

THE HIGH COURT

COMMERCIAL

[2024] IEHC 36

[2018 5922 P]

BETWEEN

ULSTER BANK IRELAND DAC, PAUL MCCANN AND PATRICK DILLON,

PLAINTIFFS

V.

BRIAN MCDONAGH, KENNETH MCDONAGH AND MAURICE MCDONAGH

DEFENDANTS

Judgment of Mr. Justice Michael Quinn delivered on the 30th day of January 2024

1. The plaintiffs have applied for an order pursuant to the inherent jurisdiction of the court restraining the defendants, referred to in parts of this judgment as “the McDonaghs”, from instituting or re - entering any proceedings as against them and as against Grant Thornton, Promontoria (Aran) Limited and Link ASI Limited, or any of their respective servants or agents, without leave of the President of the High Court (or such Judge as may be nominated by the President), “including, but not limited to any proceedings concerning or in any way relating to” eleven events and matters identified in the Notice of Motion as follows:-

- (i) the loan facility first advanced by way of facility letter dated 20 July 2007 as between Ulster Bank Ireland Limited (as it was then known) and the McDonaghs (the “loan facility”) and any security pertaining thereto;*
- (ii) the 80 acres of land at Kilpeddar, Co. Wicklow comprised in Folios WW 21790 F and WW 36738 F (“the Kilpeddar lands”);*
- (iii) the withdrawal of €325,000 from an account held in the name of Brian McDonagh;*
- (iv) the agreement, commonly referred to as the Compromise Agreement, as between Ulster Bank Ireland Limited (as it was then known) and the McDonaghs;*
- (v) the appointment of Messrs Paul McCann and Patrick Dillon as receivers over the Kilpeddar lands and the manner in which they conducted themselves as receivers over the Kilpeddar lands;*
- (vi) the proceedings entitled “Brian McDonagh, Maurice McDonagh and Kenneth McDonagh, Plaintiffs, and Ulster Bank Ireland Limited DAC, Norman Ginnelly, Paul McCann, Patrick Dillon, CBRE, Promontoria (Aran), Link ASI Limited, Conor Maher and Alan Monaghan, High Court no. [2021] 850 P”;*
- (vii) the purported Heads of Agreement dated 13 June 2014 as between the McDonaghs and Granja Limited;*
- (viii) the acquisition by Promontoria (Aran) from Ulster Bank Ireland DAC of the loan facility and any security pertaining thereto;*
- (ix) the sale of the Kilpeddar lands by the receivers and consideration received or to be received on foot thereof;*
- (x) the debt due and owing by the McDonaghs on foot of the loan facility;*
- (xi) the appointment by Ulster Bank Ireland Limited (as it was then known) of receivers over any properties owned by Brian McDonagh, including, without*

prejudice to the generality of the foregoing, Units 1 and 4 Ballymount Business Park, Ballymount Dublin 24, 8 Bloomfield Avenue, Dublin 8, 60A Albert Close, Glenageary Co. Dublin, and 13 Grosvenor Square, Rathmines, Dublin 6, or the subsequent sale of those properties.

2. It is unusual that an order of this nature, commonly referred to as an ‘Isaac Wunder’ order, is sought by a plaintiff. But, at the time of hearing this application, there had been commenced between the parties or entities related to the parties ten sets of proceedings including these proceedings.

3. In six of the proceedings the plaintiff, or petitioner in one case, is Ulster Bank (Ireland) DAC (“the Bank”) together with in some cases the second and third plaintiffs Mr. McCann and Mr. Dillon.

4. In four of the cases, the McDonaghs or a company called Granja Limited (“Granja”) are plaintiffs. Granja has been found by the High Court (Twomey J.) to be front for Mr. Brian McDonagh ([2020] IEHC 185 and [2022] IECA 87).

5. Before turning to the history and background to this application, I shall list those proceedings:-

Case No. 1. *Brian McDonagh v. Ulster Bank Ireland Limited* (2014/834P) (the “Brian McDonagh” Proceedings)

Case No.2. *Granja Limited v. Paul McCann, Patrick Dillon, Ulster Bank Ireland Limited, Brian McDonagh, Kenneth McDonagh and Maurice McDonagh* (2014/10190P) (the “Granja Specific Performance Proceedings”)

Case No. 3 *Ulster Bank Ireland DAC, Paul McCann and Patrick Dillon v. Brian McDonagh, Kenneth McDonagh, and Maurice McDonagh* (2018/5922P) (the “Judgment Proceedings”) (the proceedings in which this application is made)

Case No. 4 *Ulster Bank Ireland DAC, Paul McCann and Patrick Dillon v. Granja Limited* (2019/117SP) (the “Granja Caution Proceedings”)

Case No. 5 *In the matter of Granja Limited and the Companies Act 2014* (2019/249COS) (the “Granja Winding Up Proceedings”)

Case No. 6 *Brian McDonagh, Maurice McDonagh and Kenneth McDonagh v. Ulster Bank Ireland DAC, Norman Ginnelly, Paul McCann, Patrick Dillon, CBRE, Promontoria Aran, Link ASI Limited, Conor Maher, and Alan Monaghan* (2021/850P) (the “CBRE Proceedings”)

Case No. 7 *Kenneth McDonagh, Maurice McDonagh and Brian McDonagh v. Fane Investments Ltd., Quanta Capital Investments Ltd., Mel Sutcliffe, and Ulster Bank Ireland DAC* (2021/4439P) (the “Fane Proceedings”)

Case No. 8 *Ulster Bank Ireland DAC v. Brian McDonagh* (2022/96SP) (the “Brian McDonagh Well Charging Proceedings”)

Case No. 9 *Ulster Bank Ireland DAC v. Maurice McDonagh* (2022/107SP) (the “Maurice McDonagh Well Charging Proceedings”)

Case No. 10 *Ulster Bank Ireland DAC v. Kenneth McDonagh* (2022/108SP) (the “Kenneth McDonagh Well Charging Proceedings”)

Events before commencement of proceedings

6. On 20 July 2007, the Bank issued a facility letter to the defendants for a total sum of €21.5 million. The letter recorded that the facility would be reviewed in August 2008, and it provided for security to include a first legal charge over 80 acres of lands at Kilpeddar Co. Wicklow, and other security.

7. On 3 August 2007 the acquisition of the Kilpeddar property by the defendants was completed and they executed a mortgage of the property in favour of the Bank.

8. The borrowings were restructured in January 2009 for a higher amount of €21,855,000.

9. When the defendants failed to repay the loan on its various due dates, the parties entered into a Compromise Agreement on 13 March 2013.

10. Under the Compromise Agreement, the defendants acknowledged the amount of the debt then due to the Bank pursuant to the facility and confirmed the security. They granted certain covenants and commitments including the following: -

- the plaintiffs acknowledged the debt owing to the Bank pursuant to the original facility and confirmed the security granted to the Bank;
- to make a cash payment of €250,000;
- to dispose of all of the properties charged to the Bank, being both commercial and residential properties “for the best price reasonably obtainable”, by a series of target dates identified in the Compromise Agreement and to remit to the Bank the proceeds of sales net only of taxes and costs;
- to procure the engagement of agents approved by the Bank for the purpose of marketing the property at Kilpeddar for sale on the open market “with the intent of having the sale of same concluded no later than 31 July 2014”;
- the defendants gave further covenants in respect of their assets and affairs, the mandating of rent accounts, the sale of artwork in the case of Kenneth McDonagh, and certain other specific asset disposals by Brian McDonagh, including a property in Portugal.

11. The Bank agreed that implementation of this agreement would constitute full and final settlement of the debt owed to it.

12. The agreement provided that in the event of a failure of any of the borrowers to comply with the terms of the agreement or if the properties were not sold by a long stop date mentioned in the agreement, the Bank would be at liberty to take whatever steps it deemed fit on foot of the facility letters and security held by it.

13. The effect of the Compromise Agreement was that if the properties identified therein were sold by the target dates and the proceeds remitted to the Bank, the balance of the debt would be written off. It was estimated at that time that the relevant assets had a value of approximately €5 million.

14. The Kilpeddar property was not sold by the deadline stipulated in the agreement. On 26 September 2014, the Bank demanded repayment of its loan. On 1 October 2014, the Bank appointed receivers over the Kilpeddar property, being the first and second plaintiffs.

15. On 1 February 2021, the Bank sold the lands at Kilpeddar for a sum of €3 million to Fane Investments Limited (“Fane”). On 21 January 2021 the Bank entered into a Profit Participation Agreement with Fane whereby the Bank retained an entitlement to receive a portion of any profits Fane may receive on a further sale of the lands. The Bank has confirmed that should it receive monies on foot of that Agreement it will credit this amount against the judgment it has obtained in the Judgment Proceedings.

16. The sale of Kilpedder to Fane is the subject of the Fane Proceedings (case No. 7), which are listed for trial later this court term, and to which I shall refer in more detail below (See paragraphs 51 et seq) The plaintiffs do not seek to stay or restrain that hearing.

The Brian McDonagh Proceedings (Case No. 1)

17. On 1 October 2014, the day on which the receivers were appointed, Brian McDonagh issued plenary proceedings against the Bank, seeking the following: -

- (i) specific performance of the Compromise Agreement of 13 March 2013;

(ii) a declaration that the Bank was not entitled to remove a sum of €325,000 from his account at the Bank and payment of the sum of €325,000 to him;

(iii) a declaration that the receivers “purportedly appointed on 31 March 2014” (who were in fact appointed on 1 October 2014) were not lawfully and validly appointed and an order discharging the appointment of the receivers;

(iv) an injunction restraining the Bank from taking any steps to enforce or recover the loans or liabilities pursuant to the original loan agreement.

18. On the same day, Mr. McDonagh applied *ex parte* for and was granted an interim injunction restraining the Bank from taking steps to enforce recovery of the loan.

19. Following service of these proceedings, the Bank issued an application to set aside the interim order on the grounds of material non – disclosure. In a reserved judgment delivered on 22 October 2014, the court (Keane J.) set aside the interim order in circumstances where the court was: -

“satisfied that there was in this case a significant and material failure to disclose matters which should have been disclosed in the context of the ex parte application for interim relief”.

The application for an interlocutory injunction was dismissed.

20. Mr. McDonagh did not pursue those proceedings any further. He filed a number of notices of intention to proceed, the last of which was filed on 9 April 2019.

The Granja Specific Performance Proceedings (Case No. 2)

21. On 3 December 2014, Granja issued proceedings against six defendants, namely the receivers, Mr. McCann and Mr. Dillon, Ulster Bank Limited and the three McDonaghs.

Granja sought specific performance of an agreement which it stated had been entered into on 13 June 2014 for the purchase by it of the Kilpeddar lands for €1.5m. The agreement referred

to was a document described as a “Heads of Agreement” dated 13 June 2014 which Granja asserted was a binding contract for sale of the lands.

22. The Heads of Agreement had not been exhibited in the affidavit grounding Mr. McDonaghs application for an interim injunction in Case No. 1.

23. The McDonaghs did not defend the proceedings.

24. The Granja proceedings were defended by the Bank and the receivers and a trial commenced in March 2018. On the fifth day of the hearing, one of Granja’s witnesses, Mr. Gerard Fehily, a director of Granja who had been giving evidence, became unwell. He was hospitalised and was unable to continue his evidence the next day. The court was then informed that Granja was discontinuing the action.

25. Following the discontinuance an order for costs was made against Granja.

26. A settlement was later entered into between Granja Limited and the McDonaghs. On 26 October 2018 an order was made vacating a *lis pendens* which had been registered by Granja against the Folio for the Kilpeddar lands.

27. In these proceedings now before the court, the Judgment Proceedings (Case No. 3), Twomey J. held, inter alia, that the Heads of Agreement was not a binding contract, that Granja was a front for Mr. Brian McDonagh and that the claim that it had entered into a binding agreement to acquire the lands at Kilpeddar was made only for the purpose of seeking to assert compliance with the Compromise Agreement and to defeat the Bank’s entitlement to rely on breaches of the Compromise Agreement to demand repayment of the loan and to appoint the receivers ([2020] IEHC 185).

The Granja Caution Proceedings (Case No. 4)

28. On 23 November 2018, Granja, having retained new solicitors, registered a caution on the Kilpeddar Folio citing the Heads of Agreement.

29. On 21 March 2019, the Bank and the receivers commenced proceedings ([2019] 1175 SP) to vacate the caution.

30. That application was initially contested by Granja. Ultimately the later appointed liquidator of Granja consented to the vacation of the caution.

The Granja Winding Up Proceedings (Case No. 5)

31. Following the discontinuance of the Granja Specific Performance proceedings, and the ascertainment of costs due to the Bank, the Bank petitioned for the winding up of Granja. On 31 July 2019 an order was in that case made (Houghton J.) for the winding up of the company and appointing Mr. Shane McCarthy of KPMG as liquidator.

32. The registered directors of Granja were Yeeksee Ooi, the life partner of Mr. Brian McDonagh, and Mr. Gerard Fehilly.

33. In proceedings commenced by the liquidator of Granja, Ms. Ooi and Mr. Fehilly were made the subject of declarations of restriction pursuant to s. 819 of the Companies Act 2014.

34. In the same proceedings, the court found that Mr. Brian McDonagh was a shadow director of Granja and a declaration of restriction was made also against him.

35. Neither Ms. Ooi nor Mr. McDonagh contested those applications.

The Judgment Proceedings (Case No. 3)

36. These are the proceedings in the title of this judgment. They were commenced on 2 July 2018 and the Bank sought judgment against the defendants for the sum of €22,090,302.

37. Following a 21 day trial before Twomey J., reserved judgments were delivered on 6 April 2020 and 23 June 2020. The court granted judgment for a total sum of €22,947,202.

38. The defendants appealed this judgment and on 6 April 2022 the Court of Appeal delivered judgment dismissing the appeal (save for a credit of €3 million arising from the sale of Kilpedder in the time which intervened) ([2022] IECA 87).

39. The judgment of Twomey J. is the most comprehensive record of the history of contention between the parties as regards events which have occurred before then. ([2020] IEHC 185). Among the findings made by Twomey J. were the following: -

- (a) the Heads of Agreement dated 16 June 2014 were not a binding contract for the sale of the Kilpeddar lands;
- (b) the McDonaghs had breached the Compromise Agreement of 13 March 2013;
- (c) Granja was a front for Mr. Brian McDonagh;
- (d) the defendants had adduced false evidence, including forged Declarations of Trust relating to the shareholding in Granja, in an effort to disprove that Granja was a front for Mr. McDonagh;
- (e) that the motivation for the McDonaghs to execute the Heads of Agreement of 13 June 2014 was an attempt to defeat a sale of the Kilpeddar site by receivers appointed by the Bank;
- (f) that because of breaches of the Compromise Agreement the Bank was not precluded from enforcing its security over the Kilpeddar lands, which it did by appointing the receivers;
- (g) the Bank was entitled to judgment against the McDonaghs for the full amount of the loan without the benefit of the write – off in the Compromise Agreement;
- (h) that a claim made by Mr. Brian McDonagh that the Bank had wrongfully withdrawn a sum of €325,000 from his account on 27 March 2013 was without foundation;
- (i) the judgment amount of €22,090,302.64 took account of a sum of €5 million which the Bank had received from CBRE in settlement of a claim which the Bank had made against CBRE for negligence in valuing the Kilpeddar lands at the time of the original loan (See paragraphs 42 et seq. below)

40. Orders for costs were made against the McDonaghs in these proceedings, both in the High Court and in the Court of Appeal.

41. The Bank later brought applications for discovery in aid of execution pursuant to the judgment.

The CBRE proceedings (Case No. 6)

42. At the time of the original transaction in 2007, CBRE were retained to value the Kilpedder lands. They estimated the value at €56 million.

43. On 11 February 2021, the McDonaghs commenced these proceedings against the Bank, Norman Ginnelly, an employee of the Bank, Paul McCann, Patrick Dillion, the receivers appointed on 1 October 2014, CBRE, Promontoria Aran (to whom the loans were subsequently sold by Ulster Bank), Link ASI, a service provider to the Bank and to Promontoria, and Conor Maher and Alan Monaghan, employees of Link.

44. The first version of a statement of claim delivered in those proceedings articulates a claim in negligence against CBRE. The endorsement of claim on the summons does not do so but makes the following claims:-

- Paragraph 1: Breach of duty on the part of all the defendants;
- Paragraph 2: Breach of statutory duty on behalf of the defendants;
- Paragraph 3: Breach of contract on behalf of the Bank and the receivers;
- Paragraph 4: Concealment of breach of contract on the part of Ulster Bank and the receivers in relation to proceedings which Ulster Bank had previously initiated against CBRE and which had ultimately been settled for a sum of €5 million and costs;
- Paragraph 5: Misrepresentations made to the McDonaghs by the Bank on 13 March 2013 “to procure the signatures of the said plaintiffs to [the Compromise Agreement]”;

- Paragraph 6: Failure, refusal and neglect on the part of the Bank “to invoke the duty of care as pledged by CBRE to the receivers”;
- Paragraph 9: Unlawful removal of monies from the account of Brian McDonagh by Ulster Bank;
- Paragraph 10/11: Misrepresentations on the part of Mr. Maher and Mr. Monaghan of Link in relation to the debt the subject of these proceedings;
- Paragraph 12: Failure and refusal on the part of Mr. McCann “*to reveal his ongoing contractual relationships with CBRE when accepting his deed of appointment from Ulster Bank Ireland DAC*”;
- Paragraph 13: A declaration that the Compromise Agreement of 13 March 2013 “*was presented under circumstances of non disclosure of material facts to procure consent and thus was void ab initio*”;
- Paragraph 14: A declaration that the Bank, “in omitting Paul McCann and Patrick Dillon as co-plaintiffs in proceedings against CBRE and others in the 2013 proceedings, breached the terms of the mortgage deed and prevented the plaintiffs from accessing the right to be heard and fair procedures through their agents the receivers”;
- Paragraph 16: A declaration that Paul McCann acted in violation of his duties as a receiver in the realisation of the security for the Bank;
- Paragraph 17: A declaration that “the contractual position of Paul McCann with CBRE and his failure to rely upon the terms of the CBRE report including the valuation of €56 million upon which he was entitled to rely on the confirmations of CBRE obstructed the right of the plaintiffs to redeem the mortgage through the proceeds of remedy to which the said Paul McCann was entitled to seek”;

- Paragraph 18: A declaration that the Bank, Conor Maher, Alan Monaghan, as agents for Link ASI, “did connive to misrepresent Ulster Bank DAC as a plaintiff in proceedings Record No. 2018/5922 (the Judgment proceedings) for judgment as against the within plaintiffs when the said Ulster Bank had no *locus standi* as plaintiff”;
- Paragraph 19: A declaration that the plaintiffs “*hold an entitlement to the invocations of section 35(1)(h) of the Civil Liability Act as against Ulster Bank DAC as a concurrent wrongdoer and that the said Ulster Bank Ireland DAC under its release or accord with CBRE dated the 22nd day of January 2016 is fully liable to the plaintiffs for the sum of €56 million in damages as the specified valuation of CBRE in the terms of its report to the said Ulster Bank Ireland DAC*”;
- Paragraph 20: Damages as against all the defendants for misrepresentation, “nondisclosure of material facts, pertaining to s. 62(2) of the Registration of Title Act, unlawful disposition of properties through misrepresentation, causing economic loss, breach of express terms of the Mortgage Deed, and failure to invoke the contractual rights of the receivers to a duty of care under the terms of a report presented by CBRE, valuing the subject folios at €56 million, whereby the said damages above the valuation figure are to be decided by this Honourable Court.”

45. Following the service of these proceedings, the Bank and the receivers applied to admit them to the Commercial List of this Court. On the return date for that application, the McDonaghs confirmed that the proceedings would be discontinued against all defendants except CBRE. Notices of Discontinuance were then filed in respect of all those defendants.

46. CBRE brought an application for entry of these proceedings, then pending only against it, into the Commercial List.

47. A Statement of Claim delivered on 14 March 2022 pleads that CBRE failed to properly advise on the suitability of the Kilpedder lands as loan security, and inflated the value of the property. It makes a series of general pleas as against CBRE and claims damages for negligence, breach of duty and breach of contract.

48. CBRE issued an application for a declaration that the McDonaghs' claim as against it was barred pursuant to the provisions of the Statute of Limitations. On 12 May 2023, this Court made a declaration that the plaintiff's claim against CBRE is statute barred and dismissed the proceedings ([2023] IEHC 242). By a judgment delivered on 18 January 2024, an appeal against that judgment was dismissed.

49. I make allowance for the fact that the versions of the Plenary Summons and Statement of Claim in the CBRE proceedings and which are before the court on this application are stated to be issued and delivered by the McDonaghs in person, and therefore without the benefit of legal advice. Nonetheless, it is extremely difficult to ascertain, with one exception, what elements of the claim as initiated against the defendants other than CBRE was not a duplication of issues which were agitated firstly in the Brian McDonagh proceedings (Case No. 1), in the Granja Specific Performance Proceedings (Case No. 2) and thirdly in the McDonaghs' defence of the Judgment Proceedings (Case No. 3). The exception is the complaint against Ulster Bank and the receivers of a failure to join the McDonaghs as plaintiffs in earlier proceedings which the Bank had initiated against CBRE and which had resulted in a settlement of €5 million plus costs.

50. These proceedings stand concluded by the decision of the Court of Appeal delivered on 18 January 2024, subject of course to any application the McDonaghs make for leave to appeal further.

The Fane Proceedings: 2021 4439 P Kenneth McDonagh, Maurice McDonagh and Brian McDonagh v. Fane Investments Limited, Quanta Capital Investments Limited, Mel Sutcliffe, and Ulster Bank Ireland DAC – Case No. 7

51. There has been placed before the court on this application the Plenary Summons issued 7 July 2021, a statement of claim undated but apparently delivered on a date in 2022, an amended statement of claim dated 16 September 2022 and a second amended statement of claim delivered 9 December 2022. No other pleadings in this case were opened or referred to in this application.

52. The McDonaghs claim that on 15 December 2017 they entered into a binding agreement with Quanta Capital and Mr. Sutcliffe for the formation of a partnership through a special purpose vehicle which would be established for the sole purpose of acquiring and developing the Kilpeddar lands, at that time from Promontoria (Aran) Limited, which had purchased the loan from Ulster Bank.

53. It is alleged that in February 2021, in breach of this agreement, Fane acquired the property from the Bank for a consideration comprising the payment of €3 million and entry into a Profit Participation Agreement with the Bank. In his second affidavit in relation to this application sworn on 26 January 2023, Mr. Mahon confirms on behalf of the Bank that the lands were duly sold to Fane by the Bank as mortgagee in possession on 1 February 2021 at the price of €3 million and that the Bank has an interest in any future profit that may be made by Fane from the lands under the terms of a Profit Participation Agreement. Mr. Mahon also confirms that any amount it receives pursuant to that Agreement will be credited to the McDonaghs loan account.

54. The McDonaghs seek specific performance of the alleged agreement of 15 December 2017 with Quanta and Mr. Sutcliffe and a declaration that they are entitled to a 50% shareholding in Fane.

55. As against the Bank, they seek the following reliefs: -

- (i) a declaration that the appointment of Mr. Dillon and Mr. McCann as receivers of the mortgaged property was invalidly made;
- (ii) a declaration that the transfer of the property by the Bank to Fane did not amount to a “sale” of the property;
- (iii) a declaration that the Bank failed to act in accordance with its statutory duty of care in purporting to sell the property to Fane at the time and price at which it did so;
- (iv) damages for inducing breach of contract between the McDonaghs and Quanta.

56. The McDonaghs claim to have suffered the following loss and damage: -

- (i) the judgment obtained by the Bank against them for €22 million;
- (ii) the loss of ownership of residential properties which they had charged by way of collateral security, and loss of profits on the development of the Kilpedder lands.

57. After service of these proceedings the Bank applied to have them admitted in the Commercial List. At the return date for this application, the McDonaghs informed the court that they would discontinue the Fane proceedings as against the Bank. Notice of Discontinuance as against the Bank was subsequently filed by the McDonaghs.

58. In October 2022, the McDonaghs issued a motion seeking to rejoin the Bank in the Fane proceedings. The Bank did not oppose that application and by order of the court made on 17 October 2022, the proceedings as against the Bank were re – entered.

59. The McDonaghs claim that it was only after the discontinuance of this action against the Bank that they discovered the Profit Participation Agreement, hence the re-joining of the Bank. Although the Bank did not oppose re-entry of the action against it, it is fully defending the case. In this application the Bank does not seek to stay or restrain the pursuit or trial of the Fane proceedings. Accordingly, the issues which the McDonaghs pursue arising from the sale

of the property to Fane, and the entry into a Profit Participation Agreement between Ulster Bank and Fane will fall for determination at the trial of that action.

60. The Fane proceedings are listed for trial later this term. Therefore, I shall limit what I say about that case to the following.

61. Firstly, the McDonaghs and the Bank are not the only parties to the action.

62. Secondly, on this application the court was shown only the Plenary Summons and the Statement of Claim as amended and no other pleadings and is therefore not familiar with all the issues which may fall for determination at the trial.

63. Thirdly, and subject to what emerges at the trial, it appears that, at the least, the claims regarding the actions of the Bank in selling the Kilpedder lands to Fane on 1 February 2021 and entering the Profit Participation Agreement with Fane on 21 January 2021, have not been the subject of any prior court judgment. The court hearing the Fane Proceedings will decide the extent, if any, to which prior decisions of any court inform its consideration of the issues in that case.

64. For these reasons, nothing I have said in this judgment can prejudge the substantive merits of the Fane proceedings, or any submissions made by any of the parties thereto, whether as to res judicata, Henderson v. Henderson or otherwise.

The Well charging proceedings (Cases No. 8, 9 and 10)

65. In three separate actions, (2022 Nos 96 SP, 107 SP and 108 SP), the Bank has sought and obtained orders declaring the judgment granted by Twomey J. in these proceedings to be well charged on the principal private residences of the defendants.

Summary of Proceedings

66. The proceedings initiated by the McDonaghs or Granja may be summarised as follows: -

(i) the Brian McDonagh proceedings seeking specific performance of the Compromise Agreement and an injunction to restrain the Bank appointing the receivers, issued on 1 October 2014. The interim injunction was discharged on 22 October 2014 and this action has not proceeded;

(ii) the Granja Specific Performance proceedings issued on 3 December 2014 which were discontinued as against the Bank and the receivers, after five days of a trial, and a costs order made against Granja Limited;

(iii) the CBRE proceedings, which have been discontinued against all defendants other than CBRE and dismissed as against CBRE;

(iv) the Fane proceedings in which a trial before this Court is pending.

67. As against the McDonaghs and Granja, there were seven proceedings, as follows: -

(v) the Judgment Proceedings resulting in the judgment of Twomey J. for a sum of €22,947,202, as upheld by the Court of Appeal subject to the reduction in respect of €3 million received on the sale of the property;

(vi) the Granja Caution Proceedings were disposed of after the liquidator of Granja consented to the vacation of the caution it had registered against the Kilpedder Folio;

(vii) the Granja Winding Up Proceedings, being the petition by the Bank grounded on unpaid costs, which culminated in the making of a winding up order and appointment of a liquidator by the court on 31 July 2019;

(viii), (ix) and (x) the Special Summons proceedings for well charging orders against principal private residences of the McDonaghs for the purpose of enforcing the Judgment.

68. Numerically it can be said that the Bank has been the instigator of six actions and the McDonaghs and Granja the initiators of only four. But all of the Bank initiated proceedings relate directly or indirectly to the pursuit by the Bank of recovery of the original loan and

enforcement of the Judgment Debt. Only the Fane Proceedings relate to subsequent events, namely the 2021 transaction between the Bank and Fane.

Correspondence.

69. On 21 June, 2022 the Bank’s solicitors Amoss wrote to the McDonaghs notifying them of the Bank’s intention to apply for the relief sought in this application. They stated the following:

“Given the misleading approach taken by you to date in all proceedings, and your continued appetite to issue motions, appeals and proceedings without thought, merit or any legal basis, our client is instructed us to issue a motion seeking Isaac Wunder relief against you. Such an application will seek to indefinitely prevent you together or individually from instituting legal proceedings against all or any of our clients named above. Additionally we will seek an order preventing you from making frivolous complaints against our office to the Legal Services Regulatory Authority. Such an application is necessary given your conduct to date, your refusal to accept the determination of the High Court in 2018/5922P (the Judgment Proceedings) and your continued threats relating to Garda investigations, appeals to the ECJ etc. In advance of issuing such a Motion we are offering you the opportunity to consent to such an order being made preventing you from issuing further proceedings against any or all of our clients and/or complaints against our office without leave of the High Court.”

70. In a reply dated 22 June, 2022 the McDonaghs stated:

“We have no intention of issuing further proceedings, however this excludes matters remaining before the Court of Appeal or any matters resulting therefrom including a Supreme Court application if required. As for fresh proceedings there (sic) shall not be taken”.

71. No new proceedings were commenced by the McDonaghs after the date of that letter. But they issued their motion to re-enter the Fane Proceedings returnable for 17 October 2022.

72. Mr. Mahon has exhibited extensive correspondence in which the McDonaghs continue to agitate matters the subject of previous proceedings, including fundamentals such as the validity of the debt now the subject of a judgment, and the appointment of the receivers by the Bank. Some of the correspondence relied on by the Bank to ground this application is correspondence in which the McDonaghs say that they have only “recently” become aware of the existence of the Profit Agreement between the Bank and Fane.

73. On 31 August, 2022 Mr. Brian McDonagh wrote:

“We have recently become aware that your client, Ulster Bank Ireland DAC entered into a profit share agreement in or about January, 2020 with Fane Investments Limited.

We would like to see all the documents in relation to this profit share agreement as this agreement may have a bearing on any purported debt (which is denied) (emphasis added) to any of your clients.

Please provide all the documents in relation to the above and also include the documents relating to the purported sale by your clients of the McDonaghs’ assets to Fane Investments (whom (sic) entered into the profit share agreement with your clients) in or about 1st February, 2021”.

74. Further correspondence was exchanged regarding access to the Profit Participation Agreement, but it is evident from the above and other letters that the McDonaghs persist in denying the Judgment Debt, and the Bank’s rights to appoint receivers, all of which were upheld by Twomey J.

75. In an email of 4 August, 2022 Mr. McDonagh complains once again about the withdrawal of a sum of €325,000 from his account by the Bank in March 2013, an act which Twomey J. also found to be lawful.

Allegations of fraud.

76. A theme which emerges in the correspondence and elsewhere from the McDonaghs is an allegation that a fraud has been perpetrated by Ulster Bank and/or Amoss or both.

77. In an email of 8 October, 2020 Mr. McDonagh wrote to Mr. Burke and Mr. Simons at Amoss stating:

“Last week we were interviewed by the serious fraud squad of An Garda Siochana regarding serious fraud accusations made by the McDonaghs. These fraud accusations were perpetrated by a senior member of your staff and relates to multiple millions of euro defrauded from your client Ulster Bank DAC for whom you act and have acted in the 2018/5922P case. Critical information and documentation was given to the Garda inspectors last week which will assist in An Garda Siochana uncover the extent of the fraud (alleged at this moment).

It is most important that Amoss solicitors and Ulster Bank are aware of this investigation for which we have received a garda Pulse number”.

78. In an email of 28 October 2021 Mr. McDonagh wrote to a Mr. Burke of Amoss stating *inter alia*

“I will take this opportunity once again to advise you that you ought not to continue as solicitors in any of the ongoing actions as there exists a conflict of interest.

We once again suggest that you stem (sic) down as solicitors acting for Ulster Bank Ireland DAC, Promontoria Scariff (sic) Paul McCann, Patrick or any associate parties. We again put you on notice of a potential serious fraud involving a member of your staff.

I have appraised your Gavin Simons of this potential fraud and a current investigation by GNECB (Garda National Economic Crime Bureau) which is ongoing.

I have also appraised Norman Ginnelly from Ulster Bank Ireland DAC who is aware of the situation.”

79. Messrs. Amoss corresponded with the Garda National Economic Crime Bureau who confirmed to them by letter dated 11 November, 2021 that the bureau was not aware of any fraud investigations in relation to Amoss. No Pulse number was ever provided either by the McDonaghs or by the Garda Siochana.

80. At a hearing before the Court of Appeal on 8 November, 2021, Mr. Brian McDonagh repeated before the court his assertion that “the fraud squad are investigating Amoss in this”.

81. It is not apparent from the correspondence exhibited on this application precisely what is the nature of the fraud allegation, but the McDonaghs have in correspondence repeated and not withdrawn their allegation of the existence of an ongoing fraud investigation concerning both the Bank and its employees and Amoss.

82. At first reading the letter of 22 June, 2022, quoted at paragraph 70 above, contained a statement that the McDonaghs had no intention of issuing any further proceedings. However, the correspondence thereafter contains numerous assertions which: (a) deny the debt due to the Bank, (b) repeat assertions in relation to the withdrawal of €325,000 from Mr. Brian McDonaghs bank account, and (c) deny the entitlement of the Bank to have appointed the receivers on 1 October, 2014. All of these matters were conclusively determined by Twomey J. in his judgment and upheld by the Court of Appeal, yet the correspondence clearly evinces an intention to continue challenging the findings.

Evidence of Maurice McDonagh

83. Mr. McDonagh swore a replying affidavit on 8 January 2023 on behalf of the three McDonaghs. He characterised this application as an attempt by the Bank to prevent the McDonaghs “from determining what alleged wrongdoings have been carried out by Ulster Bank in its dealings in respect of the Kilpeddar site rather than a genuine application to prevent vexatious litigation”.

84. The central complaints described by Mr. McDonagh are that the Bank have “misled and concealed information from the McDonagh Brothers and the Courts in their pursuit of the McDonagh brothers”. He cites the following acts of the Bank: -

(a) not standing down the receivers, before selling the loans and underlying security to Promontoria in February/March 2015;

(b) not informing the McDonaghs that they had issued proceedings against CBRE and not joining them in those proceedings or informing them of the settlement of that claim;

(c) not crediting their account with the CBRE settlement amount until the matter arose before the court in the course of the Granja specific performance proceedings;

(d) failing to inform the McDonaghs and the Court of Appeal that the Bank had entered into a Profit Participation Agreement with Fane before selling Kilpeddar to Fane, and that the lands were sold “for not only €3m, as stated, but included a participation fee and/or share in any future profits realised from any future sale of the Kilpeddar site.”

85. Mr. McDonagh states the following (para. 79): -

“From the defendant’s perspective, there are two substantial matters involving Ulster Bank that remain to be resolved by the courts, a summary of which is set out below. These proceedings issues (sic) by the McDonagh brothers in respect of such matters are not vexatious and rather arise as a result of either the non – disclosure of relevant

information by Ulster Bank and/or the deliberate concealment of relevant information. Therefore, such proceedings are necessary to determine whether any wrongdoing has been carried out by Ulster Bank”.

86. Mr. McDonagh then refers to the two issues as the matters arising in the CBRE proceedings and the Fane proceedings.

87. In para. 89 Mr. McDonagh states the following: -

“Furthermore, this is not a case of the defendants ‘rehashing old arguments’ as alleged by Mr. Mahon in his affidavit of 4 November 2022, but rather a re – examination of what has been alleged by Ulster Bank in light of the further information in respect of Ulster Bank’s actions which has been discovered inadvertently by the defendants and calls into question all information provided by Ulster Bank to date in respect of the Kilpeddar site (including events that occurred in 2014 as referred to by Mr. Mahon)”.

88. Whilst the phrase “discovered inadvertently” is referenced as discovery of the Profit Participation Agreement of January 2021, this paragraph is a clear statement by Mr. McDonagh of an intention to challenge not only the 2021 Fane transaction but also “re-examine” events of 2014 which were examined in the judgment of Twomey J.

The Isaac Wunder jurisdiction

89. The so – called “Isaac Wunder” jurisdiction derives its name from a judgment of the Supreme Court delivered on 30 November 1970 in *Wunder v. Irish Hospitals Trust*.

90. In that case, the plaintiff had issued repeated proceedings arising from the refusal of the defendant to pay the plaintiff on a number of what he characterised as prize winning sweep tickets. The High Court had declared that the plaintiff’s claims were vexatious and ordered that no steps be taken in proceedings against the defendant without prior leave of the court. That order was affirmed in the Supreme Court. The matter returned to the Supreme

Court on an appeal against a refusal by the High Court (Henchy J.) of an application by the plaintiff to be allowed to proceed. The refusal by the High Court was upheld in the judgment of 30 November 1970 (16 – 1970).

91. In *Údarás Eitliochta na hÉireann (the Irish Aviation Authority) and DAA Public Limited Company v. Monks* [2019] IECA 309, the Court of Appeal considered the Isaac Wunder jurisdiction extensively. Haughton J. noted that the jurisdiction must be looked at in the context of the constitutional right of access to the courts, which he said is important but not absolute. He continued: -

“There is no doubt that the jurisdiction to grant an Isaac Wunder order should be exercised sparingly. In McMahon v WJ Law & Co. LLP [2007] IEHC 51 at para 20, MacMenamin J. identified the principles applicable: -

“Among features identified by Ó Caoimh J. in Riordan v. Ireland (No. 5) [2001] 4 I.R. 463 as justifying such an order, or militating against the vacating of such an order already granted are: -

- 1. The habitual or persistent institution of vexatious or frivolous proceedings against parties to earlier proceedings.*
- 2. The earlier history of the matter, including whether proceedings have been brought without any reasonable ground, or have been brought habitually and persistently without reasonable ground.*
- 3. The bringing up of actions to determine an issue already determined by a court of competent jurisdiction, when it is obvious that such action cannot succeed, and where such action would lead to no possible good or where no reasonable person could expect to obtain relief.*

4. *The initiation of an action for an improper purpose including the oppression of other parties by multifarious proceedings brought for the purposes other than the assertion of legitimate rights.*

5. *The rolling forward of issues into a subsequent action (emphasis added) and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings.*

6. *A failure on the part of a person instituting legal proceedings to pay the costs of successful proceedings in the context of unsuccessful appeals from judicial decisions.””*

92. In the same case, Collins J. emphasised the caution which a court should adopt and stated: -

“It is, therefore, critically important that a court asked to make an Isaac Wunder order should anxiously scrutinise the grounds advanced for doing so. It should not be seen as some form of ancillary order that follows routinely or by default from the dismissal of a party's claim, whether on its merits or on a preliminary strike-out motion. That is so even if considerations of res judicata and/or Henderson v Henderson arise. The court must in every case ask itself whether, absent such an order, further litigation is likely to ensue that would clearly be an abuse of process. Unless the court is satisfied that such is the case, no such order should be made. It is equally important that, where a court concludes that it is appropriate to make such an order, it should explain the basis for that conclusion in terms which enable its decision to be reviewed. It is also important that the order made be framed as narrowly as practicable (consistent with achieving the order's objective)”.

93. In *Kearney v. Bank of Scotland plc & Anor* [2020] IECA 92, Whelan J. put the matter thus: -

“Isaac Wunder orders now form part of the panoply of the courts' inherent powers to regulate their own process. In light of the constitutional protection of the right of access to the courts, such orders should be deployed sparingly and only be made where a clear case has been made out that demonstrates the necessity of the making of the orders in the circumstances:

i. Regard can be had by the court to the history of litigation between the parties or other parties connected with them in relation to common issues.

ii. Regard can be had also to the nature of allegations advanced and in particular where scurrilous or outrageous statements are asserted including fraud against a party to litigation or their legal representatives or other professionals connected with the other party to the litigation.

iii. The court ought to be satisfied that there are good grounds for believing that there will be further proceedings instituted by a claimant before an Isaac Wunder type order restraining the prosecution of litigation or the institution of fresh litigation is made.

iv. Regard may be had to the issue of costs and the conduct of the litigant in question with regard to the payment and discharge of costs orders incurred up to the date of the making of the order by defendants and indeed by past defendants in applications connected with the issues the subject matter of the litigation.

v. The balancing exercise between the competing rights of the parties is to be carried out with due regard to the constitutional rights of a litigant and in general no legitimate claim brought by a plaintiff ought to be precluded from being heard and determined in a court of competent jurisdiction save in exceptional circumstances.

vi. It is not the function of the courts to protect a litigant from his own insatiable appetite for litigation and an Isaac Wunder type order is intended to operate

preferably as an early stage compulsory filter, necessitated by the interests of the common good and the need to ensure that limited court resources are available to those who require same most and not dissipated and for the purposes of saving money and time for all parties and for the court.

vii. Such orders should provide a delimitation on access to the court only to the extent necessitated in the interests of the common good.

viii. Regard should be had to the fact that the right of access to the courts to determine a genuine and serious dispute about the existence of a right or interest, subject to limitations clearly defined in the jurisprudence and by statute, is constitutionally protected, was enshrined in clause 40 of Magna Carta of 1215 and is incorporated into the European Convention on Human Rights by Article 6. to which the courts have regard in the administration of justice in this jurisdiction since the coming into operation of the European Convention on Human Rights Act 2003.

ix. The courts should be vigilant in regard to making such orders in circumstances where a litigant is unrepresented and may not be in a position to properly articulate his interests in maintaining access to the courts. Where possible the litigant ought to be forewarned of an intended application for an Isaac Wunder type order. In the instant case it is noteworthy that the trial judge afforded the appellant the option of giving an undertaking to refrain from taking further proceedings which he declined.

x. Any power which a court may have to prevent, restrain or delimit a party from commencing or pursuing legal proceedings must be regarded as exceptional. It appears that inferior courts do not have such inherent power to prevent a party from initiating or pursuing proceedings at any level.

xi. An Isaac Wunder order may have serious implications for the party against whom it is made. It potentially stigmatises such a litigant by branding her or him as, in

effect, “vexatious” and this may present a risk of inherent bias in the event that a fresh application is made for leave to institute proceedings in respect of the subject matter of the order or to set aside a stay granted in litigation.

xii. Where a strike out order can be made or an order dismissing litigation whether as an abuse of process or pursuant to the inherent jurisdiction of the court or pursuant to the provisions of O. 19, r. 28, same is to be preferred and a clear and compelling case must be identified as to why, in addition, an Isaac Wunder type order is necessitated by the party seeking it”.

Application of the Principles

94. Much has been made by the applicants of the correspondence in which the defendants persist in denying liability for what they describe as the “purported debt” to the Bank, now a Judgment Debt, and denying the entitlement by the Bank to recover its debt and enforce its security. These are matters on which the court made its decisions after a 21 day hearing in a judgment upheld on appeal.

95. Much is also made of the correspondence in which allegations of fraud are made against Amoss and the Bank, although the precise nature of these allegations is not described in any detail either in the correspondence exhibited or in this application.

96. The applicants and their servants, agents and advisors and the appointed receivers are an institution and professional persons who are well resourced and capable of responding to correspondence of this nature however persistent it may be. They are therefore not parties of whom it can be said that there is a requirement or imperative to afford them “protection” from such correspondence. But there is a public interest in ensuring that scarce court time and resources are not deployed in managing and hearing proceedings which repeat issues already heard and determined.

97. Apart from the ‘Fane’ matter, the correspondence and the replying affidavit reveal an intention of the defendants to continue to agitate a dispute as to the debt which is now a final and unappealable judgment debt and as to whether the Bank was entitled to take action to pursue recovery of the loan and to enforce its security. On these questions, the High Court (Twomey J.) and Court of Appeal have ruled definitively.

98. Inasmuch as continuing complaints are made by the defendants regarding CBRE, with particular focus on the failure to include the McDonaghs in the Bank’s original action against CBRE and the settlement of that action, that matter has also been disposed of by the decision of this Court dismissing the claim as statute barred ([2023] IEHC 242) as upheld by the Court of Appeal ([2024] IECA 10).

99. The CBRE Proceedings are the clearest evidence of the defendants’ willingness to “roll forward” (as O’Caoimh J. put it in O’Riordan) into new proceedings issues previously litigated.

100. Although Mr. McDonaghs letter of 22 June 2022 contains a statement that “we have no intention of issuing further proceedings” and “as for fresh proceedings there shall not be taken”, a careful reading of exhibited correspondence as a whole reveals that the defendants are unwilling to desist from threats to pursue matters already determined and to desist from allegations of fraud against Amoss and others. This is clear from Mr. Maurice McDonagh’s replying affidavit made on behalf of all three defendants in which he states that “*this is not a case of the defendants rehashing old arguments.... but rather a re – examination of what has been alleged by Ulster Bank (sic) in light of further information*”.

101. The defendants have a history of commencing proceedings against a variety of parties, followed by discontinuance against some parties when required to engage at the stage of entry applications before the Commercial Court, and later seeking to re – enter proceedings as against the same parties.

102. The loan was advanced in 2007 and restructured a number of times before the Bank moved to enforce its security in 2014. The loan account has been credited with the sums of €3m obtained on the sale of Kilpedder and €5m achieved by the Bank in its settlement with CBRE. But the defendants themselves have made no payment against the underlying debt or the costs of any of the proceedings.

103. The Court cannot ignore the findings made by Twomey J. in his judgment in the Judgment proceedings, that the defendants have been party to the forgery of documents in efforts to conceal that Granja was a front for Mr. Brian McDonagh in an attempt to circumvent the provisions of the Compromise Agreement and thwart enforcement of its security by the Bank.

104. The court is required to balance the constitutionally protected right of access to the court against firstly the protection of parties from persistent allegations being made in new proceedings which repeat claims which have been disposed of in previous proceedings and judgments and secondly, and more importantly in this case, the need to avoid further waste of court time and resources on matters previously determined.

105. The correspondence exhibited on this application and Mr. McDonagh's replying affidavit reveal a clear intention to persist in "re-examination" of issues already determined, by whatever means the defendants themselves consider appropriate, including further proceedings.

106. Where a litigant is unrepresented the court must make allowance for limitations on his ability to articulate his case in one comprehensively pleaded action. In this case the defendants have been represented by solicitors and counsel in a number of proceedings namely the Granja Specific Performance Proceedings, the *CBRE* proceedings and in these, the Judgment proceedings. In other cases they have elected to be represented only at certain stages. The court respects the right of parties to choose when they will engage legal

representation. But where, as in this case, there is a pattern of the selective engagement of solicitors and counsel only very limited allowance can be made for this aspect of their conduct.

107. The jurisdiction to make an Isaac Wunder Order should be exercised sparingly and on an exceptional basis. This case has two particularly unusual features.

108. Firstly, it is unusual that such an order be sought by a plaintiff.

109. Secondly, one of the issues the defendants continue to agitate in correspondence is the transactions of January and February 2021, which are the subject of the pending Fane proceedings, and the plaintiffs do not seek to stay or restrain that case.

110. I have considered whether these, or any other factors, would warrant refusal of an order. My conclusion is that an order which is restricted to the terms sought, and limited as described in the conclusion below, is appropriate in all the circumstances of this case.

Decision

111. I shall make an order in the terms sought with three limitations.

112. Firstly, the restriction will relate only to institution of new proceedings. The re-entry of existing proceedings will in any event require an application to court on notice to the relevant parties. On such an application the McDonaghs would be required to demonstrate that there is good reason for re-entry and that doing so is not vexatious or an attempt to re-open matters previously determined by the Court.

113. Secondly, the order will restrict only new proceedings concerning or in any way relating to the matters identified by the plaintiffs at paragraphs 2(i)-(xi) of the Notice of Motion, and will not include the proposed phrase “including, but not limited to”. I emphasise the observations at paragraphs 61-64 regarding the Fane proceedings.

114. Thirdly, the order will not restrict the progress and determination of the Fane and other proceedings which have already been commenced, including any appeals.

