Compromise Agreement and the Heads of Agreement with Granja (iii) the claim that there had been what is termed a ‘*prior breach*’ by the Bank of the Compromise Agreement, (iv) issues arising from the alleged breach of the Compromise Agreement by the Defendants and (v) whether it was permissible for the High Court to deploy certain adverse findings made in respect of the First Defendant against the Second and Third Defendants.

26. The First Defendant also challenged the Judge’s findings relating to the CLA. In addition, he relied on a number of other grounds all of which are addressed below.

The First Defendant’s Motion to Admit Further Evidence

27. This appeal was listed for hearing on 16 and 17 February 2021. Those dates were allocated in October 2020. On the evening of 11 February 2021, a Mr. William Murphy sought to lodge with the Court of Appeal Office a motion on behalf of the First Defendant to adduce new evidence and amend the reliefs sought in his Notice of Appeal. Ordinarily, appeals in this Court are called on at least ten days before the allocated hearing date. That allows the Court to ensure that everything is in order for the appeal to proceed and for the Judge in charge of that list to determine any

applications relating to the appeal in advance of the hearing. The timing of the First Defendant's motion meant that it post-dated that list.

- 28.** The First Defendant's solicitor (in an e-mail to the Court of Appeal Office of Friday February 12) advised the office that Mr. Murphy was a '*Legal Executive*' who '*works in my office*'. No leave had been given for the issue of any motion by or on behalf of the First Defendant. The Court was thus placed in the position of having to deal with the motion on the first day of the hearing (two business days after its delivery) in circumstances in which the Bank had no opportunity to respond to the motion and affidavit (neither of which had been formally filed).
- 29.** The motion was grounded on an Affidavit sworn by the First Defendant's solicitor, Geoffrey Nwadike. He averred that he was instructed in the matter on the evening of Friday 3 February 2021 and that following his acceptance of those instructions he conducted "*research*" and ascertained that the Second Plaintiff, Mr McCann, had had past commercial relations with CBRE. Therefore, it was said, the Second Plaintiff was "*compromised*" in the receivership. Mr Nwadike exhibited – and the First Defendant sought to have admitted – "*evidence*" disclosing Mr McCann's alleged relationship with CBRE. This material appears to have been obtained through internet searches, conducted presumably by Mr Nwadike. While the First Defendant did not seek the amendment of his grounds of appeal, he did seek to amend the reliefs being sought by him, to include a number of declarations said to arise from the alleged conflict of interest. One of those declarations was in the following terms:

'3... A Declaration that [the Second Plaintiff] was not in a position to carry out his receivership duties in circumstances whereby his right and duty to pursue remedy in the realisation of the security under the terms of the CBRE report including the expressly stated valuations was compromised through his commercial relationships with the said CBRE.' (sic)

30. While Mr Nwadike stated that over the days preceding the issue of the notice of motion, he had researched the receivers and their contractual dealings, his affidavit was entirely silent on what had prompted him to undertake that exercise. Furthermore, while he said that he first accepted instructions on 3 February 2021, he did not explain when or by whom he was first approached to accept instructions in the matter. There was no affidavit from the First Defendant explaining when, or through whom, he first decided to seek to instruct solicitors to represent him in the appeal, why the instruction of solicitors in the manner was left to such a late stage or when the prospect of such an alleged conflict of interest first came to his attention or to that of anyone else who may have been assisting him with the litigation.

31. For present purposes in this case we will limit ourselves to observing that the issuing of a motion to admit further evidence or to amend a notice of appeal is a step that should never be taken lightly or regarded as routine. When the hearing date for an appeal is proximate – in particular a hearing date in a very substantial appeal of the kind presented by these proceedings - such a motion should issue only in exceptional and compelling circumstances. Solicitors and counsel owe a duty to the Court not to engage in such a course of action unless they have satisfied themselves that it is necessary,

proper and appropriate so to do. If they determine that it is appropriate to proceed with such an application it is incumbent upon them to ensure that the Court is given full details of why the motion is being brought at such a late stage. That does not mean just baldly stating when the solicitor accepted instructions and asserting that upon such late instruction he proceeded to research an issue which has produced the information which it is sought to introduce. Rather, it means providing the Court with a complete picture of when the solicitor was first approached, why he or she was approached (as in this case) at such a late stage and when and to whom the idea leading to the ‘*discovery*’ of the fresh “*evidence*” first occurred. It is difficult to see how that comprehensive picture can be painted by an affidavit from the solicitor alone. Certainly, Mr Nwadike’s affidavit did not present such a picture here.

32. In these appeals, in order to avoid the disruption that would otherwise have followed from the First Defendant’s motion, the Court received the evidence *de bene esse* on the basis that it would rule subsequently on the application to admit the evidence and to amend the notice of appeal. This was done in order to ensure that the appeal could be heard and determined within the time allocated to it. This was less than satisfactory, and created the prospect of prejudice to the Bank. Neither the Court nor the other parties should have been put in this position.

33. Having considered the motion and affidavit further and having heard the submissions of counsel for the First Defendant, as well as those of counsel for the Bank, we have concluded that the motion should be refused. Accordingly, the new “*evidence*” is not admitted and the First Defendant is not permitted to amend his Notice of Appeal.

34. The admission of further evidence in an appeal from a final order or judgment of the High Court (as was the position here) is governed by Order 86A, Rule 4(c) RSC. It provides that, save as to matters which have occurred since the date of the decision the subject of the appeal (and the evidence sought to be introduced here did not relate to such matters), further evidence “*may be admitted on special grounds only, and only with the special leave of the Court of Appeal (obtained by application by notice of motion setting out the special grounds).*”
35. The notice of motion here wrongly refers to Order 58 RSC (which relates to appeals to the Supreme Court) and does not set out any “*special grounds*” for the admission of the further evidence obtained by Mr Nwadike’s researches. There is a considerable body of authority on the application of Order 86A, Rule 4(c) and the equivalent provision in Order 58. For the purposes of this judgment, it does not appear necessary to look beyond the oft-cited decision of the Supreme Court in *Murphy v Minister for Defence* [1991] 2 IR 161, in which (at 164). Finlay CJ set out the relevant principles as follows:

“1. The evidence sought to be adduced must have been in existence at the time of the trial and must have been such that it could not have been obtained with reasonable diligence for use at the trial;

2. The evidence must be such that if given it would probably have an important influence on the result of the case, though it need not be decisive;

3. The evidence must be such as is presumably to be believed or, in other words, it must be apparently credible, though it need not be incontrovertible.”

36. The further evidence sought to be introduced here consists of a newspaper article dating back to 2014 which refers to the sale of an office block by CBRE, on the instructions of Mr McCann as receiver of Glasbay Limited (in receivership). The other document appears to be a CBRE press release, dated 28 November 2012, referring to the sale of the Burlington Hotel by CBRE, again on the instructions of Mr McCann, this time in his capacity as receiver of Burhotel Trading Company Limited. This material is hearsay evidence but, presumably, the Second Plaintiff would not dispute his role in the sale of the two properties, nor CBRE's role as agents in the transactions. However, there is not the slightest reason to suppose that the material "*could not have been obtained with reasonable diligence for use at the trial*" before Twomey J in the High Court. On the contrary, Mr Nwadike's affidavit suggests that he was able to discover the material readily following his instruction. As regards the second requirement set out in *Murphy*, again the affidavit of Mr Nwadike does not advance Mr McDonagh's position. As he himself notes at para 9 of his affidavit, the Receivers had no involvement in the Bank's settlement with CBRE. They were not parties to the Bank's action against CBRE and had no role in the Bank's decision to settle on the terms it did. Indeed, that is the subject of complaint by the Defendants. Whether there is a basis for that complaint will be addressed in due course but, in the present context, the key fact is that Mr McCann had no role in the proceedings or settlement. That being so, there is nothing that would allow the Court to conclude that the new material "*would probably have an important influence on the result of the case, though it need not be decisive*". Indeed, it is impossible in our view to identify how the material could have *any* influence on the First Defendant's appeal.'

37. In oral argument reference was made by counsel for the First Defendant to the well-known decision of the House of Lords in *Bolkiah v KPMG* [1998] UKHL 52, [1999] 2 AC 222. *Bolkiah* was considered by this Court and by the Supreme Court on further appeal in *Sweeney v Voluntary Health Insurance* [2020] IECA 150, [2021] IESC 58. In *Bolkiah*, the House of Lords held that KPMG could not act for the Brunei Investment Agency in connection with an investigation that implicated a former client, a brother of the Sultan of Brunei. KPMG had learned a great deal of confidential information about the affairs of their former client and the House was not satisfied that the arrangements that had been made by KPMG to avoid disclosure of that information to the personnel assisting the Agency were adequate to ensure that there was no risk of disclosure. However, we can see no parallel or analogy with *Bolkiah* here, or any basis on which it could be suggested that Mr McCann's capacity to discharge his functions as receiver over the Kilpeddar Lands was compromised. As already noted, he had no involvement in the proceedings against CBRE. His engagement of CBRE as agents in his capacity as receiver of third-party companies unconnected with the Defendants did not involve him acting for CRBE or putting himself in any position of potential conflict of interest. Indeed, no attempt was made by counsel for the First Defendant to identify any such conflict. What was suggested was there was a "*commercial nexus*" between CBRE and Mr McCann but, even if that is so, there is no basis in our view for any suggestion that this affected, or could reasonably be apprehended to have affected, Mr McCann's discharge of his duties as receiver.

38. The application to amend the First Defendant's Notice of Appeal is consequential to, and dependent on, the application to admit further evidence and the refusal of the latter

is fatal to the former. The declaration sought at 3 certainly falls away. In any event, it is difficult to see how the granting of such a declaration could avail the First Defendant. The declaration at 1 is very difficult to follow but it appears to be premised on the contention that the Bank was under an obligation to advise the Receivers that they had a right of action against CBRE. That issue is addressed further below, as is the argument reflected in the declaration sought at 2, the effect that the Bank has “*full liability*” for the outstanding debt by reason of the settlement with CBRE and having regard to the effect of section 35(1)(h) CLA. These declarations are unnecessary and, given the lateness of the application to amend, and the absence of any explanation for the delay, those amendments should not be permitted.

39. Accordingly, the First Defendant’s motion is refused.

**THE CIVIL LIABILITY ACT AND
THE RECOVERY OF SIMPLE CONTRACT DEBTS**

40. The principal issues on the appeals relate to the CLA and we will address them at this stage and then go on to address the remaining issues raised by the Defendants.

The issue around the CLA

41. To recap, the basic point made by the Defendants as regards the CLA was that the Defendants (in respect of their debt to the Bank) and CBRE (in relation to its negligence in the valuation of the site) were concurrent wrongdoers. Therefore, the effect of CLA (so it was said) was that by compromising the claim against CBRE the Bank precluded itself from recovering the debt from the Defendants, in whole or in part.

42. In the High Court, the Bank adopted the position that insofar as it sued in these proceedings for the recovery of monies due to it on foot of a debt, it was not capable of being a ‘*concurrent wrongdoer*’ with CBRE for the purposes of the CLA. If that was correct, it was entitled to recover the monies due and owing to it without regard to the role of CBRE or its relative blameworthiness. That contention was, as evident from the foregoing, rejected by the Judge. In the written and oral submissions made to this Court the Defendants assumed the correctness of the Judge’s conclusion on that issue, instead asserting that the Court erred in finding that the Defendants were obliged to adduce expert evidence establishing that CBRE was in fact negligent and in finding that in the absence of that evidence, the Defendants had not established that the Bank and CBRE

were concurrent wrongdoers at all. In that regard they placed very considerable emphasis upon the fact that in the statement of claim delivered in its action against CBRE, the Bank had pleaded a duty of care owed to it, had asserted that CBRE had been negligent and had advanced a claim for damages based on an assertion that, if the Bank had been advised of the true value of the Kilpeddar Lands, it would not have advanced the loan facilities to the Defendants. They also attached significance to the fact that the monies obtained from CBRE had been credited to the Defendants' loan account. The Bank in its submissions – essentially – joined issue with these contentions, but did not dispute the application in principle of the CLA's provisions governing concurrent wrongdoers to its claim.

Preliminary issue

43. Specifically, in its submissions the Bank focussed upon the question of whether the Defendants were obliged to tender evidence to establish that CBRE was negligent in its valuation of the lands, that that negligence caused or contributed to the damage suffered by the bank, and that CBRE was liable to contribute more than the sum of €5,000,000 to the Bank's loss. They also addressed the related contention seemingly advanced by the First defendant that the failure of the Receivers to join in the action against CBRE gave him a cause of action or ground of complaint.

44. In the course of the hearing of this appeal, the Court expressed concern at the prospect that it was being asked to determine an important part of this appeal based upon the premise that the CLA applied to claims brought to recover debts and/or that a party

alleged to be negligent in a valuation of property consequent upon which a loan agreement is entered into by a plaintiff is a concurrent wrongdoer with the lender *vis-à-vis* the borrower, in the absence of any argument addressing that issue. The issue of whether the provisions of the CLA addressing contribution between concurrent wrongdoers apply to claims for the recovery debts at all is foundational. If it does, the reason it has this effect is of critical importance in determining whether the negligence alleged in the proceedings against CBRE negates the liability of the Defendants altogether. In our view, it is hard to see how one of these questions could be addressed without examining the other.

45. The Court invited further submissions from the parties on the question. In its submissions, the Bank explained that it did not raise the issue of whether the Act applied because it believed it did not need to, because its client wished for an expeditious resolution of the matter and because it did not wish to add to the grounds of appeal. In any event, the Bank says that the Court is free to proceed to decide this issue if it *'believes that it is necessary or appropriate for it so to do'*. It points to the provisions of Order 86A Rule 2(2) RSC⁴ and emphasises that the question of whether the CLA applied to claims for the recovery of debt at all was fully argued in the High Court and indeed determined by the Judge in the Judgment.

⁴ Rule 2(2) provides that *'The powers of the Court of Appeal may be exercised by the Court of Appeal, notwithstanding that the notice of appeal asks that part only of the decision of the court below be reversed or varied, and those powers may also be exercised in favour of all or any of the respondents or parties, although particular respondents or parties may not have appealed from or complained of the decision'*.

46. The Defendants objected to the Court addressing the issue of whether a claim for debt falls within the provisions of Part III CLA at all. In the Second and Third Defendants' written submissions delivered following the hearing they stressed that the court is not acting in an advisory capacity, urging that the adversarial nature of the proceedings requires that it should address only the case as fixed by the parties and determined by the respective notices of appeal and respondent's notices. The argument around the application of the CLA to the claim had, it was said, been abandoned by the Bank given that it had not sought to cross-appeal the Judgment or vary it in any way. Moreover, they said that the Bank should not be permitted to raise the issue of whether the Act applied without explaining why the monies obtained from CBRE were credited to the Defendants' account.

47. Both sets of written submissions (as the Court had suggested) addressed the substantive question of whether the CLA applied to claims for the recovery of a debt. The First Defendant elected not to make written submissions on this issue, despite being given an opportunity to do so. All parties had the opportunity to make oral submissions on the question (because the Court raised the issue in the course of the hearing) and, of course, all did so before the High Court. The Court moreover had the benefit of the Judge's careful consideration of this issue, together with the conflicting perspectives of three other High Court Judges (Laffoy J., Finlay Geoghegan J. and Barniville J.) in decisions to which we will return later.

48. In these circumstances we are of the view that it is both appropriate and necessary that we should address the fundamental question presented by these proceedings as to

whether the provisions of Part III CLA making provision for concurrent wrongdoers have any application to an action for the recovery of a debt. We have reached that view, in particular, because one of the questions which is squarely before the Court is whether in the circumstances here the settlement by the Bank of its claim against CBRE operated to preclude it from seeking further recovery from the Defendants, having regard to the provisions of section 35(1)(h) CLA. The issue of whether a settlement eliminates a liability or, if not, the extent to which it reduces it, depends on the relationship between the liability and the alleged negligence, the method of calculating damages in respect of the wrongs alleged against the wrongdoers and, in particular, the manner in which these engage ‘*the same damage*’. It also depends, having regard to the express terms of section 34(1) CLA, upon whether it is ‘*just and equitable having regard to the degrees of fault of the plaintiff and defendant*’ to allocate responsibility for the wrongs of the parties in this way. This, in turn, requires that the Court have regard not merely to causative factors, but to ‘*blameworthiness*’ (see *O’Sullivan v. Dwyer* [1971] IR 275 as explained by O’Donnell J. (as he then was) in *Defender Ltd. v. HSBC France* [2020] IESC 37, [2021] 1 ILRM 1 (“*Defender*”) at paras. 48 to 51).

- 49.** It is in our view impossible to resolve these issues satisfactorily without understanding what “*damage*” (as that term is used in Part III CLA) is actually incurred by non-payment of a debt, what ‘*damage*’ was caused by the alleged negligence of CBRE and the correct relationship between those different types of ‘*damage*’ as envisaged by the CLA. That exercise simply cannot be undertaken without addressing whether non-payment of a debt comprises ‘*damage*’ for the purposes of Part III at all. The Court cannot embark upon a consideration of whether non-payment of a debt is more

'*blameworthy*' than negligence in the conduct of a valuation without an understanding of why non-payment of a debt is deemed to be a wrong captured by the CLA (if indeed it is). This is, we think, evident from the consideration of this question that appears later in this judgment.

50. For this reason, we address here first the fundamental issue of whether an action to recover a debt is of such a nature as to render the defendant a concurrent wrongdoer with a valuer but for whose negligence it is alleged the debt would never have been contracted. In doing so we do not believe it necessary that the notice of appeal be amended, as the issue is inherent in, and necessary to, the grounds of appeal that are before the Court. Nor, we should repeat, is any prejudice of any kind suffered by any of the parties in consequence. The issue was argued in the High Court and ruled upon by the Judge. All parties have had an opportunity to deliver submissions on the question. No unfairness arises from the issue being addressed by this Court.

Concurrent wrongdoers and actions to recover a debt

51. The application of the provisions of the CLA governing concurrent wrongdoers raises two issues. One is whether a claim to recover a debt can ever fall within those provisions. The second – which arises only if such a claim can come within the relevant sections – is whether a claim to recover damages for a negligent valuation and a proceeding to recover a debt which would allegedly never have arisen but for the negligent valuation have a relationship between each other such as to render the respective wrongdoers '*concurrent*' for the purposes of Part III CLA.

52. The correct resolution of both of these issues depends upon an understanding of four key and related propositions. First, the provisions governing concurrent wrongdoers in the CLA are concerned exclusively with the allocation of responsibility between wrongdoers facing legal action for the recovery of *damages*. Second, claims for *damages* for a wrong and claims to enforce a primary legal obligation are conceptually and practically distinct. Save for one situation in which it makes specific provision to that effect, the provisions of the CLA addressing the relationship between concurrent wrongdoers are concerned exclusively with the former and not the latter. Third, a claim for the recovery of a debt seeks to enforce a primary contractual obligation. It is not a claim for *damages*. Fourth, even if the CLA is to be interpreted in such a way that an action for the recovery of a debt and an action for damages for breach of contract are to be equated so that debt recovery proceedings come within Part III CLA, a claim against a debtor on foot of a loan instrument and a claim against a valuer whose negligence is alleged to have resulted in the granting of the loan are not actions to recover the same *damage*. The debtor's liability is for the whole of the debt while the valuer's liability is (at most) only for the amount of the loan that the lender is unable to recover from the debtor. The liability of the valuer and the debtor are not, therefore, concurrent.

Concurrent wrongdoers, the CLA and claims for damages

53. The definition of '*concurrent wrongdoers*' appears in section 11(1) and has two elements:

“two or more persons are concurrent wrongdoers when both or all are wrongdoers and are responsible to a third person ... for the same damage.”

(our emphasis)

54. A ‘*wrongdoer*’ is a person who commits or is otherwise responsible for a wrong (section 2(1)). ‘*Wrong*’ is defined in broad terms in section 2(1):

“‘wrong’ means a tort, breach of contract or breach of trust, whether the act is committed by the person to whom the wrong is attributed or by one for whose acts he is responsible ...”

55. “*Damage*” under s. 2(1) ‘*includes loss of property, loss of life and personal injury*’.

This is to be contrasted with ‘*damages*’ which is defined separately in the same subsection of the Act as “*except in Part IV of the Act [including] compensation for breach of trust.*”

56. It is easy to fall into the trap of thinking that the scope of the rules governing concurrent wrongdoers is defined exclusively by whether the relevant parties are ‘*wrongdoers*’ who have inflicted ‘*damage*’ on the plaintiff. That is the Defendants’ case, and indeed is the essential analysis undertaken by the Judge. However, this is wrong. It is not *any* damage caused by a wrongdoer that comes within the definition. The definition of ‘*damage*’ is concerned only with ‘*damage*’ for which a certain type of legal remedy is available. Section 12(1) CLA provides that generally (and with some stated exceptions) concurrent wrongdoers are ‘*each liable*’ for the whole of the damage in respect of which

they are concurrent wrongdoers and, it follows, it is only with ‘*damage*’ for which either would at law be ‘*liable*’ that this part of the Act is concerned. And it is not *any* legal remedy that is in play, only the remedy of damages. In our view, the relevant provisions are clear and, as we explain later in this judgment, it would be most surprising were the position otherwise.

57. In explaining why this is so, it is useful to begin with the specific provision in issue here. One of the objects of Part III CLA is to ensure that, where D1 and D2 are concurrent wrongdoers whose wrongdoing has caused ‘*the same damage*’ to P, then if P settles its claim against D2, D1 should not have to compensate P for the loss attributable to D2. This is the facility prayed in aid by the Defendants here. They say that having settled with CBRE, the Bank should not be able to recover anything from them because CBRE caused all of the Bank’s loss.

58. The statutory basis on which this argument is advanced starts with section 17(2) CLA.

Section 17 is as follows:

“17. (1) The release of, or accord with, one concurrent wrongdoer shall discharge the others if such release or accord indicates an intention that the others are to be discharged.

(2) If no such intention is indicated by such release or accord, the other wrongdoers shall not be discharged but the injured person shall be identified with the person with whom the release or accord is made in any action against

the other wrongdoers in accordance with paragraph (h) of subsection (1) of section 35; and in any such action the claim against the other wrongdoers shall be reduced in the amount of the consideration paid for the release or accord, or in any amount by which the release or accord provides that the total claim shall be reduced, or to the extent that the wrongdoer with whom the release or accord was made would have been liable to contribute if the plaintiff's total claim had been paid by the other wrongdoers, whichever of those three amounts is the greatest." (our emphasis)

59. Section 35(1) – which is referred to in section 17(2) - makes provision for the identification of certain persons with the plaintiff for the purposes of determining contributory negligence. The general conditions under which this occurs are prescribed in section 34(1) which, stripped of its provisos, states:

*“Where, in any action brought by one person in respect of a wrong committed by any other person, it is proved that the damage suffered by the plaintiff was caused partly by the negligence or want of care of the plaintiff or of one for whose acts he is responsible (in this Part called contributory negligence) and partly by the wrong of the defendant, **the damages recoverable** in respect of the said wrong **shall be reduced** by such amount as the court thinks just and equitable having regard to the degrees of fault of the plaintiff and defendant ...”*
(our emphasis)

60. The effect of there being a concurrent wrongdoer with whom a settlement has been entered into is then inserted into this general scheme of contributory negligence by section 35(1)(h). It provides:

“(1) “For the purposes of determining contributory negligence- [...]

(h) where the plaintiff’s damage was caused by concurrent wrongdoers and after the occurrence of the damage the liability of one of such wrongdoers is discharged by release or accord made with him by the plaintiff, while the liability of the other wrongdoers remains, the plaintiff shall be deemed to be responsible for the acts of the wrongdoer whose liability is so discharged.”

61. The position of concurrent wrongdoers is the dominant focus of the identification provisions, appearing also in sub-paragraphs (f) and (g) (contracts exempting concurrent wrongdoer from liability or limiting that liability entered into before occurrence of damage), (i) (claim against concurrent wrongdoer barred by the Statute of Limitations) and (j) (plaintiff proceeds against concurrent wrongdoer after failing against another fixed with liability for acts of the latter).

62. The way these provisions are said to tie together in this case is important. The Defendants’ capacity to contend that the Bank’s claim against them should be reduced or extinguished to reflect the fault of CBRE is dependent upon section 17(2). Section 17(2) incorporates by reference section 35(1)(h). Section 35(1) has no life independently of section 34(1), as section 35(1) merely describes the circumstances in

which a person is to be identified with another for the purposes of a plea of contributory negligence and it is section 34(1) that prescribes the consequences when such a plea is sustained. Section 34(1), however, is operative only to reduce a claim '*for damages*'. There is no doubt but that the Bank's claim against CBRE was a claim '*for damages*'. But if the claim to recover the debt from the Defendants is *not* a claim for damages (and as we have said and explain further shortly, it is not) then these provisions are of no avail to the Defendants. As between the Bank and the Defendants there are, in the language of section 34(1), no '*damages recoverable*' liable to be reduced.

Part III of the CLA and damages

63. The Defendants respond to this proposition by urging a broader (or as they put it '*holistic*') interpretation of section 34(1). They say that the purpose of the CLA is to prevent what is termed '*aggregate recovery*' and that '*the contract only gives rise to one outlay of money (one loan) and thus one loss, whether recovery is characterised as repayment or damages*'. Effectively, they seek to contend that the reference to '*damages*' in section 34(1) should be read as a reference to '*damage*'. However, such an exercise in re-writing the provision is impermissible. The draftsman was quite clear in differentiating between '*damage*' (the term used in the definition of concurrent wrongdoer) and '*damages*' (the trigger for the intervention of a concurrent wrongdoer in reducing an award in favour of a plaintiff). They are separately defined in section 2(1). Indeed, in *Moloney v. Liddy* [2010] IEHC 218 Clarke J. (as he then was) in reviewing the use of both terms in the CLA specifically observed that "*“damage” does not mean “damages”*" (para. 5.2).

64. It is therefore important that it is not merely section 34(1) that defines the operation of the rules governing concurrent wrongdoers by reference to recoverable *damages*. It is by reference to the recovery of *damages* that the practical operation of all of the rules as between concurrent wrongdoers is framed throughout the entirety of Part III CLA. Apart from the critical provisions in sections 34 and 35, this is evident from section 14(2) and (3) (several judgments), section 18 (cap on judgments in more than one action against concurrent wrongdoers), and the definition of ‘*satisfaction*’ in section 16 (‘*payment of damages*’).

65. But perhaps most importantly of all, one of the central innovations of the Act – the introduction of a facility for one wrongdoer to bring a claim against another by way of an action for contribution – is defined only by reference to a claim ‘*for damages*’. The entitlement to claim contribution is provided for in section 21. The marginal note to that provision (‘*Contribution in respect of damages*’) is picked up and repeated throughout Chapter II of Part III. So, the settling wrongdoer is entitled to recover contribution ‘*in the same way as if he had suffered judgment for damages*’ (section 22(1)). Section 23(1) (making provision for the enforcement of a judgment for contribution) defines a successful claimant in a contribution action as obtaining “*judgment ... for **contribution in respect of damages** for which the claimant is or has been liable to the injured person*” (our emphasis). If the wrongdoer is not liable ‘*in respect of damages*’, contribution is unavailable.

66. The rooting of the rules governing contribution, satisfaction and identification as between concurrent wrongdoers in claims for damages is not accidental. It goes to the

very foundation of this Part of the Statute. While ‘*damage*’ and ‘*damages*’ as used in the CLA are not co-extensive, the only ‘*damage*’ contemplated by the Act is loss which is recoverable by way of *damages*. This is why the draftsman felt it necessary to *expand* the definition of damages to include the cognate but theoretically distinct concept of ‘*compensation*’ for breach of trust. Indeed, the draftsman of the CLA when speaking of a similar distinction between ‘*damage*’ and ‘*damages*’ in the United Kingdom’s Law Reform (Contributory Negligence) Act 1945 defined ‘*damage*’ in precisely this way:

“‘*damage*’ comprises any item of loss that would have been recoverable as damages at common law apart from the claimant’s own fault.”

(Glanville Williams, ‘*Joint Torts and Contributory Negligence*’ (1951) at p. 118, repeated at p .317).⁵

The difference between claims for damages and other remedies

67. As we have earlier observed, it is not surprising that this part of the CLA is directed only to claims for damages. This reflects a distinction that is central to the law of private obligations. Generally, the law distinguishes between two different types of coercive

⁵ Unusually in construing a statute in this jurisdiction, Williams’ analysis in *Joint Torts and Contributory Negligence* is regularly referred to in interpreting the 1961 Act, and most recently was heavily relied upon by O’Donnell J. in his judgment in *Defender*. The CLA very closely follows the draft statute prepared by Williams and appended to the substantive text of this work.

judicial remedy in private law. One involves the *enforcement* of a legal obligation. Examples are orders for specific performance of a contract, or for the return of a chattel. The other is intended to require the provision of compensation for *breach* of such a legal obligation when it is not possible to rectify the wrong and/or the plaintiff determines to elect for damages. Damages thus ordered are intended to indemnify the plaintiff against the consequences of an injury caused by the defendant, thereby restoring it (in as much as this can be done by a monetary award) to the position it would have been in had the wrong not occurred. One way of analysing these different remedies (at least in the context of a claim of breach of contract) is to see the remedy intended to rectify the wrong as the enforcement of a primary obligation, and to define damages as a secondary obligation, which effectively substitutes for a past failure in the performance of the legal obligation in question (see in particular the speech of Lord Diplock in *Lep Air Services v. Rolloswin Ltd.* [1973] AC 331 at p. 350 and the explanation by the same judge in *Photo Production Ltd. v. Securicor Transport Ltd.* [1980] AC 827, at p. 849). However the distinction is expressed, it is a real and significant one.

- 68.** The extension of rules governing contributory negligence, contribution or satisfaction as between wrongdoers to those whose liabilities lie other than in damages would produce strange and unjust results. Where a plaintiff's claim is for a remedy by way of damages, there is a logic to ensuring that all persons who have contributed to the loss should share in the responsibility of contributing their share of the recoverable damages. This allows justice to be done as between the defendants without any consequent prejudice to the plaintiff. To take a simple example if P is injured in a road traffic

accident caused by the negligence of D1 and D2, D1 and D2 have each contributed to P's injury, and each should be required to pay damages reflecting their respective contributions to that loss. If one is sued, it should be possible for it to recover the appropriate share from the other, and if it is not possible to do so, to obtain a deduction reflecting that share from the damages payable to the plaintiff. Indeed, the concern that where D1 settles his claim with P it should have available to it a mechanism for recovering from D2, D2's share of the liability was an important factor driving the introduction of CLA. The pre-existing common law applying a version of *ex turpi causa non oritur actio* had operated to prevent D1 from recovering any contribution from D2 in this situation (*Merryweather v. Nixan* (1799) 8 TR 186, 101 ER 1337).

- 69.** This logic, however, does not transfer across to the enforcement of a primary obligation. The plaintiff claiming return of its stolen chattel, or seeking to enforce due performance of the contract it has entered into, is concerned only to obtain a remedy against the person in possession of the chattel or the counterparty obliged to perform the contract. The only way of giving effect to that obligation is to grant the plaintiff its remedy enforcing that obligation. The obligation cannot be spliced or subdivided without denying the plaintiff his legal entitlement and, potentially, unjustly rewarding one of the defendants.
- 70.** Thus, the fact that the plaintiff may have been careless, or that another party may have through its wrongful actions brought about the conditions under which the defendant has the chattel or failed to enter into the contract is neither here nor there : '*[t]he plaintiff cannot, on the ground that he was initially at fault, be penalised by forfeiture of his*

property to one who has no claim to it' (*Joint Torts and Contributory Negligence* at p. 211). It may be that if the plaintiff has incurred a loss by reason of being deprived of the chattel for a period, or by reason of the contract not being properly performed will also wish to claim a secondary remedy by way of damages. When it does so, the question of whether there are persons other than the defendant who have caused secondary loss whose liability should be taken into account may arise. However, insofar as the remedy by way of enforcing compliance with the contract is concerned only one defendant will matter, and the plaintiff's right to its order against that defendant will, if the defendant is responsible for the legal wrong alleged, stand independently of whether other wrongdoers were involved.

71. That the CLA does not generally seek to apportion liability as between different wrongdoers where an order in the nature of enforcement of a legal obligation is sought is clear from the fact that in one specific circumstance it does make such provision. Section 26 indicates that the return of a chattel is not, without express provision to that effect, capable of being viewed as equivalent to a claim for damages, while also demonstrating that the draftsman did not believe that a person who wrongfully withheld delivery of an asset – even if he was himself a wrongdoer – was a *concurrent wrongdoer* with a person who had converted it⁶:

⁶ In 'Joint Torts and Concurrent Wrongdoers' Williams says of a similar provision appearing in his draft statute 'The section means that if D1 converts P's property, and as a result of his sale or gift the property comes directly or indirectly into the hands of D2 who restores it to P, D2 has a claim for contribution (probably for indemnity) against D1 to the same extent as if he had paid damages for conversion, and this whether D2 committed conversion or not' (at p.510).

‘For the purposes of a claim for contribution –

(a) A person who restores property to its true owner shall be deemed to be a concurrent wrongdoer with one through whom he originally claimed the property and who was a wrongdoer in respect of it towards the true owner, and

(b) Such restoration of property shall, as against such wrongdoer, be deemed to be a payment of damages to the extent of the value of the property’

72. On the logic of the Defendants here, this provision was entirely unnecessary. The person holding the chattel without title who is a wrongdoer and the person who sold it to him are joint tortfeasors and therefore concurrent wrongdoers because they were responsible for the same damage reflected in the value to the plaintiff of the asset. Both committed a ‘*wrong*’ and both have caused ‘*damage*’. There was no need to ‘*deem*’ them to be such, and no need to deem the restoration of the asset as a payment of damages given that payment of ‘*damages*’ is not (it necessarily follows from the defendants’ case) the critical indicia of concurrent wrongdoers at all.

Debt and damages

73. This distinction between primary legal obligations and the liability to pay damages only assists the Bank if a claim for debt falls into the former, and not the latter, category.

Superficially a claim for payment of debt looks more like a claim for damages than it does an order for the delivery of a chattel. Money is fungible and a claim for damages and a claim for debt will, if successful, each result in orders for the payment of monies. Unlike a chattel, the debt can be split and shared. It is that similarity, it appears to us, that has caused confusion in the legal analysis of this issue.

74. In our view, a claim for debt clearly falls into the first of these categories. A debt is a definite sum of money fixed by the agreement of the parties as payable by one party in return for the performance of a specified obligation by the other party or upon the occurrence of some specified event or condition (*Chitty On Contracts* (32nd ed. 2015) (“*Chitty*”) at para. 26-008). Although in one sense a claim to recover a debt arises because of a breach of contract, it is quite different from a claim for damages for breach of that contract. Instead it is ‘*a form of specific performance, ensuring that a contract obligation is carried out*’ (*McGregor On Damages* (20th ed. 2018) at paras. 1-004 to 1-005). The rules generally governing a claim for damages do not apply to a claim for payment of a debt: the plaintiff seeking the latter remedy does not need to prove anything more than his performance of the relevant obligation or the occurrence of the event on condition which triggers the obligation of repayment. He does not have to prove loss, the concept of remoteness of damage is irrelevant and the law governing penalties does not apply to the agreed sum (as to the latter see *Pat O’Donnell and Co. Ltd. v. Truck and Machinery Sales Ltd.* [1998] 4 IR 191 at p. 217 to 218 per Barron J.). The plaintiff does not have to mitigate its loss and it is generally able to recover the debt by way of summary judgment (see *Chitty* at para. 26-008). The cause of action is obviously contractual – in that the repayment obligation derives from a legally binding

agreement supported by sufficient consideration – but the remedy is not the secondary remedy of damages for breach of contract. It is, instead, a remedy by way of enforcing compliance with a primary obligation in the contract.

75. The distinction between a claim for debt and a claim for recovery of damages was explained in precisely these terms by Millett LJ. in *Jervis v. Harris* [1996] 1 All ER 303, at p. 307 as follows:

‘The law of contract draws a clear distinction between a claim for payment of a debt and a claim for damages for breach of contract ... a debt is a definite sum of money fixed by the agreement of the parties as payable by one party to the other in return for the performance of a specified obligation by the other party or on the occurrence of some specified event or conditions; whereas damages may be claimed from a party who has broken his primary contractual obligation in some way other than by failure to pay such a debt.’

76. It follows that a person who seeks to recover a debt does not have to have suffered any ‘damage’ and, as we have explained, does not claim ‘damages’. They are simply enforcing their contractual right. Although, as Clarke J. stressed in *Moloney v. Liddy* (at para. 5.3) differences in wording between the CLA and other similar statutes in other jurisdictions mean that one must exercise caution in applying authorities from those jurisdictions in interpreting the Irish Act, we think the statement from *Goff and Jones on Restitution* (5th ed. 1998), at page 396, cited with approval by Lord Steyn in *Royal Brompton Hospital v. Hammond (No. 3)* [2002] 2 All ER 801 at para. 33 must be both

correct and applicable to the Irish legislation: a restitutionary claim is not one for ‘*damage suffered*’, the suggestion that it is ‘*cannot be justified in principle*’ and this, *a fortiori* must be the case in an action for debt which is quite distinct from an action ‘*for damage*’ (see Goff and Jones *op cit* p. 396 to 397 at fn 14). It is, functionally and in principle, equivalent to a claim for an order requiring a defendant to discharge any primary obligation owed by it to the plaintiff.

77. For this reason, the proposition that a plaintiff seeking to enforce a debt stands to have its claim *reduced* because it also has a claim in damages against another party which is in some way related to that debt, makes little sense. If correct, it would mean that the defendant’s liability to comply in full with a primary legal obligation is avoided or diminished because of the happenstance that another party has committed some separate and independent legal wrong to the plaintiff. This objection does not arise where there are concurrent wrongdoers whose negligence causes damage because it is only the secondary liability to pay damages that is in play, and there is no reason in logic or fairness why one person should have to pay damages in full for an injury that has been partly caused by another. This cannot be said of an action in debt which arises because the defendant has promised to pay a sum of money to the plaintiff. The plaintiff is entitled to hold the defendant to that promise irrespective of what any other party has or has not done. To allow the defendant to escape from the promise because of the actions of another is to enrich it at the plaintiff’s expense.

The ‘same damage’

78. If that is so, that is the end of this case insofar as the CLA is concerned. However, there is another issue following from the last point we have made, that arises here. Even if one assumes that an action for debt is capable of falling within the sections dealing with concurrent wrongdoers, it is necessary to show that in any given case the party against whom recovery of the debt is sought, and the party responsible for negligence giving rise to the incurring of the debt, are wrongdoers in respect of *the same damage*. The entire purpose of the provisions governing concurrent wrongdoers is the sharing of a common liability and is thus dependent upon the damage caused by each wrongdoer being the ‘same’ – not “similar” or “related”” “*The same damage*” does not mean “substantially or materially similar damage” .. *The natural and ordinary meaning of “the same damage” is controlling*” (per Lord Steyn in *Royal Brompton Hospital v Hammond*, at para 27 (original emphasis)).

79. If, as we consider to be clearly the case, a person who seeks to recover a debt does not bring an action for ‘damages’, and if, more importantly, they need establish no ‘damage’ as a precondition to the bringing of their claim, the proposition that the person who does not pay the debt is responsible for ‘*the same damage*’ as a party without whose negligence the debt would not have been incurred must be wrong. To put it another way, if a plaintiff in an action for recovery of debt is not claiming ‘damages’ it must follow that his claim against a third party but for whose actions it is alleged the debt would not have been incurred (which is a claim for ‘damages’) cannot be said to be in respect of the ‘*same damage*’. They are legally distinct because the object of the proceedings is different, and they are factually distinct because one is for the recovery

of debt and the other for damages to compensate for a loss where (and to the extent that) the debt is not recovered.

80. Both ultimately are directed to recovery of at least some of the money, one directly and the other indirectly, but as Lord Hope neatly put it in *Royal Brompton Hospital v. Hammond* (at para. 47) ‘*the mere fact that two or more wrongs lead to a common result does not of itself mean that the wrongdoers are liable in respect of the same damage*’. A claim for damages for personal injury, and a claim against a solicitor in negligence for allowing a claim for personal injury to be struck out seek, indirectly, the same outcome – recovery of an amount reflecting the injuries suffered by the plaintiff. They are, however, of a materially different character and for that reason are not in respect of the same damage (per Clarke J. in *Moloney v. Liddy* at para. 5.6). Precisely the same logic applies to an action in debt, and an action in negligence alleging that the defendant caused the debt to be incurred.

81. In *Royal Brompton Hospital v. Hammond* Lord Bingham expressed the test in terms of whether the two alleged wrongdoers were under what he termed ‘*a common liability*’ or whether they were ‘*independently liable*’ (at para. 7). The judgment of Clarke J. in *Moloney v. Liddy*, to which we return shortly, makes it clear that the answer to that question depends on the nature of the claim advanced by each. In *Royal Brompton Hospital v. Hammond* a claim under a construction contract by an employer against a contractor for delay in performing a contract, and against an architect for negligent advice were independent, and therefore not common, because the damage recovered in the claim against the contractor was the damage caused by delay while that against the

architect was the damage arising from his negligence which changed the employer's position detrimentally against the contractor. However, the architect's negligence did not cause delay. Both caused financial damage to the employer connected to the construction project, but the different nature of the loss caused by each meant that they did not cause '*the same damage*'. This, it must be emphasised, does not mean that the wrongdoers must both be liable under the same cause of action or even heading of legal liability. It does mean, however, that each wrongdoer is compensating the plaintiff for the same thing. In this case, they are not. Aside from the (significant) consideration that the Defendants are not being called upon to compensate the Bank at all, but rather to return its money, CBRE was compensating for the consequence of its negligence, that is the loss arising from the valuation. That may have been reflected in at least part of the irrecoverable portion of the debt owed by the Defendants. It may have been directed to the same end, but was and is *not* the same loss.

82. A simple analysis of the relationship between the two types of claim explains why this must be so. If CBRE negligently valued the property, and if the Bank would not have extended a loan to the defendants had it not received that valuation, it can certainly be argued that CBRE is liable to the bank for the extent of the loan that is not recovered from the defendants. However, the most prevalent theory would suggest a more complex analysis based upon the relationship between the extent of the overvaluation and the value of the loan granted to the borrower (which necessarily includes the extent to which recovery has been made or is possible). Either way, it must be the case that recovery from CBRE did not affect the legal liability of the Defendants under the loan agreements. The (allegedly) negligent conduct of a valuation by CBRE did not release

the Defendants from any part of their loan obligation. They were advanced a loan by the Bank and they were legally obliged to repay it. The fact that the Bank recovered monies from CBRE was a matter between the Bank and CBRE. In point of fact in this case the Bank did credit the defendants with the benefit of the settlement with CBRE. That was a matter for it. There is no sense in which it was required to do so. Not to do so, would have resulted in a windfall to the Bank had it obtained full recovery from the defendants, but that windfall was a detriment to CBRE not the defendants who remained liable for the debt. It would have resulted not of any failure in the allocation of responsibility as between the defendants and CBRE, but as a consequence of CBRE's failure to require reimbursement to the extent that monies were recovered from the Defendants. To put it another way, had the action against CBRE come to trial it would have been incumbent on the Bank to establish that it could not recover fully against the Defendants. Absent such proof, the Bank could not have established any loss. No such requirement was imposed on the Bank in seeking to recover the debt from the Defendants. It was a matter for the Defendants to sue CBRE if they believed they had any cause of action against it. All of this is a consequence of, and demonstrates, the dissociation of the claim against CBRE for negligence and the claim in debt against the Defendants.

The cases

- 83.** The reasoning of the trial Judge in reaching a different conclusion reflects that of Laffoy J. in *ACC Bank plc v. Malocco* [2000] 3 IR 191 (“*Malocco*”) and of Barniville J. in *AIB v. O’Reilly* [2019] IEHC 151, [2019] 3 IR 722 (“*O’Reilly*”) but differed from the view

adopted by Finlay Geoghegan J. in *Histon v. Shannon Foynes Port Company* [2006] IEHC 190, [2007] 1 IR 781 (“*Histon*”). So far as we are aware, neither this Court nor the Supreme Court have ruled on this issue.

84. *Malocco* appears to have been the first case in which the Courts in this jurisdiction considered whether an action to recover a debt was capable of coming within those provisions of the CLA addressing the relationship between concurrent wrongdoers. There, one of the issues in summary ‘well charging’ proceedings brought by ACC Bank was whether the settlement by the plaintiff bank with one of two joint creditors operated to release and discharge the other. At common law, the position was that a document which simply released one co-debtor without expressly or impliedly reserving the creditor’s rights against the others would wholly extinguish those rights. If section 17 of the CLA (which I have quoted above) applied, a settlement agreement with one of several joint debtors discharged the others only if an intention to that effect was indicated. Laffoy J. concluded that section 17 CLA did govern the relations between the parties and that because no documentary evidence had been adduced as to the intention indicated by the settlement agreement with the other debtor, it would not be appropriate to grant relief of a summary kind against the defendant.

85. In reaching that conclusion, Laffoy J. referred to section 17 CLA, the definition of wrong in that Act, and section 35(1)(h). She explained her reasoning as follows (at p. 201):

‘What s.17 means in the context of a wrong which is a breach of contract in the form of non-payment of a debt for which two debtors are concurrently liable and of a settlement agreement with one of the debtors is that, if the settlement agreement indicates an intention that the other is to be discharged, the settlement agreement effectuates his discharge, but, if it does not, he gets the benefit of the settlement agreement and his liability is reduced accordingly. In the application of s.17 to such a situation, in my view it is immaterial whether the debtors are jointly liable or jointly and severally liable for the debt, although in the instant case it seems to be common case that the defendant and his wife were jointly and severally liable. As to whether an accord or settlement agreement ‘indicates’ within the meaning of that word in s.17 that a co-debtor is to be discharged, it seems to me that it does so indicate if such outcome is agreed expressly or by necessary implication’.

86. It is unclear from the report to what extent the plaintiff engaged in its argument with the detail of the CLA, and indeed one cannot but think that, if it had, Laffoy J would surely have concluded that issue of whether it applied to actions for debt was not a matter sufficiently straightforward to be addressed in a summary application. However, for present purposes it is notable that Laffoy J. appears to have assumed that the critical issue in the determination of the scope of section 17 was whether the debtors were (a) wrongdoers and (b) concurrently liable for the debt. The use of that language may have suggested that if the answer to both these questions was in the affirmative, they were concurrent wrongdoers. That, of course, is not correct. The Court does not appear to have been referred to the definition of concurrent wrongdoers in section 11(1), and the

requirement that the wrongdoers be liable for the ‘*same damage*’ and indeed to section 34(1) which, as I have explained, is critical to the understanding of the relationship between ‘*damage*’ and ‘*damages*’.

87. For our part, we think the conclusion that section 17 is applicable to the relationship between a creditor and one or more joint debtors is surprising. Leaving aside all of the points we have made earlier, Part III of the CLA (in which the provision appears) describes itself as being concerned with ‘*concurrent fault*’, a term not evidently relevant to the relationship between such parties. Nothing else in the Act suggests it was intended to change the rules governing the relationship between joint creditors. Indeed, in *Royal Brompton Hospital v. Hammond* Lord Hope said (at para. 37) of the Civil Liability (Contribution) Act 1978 in that jurisdiction:

‘The Act is concerned only with liability for damage, so the rules which apply to contribution between two or more persons who are liable for the same debts are not affected by it’.

88. *Malocco* was not referred to in *Histon*, perhaps because on first glance they were concerned with different problems. There the plaintiff sued for arrears of salary, and the defendant pleaded a defence of contributory negligence under section 34 CLA. Finlay Geoghegan J., noting the novelty of the issue, rejected the defence in concise, but it follows from what we have said above, correct terms. She said (at paras. 20 and 21):

‘The submission made on behalf of the plaintiff that s.34(1) is confined to claims made in respect of damage allegedly suffered by a plaintiff by reason of alleged wrongs (i.e. a tort, breach of contract or breach of trust in accordance with s.2 of the Act of 1961) is correct. It is of the essence of s.34(1) that the damage allegedly suffered by the plaintiff is caused partly by the negligence or want of care of the plaintiff and partly by the wrong of the defendant. This presupposes that the claim must be in respect of damage allegedly suffered by the plaintiff by reason of an alleged wrong (as defined) of the defendant.

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

- 89.** If that analysis is correct – as we think it is – it follows that here, the Bank’s claim against the Defendants is equally not a claim for breach of contract and that, accordingly, the claim is not one for any “wrong” committed by the Defendants, thus excluding the operation of Part III CLA.

90. In *O'Reilly*, Barniville J. does not appear to have been referred to either *Malocco* or *Histon*. There the issue of whether a borrower from the plaintiff bank and a guarantor of that debt were concurrent wrongdoers arose in the context of summary proceedings by the Bank against the guarantor to which the latter sought to join the borrower as a third party. Noting that each was a 'wrongdoer' by reason of their respective failures to comply with their contractual obligations, Barniville J. explained the essential reason for his conclusion that the borrower and the guarantor were concurrent wrongdoers, as follows (at para. 38):

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

case of the Borrower's failure to repay the loan and in the case of the Defendants' failure to pay on foot of the guarantees."

91. It is important in considering this passage to observe that the essential point being made is not directly applicable to the instant case. As in *Malocco*, the issue arose in the context of two persons with a liability for the same debt, though in *O'Reilly* the liability of one was, *qua* guarantor, a contingent one. However, that Barniville J. viewed this as important is clear from his consideration of the judgment of Clarke J. in *Moloney v. Liddy*. There, the question arose in the context of a claim in negligence against a firm of solicitors for negligence in the form of delays in the prosecution of an action which resulted in its dismissal. The action thus dismissed was against architects whom the plaintiffs alleged had been negligent in connection with their work on the construction of a house for them. The solicitors joined the architects as third parties, and their application to set the order to that effect aside depended on whether they and the solicitors were concurrent wrongdoers. Clarke J. held that they were not, as the damage in respect of which each was liable was not the same. The damage for which it was said the solicitors had to compensate the plaintiff was the loss of the opportunity to bring effective proceedings involving an assessment of the prospect of success enjoyed by the claim that had been dismissed, while the claim against the architects was one in which the Court would consider all issues of liability and quantum which arose. Barniville J. distinguished *Moloney v. Liddy* from the case before him, as in *O'Reilly* there was no question of the liability of one of the wrongdoers being merely that of loss of opportunity. Instead, they were in respect of '*the same damage*'.

92. It will be immediately obvious that this case is far closer to *Moloney* than to *O'Reilly*.

In answering the question presented in *Moloney*, Clarke J. did not determine the matter by reference to a generalised description of 'the damage' which was ultimately, in both the action against the solicitor and that against the architect, the loss that the plaintiff had sustained as a result of the latter's negligence. Instead he focussed on the 'character' of the claim. One was for loss of opportunity and the other for direct loss caused by the architect's negligence. On our view, that must be correct. The 'damage' caused by the wrong cannot be separated from the basis on which it is sought to recover it. If an action for loss of opportunity and an action for direct professional negligence against an architect are not in respect of the 'same damage' (even though both will ultimately go to compensate the plaintiff for the same essential loss), it is impossible to see how an action for the recovery of a debt and an action for damages can be in respect of the 'same damage' simply because both may result in returning to the plaintiff in whole or in part the monies it lent to the defendants. *O'Reilly*, it might be said, was different because both claims involve actions to recover the same debt which the defendant and third party had agreed to repay, albeit under different conditions.

The Judge's analysis and submissions of the Second and Third Defendants on this appeal

93. Citing *O'Reilly* and noting that in *Histon* Finlay Geoghegan J. was not referred to Laffoy J's decision in *Malocco*, Twomey J. said that the reasons he found that the CLA applied to 'debt collection cases' in general, and that the Defendants and CBRE were concurrent wrongdoers for the purposes of Part III of the Act, were:

- (i) Noting the definition of '*damage*' in the CLA he said that where a defendant fails to repay a loan the plaintiff suffers a loss, and the concept of '*damage*' in the 1961 Act accordingly included '*loss of money*' (Judgment, para. 324).
- (ii) In any event, a loss of property was encompassed within the term '*damage*' (*id.* and para. 325).
- (iii) He further observed that '*wrongs*' included '*breach of contract*' and that the non-payment of monies in this case was a breach of contract (Judgment, para. 326).
- (iv) If the legislature had intended to exclude one type of '*civil liability*' from the provisions of the CLA, it would have so stated (Judgment, para. 327).
- (v) The bringing of such debt cases within the CLA was consistent with the purpose of the Act, which was to encourage settlement of cases (Judgment, para. 328).
- (vi) CBRE and the Defendants were responsible for the '*same damage*' namely the loss caused to the Bank arising from the failure of the Defendants to repay the loan. In this regard, the Judge stressed the fact

that the monies received from CBRE had been applied by the Bank in reduction of the loan (Judgment, paras. 330 to 334).

94. In their supplemental submissions, the Second and Third Defendants advance a detailed and sophisticated justification for the conclusions thus reached by the Judge. They begin by saying that *Histon* is distinguishable having regard to the fact that no authority was cited to the Court, the case was decided in a unique procedural setting, and the High Court was affected in its conclusion by the fact that the decision was on a preliminary issue in a summary application. They emphasise that the fact that the Bank applied the CBRE settlement sum to the Defendants' account renders the foundation of the case different from that in *Histon* and they contend that the decisions in *Malocco* and in *O'Reilly* present a considered and correct analysis of this issue.

95. From there, the point is made that while *McGregor* may characterise a claim in debt as one for specific performance, this ignores discrete types of contracts for debt and, as relevant to this case, the difference between a simple debt claim and a claim based upon what is described as '*a securitised contract which itself is predicated on a condition precedent referencing the value of the security*'.

96. They note that the UK equivalent of section 34 has been applied to claims by banks for damages from valuers where their overvaluations have formed part of lending decisions, observing:

“To suggest that the Act and s. 34 have no application to the within proceedings would be to take away one side of the triangle which O’Donnell J. used in Defender to explain the intricate mechanism established by the Act and defeat what O’Donnell J. described as “an essential symmetry in the Act which is consistent with its logic”.

97. These Defendants then refer to the decisions of the Court of Appeal ([1998] Ch. 466) and of the House of Lords ([2000] 2 AC 190) in *Platform Home Loans v. Oyston Shipways Ltd* and that of the Supreme Court here in *KBC Bank Ireland plc v. BCM Hanby Wallace (A Firm)* [2013] IESC 32, [2013] 3 IR 759 (*‘KBC’*) (where Fennelly J. cited with approval the decision of the House of Lords in *Platform Home Loans*). *KBC* establishes that a lender may suffer a finding of contributory negligence in respect of its investigation of a loan transaction: in that case the irrecoverability of loans was in part because the plaintiff bank advanced loans to persons who were ultimately unable to repay (and whose credit-worthiness had not been adequately assessed by the bank), and accordingly the defendant solicitors (who had negligently failed to put in place security before the advances were made as they had been retained by the bank to do) were entitled to a finding of contributory negligence against the bank. The Second and Third Defendants here contend that similar reasoning should be applied to this case where the Bank argued that but for the valuation the lending would not have occurred.

The errors in the analysis of the Judge and Second and Third Defendants

98. We think it clear from the above why we believe the critical features of the analysis of the Judge in his judgment in this case, and of the submissions advanced by the Second and Third Defendants in support of it are misplaced. They nonetheless afford a useful focus for gathering together the essential points:

- (i) The CLA Act is concerned with ‘*damage*’ that can be recovered by way of an action for damages. It is not concerned with an action in the nature of a claim for specific performance of a contractual obligation. These are fundamentally different claims. The Defendants’ argument involves not merely characterising a claim in debt as something other than the claim to enforce a primary contractual obligation, but begs the question (a) as to whether all such claims are within the relevant provisions and (b) if so how this can operate in the absence of provisions of general application of the kind made in respect of the return of a chattel in section 26 CLA and (c) if not how exactly that distinction is to be found within the CLA.

- (ii) If ‘*damage*’ as the term is used in the definition of concurrent wrongdoers in section 11 CLA does operate so as to bring a claim for debt within the provisions governing concurrent wrongdoers, an entire swathe of the applicable regime cannot be operated in relation to such claims without effectively rewriting significant parts of the CLA. This is because Part III of the CLA assumes throughout a claim *for damages*. Contrary to the suggestion in these Defendants’ submissions, it is not simply one section that is affected, but many. For the Defendants’ contention to be correct the definition of a contribution

action has to be changed from one dependant on a claim for ‘*damages*’ to something else entirely (sections 21, 22(1) and 23(1)). The effect of the provisions of section 14(2) and (3) (several judgments) would also have to be modified as would the provisions of section 18 (cap on judgments in more than one action against concurrent wrongdoers). The definition of ‘*satisfaction*’ in section 16 – as the “*payment of damages*” – would be similarly affected. If a claim in debt is to be brought within these provisions this can only occur by redefining the term ‘*damages*’ as it appears in each of these provisions to mean something it has *never* meant, and to equate it with ‘*damage*’ (which the draftsman plainly viewed as a different concept).

- (iii) The argument advanced by these Defendants thus assumes that the CLA effects indirectly and through the use of language that is not apt so to do a radical change in an area of law – either the enforcement of primary contractual obligations generally or that of recovering simple contract debts in particular – without clearly so stating. There is nothing in the text or context of Part III CLA to suggest it was intended to capture claims for debt, and much to indicate that it was not.
- (iv) In any event, the loss arising from non-recovery of a debt and the loss arising from the alleged negligence of a party said to have wrongfully enabled the debt to be incurred are entirely different and could by reason of that distinction never be categorised as the ‘*same damage*’ for the purposes of the definition of concurrent wrongdoers. The claim against CBRE depends upon the debt being

irrecoverable from the Defendants. The claim against the Defendants is dependant solely upon the monies having been lent and not paid back.

99. *Platform Home Loans* to which the Second and Third Defendants refer presented an issue as to how contributory negligence should be quantified under the relevant English statute. There, the claim was also by a lender against a valuer. The principles governing the quantification of a claim of this kind had by the time of this case been settled by the decision of the House of Lords in *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 (“SAAMCO”). Essentially, that approach required the Court to first establish the basic loss of the lender which is determined by reference to its position had it not entered into the transaction in question and its position after the transaction (normally the amount lent less the amount repaid and realisable value of any security). From there, and second, the Court ascertains if that basic loss exceeds the amount of the overvaluation (that is the difference between what the valuation was, and what it ought to have been). If the basic loss does not exceed that difference, there is no recovery. If it does, the recovery is limited to the extent of the overvaluation. Where a valuer is negligent “*the loss for which he is responsible is that which has been caused by the valuation being wrong*” (per Lord Hoffmann in *SAAMCO*, at 221G). In *Platform Homes*, the question was whether the reduction to the plaintiff’s damages as a result of its contributory negligence should have been applied to the plaintiff’s basic loss or to their loss at the second stage. The Court of Appeal decided that the deduction should be made at the point of calculation of the plaintiff’s basic loss, and the House of Lords (Lord Cooke dissenting) found it should be done at the second stage.

100.None of this affects the basic principle we suggest, which is that in a claim to recover a debt neither a claim of contributory negligence nor a claim of contribution is possible. Nor is this changed by the security interests to which the Defendants refer : if they wished to bring their own proceedings against CBRE it was a matter for them (and, it should be stressed, not the Receivers) to do so. Indeed, if anything the decision in *Platform Home Loans* shows that far from being concurrent wrongdoers the action against the valuer only sounds in damages to the extent that there has been a failure of recovery against the creditor. In other words, the test assumes that the lender is free to recover from the borrower, the claim against the negligent valuer being triggered only – and only to the extent – of a failure of recovery from the person to whom the monies were advanced. The defendants appear to rely upon this authority with a view to contending that if they can make such a case the effect in this action is to negate the plaintiff’s claim to recover its debt in its entirety. In fact, it says the opposite.

101.As is explained below, some aspects of SAAMCO have recently been revisited by the UK Supreme Court in *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20, [2021] 4 All ER 1. However, valuer cases continue to be approached generally on the basis that the scope of the valuer’s duty is limited by reference to the consequences of the valuation provided being incorrect, with recoverable damages being limited to the loss flowing from that fact.

102.That was also the approach taken by Clarke J in the High Court in *ACC Bank plc v Johnston*, an action brought by ACC against a solicitor who had been retained by it in a lending transaction in which he had accepted undertakings to provide security which

were not performed, leaving ACC without the agreed security. ACC advanced its claim on the basis that, if it had been aware of the fact that the agreed security was not available, it would not have advanced the loans i.e. as a “*no-transaction case*”. The High Court accepted that, if the solicitor had not been negligent, ACC would not have allowed the loans to be drawn down: [2010] IEHC 236, [2010] 4 IR 605. However, it did not follow that ACC was entitled to recover all of its losses on the lending from the solicitor. In a further judgment ([2011] IEHC 376), Clarke J analysed *SAAMCO*, from which it was clear that the considerations identified by Lord Hoffman “*may operate to reduce damages (to those which can properly be said to flow from the negligence) below the actual loss on the transaction concerned even though the transaction might not have gone ahead in the absence of the relevant negligence*” (para 7.14). Any recovery by ACC above the value of the security which should have been but was not obtained would have involved a “*windfall gain*” (para 7.22). The damages ultimately awarded against the solicitor represented only a fraction of ACC’s actual loss on the lending.

103. In some circumstances, of course, the limitations on recoverable damages arising from *SAAMCO* may have no operative effect. *Prima facie*, that would have been the position here in respect of the Bank’s claim against CBRE. As already noted, CBRE had valued the Kilpeddar Lands at €56 million as of July 2007. On the Bank’s case, the real value of the Lands at that time was €29,200,000.⁷ Thus, if the Bank’s action had proceeded to trial and it had succeeded in establishing the liability of CBRE, and if it had

⁷ See paragraph 6 of the Bank’s Replies to Particulars of 12 August 2014 in the CBRE proceedings

persuaded the Court that it was indeed a “*no transaction*” case, the *SAAMCO* principles would not in practice have limited the Bank’s recovery. In our view, however, that does not take away from the fact, even if one assumes (contrary to the view expressed above) that the Bank’s claim against the Defendant is a claim for “damage”, it is not for the “*same damage*” as the claim against CBRE (*and vice versa*). The claim against the Defendants is for repayment of the outstanding balance of the Loan; the claim against CBRE was for the loss sustained by the Bank as a result of the alleged overvaluation of the Kilpeddar Lands. These are claims of a different character, for amounts that are calculated on a different legal basis, even where the amounts potentially recoverable may be the same.

Implications for the legal relationship between joint debtors and debtors and guarantors

104. This case is not concerned with the manner in which liability as between joint debtors or debtors and guarantors should be determined. However, having regard to our finding that an action to recover a debt is not within the contemplation of those provisions of CLA addressing the relationship between concurrent wrongdoers and, as a result, our conclusion that both *Malocco* and *O’Reilly* were wrongly decided, we should make clear that this does not in any sense have the consequence that in either of these situations a creditor is entitled to effect double recovery nor does it mean that a compromise with one debtor in these circumstances has no implications for another party liable on the debt. Instead, the relevant common law rules and applicable equitable principles continue to operate. In the case of joint debtors this means that the

release of one co-debtor in an agreement which did not expressly or impliedly reserve the creditors' rights against the others will wholly extinguish the creditor's rights. In the case of the relationship between guarantors and debtors issues as to whether and if so at what point of time in the context of a particular guarantee the guarantor has a right to indemnity or contribution from the principal debtor, those rights, the guarantor's rights to subrogation, and indeed its rights against co-sureties fall to be determined in accordance with those equitable principles developed '*to ensure that the person primarily liable should bear the whole burden in relief of others*' (*Re Eylewood Ltd.* [2011] 1 ILRM 5 at para. 35 per Finlay Geoghegan J.). These were summarised before the decision in *Reilly* (and with enviable clarity) in Breslin and Corcoran, *Banking Law* (4th Ed 2019) at paras. 14-19 – 14-27.

105. This leads to the issues around the appeal regarding the CLA as argued in the parties' initial submissions.

Proof of wrongdoing

106. The point made by the Bank in its submissions to the High Court was that the Defendants and CBRE were not capable of being concurrent wrongdoers but, if they were, that it was a matter for the Defendants to prove (a) that CBRE had been negligent in its valuation and (b) that the effect of that negligence was to negate the Bank's entitlement to recover any of its debt. It based this proposition on the fact that it is the Defendants who were asserting that the Bank was not entitled to recover the debt, and that therefore it must establish each element of that claim.

107.In response, the Defendants said that they did not have to prove that CBRE was negligent because it was the Bank's own position that CBRE was negligent and because it had instructed counsel to sign pleadings making that allegation. That being so, they said, they did not have to prove the extent to which CBRE had improperly valued the asset because on the facts here had the valuation not been obtained, the monies would never have been advanced. Therefore, the operation of section 35(1)(h) was, having regard to section 34 unusually clear.

108.In reality, these arguments reduced themselves to points around the evidential burden. When the Bank says that the Defendants would have to '*prove*' that CBRE was negligent and that the negligence was such that it operated to sever the liability for the debt, they mean (a) that the Defendants would have to adduce sufficient expert evidence to generate a *prima facie* case to that effect which would then shift the burden to the Bank to establish otherwise and (b) that they would have to establish to the same standard that the extent of the undervalue was such as to eliminate the debt according to the methodology adopted in *SAAMCO*.

109.Although the Bank was inclined to present these issues as being simple, and indeed noticeably cited no authority in support of either proposition, it is our view that their resolution is more complex. Given the conclusion we have reached on the issue of whether the Act applies it is in one sense not necessary to consider them. However, the issues are central to the case as argued, and indeed it is because of the second question that it was necessary to consider the applicability of the CLA at all. We therefore propose to say something about each.

110. Viewing the matter narrowly and from the perspective of an orthodox application of the rules of evidence, the Bank's contention on the first question has obvious force. It is the Defendants who wish to contend that the Bank's claim is reduced, and their argument whereby they seek to do so is predicated on the claim that CBRE was negligent in the manner in which it conducted the valuation. Therefore, it would seem to follow as a matter of general principle that they face the burden of establishing that claim. In the case of an assertion of professional negligence, this usually requires expert evidence that the professional has indeed been negligent.

111. The counterpoint to this argument is, we think, more substantial than the Bank's submissions acknowledge. While the Defendants did not adduce evidence that CBRE had been negligent, they did adduce evidence that the Bank had itself not merely entertained the view that CBRE was negligent, but had proceeded to institute legal proceedings on that basis. It seems reasonable for the Court to assume that those proceedings were brought on foot of expert evidence to that effect. In the context of a claim involving concurrent wrongdoers, the proposition that the Defendants must prove against the Bank a claim that the Bank itself had advanced by way of legal action against another wrongdoer is, at first glance, surprising. While section 32 CLA makes it clear that where an action is brought against two persons as concurrent wrongdoers each is entitled to call evidence against the other, the reality is that had the proceedings been heard as a claim by the Bank as against the Defendants and CBRE, the Defendants could have relied *as against the Bank* upon the plea advanced by the Bank in contending that CBRE was a wrongdoer - had the Bank subsequently denied that fact. The issues in the trial are defined by the pleadings, and a plaintiff is estopped from denying in a

trial a claim made in those pleadings without, at the very least, applying to amend the pleadings to withdraw that claim (see, for an example of estoppel by pleading *Moran v. Workers Union of Ireland* [1943] IR 485). Each defendant to an action is entitled to rely *as against the plaintiff* upon the pleas made by the plaintiff itself.

112. Even if the plea had been withdrawn and the proceedings settled between the Bank and CBRE following the delivery of the pleadings before trial or for that matter before the Bank went into evidence, it can certainly be argued that the Defendants could have relied upon the fact of that plea to at least shift the evidential burden on to the Bank to disprove the claim they had previously advanced. Given that all of this would be true in an action in which the plaintiff and the alleged wrongdoers were sued in one action, and given that the entire thrust of the CLA is directed to ensuring that this is how such claims against concurrent wrongdoers should be processed, a strong case can be made that the situation should not be any different simply because two separate actions were brought. In those circumstances - but for one consideration - we think the Bank would have faced a compelling claim that it was precluded by its own pleading from adopting a position in these proceedings that was contrary to the stance it had adopted in the litigation against CBRE. Here it must be recalled there was a plea in legal action, the obtaining (through the settlement agreement) of an advantage based upon that assertion, and (insofar as the defendants did not themselves adduce evidence of CBRE's negligence because of the position adopted by the bank in the proceedings against CBRE) detrimental reliance upon that plea.

113. Had the allegation made by the Bank in its claim been one of simple fact, we think that the Defendants submission on this issue would thus have been correct and conclusive. However, an allegation of professional negligence has at its heart not a claim of fact, but one based upon judgment and opinion. The Bank's own opinion that CBRE had been negligent would, in evidence, not have been admissible unless supported by expert testimony. That being so, at least as the law in this jurisdiction presently stands, the adoption of such a position – whether in litigation or otherwise – could not in itself afford the evidential basis for a finding dependent upon opinion evidence (see for an analogous problem *Ranbaxy Laboratories Ltd. v. Warner Lambert* [2005] IESC 81). Thus, although it might be said here that many features of an estoppel by pleading are present, it seems to us that in order for the Court to make any order on the basis that CBRE was actually negligent, it would have had to have received from the Defendants some expert evidence to that effect.

Allocation of damages

114. If this is mistaken the next issue is whether the Defendants could nonetheless have sustained a claim that the wrongdoing of CBRE entirely resolved them of legal responsibility for the debt and/or that such responsibility was properly greater than the €5,000,000 deduction effected by the Bank to the Defendants' account. This issue can be netted down further: if the question was merely the allocation as between the Defendants and CBRE of the quantum of the claims against these parties, the Defendants would clearly fail in any attempt to maintain that the amount of the debt they had to pay should be *reduced* below that claimed in the action. This would require

some evidence from which the Court could deduce the extent of the overvaluation in the CBRE report, and there was none. However, if we are wrong in the preceding conclusion the defendants would not necessarily need evidence to show that their liability should be *eliminated* and that indeed is the case they make.

115. It is for this reason we have felt it necessary to address the question of whether actions to recover a debt are within the scope of the Act at all. Even if we are wrong in the conclusion we have reached on that issue, much of what we have said above remains relevant to this question. Viewed simply as a matter of *blameworthiness*, the conclusion that a person who receives a loan and does not repay it is entitled to resist recovery proceedings in full because of negligence by a third party would be, to put it at its mildest, surprising. The refusal to repay the loan is a deliberate act resulting in the enrichment of the creditor at the expense of the debtor. To say it is less ‘*blameworthy*’ than an act of negligence to the point that the negligent valuer must bear the entire of the loss caused by the failure of the defendants to repay their liabilities, and the Defendants themselves who received the loan monies must bear none, would border on the absurd.

116. In paragraph 20 above we set out the Judge’s interpretation of section 17(2) CLA. Noting that we disagree with his analysis of whether the claim for debt falls within the provisions of Part III CLA, we nonetheless agree with his analysis of this sub-section. On the assumption (contrary to the conclusions already expressed) that the Defendants and CBRE are indeed concurrent wrongdoers for the purposes of Part III CLA, the Bank’s claim against the Defendants is to be reduced by the amount that CBRE (as the

“*wrongdoer with whom the release or accord was made*”) would have been liable to contribute if the Bank’s total claim (i.e. the entirety of the Defendants’ liability to the Bank) had been paid by the Defendants and a claim for contribution had then been made by them against CBRE. That is the relevant measure. It is *not* what the Bank would or could have recovered if it had pursued its claim against CBRE to judgment. As the Judge observed, it is only if CBRE would have had a contribution liability in excess of €5 million that any reduction to the Bank’s claim against the Defendants would arise. In our view, there is absolutely no basis on which it could be suggested that CBRE could have any such liability to the Defendants. Indeed, we find it impossible to see a basis on which CBRE could be required to make *any* contribution to the Defendants, given that the effect of such contribution would be to relieve the Defendants of a contractual obligation freely undertaken by them and confer a windfall benefit on them insofar as they would be relieved, at least in part, from the obligation to repay monies of which they had had the benefit.

117.In any event (and explained above) the Defendant’s analysis does not reflect the established basis for determining the quantum of a claim against a negligent valuer which is directed to the difference between the actual value of the property and the valuation provided by the valuer. This was the precise point in *SAAMCO*, where Lord Hoffmann explained the relevant principle thus (at p. 214):

‘[A] person under a duty to take reasonable care to provide information on which someone else will decide upon a course of action is, if negligent, not generally regarded as responsible for all the consequences of that course of

action. He is responsible only for the consequences of the information being wrong. A duty of care which imposes upon the informant responsibility for losses which would have occurred even if the information which he gave had been correct is not in my view fair and reasonable as between the parties. It is therefore inappropriate either as an implied term of a contract or as a tortious duty arising from the relationship between them.

The principle thus stated distinguishes between a duty to provide information for the purpose of enabling someone else to decide upon a course of action and a duty to advise someone as to what course of action he should take. If the duty is to advise whether or not a course of action should be taken, the adviser must take reasonable care to consider all the potential consequences of that course of action. If he is negligent, he will therefore be responsible for all the foreseeable loss which is a consequence of that course of action having been taken. If his duty is only to supply information, he must take reasonable care to ensure that the information is correct and, if he is negligent, will be responsible for all the foreseeable consequences of the information being wrong.'

118. This is the origin of the formula applied in *Platform Home Loans*: where the claim is against a valuer for the negligent provision of information the court must first identify the plaintiff's loss (the loan advanced minus recovery) and then the difference between the proper value and that provided by the valuer. It is only if the latter is greater than the former (as it was in one of the cases in *SAAMCOs*) that there is full recovery. That

being so, the calculation of what that liability was could not be achieved without some expert evidence. There was no other way of determining the foreseeable consequence of the information being wrong as opposed (as the Court of Appeal had determined in that case) to simply awarding the unrecovered part of the loan on the thesis that but for the valuation it would not have been granted.

119. We are conscious that since this case was argued, *SAAMCO* has been qualified somewhat by the UK Supreme Court in *Manchester Building Society v. Grant Thornton* and, in particular, that the distinction drawn in the speech of Lord Hoffman in *SAAMCO* between ‘*advice*’ cases and ‘*information*’ cases no longer holds good, with all cases now being resolved by reference to the scope of the duty of care undertaken by the professional. However, valuer cases continue to be approached generally on the basis that the scope of the duty is limited by reference to the consequences of the information provided by the valuer being incorrect (see para. 20 of the judgment of Lord Hodge) and in those cases where the scope of the duty is not so limited, it is a matter for the person asserting a breach to establish that fact. This, again, requires evidence. As Lord Leggatt explained in the course of his judgment in *Manchester Building Society v. Grant Thornton* (at para. 93) cases in which a professional adviser is liable for all the foreseeable consequences of a commercial transaction entered into as a result of negligent advice are likely to be rare, and it is the profession itself which provides the answer.

REMAINING GROUNDS OF APPEAL

A - GROUNDS RELIED ON BY THE SECOND AND THIRD DEFENDANTS

The Meaning and Effect of the Mortgage

120. The Judge held that the effect of clause 5(c) of the Mortgage was that the prior consent of the Bank was required for the sale of the Kilpeddar Lands. Clause 5(c) provides as follows:

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

In the Judge’s view, the injunction not “*to part with possession or occupation*” amounted to a stand-alone prohibition on parting with possession which captured the sale of the Lands given that such sale would involve parting with possession (Judgment, para 250)

121. The Second and Third Defendants say that the Judge was in error. They argue, firstly, that clause 5(c) has no application to the sale of the Lands and argue in the alternative that by entering into the Compromise Agreement, the Bank consented to the sale in any event. As regards the interpretation of clause 5(c), the Second and Third Defendants do

not engage with the Judge's analysis, namely that the sale of the Lands necessarily would involve parting with possession of them and therefore is encompassed by the sub-clause. Instead, the focus of their argument is on their right of redemption *qua* mortgagor (written submissions, paras 5.1- 5.5), the argument being that a requirement for mortgagee consent to sale would constitute an impermissible and unenforceable "*clog on redemption*". In the circumstances here, that argument is an entirely theoretical one. As the Bank observes in its responding submissions (citing Wylie, *Irish Land Law* (6th ed., 2020) at para 13-35) the right to redeem is the right of the mortgagor to get their property back freed and discharged from the mortgage "*by repayment of the capital borrowed and the interest charged on it*". While, no doubt, the Bank and the Defendants intended at the time of executing the Mortgage that it would be redeemed in due course by repayment of the Loan, that never occurred. In any event, we are not persuaded that a requirement for a mortgagor to obtain the prior consent of their mortgagee to a sale of mortgaged property is, of itself, an impermissible restriction on the right of redemption. The *refusal* of consent may do so but that will depend on the circumstances.

122. We note in this context that section 94 of the Land and Conveyancing Law Reform Act 2009 now permits the court to make an order for sale on the application of a mortgagor. Such a power had been conferred by section 28 of the Conveyancing Act 1881 but that section did not apply to Ireland. Notably, other than in relation to housing loan mortgages (and the Mortgage here was obviously not a housing loan mortgage), section 94 takes effect subject to the terms of the mortgage. In other words, the application of the section can be excluded. The terms of section 94 do not appear to us to be consistent

with any suggestion that mortgagors have an untrammelled right of sale that cannot be limited by the terms of the mortgage.

123. Before addressing the Judge’s conclusions on this issue, we would observe that no issue appears to have been raised at the time that the Bank’s consent to the sale of the Kilpeddar Lands was not required. Thus, as of 6 November 2013⁸ – after the execution of the Compromise Agreement – the Defendants solicitors, Gallagher & Company, was writing to the Bank seeking confirmation whether it approved or disapproved of an “offer” said to have been received for the Lands. In subsequent correspondence with both the Defendants⁹ and their solicitors¹⁰ the Bank made it clear that the sale of the Kilpeddar Lands was subject to its consent. No issue appears to have been taken with the Bank’s stated position until after the purported sale to Granja, which the Judge effectively held to be a sham. Notably, even the Defendant’s auctioneer, Mr Dooley, clearly understood that “*the final sign off*” was with the Bank.¹¹ We refer to this material not for the purpose of construing the Mortgage – it is clearly not admissible for that purpose – but simply to demonstrate that there appears to have been no actual issue about the role of the Bank and the suggestion that the Defendants were free to sell the Kilpeddar Lands without the consent of the Bank appears to be a *post-hoc* invention.

⁸ Core Booklet 1, tabs 16 & 17)

⁹ See eg letter of 22 May 2014 (Core Booklet 1, tab 50)

¹⁰ See eg letter of 28 May 2014 (Core Booklet 1, tab 54)

¹¹ Transcript of the Granja proceedings, 19 July 2018, page 68.

124. We note also that as and from the registration of the Bank's charge over the Kilpeddar Lands, its consent to any sale was a *de facto* requirement in any event, given that any purchaser would require the Bank to vacate its charge and given the fact, as already noted, that there was no question of the proceeds of sale being sufficient to discharge the indebtedness secured by the charge.

125. In these circumstances, the issue concerning the construction of clause 5(c) of the Mortgage does not, in our view, have anything like the significance sought to be attached to it by the Second and Third Defendants.

126. As to that issue of construction, we respectfully differ from the Judge's view. While we are not persuaded that a requirement for the prior written consent of the Bank to any sale of the Kilpeddar Lands would have been unlawful or unenforceable as a clog on the Borrowers' equity of redemption, it appears to us that any such requirement would have to be expressed in clear terms. "*Parting with possession*" cannot be understood as synonymous with "*sale*". Sale may, or may not, involve parting with possession and *vice versa*. In our view what clause 5(c) addresses are situations where, without necessarily entering into a formal lease, the Borrowers might surrender possession or occupation of the Lands to a third party, thus potentially prejudicing the Bank's right to enforce its security over the Lands.

127. We would therefore uphold this ground of appeal but, in our view, it has no impact on the conclusions ultimately reached by the Judge.

The meaning and effect of the Compromise Agreement

128. It is next said by the Second and Third Defendants that the effect of the Compromise Agreement, and in particular clause 3.6.1 (a) and (b), was that the Bank had consented to the sale of the Kilpeddar Lands.

129. In light of the view we have taken as to the proper construction of clause 5(c) of the Mortgage, this ground is something of a moot but we shall nonetheless express our view on it.

130. Clause 3.6.1(a)-(c) provides as follows:

“(a) The Borrowers shall appoint the Agents for each of the Properties¹² who shall, in the absolute discretion of the Bank and without requirement for giving reasons for its decision, be acceptable to the Bank.

(b) The Borrowers shall instruct the Agents to dispose of the properties within an agreed time frame and for an agreed fee and subject to such deductions for the costs of the sale, advertising or otherwise, as shall first have been agreed in writing with the Bank.

¹² The Kilpeddar Lands were listed in Part One of the Second Schedule and thus were one of the properties within the scope of clause 3.6. The “Site” is also the subject of specific provision in clause 3.7, which provides for sale not later than “Target Date 2” which was 31 July 2014.

(c) The Borrowers shall instruct the Agents to liaise fully with and to report and disclose fully and frankly to the Bank all details of the sales process and any negotiations relating thereto.”

131. The Judge rejected the contention that this represented the giving of consent to the sale of the lands. He observed that the effect of the argument was that, on the execution of the Compromise Agreement, the Defendants were free to sell the Kilpeddar Lands “*to any person at any price*”, unconstrained by any requirement to obtain the consent of the Bank (Judgment, para 253). There was nothing to that effect in the Compromise Agreement and it would have made no sense for the Bank to have agreed to such an arrangement (Judgment, para 254). To the contrary, there were various provisions of the Compromise Agreement that gave a role to the Bank in the sales process and, furthermore, there was an express requirement in Clause 3.6.1 that the various properties be disposed of “*for the best price reasonably obtainable*”. In addition, the Judge drew attention to the correspondence noted above where the Bank had asserted, without apparent demur from the Defendants or their solicitor, a requirement for their consent.

132. In their submissions to this Court on appeal, the Second and Third Defendants suggest that the Compromise Agreement was an “*agreement for redemption*”. That is plainly not so and reflects a significant misunderstanding on the part of the Second and Third Defendants. The sale of the Kilpeddar Lands and the release of the Bank’s Mortgage over the Lands (and the associated write-down of the Defendants’ liability to the Bank) did not involve the “*redemption*” of the Mortgage. As already explained, the

redemption of a mortgage involves the payment of the sums secured by the mortgage in order to get back the mortgaged property freed from the mortgage. That was not what was provided for by the Compromise Agreement.

133. Premised on their assertion that the Compromise Agreement was a *de facto* agreement for the redemption of the Mortgage, the Second and Third Defendants then suggest that the Agreement is to be construed *contra proferentem*. There are, in our opinion, many difficulties with this argument. The first is that the starting premise is misplaced. But even if that fact is disregarded, the *contra proferentem* rule is a rule of contractual interpretation. It may be invoked where a contractual provision is genuinely ambiguous and where the application of the normal rules of contractual interpretation fail to resolve that ambiguity (it is, the authorities suggest, a rule of “*last resort*”: see e.g. *Emo Oil Limited v Sun Alliance and London Insurance* [2009] IESC 2, per Kearns J at pages 18-19). As Kearns J. said in that judgment, the maxim should not be used to create an ambiguity which it is then employed to resolve. In order to decide that there is such ambiguity, the document must first be interpreted by reference to the established methods of construction. It is only if after that exercise is undertaken there are two or more meanings that the instrument can be said to be ambiguous, and only then, that the issue of *contra proferentem* arises (*Fennell v. Corrigan* [2021] IECA 248 at para. 49).

134. Here, the Second and Third Defendants have invoked the *contra proferentem* rule without identifying any particular provision or provisions of the Compromise Agreement to which it is to be applied or how those provisions are to be interpreted when read *contra proferentem*. Finally, the Second and Third Defendants’ argument

simply assumes, without any identified basis, that the Bank was the *proferens* of the Compromise Agreement.

135.In our view, the starting point for considering this argument is that it is premised on an acceptance that clause 5(c) of the Mortgage required the Bank's prior written consent to the sale of the Kilpeddar Lands. The question is, therefore, whether there is anything in the Compromise Agreement that constitutes unconditional consent by the Bank to the sale of the Kilpeddar Lands, regardless of the terms of sale or the price achieved. In our view, there is no provision to that effect in the Agreement and we agree with the Judge that the many provisions which provide for a role for the Bank in the sales process are inconsistent with the Second and Third Defendants' argument. In particular, the terms of clause 3.6.1(c), requiring the full and frank disclosure to the Bank of "*all details of the sales process and any negotiations relating thereto*" made little if any sense unless the Bank was entitled to withhold consent to any proposed sale. Similarly, the protection to the Bank offered by the requirement in clause 3.6.1 that the properties would be sold for the "*best price reasonably obtainable*" would be significantly undermined in the event that the Bank could not withhold its consent to a sale where it appeared to it that the proposed price was less than the best price reasonably obtainable.

136.The issue here is not whether the Compromise Agreement in itself gave rise to a requirement for the Bank to consent. On the Bank's argument, which was accepted by the Judge, the requirement for the Bank's consent arose from the terms of clause 5(c) of the Mortgage. While we have reached a different view on clause 5(c), we nonetheless take the view that the Bank was, as a matter of practical reality, entitled to give or

withhold its consent to sale having regard to the fact that the Lands were charged in its favour. The issue is whether, by entering into the Compromise Agreement, the Bank gave its consent to the sale of (*inter alia*) the Kilpeddar Lands. As the Bank observed in its submissions, the Compromise Agreement created a framework of conditions under which a sale could take place. However, we agree with the Bank and the Judge that the Agreement did not constitute a consent to sale.

137. The Judge went on to find that the Bank did not consent to the sale of the Kilpeddar Lands to Granja (Judgment, paras 261-269). That finding is not challenged by the Second and Third Defendants.

The meaning and effect of the Heads of Agreement of 13 June 2014

138. The next point made by the Second and Third Defendants is that the Bank had “*no standing as a matter of contract and no right as a matter of law to raise an objection*” to the sale to Granja on the basis that the parties to the Heads of Agreement had “*conceded the enforceability*” of the agreement in the course of the Granja proceedings and the Bank had no right to “*intermeddle*” in the contractual relationship between the purchaser and the vendors. It is also said that, in any event, the terms which, on the Bank’s case, required to be addressed in the Heads of Agreement were matters that could and should have been dealt with on closing. The Heads of Agreement were not, it is said, “*a thing writ in water*” (written submissions para 7.1 & 7.2).

139. That is the extent of the submissions on this point and the Second and Third Defendants make no attempt to engage with the analysis of the Judge or demonstrate where that analysis is mistaken. No authority is cited in support of the bald assertions advanced. That is wholly unsatisfactory.

140. The suggestion that the Bank had no standing to object to the sale to Granja, or any interest in whether there was a binding agreement for sale is, to put it at its lowest, a surprising one. The Mortgage gave the Bank security over the Kilpeddar Lands. As of June 2014, when the Heads of Agreement were purportedly executed, the Bank's charge had been registered in the Land Registry. The Bank never gave its consent to a sale to Granja. The Bank had a vital commercial interest in the sale of the Lands pursuant to the terms of the Compromise Agreement. It had subsequently appointed Receivers to realise its security. Their entitlement to deal with the Kilpeddar Lands was clearly potentially affected by the purported agreement with Granja. Following their appointment, the Receivers had made it clear to Granja that they did not consider themselves bound by the Heads of Agreement.¹³ Granja had then brought proceedings against the Receivers and the Bank, as well as the McDonaghs, to seek to have them bound by the Heads of Agreement but had discontinued their proceedings (as against the Receivers and the Bank) in mid-hearing in 2018. The trial judge, Haughton J, articulated the effect of that discontinuance in the following terms: "*the position must be that Ulster Bank's charge is accepted and that clause 5(c) applies such that Ulster*

¹³ Letter of 17 November from the Receivers to Cathal L Flynn & Co, solicitors for Granja (Core Booklet 2, tab 104).

*Bank's written consent to any parting of possession by the borrowers is required.”*¹⁴

On that basis, it appears, the *lis pendens* previously registered by Granja against the Kilpeddar Lands was vacated. All of that was plainly of direct and legitimate interest to the Bank and to the Receivers.

141. After a meticulous consideration of the evidence, the Judge found as a matter of probability that the Heads of Agreement had not been executed in June 2014 but were in fact executed only in October 2014, in response to the appointment of the Receivers by the Bank and “*as an attempt by [the McDonagh] to thwart the sale of the Kilpeddar site by the Receivers*” (Judgment, para 247). After an equally meticulous analysis of the available evidence, the Judge found that Granja was “*a front for Brian McDonagh*” (Judgment, para 140). In those circumstances, the suggestion that the Bank is bound by the subsequent agreement between the McDonaghs and Granja conceding the enforceability of the Heads of Agreement is little short of breath-taking. As the Bank observes in its submissions, the compromise of the Granja proceedings was as much a contrivance as the Heads of Agreement and could not affect the legal position of either the Bank or of the Receivers.

142. The issue as to whether the Heads of Agreement constituted a binding agreement for the sale of the Kilpeddar Lands was also the subject of detailed and careful analysis by the Judge. The Second and Third Defendants have not engaged with that analysis or made any effort to demonstrate any error on the part of the Judge. As the Bank points

¹⁴ Transcript of 14 June 2018, page 17.

out in its submissions, the Judge’s analysis is consistent with the evidence given by Mr Feehily, a director of Granja, in the proceedings brought by that company against the Bank, the Receivers and the McDonaghs (Bank’s written submissions, para 68). As the Bank also note, in his evidence in these proceedings Mr Dooley – who said that the Heads of Agreement was a “*standard document*” that his office used – accepted that the “*actual contract for sale*” would have been a different document.¹⁵

143.In the circumstances, we are not persuaded that there is any substance in this part of the Second and Third Defendants’ appeal.

Prior Breach by the Bank

144.Two points are made under this heading. The first is that after the Compromise Agreement was signed by the McDonaghs on 13 March 2013, “*the Bank purported to set-off €325,000 standing to the credit of Brian McDonagh against the indebtedness the subject-matter of the Compromise Agreement.*” This is offered as a free-standing assertion: the submissions do not explain how the alleged set-off constituted a breach of the Compromise Agreement by the Bank or, more significantly, how any such breach might affect the position of the Second and Third Defendants *vis-à-vis* the Bank.

145.Although it is not evident from the Second and Third Defendants’ submissions, the suggestion that the Bank had acted in breach of the Compromise Agreement by

¹⁵ Day 15, page 28.

effecting a set-off of €325,000 from the bank account of Brian McDonagh on 27 March 2013 was addressed by the Judge who concluded that it was “*without foundation*” (Judgment, paras 310-313). Again, no effort has been made to establish any error on the part of the Judge. That is not an appropriate approach in an appeal to this Court.

146. As the Judge explains in his Judgment, at the time that the set-off was effected by the Bank, the Compromise Agreement had not been signed and had not become operative. Brian McDonagh had previously signed a letter authorising the Bank to make set-offs against his liabilities to it.¹⁶ Given that the Compromise Agreement was not signed as of 27 March 2013, the Judge concluded that there was nothing to prevent the Bank exercising its right of set-off.

147. The Judge also noted (though again this is not referred to by the Second and Third Defendants in their submissions) that the set-off was queried at the time by the solicitors acting for the Defendants.¹⁷ In response, the Bank explained the basis for the set-off, referred to delays in the “*completion of formalities*” and stated that the “*offer of compromise*” would be withdrawn unless “*the initialled Agreement and the cash payment*” were not with the Bank by close of business that day.¹⁸ The initialled agreement (initialled by Brian McDonagh *inter alia*) and the relevant payment were

¹⁶ Letter of 23 July 2007 (Core Book 1, tab 5)

¹⁷ Email of 28 May 2013 from Gallagher & Co to the Bank (Core Book 1, tab 10)

¹⁸ Email of 29 May 2013 from the Bank to Gallagher & Co (*ibid*)

sent to the Bank on the same day and it appears that there was no further issue raised about the set-off at the time.¹⁹

148. We therefore must reject the argument that the set-off constituted a breach of the Compromise Agreement by the Bank. It is unnecessary accordingly to consider how (if at all) a finding of such a breach could benefit the Second and Third Defendants.

149. The second point made by the Second and Third Defendants under this heading is that on 20 June 2014 the Bank unilaterally rendered further performance of the Compromise Agreement impossible “*and in the premises breached a fundamental condition of the agreement so as to repudiate same*” (written submissions, para 8.2). This relates to the withdrawal by the Bank of its consent to the sale of the Kilpeddar Lands on 20 June 2014, some six weeks before the target date for the sale of the Lands which was 31 July 2014.

150. The reference here to the *repudiation* of the Compromise Agreement might suggest that the Second and Third Defendants are seeking to contend that the Compromise Agreement has terminated by reason of their acceptance of a repudiatory breach by the Bank. However, as the Bank observes in its submissions, all of the Defendants have in their respective Defences and Counterclaims sought a declaration that the Compromise

¹⁹ In July 2014 (after the Bank had appointed receivers over properties of the First Defendant in London) English solicitors acting for the First Defendant wrote to the Bank to say that they were “astounded” to note the set-off that had been effected in March 2013 and making the self-same complaints as had been raised in May 2013 and addressed by the Bank.

Agreement remains extant and binding on the Bank and its successors. Even if there was a repudiatory breach by the Bank – and the Bank of course disputes that there was any breach by it – the Defendants have all clearly elected to affirm the Agreement.

151. As to the suggestion that the Bank's withdrawal of consent to the sale of the Kilpeddar Lands rendered compliance with the Agreement impossible, that is, on any view, a significant over-statement of the position. The high water mark of the Defendant's argument is that the Bank made it impossible to comply with one of the requirements in the Compromise Agreement, namely that the Kilpeddar Lands were to be sold by 31 July 2014 (though that, in fact, was a target date rather than an absolute deadline; the only absolute deadline was the long-stop date of 30 September 2015). The Defendants' ability to comply with the other provisions of the Compromise Agreement was unaffected and the various breaches of the Compromise Agreement found by the Judge are similarly unaffected. That being so, it is not evident to us what would be the practical effect of the Second and Third Defendants' argument, if it were to be accepted. The fact is that there were numerous other breaches identified by the Judge which, in his view, entitled the Bank to treat the Compromise Agreement as being at an end and which entitled it to recover judgment from the Defendants for the entirety of the debt owed to the Bank. None of those findings are directly challenged by the Second and Third Defendants (insofar as they are indirectly challenged, the arguments are addressed below).

152. As regards the Kilpeddar Lands themselves, the suggestion by the Second and Third Defendants that the Bank's withdrawal of consent to sale on 20 June 2014 rendered

their sale impossible sits rather uncomfortably with their case that the sale of the Lands to Granja was actually agreed the previous week, on 13 June 2014. On their case, therefore, the Bank's withdrawal of consent to the sale of the Lands had no effect. Of course, the Judge found that the Heads of Agreement were not signed until October 2014 and he also found that they did not constitute a binding agreement for sale in any event. But the point here is that, *on the Defendants' case*, the Bank's withdrawal of consent did not prevent the sale of the Kilpeddar Lands.

153. One of the breaches of the Compromise Agreement found by the Judge was the failure of the Defendants to reappoint Robert Ganly of Ganly Walters as joint selling agent (Judgment, paras 286-293). That finding is not challenged by the Second and Third Defendants (it is challenged by the First Defendant and his argument is addressed below). The failure to re-appoint Mr Ganly was one of the principal factors that led the Bank to withdraw its consent to the sale of the Kilpeddar Lands, though the Bank's email of 20 June also refers to other matters. On the premise that the failure to re-appoint Mr Ganly was a breach of the Compromise Agreement, the Bank was perfectly entitled to withdraw its consent to the sale of the Lands. As the Judge explains, the involvement of Mr Ganly in the sales process was an important protection for the Bank. If the withdrawal of consent caused difficulty for the Defendants, the solution was in their hands. They could have re-appointed Mr Ganly and addressed the other issues of concern identified by the Bank in its correspondence (including its letters of 17 June 2014 which are referenced in the Bank's email of 20 June 2014, as well as the earlier correspondence referred to in para 298 of the Judgment). In any event, the Bank's

position did not exclude the giving of consent to the sale of the Lands in the event of a future request for such consent.

154.In the circumstances, we are not persuaded that the Bank's letter of 20 June 2014 constituted a breach of the Compromise Agreement. Even if it had, it did not render further performance of the Compromise Agreement by the Defendants impossible as suggested nor could it have excused the many breaches of the Compromise Agreement by the Defendants found by the Judge.

Breach on the part of the McDonaghs

155.The Second and Third Defendants assert that "*to a large extent*" the breaches relied on by the High Court were alleged breaches by the First Defendant (written submissions, para 9.1). It is then said that the Bank imposed a 7 day deadline for compliance with the Compromise Agreement by letter of 3 September 2014 which letter itemised a long list of clauses of the Compromise Agreement that (according to the Bank) had not been complied with. That deadline is said to have been "*impossible*", at least as far as the sale of the Kilpeddar Lands was concerned, given the sale to Granja and the Bank's withdrawal of consent to sale in any event. On that basis, it is said, the Bank was not entitled to rely on the Defendants' failure to comply with its conditions. Further, and in any event, it is said that it is "*long-held principle of law*" that a party to an agreement is not ordinarily entitled to rely upon its own breach of an agreement in order to bring about its end. *New Zealand Shipping Company v Société des Ateliers et Chantiers de*

France [1919] 1 AC 1 and *Extra MSA Services Cobham Limited* [2011] EWHC 775 (Ch) are cited in support of that proposition.

156. There is no doubt that “[i]n the absence of clear words there is a presumption that neither of the parties is entitled to benefit from their own breach of contract.” (McDermott et al, *Contract Law* (2nd ed., 2017) at para 10.115). However, how that principle is said to avail the Second and Third Defendants is unclear, having regard to the findings made by the Judge. We have already considered and rejected the suggestion that the Bank’s withdrawal of consent to the sale of the Kilpeddar Lands in June 2014 amounted to a breach of the Compromise Agreement. It did not, in any event, render impossible the Defendants’ compliance with the Compromise Agreement or excuse the many respects in which they had breached their obligations under the Agreement.

157. As for “*the fact of sale to Granja*”, if that sale was a fact as of 3 September 2014 (and the Judge, it will be recalled, found that the Heads of Agreement were probably not signed until October 2014), either it complied with the Compromise Agreement or it did not. If the Bank’s prior consent to such sale was required – as the Judge found to be the case – it was a matter for the Defendants to procure that consent. The Judge found that the Bank never consented to the sale. In fact, it appears that it was never asked to give such consent and did not become aware of the purported sale to Granja until 2 October 2014 (Judgment, para 265). By then, of course, the Bank had demanded payment of the entire debt from the Defendants (on 26 September 2014) and had appointed the Receivers (on 1 October 2014). Even if the Bank had refused consent to the sale to Granja, that would have been an exercise by the Bank of a discretion given

to it under clause 5(c) of the Mortgage, rather than a breach by it of any provision of the Compromise Agreement.

158. Accordingly, the Second and Third Defendants have not established any breach of the Compromise Agreement by the Bank and the breaches relied on by the Bank cannot be attributed to any such breach by the Bank. This ground of appeal therefore fails.

The Right of the High Court to deploy certain findings against the First Defendant as well as the Second and Third Defendants.

159. The Second and Third Defendant's final ground of appeal is to the effect that, the Judge having excluded them from cross-examining the First Defendant, it ought to follow that the Judge's adverse findings against the First Defendant cannot be deployed against them.

160. It is necessary to explain how this issue arose. On Day 13 of the hearing in the High Court the Bank's cross-examination of the First Defendant concluded. It was then indicated to the Judge that there was going to be some debate as to whether counsel for the Second and Third Defendants was entitled to cross-examine the First Defendant. Counsel for the Bank then advanced an objection to such cross-examination being permitted "*based on the fact that the interests of Mr Brian McDonagh are wholly and quintessentially aligned with the interests of Maurice and Kenneth McDonagh.*"²⁰

²⁰ Day 15, page 146.

Counsel then opened the following passage from Biehler et al, *Delany and McGrath on Civil Procedure* (4th ed., 2018):

“21-35 The general rule is that a witness may be examined by all other parties to the proceedings even if the witness has not given any evidence adverse to the interests of the party that wishes to cross-examine him. Thus, a defendant will usually be permitted to cross-examine a co-defendant or a witness called by him subject to a discretion on the part of the judge to refuse to allow such cross-examination where the co-defendants have similar interests.” (footnotes omitted)

161. Counsel for the Bank, while acknowledging the general rule, relied on the statement that the judge has a discretion to refuse cross-examination where co-defendants had similar interests. That statement is supported by the citation of two Canadian decisions, *Millar v BC Rapid Transit Co* [1926] 1 DLR 1171 and *Losier v Clement* (1970) 18 DLR (3d) 185. Counsel opened *Millar v BC Rapid Transit Co* as well as two subsequent decisions referring to it which, in his submission, supported the contention that the Second and Third Defendants should not be permitted to cross-examine the First Defendant given that *“inter se between the three defendants, their interests are wholly and utterly aligned.”*

162. In response, counsel for the Second and Third Defendants referred to *Allen v Allen* [1894] P 248 and *Chilton v Saga Holidays* [1986] 1 All ER 841. He accepted that the Court had *“a jurisdiction to fetter the right to cross-examination in any case such as*

this” and the focus of his submission was on the consequences that would follow if that jurisdiction was exercised. He was, he said, “*more than happy*” if the Court restricted his right to cross-examine Brian McDonagh but he indicated that, in that event, he would “*advance, and it will leave an interesting conundrum for the Court, that that evidence cannot be deployed against me in any finding that the Court makes at the conclusion of the evidence in general.*”²¹

163. The Judge then ruled that that cross-examination should not be permitted given that the interests of the Defendants were aligned and having regard to the fact that Brian McDonagh had not given any evidence contrary to the interests of his brothers.

164. Before this Court the Second and Third Defendants did not challenge the Judge’s decision not to permit them to cross-examine the First Defendant. Instead, their contention was that the Judge had wrongly “*deployed*” the adverse findings it had made about the conduct of the First Defendant – based (*inter alia*) on the evidence given by him - against them. That, it was said, was a breach of the principle in *Allen v Allen* and *Chilton v Saga Holidays*. In *Allen v Allen*, Lopes LJ emphasised that it was “*contrary to all rules of evidence, and opposed to natural justice, that the evidence of one party should be received as evidence against another party, without the latter having an opportunity to testing its truthfulness by cross-examination*” (at 253). That was, it was said, precisely the error the Judge here had made.

²¹ Day 15, page 1689.

165. We do not agree. There are a number of relevant points. The first, and, if we may say obvious point is that the Judge found that the Second and Third Defendants were themselves in breach of the Compromise Agreement: see the summary in para [15] above. Those findings were not dependent upon the Judge's findings as to the breaches of the First Defendant. On the Judge's analysis of the Compromise Agreement, and in particular the effect of clause 3.1.3 and clause 4 – and his analysis had not been challenged by the Second and Third Defendants on appeal – each of those breaches was, in in itself, sufficient to entitle the Bank to treat the Compromise Agreement as being at an end and/or to proceed against the Defendants on foot of the Finance Documents.

166. Secondly, the fundamental premise of the argument made by the Second and Third Defendants in this context is not, in our view, well-founded. These Defendants have not identified a single finding that is adverse to them that is said to have been made by the Judge in reliance (whether in whole or part) on evidence given by the First Defendant. In ruling on the cross-examination issue, the Judge expressed the view that the First Defendant had not given any evidence contrary to the interests of his brothers. No attempt has been made to gainsay that view. This is not a case where “*evidence given by one party affecting another party in the same litigation*” has been admitted “*against that other party*”, as was the case in *Allen v Allen*. There, conflicting evidence was given by the respondent and co-respondent in a contested divorce action. The co-respondent had not been permitted to cross-examine the respondent. Far from making it clear to the jury that the evidence of the respondent was not admissible against the co-respondent, the presiding judge had contrasted their evidence in his summing up in

a manner which, in the view of the Court of Appeal, was “*distinctly prejudicial to the co-respondent*” (at p. 255). In those circumstances, it is hardly surprising that the jury’s verdict was set aside and a new trial ordered.

167. The purported complaint of the Second and Third Defendants here is quite different to the co-respondent’s complaint in *Allen v Allen*. As we have said, they have not pointed to any adverse finding against them that relies on the evidence of their brother. Rather, they effectively seek to be immunised from the consequences of the adverse findings made by the Judge as to the conduct of the *First Defendant* and his findings as to various ways in which the *First Defendant* breached the Compromise Agreement.

168. The Second and Third Defendants expressly accept that the Judge was entitled on the evidence to find that the First Defendant had breached the Compromise Agreement, including by his failure to disclose assets.²² They also accept that the consequence of those breaches was to bring the Compromise Agreement to an end, regardless of any involvement on the part of the Second and Third Defendants.²³ In our view, that is the end of the point. Insofar as the Judge’s findings that the First Defendant breached the Compromise Agreement adversely impacted on the Second and Third Defendants, that was not because the Judge attributed any responsibility for the First Defendant’s conduct to the other Defendants. Rather, it was a function of the structure and operation

²² Day 1 of Appeal hearing, at page 103.

²³ *Ibid.*

of the Compromise Agreement to which all of the Defendants agreed. The principle in *Allen v Allen* is simply not engaged in the circumstances here.

169. The overwhelming reality of these proceedings – one which none of the Defendants appear willing to face up to – is that the Judge found that each of the Defendants breached the Compromise Agreement in multiple and significant respects. Those findings are unchallenged as to their substance. The Compromise Agreement required strict compliance by the Defendants. Given the significant concessions being made by the Bank, that is hardly surprising. Given the Defendants’ non-compliance with the Agreement, the Bank was entitled to treat it as being at an end and to pursue each of the Defendants for the debt for which they were jointly and severally liable to the Bank. That is unfortunate for the Defendants but it is attributable to their own conduct.

170. It follows that this ground of appeal also fails.

171. Thus, all of the remaining grounds relied on by the Second and Defendants are rejected.

B - GROUNDS RELIED ON BY THE FIRST DEFENDANT

Witnesses not called by the Bank/Not permitted to be called by First Defendant

172. Under this heading, the First Defendants complains that the Bank's principal witness was "*strategically put forward*" in a capacity "*akin to a decoy witness*" and that he was wrongly refused leave to examine other named officers of the Bank. In particular, it is said that the Judge acted unfairly in preventing the First Defendant from taking evidence from a Mr Norman McGinley "*in the discovery process*".²⁴ Mr McGinley was, it was said, involved in the engagement of CBRE and it was suggested by counsel for the First Defendant that he was entitled to ask Mr McGinley "*why he disregarded the confirmations granted to him and the receivers*" which, it was suggested, allowed CBRE "*to escape liability*".

173. That is as far as the point is put. The First Defendant's Notice of Appeal asserts that "*crucial evidence*" was available from Mr McGinley and the other Bank employees who had, apparently, been subpoenaed by the First Defendant around or shortly before the commencement of the trial in the High Court. What this "*crucial evidence*" would have been has not explained beyond what is recorded above.

174. It appears that the First Defendant had delivered two witness statements in response to the Bank's witness statements, one on his own behalf and the other a witness statement

²⁴ Day 1 of appeal hearing, page 125.

of Gabriel Dooley, the auctioneer. The First Defendant had not, it seems, given any notice of his intention to call these additional persons as witnesses or any notice of their intended/anticipated evidence. These are fundamental requirements of the rules governing proceedings in the Commercial List: Order 63A, Rule 22(1) RSC, as well as the observations of Clarke J in *Moorview Developments Ltd v First Active plc* [2008] IEHC 274, [2009] 2 IR 788, at para 3.23. In its Respondent's Notice, the Bank explains that on Day 9 of the hearing the Judge made an order setting aside the subpoenas on the basis that the persons subpoenaed were not in a position to give relevant evidence. That has not been challenged nor any effort made to demonstrate that the Judge erred in so ruling. In fact, quite remarkably, while complaining of the unfair exclusion of this "crucial evidence" by the Judge, the First Defendant has not brought us to the Judge's ruling. In any event, as to what has been asserted as why the First Defendant was "entitled" to examine Mr McGinley, that reflects a fundamental misconception of the effect of CBRE's terms of engagement, an issue that is addressed further below.

175. The onus is, of course, on the First Defendant to establish some material error on the part of the Judge. In the circumstances, he has manifestly failed to do so under this heading.

176. The Judge's refusal to permit the First Defendant to examine "witnesses" of the Bank is also said to demonstrate an "inherent prejudice" against him as a lay litigant (Notice of Appeal, para 10). The First Defendant was not, in fact, refused leave to examine the witnesses called by the Bank. He was instead refused leave to call additional Bank personnel/former personnel as witnesses (he would not in the ordinary course have been

entitled to cross-examine these persons had they been called). No error in that ruling has been identified and the fact that it was adverse to the First Defendant does not provide any basis for the suggestion that the Judge was prejudiced towards him. At various other points in the Notice of Appeal and/or in the First Defendant's written submissions allegations of bias are made against the Judge. No basis for any of those allegations has been established and they ought never to have been made.

The Judge's refusal to allow the First Defendant to call an expert graphologist

177. This issue requires a little explanation.

178. One of the major issues in dispute in the High Court was whether Granja was effectively a front for the First Defendant and whether the monies available to Granja to fund the purchase of the Kilpeddar Lands were actually provided by the First Defendant. These issues were the subject of very close analysis by the Judge.

179. In order to dispute the Bank's claim that the purchase monies had been provided by him, the First Defendant produced in evidence two Declarations of Trust. The first, dated 22 February 2000, purported to state that the entire shareholding in Balcora Holdings Limited ("*Balcora*") was held in trust by the First Defendant for his brother-in-law, Mr Tian Su Ooi. Balcora was an English company. The First Defendant had been a director and was its sole shareholder until a transfer of his shareholding to his secretary which was effected shortly before the execution of the Compromise Agreement. Balcora held cash of STG£274,340 (Judgment, para 90). The second

Declaration of Trust, dated 9 April 2007, related to another English company Cleverpeople Limited (“*Cleverpeople*”). Cleverpeople was a subsidiary of Balcora. Cleverpeople owed STG£915,441 to the First Defendant but the Declaration of Trust declared that this sum was held on trust by the First Defendant for Mr Ooi (Judgment, para 91).

180. That the sums held by Balcora and Cleverpeople were the source of the funds in Granja’s client account with its solicitors appears not to have been in dispute (Judgment, para 79). The Judge also found that, when the sale of the Kilpeddar Lands to Granja did not proceed, the balance held by the solicitors, after deduction of litigation and legal costs (which appear to have been significant) was paid to the First Defendant, rather than to Mr Ooi (Judgment, para 106).

181. The two Declarations of Trust were signed by the First Defendant (though not by Mr Ooi) and purportedly witnessed by a solicitor, Earl Gallogly. Mr Gallogly had died in September 2013. The Bank asserted that the purported signatures of Mr Gallogly on the Declarations of Trust were forgeries. In order to make that case, the Bank relied on the evidence of an expert graphologist, Sean Lynch. We were told by the Bank that Mr Lynch prepared a report which, we were told, was furnished to the Defendants long in advance of the hearing. The First Respondent did not give notice of any intention to call a graphologist as a witness or deliver a statement or report from a graphologist. We were also told by the Bank that Mr Lynch was tendered as a witness on Day 8 of the trial (13 December 2019) but that the First Defendant did not seek to cross-examine him. None of this was disputed by the First Defendant.

182.As we understand the position (and in this context we rely on the narrative in the Respondent's Notice filed by the Bank, which has not been challenged in any way) Mr Lynch examined documents filed in the Companies Registration Office which purported to be signed by Mr Gallogly and compared the signature on those documents with the form of signature on the two Declarations of Trust. In Mr Lynch's opinion, the signatures on the Declarations of Trust were not written by the same person who signed the CRO documents. Mr Lynch did not give evidence to the effect that the First Defendant had forged the signatures of Mr Gallogly on the Declarations of Trust. At the request of the Judge, Mr Lynch examined a copy of Mr Gallogly's will and produced an addendum report which concluded that the signature on the will was also at variance with the signatures on the Declarations of Trust. Again, it appears, the First Defendant did not seek to challenge that opinion.

183.On Day 18 of the High Court hearing - after the conclusion of the evidence - the First Defendant sought to call a graphologist to rebut the evidence of Mr Lynch. Quite apart from the timing of that application, it was clearly irregular in circumstances where the evidence of Mr Lynch had not been challenged by the First Defendant. In any event, it is apparent from the transcript extract relied on by the First Defendant in this context (Day 18, pages 15-18) that the stated basis on which the First Defendant wished to call a graphologist was to refute any allegation that he (the First Defendant) had forged Mr Gallogly's signature on the Declarations of Trust. The Bank made it clear in discussion with the Court that it was not making such an allegation or asking the Court to make such a finding to that effect. The Judge in turn stated clearly that "*whatever happens, I will not or this Court will not be making a finding that you forged that signature*" (Day

18, page 8). On that basis the Judge ruled that it was unnecessary to allow the graphologist to be called (*Ibid*).

184. The lateness of the application and the fact that Mr Lynch's evidence had not been challenged were weighty factors against permitting the graphologist to be called. These proceedings had been case managed in the Commercial List and were subject to the specific regime set out in Order 63A RSC. The First Defendant had had ample opportunity to retain a graphologist if he wished to challenge Mr Lynch's opinion. Acceding to the First Defendant's application would inevitably have resulted in delay and additional costs. The stated concern of the First Defendant – that a finding would be made that he forged the signatures – was addressed by the Judge and he was entitled to take the view that no useful purpose would therefore be served by permitting the evidence to be called. In these circumstances, we do not consider that there is any basis on which this Court could properly conclude that the Judge erred in not permitting the First Defendant to call a graphologist to give evidence or that any injustice was caused to the First Defendant. Accordingly, this ground of appeal fails.

185. We would point out in any event that the Judge's finding that the purported signatures of Mr Gallogly on the Declarations of Trust were forgeries was but one part of a much broader analysis of the evidence that led the Judge to conclude that Granja was a front for the First Defendant and that the monies made available to Granja's solicitors to fund the purchase of the Kilpeddar Lands were provided by him. It is a striking and significant feature of the First Defendant's appeal that the other elements of the Judge's analysis are unchallenged. Even if there had been any merit in this grounds of appeal –

and in our view there is none - that would not provide a sufficient basis for interfering with the Judge's conclusions about the First Defendant's relationship with Granja and the fact that the funds for the purchase of the Kilpeddar Lands were provided by him.

The Contention that the Bank was not entitled to require Joint Selling Agents

186. Clause 3.6.1(a) of the Compromise Agreement provided that:

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

187. In the Judge's view, the effect of this provision was to give the Bank “*a veto over who the agent would be for the sale of the Kilpeddar site*” and that entitled the Bank to require the appointment of joint agent, given that it was the Bank that “*was taking all of the market risk*” because it, rather than the McDonaghs, was to receive the proceeds of any sale of the Kilpeddar Lands (Judgment, para 286).

188. As the Judge explains, the McDonaghs initially appointed Mr Dooley, a local agent based in County Wicklow as sole agent. However, the Bank sought the appointment of an estate agent with national reach, Mr Ganly of Ganly Walters, as joint agent with Mr Dooley. The McDonaghs agreed to appoint Mr Ganly pursuant to an agreement of 7 February 2014 which provided that the appointment would last until 31 May 2014 (Judgment, para 287). Although the Bank wished to have Mr Ganly re-appointed the

Defendants would not do so because (so the Judge found at para 294 of the Judgment) the removal of Mr Ganly increased the chances of Granja (the front for the First Defendant) being the winning bid (which was how events transpired).

189.In our view, clause 3.6.1(a) of the Compromise Agreement was broad enough in its terms to permit the Bank to require the McDonaghs to appoint Mr Ganly as a condition for the Bank's consent to the appointment and ongoing retainer of Mr Dooley. Furthermore, and in any event, the McDonaghs in fact agreed to appoint Mr Ganly as joint agent. As the Judge correctly observed, the success or otherwise of the marketing of the Kilpeddar Lands was a matter of huge concern to the Bank given that it was taking all of the market risk. That fact is reflected in the provisions of clause 3.6.1(a), as well as in the reporting and disclosure obligations imposed by clause 3.6.1(a). It is also reflected in the obligation imposed on the McDonaghs to dispose of the Properties for the "*best price reasonably obtainable*". In the circumstances described by the Judge in his Judgment, the Bank was, in our view, entitled to take the view that the McDonagh's decision not to re-appoint Mr Ganley was inconsistent with clause 3.6.1(a). But even if that was not the case, it was entirely reasonable for the Bank to take the view that the exclusion of Mr Ganly was seriously prejudicial to its legitimate interests under the Compromise Agreement and to assert its rights under the Agreement, as it continued to do in the June 2014 correspondence and subsequently in the appointment of the Joint Receivers.

190.Accordingly, no error has been demonstrated in the Judge's constriction of clause 3.6.1(a). In any event, even if the Judge had been wrong to conclude that the Bank had

power to insist on the appointment of Mr Ganly as joint agent, that would not have any material effect on the Judge's analysis or conclusions. Mr Ganley was, in fact, appointed by the McDonaghs. There is no basis for the assertion that they were "coerced" into such an appointment. The McDonaghs must have anticipated that their refusal to re-appoint Mr Ganly – a position that appears to have been driven largely by Brian McDonagh – would have an immediate and significant impact on the Bank's confidence in the sales process relating to the Kilpeddar Lands and, more generally, in the McDonagh's ability and willingness to perform the Compromise Agreement. That is what occurred. Even if the refusal to re-appoint Mr Ganly did not in itself constitute a breach of the Compromise Agreement– and, for the avoidance of doubt, we re-iterate that, in our view, the terms of clause 3.6.1(a) were sufficiently broad to entitle the Bank to make its acceptance of Mr Dooley conditional on the appointment of Mr Ganly as a joint agent – the Bank was clearly entitled to take the view that, in the circumstances, it could no longer trust the McDonaghs to perform their obligations.

191. Accordingly, this ground of appeal fails.

The Refusal of the Judge to Review his Judgment/The Registration Point

192. Under this heading the First Defendant contends that, by reason of the fact that the Bank had no registered charge over the Kilpeddar Lands when the Compromise Agreement was executed on 13 March 2013, it "*had no 'interest' in the lands sufficient to demand*

the consent of sale by the appellants".²⁵ The Bank, it is said, "*made a representation on the 13th of March 2013 that it was entitled to force a sale of the lands when clearly it was not at that conferred with any interest in the lands under Section 62(2) of the Registration of Title Act.*"²⁶ That is said to have involved knowing "*deceit*" on the part of the Bank.

193. This argument was not advanced by the First Defendant at trial but, as explained earlier, was the subject of a motion which the First Defendant sought leave to issue following delivery of the Supplementary Judgment. After hearing submissions on 16 July 2020, the Judge refused to give leave to issue the motion, on the basis that the material on which the First Defendant sought to rely was material that was raised in the course of the trial or which could have raised. Either way, in the Judge's view, there was no basis for revisiting the Judgment.

194. The First Defendant complains that the Judge did not provide any reasoning for refusing to re-visit the Judgment. That complaint is manifestly unfounded. As we have already noted, it is evident from the Judge's ruling that he accepted that he should approach the First Defendant's application on the basis of the test set out by Clarke J in *In re McInerney Homes Limited*. No argument was advanced to this Court to the effect that the Judge erred in adopting that approach. The Judge then made it clear why, by

²⁵ First Defendant's written submissions, para 18, at page 17.

²⁶ *Ibid*, at page 18.

applying that approach, he had concluded that the application ought to be refused. In the circumstances, the Judge's decision was more than adequately explained.

195. The First Defendant has not disputed the Judge's finding that the material that he sought to rely on in support of his application to have the Judgment re-opened had been available to him. To the contrary, in his notice of appeal the First Defendant asserts that the "*the documents presented were in the pleadings*".²⁷ Whether or not the Bank's charge over the Kilpeddar Lands was or was not registered in the relevant Land Registry folios as of 13 March 2013 was, in any event, a matter of public record, readily ascertainable from the Land Registry. If there was any merit in the arguments that the First Defendant sought to make in support of his application to have the Compromise Agreement voided and the Judgment set aside (the principal reliefs sought in the review motion) – and, as we shall explain, those arguments are, in our view, entirely devoid of merit – those arguments could and should have been advanced at trial. In the circumstances, no error on the part of the Judge in refusing leave to bring the review motion has been identified.

196. That is sufficient to deal with this ground of appeal. However, given the tenor of the allegations made against the Bank, we think it appropriate to explain briefly why the allegations are groundless.

²⁷ Notice of Appeal, para 9.

197. The starting point is the Facility Letter of 20 July 2007 which provided that the facility was to be secured by a “*First Legal Charge over the [Kilpeddar] Site*”. That was followed by the Mortgage (dated 3 August 2007) clause 3(a) of which provided that the Borrowers “*as registered owner or as person entitled to be registered as owner*” charged the registered lands specified in the Third Schedule. The Third Schedule in turn referred to “***ALL THAT AND THOSE*** the lands the subject of Deed and Conveyance and Transfer dated the 3rd August 2007 between Dryfield Limited of the one part and [the McDonaghs] of the other part”. In other words, the Mortgage was executed on the same day as the deed of sale to the McDonaghs and therefore in advance of the McDonaghs being registered as owners of the Kilpeddar Lands in the Land Registry.

198. Nothing in the material provided to the Court raised any question or doubt as to the Bank’s entitlement to a charge over the entirety of the registered lands to be transferred from Dryfield Limited to the McDonaghs.

199. It appears from the material available to the Court that there may have been a delay in the McDonaghs being registered as owners of one of the parcels of land included in the transfer from Dryfield, namely the lands in Folio 21790F. The copy folio furnished to the Court appears to record the registration of the McDonaghs as owners on 12 November 2007 and the registration of the Bank’s charge on the same day. However, we were also furnished with correspondence between McDowell Purcell (for the Bank) and the Land Registry/Property Registration Authority which indicates that there was an issue regarding the registration of the McDonaghs as owners of the lands in that folio

which was not finally resolved until December 2013. The issue was as to whether the 2007 transfer to the McDonaghs included the entirety of the lands in Folio 21790F or only part of those lands. Ultimately, the Land Registry's concerns were addressed to its satisfaction and the McDonaghs were registered as owners of the entirety of the lands. Insofar as there was delay in registering the McDonaghs as owners of the Folio 21790F lands, that obviously had a knock-on impact on the registration of the Bank's charge but there is no suggestion in the material provided to the Court that any separate issue arose as to the Bank's entitlement to have its charge registered on these lands.

200. The other relevant folio appears to have been Folio 36738F, which contains lands transferred from Folio 10117F (under the Deed of Sale from Dryfield, only a portion of the lands in Folio 10117F were transferred to the McDonaghs). Again, that folio appears to indicate that the McDonaghs were registered as owners of the lands in it on 12 November 2007 and that a charge in favour of the Bank was registered on the same day. It is possible, however, that any delay in the registration of the dealing in respect of Folio 21790F also impacted on the registration of the McDonaghs as registered owners of the lands in this folio. Again, there is no suggestion in the material provided to the Court that any separate issue arose as to the Bank's entitlement to have its charge registered on these lands.

201. Even if one assumes (in favour of the First Defendant) that the Bank's charge had not been registered on either folio when the Compromise Agreement was signed (which, as already noted, did not happen until sometime after 13 March 2013), it gets the First Defendant nowhere. The Mortgage gave the Bank a charge over the Lands which it

was entitled to have charge registered and it had made the appropriate application for registration to the Land Registry. Any delay in registration appears to have resulted from issues relating to the transfer from Dryfield to the McDonaghs, rather than any difficulty about the Bank's entitlement to a charge. True it is that, until the registration of its charge, the Bank could not rely on the provisions of section 62 (or section 64) of the Registration of Title Act 1964: *Kavanagh v McLaughlin* [2015] IESC 27, [2015] 3 IR 555. But that is *nihil ad rem*. The Bank had the protection of the Mortgage. It gave significant rights to the Bank, including the right, in clause 5(i), to appoint a receiver over the mortgaged property (of which the Kilpeddar Lands formed part) in the event of a breach, non-performance or non-observance by the Borrowers of their obligations to the Bank. That contractual entitlement was unaffected by the 1964 Act: *Kavanagh v McLaughlin* per Laffoy J at para 109. In fact, by the time that the Receivers were appointed by the Bank, its charge was registered and it had all of the powers flowing from section 62. Nothing in *Kavanagh v McLaughlin* assists the position of the First Defendant or provides any support for his contention that the Judgment ought to have been reviewed.

202. It is said by the First Defendant that, by procuring the consent of the McDonaghs to the sale of the Kilpeddar Lands, the Bank acted in breach of Section 62(2) of the 1964 Act. Section 62(2) provides that the owner of a charge over land does not have any interest in that land until registration. How that provision might affect the entitlement of the Bank to seek the *agreement* of the McDonaghs to sell the Lands, or the entitlement of the McDonaghs to agree to their sale, was never explained. Indeed, no attempt was made to explain it. Even if there had never been a charge, the Bank would have been

entitled to seek the sale by the McDonaghs of their assets, in circumstances where they were so heavily indebted to the Bank and where they were not in a position to service that debt.

203. It is also said by the First Defendant is that the Bank was under a duty to disclose to the McDonaghs at the time that the Compromise Agreement was entered into that it did not have any power of sale in relation to the Kilpeddar Lands. No basis for the existence of such a duty was identified in argument. In any event, it was at all times open to the Defendants and their legal advisers to check the position in the Land Registry. Whether the Bank had an existing power of sale was not relevant to any aspect of the Compromise Agreement. It provided for the sale *by the McDonaghs* of the various properties, including the Kilpeddar Lands. Performance of that obligation by the McDonaghs (including the First Defendant) was not in any way contingent on the Bank being in a position to exercise a power of sale at that time. To the contrary, if the Agreement was performed, and the Properties sold, the Bank's power of sale would not have to be exercised. It is next said that, had the Bank disclosed the fact that it did not have a power of sale, the First Defendant would not have entered into the Compromise Agreement (no such claim is made by the Second and Third Defendants). That assertion is not supported by any evidence and is, in any event, wholly implausible. The Compromise Agreement offered very significant benefits to the McDonaghs (or would have done if they had performed their obligations under it). The fact that the Bank was not registered as owner of the charge over the Kilpeddar Land at the time that the Agreement was negotiated and executed did not affect the relative advantages and disadvantages of the Agreement in any way. The delay in the registration of the charge

arose from the delay in registering the title of the McDonaghs; once the McDonaghs were registered as owners, the Bank would be (and was) registered as owner of the charge. The implication – and that is all that it is – that the First Defendant might have refused to execute the Compromise Agreement on the basis that the McDonaghs would have been free to deal with the Kilpeddar Lands, without reference to the Bank, is manifestly groundless.

204. In the circumstances, we are satisfied that there is nothing in this point, even if the First Defendant was entitled to advance it, which he is not.

205. It follows that the suggestion that, in refusing to review his Judgment, the Judge failed to “*carry out his inherent duty to protect the property right*” of the First Defendant (Notice of Appeal, para 8) is baseless. The property rights of the First Defendant were at all times subject to the Bank’s security. In any event, they did not constitute some form of wildcard that allowed the First Defendant to circumvent the fundamental ground rules of civil litigation in this jurisdiction.

The Bank’s Entitlement to Sue/Redaction of the Loan Sale Documentation

206. In the High Court an issue was raised as to the entitlement of the Bank to pursue a claim against the McDonaghs, in circumstances where Promontoria (Aran) Limited had acquired the economic interest in the Facility Letter and the underlying security pursuant to a Declaration of Trust dated 12 February 2015. This transaction had been

disclosed in the witness statement of Ted Mahon, one of the Bank's witnesses, and he also addressed it in his oral evidence.

207. The Judge held that it was clear from the Declaration of Trust that the Bank had retained the legal interest in the Facility and the underlying security: Judgment, para 303. That had also been confirmed by the “*uncontroverted evidence*” of Mr Mahon (Judgment, paras 303-304). Having referred to Recital C and Clause 2.1 of the Declaration of Trust, the Judge concluded that:

“It is clear that the Trust Assets referenced therein covers the Facility Letter and the Mortgage in this case and accordingly, this Court concludes that Ulster Bank retains the legal interest in the Facility Letter and underlying security and so is legally entitled to pursue this litigation as the legal owner of the Facility Letter and the underlying security.” (Judgment, para 305)

208. That analysis has not been challenged in any way by the First Defendant. Rather, it is said that material put before the High Court by the First Defendant in July 2020 - *subsequent* to the Judgment and Supplemental Judgment – proved that the Bank enjoyed no rights as plaintiff from 18 September 2017. At that stage, the only issue before the High Court was the amount of the judgment that the Bank was entitled to. A brief affidavit was sworn by Alan Monaghan, an employee of Link ASI Limited (formerly Capita Asset Services (Ireland) Limited (“*Link*”), for the purpose of confirming the up to date indebtedness of the Defendants. Mr Monaghan referred to a witness statement that had been provided by Conor Maher (also an employee of Link)

which explained that Link had been appointed by the Bank to provide loan administration services. We were told that Mr Maher gave evidence and had not been cross-examined by the First Defendant. Mr Mahon also gave evidence of the appointment of Link.

209.In any event, the First Defendant was given liberty to file an affidavit in reply to the affidavit of Mr Monaghan. In that affidavit he referred to, and exhibited, a number of emails passing between Link (then Capita Asset Services) and, it appears, Ger Feehily (of Granja) and Granja's solicitors. The affidavit does not disclose when or how this material had come into the possession of the First Defendant.

210.In our view, this material is not properly in evidence in the proceedings and accordingly cannot be relied on by the First Defendant. No application was made to this Court for leave to adduce this material in evidence for the purposes of the First Defendants' appeal.. While the material was before the High Court, that was only for the purpose of quantifying the judgment that the Judge had already held the Bank to be entitled.

211.In any event, the material is not probative of anything. Reference is made to a loan sale deed but it is not at all clear what that relates to (reference is made to the deed being signed by Granja) and it is not suggested that any such deed had been executed in any event. The material does not provide an adequate basis for impugning the evidence given by the Bank that it had retained the legal interest in the loans which was accepted by the Judge.

212. At the same stage of the proceedings – that is say *after* delivery of the Judgment and Supplemental Judgment - the First Defendant sought to make a complaint about the fact that the Declaration of Trust produced by the Bank was in redacted form, relying on a decision of the Chancery Division, *Promontoria (Oak) Ltd v Emanuel* [2020] EWHC 104 (Ch) to submit that the Bank had been obliged to produce unredacted documentation as proof of its title to sue. That argument was agitated once again before this Court and extensive reference was made to the judgment of Smith J in *Promontoria (Oak) Ltd v Emanuel*.

213. Before addressing this argument further, we would observe that no issue appears to have been raised at trial regarding the production of a redacted Declaration of Trust. Counsel for the Second and Third Defendants expressly confirmed that he was making no objections on the redactions.²⁸ The issue was raised by the First Defendant at the conclusion of the Bank's substantive evidence. In response the Bank made it clear that it would produce an unredacted copy of the Declaration of Trust if directed to do so but also submitted that authority indicated that the burden is on the person seeking the production of an unredacted copy to establish that such was necessary.²⁹ Counsel for the Bank submitted that, if he wished to pursue the issues, the First Defendant would have to make a formal application and suggested that, if such an application was to be made, the time to deal with it might be when a further Bank witness, a Mr Hanley, came

²⁸ Day 7, page 6.

²⁹ Day 10, page 143, referring to the decision of McDonald J in *Everyday Finance Limited v Woods* [2019] IEHC

to give evidence regarding the execution of the Declaration of Trust (proof of execution having been required by the Second and Third Defendants).³⁰

214. The Court was told, without contradiction from the First Defendant, that no such application was subsequently made. In our view, that is a fatal impediment to any complaint being advanced by the First Defendant on appeal concerning the redaction of the Declaration of Trust. This is a court of *appeal*. It is not a forum for agitating issues that could and should have been agitated in advance of or in the course of a very lengthy hearing in the High Court but which (for whatever reason) were not pursued.

215. Even at this stage, it has not been suggested by the First Defendant that he was prejudiced in any way by the redactions or that the nature and extent of the redactions undermine or casts any doubt on the Judge' finding that the Bank was legally entitled to pursue this litigation as the legal owner of the Facility Letter and the underlying security. On the contrary, no challenge has been made to the Judge's analysis of the effect of the Declaration of Trust or to the findings made by him.

216. That is sufficient to dispose of this ground of appeal. However, we will make some comments regarding the decision in *Promontoria (Oak) Ltd v Emanuel*. It involved a claim by Promontoria (Oak) Ltd as assignee of the original lender, Clydesdale Bank. Here, of course, the Bank was not suing as assignee of the original lender: rather, it was the lender. The Facility Letter was in its name and it was the mortgagee/charge under

³⁰ Day 10, pages 142-144.

the Mortgage (and the registered owner of the charges in the relevant Land Registry folios). In any event, in order to establish its title to sue, the claimant relied on redacted copy deed of assignment. A number of other potentially relevant documents were not produced at all (including a sales and purchase agreement which the Judge considered to be “*obviously relevant*”). Before the recorder, vehement objection was taken to the admission of the redacted deed of assignment. That of course was not the case here. However, the recorder rejected the objection and gave judgment in favour of the claimant. On appeal to the Chancery Division, Smith J held that the recorder had erred in admitting the redacted deed. His reasons for reaching that conclusion are set out in some detail in his judgment (paras 54-75). The result was that the judgment in favour of the claimant was set aside.

217. We would observe that the decision of the Chancery Division was subsequently doubted by the Court of Appeal in *Hancock v Promontoria (Chestnut) Limited* [2020] EWCA Civ 907 and when *Emanuel* itself came before the Court of Appeal, as one of a number of related appeals raising issues about redaction, Promontoria’s appeal succeeded [2021] EWCA Civ 1682. In the Court of Appeal’s view, the resolution of the appeals turned on the question identified in *Hancock*: “*can the Court in the circumstances safely resolve the question of construction (or in the present cases the question whether the instrument is effect as an assignment) on the material before it?*” (at para 48). If it can, the Court of Appeal saw no reason why it should not do so (*ibid*). In *Emanuel*, the Recorder had been entitled to accept that the redactions to the deed of assignment were justifiable and he had been entitled to conclude that he could safely resolve the issue of Promontoria’s title to sue (paragraphs 86 and 87).

218. The decisions of the Court of Appeal in *Hancock* and *Emanuel* provide useful guidance as to the appropriate approach to issues of redaction in this context, while emphasising that the approach in any particular case will be heavily dependent on the context: *Emanuel*, paragraphs 44-46. The Court in *Emanuel* also expressed the view that it was in general unsatisfactory for questions as to the extent of redactions to be first raised at trial: para 47. We agree. We were told, without contradiction, that the Declaration of Trust was produced on discovery in redacted form. If any of the Defendants considered that they were entitled to see the document in unredacted form, or otherwise sought to object to the Bank relying on the redacted document in evidence, that issue should have been raised in advance of the hearing.

219. This ground of appeal fails.

The Bank's failure to join the Receivers as plaintiffs in the claim against CBRE

220. Ground 15 of the First Defendant's Notice of Appeal refers to the terms of engagement between the Bank and CBRE whereby (so it is said) that CBRE accepted that it had a duty of care to the Bank and its receivers in the carrying out of its professional duties. It is then said that the Receivers appointed by the Bank were agents of the Borrowers (the McDonaghs) and the First Defendant then complains of the Bank's failure to "*involve the Receivers as parties to the litigation with CBRE notwithstanding the duty of care bestowed on the receivers as agents of the borrowers to which said receivers were entitled to invoke by contract*". Ground 16 then asserts that the Judge erred in failing to take into account "*that the omission of the Receivers from the Litigation*

denied the borrowers through their agents the Receivers, the right to be heard and was an abuse of the Power of Attorney clause in the Mortgage Deed, contrary to the Interests of Justice and proportionality.”

221. The First Defendant’s written submissions are to similar effect, suggesting (at para 12) that *“the actions of Ulster Bank had prevented the Borrowers from pursuing [a] remedy as against CBRE who had pledged a duty of care to their agents, the receivers.”* The Borrowers, it is said, were, by contract, *“indemnified under a duty of care confirmed by CBRE in the event of erroneous valuations presented to the Bank”* (*ibid*).

222. In her oral submissions, Counsel for the First Defendant referred to *Coulston v Doyle* [2020] IEHC 619 – as it happens a decision of Twomey J – where consideration was given to the tripartite agency between bank, receiver and borrower and the special character of the receiver’s agency was discussed. Counsel said that the Bank’s security was not confined to the Kilpeddar Lands but also included CBRE’s confirmation that the Bank could rely on its valuation report. The Receivers were also entitled to rely on that confirmation. The Bank, it was said, was not *“entitled to prevent or inhibit the primary duties of the receiver to try to bring about a situation in which the secured debt was repaid”*, reference being made to the decision of the Court of Appeal of England and Wales in *Silven Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409, [2004] 1 WLR 997. Counsel relied on *Medforth v Blake* [2000] Ch 86 as authority for the position that the Receivers owed a duty of good faith to the Borrowers. The

Receivers had (so it was said) “*absconded from their primary duties*” by walking away from “*the legitimate right to [a] remedy in contract as against CBRE.*”³¹

223. This ground of appeal is, in our view, specious and without merit. Extended analysis is not warranted. Instead, we make the following observations:

- CBRE provided its valuation report to the Bank. It did so pursuant to a letter of instruction which made it clear that the Bank intended to rely on CBRE’s valuation “*for the purposes of evaluating both the [Borrowers’] proposal and the security value of the [Kilpeddar Lands]*”. In the circumstances, absent any contractual exclusion of duty (and there was none), CBRE clearly owed a duty of care to the Bank in preparing its valuation of the Lands.
- Notwithstanding CBRE’s apparent confirmation that “*any receiver appointed by the Bank to realise its security*” might rely on the terms of its report and that the duty of care owed by it extended to such a receiver, it is difficult to see how the Receivers – who were appointed in excess of 7 years after CBRE furnished its valuation report – could have had any cause of action in the circumstances here, given that any loss arising from any breach of duty by CBRE was suffered by the Bank and not by the Receivers.

³¹ Transcript, pages 143-144.

- Insofar as it may be said that .that the “*primary duty*” of the Receivers “*to bring about a situation where the secured debt is repaid*” (*Silven Properties Ltd v Royal Bank of Scotland plc*, para 28) entitled them to sue CBRE, any such action could only have been brought on behalf of the Bank.
- The suggestion that CBRE’s confirmation that the Bank’s receiver could rely on the valuation report and was owed a duty of care effectively constituted an assurance to the Borrowers and extended CBRE’s duty of care to the Borrowers on the basis that the Receivers were appointed as their agents, is baseless. The Receivers are not the general agents of the Borrowers. Their agency is primarily a mechanism to protect the Bank: *Bula Ltd v Crowley (No 3)* [2003] 1 IR 396, per Denham J at 424, citing *Gomba Holdings Ltd v Minorities Finance Ltd* [1988] 1 WLR 1231, at 1233.
- Insofar as the First Defendant suggests that the Receivers were under a duty to sue CBRE, either such duty was owed to the Bank (in which case any breach of that duty is a matter for the Bank to pursue with the Receivers) or, alternatively, the duty was owed to the Borrowers (in which case any breach of that duty is a matter for the Borrowers to pursue with the Receivers). In neither scenario would any alleged breach of duty by the Receivers give the Defendants a defence against the Bank’s claim against them.

224.It follows that this ground of appeal fails.

225.A related ground of appeal advanced by the First Defendant relates to the Bank's alleged failure to account for the payment received from CBRE in settlement of the Bank's claim against it. That complaint does not raise any cognisable issue in circumstances where the payment has now been fully credited against the Defendants' liabilities to the Bank (aside entirely from the view we have previously expressed that there was, in fact, no legal duty on the Bank to make such a credit).

226.Thus, all of the remaining grounds relied on by the First Defendant are rejected.

CONCLUSIONS AND ORDER

227. We summarise our conclusions as follows:

228. The provisions in the CLA governing concurrent wrongdoers are concerned exclusively with the allocation of responsibility between wrongdoers facing legal action for the recovery of damages.

229. A claim for recovery of a debt is not an action for the recovery of damages, but an order in the nature of specific performance of a contractual obligation. The law governing contribution as between or claims as against concurrent wrongdoers has never applied to an action for the recovery of a debt and nothing in the CLA changes that.

230. Even if the CLA could be interpreted in such a way that an action for the recovery of a debt and an action for damages for breach of contract are to be equated so that debt recovery proceedings come within Part III CLA, a claim against a debtor on foot of a loan instrument and a claim against a valuer whose negligence is alleged to have resulted in the granting of the loan are not actions to recover the same 'damage'. The debtor's liability is for the whole of the debt while the valuer's liability is (at most) only for the amount of the loan that the lender is unable to recover from the debtor. The liability of the debtor and the debtor are not therefore concurrent.

231. We agree with the contention of the Bank that if the defendants wished to make a case that CBRE was a wrongdoer it was incumbent on them to adduce some expert evidence that that firm had acted negligently as alleged by the defendants.

232. It is only if CBRE would have had a contribution liability in excess of €5 million that any reduction to the Bank's claim against the Defendants would arise. In our view, there is absolutely no basis on which it could be suggested that CBRE could have any such liability to the Defendants. Indeed, we find it impossible to see a basis on which CBRE could be required to make any contribution to the Defendants, given that the effect of such contribution would be to relieve the Defendants of a contractual obligation freely undertaken by them and confer a windfall benefit on them insofar as they would be relieved, at least in part, from the obligation to repay monies of which they had had the benefit.

The Non-CLA Issues – Second and Third Defendants' Appeal

233. In our view, the Judge erred in concluding that the effect of clause 5(c) of the Mortgage required the prior written consent of the Bank to the sale of the Kilpeddar Lands. However, that has no impact on the conclusions ultimately reached by the Judge.

234. The Compromise Agreement did not constitute a consent by the Bank to the sale of the Lands.

235.No basis has been shown for impugning the Judge's conclusion that the Heads of Agreement of 13 June 2014 did not constitute a binding agreement for the sale of the Kilpeddar Lands to Granja. We reject the argument that the Bank was not entitled to question the Heads of Agreement or somehow obliged to concede that it was a legitimate and enforceable agreement.

236.We reject these Defendants' contention that the Bank breached the Compromise Agreement by effecting a set-off of monies of the First Defendant in March 2013. We also reject the contention that the Bank rendered it impossible for the Defendants to comply with the Agreement by withdrawing its consent to the sale of the Kilpeddar Lands.

237.The Second and Third Defendants have failed to establish that the Bank breached the Compromise Agreement and the breaches of the Agreement by the Defendants on which the Bank relies cannot be attributed to any breach by the Bank.

238.The principle in *Allen v Allen* is not engaged in the circumstances here and the contention that the Judgment should be set aside because the Judge wrongly deployed findings made in respect of the First Defendant against the Second and Third Defendant is without basis.

The Non-CLA Issues – First Defendant’s Appeal

239. We unhesitatingly reject the First Defendant’s complaints that he was wrongfully excluded from calling evidence either from employees of the Bank or from a graphologist.

240. We are not persuaded that the Judge erred in concluding that the Bank was entitled to require Joint Selling Agents in relation to the proposed sale of the Kilpeddar Lands.

241. The Judge was correct to refuse to review his Judgment when the First Defendant sought such a review following the conclusion of the hearing and the giving of the Judgment and Supplemental Judgment. In any event, the argument that the Defendants or any of them were deceived into signing the Compromise Agreement by the Bank’s failure to disclose to them that, as of that time, the Bank’s charge over the Kilpeddar Lands had not been registered in the Land Registry is devoid of merit.

242. The Judge was entitled to find that the Bank was entitled to sue on the basis that it remained the legal owner of the facilities and the underlying security. No challenge was made to the Judge’s analysis of the effect of the Declaration of Trust of 12 February 2015.

243. The First Defendant is not entitled to raise issues relating to the redaction of the Declaration of Trust for the first time on appeal to this Court.

244. The contention that the Bank's failure to join the Receivers as co-plaintiffs in the claim against CBRE gave rise to some defence against the Bank's claim was specious and without merit.

245. It follows from these conclusions that both of the appeals must be dismissed.

246. In light of the conclusions we have reached and the failure of the appeals, it is our provisional view that the unsuccessful appellants should have to pay the costs of the Bank. If either the First Defendant or the Second and Third Defendants wish to contend for any different order, they will have 21 days in which to make a written submission (not to exceed 1,500 words) setting out the grounds for objecting to the proposed order and the Bank will then have 7 days in which to respond (again, subject to a maximum word count of 1,500 words). In that event, the Court will consider the submissions and issue a written ruling.

Pilkington J has indicated her agreement with this judgment and the orders proposed.