THE HIGH COURT

COMMERCIAL

[2017 No. 966 P.]

[2017 No. 77 COM]

BETWEEN

DAVID LANGAN

PLAINTIFF

AND

PROMONTORIA (ARAN) LIMITED

AND

TOM O'BRIEN

DEFENDANTS

JUDGMENT of Mr. Justice Twomey delivered on the 31st day of July, 2019

SUMMARY

1. This is a case in which the plaintiff ("Mr. Langan") seeks injunctions and declarations in relation to Apartment 902, Belvedere Heights, 199 Lisson Grove, London, United Kingdom (the "London Apartment") to the effect that the apartment is no longer charged in favour of Ulster Bank/Promontoria for borrowings extended to Mr. Langan and his company. Mr. Langan also seeks declarations that the assignment of a legal charge, loan facilities and guarantees from Ulster Bank Ireland Limited ("Ulster Bank") to the first named defendant ("Promontoria") is invalid. The second named defendant, Mr. O'Brien, is sued in his capacity as receiver over the London Apartment.

2. This judgment considers two issues, first the allegation by Mr. Langan that he made a binding agreement with Ulster Bank between May and September 2008 to the effect that a legal charge over the London Apartment had been released, which charge had been executed on the 8th February, 2002 by Mr. Langan in favour of Ulster Bank (the "Charge"). This issue of whether such an agreement was ever reached is the subject of a factual dispute between the parties and occupied the majority of the hearing time of this action.

3. The second issue relates to claims made by Mr. Langan that the assignment by Ulster Bank to Promontoria of the aforementioned legal charge, as well as loan facilities and guarantees is invalid. Mr. Langan relies on this technical legal argument to deny that he is liable for the monies claimed to be due and owing to Promontoria.

4. In its defence to these proceedings, Promontoria includes a counterclaim against Mr. Langan pursuant to the terms of the legal charge over the London Apartment, along with loan facility letters and guarantees as detailed below. Promontoria seeks judgment against Mr. Langan in the sum of €4,309,428.

5. For the reasons set out below, this Court finds that there was no binding agreement by Ulster Bank for the release of the Charge and that the loans and underlying security were properly transferred by Ulster Bank to Promontoria and will hear from counsel regarding the counterclaim seeking judgment in the sum of €4,309,428.

BACKGROUND

6. Mr. Langan is a businessman with an address at Malahide Marina Village, Malahide, County Dublin. He has been involved in the furniture retail business for over thirty years, having set up his business, Classic Furniture Limited ("CFL"), in 1986. In his evidence to this Court, Mr. Langan advised that at the height of CFL's success, the company was operating seven retail outlets across Ireland and had a turnover of some €13 million. During this time, Mr. Langan was taking out a very significant income from the business of circa €300,000 per annum.

7. Although it appears that both Mr. Langan and his company, CFL, had dealings with several banks over a number of years, for the purposes of these proceedings, the primary focus is on the banking relationship between Mr. Langan/CFL and Ulster Bank. In this regard, Mr. Langan gave evidence that CFL's business banking relationship with Ulster Bank began in 1998 as a result of an "introduction" to Ulster Bank by Ms. Imelda Lennon ("Ms. Lennon"), the financial controller and joint-director of CFL. The banking relationship between CFL and Ulster Bank was managed by Mr. Neil Kinsella ("Mr. Kinsella"), a relationship manager employed within Ulster Bank at that time, but now retired.

8. In his evidence to this Court, Mr. Kinsella stated that he managed the banking relationship between CFL and Ulster Bank between the years 2004 to 2008. Mr. Kinsella advised that in relation to CFL's day-to-day business with Ulster Bank he dealt directly with Ms. Lennon. However, "*when meetings were taking place, reviews or requests for additional facilities*", Mr. Kinsella advised that he would deal with both Ms. Lennon and Mr. Langan on those occasions.

Loan facilities and guarantees

9. It is relevant for an understanding of the issues in these proceedings to outline in some detail the various loan facilities extended by Ulster Bank to Mr. Langan, as well as seven personal guarantees signed by Mr. Langan. This understanding is particularly relevant in so far as this judgment considers the validity of the assignment and transfer of these loan facilities and guarantees from Ulster Bank to Promontoria.

Loan facility letter dated 9th April, 2008 with Mr. Langan

10. On 9th April, 2008 Ulster Bank agreed to renew certain loan facilities made in favour of Mr. Langan. The loan facility letter included three separate facilities - an overdraft (with a limit of €5,000) and two demand loan facilities. In particular, this facility letter provided for a new loan facility of €500,000 (the "First €500,000") to Mr. Langan, which loan was to provide additional funds for investment in CFL. The total amount of the two loans under this personal facility to Mr. Langan was €912,000.

11. The loan facility provided that this loan was to be repaid from the net sale proceeds of a property owned by Mr. Langan on Green Street, Kilkenny (the "Kilkenny Property") by 15th August, 2008.

Loan facility letter dated 9th April, 2008 with CFL
12. On the same date as the foregoing loan facilities were renewed in favour of Mr. Langan, Ulster Bank agreed to renew loan facilities (including a group overdraft) in favour of CFL in the sum of €4.14 million.

13. The purpose of these facilities was to provide working capital for CFL and to renew existing loan facilities which had originally been extended for, *inter alia*, the purpose of fitting-out various CFL retail units.

Guarantees by Mr. Langan
14. In the period between May 2002 and December 2008, Mr. Langan entered seven personal guarantees (the "Guarantees") as security for the liabilities of CFL. The exact dates of the Guarantees are as follows:

- 7th May, 2002,
- 3rd September, 2003,
- 2nd October, 2003,
- 17th June, 2004,
- 24th April, 2006,
- 26th July, 2007,
- 23rd December, 2008.

These guarantees total an amount in excess of €3.3 million.

15. It is Mr. Langan's case that the assignment from Ulster Bank to Promontoria of the aforementioned loan facility letters, guarantees and the Charge over the London Apartment is invalid. Mr. Langan claims that Ulster Bank were not legally entitled to assign to Promontoria the loan facilities, guarantees and the Charge as they did not seek or obtain his prior consent to the assignment.

16. Mr. Langan also claims that the transfer from Ulster Bank to Promontoria of the loan facilities, guarantees and the Charge is invalid as the mechanics of the transfer were flawed and that the transfer was not properly effected.

Alleged agreement to release the Charge
17. The purpose of the Charge over the London Apartment was to provide Ulster Bank with security for the liabilities of both Mr. Langan and CFL to Ulster Bank.

18. As noted at the outset of this judgment, it is Mr. Langan's case that the Charge over the London Apartment was released by Ulster Bank. In support of his case that the Charge was released, Mr. Langan relies in particular, on an email dated 15th May, 2008 sent by Mr. Kinsella to Ms. Lennon (which is part of an email chain between 12th and 15th May, 2008 referenced herein as the "May Emails"). In that email, Mr. Kinsella writes that he:

> "had advised [Ms. Lennon] and David [Langan] previously that the Bank had agreed to release [the London Apartment] subject to a satisfactory present day valuation on the leasehold interest in the Blanchardstown retail unit."

19. Based in particular on this email, Mr. Langan alleges that Mr. Kinsella agreed with him that Ulster Bank would release the Charge if Mr. Langan produced a valuation of €800,000 for the leasehold interest which CFL had in West End Retail Park ("Blanchardstown Lease"). This valuation of €800,000 for the Blanchardstown Lease was obtained by CFL on the 15th September, 2008 and on Mr. Langan's case, he was entitled to the release of the Charge as of this date. Thus, Mr. Langan's case in these proceedings is that in the period May-September 2008 a binding agreement came into existence between Ulster Bank and Mr. Langan, whereby Ulster Bank agreed to release the Charge.

20. This judgment considers, however, not just the email dated 15th May, 2008 from Mr. Kinsella to Ms. Lennon, but also other exchanges between Mr. Langan, Ms. Lennon and Mr. Kinsella during, in particular, the period of May-December 2008. These exchanges include, *inter alia*, notes of a meeting of the 21st May, 2008 between Mr. Langan and Mr. Kinsella. Mr. Kinsella claims that a note of this meeting shows that there was a second condition attached to the alleged release of the Charge, not mentioned in the 15th May email. This condition was that Mr. Langan would secure €500,000 from a different bank (AIB) to be invested in CFL, in return for Mr. Langan charging the London Apartment in favour of AIB, the Charge to be released by Ulster Bank for this purpose. It is not disputed that if this was a condition to the release of the Charge, that this condition was never satisfied, since Mr. Langan did not obtain the €500,000 funding from AIB, or indeed from any other financial institution.

21. For the detailed reasons set out herein, this Court prefers the evidence given by Mr. Kinsella regarding the dealings between Ulster Bank and Mr. Langan and finds that no binding agreement ever existed between Mr. Langan and Ulster Bank to the effect that the Charge would be released.

ANALYSIS
22. At the outset of this analysis, it must be accepted that if one reads just the email of 15th May, 2008 from Mr. Kinsella of Ulster Bank in isolation, in which he states:

> "I had advised both yourself and David previously that the Bank had agreed to release the UK apt subject to a satisfactory present day valuation on the leasehold interest in the Blanchardstown retail unit",

one might be inclined to the view that this email supports a finding that Ulster Bank had reached a binding oral agreement to release the Charge.

In this regard, Mr. Langan's case is summarised in his legal submissions, as follows:

> "It is the Plaintiff's case that he was assured that the Property would be released by the Bank upon receipt of a valuation of €800,000 or higher in respect of the Blanchardstown property, the Plaintiff then provided such a valuation and understood, pursuant to the agreement, that the Property was released."

It is clear that Mr. Langan relies in these proceedings almost exclusively on this email, to the exclusion of other documentary and non-documentary evidence (with some exceptions), to support his case.

23. However, to properly determine whether a binding oral agreement had been reached between Ulster Bank and Mr. Langan for the release of the Charge, a Court must look at not just one email in isolation. Indeed, Mr. Langan himself accepted during cross-examination that it would not be fair to view one or two emails in isolation and say that they represented the entirety of the situation. This is because a Court must look at all the evidence of the oral and written engagement between the parties at the relevant time as well as the actions of the parties both before and after the alleged binding oral agreement to see if all this evidence supports a finding that a binding agreement had indeed been reached.

24. An analysis of all of this evidence, and in particular the actions of the parties after the alleged agreement had been reached, will also help determine whether the parties themselves believed that a binding agreement had been reached, particularly since Mr. Langan claims in these proceedings that in the period May to September, 2008 he believed that Ulster Bank had entered into a binding agreement with him to release the Charge. For this reason, as an alternative claim in these proceedings, Mr. Langan claims that even if there was not a binding legal agreement to release the Charge, Ulster Bank represented to him that it would release the Charge and so is estopped from now denying that agreement.

25. When one considers all of the evidence, it is this Court's view that there is insufficient evidence to conclude, on the balance of probabilities, that Ulster Bank entered a binding agreement to release the Charge. In addition, this Court concludes that by his actions after, and at the time of, the alleged agreement, Mr. Langan shows that he knew that, while he was negotiating the release of the Charge, Ulster Bank had not actually entered a binding agreement to release the Charge, since the pre-conditions for that release (and in particular his obtaining of funding of €500,000 to invest in his business from another financial institution) had not been satisfied. On this basis, this Court concludes that not only was there no binding agreement to release the Charge, but also that Ulster Bank did not represent to Mr. Langan that it would release the Charge.

26. This Court reaches these conclusions for the following reasons.

I. The financial climate at time of the 'agreement' for the release of the Charge

27. In order to consider the legal effect of the May Emails, upon which Mr. Langan relies, it is necessary to consider them in context. One aspect of this context is that the proposed release of the Charge was being negotiated in May to September 2008 at the time of the global financial crisis. At this time, as is evident from some of the documentary evidence referenced below, the impact of this financial crisis was being felt in Ireland. The international financial crisis ultimately came to a head with the collapse of Lehman Brothers in September 2008, the exact month when Mr. Langan alleges the agreement to release became binding on Ulster Bank.

28. According to Mr. Langan's evidence, the discussions regarding the release by Ulster Bank of the security it had for Mr. Langan and CFL's borrowings took place around the time of the May Emails. It is relevant to note therefore that at this time, the effect of the financial crisis was being felt generally in Ireland and by CFL in particular. As a result, Mr. Langan required the extra working capital of €500,000 (the "First €500,000") from Ulster Bank in April of 2008 to invest in CFL, which was provided to him pursuant to the facility letter dated 9th April, 2008, to which reference has already been made.

29. In an internal bank document entitled *Transactional and Nontransactional Comments* dated 31st March, 2008, which contains, *inter alia*, an internal bank application for the approval of this loan for the First €500,000 to Mr. Langan for investment in CFL, it is stated regarding market conditions that:

> "some furniture retailers have experienced a more severe sales downturn in late 2007 and early 2008 ie sales periods and have been impacted by higher stock holdings as a result. [...] Much improved leasehold terms are available in the current market […]",

30. In relation to CFL in particular, it is relevant to note that CFL was experiencing financial difficulty in January 2008, since it did not have enough cash to pay the VAT it collected from customers to the Revenue. Instead, CFL had to use €300,000 of Mr. Langan's personal money to meet this VAT liability in January 2008.

31. It is also relevant to note that the previous year, 2007, had been a very difficult year financially for CFL. While it had a turnover of almost €13 million, its gross profit was just €36,000, which was a fraction of the profit of €269,000 approx. in 2006. A true flavour therefore of the scale of the financial difficulties encountered in January 2008, just prior to the alleged agreement for the release of the Charge, is gleaned from the fact that the sum of money which Mr. Langan had to invest from his own resources in CFL (€300,000) for cashflow purposes, was almost ten times the company's profit (of €36,000).

32. It is also clear from the aforementioned internal bank document entitled *Transactional and Nontransactional Comments* dated 31st March, 2008, that at this time prior to the negotiation of the alleged agreement, not only was the business short of cash, but it was also projected to be loss making. This is because at page 9 of that document the projected profit and loss management accounts for the period January to December 2008 showed that the business had a projected loss (before tax) of €216,000. In fact, In fact, as matters transpired, evidence was provided that the projected loss figure for the entire of 2008 (which were prepared in December 2008) was €1.3 million.

33. In this regard, when looking back on 2008, Mr. Langan stated, in his email of 16th December, 2008 to Mr. Kinsella that:

> "As we all know, 2008 has been a disaster for everyone (banks included)."

This therefore was the context to the negotiation by Mr. Langan of the alleged binding agreement for the release of the Charge by Ulster Bank, which release would of course leave the bank with less security for its loans to CFL and Mr. Langan.

34. Against this backdrop of financial pressure, it is Mr. Langan's evidence to this Court that sometime around May 2008 he came across in his office the valuations of the Kilkenny Property and a premises in Northwest Business Park, Blanchardstown, Co. Dublin which CFL owned ("Northwest Business Park"), which properties were secured to Ulster Bank. These two properties had valuations, *albeit* from a full year earlier (May 2007) of €3.5 million and €3.65 million respectively, giving a total security of over €7 million, which was being held by Ulster Bank as security for borrowings of circa €5 million. Mr. Langan (and Ms. Lennon, who gave similar evidence)

states that this was why he decided that Ulster Bank had more security than they needed for the borrowings of CFL (or were 'over-secured', to use this expression). He claims that it was for this reason (and not because he needed to get additional funding from AIB to invest in CFL) that he decided to ask Ulster Bank to release the Charge over the London Apartment in or around May 2008.

35. It is the evidence of Mr. Kinsella of Ulster Bank, who was Mr. Langan's relationship manager in the Bank, that Mr. Langan was seeking the release of the Charge in order to raise funds from AIB to invest in CFL.

36. Even though CFL did not have enough money to pay its VAT bills in January 2008, Mr. Langan denied that he was seeking the release of the London Apartment in May 2008 to raise funds to invest in his business during what both Ms. Lennon and Mr. Langan accepted was a difficult financial time for CFL. Rather, Mr. Langan's evidence was that he wanted the release of the London Apartment as Ulster Bank were over-secured and that he planned in later years to use the apartment for his own personal use, although at that stage it was rented out.

II. Mr. Langan seeks €500,000 new funding from Ulster Bank in March 2008

37. Another aspect of the context to the May Emails from Ulster Bank allegedly recording a binding *'agreement'* to reduce its security, is that in March 2008, just a matter of weeks before this alleged agreement, CFL's cash reserves had diminished to the extent that Mr. Langan needed to seek the First €500,000 from Ulster Bank to invest in CFL. Mr. Langan had made this application in March 2008 and, as previously noted, it was approved in April 2008 pursuant to a Facility Letter dated 9th April, 2008 with Ulster Bank, which he entered at the same time as CFL was refinancing its loans with Ulster Bank of circa €4.1 million pursuant to a Facility Letter of the same date (both letters are referred to herein as the "Facility Letters").

38. The internal bank document entitled *Transactional and Nontransactional Comments* dated 31st March, 2008 is a document created by Mr. Kinsella and is in essence a credit application to Ulster Bank's credit department by Mr. Kinsella to approve the said re-financing by CFL and the new borrowing by Mr. Langan of the First €500,000, which was subsequently approved and granted pursuant to the Facility Letters. This document references the challenging market conditions at that time in the following terms:

> "The customer has embarked on a re-structuring programme in light of current market conditions. […] Due to market conditions, CFL have made a decision to curtail their expansion programme. […]"

It then goes on to seek approval for the First €500,000 to Mr. Langan as follows:

> "This paper requests approval to increase the limit on facility D1 from 412K to 912K. These additional funds would be utilised to inject additional capital into Classic Furniture Limited which due to current market conditions and slowed stock turnover has experienced strain on existing working capital facilities. […] 500 K eqr [equity release] will address permanent w/c [working capital] requirements and any cashflow issues that may arise as a result of the above and to ensure sufficient capitalisation of the Company going forward."

39. The next element therefore to the context in which the alleged agreement was reached is that on 9th April, 2008, this re-financing and new borrowing was effected pursuant to the two Facility Letters, one to CFL and one to Mr. Langan. However, both Facility Letters contained somewhat stringent terms, namely the commitment to sell the Kilkenny Property (which had previously been secured to Ulster Bank for CFL's and Mr. Langan's borrowings) and to use the proceeds to reduce the borrowings of CFL and Mr. Langan. In addition, there was the very significant proviso that if this was not done within a few months of the Facility Letters of 9th April, 2008, i.e. by 15th August, 2008, that Mr. Langan would then be obliged to grant security over his family home for this borrowing.

40. It was also the case that all of CFL's facilities and this loan of the First €500,000 to Mr. Langan were subject to review under the Facility Letters within a matter of months (by 15th August of 2008). These were therefore the somewhat stringent terms, during the early part of the financial crisis in April 2008, upon which Mr. Langan obtained the First €500,000 to invest in CFL. It is also relevant to note that while CFL sought an increase in its overdraft from €400,000 to €800,000 as it was re-financing its loans under the Facility Letters, this increase was refused by the Bank.

41. As regards the London Apartment, which Mr. Langan claims that the Bank agreed to release in May 2008, it is relevant to note that the London Apartment had been secured to Ulster Bank pursuant to the Charge entered into several years previously on the 8th February 2002. It is also relevant to note that the two Facility Letters expressly provided that the re-financing of the loans to CFL and the loan of the First €500,000 to Mr. Langan was to be secured by that Charge. Both the Facility Letters provided in express terms that *'[t]hese are legal documents and should be read carefully'* in bold print and then both provided that:

> "It is understood that the Bank will hold and/or continue to hold the following and that these securities will continue to be available for all the Borrower's liabilities to the Bank:
>
> - Legal Charge over Apartment 902, Belvedere Heights, Lisson Grove, London. [….]"

42. On Mr. Langan's version of events therefore, in May 2008, a few weeks after his borrowing in April of the First €500,000 on the security of the Charge, Mr. Langan proposed, and Ulster Bank agreed, a release of the Charge over the London Apartment, subject only to the provision of a valuation of the Blanchardstown Lease of at least €800,000. This is against the background of the financial difficulties experienced at this time by furniture retailers generally, and specifically by CFL, which necessitated Mr. Langan having to inject €300,000 of his own money into the company in January 2008. These financial difficulties also led to Mr. Langan borrowing the First €500,000 in April 2008 to invest in the company, and it must be re-emphasised that the alleged release of the Charge is also against the backdrop of the Facility Letters for the First €500,000 expressly providing for the London Apartment (which had been mortgaged to Ulster Bank since 2002) to be security for the First €500,000, as well as the somewhat stringent condition that the Kilkenny Property had to be sold to reduce the borrowings, failing which Mr. Langan would provide further security to Ulster Bank over his family home.

III. Mr. Langan's April/May search for a Second €500,000 from AIB

43. However, this is not the end of the context for the alleged agreement for the release of the Charge referenced in the May Emails. One must consider the evidence of Mr. Kinsella, Mr. Langan's relationship manager in Ulster Bank and with whom Mr. Langan stated he had *'an excellent relationship'* over several years. While Mr. Langan has no notes of his discussions with Mr. Kinsella, Mr. Kinsella confirmed that the information he put in his file notes and emails to colleagues were based on meetings and discussions he had with Mr. Langan and while not contemporaneous notes, they were prepared within either hours or a day or two of the relevant discussions. Thus, these file notes and emails can be treated as almost contemporaneous and are therefore helpful evidence to this Court of what actually occurred between Mr. Kinsella and Mr. Langan in 2008.

44. In this regard, Mr. Kinsella is a retired banker, who no longer works for Ulster Bank and was an impressively candid witness who stated quite honestly that he could not remember the actual content of conversations from 11 years ago. However, he was equally clear that his notes would have accurately reflected those conversations and he was also quite clear that he is sure that he would never have agreed to release security without Ulster Bank's credit department's approval, since it was something he never did in his entire career in banking and in particular he gave evidence that he *'did not have the sanction or the discretion to release the property held as security by the bank'*. The written notes made by Mr. Kinsella contained on Ulster Bank's files are consistent with the oral evidence he gave of what actually happened between him and Mr. Langan at this time.

45. Reference has already been made to the notes contained in the credit application for the April Loan prepared by Mr. Kinsella (the *Transactional and Nontransactional Comments* document dated 31st March, 2008). However, in the context of the alleged agreement between Mr. Kinsella and Mr. Langan for the release of the Charge, the document entitled Advice, which has entries dated 24th April, 2008 and 24th May, 2008, is of particular relevance since it contains notes based on the engagement between Mr. Kinsella and Mr. Langan in the crucial period before and after the dates of the May Emails, the 12th to 15th May, 2008, when Mr. Langan alleges a binding agreement to release the Charge came into being.

46. Of particular significance are the entries in this Advice document which provide a very different basis for the negotiations for the release of the Charge, than that provided by Mr. Langan. As will be seen in the extracts below, consistent with these entries, Mr. Kinsella's evidence was that in late April/May 2008 Mr. Langan sought an extra €500,000 (the "Second €500,000") from Ulster Bank to invest in CFL, but that this was rejected by Ulster Bank because the Bank was not willing to lend him another €500,000 so soon after the First €500,000. Mr. Kinsella's evidence was that, as an alternative, Mr. Langan approached Mr. Kinsella to release the Charge (not in order to reduce Ulster Bank's security as it was 'over-secured', as alleged by Mr. Langan) but in order to enable Mr. Langan provide the London Apartment (along with his family home) as security for a loan of this Second €500,000 from AIB, provided that the Second €500,000 was to be invested in CFL.

47. Mr. Kinsella's evidence was that he was prepared to make an application to the credit department of the Bank on this basis, provided that Mr. Langan could provide him with a valuation of the Blanchardstown Lease which was satisfactory to the Bank. He told this Court that he was prepared to do so because it was in Ulster Bank's interests that a Second €500,000 be sourced from AIB or elsewhere to invest in CFL, since Ulster Bank was not prepared to lend this sum to Mr. Langan.

48. Mr. Kinsella's evidence was that Mr. Langan did not succeed in obtaining the Second €500,000 from AIB and so the Charge was not released. According to Mr. Kinsella, Mr. Langan's next approach was to use the London Apartment and two other residential investment properties which he owned, to raise from other financial institutions the Second €500,000. Those two other residential properties were unsecured (the "Bachelor's Walk Property" and the "Wexford Property") and for this reason Mr. Langan wanted Ulster Bank to release the London Apartment as security so that these three residential properties could be offered to other financial institutions to secure his borrowing of the Second €500,000.

49. Mr. Kinsella's evidence is that subsequently there was a discussion with Mr. Langan whereby security was to be granted only over the Bachelor's Walk Property and the Wexford Property, because Mr. Langan's broker was not able, or had not yet managed at that stage, to get funding using the London Apartment as security. For this reason, Mr. Kinsella explains that one of the notes (set out below) refers to just two residential investment properties being used as security. However, as matters transpired, no security was granted to another financial institution over either the Bachelor's Walk Property or the Wexford Property and the Second €500,000 was never obtained, and as noted hereunder CFL ended up going into receivership on the 5th February, 2009.

50. Significantly, Mr. Kinsella refers, in the Advice note in a section dated well before the May Emails, i.e. with a date of the 24th April, 2008, to what Mr Kinsella refers in his evidence, as a condition for releasing the Charge, namely the procuring of the Second €500,000 for investment in CFL. This document appears to be a copy of an email sent by Mr. Kinsella to one of his colleagues in the credit department of Ulster Bank and it states:

> "Ref todays telecon, I understand that credit are unwilling to release the UK property (v. 380k) held as security for the various reasons discussed and including;
>
> - bank has just provided an additional 500k in funding support based on security held.
>
> - real sale of Kilkenny is hard to project and were effectively on an open-bridge on paydown of debt at present.
>
> - customer cannot make a funding decision on the proposed move to Mahon Retail Park until he has a satisfactory contract for sale on Kilkenny.
>
> I am of the view that there is a strong possibility that we will lose this valuable relationship to a competitor Bank if we are unable to support customers request and facilitate a further 500k equity investment in CFL to fund future strategic plan to move from secondary location to a prime retail location in Mahon Retail Park in Cork. Whilst acknowledging your comments, we still feel that the leasehold interests in Blanch & Carrickmines have an inherent trading value due to location and that [David Langan's personal guarantees] also have to be apportioned some value and this mitigates against the open-ended nature of the impending sale of the Kilkenny property which is centrally located for sale purposes. Request is supported by BC [Business Centre] on this basis."

51. This note is important background to the May Emails, since it clearly shows, that the May Emails cannot be read in isolation, since the release of the Charge referenced in those emails is clearly stated in this document to be part of an attempt by Mr. Langan to raise the Second €500,000. In particular, this note, which appears to be from some weeks before the May Emails were issued, supports Mr. Kinsella's claim that the release of the Charge was only being contemplated by the Bank at this stage, in return for Mr. Langan using the security of the London Apartment, so released, to procure the Second €500,000 for investment in CFL.

52. This Advice note also shows that, notwithstanding Mr. Kinsella's support for its release, the credit department in Ulster Bank refused to release the Charge to enable the Second €500,000 from another bank, on top of the First €500,000, to be invested in CFL. Accordingly, this note is consistent with Mr. Kinsella's evidence that there were several conditions attached to the release of the Charge, i.e. as well as getting a satisfactory valuation of the Blanchardstown Lease, the release was conditional on Mr. Langan sourcing the Second €500,000, from AIB or some other source, to invest in CFL (which funding was never obtained). This almost contemporaneous note therefore supports Mr. Kinsella's version of events, namely that the May Emails were issued in the context of Mr. Langan's attempt to secure the Second €500,000 and not simply because the Bank was over secured, as alleged by Mr. Langan.

53. On a more general level, this note is also evidence that the credit department refused to release the Charge, which it had just taken pursuant to the Facility Letters dated 9th April, 2008 and is consistent with Mr. Kinsella's evidence that it was never agreed by the credit department of Ulster Bank to release the Charge. This documentary evidence is also consistent with Mr. Kinsella's evidence that he had no authority to release security without first obtaining the approval of the Bank's credit department.

54. It is also relevant to note that the reference here in April 2008 to the planned expansion into Mahon Retail Park in County Cork, which information Mr. Kinsella must, on the balance of probabilities, have received from Mr. Langan, was, according to Ms. Lennon's evidence, a plan that had been shelved since 2007, because of the cost-cutting measures which were underway in the company since 2008. It therefore appears that the justification for the Second €500,000, i.e. that the company planned to expand their business, given by Mr. Langan to Mr. Kinsella at this time in April 2008 was false.

IV. The meeting on 21st May, 2008

55. Another note in this Advice document, which appears to be a copy of the contents of an email sent by Mr. Kinsella to a colleague in Ulster Bank dated 22nd May, 2008 (copied into the Advice note on the 24th May, 2008), is also consistent with Mr. Kinsella's evidence to this Court.

56. This email refers to a meeting, which appears to have taken place on the 21st May, 2008 (since, as noted below, there is a reference in the email to the previous day's meeting) in which Mr. Kinsella refused Mr. Langan's request for the Second €500,000 from Ulster Bank. In this email, Mr. Kinsella specifically refers to what is termed an 'agreement' which Mr. Langan had with AIB to provide the Second €500,000 on the security of the London Apartment and his family home. The content of this email is as follows:

> "I had a difficult meeting with David Langan (CEO & proprietory (sic) Director of CFL) yesterday.
>
> He has requested an additional 500k in funding against the personal property assets (held as security) to invest further capital
>
> In the CFL balance sheet. Recently approved 500k has already been drawn and invested.
>
> The requirement relates to his vision for the company in terms of relocating from secondary locations to primary (ie Kilkenny City to Mahon Retail Park in Cork) ie
>
> he wants to be a position to fund the move to Cork from cashflow without recourse to further lending following sale of Kilkenny.
>
> I declined the request for various reasons we would have discussed when approving the 500k request as our max level of support. He agreed in last offer letter that net sale proceeds from Kilkenny will be applied in reduction of personal & company debt. He advises that AIB are his personal bankers and have been pushing him for personal/commercial business for some time. As such, they have agreed to provide him with the 500k requirement in his personal name subject to takeover of the security over the apt in London value 380k and existing security on his pdh [personal dwelling home] in Malahide (in 226k v value 2,000k – customer estimate – were due to take a second charge if Kilkenny doesn't sell with the agreed 6 mth timeframe)).
>
> Our present exp is: 4.4m term
>
> 0.5m o/d
>
> 0.8m contingent
>
> 5.7m total
>
> Against: property assets value 7.15m (wdv 5.1m)
>
> Debenture (NW of 2.5m @ 12/07) and grasp on valuable leasehold interest in Blanch & Carrickmines
>
> plg's from David Langan for 2.8m (net worth of 2.2m excluding Kilkenny property and trading value of CFL)
>
> I am recommending that we release the London apt for security purposes in view of the residual security cover and in order to protect the main relationship from an AIB competitor approach. Customer has requested a decision by tommorrow (sic) as he was unhappy with the service that we provided on his last application."

57. The reference in the early part of the email to Mr. Langan's request for an additional €500,000 against his personal property held as security, along with the later reference to the proposal for the *'takeover of the security'* by AIB, and the later recommendation in the email that the London Apartment be released, indicates quite clearly, at this stage, once again the conditionality between the release of the Charge and Mr. Langan getting the Second €500,000 from AIB.

58. Of course, this note is completely inconsistent with Mr. Langan's version of events, since on his version, there would be no need at this meeting for a recommendation for a 'release' and 'takeover' of the security by AIB, since according to him, the Bank had already agreed to release the Charge by this time. This Court would observe that Mr. Kinsella would have no apparent reason to fabricate the content of this email, particularly since he was trying to achieve the same objective as Mr. Langan, namely the release of the Charge, and thus this Court finds, on the balance of probabilities, that this note is an accurate summary of the meeting which took place on the 21st May, 2008.

59. This note is also inconsistent with the claim by Mr. Langan that he relied on the representation contained in the May Emails, since this meeting took place after those emails and it shows Mr. Langan engaging in negotiation for the release of the Charge. It clearly does not show that Mr. Langan was convinced that the Charge had been released or that the Charge had been agreed to be released at this time.

60. The fact that Mr. Kinsella does not believe at this time (or indeed at any time) that he has agreed to release the Charge (subject to a €800,000 valuation of the Blanchardstown Lease or otherwise) is also clear from the fact that this Advice document contains no more than a recommendation by Mr. Kinsella to the credit department that the Bank release the Charge.

61. There is no suggestion in this note dated 24th May, 2008 that Mr. Kinsella has previously agreed the release of the Charge subject only to obtaining a valuation of the Blanchardstown Lease. Rather, this note records that Mr. Kinsella, having refused on behalf of Ulster Bank to lend the Second €500,000, is recommending that the Bank release the Charge so that Mr. Langan can borrow the Second €500,000 from AIB. He gives this recommendation to his Ulster Bank colleagues in the following terms:

> "I am recommending that we release the London apt for security purposes in view of the residual security cover and in order to protect the main relationship from an AIB competitor approach."

62. For his part, Mr. Langan denies that he ever sought funding from AIB for the Second €500,000, but he did concede that he may have mentioned AIB in a vague way to Mr. Kinsella. Mr. Langan therefore claims that this note is not an accurate summary of his conversations with Mr. Kinsella. However, this Court concludes that it is improbable that in a note, that was created within a very short time of the conversations between Mr. Kinsella and Mr. Langan, that Mr. Kinsella would make up these details as part of the application to the credit department to release the Charge, which Mr. Kinsella was supporting. It is also relevant to note that Mr. Langan did not dispute the other contents of Mr. Kinsella's notes, but only those notes which did not support Mr. Langan's claim in these proceedings and so there is no suggestion on the part of Mr. Langan that in relation to his note-taking generally that Mr. Kinsella was inaccurate. It is also the case that Mr. Langan is relying solely on his memory of conversations which occurred 11 years ago, while Mr. Kinsella is relying on more or less contemporaneous notes. On the balance of probabilities therefore (and in light of the other circumstances set out in this judgment), this Court concludes that this and the other file notes are an accurate summary of conversations between Mr. Langan and/or Ms. Lennon (on his behalf), on the one hand and Mr. Kinsella on the other hand.

63. This Court concludes therefore that Mr. Kinsella's evidence regarding the negotiations around the release of the Charge is to be preferred over the evidence of Mr. Langan and to the extent that it is relevant, the evidence of Ms. Lennon in this regard.

64. On this basis, this Court concludes that the 'agreement' that was reached between Mr. Langan and Ulster Bank in May-September 2008 was an agreement that was subject to two conditions. First, that Mr. Langan would obtain a valuation of the Blanchardstown Lease which was satisfactory to the Bank, and second, that he would obtain funding from another financial institution for €500,000 on the security of, *inter alia*, the London Apartment, which funds would be injected into CFL (which he failed to do). It was only if these conditions were fulfilled that Mr. Kinsella would recommend that the Bank release the Charge to facilitate that funding.

65. Despite numerous efforts to obtain the funding during the financial crisis of 2008, Mr. Langan was ultimately unsuccessful. So, the conditional agreement to release the Charge never became unconditional and binding and so never amounted to an 'agreement' to release the Charge, as alleged by Mr. Langan.

66. Further support for this conclusion is provided by the following evidence, the majority of which comes after the May Emails.

IV. Mr. Langan/Ms. Lennon realise in 2007 that Bank was 'over-secured'

67. Ms. Lennon was a director of CFL, along with Mr. Langan, and was also the financial controller of the company. She gave evidence which supported Mr. Langan's version of events regarding the circumstances surrounding the alleged 'agreement' to release the Charge. In her Witness Statement, she stated that:

> "Prior to 2008 we obtained valuations and realised that the security the Bank held, was far greater than the Bank's borrowings."

68. In her oral evidence, Ms. Lennon pointed out that this 'realisation' was that Ulster Bank had too much security, some €7 million approx, for borrowings of €5 million approx. Consistent with Mr. Langan's version of events, she says that this was why Mr. Langan was seeking the release of the Charge in mid-2008 when the financial crisis was worsening, and not as claimed by Ulster Bank, that it was because Mr. Langan needed to raise the Second €500,000 from AIB or some other financial institution.

69. However, Ms. Lennon accepted in her oral evidence that, as the valuations for the Kilkenny Property and for Northwest Business Park were obtained in May 2007, that if this realisation happened *'prior to 2008'*, as she swore in her Witness Statement, it must have happened sometime in or after May 2007, but before the end of 2007.

70. What makes Ms. Lennon's evidence improbable (regarding the approach by Mr. Langan in May 2008 to the Bank to release the Charge after realising that the Bank was 'over-secured' since 2007) is the fact that in March/April 2008, CFL needed an injection from Ulster Bank of the First €500,000, which it obtained pursuant to the Facility Letters, to meet its cashflow requirements, even though €300,000 had been invested in the company only a few months previously in January 2008 from Mr. Langan's personal funds.

71. In addition, this was at a time when the property market and valuations were negatively affected, since as noted in the *Transactional and Nontransactional Comments* dated 31st March, 2008, *'much improved leasehold terms'* were available at that stage.

72. Furthermore, in order to get the First €500,000 in April 2008, Mr. Langan had to give *additional* security to the Bank, in the sense that Mr. Langan had to agree to sell the Kilkenny Property and apply the proceeds to reduce the loans. Even more significantly, if he failed to do so, he agreed that he had to charge his family home.

73. In this Court's view, it is completely inconsistent with this state of affairs for Mr. Langan, in May 2008, to approach Ulster Bank, and for Ulster Bank to entertain, a proposal that Mr. Langan would simply take back the security which he had, only a few weeks previously, given to Ulster Bank for the First €500,000. It must be noted that if Ulster Bank had agreed to such a proposition it would have thereby *lessened* its security, even though it had just required the aforesaid *additional* security in order to lend this First €500,000, with no direct benefit to Ulster Bank (or indirect benefit such as its debtor, CFL, improving its financial position by obtaining an extra €500,000).

74. Furthermore, if Ms. Lennon and Mr. Langan had realised as far back as 2007 that the Bank had too much security, then, on the balance of probabilities, the more logical response by them in April 2008 when Ulster Bank sought *additional* security, should have been to refuse to give the Bank additional security for the First €500,000, on the basis that the bank was allegedly 'over-secured'. Instead, the response adopted by Mr. Langan and Ms. Lennon was to give additional security to Ulster Bank as well as executing Facility Letters to provide the London Apartment as security for the First €500,000.

75. The fact that Mr. Langan and Ms. Lennon did not refuse to provide the additional security sought by Ulster Bank, supports Ulster Bank's version of events, namely that the proposal by Mr. Langan for the release of the Charge had nothing to do with Ulster Bank being 'over-secured'. Rather, it related to Mr. Langan's need to obtain funds from other sources to invest in CFL, and thus his need to

seek the release of the Charge, and thereby obtaining the Second €500,000 was a condition for the agreement to release the Charge.

V. The May 2008 Emails

76. Since Mr. Langan places such reliance upon the May Emails, it is important to consider them in full. It is of course relevant to remind oneself that the Advice note dated 24th April, 2008, to which reference has already been made, making specific reference to Mr. Langan using the London Apartment to secure the Second €500,000 from AIB, provides the context for these subsequent emails. Against this background, the May Emails begin with an email dated 12th May 2008 from Ms. Lennon to Mr. Kinsella as follows:

> "I understand from David Langan that you have agreed to remove the charge you hold over the Apartment 902 Belvedere Heights, Lisson Grove, London. Please issue an amended facility letter to reflect the change in the conditions applicable to the facilities."

77. In his reply, dated the 14th May 2008, to Ms. Lennon's email, Mr. Kinsella states that:

> "The Bank had requested an utd [up to date] leasehold valuation for Blanchardstown Retail Park and I understood from our last conversation that you were going to send this on to me."

78. On the same date Ms. Lennon replies to Mr. Kinsella in the following terms:

> "David [Langan] told me that when you were speaking to him on the phone last week you said that the charge against his apartment in the UK had been released. Please clarify."

79. In alleging that the Charge over the London Apartment was agreed to be released by Ulster Bank, Mr. Langan places particular reliance on the email dated 15th May, 2008 sent by Mr. Kinsella to Ms. Lennon in which he states:

> "I had advised yourself and David [Langan] previously that the Bank had agreed to release the UK apt subject to a satisfactory present day valuation on the leasehold interest in the Blanchardstown retail unit. You advised that you would arrange for the valuation but I havnt (sic) received it yet."

80. Mr. Kinsella's evidence was that the email of the 15th May, 2008 in which he says that it was 'agreed' to release the Charge subject to a satisfactory valuation of the Blanchardstown Lease does not mean that a satisfactory valuation was the only condition for the release of the Charge, since this email must be read in the context of the numerous discussions he had with Mr. Langan, which are evidenced by his notes at that time, and in particular the notes dated 24th April 2008 and 24th May, 2008, as well as later notes (referenced below).

81. Quite apart from this very significant point, it is relevant to note that, even if one considers the May Emails in isolation, in reply to Ms. Lennon's emails of 12th May, in which she states that you have 'agreed' simpliciter to release the charge, Mr. Kinsella did not confirm what she had stated, but rather he sought further information.

82. In addition, it is relevant to note that the email chain begins with an email dated 12th May from Ms. Lennon, which is headed in the subject of the email, "Facility Letter", and requests Mr. Kinsella to issue an amended facility letter. This sets the tone for the emails, namely a request to issue an amended facility letter, against the backdrop of the *Advice* note of 24th April, 2008 noting the request by Mr. Langan to have the Charge released to enable him raise Second €500,000 from AIB. This backdrop does not change after the May Emails, since, as already noted, the meeting of 21st May, 2008 also refers to the release of the London Apartment to facilitate Mr. Langan raising €500,000 from AIB.

83. Therefore, in the context of Mr. Langan's allegation that the May Emails amounted to a representation to him that the Charge would be released, the documentary evidence both before and after these emails contradicts this claim. This is because it shows negotiations both before and after the May Emails continuing and there is no suggestion in any of the documentary evidence that the Charge would be released (unless one looks solely at one sentence in the email of 15th May, and views it in isolation).

84. Furthermore, in relation to the 14th May email from Ms. Lennon to Mr. Kinsella seeking confirmation that the Charge had actually been formally released, Mr. Kinsella again did not do what Ms. Lennon sought, since he did not provide that confirmation but rather he stated that the Bank had *conditionally* agreed to release the London Apartment, i.e. subject to the Bank being satisfied by the valuation of the Blanchardstown Lease.

85. Since Mr. Langan places such reliance on the May Emails, to the exclusion of other documentary evidence, it is important to note, that this is the extent of the evidence of the agreement between Mr. Langan and Ulster Bank at this stage, i.e. a *conditional* agreement, whereby the Bank had to be satisfied with the valuation of the Blanchardstown Lease.

86. Mr. Langan gave evidence to this Court (which was supported by the evidence of Ms. Lennon) that in a meeting with Mr. Kinsella around this time, Mr. Kinsella indicated to Mr. Langan that if the Blanchardstown Lease was valued at €800,000 this would be sufficient to satisfy Ulster Bank's requirements in order to release the Charge. For this reason, Mr. Langan's position in his evidence to this Court was that once he sent Mr. Kinsella the valuation of €800,000 for the Blanchardstown Lease, which appears to have occurred some time after the 15th September, 2008 (the date of the valuation), there was a binding agreement for the release of the Charge.

87. This is significant, because Mr. Langan rests his case, that there was a binding agreement to release the Charge, on the fact that once the valuation of €800,000 of the Blanchardstown Lease was provided to Ulster Bank, the Bank was legally obliged to release the Charge. Yet, even if one was relying solely on the May Emails, nowhere in any documentation produced to this Court is there any reference to a valuation of €800,000 or any other figure satisfying Ulster Bank, there is simply a reference to Ulster Bank having to be satisfied with the valuation.

88. Thus, even if all the file notes of Mr. Kinsella, based on conversations he had with Mr. Langan were to be ignored (which in this Court's view they cannot), it is relevant to note that based on the May Emails alone, the most that one could conclude is that there was a conditional agreement for the release of the Charge if Ulster Bank was satisfied with some unascertained valuation of the Blanchardstown Lease. There is no documentary evidence to support the contention that €800,000 was such a value.

89. In the context of considering in isolation the May Emails (for present purposes only), it is also relevant to note that, based on the email of 12th May, it is obvious that Ms. Lennon (and it seems clear that she was acting on behalf of Mr. Langan in this matter) believed that something more than written confirmation in an email was needed for there to be a binding agreement for the release of

the Charge, since she did not, in this email, simply seek an email confirmation that the Charge had been released, but rather she sought an amended Facility Letter. This is not surprising, since Ms. Lennon had signed, only a few weeks previously, the CFL Facility Letter, in which there was express reference to the fact that the London Apartment would continue to provide security for all CFL's borrowings and Mr. Langan's borrowings. In this regard, in her evidence, Ms. Lennon admitted that, as an experienced financial controller, she was well aware that Mr. Kinsella would have to get the authority of Ulster Bank, and that an amended Facility Letter would have to be signed, for there to be a binding agreement to release the Charge.

90. This email request therefore by Ms. Lennon for an amended Facility Letter provides evidence of Ms. Lennon's understanding (on behalf of Mr. Langan) that something more was required to have a binding agreement for the release of a Charge than simply confirmation in the form of an email or a discussion. In this regard, it is also relevant to note that at no time did Ulster Bank comply with the request from Ms. Lennon to amend the Facility Letters, since no amended Facility Letters were ever sent or signed by Ulster Bank.

91. Thus, without even considering any of the other documentary evidence, it is the case that the May Emails do not, on their own, provide sufficient evidence that there was a binding agreement to release the Charge on the receipt by the Bank of a valuation of €800,000 for the Blanchardstown Lease.

Events after the May Emails

92. In considering whether Mr. Langan's or Mr. Kinsella's version of events is more probable, it is relevant to consider what happened in the engagement (as evidenced by the file notes of Ulster Bank) between Ulster Bank and Mr. Langan after the May Emails, to see if that engagement between the parties is consistent with the alleged 'agreement' by Ulster Bank to release the Charge it had as security for its borrowings to Mr. Langan and CFL.

93. Before doing so, it is worth recalling the context, as provided by the Advice document with notes dated 24th April and 24th May 2008 which were made by Mr. Kinsella based on conversations with Mr. Langan. These notes provide evidence that Mr. Langan, at the time of the May Emails, sought and was refused a Second €500,000 from Ulster Bank. It follows that Mr. Langan's case is that Ulster Bank, who had just refused him the Second €500,000, were nonetheless willing to enter a binding agreement to reduce the security it held for Mr. Langan's borrowings by releasing the Charge. The *Advice* note also provides the context that Mr. Langan had stated to Ulster Bank that AIB had agreed to provide the Second €500,000 on the security of the London Apartment and his family home and these notes show Mr. Langan recommending the release of the Charge in order not to 'lose this valuable relationship to a competitor bank' by *'facilit[ing] a further 500k equity investment in CFL'*. Despite this recommendation, the credit department refused to release the Charge.

VI. Second €500,000 sought from another bank by 9th September, 2008

94. Against this background, the next relevant document to consider after the May Emails is an internal Ulster Bank document entitled '*Information Advice'* dated 9th September, 2008. It is around this time that CFL had serious difficulty with paying monies owed to the Revenue, as evidenced by the fact that the Revenue had obtained an Attachment Order against CFL, in respect of a sum of €80,000. This is evident from the *Information Advice* document which notes that by 9th September, 2008, the Revenue had obtained and then released an Attachment Order for a failure to pay taxes:

> "All loan rpyts [repayments] have been maintained fully utd [up to date] and 80k Revenue payment has been effected and Revenue have revoked their Attachment Order"

95. *This Information Advice* document prepared by Mr. Kinsella is also relevant since it contains evidence of further information obtained by Mr. Kinsella from Mr. Langan regarding an alternative proposal by Mr. Langan to get the Second €500,000 from a bank other than AIB, since at this stage the AIB funding had not transpired. *This Information Advice* document is in effect a request, once again, for the release of the London Apartment, but this time in order to get the Second €500,000 on the security of it, and two other properties (Bachelor's Walk and Wexford), but on this occasion, not on the security of Mr. Langan's family home. This document states:

> "This paper also requests release of security over London property with wdv [written down value] of E275k to enable David Langan to release equity of 500k on 3 x rips [residential investment properties] to invest in CFL – release was previously agreed subject to a satisfactory leasehold valuation on the Blanch store – valued in 09/09 @ 1.2m. […]
>
> DL's proposal to provide a 0.5m cash injection to CFL from the refinancing of his 3 RIP's (Wexford, Batchelors Walk & London) with another Bank. Application is already in train and DL has also agreed to UB taking a second charge on his PDH [Private Dwelling Home] in Malahide Marina. Re-structuring will have no net effect on mthly outgoings as he is also switching his pdh mortgage to interest only rpyts."

96. Most significantly, this document is consistent with the oral evidence of Mr. Kinsella to this Court (as referenced above) regarding the release of the Charge being for the purpose of, and on the condition that, Mr. Langan get the Second €500,000 to invest in CFL.

97. In particular, this document is evidence of the state of the negotiations in September 2008 between Mr. Langan and Mr. Kinsella being such that Mr. Kinsella *'requests release of security'* to the credit department of Ulster Bank, which once again is entirely inconsistent with Mr. Langan's claim that he had a binding agreement or a representation that the Charge would be released. This time the proposal is for the use of three residential properties as security for the Second €500,000.

98. It is also worth noting that in this document Mr. Kinsella uses the term 'agreed' in the sense of *'agreed subject to getting credit committee approval'*. This is because, while he states in the first sentence that the release of the Charge was 'agreed', the whole import of this sentence is that he is seeking approval from the credit department for this *'agreement'* to release the Charge. In this regard, this internal note wholly supports the position of Mr. Kinsella in his evidence to this Court that, although the term 'agreed' was used in the May Emails with CFL, the term 'agreed' was used in the May Emails in the same sense as it is used in this document, i.e. agreed subject to credit department approval, and so was not legally binding.

99. In addition, this *Information Advice* document also records the difficult financial position at the time since it records a request by CFL for a letter of a credit line in the sum of €150,000 in the following terms:

> "E150k line requested to pay UK suppliers and will improve credit terms on payment ie 30 days from delivery. Request is urgent as stock levels have been reducing and customer needs to buy in stock now for the Q4 season which is historically the busiest and most profitable qter."

100. It also records that the Kilkenny Property, which was put up for sale as a requirement of the First €500,000 at a price of €3.5 million, had now, only a few months later in September 2008, been reduced drastically in price to €2.3 million:

> "FLC [First Legal Charge] on Kilkenny store – customers have reduced sale price to 2.3m to achieve a sale."

101. A later section of the same *Information Advice* document gives a flavour of the deteriorating trading conditions, although this section appears to have been inserted a few months later, on 10th December, 2008:

> "Deteriorating trading profile in Q4 is highly disappointing especially viewed in the context of the original projections provided which were highly optimistic."

VII. Mr. Langan proposes two properties as security by 10th December, 2008

102. The next documentary evidence of the events that occurred after the alleged 'agreement' to release the Charge is an internal bank document entitled Information Advice and dated 10th December, 2008. In this document, Mr. Kinsella records the following information which he states he received from Mr. Langan:

> "In relation to the proposed 500k cash injection from re-financing of 2 x DL's [David Langan's] non-UB investment properties the utd [up to date] position is as follow. ICS have approved an eqr [equity release] of 208k on the Batchelors Walk property. Offer letter has been accepted and legals are being finalised. Broker has advised DL that he has a SIP [Sanction In Principle] from AIB for a 150k eqr [equity release] on the Wexford property (not sighted). These facs [facilities] will provide equity of 358k before fees against original proposal of 500k. D.L.'s commitment is still evident."

103. This note, which appears to have been written on 10th December, 2008, is consistent with Mr. Kinsella's oral evidence that the reference at this stage in December 2008 to just two properties as security (Bachelor's Walk and Wexford), when three properties were contemplated in September 2008 (Bachelor's Walk, Wexford and the London Apartment), was because Mr. Langan's broker had not managed at that stage to reach agreement regarding the London Apartment being used as security for borrowings.

VIII Emergency €300,000 on 22nd December with Wexford Property as security

104. On the 22nd December, 2008, a number of months after the alleged agreement in May-September 2008 for the release of the Charge had allegedly been concluded, Mr. Langan sought emergency funding of €300,000 for CFL from Ulster Bank, in order to release a container of goods held in Dublin Port. At this stage, it is clear that the company was in a very difficult position financially, as evidenced by the fact that only a few weeks later, in January 2009, it is recorded that CFL owed €600,000 approx to the Revenue and €600,000 approx to landlords. Indeed, on the very day of this emergency meeting with Ulster Bank, on the 22nd December, 2008, the company was threatened with a winding up order by its landlord in The Park, Carrickmines for outstanding rent of €120,067, which that landlord had unsuccessfully sought in October and November of 2008 from CFL. A petition was subsequently issued by that landlord for the winding up of the company on 30th January, 2009 and CFL went into receivership on 5th February, 2009.

105. In the weeks before all this occurred, the company needed €300,000 in order to prevent the containers of goods being returned to the suppliers within 48 hours and there was an all-day emergency meeting between, *inter alia*, Mr. Langan and Mr. Kinsella. Consistent with Mr. Kinsella's version of events, namely that the Charge had not been released or agreed to be released in May-September 2008, there is a contemporaneous note taken of a telephone conversation between, *inter alia*, Mr. Graham Roche ("Mr. Roche") of Ulster Bank and Mr. Kinsella during the course of this all day meeting. In that note, a summary of CFL and Mr. Langan's borrowings are noted as the following:

> "scty [security] = Kilkenny unit, UK property"

106. Mr. Roche gave evidence that this indicated, and was consistent with his recollection at that time, that he was noting the relevant security Ulster Bank held. Thus, this is further evidence that there was no question of Ulster Bank at this time having agreed to release the Charge.

107. A memorandum of the all-day meeting between, *inter alia*, Mr. Langan, Ms. Lennon, Mr. Brohoon (Mr. Langan's broker), Mr. Kinsella and Mr. Andrew Farry of Ulster Bank, was prepared by Mr. Farry who gave evidence to this Court. That note of the meeting is contained in a Memorandum from Mr. Farry to Mr. Roche dated 28th January, 2009. It provides, insofar as relevant, as follows:

> "Meeting was called following initial meeting with the customer on 16th December 2008 – attended by all the above individuals and Oisin Gilbride (Customer's Accountant) and Joe Brohoon (Mortgage Broker). This meeting was called by DL at short notice to advise of pressing need to release additional c. € 300k of funds so as to release goods held at Dublin Port. [….]
>
> Discussion commenced in relation to urgency of requirement to release additional €300k funds in order to secure release of goods held at Dublin Port – supplier was threatening to return goods if payment was not made within a period of 48 Hours. […]
>
> RMT [retail banking] advised customer that they would require a €500k guarantee from David Langan – to be counter-covered by Solicitor's Letter of Undertaking over afore mentioned property @ Sandy Lane, Ballymoney, Co. Wexford. DL was advised that this level of security was required as Account was at €600k dr with a further €300k requested – which would bring account bal to €900k dr versus limit of €400k – ie a difference of €500k. RMT also requested that the Bank would seek to take a First Legal Charge over the Sandy Lane [Wexford] property if re-financing of same did not conclude by the end of January 2009."

108. Based on this note, it is clear that the meeting between, *inter alia*, Mr. Langan and Mr. Kinsella dealt with CFL's need for €300,000 from Ulster Bank, and Mr. Langan offered as security for this loan, his then unsecured holiday home, the Wexford Property. It is significant to note that despite the very serious situation in which he was in, where the existence of his company was in danger, Mr. Langan did not offer his London Apartment as security, even though on his version of events he believed that the London Apartment was totally free as security since it had been released pursuant to the May-September agreement. When it was put to him that if he truly believed that the London Apartment was unencumbered, he would have used it as security for this loan, since it was an investment property that he never used, rather than offering as security his holiday home in Wexford which he did use, he denied that it was because he believed that the London Apartment was already charged to Ulster Bank.

109. This Court concludes that the more probable reason that Mr. Langan did not offer the London Apartment as security for a loan to

save his business, is not because, as suggested by Mr. Langan in evidence, he did not wish to offer his London Apartment, but rather because he knew that the London Apartment was already secured to Ulster Bank and so was not available as an unsecured asset to provide security for this emergency €300,000 loan. If he had believed that an investment property in London, was genuinely unsecured at this stage, it seems improbable that he would not have used it as security, since he had previously offered even his family home as security to get funds for the business.

110. It is also remarkable, in this Court's view, that if the London Apartment was free from security, as Mr. Langan now alleges, there is no evidence of him saying anything about this unencumbered asset, even though his company is going through a severe financial crisis. In particular, if he genuinely believed this was the case, it is curious that he does not look for the deeds of the property to seek funding from another bank during this time from September to December 2008, when his business is facing liquidation.

111. In particular, if one returns to the email of 12th May, 2008, in which Ms. Lennon first alleges the existence of an agreement to release the Charge and then seeks an amended Facility Letter, there is no follow up to this email seeking the amended Facility Letter to reflect the *alleged* release of the Charge during a time of severe financial crisis, when an unencumbered asset would have been a hugely valuable asset. These omissions by Mr. Langan and/or Ms. Lennon in the period after the alleged 'agreement' to release the Charge are indicative, in this Court's view, of the fact that the agreement to release the Charge was conditional, not only on a satisfactory valuation of the Blanchardstown Lease, but also on the provision of the Second €500,000 from another financial institution for investment in CFL, which never transpired. For this reason, there was never a binding agreement to release the Charge.

IX. The March 2009 Emails regarding the existence of the Charge

112. The next important engagement to consider in determining whose version of events is more likely is a series of emails between the parties in March 2009, beginning with an email dated the 13th March, 2009 from Ms. Lennon to Mr. Roche as follows:

> "Graham
>
> Re our telephone conversation today, can you supply me with a list of the properties you are holding as security in respect of the debts of Classic Furniture and David Langan and detail the security held in respect of each property."

113. On the same date, Mr. Roche replies to Ms. Lennon's request in the following terms:

> "Imelda
>
> The security held by the bank is as follows : -
>
> From the company
>
> All Monies Debenture
>
> First Legal Charge over Unit 5 North West Business Park
>
> David
>
> First Legal Charge over Kilkenny
>
> First Legal Charge over Apt 902, Belvedere Heights, London Solicitors undertaking leading to a first legal charge re Ballymoney
>
> The guarantees from David to the company are outlined in letter to David where the bank called in on the guarantees.
>
> All security pledged by David is pledged for his personal liability and that of the company (captured by the guarantees)."

114. It is relevant to note that Mr. Langan was copied on the above email sent by Mr. Roche to Ms. Lennon. However, when Mr. Langan received this email he did not reply (nor did Ms. Lennon reply on his behalf) stating that Ulster Bank released/agreed to release the Charge in May-September 2008, which would have been the logical reaction, if he truly believed, as he now claims, that Ulster Bank had agreed to the release of the Charge, particularly since the alleged agreement had only been finalised a few months previously

115. Instead, the only reaction was Ms. Lennon's request by emails dated 23rd March, 2009 for the paperwork for the Charges, which is clearly consistent with the Charge not having been released or agreed to be released. It is also relevant to note that in her email dated 23rd March, 2009 requesting that the relevant paperwork for the Charges be sent on by Mr. Roche, Ms. Lennon asks that Mr. Roche *"forward [the paperwork] to David's address and confirm by mail."*

X. Denial of the existence of the Charge

116. More significantly, there is a telephone conversation between Mr. Langan and Mr. Roche a few days after these emails, which is consistent with there being no such binding agreement for the release of the Charge, since Mr. Langan appears to challenge that he ever signed the Charge in the first place. This conversation took place on 27th March, 2009 and the conversation is recorded as follows in a handwritten contemporaneous note by a colleague of Mr. Roche, who took a note of the phone call:

> "DL: I know nothing abt London property I didn't sign anything
>
> GR: Did you know you pledged that property? Ann sent you offer letter?
>
> DL I'm shocked at this
>
> GR The signed offer? Yesterday
>
> DL"

117. In this telephone exchange, it seems clear that Mr. Langan is shocked that he even charged the London Apartment in the first place and he appears to deny charging it. In considering this contemporaneous note of the conversation, it is relevant to note that

Mr. Langan states in his evidence to this Court for the purposes of these proceedings, (which, it must be remembered, seek to avoid liability for his and CFL's borrowings and to have his security released), that he *'remembers like yesterday'* the discussion with Mr. Kinsella regarding the only condition for the release of the Charge being a valuation of €800,000 for the Blanchardstown Lease.

118. It does seem strange, to say the least, that Mr. Langan suggests that he can remember 'like yesterday' the alleged release of a Charge but at the same time there is this evidence that he denied that he executed the Charge in the first place, some months after the alleged release of the Charge that he so clearly remembers. The two positions are clearly inconsistent. Mr. Roche gave evidence that his recollection of this conversation was that he regarded Mr. Langan's denial of the execution of the Charge on the phone as being completely 'bizarre' since Ms. Lennon had previously sought a copy of the signed Charge.

119. Mr. Langan, in his evidence, attempted to explain this conversation by saying that he was not in fact shocked at having signed the Charge, and came up with the somewhat artificial explanation that he was expressing shock that the Deeds were in the possession of the Bank, rather than shock at having executed the Charge. This Court does not find this explanation credible, since Mr Langan appears to be suggesting that as well as charging a property, there had to be some other document signed by a borrower entitling Ulster Bank to have possession of the title deeds, and he gave no reason for believing that this was the position.

120. For this reason, this Court concludes that, on the balance of probabilities, Mr. Langan's memory is playing tricks on him and that what he remembers 'like yesterday' is the negotiation for the release of the Charge, which was a conditional agreement, where one of those conditions was his procuring the Second €500,000, which he failed to do.

XI. Summary of events by Mr. Kinsella on 5th March, 2010

121. Another piece of documentary evidence which supports Ulster Bank's position is from a year and a half after the alleged agreement to release the Charge had been reached, but still some seven years before the proceedings in this case issued on the 2nd February, 2017. It is an email dated 5th March, 2010, in which Mr. Kinsella provides his understanding to a colleague in Ulster Bank of his engagement with CFL and Mr. Langan in relation to the issues now in dispute. His summary at that stage was as follows:

> "Sean,
>
> In response to your security queries on;
>
> 1. The London property
>
> From memory, the Bank approved a 500k eqr facility in early 2008 for DL to invest the funds in CFL.
>
> DL reverted afterwards and requested an additional 500k which Credit Dept declined. Customer advised that he was raising 500k mortgage with another Bank and requested release of the London property to offer as collateral security.
>
> Bank agreed to review the request to release London and requested an utd [up to date] valuation of the leasehold interest in the retail unit in Blanch.
>
> The risk position subsequently deteriorated and the customer was unable to raise mortgages through other financial institutions to support company cashflow. Credit Dept declined to release the London property."

122. Although not a contemporaneous note, it was made before this litigation commenced and accordingly is of some relevance since it outlines a position which is once again consistent with Mr. Kinsella's evidence to this Court regarding how events transpired in May-September 2008.

XII. Reliability of Mr. Langan's sworn evidence

123. The next factor to consider in determining whether Mr. Langan's version of events or Mr. Kinsella's version of events is the more likely, is the credibility of the parties. In this regard, Mr. Langan has made certain sworn statements which are not credible and this must be considered by this Court in analysing the credibility of his other sworn statements upon which he seeks to rely in these proceedings.

124. In particular, in Mr. Langan's witness statement he made a sworn statement in the following terms:

> "In or about February 2009 I agreed to the Bank appointing a receiver of the Company's assets and undertaking (the Bank's demand letter dated 12 February 2009 in fact referred to the fact that the Company's directors had requested that the Bank appoint a Receiver), and that the Bank would take security over and dispose of your Deponent's property in Green Street, Kilkenny in settlement of the Company and your Deponent's personal liabilities to the Bank (hereinafter the "February 2009 Agreement"). At the time that it was agreed, and it was common case, that the Company's assets, together with the unencumbered Green Street, Kilkenny (from which the Company still traded) were more than sufficient to discharge in full all liabilities owed by the Company and me personally pursuant to the 2007 and 2008 Facilities."

125. It is important to consider what Mr. Langan is saying here in his sworn evidence. He is stating that in February 2009 he reached an agreement with Ulster Bank that he would be released from his liability to Ulster Bank because the property which he had secured to the Bank along with CFL's assets covered the entire liability owed to the bank.

126. Based on the evidence of Mr. Langan and Ms. Lennon, it seems clear that based on valuations of the property and assets at their height, Ulster Bank would have been well 'covered' by the security they had for the loans. However, it is also clear that this position changed dramatically between late 2007 and the receivership of the company in February 2009, as the financial crisis took hold. It is possible that Mr. Langan's regret, that he had not got Ulster Bank to agree that he would be released from personal liability because it had sufficient security at the height of the property market, evolved in his mind into 'an agreement' to that effect which was allegedly reached in February 2009.

127. However, whatever about the 'conditional agreement' for the release of the Charge in May-September 2008 (where there is at least some evidence of negotiations and some evidence of a conditional agreement to release the Charge provided by the May Emails), there is absolutely no evidence for an alleged agreement with Ulster Bank in February 2009 for Mr. Langan's release from *all personal liability* because the secured property and assets were sufficient to cover Ulster Bank's loans. The kindest comment that could be made about this sworn statement is that it amounts to wishful thinking on the part of Mr. Langan.

128. However, this clearly false claim of the existence of a February 2009 agreement cannot be simply disregarded for the purposes of

these proceedings, as Mr. Langan suggests it should be, because, as he repeated in cross examination he is '*not pursuing it'*. A sworn statement that an agreement exists which supports a plaintiff's case, followed by the plaintiff's acceptance that the claim is not correct and therefore will not be pursued, cannot simply be disregarded. This is because the provision of clearly false sworn statements by a plaintiff call into question the credibility of the plaintiff's evidence in support of his other claims.

129. Mr. Langan's insistence that he was not pursuing the February 2009 Agreement does not address the fact that this sworn statement, which he accepts is not correct, is false and was sworn by him to be true. This sworn statement is therefore evidence that Mr. Langan is capable of making false claims to pursue what he regards as a legitimate aim, namely to deny Ulster Bank/Promontoria of its right to recover money lent to him. As such, it is a further factor in this Court's determination that on the balance of probabilities Mr. Kinsella's version of events is correct, rather than Mr. Langan's.

130. This Court would observe that based on the evidence he provided to this Court, it seems that Mr. Langan feels that Ulster Bank could have done more to assist his business during the financial crisis and/or it should have released him from personal liability when the value of the secured property and assets was greater than the outstanding loans. It appears to this Court that Mr. Langan feels that Ulster Bank, rather than the financial crisis, was the cause of the collapse of his entire business, and he may have used this belief to rationalise his claims that an agreement was reached for the release of the Charge (and a claim that he *should not* be pursued for the some €4.3 million debt). It is difficult for this Court to avoid the conclusion therefore that, just as with the alleged February 2009 Agreement, so it is with the alleged May-September 2008 Agreement. Accordingly, despite the fact that Mr. Langan knew all along that no such binding agreement to release the Charge was ever reached in May-September 2008, his belief that Ulster Bank allowed his business to close down and that it should have released the Charge as it had at one stage sufficient security, evolved into his claim of an agreement to release the Charge in May-September, 2008.

SUMMARY - REASONS FOR FINDING THAT NO BINDING AGREEMENT

131. In this Court's view, when one considers all the circumstances in and around May-September 2008, i.e.:

- that CFL was loss making,
- that Mr. Langan had just put in €300,000 of his own money in January 2008 to pay CFL's VAT,
- that in April 2008 Mr. Langan had to borrow the First €500,000 in invest in CFL,
- that the property crisis was beginning to bite as evidenced by very attractive leasehold terms available in March 2008 and that,
- the Bank refused in May 2008 to lend the Second €500,000 in funding to Mr. Langan,

it was a very curious time, in May 2008, for Ulster Bank to enter a binding agreement to reduce its security by releasing the Charge over the London Apartment (subject only to a satisfactory valuation of a lease) This is particularly so when only a few weeks previously Mr. Langan had given security over that very same London Apartment to Ulster Bank for its lending of the First €500,000 to him to invest in CFL.

132. However, of more significance is the evidence and file notes from Mr. Kinsella throughout this period which supports his version of events, namely that there was a conditional agreement to release the Charge, subject to Mr. Langan procuring the Second €500,000 from another financial institution to invest in CFL, which never occurred.

133. For that reason (and the other reasons set out above) and due to the fact that Mr. Langan has made a clearly false sworn statement in these proceedings, this Court concludes that, on the balance of probabilities, Ulster Bank did not reach a binding agreement with Mr. Langan for the release of the Charge.

Similarly, this Court concludes that Mr. Langan never believed that Ulster Bank had reached such a binding agreement with him, as evidenced by his actions before and after the period May-September 2008 and in particular:

- Mr. Langan's failure to use the allegedly unencumbered London Apartment as security during the financial crisis in December 2008 when his company was on the brink of winding up/receivership (if he truly believed that the London Apartment had been released from the Charge), and
- his attempt in March 2009 to challenge the very existence of the Charge by denying that he had ever executed it (rather than pointing out that it had been released only a few months previously, as he now alleges).

134. Accordingly, Mr. Langan's claim that there was a binding agreement to release the Charge is dismissed. In addition, Mr. Langan by his actions after the May Emails showed that he did not treat the May Emails as a representation by Ulster Bank that the Charge had been released, or would be released. Rather his actions showed that he knew that he was negotiating a release of the Charge, if he sourced €500,000 from another financial institution. Accordingly, his claim that the May Emails amounted to a representation, that the Charge would be released upon receipt of an €800,000 valuation for the Blanchardstown Lease, is also dismissed.

TECHNICAL LEGAL CHALLENGES TO PROMONTORIA'S RIGHTS

135. What remains are certain technical legal issues raised by Mr. Langan regarding, *inter alia*, the right of Promontoria to pursue Mr. Langan for €4,309,428, as the assignee of the loans extended by Ulster Bank to Mr. Langan and CFL. These will be considered in turn.

Failure to get Mr. Langan's consent to the assignment of the loan

136. Mr. Langan claims that his consent was required for the assignment of the loans and underlying security by Ulster Bank to Promontoria and so, because it was not obtained, the assignment is invalid as a matter of law.

137. First, it is important to note that Mr. Langan has accepted that he received notice of the assignment. This is important because s. 28(6) of the Supreme Court of Judicature Act (Ireland) 1877 provides that an assignment of a chose in action, and it is not disputed that the loans and underlying security constitute a chose in action, is effective where it is done writing with notice to the debtor. Section 28(6) states, insofar as relevant:

> "Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be

deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed,) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor [….]."

138. It is also relevant to note what the Court of Appeal has stated in relation to the fact that there is no requirement for the consent of the mortgagor to the assignment. In *Vitgeson Limited v. O'Brien & Promontori*a [2019] IECA 184, McGovern J. stated at para. 16:

> "But in any event it is important to point out that a chose action is freely assignable under s. 28(6) of the Supreme Court of Judicature (Ireland) Act 1877 and does not require the mortgagor's consent nor does it require to be approved in writing. In my view the trial judge was correct in reaching his conclusions on the basis of the deed of transfer. But it was not necessary for him to do so and he could have reached the same conclusion on the basis of oral evidence given by Ms. Hallissey and Mr. Burke and proof of the receipt by the appellants of the "goodbye" letter and "hello" letter. In short there is ample evidence of the sale of the loan. At para. 12 of the statement of claim the appellants admitted to having received a written notice of the assignment from NALM (the "goodbye" letter). Ms. Catherine Mangan, a director of Vitgeson Limited and the partner of the second named appellant gave evidence in which she confirmed no only the receipt of the "goodbye" letter but also the receipt of the "hello" letter from PARL."

139. Since the loans and security, the subject of these proceedings, are choses in action, and Mr. Langan received express notice in writing of the assignment of the loans and the security by letter dated 5th September, 2016, it seems clear that under s. 28(6) of the Supreme Court of Judicature Act (Ireland) 1877, the consent of Mr. Langan was not required for a valid assignment of the loans and security in this case. It is also relevant to note that there is no clause prohibiting the assignment of the loans in the Facility Letters and thus no restriction on the assignment of the loans in this case.

140. With specific reference to the Guarantees, it is to be noted there are no provisions in any of the guarantees restricting their assignment, and as noted in Andrews & Millett, *Law of Guarantees* (6th Ed.) at para. 7-031:

> "In the absence of express agreement to the contrary, the creditor is entitled to assign the guaranteed debt and the securities for the debt to someone else".

141. With specific reference to the Charge, Clause 12.1 of this document makes clear that the definition of 'Bank' (in the original charge, being Ulster Bank Ireland Limited), includes its *'respective successors in title and assigns'*. As this Charge is subject to English law, uncontested evidence was provided by Ms. Candice Blackwood, a solicitor admitted to the roll of solicitors in England and Wales, that entry, in the register maintained under the Land Registration Act 2002, of Promontoria as the transferee of the Charge means that it is 'conclusive' that the legal title to the Charge is vested in Promontoria.

142. Accordingly, this Court concludes that the absence of the consent of Mr. Langan to the transfer of the loans and security the subject of these proceedings is not fatal to their assignment to Promontoria.

Challenge to the mechanics of the transfer to Promontoria

143. Mr. Langan also claims that Promontoria is not legally entitled to pursue and enforce security against Mr. Langan pursuant to the Facility Letters, the Guarantees –or the Charge, because of defects in the mechanics of the transfer by Ulster Bank to Promontoria.

144. This is a common defence raised in these types of cases and has been considered regularly by the Irish courts, most recently by the High Court and Court of Appeal in the case of *Vitgeson v. Promontoria* [2017] IEHC 846, [2019] IECA 184. In that case, a similar argument was made, as is made here, regarding Promontoria's right to loans and security allegedly transferred to it. Haughton J., at page 18 of his judgment, sets out the relevant part of the deed of transfer in that case:

> "Turning to that deed, as proven, it describes itself as being between National Asset Loan Management Limited as assignor and Promontoria (Arrow) Limited as assignee and it is dated 11th December 2015 and carries the heading "Deed of Transfer (Global Assignment Deed)" in respect of the Arrow portfolio. It then sets out the parties. It sets out recitals, the interpretation of terms and at Clause 3, under the heading "Transfer", it states the following:
>
> > 3.1. The assignor unconditionally irrevocably and absolutely transfers, conveys, assigns and delivers to the assignee with effect from the completion date, to the extent that it has any right, title, interest or benefit in and to the relevant GAD loan asset and to the extent capable of transfer, conveyance, assignment and/or delivery, all its rights, title, interest and benefit in and to each of the GAD loan assets, subject to the subsistence rights of redemption of the obligors including, without limitation...."
>
> And then it goes on to add additional clauses. It is not necessary to go beyond that opening part of the transfer clause, that is to say Clause 3.1.
>
> I am quite satisfied that the effect of that clause was for NALM to transfer to Promontoria (Arrow) Limited all NALM's interest, rights and entitlement in the Plaintiffs' loan and security to Promontoria. It does so, of course, by reference to the loan facilities and securities that are set out in the schedule. These are of course the redacted schedules that they set out at pages 109 and 110, the facility letters referable to Vitgeson under the connection ID number 0910.
>
> It sets out the relevant mortgages at pages 217 and 218, again under the same connection number.
>
> Even if that proven copy deed could not be relied upon, I would accept the Defendants' contention that by their acts, the Plaintiffs are not contesting the validity of the assignments, or did not contest the validity of the assignments after they received notification of the assignments in December 2015, and by their acts in meeting thereafter with Promontoria or Promontoria's representatives to try and buy their loans, or to do a deal, and by the fact that they did not at those meetings contest the validity of the transfers, or reserve their rights to do so. The result of that is that the Plaintiffs are, in the Court's view, estopped from challenging the validity of the assignment of the loans and security by NALM to Promontoria."

145. In this case, evidence has been provided of the Mortgage Sale Deed dated 16th December, 2014 between various Ulster Bank companies and Promontoria Holdings 128 B.V. There was uncontested evidence that by virtue of a Deed of Novation dated 12th February, 2015 between various Ulster Bank companies, Promontoria Holdings 128 B.V and Promontoria, the rights and obligations

under the Mortgage Sale Deed were novated to Promontoria. Evidence was also provided of the Global Deed of Transfer dated 12th February, 2015 between various Ulster Bank companies and Promontoria.

146. As in the Vitgeson case, the crucial part of these documents is the transfer clause in the Global Deed of Transfer. The wording of Clause 1 of the Global Deed of Transfer is similar to the clause referenced by Haughton J. and it states, insofar as relevant:

> "each Seller as beneficial owner free from Encumbrances and as the registered owner or, as applicable, the party entitled to be registered as owner, with effect on and from the date of this Deed, hereby grants, conveys, confirms, assigns, transfers and assures unto the Buyer, subject to the subsisting rights of redemption of the Borrowers and any Obligor and to the extent capable of assignment, all its rights, title, interest, estate, entitlement and obligation (past, present and future) in and under each Mortgage Asset, Underlying Loan, Swap Claim and each of the Finance Documents (including all schedules and appendices to such Finance Documents) related to the First Closing Sale Assets and the Seller's right, title and interest in and to the Ancillary Rights and Claims and including, without limitation:
>
> > 1.1 all right, title, interest, benefit estate, entitlement and obligation of the Sellers in the First Closing Sale Assets constituted by the documents listed in Schedule 1 (together with any further mortgages, charges, security assignments and other security interests (including any other agreements to create or effect any of the foregoing) relating to the Underlying Loans and Finance Documents granted by a Borrower or an Obligor);"

147. Since under the express terms of this clause, the 'First Closing Sale Assets' constitute the documents set out in Schedule 1, it seems clear that this clause effects the transfer of the loans and security set out in Schedule 1. That schedule lists the seven guarantees the subject of these proceedings as well as the Charge. It also lists the Facility Letters, *albeit*, that there is a typo in the reference to the CFL Facility Letter, by virtue of the reference to 9th April, *2009* rather than 9th April, *2008*. However, Mr. Langan accepted that the loans and security listed in this Schedule were the relevant loans and security the subject of these proceedings.

148. For these reasons, it seems clear that the loans and security the subject of these proceedings were transferred to Promontoria pursuant to this Global Deed of Transfer.

Mr. Langan acknowledged debts, which he now says were not acquired

149. In any case, as in the *Vitgeson* decision, Mr. Langan by his acts never contested the validity of the assignment after his notification of the assignment in March 2015. On the contrary, by letter dated 3rd July, 2015 Mr. Conor Sheahan of CKS Finance, on behalf of Mr. Langan, sought to negotiate the settlement of the loans with Capita Asset Services (Ireland) Limited on behalf of Promontoria, as the *'new owners of the loan'*. Furthermore, over a year later, by letter dated 26th October, 2016, Mr. Sheahan put forward a revised proposal on behalf of Mr. Langan to settle *'his outstanding debt'* with Promontoria. Therefore Mr. Langan acknowledged the debts and security which were assigned to Promontoria on a number of occasions prior to issuing the within proceedings, yet he is now seeking to claim that those debts and security were never acquired by Promontoria. For this reason, as occurred in the *Vitgeson* case, there is a basis for Mr. Langan being estopped from now challenging the validity of the assignment of the loans and security to Promontoria.

150. For these reasons, this Court does not accept that there is any basis for Mr. Langan to challenge the entitlement of Promontoria to pursue him for the loans and security entered into by Mr. Langan with Ulster Bank, the subject of these proceedings, and duly assigned to Promontoria.

CONCLUSION

151. For all the foregoing reasons, this Court rejects Mr. Langan's claims that there was any agreement between Ulster Bank and Mr. Langan that the Charge would be released. This Court also rejects Mr. Langan's technical legal arguments alleging that the assignment and transfer of the loan facilities, the Guarantees and the Charge to Promontoria were not properly effected. This Court therefore refuses the reliefs sought by Mr. Langan and will hear counsel in relation to the terms of any order sought regarding Promontoria's counterclaim in the sum of €4,309,428.