Neutral Citation Number: [2009] IEHC 214

THE HIGH COURT

2003 9018 P

BETWEEN

MOORVIEW DEVELOPMENTS LIMITED, SALTHILL PROPERTIES LIMITED, VALEBROOK DEVELOPMENTS LIMITED, SPRINGSIDE PROPERTIES LIMITED, DRAKE S.C. LIMITED, MALLDRO S.C. LIMITED, THE POPPINTREE MALL LIMITED AND BLONDON PROPERTIES LIMITED

PLAINTIFFS

AND

FIRST ACTIVE PLC AND RAY JACKSON

AND BY ORDER

BERNARD DUFFY

DEFENDANTS

AND LINKED PROCEEDINGS

JUDGMENT of Mr. Justice Clarke delivered on the 6th of March, 2009

1. Introduction

1.1 These linked proceedings arise out of the collapse of a series of companies associated with Mr. Cunningham (respectively "the Cunningham Group" or "Mr. Cunningham) which occurred when Mr. Ray Jackson ("Mr. Jackson") was appointed as receiver of a number of those companies by First Active plc ("First Active"). At the time of the appointment of Mr. Jackson as receiver it would appear that a sum of €31,152,169.62 ws owing by certain Cunningham Group companies to First Active. Generally these proceedings arise out of the banking relationship between First Active and the Cunningham Group, together with the appointment of Mr. Jackson as receiver and the events that followed. One aspect of that sequence of events was a sale to Bernard Duffy ("Mr. Duffy") of a significant asset of the Cunningham Group, being a partially built apartment and commercial development at Bailey Point in Salthill, Galway ("Bailey Point").

1.2 It will be necessary to set out the issues which have arisen between the parties in more detail in the course of this judgment. However, in general terms, a wide range of issues were canvassed in the various linked proceedings the titles of which proceedings are set out in the first schedule to this judgment. The separate cases were given a designation letter as appears in that schedule. The references in this judgment to individual cases by letter refers likewise to the designation in that schedule. All of those proceedings were linked during a lengthy and complex case management process. In general terms, all of the linked cases were listed for hearing at the end of April, 2008. However, by an arrangement reached between the parties, with which I agreed, certain limited issues which arose in some of the proceedings were not proceeded with as part of what might reasonably be called the main hearing. The reason for this was that those issues appeared to be largely stand alone questions, which were not significantly dependent on the facts that were relevant to the central issues between the parties.

1.3 The second schedule sets out a list of those issues which, on the basis I have noted, were specifically not proceeded with. It follows that those issues remain for determination.

1.4 The balance of the issues were at trial for a period of 65 days. At the close of the Cunningham Group's case, counsel for each of the defendants applied for a non-suit. It will be necessary to refer in some little more detail to the basis upon which those respective applications were made in due course.

1.5 Having regard to the fact that, in the event that it should have transpired that those applications were, at least in part, unsuccessful, it would have been necessary for at least some of the defendants to go into evidence, I indicated that the appropriate course of action to adopt would be to consider the matter for a period of ten days and deliver an unreasoned ruling on the respective applications. In accordance with the relevant jurisprudence (to which I will refer in more detail in due course), a judge allowing a non-suit application, such as that applied for on behalf of the various defendants in this case, is required, ultimately, to deliver a reasoned ruling. On the other hand, where the application is unsuccessful, the judge concerned is required simply to rule against the application without reason and proceed to hear such evidence as the defendants may wish to call. It follows that in the event that the various applications were unsuccessful, the delivery of an early ruling would have facilitated a resumption of the trial, with such of the defendants as had indicated that they wished to go into evidence being given the opportunity to lead whatever evidence as was considered appropriate.

1.6 However, on Monday the 15th December, 2008, I ruled that all of the issues which had been at trial and which had not been abandoned by the Cunningham Group were, with a limited exception, dismissed on the basis of having come to the view that each of the defendants had made out a case for a non-suit on those issues. In respect of the remaining issue I indicated that I required further time to review the position. The issue concerned involved questions associated with the extent of a debenture held by First Active over the interests of the Cunningham Group in Bailey Point. That issue is addressed in this judgment. As pointed out, at the time of the rulings of the 15th December, I did not give a reasoned judgment. This judgment is directed towards setting out the reasons which led me to the conclusions which underlay that ruling.

1.7 Before going on to set out those reasons it is necessary to say a little about the procedural history of these proceedings, insofar as that history remained relevant to the issues which arose on the non-suit applications. I, therefore, turn to the procedural history of the case.

2. Procedural History

2.1 The pre-trial history of these connected proceedings is littered with a whole series of contentious interlocutory applications.

Some of the more important of these applications gave rise to written judgments, details of which are set out the third schedule. While the majority of those judgments relate to events which occurred prior to the beginning of the full hearing some of the latter judgments relate to applications which arose in the course of the hearing itself.

2.2 However, little of that procedural history is of any continuing significance to the issues which I have to decide, in the light of the submissions made at the close of the Cunningham Group's case. However, one element of that process is of continuing relevance – that is the evolution of the Cunningham Group's fraud claim against First Active and, to an extent, Mr. Duffy. It is necessary, at this stage, to comment briefly on that aspect of the procedure together with a number of procedural issues which arose in the course of the hearing itself.

2.3 As is clear from a judgment delivered on the 7th September, 2007 in *Porterridge Trading Ltd v. First Active plc* [2007] IEHC 313, the claim in fraud as against First Active had its origins in applications made to the court at a time when the proceedings had reached a significant degree of readiness for hearing. An initial application to amend the claim in case C was followed by an associated application to amend the claim in case A. For the reasons set out in the judgment to which I have just referred, I felt it appropriate to deal with both matters together and allowed the application to amend on strict terms. In the course of the proceedings the claim as made resulting from the amendment allowed by that judgment came to be called the "fraudulent scheme" allegation. At its simplest that claim involved an allegation that First Active, in August 2002, entered into certain banking arrangements in with the Cunningham Group on what was said to be a fraudulent basis. I will turn to those arrangements in due course. However, it is common case that an agreement was reached between First Active, the Cunningham Group and representatives of Mr. Cunningham personally, in mid August 2002, as a result of which new banking facilities were made available to the Cunningham Group. In general terms it is not disputed but that the facilities concerned were envisaged as allowing the Cunningham Group to complete the two major projects then on hand, being the retail and residential development at Bailey Point to which I have referred, and a construction contract being conducted on behalf of the National Association of Building Co-operatives ("NABCo") at Malahide Road in Dublin ("Malahide Road"). The fraudulent scheme allegation involved a contention that First Active entered into those lending arrangements while having no intention to make the relevant funds available. It was said that First Active's motive in entering into the arrangements concerned was to secure a perfection in its security which, it was contended, was deficient prior to those arrangements.

2.4 During the opening of the case the fraudulent scheme allegation was withdrawn and it was sought to be replaced by what, at best, might be described as a refinement of the original allegation. For reasons set out in a judgment delivered on 20th May, 2008, in *Moorview Developments v. First Active plc & Ors* [2008] IEHC 211, I held that the revised allegation could not be said to come within the case as then pleaded, but allowed the Cunningham Group an opportunity to amend their pleadings to reflect the revised allegation.

2.5 The allegation as revised involved a contention that First Active had fraudulently represented that money would be made available under the facility agreed in mid August, 2002. The allegation involved an assertion that, at the relevant time, First Active did not, necessarily, have an intention to advance monies for the completion of the two projects to which I have referred but rather had retained to itself the right to make a subsequent decision, or series of decisions, as to whether to advance monies. It was on the basis of that allegation that the case proceeded and it was to that allegation that the evidence was directed.

2.6 Before leaving this aspect of the case I should note that an issue arose between the parties in the course of the submission made at the close of the Cunningham Group's case as to whether the argument then put forward, on behalf of the Cunningham Group, involved yet a further refinement of the case. It will be necessary to turn to that question in due course. However, at this stage it is worth noting that First Active argued that the case as opened and the case as run involved an allegation that there had been a specific oral representation made by First Active to representatives of Mr. Cunningham, to the effect that the relevant funds would be made available. By the close of the submissions the case being made on behalf of the Cunningham Group was that the representation was in part verbal, and was in part by conduct. It was in relation to the introduction of an allegation of representation by conduct that First Active maintained that there had been a further alteration in the claim as made.

2.7 In addition to the matters that I have just outlined, which, as appears from the account given, involved some matters that occurred prior to and other matters that occurred subsequent to the commencement of the trial, it is also necessary to note a number of features of the conduct of the trial insofar as they have some relevance to the issues which I have to decide.

2.8 Before going on to consider the facts and the specific issues which arose on the non-suit application, I propose dealing with a number of overriding procedural and evidential questions at this stage as same involve questions of principle which had the potential to affect the overall approach to the evidence in a case such as this.

2.9 The relevant issues are as follows:-

> A. Reliance on documents obtained from opposing parties discovery (including reliance on a defendant's witness statements in a non-suit application where, by definition, the relevant witness had not been called in evidence);
>
> B. Reliance by experts on documents;
>
> C. The proper approach of the court on an application for a non-suit. While there was some difference between counsel on this later issue, the basic principles were not in dispute. However, two subsidiary issues did arise. The first concerned the extent to which it is permissible for a court in hearing an application for a non-suit to scrutinise, to any extent, evidence presented on behalf of the plaintiff. This issue was, in itself, somewhat interlinked with issue (A) above in that much of the evidence relied on by the Cunningham Group was to be found in documents produced by the various defendants in discovery. There were, therefore, also connected issues as to the precise approach which the court should take on a non-suit application where a significant portion of the plaintiffs' evidence was to be found in defendants documents. The second complicating factor, to which I will return in due course, stems from the fact that counsel for First Active indicated, in moving the non-suit application, that he reserved First Active's entitlement to go into evidence in the event that the application was unsuccessful, while counsel for Mr. Jackson took the opposite course, and indicated that Mr. Jackson did not, irrespective of the outcome of the application, intend to go into evidence. On the jurisprudence, to which I will turn in due course, it is clear, and not disputed between the parties, that a different approach is mandated to the court in those different circumstances. A question arose as to whether there might not be some difficulty in applying two different approaches to the same evidence and, as to how a court should properly deal with such a situation.

2.10 I turn first to the question of reliance on discovered documents.

3. Reliance on Discovered Documents

3.1 The history of how this issue arose has already been the subject of a ruling made by me on 31st July, 2008, in *Moorview Developments & Ors v. First Active plc* [2008] IEHC 274. As appears from that ruling First Active and Mr. Jackson both agreed that any documents produced by them in discovery should be admissible against them on the so called *Bula/Fyffes* basis. It followed that any relevant documents were taken to be admissible as *prima facie* evidence of the truth of their contents as against the party producing the document in question (in the sense that the original document was authored by that party or its officials) but did not involve any admission that documents emanating from any third party (which for these purposes included a co-defendant) could be likewise admissible. Before going on to deal with the issues which arose subsequently, I should note that the judgment to which I have referred suggests that Mr. Duffy also agreed to be bound by a similar arrangement. It would appear that that suggestion is factually inaccurate in that, in the course of his submissions at the close of the evidence tendered on behalf of the Cunningham Group, counsel on behalf of Mr. Duffy indicated that Mr. Duffy had not, in fact, been asked to make such a concession and had not, therefore, done so. However, counsel for Mr. Duffy, quite properly in my view, agreed with the submission made on behalf of the Cunningham Group that it was now too late for Mr. Duffy to assert that he was not bound by any documents emanating from his side on the *Bula/Fyffes* basis given that the Cunningham Group's case had run on the assumption that Mr. Duffy was so bound. Furthermore, in fairness to Mr. Duffy, it was indicated by his counsel that had he been asked, he would in fact have agreed to be so bound. It was further accepted that no objection had been taken at the time to the contents of the relevant ruling, and that all parties (and in particular the Cunningham Group) were, therefore, entitled to proceed on the basis that Mr. Duffy was bound in like manner to the other parties. There is, therefore, no doubt but that each of the defendants has accepted that the contents of documents emanating from that defendant can be admitted as *prima facie* evidence of the truth of the contents of such document.

3.2 It is important to note, however, that the volume of discovered documentation in this case was enormous. Despite my best efforts to procure that there be a single set of agreed court documents, the parties found themselves unable to agree to such a course of action with the result that there were separate books of documents prepared on behalf of the Cunningham Group on the one hand, and the various defendants on the other hand. Likewise my suggestion that the parties attempt to agree on a true collection of core documents did not avail. I should, in passing, make the comment that it seems to me to be essential for the proper management of complex document driven litigation, that every effort be made to ensure that all parties can work off a single set of documentation and that, whenever possible, the parties agree on a subset of that documentation which is likely to feature most strongly in the evidence. It has been the court's experience that very frequently a large volume of documentation is contained in court books (whether agreed or not agreed) to which no reference is made at the trial. While I fully appreciate that parties may wish to include documentation in court books against the possibility that it might become relevant, it seems to me that that fact in itself provides a further argument for the suggestion that the parties should attempt to agree on the usually relatively small number of documents which are likely to be central to the evidence or the courts deliberation. For whatever reason, and I am in possession of no information which would allow me to pass judgment on the reason that this was not done in this case.

3.3 It follows that it would have been impossible for any meaningful reading of all of the documents, which were contained in one or other of the parties court books, to take place less still for any such reading to occur in an informed way that would place the document in question in context.

3.4 Against that background it is important to note that counsel for the Cunningham Group opened a significant number of documents emanating from the defendants in the course of his opening of the case. Furthermore, in the course of evidence various other documents emanating from one or other of the defendants were also drawn to the courts attention. The contentious issue, under this heading, which arose during the non-suit application concerned the status of any documents which had not been adverted to in any fashion in the course of the hearing.

3.5 Counsel for each of the defendants complained that it would be unfair to allow documents which had not featured in the course of the hearing, in any fashion, to be relied on in submissions. I am of the view that there is some considerable merit in that objection. It is important to note some of the consequences of the admission of documentation on the *Bula/Fyffes* basis insofar as that bears on the practical conduct of a case. Without such an admission, any document which a party wished to establish would need to be proved in the ordinary way. The document would, therefore, be the subject of some reference by a relevant witness. If anyone wanted to say anything about the document then that witness, or indeed any other witness, could be asked about it. Any other related documents which, it might be said, placed the document under consideration in context, could also be referred to. At a minimum the fact that some reliance was being placed on the document concerned would be obvious to each of the parties, and indeed, the court.

3.6 It seems to me that the fundamental issue under this heading is to ensure fairness. Where a party makes a concession to the effect that its documents can be admitted on the *Bula/Fyffes* basis, then it seems to me that basic fairness requires that an opposing party wishing to place reliance on any such document or documents needs to make some reference to the document concerned, and to the interpretation which it is sought to place on that document, so as to give the party whose document it is an opportunity to know the case against it that is being made in reliance on the document or documents concerned, and to challenge that case if it should wish to do so. It seems to me, therefore, that at the level of principle it would amount to an unfair procedure if a party were to allow the evidence to close without making any reference to a particular document, but then to rely on that document as evidence whether in closing submissions or, in the case, as here, of an application for a non-suit, in submissions at the close of the plaintiffs case. To take a contrary view would lead to a real possibility of injustice. A party might well have cross examined witnesses as to a document had that party been aware that reliance was being placed on it. In a case in which a defendant went into evidence (which is obviously not the case here), a defendant might wish to lead its own evidence as to the proper interpretation of the document concerned. These and other considerations seem to me to lead only to the conclusion that it would amount to an unfair procedure to allow documents to be relied on after the evidence had closed, where the document concerned had not been referred to in any way prior to or during the course of evidence.

3.7 However, like all practical rules, it seems to me that there should not be an over rigid application of such a principle. There are a variety of reasons for taking that view, some of which I will touch on.

3.8 Firstly, documents may well form part of a series of connected documents, such as a series of correspondence or documents which make express reference to others. The fact that a document has not been expressly referred to should not necessarily rule it out as being properly regarded as being in evidence where other connected documents had been referred to, and where in all the circumstances it would not be unfair to regard the document concerned as being before the court.

3.9 Secondly, as the overriding principle is that the procedure be fair, a court should not take an over literal view of whether a document has been specifically referred to by name. If it is clear, either from the submissions of counsel or evidence given by witnesses that reliance is being placed upon a particular document or category or documents which are readily identifiable, even though not specifically mentioned, then the court should lean in favour of allowing such reliance to be placed on the document even

though it may not, strictly speaking, have been specifically referred to.

3.10 Therefore, as a matter of general principle it seems to me that the court should take a broad view as to whether it can properly be said that the opposing party ought to have reasonably understood that the document in question was being relied on. Only where a court is satisfied that an opposing party could not reasonably have apprehended that reliance was being placed upon a particular document for a particular purpose, should the court exclude that document from its considerations.

3.11 However, it does have to be said that the question of what documents could or could not be relied on was an issue which only arose at the very end of the hearing in the course of the submissions of the parties on the non-suit applications. It would have been preferable if this issue had come into focus at an earlier stage, and I must accept my own responsibility in part for that state of affairs. In those circumstances it seemed to me that it would be unfair, on the facts of this case, if the Cunningham Group were not afforded some reasonable leeway in referring to additional documents in the course of its submissions on the non-suit applications, subject to the right of the defendants to also have other connected documents considered where it was reasonable to regard those documents are being part of a connected series of documents. This leads to a second issue of principle under this general heading. The issue relates to connected documents.

3.12 It would be wholly unsatisfactory if a party were entitled to cherry pick which of its opponents documents it might choose to introduce into evidence on foot of an admission on the *Bula/Fyffes* basis without its opponent being able to point to other connected documents, which might be asserted to form part of a connected sequence.

3.13 It seems to me that it would, therefore, always be open to a party whose documents have been relied on by its opponent on the *Bula/Fyffes* basis to refer to any connected documents. It is important to emphasise the reason why this is so. In the ordinary way the party who has produced the documents concerned in discovery will not be able to place any reliance on those documents without calling a relevant witness to prove them. Where parties proceed on the basis of *Bula/Fyffes*, then that party's own documents will not, of course, be capable of being admitted in evidence against its opponent. In the ordinary way, therefore, such documents can only be admitted if proved.

3.14 However, it would seem to me to be a clear abuse of the *Bula/Fyffes* model if a party were permitted to cherry pick those of its opponents documents on which it wished to place reliance, and refrain from putting in evidence other connected documents. Such a practice could lead to significant procedural unfairness and would be a recipe for unjust results. While a party placing reliance on a *Bula/Fyffes* concession is not obliged to place any of its opponents documents before the court, it seems to me that if it does so it must, in like manner to a party waiving privilege, also accept that all other connected documents can properly be referred to without being proved. In this latter regard it seems to me that the test is analogous to that adopted where a court has to consider whether the waiver of privilege in respect of an individual document necessarily requires a waiver of privilege in respect of any connected documents, on the basis that a serious risk of injustice would exist if a party were entitled to cherry pick some but not all out of a connected series of privileged documents for disclosure. See for example *Byrne & Anor v. Shannon Foynes Port Co. & Anor* [2007] IEHC 315.

3.15 It follows that, having allowed some leeway to the Cunningham Group because of the fact that the precise parameters of the application of the *Bula/Fyffes* model had only been debated after the evidence had closed, it seemed to me that it necessarily followed that a similar leeway had to be allowed to the various defendants if they wished to refer to other connected documents, being documents connected to those which first were referred to in the course of the submissions on the non-suit application. For reasons I have sought to analyse, reliance by the Cunningham Group on one or more of a connected series of documents (taken from the defendants' discovery) carried with it an entitlement on the part of the defendant concerned to place any other connected documents before the court without formal proof on the same *prima facie* basis.

3.16 Notwithstanding the leeway which was given in the circumstances of this case, I would wish to make it clear that, in future, it seems to me that any party wishing to place reliance on documents on the basis of a concession along *Bula/Fyffes* lines ought, prior to the close of the evidence, make clear that reliance is being placed on the document or set of documents in question, so as to place its opponent on fair notice in a timely fashion of the fact and nature of the reliance being placed on the relevant document or documents. The leeway given in this case was based solely on the fact that the issue as to the precise application of the *Bula/Fyffes* model in such circumstances only became a matter of debate at a very late stage in the hearing.

3.17 As pointed out earlier an analogous issue arose concerning the entitlement, in principle, of a plaintiff to place reliance on the contents of witness statements filed on behalf of a defendant. This issue came into stark relief in the context of the application for a non-suit for at that stage, for obvious reasons, no witnesses had been called on behalf of any of the defendants. In those circumstances the entitlement of the Cunningham Group to place reliance on the content of statements of intended evidence filed on behalf of the defendants arose.

3.18 It does not seem to me that the alteration in the Rules of Court applicable to the Commercial Court (which are being applied by agreement of the parties in this case even though the case was not, strictly speaking, admitted into the Commercial Court list) could be taken to have altered the substantive law. The law is that a plaintiff is required to establish a *prima facie* case in respect of any issues arising on the pleadings on the basis of admissible evidence tendered on behalf of the that plaintiff. Furthermore, if the plaintiff fails to establish a *prima facie* case on such evidence, then a defendant is entitled to a non-suit and is not required, itself, to go into evidence. The fact that, as a procedural measure, it has been considered advantageous that parties obtain notice in advance of the evidence likely to be given by their opponent does not, in my view, alter that legal situation. A statement of evidence intended to be given by a witness is no more than what its description states it to be. It is a statement that the party concerned anticipates that, if necessary, the named witness will give evidence along the lines of the content of the witness statement concerned. In the absence of any agreement by the parties in advance that all of the witness statements filed should be taken as evidence in chief, or a form of similar agreement which would turn a statement of intended evidence into an admitted statement of actual evidence, I do not believe that a plaintiff is entitled to place any reliance on defendants witness statements in circumstances such as arose in this case.

3.19 Lest I be wrong in that view, I should go on to state that the principal reliance sought to be placed on behalf of the Cunningham Group on witness statements filed in these proceedings on behalf of the defendants, relates to a witness statement of a Mr. Conor Holmes, filed on behalf of First Active. It should be recalled, in that context, that there was an alteration in the fraud claim as pleaded arising out of the dropping by the Cunningham Group of the so called fraudulent scheme claim. Part of the consequential measures put in place as a result of the amendment to the pleading which occurred on that occasion was that First Active became entitled to file supplementary witness statements (including one from Mr. Holmes) to reflect its case in relation to the claim in its amended form. However, the relevant statement of Mr. Holmes with which I am now concerned was the original statement filed in the context of the fraudulent scheme allegation. The Cunningham Group sought to place a construction on para. 160 of the statement in question, with a view to suggesting that that paragraph contained an admission on the part of Mr. Holmes of never having had a *bona*

fide intention to advance funds to the Cunningham Group. I believe that the construction which the Cunningham Group sought to place on the paragraph in question was misplaced. It is clear from the context of the paragraph concerned and its position in Mr. Holmes witness statement, that Mr. Holmes is speaking, at that stage, of a time in early 2003, when events had moved on to a significant extent. I will turn to those events in due course. However, I think it is appropriate to record at this stage that the construction sought to be placed on Mr. Holmes's witness statement on behalf of the Cunningham Group was not, in my view, reasonable or correct.

3.20 Having dealt with the issues which arose in relation to reliance on documents, it is next appropriate to turn to the connected area of the reliance by experts on documents including especially those made available from the other side's discovery. I now turn to that issue.

4. Expert Reliance on Documents

4.1 It will be necessary to return to the detail of the expert evidence tendered on behalf of the Cunningham Group in due course. However, as one of the issues which arose at the hearing concerned the reliance placed by such experts on documents submitted to them from the discovery of the defendants, this seems a convenient time to deal with that question.

4.2 I should emphasise that there is nothing at all inappropriate in an expert being furnished with documents which it is intended to prove in the course of the hearing, or which do not require proof because, as here, the documents have been admitted as *prima facie* proof of the evidence of their contents. Such a practice is but one aspect of the more general rule that there is nothing inappropriate in an expert being asked his or her view on the basis of hypothetical facts subject, of course, to the obligation of the party calling that expert in evidence to establish the facts on which the experts view has been expressed.

4.3 However, a particular difficulty arose in respect of the expert witnesses called on behalf of the Cunningham Group, which stemmed from a lack of clarity as to the precise documents which had been furnished to those experts for the purposes of the expert forming a view as to the evidence which could be given. It is, of course, the case that, in some circumstances, the facts on which an expert may give an opinion are facts within that experts own knowledge. The expert may have personally examined a location and may be in a position to give evidence about it. An expert may have conducted measurements or experiments and may be able to give evidence as to the findings resulting from those measurements or experiments which had been personally conducted. However, in other cases, the expert will not know anything about the facts of the case of their own knowledge, and may thus have to express an opinion on the basis of facts which they are told by those advising the party concerned, or which they may be able to glean from documents supplied to them. It seems to me that, in either of the two latter cases, it is of particular importance that the expert concerned should state, with some significant degree of clarity, the precise information given and, where relevant, a precise description of any documents supplied to the expert concerned. An expert opinion on hypothetical facts is only as good as the facts briefed. In this context I would include in the term "hypothetical facts" those which are briefed to the expert concerned, or those which may be found in documents supplied to the expert concerned. Those matters may turn out to be true and may be established at the trial. However, so far as the expert is concerned, the facts are hypothetical in that the expert does not know of the truth or falsity of them of his or her own knowledge.

4.4 Given that the experts opinion is only as good as the facts on which it is based (when they are not facts which the expert knows from his or her own knowledge) it follows that an opposing party is entitled to know with some precision the facts briefed and, of equal importance, the court is entitled to know precisely what it was that the expert was told. In particular, it seems to me that in cases being conducted under the Commercial Court Rules, where an expert is required to submit a report or statement of the evidence intended to be given, any such report should contain a clear account of any facts which the expert is invited to assume for the purposes of his or her opinion, together with a clear account of all documents which the expert was given to consider. There can be little doubt that the expert reports in this case were quite unsatisfactory under this heading although, for reasons which I will address later, it does not seem to me that blame in this regard lies on the experts concerned. There was, in all cases, a material lack of clarity as to what documents had been supplied to the expert concerned. This was of real relevance as there were serious issues as to whether some of the expert views given in evidence were based on an incomplete account of the relevant facts. As previously noted the question of the expert evidence is an issue to which I will have to return in due course. It is next necessary to turn to the issues which arose concerning the proper approach of the court to a non-suit application in the circumstances of a case such as this. I now turn to that issue.

5. The Non-Suit Application

5.1 There was no dispute between the parties as to the general principles applicable. The jurisprudence in this area is well settled. As correctly put by the authors of Delaney and McGrath on *Civil Procedure in the Superior Courts* (2nd Ed.) at para. 19 – 44:-

> "In general the question of whether a party has discharged the burden of proof upon him by proving his case on a balance of probabilities is decided, once, at the conclusion of the case by the trier of fact. However, an issue will not even reach the trier of fact for this adjudication if a party fails to satisfy the evidential burden placed upon him to make out a *prima facie* case. Whether a party has done this can be tested by a defendant by means of an application for a non-suit after the conclusion of the plaintiff's case. On such an application the question for the trial judge is whether, assuming that the trier of fact was prepared to find that all the evidence of the plaintiff was true and taking the plaintiffs case at its highest, the defendant has a case to meet."

5.2 The authors make reference to the two leading decisions of the Supreme Court being *Hetherington v. Ultra Tyre Service Limited* [1993] 2 I.R. 535 and *O'Toole v. Heavey* [1993] 2 I.R. 544.

5.3 In specific reference to cases, such as this, tried without a jury, the authors note, at para. 19 – 46, that the trial judge should inquire from a defendant as to whether, in the event of a refusal of the application, the defendant intends to go into evidence. The authors then go on to note that:-

> "If the defendant indicates that he does intend to go into evidence if the application is refused, then the trial judge has to decide whether the plaintiff has made out a *prima facie* case. If, on the other hand, the defendant indicates that he does not intend to go into evidence on the issue of liability, if the application is refused, then the trial judge is required to determine whether, having regard to his view of the evidence of the plaintiff, the plaintiff has established as a matter of probability the facts necessary to support a verdict in his favour."

The authors quote in support of that proposition both *Hetherington* and *O'Toole v. Heavey.*

5.4 The overall approach identified in Delaney and McGrath is not the subject of any dispute between the parties. As indicated earlier there are, however, two issues of some relevance to these proceedings that were the subject of debate in the submissions on the

non-suit application. The first is the question of the degree of scrutiny to which a plaintiff's evidence can legitimately be subjected in circumstances where the relevant defendant has reserved a right to go in to evidence. As pointed out earlier, First Active reserved a right to go in to evidence in the event that its application for non-suit was unsuccessful. Therefore the test to be applied, so far as the case against First Active is concerned, is as to whether the Cunningham Group has made out a *prima facie* case or, to put it another way, whether, on the evidence adduced by the Cunningham Group it would be open to a jury, if no other evidence was given, to enter a verdict for the plaintiff. In passing I should refer to *O'Donovan v. The Southern Health Board* [2001] 3 I.R. 385, where, when dealing with an application for a non-suit, the trial judge expressed an opinion that if he were dealing with the case on the basis that the defendants were not going to go into evidence, he would find in favour of the defendants at that stage as, in his opinion, on the balance of probabilities, the plaintiff was not entitled to succeed. The Supreme Court held that the trial judge had not dealt with the application for a non-suit in a satisfactory manner and that where a trial judge believed there was no case to meet then that was all the trial judge was required to say. At page 388 of his judgment Keane C.J. stated:-

> "Where a trial judge had before him an application for a non-suit, then of course if he is granting it the plaintiff is entitled to a reasoned judgment from the trial judge as to why his case is being dismissed at that stage. Where, as was the situation in this case, the trial judge was of the view that there was, to use the convenient though not altogether accurate, shorthand of a case to meet, then that was all that he was required to or indeed should have said."

It was because of that authority that I considered it appropriate to rule on the non-suit application at as early a time as possible for, if the application was unsuccessful, in whole or in part, no reasons would have had to have been given, at that time, at least so far as those aspects of the case that were to continue were concerned, so that the case could have resumed in early course.

5.5 In the context of scrutiny of a plaintiffs evidence on a non-suit application such as this, First Active placed significant reliance on the decisions, both in this Court and in the Supreme Court, in *Hanafin v. Minister for Environment* [1996] 2 I.R. 321. That case involved an election petition which sought to have declared null and void the result of the referendum designed to introduce an Article into the Constitution permitting divorce and at the same time, to remove the then existing constitutional prohibition on divorce. The case followed on from a decision of the Supreme Court in *McKenna v. An Taoiseach* (No.2) [1995] 2 I.R. 10, which had been made in the course of the relevant referendum campaign and which determined, in substance, that the expenditure by the Government of a sum in the order of IR£500,000 on a professional campaign designed to support a "Yes" vote in the referendum was in breach of the constitution. The fact that monies had been expended on the referendum campaign by the government in breach of the Constitution was not, therefore, in issue. What was in issue in *Hanafin* was the extent to which the expenditure of those monies in breach of the Constitution could be said, as a matter of fact and/or law, to invalidate the result of the referendum. Many of the issues which arose concerned legal questions which are of no relevance whatsoever to the issues which I have to decide in this case.

5.6 However, one of the matters that came for debate in *Hanafin* was the factual question as to whether it could be demonstrated that the expenditure of the monies concerned had, in fact, affected the result of the referendum. The case in this Court came before a Divisional Court consisting of Murphy J., Lynch J. and Barr J.. The petitioner led expert evidence which suggested that the expenditure concerned had a sufficient effect so as to make a difference to the result (which, it will be recalled, was exceptionally close). The Divisional Court, in acceding to an application for a non-suit at the close of the petitioner's case, did indeed subject that expert evidence to a degree of scrutiny which led the Divisional Court to conclude that the petitioner had failed to discharge the onus of proof upon him in relation to, amongst other things, the factual basis for his claim.

5.7 First Active argued that *Hanafin* is, therefore, authority for the proposition that a court can scrutinise expert evidence as part of a non-suit application, and is not bound to accept such evidence if it does not stand up to scrutiny. One aspect of the relevant scrutiny in *Hanafin* will illustrate the point. Both the Divisional Court, and the Supreme Court on appeal, noted that it was accepted that the very decision of the Supreme Court in *McKenna* must have had an effect on the referendum campaign. The very fact that the government had been found to have expended funds in an unconstitutional fashion in the heightened circumstances of a referendum campaign was bound to have some effect. However, the real question was the extent of that effect. The experts called on behalf of the petitioner had made an allowance for the effect of that decision. However, as put by Barrington J. in the Supreme Court in *Hanafin*, at p. 457:-

> "But even assuming that the petitioner's experts could have accurately assessed the movement of public opinion in the course of the election campaign, the vital question is what happened on the 24th November, 1995, the day of the referendum poll. Even assuming one could measure the effect of the governments advertising campaign in the weeks before the 17th November, a totally new factor entered into the situation on the 17th November, when the Supreme Court ruled that the government's advertising campaign was unconstitutional. It seems to me to be impossible to assess on any scientific basis what affect the Supreme Court ruling, and the reaction of the government and the various parties to it, had upon public opinion. The most important week of the campaign was undoubtedly the last week but whether the governments advertising campaign, viewed in the light of the Supreme Court ruling, had a positive or negative impact on the voters appears to me to be impossible to estimate."

5.8 In commenting on a similar issue, Murphy J., presiding over the Divisional Court, noted that one of the petitioners experts, Dr. Brugha, had given evidence that a discount had been allowed of 3.5% to cover factors which were seen to be different between the 1995 divorce referendum campaign with which the petition was concerned and the earlier failed referendum to similar effect conducted in 1986. Dr. Brugha had expressed a professional judgment that a discount of 3.5% should be allowed to cover those factors but, in the words of Murphy J., could "give no explanation of a justification for that figure". As Murphy J. noted "if 3.5% why not 7.5%". Having considered all of the evidence Murphy J. concluded as follows, at p. 362:-

> "Having heard all of the witnesses giving their evidence and being cross-examined thereon, I am unconvinced that the campaign affected materially the result of the referendum."

In the Supreme Court that passage was noted and accepted by Hamilton C.J. at p. 431 who also noted a passage to like effect from the judgment of Barr J. which was in the following terms:-

> "There is no evidence which might reasonably be regarded as establishing in accordance with the standard of proof postulated by the Supreme Court in *Hetherington v. Ultra Tyre Service Limited* [1993] 2 I.R. 535 and *O'Toole v. Heavey* [1993] 2 I.R. 544, that the will of the people was not properly ascertained and freely expressed in accordance with law in the divorce referendum on the 24th November, 1995."

5.9 It is clear, therefore, that both the Divisional Court and the Supreme Court were prepared to permit, on a non-suit application, a reasonable degree of scrutiny of the expert evidence tendered. It is clear from numerous passages in the judgments in both courts

that the relevant experts remained of the view, notwithstanding cross examination, that the unconstitutional expenditure of the government did materially affect the result of the referendum. There was, therefore, in that sense, evidence before the court of such a material effect. However, having scrutinised that evidence neither court was satisfied that it provided a sufficient basis for establishing the factual aspect of the petitioners claim. More precisely the Divisional Court was not so satisfied and the Supreme Court did not see any proper basis for overturning that finding.

5.10 Counsel for the Cunningham Group drew attention to a passage from the judgment of Lynch J., at p. 367, in which it was noted that counsel for the Government had submitted that, in the particular circumstances of a referendum petition, the respondent should not be asked to elect as to whether it was intended to go in to evidence in the event that the application was unsuccessful. Lynch J. went on to say the following:-

> "In other words they submit that the procedure laid down in *Hetherington v. Ultra Tyre Service Limited* [1993] 2 I.R. 535 and *O'Toole v. Heavey* [1993] 2 I.R. 544 should not necessarily be applied, and in the case of this particular petition ought not be applied. I agree with that submission."

5.11 On that basis it is suggested that the court applied a different test in *Hanafin* to that which normally is applied, and that the level of scrutiny which undoubtedly occurred in *Hanafin* should only be regarded as being appropriate in special circumstances. On the other hand it is clear from the passage from the judgment of Barr J. to which I have already referred that, in the view of Barr J., the test being applied by the court was the ordinary *Hetherington* or *O'Toole v. Heavey* test. In that regard it is important to note that what Lynch J. spoke of as not being applied was "the procedure" laid down in *Hetherington* and *O'Toole v. Heavey.*

5.12 It is also worthy of some note that the authors of Delaney and McGrath cite *Hanafin* as being an application of the general principle rather than as being a special case.

5.13 I am satisfied that the view of *Hanafin* urged on behalf of First Active is the correct one. The only deviation from *Hetherington* and *O'Toole v. Heavey* was a procedural deviation rather than a deviation as to the substance of the test to be applied. I am, therefore, satisfied that *Hanafin* is authority for the fact that a court can, on a non-suit application, subject, in particular expert evidence, to some degree of scrutiny to ascertain whether there is a reasonable basis for the expert opinion tendered. The court is not bound to accept the expert view if, when subjected to such scrutiny, the expert view does not stand up even on a *prima facie* basis. It seems to me that the reasoning behind such an approach is clear. The overall test derives from the role of a judge in respect of a trial where facts are to be determined by a jury. The case is not permitted to go to the jury (and will be dismissed by direction) where the evidence is not such as would permit a jury properly directed to reasonably find for the plaintiff. Where expert evidence does not stand up, even on a *prima facie* basis, to scrutiny then it follows that it would have been unsafe to allow a case dependent on such expert evidence to go to a jury, and it equally follows that in a case being tried without a jury a non-suit should be allowed.

5.14 I should emphasis that none of the comments which I have made should be taken as implying that the court should take a view as to whether it accepts the evidence of the expert concerned. Clearly at the end of the case that will be the role of the court. However, at the stage of a non-suit application the question is not whether the court accepts the evidence of the expert concerned, but rather whether, in the light of the scrutiny to which the expert evidence is subjected, the evidence remains such as could reasonably be relied on by a jury for the proposition which it is sought to support, so that the plaintiff can be said to have discharged the onus of proof on that issue.

5.15 I will deal with the specific evidence relevant to each of the issues as they arise in the course of this judgment. However, it is, perhaps, convenient at this stage to touch on two connected general questions raised by First Active in the course of its submissions on the non-suit application. First Active pointed to certain matters which, it was said, could legitimately give rise to an inference that Mr. Cunningham's evidence generally lacked credibility. Likewise, First Active sought to draw attention to certain witnesses whom, it was said, were not called in circumstances where it might have been reasonable to expect that they should be called. On both of those bases, First Active sought to suggest that I should treat, even at the stage of a non-suite application, much of Cunningham Group's evidence with a certain degree of scepticism. It is important to record that I was not persuaded by First Active's argument on this point. The matters raised might well have been important considerations at the close of the case (or, indeed, on a non-suit application if First Active had indicated an intention not to go in to evidence). However, it did not seem to me to be appropriate to form any generalised views as to the credibility of Mr. Cunningham's evidence or as to the consequences of the absence of evidence which, it might be argued, could and should have been led. To the extent that the absence of relevant evidence or a specific failure on the part of the Cunningham Group to provide explanation for apparent inconsistencies in its own evidence, arose in individual circumstances then I had regard to such matters and make reference, where relevant, to same in the course of this judgment. I did not, however, form any more generalised view of the evidence but rather accepted it at its high watermark save where, for reasons specified, and in accordance with the general test which I have sought to analyse, I did not consider the evidence in question to be adequate or credible.

5.16 It seems to me that similar principles apply in respect of evidence of fact. First Active also placed reliance on *Bentley v. Jones Harris & Co.* [2001] EWCA Civ 1724, in which the Court of Appeal in the United Kingdom upheld a decision of the High Court to dismiss a claim which was, in significant part, dependent on the plaintiff's evidence as to what occurred at a series of meetings. A range of different documents, which appeared to be notes or minutes of the meetings concerned, were put to the plaintiff in question in the course of cross examination. All of the notes or minutes were entirely inconsistent with the factual assertion which the plaintiff sought to make. The plaintiff, in the view of the trial judge, had given no arguable explanation as to how all of the relevant documents could be incorrect and his recollection be correct. In those circumstances the High Court Judge acceded to an application for a non-suit. That decision was upheld on appeal. At para. 70 of the decision of the Court of Appeal Burton L. J. stated the following:-

> "Though the wording of the learned judge's unreserved judgement was perhaps infelicitous, he was plainly rejecting the Claimant's evidence and rejecting it not only on the basis of the attendance notes, because in any event he might be just as entitled to do that on the basis of having heard the attendance notes put to the Claimant as if he had heard the contents of a witness' evidence put to him in cross-examination in that witness' statement before such evidence was called in order to see how the Claimant's evidence survived."

Burton L.J. added at para. 71:-

> "Quite apart from the fact that there has been much other material besides the attendance notes upon which the learned judge could reach the conclusion that the Claimant's case was not at all credible, it ignores the fact that the learned judge was, in my opinion, perfectly entitled to take into account the way in which the Claimant dealt with the attendance notes in the respects to which I have already referred and rejected the evidence of the

Claimant."

5.17 It seems to me that the position adopted in *Bentley* also represents the law in the jurisdiction. Where, as a result of internal contradiction, inability to offer an explanation as to the inconsistency of evidence with other facts, or the like, a witness' account, although maintained under cross examination, lacks any real credibility, then it is open to a trial judge on a non-suit application to disregard that evidence for the purposes of assessing whether there is sufficient evidence to discharge the onus of proof at a non-suit stage.

5.18 In making that comment I would again wish to emphasise that I do not believe that it is the role of a trial judge at the non-suit stage to give effect to any general view of the credibility of a witness or witnesses. Those are matters which properly fall for consideration at the close of the evidence. However, where, in respect of a particular aspect of a witness's evidence, same lacks any credibility for reasons such as those which I have sought to identify, then it seems to me that that evidence can be properly disregarded.

5.19 I, therefore, propose to approach the evidence tendered on behalf of the Cunningham Group with the limited degree of scrutiny which I have identified as being permissible on a non-suit application. I should emphasise that the comments made in this section of the judgment are concerned with the application of First Active for a non-suit. As pointed out earlier, counsel for Mr. Jackson indicated that it was not Mr. Jackson's intention to go in to evidence irrespective of the result of the non-suit application moved on Mr. Jackson's behalf. It follows, therefore, that the approach of the court to the evidence in the respect of the claim as against Mr. Jackson is an entirely different one. Finally, before leaving this aspect of the case, I should note that, at a number of points in the course of the hearing, reference was made on behalf of the Cunningham Group to matters that might emerge on cross examination of the defendant's witnesses. Indeed the high point of such submissions arose when it was suggested that certain matters "cried out for cross examination". I should emphasise that no such consideration is relevant on an application such as this. Either a plaintiff meets the standard specified in *Hetherington* and *O'Toole v. Heavey* or it does not. If it meets the relevant standard then the defendant must go into evidence or take whatever risks flow from not going into evidence. If the plaintiff concerned does not meet the *Hetherington* standard, then it is inappropriate to require the defendant concerned to go into evidence.

5.20 This latter point leads to the second issue which arises under this heading. It is clear that the approach identified in *Hetherington* and *O'Toole v. Heavey* is subject to some exceptions. As Finlay C.J. noted in *Hetherington,* at p. 542:-

> "Secondly, and more importantly, in the light of this case, I am quite satisfied that if two defendants are sued and if one of them makes an application for non-suit at the conclusion of the plaintiffs' case, that is open to a judge and, in my view, probably very desirable in the interests of justice, that he should inquire from the other defendants involved in the case as to whether it would be their intention, if they are left in the action, to present a case against the party seeking a non-suit at that time. If they are going to present a case by evidence or submission against the co-defendant, seeking to blame him, all the requirements of justice are that all that evidence should be heard before a final determination of the case."

5.21 It is clear, therefore, that there is at least an exception in a case where a co-defendant may seek to blame the defendant seeking a non-suit. However, it seems to me that the circumstances identified by Finlay C.J. are an example, doubtless the most common example, of a more general principle to the effect that the court should exercise some care in considering an application for a non-suit in multi party litigation, to ensure that no risk of injustice or embarrassment might arise by determining facts as a result of a non-suit application at the close of the plaintiffs case. It seems to me that another such example can, potentially, arise where, as here, each defendant seeks a non-suit but where the basis of the respective applications (in terms of whether it is intended to reserve a position in respect of going in to evidence) of the various defendants differs.

5.22 Obviously the basic exception identified in *Hetherington* applies also in such circumstances. I will turn to whether that exception has any application to the facts of this case in early course. However, it seems to me that it would give rise to a risk of injustice or embarrassment, at least in some cases, if a court were required, at the same time, to form a judgment on a question of fact on two different bases. I emphasise "at the same time" for it will often be the case that a court accepts, at the close of the plaintiffs case, that a *prima facie* case for a certain factual situation has been established but nonetheless finds, on the balance of probabilities, at the close of the case, that the facts were not as asserted by the plaintiff. However, to invite the court to consider the same facts at the same time on both bases could place the court in an invidious position. It might decide that the plaintiffs evidence established a *prima facie* case for particular proposition (and thus allow the case to continue against that defendant) but decide that on the balance of probabilities the relevant facts were not established and thus allow a second defendant who had elected not to go in to evidence to obtain a dismiss. It seems to me, therefore, that in addition to the specific exception identified by Finlay C.J. in *Hetherington* there is also a need for the court to exercise care in ensuring that, when confronted, as here, with a number of applications for a non-suit some based on a reservation of a right to go in to evidence and others not, the court will not be potentially embarrassed by being required to assess the same facts by reference to two different standards. The latter consideration may, obviously, loom all the larger where there is real possibility that the court's view of the facts might differ dependant on the standard to be applied.

5.23 Having identified the two questions which arise from the nature of the various applications for a non-suit in this case I propose dealing with each in turn.

5.24 It is important to emphasise that the case against Mr. Jackson is, to a very large extent, separate from the case against First Active. It will be necessary to set out the case against Mr. Jackson in more detail in due course. However, by the close of the Cunningham Group's evidence that case was, in general terms, confined to two main allegations. One concerned the manner in which Mr. Jackson, as receiver, had managed the ongoing Malahide Road project. The second concerned attempts made by Mr. Jackson, as receiver, to sell the partly developed Bailey Point development. In the events that happened Bailey Point was ultimately sold by First Active as mortgagee in possession. However, it is clear that initial agreements in principle had been reached between Mr. Jackson, as receiver, and Mr. Duffy for such purchase. The negotiations were subsequently taken over by First Active when First Active went into possession as mortgagee. In those circumstances it is contended that actions taken by Mr. Jackson adversely affected the price ultimately obtained by First Active. It is also argued against First Active that it failed to secure the best price.

5.25 So far as Malahide Road is concerned there seems, therefore, and I did not understand any party to argue to the contrary, to be no real overlap in the claim brought on behalf of the Cunningham Group as against Mr. Jackson on the one hand and First Active on the other. So far as Bailey Point is concerned there is a potential overlap in that the claim in both respects involves an allegation of, on the one hand selling at an undervalue and on the other hand being guilty of conduct that contributed to the same sale at an undervalue.

5.26 So far as the specific issue raised in *Hetherington* is concerned I invited, on that basis, counsel for First Active to clarify whether it would, in defending the case made against it for sale at an undervalue, and in the event that its application for a non-suit was unsuccessful, seek in any way to place blame on Mr. Jackson. Counsel for First Active indicated that it was not First Active's intention so to do. On that basis the specific exception identified in *Hetherington* does not arise.

5.27 In respect of the claims arising out of the sale of Bailey Point I was, at one stage, somewhat concerned that there might be a possibility that I would be placed in the invidious position, which I have sought to identify earlier in this section of the judgment, of having to approach the same factual issues on two different bases. However, in the light of the clarification of the issues between the parties which arose in the course of the submissions on the non-suit application and in the light of my view of the relevant evidence, to which I will turn in due course, I became satisfied that there was no material risk that I would be required to assess the same facts on two different bases, or, more precisely, that any difficulty or embarrassment might arise out of having to conduct those different assessments. The second exception which I have set out earlier in this section does not, therefore, arise on the facts of this case either.

5.28 In those circumstances I was satisfied that there was no barrier to the proper consideration of the non-suit application by the various defendants and to the application of the appropriate standard in each case, being what I might call the *prima facie* standard so far as First Active and Mr. Duffy are concerned and the balance of probability standard so far as Mr. Jackson is concerned.

5.29 Having dealt with those preliminary issues it is now necessary to turn to the substance of the case. As the basic history of dealings between the various parties was not, in itself, in significant dispute it seems to me to be convenient to start by setting out the uncontroversial facts of the case. It will, of course, be necessary to deal with such facts as were in controversy between the parties at a later stage in the course of this judgment, but it seems to me that it is more convenient to deal with those facts in the particular context of the issues to which they relate. I, therefore, turn to the uncontroversial facts of the case.

6. Uncontroversial Facts
(i) History of the Cunningham Group

6.1 The Cunningham Group are a number of companies involved in construction and/or development, all of which are either owned or controlled by Mr. Cunningham. The fourth schedule to this judgment is adapted from a chart put to Mr. Cunningham as representing the interlocking ownership of the companies within the Group. I did not understand Mr. Cunningham to disagree that the chart presented an accurate picture. Mr. Cunningham has been involved in construction and development since the late seventies, when he first set up his own business. In or about 1989, Mr. Cunningham formed his first company, Cunningham Builders Ltd., with him and his wife, Marion, as directors. Over the next decade, Mr. Cunningham formed a number of companies, which would become the Cunningham Group. Usually each company was formed in respect of a particular construction and development project. The companies used a number of lending institutions as a source of funding.

6.2 In 1990, Mr. Cunningham formed the first Plaintiff in Case A, Moorview Developments Ltd. ("Moorview") to develop a site at Ravencourt, Finglas for a small residential development. The development was funded with a loan from the Industrial Credit Corporation ("ICC"). Moorview went on to buy and develop sites in Dublin at Firhouse, Clonskeagh, and Balbriggan. For most of these developments Moorview received funding from ICC. In 1999 the Cunningham Group replaced ICC with Ulster Bank as bankers for all developments.

6.3 In July 1995, the plaintiff company in cases L, N and O, Valebrook Developments Ltd ("Valebrook") was formed, with Mr. Cunningham as shareholder and director. Valebrook bought land at Dunsoghly in Finglas and began building 130 houses. The bankers for this project were ICC. In April and May, 1997 Mr. Cunningham bought several properties on Moore Street, Dublin, in his own name, with a plan to develop the block in joint venture with John Ronan and Richard Barrett of Treasury Holdings Ltd. A shareholder agreement was entered into with Valebrook named as a 50% shareholder and Treasury Holdings Ltd as the other 50% shareholder.

The Fourth, Fifth, Sixth and Seventh Plaintiffs in Case A ("the Finglas Companies") were bought by Mr. Cunningham as part of a transaction to purchase a significant portion of the Finglas Shopping Centre.

(ii) Development Projects Relevant to the Proceedings

a. Finglas Shopping Centre

6.4 In around 1998/9, the Cunningham Group entered its first commercial (as opposed to residential) venture when Mr. Cunningham bought three shopping malls in the Finglas shopping centre in north Dublin. The Cunningham Group bought various companies that in total owned about half the units in the centre. The companies concerned were Springside Properties Ltd, Drake SC Ltd, Malldro SC Ltd and Poppintree Mall Ltd who are the "Finglas Companies". The Cunningham Group designed a scheme to redevelop the Finglas Shopping Centre. The purchase cost of the relevant part of the shopping centre was IR£7.5 million, which was funded, in part with IR£1million from Mr. Cunningham's personal funds and the sale of houses in Clonskeagh and from the Cunningham Group funding from other developments in North Dublin. A loan for the balance of IR£6.5 million was obtained from First Active. The loan in question was for a fifteen year term and was to be serviced by rental income from the shop units.

b. Salthill/ Bailey Point

6.5 In the late nineties Mr. Cunningham began acquiring property at Bailey Point. The project incorporated a number of different sites, including two hotels, the Banba Hotel and the Grand Hotel. The Bailey Point development was to include a ten screen cinema, restaurant, nightclub ("the commercial units") a car park and 97 residential apartments. In order to conduct the development, Salthill Properties Ltd ("Salthill") was formed in 1998 with Mr. Cunningham and Marian Cunningham as directors.

Anglo Irish Bank initially financed the Bailey Point development in the sum of IR£1.3 million. Anglo Irish Bank were later replaced as bankers for Salthill by Irish Nationwide Building Society. The work commenced in 1999.

c. Malahide Road and the NABCo Contract

6.6 In March 2001 Mr. Cunningham and Moorview closed a deal for the purchase of a site at Malahide Road. The cost of the site was IR£5 million, financed in the main by IIB Bank with Mr. Cunningham providing some of the funding directly including sums borrowed separately on the security of his home. The site had planning permission for 172 apartments.

NABCo agreed to purchase the 172 apartments from Moorview for IR£150,000 per unit, giving a total contract price of IR£25.8 million.

While Moorview remained as general contractor for NABCo under this contract dated August 2001, the site itself was sold to NABCo in September 2001, by another Group company, Wyman Development Limited, for IR£7.1 million. The loan from IIB was repaid and the surplus went to First Active to be drawn down for the Bailey Point development. Under the NABCo contract, stage payments were made to Moorview, which were passed on to First Active. In April, 2002 NABCo amended the contract to provide for a further 21 apartments.

d. Dunsoghly

6.7 In 1998, Valebrook purchased a site at Dunsoghly, North County Dublin, and obtained planning permission for 130 houses. Once the houses had been completed and sold and profits put towards the repayment of the debt to Ulster Bank and a number of loans for the development at Finglas, there remained a surplus of undeveloped land, a greenfield site. It was the Cunningham Group's intention to achieve residential zoning on this land and develop a scheme of 75 houses similar to the other 130 that had been completed on the adjacent site. There were objections by local residents in relation to the rezoning application and this application was ultimately unsuccessful. The land was eventually sold, after the appointment of Mr. Jackson as receiver, to a company called Dunsoghly Land Limited.

e. Oscar Traynor Road

6.8 In late 2000 Mr. Cunningham approached First Active for its support in relation to a development at Oscar Traynor Road, Coolock. In November, 2000 First Active informed the Cunningham Group that it would advance IR£1 million as a deposit for the purchase of the site under the existing facilities made available in respect of Salthill and Finglas. As a condition of the loan, Mr. Cunningham signed a negative pledge in favour of First Active to the effect that he would not enter into any further borrowings until the completion of the developments at Bailey Point and Salthill. The deposit in relation to Oscar Traynor Road was paid on or about 21st November, 2000. After payment of the IR£1 million deposit it emerged that the price of the deposit was in fact £1 million sterling. First Active advanced the balance of IR£330,000 (being the then difference between the currencies) on condition that the seller granted an extension of time. That later sum was held by Michael Lynn, solicitor on behalf of the Cunningham Group, but was eventually returned to First Active on 4th October, 2001. The project did not proceed and the original IR£1m deposit was lost.

(iii) Beginnings of the relationship between the Cunningham Group and First Active

6.9 As will have been seen, by 1998 there were a number of different banks financing the various developments of the Cunningham Group. Ulster Bank were the bankers for Dunsoghly. Malahide Road was financed by IIB Bank and Irish Nationwide were bankers for Salthill. For the funding of the purchase of part of the Finglas Shopping Centre in 1998, the Group chose to secure finance from First Active and as such became, it would seem, First Active's first commercial customer. Mr. Cunningham gave evidence that the Cunningham Group appointed First Active as its bankers for Finglas as First Active gave the Cunningham Group a better rate than its existing banks. The Cunningham Group's initial principal contact in First Active was Conor Holmes, the then General Manager in the Credit department and subsequently the General Manager of Credit and Commercial Lending.

(iv) Relevant Lending Facilities

a. Finglas

6.10 The Finglas facility is not directly in issue in this case as it has been fully repaid. Initial loan facilities were offered by First Active in June, 1998 in the sum of IR£5.5 million for the acquisition of a number of units in Finglas. Shortly after approval, the Group asked for increased facilities amounting to IR£6.5 and in October 1998 facility letters were finalised and signed in the names of the Fifth Plaintiff, Drake SC Limited, and Seventh Plaintiff, Poppintree Mall Limited. Initially the loans were term loans, with the bulk of the money to be repaid over 15 years, with repayments to be funded by rental income. Various securities were granted, including a personal guarantee from Mr. Cunningham.

b. Bailey Point / Salthill

6.11 From early 1999, Colm O'Riordan, First Active's newly appointed Head of Commercial Business, began to discuss the possibilities of funding the development at Bailey Point and on 21st June 1999, First Active approved total exposure to the Group of IR£22 million over 15 years. This was approved by the Senior Executive committee and Board of First Active. On 6th August 1999, First Active's Credit Committee approved loans of IR£14.8 million to Salthill and IR£7.6 million for the project at Finglas.

6.12 The Cunningham Group was initially lent IR£6.5 million to complete the purchase of the site at Bailey Point and IR£8.5 million to build out the 97 apartments, the car park and the commercial units. The facilities under which money was lent to Salthill for Bailey Point were as follows:

i. Facility of 25thAugust 1999 for IR£14.8 million repayable on 30th June 2000. This facility was wholly drawn down. It was renewed on 18th May 2001 to 31st July 2001 and on 15th November 2001 to 15th February 2002;

ii. Facility of 10th July 2001 in the total sum of IR£3.4 million. This was partly drawn down in the sum of IR£1.1 million and was for the working capital for the development. One of the conditions of the loan was that the Board would pass a resolution to sell Finglas;

iii. Facility of 12th December 2001 of IR£2.35 million for working capital for Bailey Point. Again a precondition of this facility was the sale of Finglas.

iv. Facility of 16th August 2002This was the final and most contentious facility offered by the Bank to the Group.

It will be necessary to return to the circumstances in which this later facility was put in place in due course.

6.13 The Moorview facilities in relation to the Malahide Road project were as follows:

a. Facility of 12th December 2001 for IR£1.54 million as working capital for the NABCo contract on Malahide Road;

b. Facility of 16th August 2002 for €5 million.

As is obvious this later facility was entered into at the same time as the facility referred to at 6.12 (iv) above.

First Active also issued a loan offer to the Eight Named Plaintiff, Blondon Properties, a Cunningham Group company owning properties in Bayside, Dublin, which was to clear a guarantee in favour of Ulster Bank. While certain current accounts of companies within the Cunningham Group remained with Ulster Bank, First Active became the main lender to all companies within the Group.

(v) Restructuring of Cunningham Group: the Ryan Glennon report.

6.14 In autumn, 2000 the Cunningham Group commissioned John Glennon of Ryan Glennon & Company to produce a financial model for the future of the Group. This model, which was also delivered to First Active, suggested the establishment of a board of directors of the Cunningham Group as a measure to improve corporate governance. First Active, at a minimum, supported that suggestion. The extent to which the idea for an independent board was primarily First Active's or came from Mr. Cunningham's advisors is a matter of some controversy. However, in or around December 2000, a number of non-executive directors, including Albert Reynolds, the former Taoiseach, and Padraic White, the former Chief Executive of the IDA, were appointed to the board of directors of the Cunningham Group (or more specifically Moorview), with Albert Reynolds appointed as Chairman of the Board. In April 2001, the Cunningham Group appointed a chief executive, Pat Caslin, and a chief financial officer, Pat Purcell. The Cunningham Group also selected a quantity surveyor, David O'Leary from McBains Cooper, to assist in relation to the Bailey Point development.

(vi) Problems at Bailey Point

6.15 Problems began to arise with the development at Bailey Point at and around March 2000. There were a number of planning conditions to be met and title problems that had to be dealt with, which problems were preventing the Cunningham Group from drawing down the loan from First Active. Planning Permission for the planned cinema at the development had been appealed. Garry Solan, the Cunningham Group's architect for the development, found some anomalies in the title, as a result of which First Active declined to allow certain draw downs of the loan facility. First Active did, however, offer the Cunningham Group a temporary facility.

6.16 Problems were met again in September 2000 during excavation works on site, when more rock than had previously been expected was uncovered. The breaking of this underlying rock led to a further problem of noise pollution, with neighbours of the site successfully bringing an action to restrict the use of rock breaking machines. The combined problems on site at Bailey Point lead to delays to the completion of the development. These delays were a cause of considerable concern to First Active.

6.17 In the middle of 2000, First Active put in place a procedure for draw downs in relation to the facility for Salthill. The procedure demanded that a valuation report be carried out based on a site visit. This valuation report would be then assessed by First Active's quantity surveyors, the Bruce Shaw Partnership, who would in turn make a recommendation to First Active as to what monies should be dispersed.

6.18 These delays were becoming problematic in or around the same time as the issue arose over the deposit for the Oscar Traynor road site. A deterioration in the relationship between the Cunningham Group and First Active is evident from about this time. Over the course of the subsequent two to three years, First Active continued to express concern in relation to delays on site at Bailey Point.

(vii) Sale of Finglas

6.19 Before dealing with the specific facts concerning the sale of Finglas it is important to note, in passing, that the Cunningham Group (or sometimes Mr. Cunningham personally but, it would appear, on behalf of the Cunningham Group) entered into a number of contracts for the purchase of additional units within the Finglas Shopping Centre beyond those which had been acquired by the purchase of the Finglas companies. As pointed out earlier, the Finglas companies owned a significant portion but by no means all of the Finglas Shopping Centre. It is clear that Mr. Cunningham wished to develop the Centre as a whole (if at all possible) and was, therefore, anxious to purchase as much of the remaining units as he could. There can be little doubt on the evidence that the relevant agreements to purchase those additional units were at a price significantly above the going rate for the units concerned on the open market. There obviously was, potentially, commercial sense in Mr. Cunningham and the Cunningham Group seeking to acquire the balance of the units and, perhaps, to pay somewhat over the odds to that end on the basis that the acquisition of the entire centre would give added value and would enhance the possibility of a comprehensive beneficial development.

6.20 Be that as it may, a number of contracts were entered into which, if they had been completed, would have required significant additional funding on the part of either First Active or some other financial institution. There does not appear to be any evidence that Mr. Cunningham or the Cunningham Group had funding in place for the relevant purchases when entering into the contracts concerned. The contracts were never completed. In some cases the result was the loss of a significant deposit. However, at least one vendor sued for loss of bargain on the basis that Mr. Cunningham personally had entered into a contract with him at a price which was significantly above the market value. Those proceedings were ultimately successful, although Mr. Cunningham complains that he was not afforded any reasonable opportunity by reason of the absence of funds to settle the proceedings at a lower rate. It did not seem to me that it was necessary to resolve, in detail, any issues concerning the sales in question. The only relevance of those sales to the overall issues with which I am concerned is that same provide part of the backdrop to the insistence by First Active on the sale of Finglas. The Cunningham Group and Mr. Cunningham had entered into a number of contracts to extend their interest in the Finglas Shopping Centre without having put finance in place. The result was significant losses to the Cunningham Group which gave rise to a situation where its overall funding was, on any view, more precarious. The insistence by First Active on a sale of Finglas in circumstances where further funding was required for Bailey Point and Malahide Road needs to be seen in that context.

6.21 In July 2001, First Active agreed to provide further loan facilities of IR£3.4 million in respect of working capital for the Bailey Point development, on condition that the Cunningham Group would agree to sell Finglas within four months of draw down in the event that First Active were not satisfied with the progress of the Salthill project. The sale of Finglas was to be carried out in order to release equity, anticipated to be around IR£5 million, to complete the Bailey Point development.

6.22 On 23rd November 2001, First Active's Credit Committee approved extra funding to Salthill of IR£4.4 million, subject to conditions including the sale of Finglas and a short timetable for the closure of the sale of the commercial units at the Bailey Point. In December 2001, preparation for the sale of Finglas began and the Board of the Cunningham Group passed a resolution to tender Finglas for sale by 22nd January 2002. On 26th June 2002 the Board resolved to sell Finglas at the highest offer within two days. As events moved towards the crucial meetings of mid August the sale of Finglas progressed further to a stage where there was a detailed offer available which the Cunningham Group Board, with the exception of Mr. Cunningham and his wife, was minded to accept.

6.23 The sale of Finglas became a precondition for the future funding of the Cunningham Group provided for by the facility letters of August 2002. In the run up to the August facility letters Mr. Cunningham himself introduced Harcourt Developments limited as a prospective alternative purchaser of Finglas but this offer did not proceed. The circumstances surrounding this are of some controversy. It is fair to say that Mr. Cunningham was, at all times, opposed to the sale of Finglas. However, he does appear to have

gone along, after argument admittedly, with each of the terms imposed by First Active in relation to that sale as a condition of further funding for the Group as a whole.

(viii) Meeting of 15th August 2002 and Facility Letters of 16th August 2002

6.24 During the early part 2002, First Active continued to express concerns over progress at Bailey Point and there was some discussion of receivership. At the same time First Active was applying pressure on the Cunningham Group to complete the sale of Finglas. As matters in relation to the sale of Finglas came to a head, First Active called the Board of the Cunningham Group to a meeting on 15th August 2002. Mr. Cunningham attended the meting with his advisers, David Beattie from O'Donnell Sweeney Solicitors and Greg Sparks from Farrell Grant Sparks Accountants. The evidence concerning the events of that day is that the parties at the meeting were not always in the one room at the same time. Mr. Cunningham was often outside the main meeting room, with his advisers staying in the main meeting room and acting as go-betweens. Previous facility letters which had been under discussion for the pervious month were put before the parties at the meeting.

6.25 As there is no verbatim note or agreed minutes of this meeting, it is open to some debate as to what, precisely, if anything, was agreed by the parties on the 15th. The cornerstone of the Cunningham Group's claim of fraud against First Active was that a representation was made by First Active at the meeting of 15th August to the effect that First Active would fund the projects at Bailey Point and Malahide Road to completion. It is First Active's case that it agreed to provide funding to the Cunningham Group subject to compliance with the terms and conditions set out in the facility letters and related documents which were ultimately signed on 16th August.

6.26 On 16th August, First Active issued facility letters and related documents confirming, it is said, the arrangements made on 15th August and the terms and conditions on which those arrangements were made. The contracts for the sale of Finglas (which was a term of those arrangements) were exchanged on 21st August 2002.

6.27 In August 2002, Finglas was sold to Marumba Properties Limited, a client of First Active, for €13 million. In excess of €800,000 was deducted by the Group's solicitors, Michael Lynn & Co, in respect of legal fees. This deduction was not anticipated at the time of the August meeting or at least no provision was made for it in the cash flow statements used to calculate the amount of the facilities agreed. Other deductions were also made at least some of which had also not been anticipated in August. The surplus proceeds, in any event, were received by First Active and were applied to repay the Finglas borrowings and in reduction of the Salthill borrowings, in accordance with the terms of the August 2002 facility letters. For obvious reasons the reduction in the Salthill borrowing was not as large as had been anticipated.

(ix) Facility of 16th August 2002

6.28 The final facility letters for the Group are dated the 16th August, 2002. The amount of the facility for Salthill was almost €7.144m (in addition to the amount already outstanding). The amount of the facility for Moorview was €5m. Both facilities were repayable within 10 months of the date of drawdown, and were to be reviewed without commitment by the 31st August, 2002, and on a monthly basis thereafter. The final facility letters both stated, at the paragraph titled "Type/Term", that only were the facilities repayable on demand but that the demand "*may be made at any time without assigning any reason therefore"* and that the ten month term was "*without prejudice to the demand nature*" of the facility.

6.29 The letters incorporated Standard Loan Conditions. However, the clause referring to "events of default" had been removed from the Standard Loan Conditions. Both the inclusion of the phrases referred to in the preceding paragraph and the deletion of the "events of default" provisions are of some controversy. Preconditions to the facility letters and related documents included the sale of Finglas and the signing by Mr. Cunningham of a subordination agreement concerning the liabilities of Moorview.

(x) Problems on the Malahide Road Site

6.30 By March 2002 the relationship between Mr. Cunningham and First Active had been under strain for some time. Mr. Cunningham signed an undertaking that he would not be involved in the day to day running of the development at Malahide Road. At a minimum Mr. Cunningham's removal from active involvement was at least in part due to pressure from NABCo. By April of that year First Active had ceased to fund work on the Malahide Road site. On 25th April 2002 Mr. Cunningham told Justin McCarty, Moorview's new project manager, that work had stopped and that NABCo was threatening to take over the site. This never happened and NABCo amended the relevant contract to provide for 21 further apartments, permission for which was given in June 2002.

6.31 After the facilities of 16th August 2002 were agreed, funding of the site was recommenced and management of the site was handed over to Construction Site Services ("CSS"). On 23rd December 2002, First Active received approximately €3.2 million from NABCo through the Cunningham Group in relation to the Malahide Road development and the development continued. By the time of the receivership, delays had already been incurred. However, the project manager expected completion in November 2003. Issues arose as to the quality of the management by CSS of the site. On 14th April 2003 Mr. Cunningham warned Mr. Jackson of possible fraud on the site by CSS. It was the Cunningham Group's case that Mr. Jackson ought to have dismissed CSS at this point. During the receivership there is no doubt that the site experienced delays and cost overruns. Part of the cost overruns was an admitted fraud committed by CSS staff. CSS admitted the fraud in January 2004 and were dismissed on 27th January of that year. The site was not completed until 2006.

(xi) The Final Breakdown of the Relationship between the Group (or more particularly Mr. Cunningham) and First Active

6.32 Contentions arose over draw downs from the 16th August facilities. It should, however, be pointed out that there were no requests for funding to recommence development at Bailey Point for, on any view, quite some time after the August facilities were in place. Thereafter, First Active refused draw downs in relation to Bailey Point on the grounds that the preconditions to the facility were not being met by Mr. Cunningham and the Cunningham Group. From late February 2003, relations within the Cunningham Group, and in particular, as between Mr. Cunningham and the other directors, executives and professional advisors, deteriorated irretrievably. After Mr. Cunningham forcefully voiced concerns over alleged mismanagement of the site at Malahide Road, both Justin McCarthy and CSS gave notice of termination of their contracts as of the 28th February 2003. At a Board meeting of 6th March 2003, the Board of the Cunningham Group passed a resolution excluding Mr. Cunningham from the sites.

6.33 There remained at this time outstanding issues in relation to a right of way and boundaries at Bailey Point. Mr. Cunningham sent correspondence to First Active and the Board in relation to these matters. In a letter of 28th March 2003 to First Active, Mr. Cunningham expressed concern that First Active should permit the drawdown of funds for Salthtill "*on what could clearly be a defective title*".

6.34 At a meeting between First Active and the Board of the Cunningham Group on 24th March 2003, First Active told the Cunningham Group that if matters were not resolved First Active would appoint a receiver. By the end of March 2003 First Active requested a meeting with the Board to determine whether there was a way forward or if a receiver would have to be appointed.

6.35 In early April 2003, matters came to a head, with a series of crisis meetings between First Active and the Board to discuss problems with the management of the sites and funding of the developments. On 8th April, 2003, First Active met the Cunningham Group's directors, other than Mr. Cunningham, to outline the options with which the Group was faced. First Active indicted that it was withdrawing support and would move to appoint a receiver if the Cunningham Group failed to repay the loans. The Board indicated that they would consider the option of the appointment of an examiner.

(xii) Appointment of the Receiver

6.36 After the meeting of 8th April, 2003, the descent into receivership was rapid and on the same day demands issued in respect of all the facilities to Moorview and Salthill. On the following day, 9th April, 2003, Mr. Jackson was appointed as receiver to Moorview and Salthill. On 10th April, 2003, a demand was issued to Valebrook and Mr. Jackson was appointed a receiver to that company on 14th April, 2003, with a further appointment under another debenture on 25th September, 2003. Mr. Jackson was also appointed as receiver and manager to the Fourth Named Plaintiff ("Springside") on 3rd November, 2003.

6.37 Following his appointment, Mr. Jackson took possession of the sites at Malahide Road and Bailey Point. Mr. Cunningham continued to voice concerns that the development at Malahide Road was being mismanaged and was behind schedule.

(xiii) Sale of Bailey Point to Bernard Duffy

6.38 In May 2003, Mr. Jackson sent a prospectus for sale of Bailey Point to various interested parties. In March 2004, Mr. Duffy negotiated a price of €19.3 million for the purchase of Bailey Point. On 20th August, 2004, First Active, in circumstances of some controversy to which it will be necessary to return, took possession of the commercial units at Bailey Point, which were the subject of leases in favour of the plaintiff in case B, Porterridge Trading Ltd, ("Porterridge") and on 5th October, 2004, First Active went into possession of the remainder of the site. That possession of First Active was said to be as mortgagee in possession. Thus First Active took possession in that capacity from Mr. Jackson who had, up to then, been in possession as receiver. Subsequently the site, with the exception of the commercial units, was sold by First Active as mortgagee in possession to Mr. Duffy, which sale completed on 1st September, 2005 for a price of €17 million. On 25th July, 2005, First Active had entered into a contract for the sale of the commercial units to Mr. Duffy. A *lis pendens* registered by Porterridge has prevented the completion of this sale. It should be noted that Porterridge was formed in December 1999, with Cunningham Group employees Ita Hynes, the Cunningham Group's financial controller, and Ronan Quinn as directors, and was established to take leases of the commercial units at Bailey Point in order, it would appear, to avail of a holiday resort tax incentive scheme. In December 1999, Porterridge entered into a 25 year lease with Salthill for the commercial units at Bailey Point. Having set out a brief history of the uncontroversial facts it is next necessary to outline the categories of issues which arose at the hearing.

7. Issues in General Terms

7.1 A very large number of issues arose at the hearing. Some were not direct issues in themselves but were nonetheless the subject of significant controversy on the basis that the view which might properly be taken in respect of those tangential issues could affect some of the true issues which remained for decision between the parties. For example, a very considerable amount of evidence was directed towards the events which occurred between the facility letters of the 16th August, 2002, and the appointment of the receiver. Many of those areas of controversy were not themselves issues in the proceedings but had the potential to affect the question as to whether First Active had good reason to refrain from providing additional funding in relation to Bailey Point. That question, in turn, had the potential to influence the important issue as to whether it was appropriate to infer from all of the evidence that First Active had not an actual positive intention, in August, 2002 to provide funding, but rather had reserved to itself the right to make a later decision on that question.

7.2 However, so far as the real issues in the case are concerned it seemed to me that same could conveniently be divided into four parts:-

A. The core issues against First Active being the claims in contract and fraud;

B. The core claims against Mr. Jackson being the claims in respect of the management of Malahide Road and the sale of Bailey Point, the latter issue being closely connected to the similar claim made against First Active arising out of the ultimate sale by First Active as mortgagee in possession of Bailey Point;

C. Certain other issues which were, to a greater or lesser extent, dependant on the fraud claim; and

D. A range of other issues, mainly of principal relevance to the case against First Active but some of which had either direct or indirect relevance for the claim against either or both Mr. Jackson and Mr. Duffy.

7.3 It should be noted that while Mr. Duffy was potentially affected by some of the issues which arose against other parties, few of the issues, save for some arising under D, involved direct accusation against Mr. Duffy. On that basis counsel for Mr. Duffy only attended when required. Against that synopsis of the issues I turn first to the core claims in fraud and contract as against First Active.

8. The Fraud and Contract Claims

8.1 The claims under these headings were, on any view, the core issues in the proceedings. The essential element of the Cunningham Group's claim stems from a contention that, at the meeting of the 15th August, 2002 to which reference has already been made, First Active represented that the bank would fund the projects at Bailey Point and Malahide Road to completion. It is clear that while significant additional funds were provided in respect of the Malahide Road project, very little funds were, in fact, provided in respect of Bailey Point such that, in reality, work towards the completion of the Bailey Point project never got off the ground. It will be recalled that work on Bailey Point had halted some time before the events of August, 2002. Why work did not recommence is a matter of some controversy to which it will be necessary to return at least in part. However, so far as the contract and fraud claims are concerned, both stem from the arrangements entered into between the parties on the 15th and 16th August, 2002.

8.2 As already noted facility letters and other connected documentation were put in place on the 16th. The negotiations which led to those facility letters were conducted on the 15th. In submissions made at the close of the Cunningham Group's evidence it was accepted by counsel on behalf of the Cunningham Group that, subject to one exception, the claim made in contract could not

succeed unless the Cunningham Group also succeeded in having the contracts entered into on the 16th August rectified. This acceptance was qualified by reference to one additional issue to which I will turn in early course.

8.3 However, subject only to that additional issue, it was accepted on behalf of the Cunningham Group that the evidence did not disclose any breach by First Active of the obligations which it undertook on foot of the facility letters of the 16th August and the documents connected with same. In substance it was accepted that the facility letters concerned represented a so called "demand" facility which permitted First Active to call in the loan at any time without assigning a reason.

8.4 Under the contractual heading the two issues which, therefore, arose were:-

> 1. Whether the Cunningham Group was entitled to rectification. If so, then it would obviously follow that the court would have had to go on to consider whether the contract as rectified was breached by First Active. If not, then it would be necessary to turn to the second issue which was:-
>
> 2. Whether a demand facility entitles the lender to decline to make further funds available at any time or whether, as argued on behalf of the Cunningham Group, the lender is obliged to make funds available under the terms of the facility as long as the facility continues subject only to an overall entitlement to call in the whole loan outstanding at any given time.

8.5 I have already briefly outlined the claim in fraud when addressing its evolution at paras. 2.3 to 2.5 above. In essence, the claim is based on an assertion that First Active represented verbally or by conduct or by both, at the meetings on the 15th August, that it would, subject to certain conditions, fund Bailey Point and Malahide Road to completion. It was said that that representation was false to the knowledge of First Active, because it was asserted that, at the material time, First Active had not made its mind up as to whether it was going to fund both projects. Thus, it was argued, there was a fraudulent misrepresentation on the part of First Active.

8.6 However, it seemed to me that it was more logical to deal with the contractual questions first and, in that context, it seemed appropriate to start by addressing the claim for rectification. I, therefore, turn to that issue.

9. The Claim for Rectification

9.1 In order to understand the claim made under this heading it is necessary to say a little about the backdrop to the meeting of the 15th August, 2002. Over the weeks prior to that meeting First Active had issued a number of draft facility letters which would have involved, if same were the subject of agreement, the provision of significant additional facilities to the Cunningham Group. However, it was at all times a requirement of First Active that a sale of the Cunningham Group's interest in the Finglas Shopping Centre be a condition of any such facilities. It also needs to be recalled that similar, although not identical, requirements concerning the sale of Finglas had been put in place in a number of earlier facilities given by First Active to the Cunningham Group. The earlier terms in relation to the Finglas Shopping Centre required that it be offered for sale. However, as I have already noted, there was a specific sale of the Finglas Shopping Centre in contemplation at the relevant time, and First Active insisted that that sale go through as part of the terms and conditions on which it was prepared to make further facilities available.

9.2 It is equally fair to say that Mr. Cunningham had, at all relevant times, been strenuously opposed to a sale of the Finglas Shopping Centre, although he had, as has been pointed out, reluctantly gone along with terms requiring such sale contained in previous facility letters from First Active. Mr. Cunningham remained opposed to a sale of Finglas up to the period with which I am now dealing. It should also be recalled that Mr. Cunningham was, by this time, in significant disagreement with most of the other directors of the Cunningham Group. The directors of the Cunningham Group had agreed to accept the bank's previous facility letter offer of the 30th July, 2008, and had, in fact, signed that facility letter in the ordinary way notifying such acceptance. However, there was a difficulty. It transpired that the persons (other than Mr. Cunningham and his wife) ("the independent directors") who were believed to be directors of all of the companies within the Cunningham Group were, in fact, directors only of Moorview and not of the other companies within the group, most particularly the companies (i.e. Malldro Shopping Centre Limited, the Poppintree Mall Limited, Springside Properties Limited and Drake Shopping Centre Limited) which owned the Cunningham Group's interest in the Finglas Shopping Centre. Only Mr. Cunningham and his wife were directors of those companies. It would appear that legal advice was taken by the Cunningham Group which was to the effect that it would ultimately be possible for Moorview to procure the appointment of each of its directors to also be directors of each of the relevant companies. Moorview was a shareholder to the extent of 50% in each of the Finglas Shopping Centre companies. The remaining 50% was, it would appear, held by Mr. Cunningham on trust for Moorview. On that basis it would have been open to Moorview to procure the convening of general meetings which could, it was hoped, have arranged for the appointment of directors concerned. However, it would appear that time was not on the side of the independent directors of the Cunningham Group in that First Active had made clear that it wanted an immediate agreement at the risk of appointing a receiver, or taking other similar action. On that basis, it was clear that an early agreement could only be reached if Mr. Cunningham was on board. For example if Mr. Cunningham were to question that he held his shareholding in the relevant companies on trust for Moorview, general meetings of the Finglas companies could have ended in stalemate pending a resolution of any questions concerning such trusts.

9.3 It should also be recalled that Mr. Cunningham had, at this time, employed two personal advisers in the shape of Mr. David Beattie, a solicitor with O'Donnell Sweeney and Mr. Greg Sparks, an accountant with Farrell Grant Sparks. It is clear on the evidence that Mr. Beattie had advised Mr. Cunningham that the fact that his agreement to the sale of Finglas was, at least in the short term, necessary in order that the Cunningham Group could meet First Active requirements, was a bargaining chip which he might use to secure some advantage in any negotiations which might take place.

9.4 It is important, therefore, to note the position as of the commencement of the meeting of the 15th August. The broad terms on which First Active were prepared to lend to the Cunningham Group had already, largely, been put in place. There were a number of matters which Mr. Cunningham and his advisors wished to secure. These included the securing of a reduction in Mr. Cunningham's guarantee obligations together with, amongst other things, seeking an agreement that Mr. Cunningham be repaid some monies owed to him by the Cunningham Group. From Mr. Cunningham's point of view, he also wished to avoid the sale of Finglas.

9.5 I am, of course, at this stage required to take the case made on behalf of the Cunningham Group at its height. On the basis of the evidence presented and, for the purposes of ruling on the non-suit application, accepting that evidence, it is clear that Mr. Cunningham was not directly involved in any of the negotiations that took place on the 15th August. Insofar as the Cunningham Group itself was concerned it was represented by its directors (except for Albert Reynolds and Marian Cunningham) and by its advisors Michael Lynn, Davnet O'Driscoll (a solicitor in Michael Lynn & Co.) and Kieran O'Brien (a financial officer). Insofar as Mr. Cunningham's personal interests were concerned he was represented by Mr. Beattie and Mr. Sparks. On Mr. Cunningham's own evidence, while he attended an initial general introductory meeting, he was not involved in what appeared to have been a series of subsequent rolling meetings at which different parties attended depending on the issues under discussion. The only evidence as to

what took place at the negotiations themselves is, therefore, the oral evidence of Mr. Beattie, the evidence of Mr. Pat Gillan being the only director of the Cunningham Group (other than Mr. Cunningham himself) who gave evidence, the evidence of Mr. O'Brien and various notes of the discussions taken by officers of First Active or its advisors which are, of course, admissible as to *prima facie* evidence of their truth.

9.6 It will be necessary to return to that evidence in relation to a number of other issues not least the fraud question. However, for the purposes of the rectification claim it is important to note that a number of changes to the arrangements contemplated by the July facility letters and additional documentation were negotiated in the course of the meetings of the 15th August. It was then left to the parties (or more particularly the parties' advisors) to reflect those arrangements in documentation which was prepared and executed during the course of the 16th August. Most of the changes that took place in the documentation (and in particular in the facility letters) were designed to reflect specific agreements reached on the 15th August. However, the Cunningham Group place reliance on what are said to be changes to the facility letters introduced by First Active, without notice to the Cunningham Group or its advisors or Mr. Cunningham or his advisors, and which, it is said, materially changed the agreements. It is these changes which give rise to the claim for rectification.

9.7 By the close of the proceedings the principal focus of the rectification claim concerned the demand nature of the facility. As pointed out earlier, it is accepted that the facility letters, as ultimately executed, amount to a demand facility such that all bar one of the contractual claims must fall in the event that rectification of those facility letters is not ordered.

9.8 However, it is argued on behalf of the Cunningham Group that the earlier facility letters were not, in truth, demand facilities on a proper construction of those letters. What, on the Cunningham Group's case, is said to have made the difference is the inclusion of an additional phrase "which demand may be made at any time without assigning reason therefore" in the paragraph titled "Type/Term" of the respective facility letters, together with the deletion of a portion of the standard terms and conditions annexed to the facility letters which provided for "events of default". It is argued on behalf of the Cunningham Group that in their previous form (that is without the relevant added phrase and with the terms of the "events of default" provision included) the facility letters, although described as demand facilities, were not, on a true construction, properly so characterised. On that basis it is said that the making of the changes to which I have referred without, it is said, drawing the attention of the Cunningham Group and Mr. Cunningham and their respective advisors to those changes, gives rise to a situation where the documents that were signed off on on the 16th August, did not correspond to what had been agreed on the 15th. On that basis rectification is sought.

9.9 There was no real dispute between the parties as to the legal basis on which rectification can be ordered. Rectification is a discretionary remedy which allows a court to amend the wording, but not affect the making, of a contract, where the wording does not reflect the intentions of the parties to the contract. The party seeking rectification must provide evidence of a common continuing intention in relation to the provisions of the contract agreed between the parties up to the point of execution of the formal contract. In *Irish Life Assurance Co. v. Dublin Land Securities Ltd* [1989] I.R. 253, Griffin J., at p. 263, described this standard of proof as "convincing proof, reflected in some outward expression of accord, that the contract in writing did not represent the common continuing expression of accord, that the contract in writing did not represent the common continuing intention of the parties on which the court can act". The court in *Irish Life* further held that there will be an especially onerous burden on a party seeking rectification where long negotiations have taken place between the parties, both of whom have taken legal advice during such negotiations.

9.10 It was necessary, therefore, for the Cunningham Group to establish, in order to obtain rectification that the facility letters of the 16th August did not reflect the true agreement of the parties which alleged true agreement would, necessarily, have had to have remained the intention of the parties up to and including the time when the relevant documentation was signed. It is important in that context to note that complex commercial agreements frequently go through many drafts. The parties involved in drafting such arrangements may well have their own views as to precisely what individual clauses might mean. The mere fact that a clause, as ultimately interpreted in accordance with the jurisprudence of the courts, does not turn out to mean what one of the parties thought it might mean does not entitle that party to rectification.

9.11 However, where it can be established that the parties had, in effect, agreed one thing, but where the agreement as ultimately drafted and as properly interpreted means another, then rectification is, *prima facie*, available. There are, of course, a variety of ways in which such an eventuality might come about. As pointed out it will be difficult to establish the necessary conditions where the final documentation is negotiated with the assistance of legal advice. At a level of principle, however, I am satisfied that, in cases involving many drafts produced with the assistance of legal advisors and where a number of conditions are met, rectification is, *prima facie*, available.

9.12 The relevant conditions are as follows:-

> A. That the parties had reached an understanding as to the substance of a term or clause to be inserted into the agreement; and
>
> B. That one party, without drawing attention to the fact that a relevant change is intended to alter the substance of the matter already agreed, procures an alteration in the relevant term; and
>
> C. That agreement between the parties is executed in that amended form without there being any circumstances from which it would be appropriate to infer that the opposite party had accepted a change in the substance of the agreement between the parties.

9.13 It is important to emphasis that each of the above elements seem to me to be necessary in order to meet the overall requirements recognised in *Irish Life*. After all the parties did sign up to the agreement in its final form. It is in that context that Item (A) is important. If the disputed clause or clauses merely emerged from the natural to and fro of the negotiations leading to the finalisation of the agreement, then each party must be taken to have agreed to that clause, in its final form, and be bound by it. It is only where the clause is different from the substance of what was actually agreed between the parties that the basic grounds for permitting rectification can arise.

9.14 Likewise, where the party who procures the alteration brings to the attention of its opposite number that the alteration is intended to change the substance of what had, up to that time, been agreed, then rectification could not possibly arise. Finally it also needs to be noted that parties frequently accept a certain amount of give and take in the course of the negotiations leading to the finalisation of documents. It is necessary, therefore, that the party seeking rectification be able to satisfy the court that it should not be taken to have agreed to the alteration concerned.

9.15 On the basis of the evidence which was before me as of the end of the Cunningham Group's case, I must, for the purposes of this application, accept that the relevant alteration took place and that the attention of the Cunningham Group, Mr. Cunningham and their respective advisors was not drawn to the fact that that alteration had occurred. However, there was, in my view, a fundamental problem with the case which the Cunningham Group sought to make in respect of rectification. The only evidence available as to the substance of the agreements reached between the parties on the 15th August is, as I have noted, the evidence of Mr. Gillan, Mr. Beattie and the documentary evidence. Both witnesses agreed on one thing. It was their understanding that what was being negotiated was a demand facility. There is nothing in the documentation to suggest otherwise. There was, therefore, no agreement in advance of the production of the final written documentation which was for anything other than a demand facility. There is, therefore, even at the high water mark of the Cunningham Group's case, no evidence that there was an agreement in substance for a facility that was not a demand facility. Indeed all of the evidence is to the contrary.

9.16 In response to that point Counsel for the Cunningham Group argued, correctly so far as it goes, that all contractual documents are to be construed in an objective fashion. On that basis it was argued that, on an objective construction of the earlier drafts of the facility letter, that facility letter was not, in fact, a demand facility. It is, therefore, said that objectively speaking the alterations concerned altered the facility letter from a non-demand facility to a demand facility. I had very considerable doubt as to whether, properly construed, the original draft could properly be characterised as a non-demand facility, given the clear wording contained in it, which describes it as a demand facility. However, even if I was wrong in that view, the fact remains that the parties did not agree a non-demand facility. There is no evidence that suggests that what was agreed on 15th August was anything other than a demand facility. The fact that the wording ultimately executed may make that fact clear (whereas there might, arguably, have been some doubt about it in respect of the earlier draft), does not seem to me to either here nor there in a rectification claim.

9.17 It is, of course, true that if the contractual arrangements between the parties had ultimately come to be governed by the facility letter of 30th July, then that facility letter would, as a matter of contract, require to have been construed objectively and might, at least on one view, have been open to the argument that it amounted to a non-demand facility. But that is a very different thing from saying that the parties had actually agreed on the 15th August to a non-demand facility when the evidence makes clear that the opposite of the case. The fact that the Cunningham Group might, on one view, have got away with a non-demand facility on the basis of the letter of 30th July, notwithstanding the fact that everyone at the meeting (on the basis of all of the evidence which I have heard), would have taken the view that it was demand facility, cannot provide a basis for rectification.

9.18 On that basis it seemed to me that the claim for rectification must necessarily fail. All relevant parties, on all the evidence, understood themselves to be agreeing to a demand facility on 15th. It was accepted that the letter of the 16th amounts to such a demand facility. There was, on that basis, in my view, no arguable case for rectification. It was on that basis that I was satisfied that First Active were entitled to non suit on the rectification claim. It followed that the next matter that required to be addressed was the claim made concerning the nature of a demand facility and the entitlement of a lender to refuse to provide additional facilities under it. I now turn to that claim.

10. Nature of Demand Facility

10.1 As pointed out earlier the argument under this heading suggests that a lender, who has entered into a demand facility with a borrower, while retaining the right to call in the loan at any stage, does not have an entitlement, *per se*, to refuse to advance further funds provided that the funds sought to be drawn down are within the scope of the facility terms. The consequences of this argument are quite startling. If the Cunningham Group's case be correct then it follows that a lender who has lost confidence in a borrower and who is, in any event, entitled to call in all of its loan on foot of a demand facility, is faced with a very stark choice. Where, as may well happen in many cases in practice, some but not all of the facility has been drawn down, the lender must elect, if the argument is correct, between providing additional funds in accordance with the facility letter or calling in the entirety of the loan then outstanding. I am not satisfied that that is an appropriate construction to place upon a demand facility. It is, in my view, a logical consequence of any facility being one which can be demanded by the lender, that the lender cannot be obliged to provide any further funding. It would be wholly artificial to say that the lender is required to provide additional funding but could call it all in the next day, or to hold that the lender concerned could only avoid making further funding available to a venture which was adjudged to have become very risky by calling in all amounts already advanced.

10.2 I was not, therefore satisfied that there was any proper basis for the contention that, even at the level of principle, there is anything wrong with a lender declining to provide additional facilities on a demand loan. However, lest I be wrong in that view, I also considered the question of whether there would have been any practical consequences flowing from the interpretation sought to be placed on a demand facility by the Cunningham Group. However, in order to make that assessment it was necessary to consider the sequence of events which followed on from the execution of the facility letters in August, 2002. As that sequence of events is of some significant relevance to the fraud claim, I propose dealing with this latter issue (i.e. that of consequences), while dealing with the fraud claim to which I now turn.

11. The Fraud Claim

11.1 There was no significant dispute, at the level of principle, as to the ingredients of a claim in fraudulent misrepresentation.

11.2 The allegation of fraudulent misrepresentation is founded on the tort of deceit. In Cartwright on *Misrepresentation, Mistake and Non-Disclosure* (2nd Ed. 2007), the author notes, at p. 137, that there are two elements to the claim of deceit. The representor must show that the representation was fraudulent in the sense that he did not honestly believe that the representation was true, and secondly, that he intended the representee to act on the statement, this intention must be proven strictly and subjectively.

11.3 In *Forshall v. Walsh* (Unreported, High Court, Shanley J., 18th June, 1997), Shanley J. held, at p. 64, that to establish deceit, a plaintiff must prove the following:-

> "(i) the making of a representation as to a past or existing fact by the defendant
>
> (ii) that the representation was made knowingly, or without belief in its truth, or recklessly, careless whether it be true or false
>
> (iii) that it was intended by the defendant that the representation should be acted upon by the plaintiff
>
> (iv) that the plaintiff did act on foot of representation and
>
> (v) suffered damages as a result."

11.4 In substance, therefore, what the Cunningham Group required to establish in this case was that there was:-

A. A representation;

B. Which was false;

C. That First Active knew it was false or was reckless as to its truth; and

D. That any such false representation as might be established was intended to be acted on by the Cunningham Group, was in fact acted upon, and that damage resulted.

11.5 As will be clear the real issue on the facts of this case concerned whether items A, B and C were established. The central defence mounted on behalf of First Active was to suggest that there was no representation or, if there was a representation, that it was true.

11.6 It logically follows that the first issue that I needed to consider was the existence or otherwise of the alleged representation itself. It is said that the representation took place partly orally and partly by conduct (or one or other of those), at the meeting of 15th August. In addition it is said that the representation was to the effect that First Active had an intention to fund both the Bailey Point and Malahide Road projects to completion subject to certain conditions. I will return to those conditions in due course.

11.7 It is important to note briefly the evidence as to what transpired at the meeting of 15th August and on its fringes. Mr. Cunningham gave most extraordinary evidence in this regard. It was his evidence that he was told by Mr. Beattie (whom, as I have pointed out, was advising him personally), that First Active had agreed to fund the completion of those two projects in all circumstances. Mr. Cunningham was pressed on this issue but made it clear that it was his evidence that Mr. Beattie had told him that the projects would be funded no matter how much they cost, or no matter how long they took to completion. It would be a quite extraordinary undertaking for a bank to give. Not surprisingly Mr. Beattie flatly contradicted the suggestion that he had said anything of the sort to Mr. Cunningham. Mr. Cunningham was not, of course, at any of the meetings at which any representations might have been made. The only evidence as to representations can, therefore, come from Mr. Gillan and Mr. Beattie. There is no evidence, therefore, to support Mr. Cunningham's assertion that First Active had agreed to or represented that it would fund both projects irregardless.

11.8 It is clear from Mr. Beattie's evidence that there was very little discussion indeed on the occasion in question about the funding of the relevant projects. Most of the discussion concerned negotiations relating to the various improvements which Mr. Cunningham wished to see in his own personal position. The reason for that fact is obvious. The basic scale of the funding to be advanced had already been agreed well in advance with the meeting of the 15th August. The amount of the facilities, subject to one change which is not material to the issues I had to decide, had already been set out in the facility letters of 30th July. Those amounts were based on cash flows which had been produced by the Cunningham Group. Indeed Mr. Kieran O'Brien, who was an official of the Cunningham Group who had been heavily involved in the production of the cash flows concerned, gave evidence at the trial but indicated that he had little or no involvement in the meetings because the cash flows seemed to be accepted. His presence was, of course, to cover the eventuality that First Active might question the cash flows. That did not, in fact, happen.

11.9 Giving the Cunningham Group the benefit of accepting all of the evidence tendered on its behalf, in so far as that was possible given the differences between Mr. Cunningham and Mr. Beattie, I was not satisfied that there was evidence of any express representation at all. While Mr. Beattie did say in evidence that it was his understanding after the meeting that First Active intended to provide funding in accordance with what had been agreed, it was, in my view, absolutely clear (and indeed Mr. Beattie confirmed this in answer to a question from me), that the reason why he was of that view was because the parties had spent the whole day negotiating terms. Mr. Beattie did not give any evidence of any direct representation by First Active. Furthermore Mr. Beattie gave very careful evidence to the effect that what was understood to be the case as a result of the meeting of 15th August was that First Active would issue further facility letters and associated documentation which would incorporate the additional matters that had been agreed at those meetings. There was, in my view, nothing in Mr. Beattie's evidence from which it would be possible to infer that First Active had made any representation greater than the commitments that would be set out in those facility letters and associated documentation. In addition Mr. Cunningham was not himself present when any possible representation might have been made. Furthermore, as I have already pointed out in a different context, it was Mr. Beattie's understanding that the facility letters that would ultimately issue would be demand facilities. It was again clear on the evidence of both Mr. Beattie and Mr. Pat Gillan (who agreed that what was under negotiation were demand facilities), that a borrower who has a demand facility loan from a bank must maintain the confidence of the bank concerned or risk that the demand facility would be called in. It was not possible, therefore, in my view, on the evidence to conclude that there was an arguable case to the effect that any express representation was made by First Active or its officials.

11.10 If the parties' understanding was that demand facilities were being negotiated and if it followed that First Active were reserving the right to call in the loan at any time, how could there have been any representation that full funding would necessarily be provided? It is, perhaps, possible to make a "fine" distinction between two situations. In case A, a lender has an intention today to lend money on certain terms but retains a discretion, when the money is sought to be drawn down, to revise his view. In case B the lender is prepared, without having any particular current intention, to indicate a preparedness to consider lending on the same terms but postpones a final decision until the drawdown request is made. It is a "fine" distinction but not one of any real substance. In either case the lender reserves the right to make a final decision when a drawdown is requested. Whether that decision is characterised as a revision of a decision to lend or a decision to go ahead with a lending tentatively agreed is of little materiality provided it is clear that the lender has the relevant discretion. The difference between what is, in effect, an opt in or an opt out is of little substance provided the entitlement to opt is clear. It is finally worthy of some note that the case as pleaded appeared to accept that any representation made on behalf of First Active was at least conditional to some extent. It was asserted that the representation was to the effect that funding would be provided subject to certain specified conditions. The relevant conditions appear to represent some, but by means all, of the contents of the matters contained in the facility letters of the 16th August, 2002. Frankly, it never became clear to me as to why some of those conditions had been singled out for special mention. In any event it seemed to me that reference to certain specified conditions without facing up to the question raised by the fact that the facility letters were demand facilities, was to miss the point.

11.11 I had some reservation concerning the alternative basis put forward on behalf of the Cunningham Group which suggested representation by conduct. It was certainly not my understanding of the case which the Cunningham Group sought to make up and until the non-suit submissions, that same was based on an allegation of representation by conduct. Rather it was at all times my understanding that the Cunningham Group hoped to establish an express oral representation made at the meeting of 15th August. I should, in passing, note that Mr. Beattie had declined to a give a witness statement in advance to the Cunningham Group and, for that reason, it was understandable that the Cunningham Group's advisors would not know precisely what evidence Mr. Beattie was going to give. Even allowing for that fact, it was at all times my understanding that it was hoped that Mr. Beattie would give evidence

of actual representations made by officials of First Active. This he did not do. Indeed the particulars given by the Cunningham Group in respect of the alleged misrepresentation specified that the representation was said to have been made by Mr. Holmes and that others on the First Active side, who were said to have been present at the meeting in question, were alleged to have supported that representation by their silence.

11.12 However, on balance, I came to the view that I should consider whether a case for representation by conduct had been made out. Given the evidence of Mr. Beattie, to which I have referred (which was to the effect that his reason for understanding that First Active intended to fund the relevant projects was because he and others had spent a day negotiating a set of interlocking arrangements which would lead to the issuing of a facility letter designed to meet the requirement set out in the Cunningham Group's cash flows), it did not seem to me that there could be any basis for suggesting that any representation by conduct went beyond the terms of the contract. The contract was highly conditional. It will be necessary shortly to turn to some of those conditions and how same were dealt with. But the contract also was a demand facility. On that basis it was clear, even on the height of the Cunningham Group's evidence, that if First Active were to lose confidence in the Cunningham Group, all facilities could be withdrawn. Given that, to the knowledge of all those involved in the negotiations, the facility letters that were anticipated to be put in place on the 16th August, were to be demand facilities, then it is difficult to see how there could be any basis for suggesting that First Active had, by its conduct, represented that it would fund out the completion of Bailey Point and Malahide Road, other than on the basis of the facility letters which, in turn, entitled First Active to withdraw all funding. I should finally touch on the fact that the facility letters concerned contained a so called "all agreement clause", which provided that the relevant documentation in each case contained the whole agreement between the parties. On that basis it was clear that nothing which passed in the negotiations between the parties could be said to amount to a collateral contractual term, or the like. It is true to say, as was argued by counsel on behalf of the Cunningham Group, that the clauses in question (there was one in each of the facility letters) did not expressly exclude possible reliance on any representations that might have been made as a ground for an action in tort. I was not, therefore, satisfied that the clauses in question provided an absolute barrier to the claim in misrepresentation. However, the clauses did, in my view, provide added weight to the argument that no representation beyond compliance with the terms of the facility letters intended to be issued on the following day could be said to have been made.

11.13 In summary there was no evidence of any express representation. The only possible representation by conduct involved First Active entering into negotiations. Such conduct could not, even on the high watermark of the Cunningham Group's case, amount to a representation beyond the scope of the contract itself which, to everyone's knowledge, involved a demand facility and, indeed, one which was highly conditional. There is no evidence, therefore, of the representations contended for on behalf of the Cunningham Group. On that basis alone First Active were, in my view, entitled to a non suit on the fraud claim.

11.14 However, lest I be wrong in that conclusion, I did go on to consider whether there was any evidence to support the view that any representation, which might be said to have been made, was false. In the light of the analysis which I have conducted of the events of the 15th August, it seems to me that the only representation that could conceivably be regarded as having been made by conduct was one to the effect that First Active had, at the time of that meeting, a *bona fide* intention to lend the money concerned subject only to not having good reason for changing its mind because of intervening events prior to a relevant drawdown request. Given the demand nature of the facility, it was, in my view, inconceivable that any other representation by conduct could be considered as having been made. If, therefore, contrary to the view which I have expressed, there was a representation, then same could only be to the effect that First Active had a present *bona fide* intention as of the 15th August, to make the funds available in accordance with the facility letters and associated documentation, subject to there being some good reason for taking a contrary view at a later stage. It is, of course, the case, as I have pointed out, that much of the funding in relation to Bailey Point was not, in fact, made available. On that basis the Cunningham Group invited me to infer that First Active reserved to itself the right to make a subsequent decision as to whether to provide funding without informing the Cunningham Group on the 15th and 16th August that it was making that reservation. In that context it is necessary to look briefly at what happened over the next number of months in order to assess the circumstances in which funding for Bailey Point was not, in fact, made available.

11.15 The first point to note is that funding for the Malahide Road Development did in fact, occur. There were difficulties with the Malahide Road Project to which it will be necessary to return most particularly in the context of the claim against Mr. Jackson. However, the one thing that did not happen was that funding was declined in respect of that project. Indeed it is clear that the entire sum provided for in the facility letter of the 16th August in respect of the Malahide Road Project was, in fact, drawn down. However, no significant draw downs occurred in respect of Bailey Point, at least insofar as a recommencement of work on that site was involved. As pointed out earlier, work on Bailey Point had, in practice, stopped well before the middle of August, 2002. There were certain historic debts and certain ongoing liabilities relating to keeping the site in order, some of which were met. However, funding was not made available for a recommencement of the project. It is the absence of such funding that is suggested to be the basis for a proper inference to the effect that First Active did not, as of August 2002, have a definite current and *bona fide* intention to make the relevant funds available. However, as I have sought to analyse, the only representation for which there could conceivably be a basis (even if I am wrong in my conclusion that there was in fact no representation) could be one to the effect that First Active intended, as of August 2002, to make funding available for, in particular, Bailey Point unless there was good reason for not so doing.

11.16 In that context it is necessary to analyse whether there was good reason for First Active not making funding available for if there were such good reason it is very difficult to see how any inference could be drawn, even on the high water mark of the Cunningham Group's case, to suggest that First Active did not intend, *bona fide*, to make funds available as of August 2002.

11.17 The first set of problems which arose, subsequent to the 16th August, 2002, concerned the completion of First Active's security and allied matters. Even on the Cunningham Group's evidence, Mr. Cunningham was clearly the main cause of this difficulty. It was manifestly clear from the documentation signed on the 16th August that a number of further matters needed to be put in place in order for drawdowns to take place. Many of those matters were attended to but a number involved Mr. Cunningham personally. Mr. Cunningham gave evidence that he was under the impression, after the events of the 15th and 16th August, that there was nothing further to be agreed or signed. The evidence tendered on behalf of the Cunningham Group included that of Mr. Beattie who gave clear evidence to the effect that he had carefully taken Mr. Cunningham through all of the relevant documentation and explained it to him. On the basis of Mr. Beattie's evidence, Mr. Cunningham would have been well aware that there were some further matters to be attended to. It was not necessary, on this application, to reach any concluded view as to whether Mr. Beattie or Mr. Cunningham was correct in this regard. Suffice it to say that Mr. Cunningham signed up to documentation which, in its clear terms, required some further security or allied matters to be put in place which could only be done with his cooperation.

11.18 Therefore, even if Mr. Cunningham is correct in stating that Mr. Beattie did not explain these matters to him, it follows that Mr. Cunningham signed documentation without regard to its contents and must live with the consequences. It is clear, therefore, that a significant period of time elapsed before full security was put in place in accordance with the facility letters and connected documents and other conditions precedent to drawdown complied with. Indeed on one view all of the matters envisaged by the

various connected documents were not in place until March 2003. There were some disputes on the evidence as to just how necessary, in practical terms, some of the final items actually were. There is, however, no doubt but that strict compliance with all of the items set out in the various documents signed off on on the 16th August did not occur until March of the following year. Even on the basis of its own case the Cunningham Group accepts that significant and material security was not in place until well into October. In addition, to the extent that some of the relevant requirements of First Active may seem technical, it must be recalled that Mr. Cunningham had made considerable use in the then recent past of the "technicality" that the independent directors of the Cunningham Group had not formally been appointed as directors of subsidiary companies.

11.19 It is also important to note that a number of additional matters came to light in the course of the months after agreement was reached in August 2002, which had a significant and detrimental effect on the Cunningham Group's financial position. Many of these issues were explored at considerable length in the course of the evidence. Such matters were not issues in themselves but had the potential to affect the view which might properly be taken of First Active's actions and thus whether it could possibly be appropriate to infer that First Active might not have had good reason for declining to further fund Bailey Point. I do not, therefore, intend to go into each of these matters in detail but only to such extent as is necessary for the purpose which I have just identified.

11.20 Firstly, a number of significant claims against the Cunningham Group emerged. The estimates for the cost of dealing with these claims varied from time to time, but it is clear on all the evidence that the total amount of those claims were likely to be significant in the context of the position of the Cunningham Group as a whole. One such claim was Mr. Cunningham's own claim for repayment of funds advanced by him. There was not, in my view, any reliable evidence that First Active knew, as of the 15th/16th August, of the agreement undoubtedly reached, at a board meeting of the Cunningham Group on the 15th August, between the Board of the Cunningham Group and Mr. Cunningham personally for such repayment. The possible need to provide for any such payments (which were pressed by Mr. Cunningham over the coming months) was, therefore, a further possible downside to the Cunningham Group's cash flow. Likewise claims relating to the failed purchases in respect of extra units at Finglas emerged including claims against Mr. Cunningham personally which the Board agreed to indemnity on the basis that Mr. Cunningham had been acting on behalf of the Cunningham Group when entering into the relevant contracts. Furthermore, the delay in putting the security and allied matters in place lead, at a minimum, to a significant increase in interest costs which had not been contemplated in the original cash flows. Some of the monies deducted from the Finglas sale (most especially those deducted by Mr. Lynn) were not anticipated. There can be little doubt but that, therefore, the position of the Cunningham Group looked a lot less attractive as of October-November 2002, than it had done in August. It also seems clear that First Active was being kept informed by officials within the Cunningham Group of a least some of these matters not least by means of their inclusion in revised cash flows.

11.21 It is also important to emphasise that, while the projections on which the facility letters of the 16th August were based did show a positive outrun for the Cunningham Group, the margin was, having regard to the very large sums to be advanced, quite modest. First Active was contemplating a maximum exposure of €45 million and a significant exposure up and until the Bailey Point Development could come on stream. In the context of funding of that level the projected outcome for the Cunningham Group of a net position of (insert…) as of the relevant cash flows suggests a situation where any significant deterioration in the Cunningham Group's position would necessarily expose the bank to a significant increase in risk. Taking all of the evidence at its high point from the prospective of the Cunningham Group, I am nonetheless satisfied that the position up to the end of 2002 could not be characterised other than as one in which the Cunningham Group was struggling, by reason of the non cooperation of Mr. Cunningham, to comply with its obligations in relation to security and allied matters while the overall prospects for the company were significantly deteriorating. On that basis it seems absolutely clear that the position, from the prospective of First Active, was significantly less favourable by the end of the year.

11.22 However, the situation became considerably worse in the New Year. It is again clear on the evidence that in early January, 2003 Mr. Cunningham employed a Mr. Elio Malocco in a rather curious capacity. It would seem that almost all of the letters written in Mr. Cunningham's name thereafter were in fact written by Mr. Malocco.

11.23 Mr. Malocco was not called in evidence. On occasion Mr. Cunningham had difficulty in explaining the purpose behind some of the letters written in his name by Mr. Malocco. It is impossible to avoid the conclusion that the effect of many of those letters, written not only to First Active but also to a large number of other parties connected with the Cunningham Group, was to create as much difficulty for those parties as possible. I inferred from much of the cross examination of Mr. Cunningham on behalf of First Active that it was First Active's case that the purpose behind much of the relevant correspondence was designed to contrive a situation where First Active might become prepared to write off a material portion of the liabilities of the Cunningham Group. In that regard evidence was called by the Cunningham Group from a Mr. Dominic Lydon, a Galway businessman, who had entered into certain preliminary discussions with Mr. Cunningham in February and March of 2003, concerning what was described as a joint venture in relation to Bailey Point. The Cunningham Group sought to suggest that First Active had, for an inadequate reason, dismissed the possibility of an involvement on the part of Mr. Lydon. Mr. Cunningham's evidence was to that effect. However, it was absolutely clear on Mr. Lydon's own evidence that the discussions between him and Mr. Cunningham were of an extremely tentative nature and would have required a great deal of additional exploration both as to the legal structure of any arrangement which might be put in place and the financial terms of such an arrangement. There was no evidence that any significant work had been done on either of those two issues. There was no evidence, therefore, that the proposed joint venture with Mr. Lydon ever got beyond a very tentative stage. I was not, therefore, satisfied, that there was any evidence on which a *prima facie* case could be established to the effect that First Active had acted in any way wrongly in not significantly engaging with Mr. Lydon.

11.24 However, it is clear that amongst the proposals that were under consideration at that stage, even on that tentative basis, were arrangements which would have involved First Active being asked to accept a significant write down of its liabilities. There was, therefore, at least some evidence for the suggestion put forward on behalf of First Active to the effect that Mr. Cunningham (or his advisors and in particular Mr. Malocco) was attempting to procure that First Active would accept a significant reduction in the sums due to it. First Active's case would appear to be that the campaign orchestrated by Mr. Malocco (for even on the high water mark of the Cunningham Group's case it could not otherwise be described) was designed to make life as difficult as possible for everyone with a view to encouraging First Active to accept such a write down.

11.25 Given that, at this stage, I was required to assess the case made on behalf of the Cunningham Group on a *prima facie* basis it would not, in my view, be proper to reach any conclusion adverse to the Cunningham Group under this heading. I did not, therefore, consider the matter on the basis that it had been established that Mr. Malocco, acting on behalf of Mr. Cunningham, was engaged in such a campaign designed to procure a reduction in the banks indebtedness. However, whatever be the motive behind Mr. Malocco's campaign, there is no doubt but that it, as a matter of fact, took place.

11.26 Likewise, it was not, in my view, appropriate at this stage, for me to reach any conclusion adverse to the Cunningham Group as to whether Mr. Cunningham was aware of all of the intent behind the letters written in his name. So far as any third party (including First Active and its officials) were concerned the letters came from Mr. Cunningham. There is no evidence to suggest that,

at the relevant time, anyone on the outside knew of Mr. Malocco's involvement. Whether Mr. Cunningham fully understood the actions being taken in his name by Mr. Malocco or not, the position of any third party receiving the relevant correspondence or becoming aware of it would only have led that person to the view that Mr. Cunningham was engaged in a significant campaign of creating difficulties and issuing threats to all concerned. It is fair to say that it would have taken some little time during 2003, for that position to become obvious. It is, therefore, necessary to view somewhat more closely the position in the early weeks of 2003. That is an issue to which I will return. However, I am satisfied that by the middle of February at the very latest, it would have been obvious to First Active that such a campaign was underway, and that it would be more than reasonable for First Active not to engage further with the Cunningham Group unless a significant change were to take place.

11.27 In that context it is also important to note that relations between Mr. Cunningham on the one hand and the independent directors of the Cunningham Group on the other hand deteriorated significantly during the early part of 2003. Even on the high watermark of the Cunningham Group's case the situation that was reached does not fall far short of the characterisation of "open warfare" put on the situation by counsel for First Active. Therefore, at least from the time when that situation became serious, I am not satisfied that there is any evidence from which it would be appropriate to infer, from the absence of funding during that period, a lack of intention on the part of First Active to fund for no good reason. There was ample good reason for First Active not funding during the period in question. No adverse inference to First Active could, possibly, be drawn from the absence of such funding.

11.28 That leaves the period in the earlier part of 2003, to which I indicated I would return. It is clear from the internal documentation of First Active that consideration was given at that time to the possibility of extending further facilities to the Cunningham Group. There were two difficulties with the situation as presented itself to First Active at that time. Firstly, at least from First Active's perspective, there were remaining problems with security and other conditions precedent, although it is fair to say that by the early part of 2003 many of those problems had been solved and, at least at certain times, First Active's advisors expressed the view that any remaining problems were soluble. It appears to be the case that some officials within First Active supported the view that revised facilities should be made available to the Cunningham Group, notwithstanding whatever difficulties there remained concerning security and compliance with conditions precedent. Those officials also, necessarily, supported the view of extending funds to the Cunningham Group which went well beyond those which had been contained in the August, 2002 facilities for it was clear, by that stage, that, on any view, the projects could not be completed without funds in addition to those contemplated the previous August being made available. It is equally clear that there was opposition to that position from, most importantly, Mr. Holmes. It also seems clear on the evidence that Mr. Holmes view ultimately won out and no increased facilities were made available.

11.29 However, given that First Active would have had to have increased its exposure by a material amount had it gone along with the suggestions being promoted by some of its officials, it does not seem to me that there could be any legitimate basis for inferring from the refusal to make those additional facilities available in the early part of 2003, an intention that First Active did not *bona fide* intend to make facilities available in August, 2002 or had some reservation about whether it intended so to do beyond its entitlement not to find in accordance with the terms of the facility letters. The situation facing First Active in the early part of 2003 was significantly different, on any view, from that which pertained in August, 2002. The fact that First Active was reluctant to, and ultimately did not, make facilities of a larger scale available in 2003 could not, even on the high watermark of the Cunningham Group's case, therefore, give rise to an inference that First Active did not *bona fide* intend to make funds available in August, 2002.

11.30 I was not, therefore, satisfied that there was any evidence from which it would be appropriate to infer that First Active did not *bona fide* intend, in August 2002, to make funds available on foot of the facility letters and connected documents, provided that the Cunningham Group complied with its obligations under the agreements, and provided that there was no significant or material alteration in the circumstances such as might legitimately cause First Active to take a different view of the risk and exercise its right under the demand nature of the facility.

11.31 It should also be remembered in this context that Mr. Beattie gave evidence, which seems to me to be entirely sensible, that he would have envisaged that the various matters of security or compliance with conditions precedent that were included in the documentation executed on the 16th August, could readily have been completed within a period of not more than two weeks. It seems highly improbable that any of the other parties to those arrangements were of any different view. Therefore, what First Active had in mind was that there would be a speedy completion of the various matters of security and compliance with condition precedent. There would, it follows, be a relatively early application for significant draw downs, and there would, in those circumstances, have been most unlikely to have been any intervening circumstances which would have altered the legitimate overall perception of the risk involved. There is, in my view, no evidence from which it could be inferred that had the security and condition precedent documentation been put in place in a timely fashion, First Active would not have made funds available for the Bailey Point project in an orderly and timely way.

11.32 The other matter on which the Cunningham Group placed significant reliance was what was said to be the classification of the loans of the Cunningham Group at the relevant time. While the material facts in this regard appear to have emerged as a result of a witness statement filed on behalf of First Active, I did not understand, from the cross examination of witnesses on behalf of First Active, that the primary facts were in any dispute. On that basis I was prepared to approach the non-suit application on the basis that the facts concerned were true. It would appear that some time prior to the events of August 2002, First Active had reclassified the facilities of the Cunningham Group into a category where it was First Active's policy to provide further funding only where First Active was satisfied that the provision of such further funding would enhance the banks security. There is nothing, in itself, peculiar or unusual with a bank, such as First Active, adopting such a classification. Neither was it, or could it have been, suggested that it was unreasonable for First Active to take such a view of the Cunningham Group's facilities at that time. There was no evidence to suggest that the Cunningham Group was informed of that classification. Nothing, it seems to me, turns directly on that fact. However, it is argued on behalf of the Cunningham Group that the relevant classification also leads to the conclusion that First Active was reserving to itself a right to make a decision from time to time (when any relevant drawdown might be sought), as to whether the drawdown concerned would enhance First Active's security.

11.33 However, for the reasons which I have sought to analyse, the facilities under negotiation were understood by all involved to be demand facilities. It is implicit in such facilities, as was accepted by Mr. Beattie, that in such circumstances the borrower needs to retain the confidence of the lender in order for the facilities to continue. There was no evidence to suggest that First Active did not, as of August 2002, have the necessary confidence in the Cunningham Group to the effect that it could repay not only the then outstanding balances, but also the sums intended to be advanced on foot of the facility letters under negotiation. There was, therefore, in my view, no evidence to suggest that the bank did not think, at the relevant time, that advancing the relevant facilities would enhance its security by making it more likely that the already existing balances could be repaid (by the bringing to completion of the projects at Bailey Point and Malahide Road). Obviously if some material change in circumstances occurred such that First Active could legitimately take a different view of the likelihood of repayment, then it must have been implicit in the nature of the demand facility on offer that the loan might either be called in or further funds not provided under it. For the reasons which I have sought to analyse there was not, in my view, any basis for suggesting that First Active lacked good reason for any failure to advance

further sums. It does not seem to me, therefore, that the classification of the loans concerned was the significant issue which the Cunningham Group sought to make of it.

11.34 For those reasons I was satisfied that even were I wrong in concluding that there was no representation in the first place, it could not be said that there was a false representation for there is no evidence that the bank did not have a *bona fide* intention to lend money when it entered into the arrangements in August, 2002. For this reason also I was satisfied that the claim in fraud must fail and acceded to the application of First Active in that regard.

11.35 As indicated earlier there was no real issue raised at the hearing concerning the other elements of the tort of deceit. The reason for this is obvious. It is virtually impossible to disentangle, in a case such as this, the consequences of an alleged fraudulent misrepresentation from the representation itself. Given the absence of any evidence of an express representation, the only form of representation that could conceivably have been found was one by conduct and one whose interpretation would at least be a matter of some controversy. In those circumstances without defining the precise terms of any representation that might have been found to exist, it would have been virtually impossible to address the additional questions as to whether any such alleged representation was intended to be acted upon, whether such representation was in fact acted upon, and whether any loss flowed from it having been acted upon. To pose but one of the hypothetical questions that might arise in such circumstances it is only necessary to consider the very difficult question of the response of the Cunningham Group to any matters that might have been raised by First Active at the meetings on the 15th August. It was clear on all the evidence that the Cunningham Group had no other option available to it in the middle of August 2002, beyond entering into some form of agreement with First Active or else allowing the company either to be put into receivership by First Active or wither on the vine. When faced with such a situation it is very difficult to know what the response of the Cunningham Group would have been had First Active indicated a willingness, in general terms, to make facilities available, but subject to a reservation on the part of First Active of an entitlement to make a specific decision on each occasion when a drawdown was requested which decision could be made in the light of circumstances then prevailing. Likewise Mr. Beattie was clearly aware that the facilities were demand facilities in which circumstances it was necessary that the Cunningham Group retain the confidence of First Active for the continued availability of the facilities concerned. Precisely what his advice would have been in different circumstances is virtually impossible to predict.

11.36 While I would, ordinarily, therefore, be anxious to set out what views I would have had on issues such as those relating to the intention that any representation be relied upon and actual reliance on any such representation (in the event that I be wrong in the conclusions which I have reached concerning the existence of a false representation in the first place), it seems to me that in the circumstances of this case any such consideration would be so hypothetical as to be unhelpful. I did not, therefore, form any view on those issues.

11.37 I should not pass from this question by also noting that the question of whether any damage could be said to flow from any alleged misrepresentation was, for like reasons, so hypothetical as to be impossible to assess. In order to even begin to consider the question of damages it would have been necessary to assess what consequences, in practice, would have flown from the absence of any misrepresentation concerned. That task was, in my view, hopelessly hypothetical, so that even the starting point for a consideration of the question of damages under this heading was, likewise, hypothetical.

11.38 I indicated earlier that I would return to the question of the potential consequences of my being wrong in relation to the view which I formed concerning the entitlement of First Active to decline to make further funding available by virtue of the fact that the loan facilities in question were demand facilities. It is now appropriate to do so having reviewed the events which passed between the date of the facilities being put in place and the receivership. It is clear from that review of the facts that there was no request for a drawdown of funds in respect of a significant recommencement of work at Bailey Point for a very considerable period of time indeed after the facility letters were put in place in August, 2002. As pointed out earlier funding was, in fact, provided in respect of Malahide Road. There was some dispute as to the precise time at which it might be said that a true request for such funding for Bailey Point was made on behalf of the Cunningham Group. On the high watermark of the evidence from the perspective of the Cunningham Group it does not seem to me that any such request could, even on a *prima facie* basis, be said to have been made until the very end of 2002 at the earliest. Thus that time was the earliest point at which First Active could have been in breach of any obligation which would flow from the Cunningham Group being correct in its interpretation of the meaning of a demand facility. It is manifestly clear that First Active would have been opposed to providing any further funding at that stage. Therefore, the only practical consequence of the Cunningham Group being correct in its interpretation of the nature of a demand facility, is that First Active would have been faced with a choice between making funding available (almost certainly in the early part of 2003), or calling in the whole loan. It seems clear that, in that eventuality, it is highly probable that the whole loan would have been called in at that stage. Therefore, even on a best case scenario from the perspective of the Cunningham Group, the only consequence of the Cunningham Group being correct in its interpretation of the relevant clause (contrary to the view which I have taken) is that receivership would have been advanced by approximately three months at the most.

11.39 Given the grave difficulties with which the receivership was faced in the light of the challenges brought by Mr. Cunningham, it does not seem to me that the evidence disclosed any loss on the part of the Cunningham Group under this heading. There was no evidence from which it might be inferred that anything different would have happened in respect of Malahide Road had the receiver gone in three months earlier. Likewise, there is nothing to suggest that the end result in respect of Bailey Point would have been different. Obviously the amount due and owing, as of the date of the receivership, would have been less, but the amounts that would have fallen due during the receivership would have been greater to an exactly corresponding amount because a conclusion in respect of both Malahide Road and Bailey Point would not, in my view, even on the high watermark of the Cunningham Group's evidence, have been reached any quicker had the receivership been advanced by the three or so months which I have identified. Therefore, even if I am wrong in the conclusion which I reached in respect of the proper interpretation of a demand facility, it did not seem to me that the Cunningham Group had established even a *prima facie* case to the effect that any loss would have flown from any potential breach of contract that might result from the Cunningham Group being correct in its interpretation of the clause in question.

11.40 Having dealt with what seems to the core issues as and between the Cunningham Group and First Active, it seems to me to be appropriate to now turn to the issues as and between the Cunningham Group and Mr. Jackson (including, for reasons which will appear, a connected issue involving First Active).

12. The Case against Mr. Jackson – Potential Liability of a receiver/manager

12.1 The core case against Mr. Jackson involves claims relating to both Malahide Road and Bailey Point although some of the non-core claims (which mainly relate to First Active) to which I will turn in due course are also of relevance to the case against Mr. Jackson. So far as Malahide Road is concerned a question arises as to the duty of care owed by a receiver, such as Mr. Jackson, to the company in respect of whom he is appointed receiver in circumstances where the receiver manages some or all of the companies' assets rather than simply selling them. Mr. Jackson managed the Malahide Road project. There is no doubt but that a receiver who sells the assets of a company may be liable, both at common law and under statute (s. 316A, Companies Act 1963, as inserted by s.

172 Companies Act 1990) for failing to realise the true value of the asset concerned. As the issues concerning Bailey Point centre on an allegation concerned with sale at an undervalue, no issue of principle concerning the potential liability of Mr. Jackson exist in relation to that aspect of the claim. On the other hand, the issue with which I am concerned in respect of Malahide Road involves an allegation of negligence on the part of Mr. Jackson in conducting part of the business of the Cunningham Group and the management of its asset (being the management of the building contract with NABCo). It is to the legal issue concerning the potential liability, at the level of principle, in respect of a receiver as manager that I, therefore, first turn.

12.2 The Cunningham Group accepted that the primary duty of a receiver who decides to manage the business of a mortgagor, is to bring about a situation in which the debt of the company concerned can be serviced and paid. However, it was argued that, additional to same, a receiver is under a duty to the mortgagor to manage the business with due diligence. In this respect the Cunningham Group relied on the English case of *Medforth v Blake* [2000] Ch 86, where, at page 102, Sir Richard Scott VC set out the following propositions in relation to the functions of receivers:-

> *"(1) A Receiver managing mortgaged property owes duties to the mortgagor and any one else with an interest in the equity of redemption.*
>
> *(2) The duties include, but are not necessarily confined to, a duty of good faith.*
>
> *(3) The extent and scope of any duty additional to that of good faith will depend on the facts and circumstances of a particular case.*
>
> *(4) In exercising his powers of management the primary duty of the Receiver is to try and bring about a situation in which the interest on the security can be paid and the debt itself repaid.*
>
> *(5) Subject to the primary duty, the Receiver owes a duty to manage the property with due diligence.*
>
> *(6) Due diligence does not oblige the Receiver to continue to carry on a business on the alleged premises previously carried out by the mortgagor.*
>
> *(7) If the Receiver does carry on a business on the mortgaged premises, due diligence requires reasonable steps to be taken in order to do so profitably."*

12.3 The Cunningham Group submitted that Mr. Jackson was in breach of his duty of managing the property with due diligence in a number of respects to which it will be necessary to turn in due course. In response, Counsel for Mr Jackson submitted that the decision of *Medforth v. Blake* did not represent the law in this jurisdiction. Insofar as other case law in relation to duties owed by a receiver was relied on by the Cunningham Group, such as in *Holohan v. Friends Provident* [1966] I.R. 1, it is pointed out that such authorities dealt mainly with the duties owed in realising a company's assets, rather than in managing its assets. Counsel for Mr Jackson further submitted that the law in this jurisdiction in relation to the duties of a receiver follows a separate line of English authorities such as *Downsview Nominees Ltd v. First City Corp Ltd* [1993] 1 A.C. 295, where it was held that a receiver/manager should not be subject to liability where he decides at his discretion to manage, and does manage in good faith with the object of preserving and realising the assets for the benefit of the debenture holder. Lord Templemen, at page 316 of his judgment in *Downsview,* cautioned against the extension of the scope of duty of care owed by a receiver manager to a company and that a receiver manager should not be subject to scrutiny with the benefit of hindsight, stating that:-

> "There will always be expert witnesses ready to testify with the benefit of hindsight that they would have acted differently and fared better."

12.4 The decision in *Downsview* was cited with approval in this Court in *Kinsella v. Somers* (Unreported, High Court, Budd J, 23rd November, 1999), when considering a receiver's duty to provide information to directors and shareholders of a company in receivership. In the same context, Budd J. also quoted with approval from the decision of Jenkins LJ in *Re B. Johnson & Co. (Builders)* Ltd [1955] 1 Ch. 634 where, at page 662, the following is stated:-

> "In determining whether a receiver and manager for the debenture holders of a company has broken any duty owed by him to the company, regard must be had to the fact that he is a receiver and manager - that is to say, a receiver, with ancillary powers of management - for the debenture holders, and not simply a person appointed to manage the company's affairs for the benefit of the company…
>
> *The duties of a receiver and manager for debenture holders are widely different from those of a manager of the company. He is under no obligation to carry on the company's business at the expense of the debenture holders. Therefore he commits no breach of duty to the company by refusing to do so, even thought his discontinuance of the business may be deterimental from the company's point of view…*
>
> *In a word, in the absence of fraud or mala fides, the company cannot complain of any act or omission of the receiver and manager, provided that he does nothing that he is not empowered to do, and omits nothing that he is enjoined to do by the terms of this appointment. If the company conceives that it has any claim against the receiver and manager for breach of some duty owed by him to the company, the issue is not whether the receiver and manager has done or omitted to do anything which it would be wrongful in a manager of a company to do or omit, but whether he has exceeded or abused or wrongfully omitted to use the special powers and discretions vested in him pursuant to the contract of loan constituted by the debenture for the special purpose of enabling the assets comprised in the debenture holders' security to be preserved and realised."*

12.5 That passage provides, it is said, authority for the proposition that a receiver/manager does not hold the same duties as a manager of a company and also appears to limit the scope of duty of a receiver to exclude liability for the management of a company's affairs provided the receiver stays within his terms of appointment and in the absence of *mala fides*. Counsel for Mr Jackson referred also to a passage from Keane on *Company Law* where, notwithstanding the decision in *Medforth v. Blake*, Keane J. draws a distinction between the duties of a receiver in the sale of company assets and his duties as a manager. The paragraph in question, from Keane, *Company Law* (4th edition, 2007) at paragraph 22.17, states the following:-

> "While a receiver's primary duty is to the debenture holder, he also owes certain duties to the company. Where he acts as manager, however, he will not be liable to the company provided that he acts in good faith. While the English decisions are not easy to reconcile and there is no Irish decision directly in point, the better view would

appear to be that he will not be liable for negligence alone in carrying on the business as a manager. The receiver is, however, liable to the company where he is negligent in the sale of the company's assets."

12.6 It is possible, therefore, to discern two strands in the United Kingdom authorities. Cases such as *Downsview* are part of a line of authority which suggests that a receiver is immune from liability for acts carried out in the management of an asset (as opposed to the sale of the same asset), where no *mala fides* can be established.

12.7 However, *Medforth v. Blake* represents a different view which suggests that while the primary obligation of a receiver is towards the debenture holder, the receiver may, subject to that obligation, have a remaining obligation to the company.

12.8 The Irish authorities, so far as they go, appear to accept the *Downsview* position with no Irish authority being cited which has considered the expanded view of the potential liability of a receiver identified in *Medforth v. Blake.*

12.9 The real question which I had to address was, therefore, as to whether *Medforth v. Blake* represents the law in this jurisdiction.

12.10 The underlying problem can be simply put. As was accepted in *Medforth v. Blake* the underlying obligation of a receiver is to the debenture holder who has appointed that receiver. The reason for this is obvious. A debt has already fallen due by the company in circumstances where the debenture holder has an entitlement, under the debenture, to appoint a receiver. The purpose of the appointment of the receiver is to arrange for the payment of the debt including any interest on it. The fact that one particular means of managing the business of the company might, from the company's point of view, be perceived to be more advantageous in the long run is, in those circumstances, not a relevant consideration for a receiver who is faced with the overriding entitlement of the debenture holder to be paid.

12.11 In the light of that overriding obligation to ensure that the debt is discharged, the line of authority exemplified by *Downsview* suggests that it is impossible to impose any obligation on the receiver in respect of the management of the property, when his primary obligation is to the debenture holder. In a sense it is said that the receiver cannot reasonably be expected to serve two masters. As the position of the debenture holder is superior (because the company has allowed itself to get into default) then the receiver must serve the interests of the debenture holder, and not the company. On that basis it is suggested that to attempt to impose some residual obligation on the receiver would be a recipe for difficulty, with the court being constantly faced with an attempt to strip out from the primary obligation of the receiver towards the debenture holder, some residual obligation in respect of the company.

12.12 *Medforth v. Blake* seeks to get round that difficulty by recognising that the primary duty of the receiver is to procure that the debt be paid, but suggests that, subject to that primary duty, there remains a duty on the receiver to manage the property with due diligence in order that the business of the company be carried on profitably.

12.13 The real question of principle is as to whether that residual obligation, identified in *Medforth v. Blake*, represents the law in this jurisdiction.

12.14 For reasons which I will shortly address I came to the view that even if *Medforth v. Blake* represented the law in this jurisdiction it would not avail the Cunningham Group for no sufficient case had been made out for negligence on the part of Mr. Jackson or, of equal importance, for any causal link between the alleged negligence and any consequences for the Cunningham Group. In those circumstances it seemed to me that it would be inappropriate to seek to make a definitive ruling on the applicability of *Medforth v. Blake* in this jurisdiction in circumstances where that question was not, in my view, decisive on the facts of the case. Any such view would, necessarily, be obiter. I would confine myself to indicating that I believe that there are at least arguable grounds for the proposition that *Medforth v. Blake* does represent the law in this jurisdiction. While understanding the practical difficulties which have led courts in the common law world to shy away from imposing a liability on receivers in such circumstances, (and in particular the difficulty in identifying the responsibility of a receiver to a company where the primary responsibility of that receiver is to the debenture holder), I am not convinced that a blanket immunity from liability on the part of receivers for the management of businesses placed in their hands is an appropriate response to the undoubted difficulties which arise. On the other hand, it is also necessary to take into account the fact that the legislature has decided to enact a specific provision providing for the liability of receivers in cases of sale at an undervalue without specifying any similar liability in cases of mismanagement. It is at least open to the view that in so doing the legislature impliedly declined to extend the potential liability of receivers beyond the category of sale at an undervalue traditionally established at common law. In those circumstances, I would prefer to leave a definitive decision on this point to a case where negligence and causation had been established. It, therefore, follows that it is appropriate to set out the position, so far as the claim against Mr. Jackson in relation to Malahide Road is concerned, in relation to the allegation of negligence against Mr. Jackson.

13. The Claim in Respect of Malahide Road

13.1 As pointed out earlier, negligence in relation to Malahide Road was argued in two ways on behalf of the Cunningham Group. Firstly, it was said that Mr. Jackson is vicariously liable for the acts of the professional team under whose management Malahide Road was conducted. Secondly, it was said that Mr. Jackson was himself negligent in failing to seek and take the advice of a so called insolvency Quantity Surveyor. I will turn to that alleged negligence in due course. However, before so doing it is appropriate that I set out firstly the facts and the manner in which the claim as against Mr. Jackson in respect of Malahide Road was put.

13.2 As briefly outlined earlier the core claims against Mr. Jackson arise out of the two main projects with which the Cunningham Group was concerned at the time when Mr. Jackson was appointed as receiver. Malahide Road was one of those projects. It is, therefore, necessary to say something about the state of play in respect of that project, as of the appointment of Mr. Jackson as receiver, before going on to outline the core allegations made against Mr. Jackson under this heading.

13.3 As summarised earlier, the project being conducted at Malahide Road in Dublin was a construction project on behalf of NABCo. The Cunningham Group did not, at least at the times relevant to the issues in these proceedings, have any direct interest in the project other than as builder on foot of a construction contract. In those circumstances the benefit of the contract was perceived to be the profits that could be earned by continuing with that construction project and obtaining from NABCo the payments agreed in respect of that construction. It has not been suggested that the contract had any separate benefit such that a profit could be realised in any other way such a sale.

13.4 It should also be recalled that some difficulties had been encountered in respect of the Malahide Road project prior to the receivership. The evidence did not fully explain precisely what had led to those difficulties but it is clear from the evidence that NABCo had come to insist that Mr. Cunningham not be directly involved in the construction project and in that context various professionals had been appointed to manage the ongoing project. That professional team was in place as of the date of the appointment of Mr. Jackson.

13.5 So far as the claim against Mr. Jackson under this heading is concerned it is asserted that Mr. Jackson was in breach of duty to the Cunningham Group in his capacity as receiver in the manner in which he managed the Malahide Road project. I have already addressed the legal question as to whether a receiver may owe a duty of care relating to management of the assets of a company in respect of whose assets he has been appointed receiver. For the reasons which I have set out it did not seem to me to be appropriate to reach a definite conclusion on that issue because I had become satisfied that, even if a duty of care was owed, there was no sufficient *prima facie* evidence of negligence on the part of Mr. Jackson or of a causal link between the alleged negligence and any specific identifiable consequence. It follows that the issues to which I must turn in relation to the claim against Mr. Jackson relating to Malahide Road are whether there was sufficient evidence of negligence and causation in relation to the claim of direct liability against Mr. Jackson and/or whether Mr. Jackson was vicariously liable for any negligence or wrongdoing on the part of those charged directly with the management of the Malahide Road site.

13.6 The analysis which follows is, of course, predicated on the assumption that there is a potential liability on the part of a receiver/manager to a company over whose assets such receiver has been appointed. As there is no crossover element between the claim made under this heading as against Mr. Jackson and any of the claims made as against First Active it is clear that I should determine any issues of fact in respect of this aspect of the case on the balance of probabilities. With that in mind I turn first to the facts. There is ample evidence that as of the time of the receivership it was anticipated by the professional team then currently involved in the management of the Malahide Road project that it would generate a significant profit. Mr. Jackson continued that professional team in place. The legal characterisation of that continuance is a matter to which I will return. It should be said that, prior to the appointment of Mr. Jackson, Mr. Cunningham had already been complaining about that professional team and had indicated that the management of the project was a long way short of satisfactory. It is equally clear that Mr. Cunningham made similar complaints to Mr. Jackson after his appointment.

13.7 There is equally no doubt but that there was some element of fraud ultimately established against members of the professional team which ultimately led to the discharge of some of those members. It is equally clear that the project turned out to be significantly loss making rather than generating the profit that had been anticipated at the time of Mr. Jackson's appointment. It is said that that shortfall (being the difference between the anticipated profit and the actual loss) was attributable to the mismanagement of the project by Mr. Jackson or those whom he appointed or continued in office. As pointed out earlier the case against Mr. Jackson relating to Malahide Road was put on two bases. Firstly, it is said that Mr. Jackson was personally negligent. Secondly, it is said that Mr. Jackson was vicariously liable.

13.8 So far as the claim that Mr. Jackson was personally liable is concerned, a most significant problem emerged concerning the question of causation and stemmed from the expert evidence (or the lack of it) in this regard tendered on behalf of the Cunningham Group including, to a large extent, the absence of relevant expert evidence in a very important area. In this context it is appropriate, at this stage, to comment both generally and specifically on the expert evidence tendered on behalf of the Cunningham Group. The comments made now are equally applicable to the other expert witnesses to whom reference will be made in the context of other aspects of the claim.

13.9 As is abundantly clear from the series of previous rulings set out in the third schedule to this judgment these proceedings have been under case management for a very prolonged period of time and it would have been very clear from at least the early or middle part of 2007 that the proceedings were nearing a stage where they were likely to be listed for hearing. Indeed, as has already been noted, case C was almost ready for trial when the fraud claim was introduced.

13.10 It is against that background that the timing at which the various experts appear to have been instructed needs to be judged. The hearing was due to commence in late April. It would appear that none of the experts instructed were even approached before the beginning of March or the very end of February at the earliest. It is clear, therefore, that the experts were given a very short period of time to prepare their expert reports. Many of the shortcomings in those reports can, in my view, be attributed to that timescale. It was for that reason that I indicated earlier in the course of this judgment that it did not seem to me to be appropriate to blame the experts themselves. Rather the blame must attach to the Cunningham Group and its advisers who, for whatever reason, did not seem to have addressed themselves to the question of instructing experts until an extraordinary late stage in the proceedings. It was neither proper nor appropriate for me to enquire into why that might be so but it is undoubtedly a fact and a fact which significantly impacted on the expert reports produced.

13.11 Because of the difficulty concerning the expert evidence relating to causation which I have identified, I felt it appropriate to deal with that question first. The relevant expert so far as Malahide Road is concerned, was Mr. Nadim Ailyan who is undoubtedly a qualified expert in the conduct of insolvency proceedings in the United Kingdom. The oral testimony given was to the effect that Mr. Jackson, as a receiver, should have appointed what was called an insolvency Quantity Surveyor to advise him on the project. When it was put to the witness that there was no separate division of the profession known as an insolvency Q.S. in Ireland the witness indicated that, nonetheless, a Q.S., independent of the existing professional team, and with some experience of insolvency matters should be appointed. The core allegation of negligence was, therefore, that such a person should have been appointed and was not appointed.

13.12 However, before going on to consider that allegation it is necessary to note two matters. Firstly even a careful reading of the witness statement filed on behalf of Mr. Ailyan would not, in my view, have given either Mr. Jackson or indeed the court any significant hint that the central trust of his evidence was going to be to the effect that Mr. Jackson was negligent by reason of failing to appoint an Insolvency Q.S. or person with like qualifications. There is a brief mention of the fact that appropriate experts should have been appointed and a very brief mention of a Q.S. However it does have to be said that the witness statement concerned did not, by a very large margin, in my view give a fair account of the thrust or crux of the evidence that was ultimately tendered in court. Likewise there was no mention in the opening of the fact that the crux of Mr. Ailyan's evidence would be what it turned out to be nor was there any explanation as to why the core accusation against Mr. Jackson in relation to Malahide Road should not have been set out, even in general terms, in either Mr. Ailyan's witness statement or in the opening. On that basis counsel for Mr. Jackson objected to the evidence. In my view that objection was well founded. I have had previous occasion to address the circumstances in which it is appropriate to allow a revised witness statement to be put in and the fact that an over rigid approach should not be taken to confining witnesses to what is set out in their witness statement (see *Moorview Development & Ors v. First Active Plc & Ors* [2008] IEHC 274). However, the overriding principle must be that unless there is a good reason, such as a development in the case which could not reasonably have been anticipated or the like, at least the broad drift of a witness's evidence should be disclosed in his witness statement. Without that there is no point in the case management process.

13.13 No person reading the witness statement with which I am now concerned could have reasonably anticipated the oral evidence which was subsequently given. For that reason alone I would have been satisfied to disregard that element of the evidence. However lest I be wrong in that view it seems to me that I should go on to consider whether a case would have been made out on the balance of probabilities against Mr. Jackson on the basis of that evidence being admissible.

13.14 Two questions arise. The first is as to whether the Cunningham Group had established that Mr. Jackson was negligent. The second was whether the Cunningham Group had established any causal link between the negligence asserted and any definable loss. I propose dealing with the second question first.

13.15 In was conceded on behalf of the Cunningham Group that a very significant difficulty arose in relation to establishing any specific claim for damages under this heading. I will return shortly to Mr. Ailyan's evidence in relation to causation. Even, for the moment, accepting that evidence as being evidence, the witness was unable to even offer a tentative view as to what consequences could be said to have flown from the failure to appoint an Insolvency Q.S. Two problems arose. In order, on the assumption that Mr. Jackson was negligent, for there to be a causal link with any identifiable loss then it would be necessary to define with some precision three matters viz:-

> (a) At precisely what time was it negligent for Mr. Jackson not to have appointed an Insolvency Q.S. or like expert (there were a variety of points in the sequence canvassed as to when this might be said to be so);
>
> (b) How soon would it have been, after the appointment of an Insolvency Q.S. or like expert, that it could be said that what would have happened would have been different than what actually happened; and
>
> (c) What the financial consequences of any such difference would have been.

13.16 The problem for the Cunningham Group was that Mr. Ailyan expressly disavowed any expertise in being able to tell precisely what an Insolvency Q.S. would have done and how that might have changed things. Mr. Ailyan confined himself to expressing a view that, given his experience of insolvencies and given what seemed to be the very large scale of the difference between the original projections and the ultimate outcome, he thought it was likely that at least some of the shortfall could have been avoided had an insolvency Q.S. been appointed.

13.17 On any view, therefore, it would not have been possible, on that evidence, for me to reach a conclusion as to damages. Accepting that proposition counsel for the Cunningham Group suggested that it would be appropriate that I now find negligence and direct a further hearing as to quantum.

13.18 In that context it seemed to me that the first matter that needed to be considered was the question of causation. The only evidence on causation was the statement of Mr. Ailyan to the effect that in his view, and for the reasons which I have just outlined, it was likely that the appointment of an insolvency Q.S. would have made some difference. It did not seem to me that that was evidence at all in any real sense. There are doubtless many occasions when a professional in one field can engage in informed speculation as to what an expert in another field might be likely to say. An experienced member of the Inner Bar might well be able to offer a view as to the likely evidence that it might be possible to obtain from an expert in a field with which that Senior Counsel was familiar. An experienced medical negligence practitioner, for example, might well be able to offer a view that there was a very good chance (or a probability) that a relevant medical expert would say that there was negligence in the particular circumstances of a case. It is not to denigrate that view to say that it nonetheless remains speculation, if informed speculation and speculation which might reasonably lead someone to be quite hopeful that the relevant expert report when it arrived would be broadly in line with that postulated. Likewise an experienced commercial Silk might well be able to offer a similar view as to whether an accountant might be in a position to give expert evidence of a particular type. But again, however informed, such a view remains speculation. Mr. Ailyan did not know of his own knowledge what would have happened had an Insolvency Q.S. been employed. As he agreed in the course of evidence there are a whole range of reasons why ultimate outturn may not meet projections. A by no means exhaustive list of the possible reasons for such an eventuality might include any or all of the following:-

> (a) the original estimates were unduly optimistic;
>
> (b) events had taken place prior to the appointment of the receiver (and thus prior to any hypothetical appointment of an Insolvency Q.S.) which had not been reflected in an adjustment in the projections but which nonetheless had significantly impaired the prospects for the project;
>
> (c) the likely length of time it would have taken an insolvency Q.S. to obtain sufficient information to realise that things were going wrong and to recommend appropriate remedial action;
>
> (d) arising out of (c) whether the fraud that in fact occur or any other causes that might be identified for the shortfall would, in fact, have been discovered at all by in the insolvency Q.S. or at least discovered in such time as would have made it probable that they could, at least in part, have been reversed;
>
> (e) An issue identified by Mr. Ailyan himself, being that a change in personnel resultant on a receivership or other insolvency, can give rise to losses arising out of the new personnel blaming the old personnel for anything that goes wrong in circumstances where it is difficult to fix the new personnel with responsibility. These and many other examples are simply issues which would need to have been addressed by an insolvency Q.S. in evidence before any view could be taken as to whether there was full explanation for any shortfall ultimately achieved.

13.19 To take but one important example of the consequences of the absence of any evidence in relation to the above matters, it is necessary only to consider the fraud. There is no doubt that a fraud took place. The evidence for such fraud comes from the documents of Mr. Jackson which have been admitted on the *Bula/Fyffes* basis. On that basis the fraud related to a sum of less than €100,000 and was discovered in the latter part of 2003. There are suggestions in certain documentation that there may have been a fraud to a larger scale. However, there was no evidence from which I could have been satisfied on the balance of probabilities that a fraud of any larger scale than that conceded on behalf of Mr. Jackson had occurred. But what is of even greater importance, however, is that there is no evidence at this point from which it could be inferred, on the balance of probabilities, that the appointment of an insolvency Q.S. or similar professional would have prevented the fraud taking place. In order for there to be a causal link between the absence of appointment of such a professional and the consequences of the fraud (whatever they may be), it would be necessary for there to be some evidence to suggest that an insolvency Q.S. would have identified matters prior to the fraud in such a way as would have been likely to have prevented the fraud occurring. There is, quite frankly, no evidence of any sort from which such a conclusion could be reached.

13.20 I am satisfied that the evidence given by Mr. Ailyan in relation to causation is no more than speculation, albeit informed speculation. I was not satisfied, therefore, that there was any evidence from which I could conclude that there had been a causal link established to any particular category of loss, or loss arising in any particular circumstances, let alone any particular sum that might be attributed to such category or identified type of loss.

13.21 In those circumstances it did not seem to me that it would have been appropriate, even had I been satisfied that negligence had been established, to accede to the application made on behalf of the Cunningham Group for a further trial in respect of quantum. The truth is that a further trial would not only have been in respect of quantum but also in respect of causation. I am mindful of the fact that there may often be circumstances where it is appropriate to separate out issues concerning the precise calculation of damages from issues concerning liability and causation. It may well be that in an appropriate case it may even make sense to direct such a separation, notwithstanding the fact that the trial concerned commenced as a unitary trial. For example the question of calculation of loss may be complex and may be highly dependent on the precise basis on which a defendant may be found liable, and the precise basis on which a causal link between that liability and particular categories of loss may be established. Given that the parties may not know in advance as to which of a whole range of scenarios under those two headings may ultimately be determined on by the court, it will, not infrequently, be the case that the parties may not have conducted their calculations as to loss on each and every hypothetical possibility that might arise. In those circumstances there may well be sense in deferring issues concerning the calculation of loss even though it might originally have been intended that such a matter be dealt with in the course of a single unitary trial.

13.22 In passing I should note that a minor example of such an eventuality (which was in fact capable of being dealt with within the trial) occurred in the course of the evidence of the expert valuer called on behalf of the Cunningham Group, Mr. Phelan, to whose evidence it will be necessary to return when dealing with the Bailey Point aspect of the claim against First Active and Mr. Jackson. As a result of certain concessions made by Mr. Phelan when under cross examination on behalf of First Active, he sought to introduce revised calculations at a resumed hearing. I acceded to that application notwithstanding the fact that those revised calculations had, for obvious reasons, not formed part of his original witness statement. However, it is obvious that where a change in the proper basis of conducting calculations is mandated by reason of either the findings of the court, or matters which necessarily have to be conceded in the course of the hearing, then a witness who is concerned with the relevant calculation will need to revise his calculations on the basis of new assumptions. Sometimes, in a straightforward case, the witness can do that while in the witness box. Sometimes, as in Mr. Phelan's case, it may be reasonable to afford the witness a short period of time, but still within the same hearing, to produce revised calculations in the light of the new circumstances. Sometimes, however, it may well be that the matter is so complex that the best course of action would be to strip out the question of calculation from the main hearing and leave it over to a subsequent hearing, where the parameters by reference to which the calculation is to be done would be established as a result of the courts' findings on liability and causation at the main hearing.

13.23 However, while there should be no hard and fast rule as to what the proper course of action to be adopted in any given case should be, nonetheless it seems to me that, ordinarily, there is at least an obligation on a plaintiff to satisfy the court both on liability and causation so as to enable the court to identify the precise basis on which a calculation of damages is to be done, before it would be appropriate to defer the question of calculation to a further hearing. It should also be noted that there is a significant difference between a case where there emerges in the course of the hearing a need to recalculate matters because of developments in the course of the hearing, on the one hand, or a case, such as this, where the plaintiff simply did not put up any evidence as to calculation in the first place. A court would have much greater sympathy with a plaintiff who had produced complex calculations on one basis which calculations turned out to be of no value because underlying assumptions had to be changed as a result of the evidence. Much less sympathy would apply in the case of a plaintiff who simply failed to address the need to call evidence of a particular type in the first place.

13.24 In all the circumstances I was not satisfied that this would have been an appropriate case to allow the Cunningham Group a second bite of the cherry. No real explanation was given as to why evidence from a competent professional was not available other than that the need for such evidence was only identified when the report of Mr. Ailyan became available and when it became clear that Mr. Ailyan could not address the relevant issues himself. True it is to say that that occurred very late in the day. However, the reason why it occurred very late in the day is that the Cunningham Group only sought to procure a report from a competent insolvency expert at a very late stage and, thus it is entirely the Cunningham Group's own fault that it only learned at a late stage that it might need evidence from an insolvency Q.S. or like expert. That does not, in my view, provide any adequate explanation for the absence of evidence of causation or *prima facie* of calculation. In those circumstances even had I been satisfied that Mr. Jackson was negligent, I would not have been prepared to allow a further hearing which would in substance have been a hearing not only in relation to the calculation of damages but also, in truth, a hearing in relation to causation. In those circumstances even had I been satisfied that Mr. Jackson was guilty of negligence, it would not have availed the Cunningham Group and their claim under that heading so far as Malahide Road in concerned would also have failed.

13.25 Lest I be wrong in the view which I came to concerning the absence of any evidence sufficient to establish a claim on the balance of probabilities in respect of causation, I also considered whether the Cunningham Group had established a claim in negligence against Mr. Jackson arising out of the absence of an appointment of an insolvency Q.S..

13.26 It is important, in this context, to recall that there was a significant professional team already in place in respect of the Malahide Road project as of the appointment of Mr. Jackson as receiver. Because of the difficulties which had already been encountered as and between First Active and the Cunningham Group in relation to Malahide Road, the controls which appeared to be in place were significantly more elaborate than would have been expected in circumstances where a contractor was engaged in a significant development project, but was in order in its affairs with its bankers. Not only had the Cunningham Group in place the usual professional team that one would expect to find in a significant commercial development but also First Active had procured that there be additional controls in place to enable it to formulate a view as to whether it was reasonable to advance monies on foot of the Malahide Road facilities, having regard to an assessment of work in progress. This was not, therefore, a situation where what one might describe as the ordinary layer of professional control was all that was in place.

13.27 I agree with the view expressed by Mr. Ailyan that a receiver might well have to exercise some caution in accepting, without adequate scrutiny, the views communicated to him by a professional team who had been in place as representatives of the company which had gone into receivership and had, therefore, been themselves involved in the project over which the receiver was now required to exercise some degree of management control. It is true, as Mr. Ailyan pointed out, that persons who were involved in the affairs of a company which has gotten into financial difficulties, may be self serving in the advice which they give. There might, therefore, at the level of principle, be an arguable case in negligence against a receiver who simply took over a management and professional team and imposed no level of scrutiny as to whether the information coming from that management and professional team was correct.

13.28 However, here Mr. Jackson had, in fact, the benefit of an additional layer of scrutiny. In my view he was entitled to take the view that he did not need yet a further independent assessor in the form of a Q.S. with insolvency experience. It might be that a receiver, in a position such as Mr. Jackson found himself in relation to Malahide Road, might chose to bring in yet another expert. However, I am not satisfied that a failure to bring in such an expert in the context of the level of scrutiny which was, in fact, in existence, could, on any view, amount to negligence. It must be recalled that the cost of managing the assets of a company in

receivership will fall, in the ordinary way, to be met by the company. Therefore, an over specification of the number of experts who may be employed gives rise to a real risk that the position of the company will be impaired, rather than enhanced. A receiver has, in my view, to exercise a judgment as to whether additional expenditure is justified in such circumstances. Having regard to the level of scrutiny in place and the relative independence of some of those concerned, I am satisfied that the decision taken by Mr. Jackson not to engage any further experts was well within the bounds of a reasonable exercise of judgment in relation to such matters.

13.29 As already pointed out I was not satisfied that the Cunningham Group had established a causal link between a failure to appoint an insolvency Q.S. and any particular category of damages. I have also set out the reasons why I was not satisfied to allow the Cunningham Group to reopen the question of causation and damages. Even if I had been satisfied that it was, in principle, correct to allow the Cunningham Group to reopen those issues, or if I had come to a different conclusion in respect of causation, I would, nonetheless, have dismissed the Cunningham Group's claim insofar as it related to an allegation of direct negligence on the part of Mr. Jackson on the grounds that no such negligence had been established.

13.30 It is then necessary to turn to the contention made on behalf of the Cunningham Group that Mr. Jackson is vicariously liable for the acts of the professional team employed at Malahide Road. There is no doubt but that two different situations can pertain in relation to persons who continue to act on behalf of a company after the company has been placed in receivership. In one circumstance the persons continue to have their direct contractual relationship with the company, even though the receiver may be able to direct how the company conducts its business. In those circumstances the persons are not, in any meaningful sense, agents or employees of the receiver. Rather they remain, as they were before the receivership, agents or employees of the company which happens, as a matter of practice, to be now under the direction, in large measure (depending, of course, on the extent of the assets over which the receiver has been appointed and his powers under the debenture and as a matter of law) under the direction of the receiver rather than the Board of Directors.

13.31 It is also clear that, in other circumstances, persons, whether becoming involved in the affairs of the company for the first time or, being continued in their involvement with the company after the receivership, can be regarded as being directly employed by the receiver.

13.32 Which may be found to be the proper characterisation in the circumstances of a particular case is a matter of fact.

13.33 It is important to note that the only evidence relevant to this question of fact is to be found in documentation emanating from Mr. Jackson which was admitted on the *Bula/Fyffes* basis. In my view considering that documentation as a whole, I am satisfied on the balance of probabilities that the receiver did not take over, in a direct sense, the contractual relationships previously had by the professional team with the Cunningham Group. While attention was drawn to one or two passages in individual reports emanating from or relating to the receiver which might, on one view, be interpreted as implying that the receiver had reemployed such persons directly himself, it was obvious that Mr. Jackson would have to make a decision as to whether to carry on with Malahide Road (which was highly likely in all the circumstances), and as to the extent to which the existing professionals would continue to operate. The fact that a decision of that type may be colloquially described in a manner that does not have regard to the precise legal distinction between, on the one hand, the receiver taking a decision not to cause the company to terminate its contract with the professionals concerned or, on the other hand, the receiver deciding to take on the professionals as parties contracting directly with himself, does not seem to me to be a matter on which great reliance could properly be placed. Having regard to the totality of the relevant documentation as was opened in court, I was satisfied on the balance of probabilities that the professional team concerned remained as agents or employees of the Cunningham Group rather than becoming engaged directly by Mr. Jackson in his capacity as receiver. On that basis it did not seem to me that any case had been made out for the suggestion that Mr. Jackson was vicariously liable for the actions of any such persons.

13.34 In any event, much of the difficulty concerning the establishment of causation in respect of any losses attributable to the actions of such professional team (as I have already analysed in relation to the claim against Mr. Jackson for negligence in his own right) also apply under this heading. The only exception would appear to be the fraud claim. If Mr. Jackson were vicariously liable for the actions of CSS then it follows that he would, equally, be vicariously liable for the admitted amount of the fraud perpetrated by CSS. So far as the remainder of the losses are concerned there was not, for the reasons which I have sought to identify, any evidence from which it would have been possible to conclude that any particular damage or category of damage (wholly apart from the quantification of any such damage) was attributable to the negligence of any member of the professional team. In those circumstances, even if Mr. Jackson were vicariously liable for the actions of the professional team, I would not have been satisfied that consequences beyond the fraud claim had been shown to flow from such vicarious liability, and the claim under this heading would, in any event, for that reason, have been confined to the admitted amount of the fraud claim.

13.35 I now turn to the claim in respect of Bailey Point which, as I have pointed out, refers both to the claim as against First Active and against Mr. Jackson, and which derived from the allegation that Bailey Point was sold at an undervalue.

14. The Sale of Bailey Point

14.1 So far as Bailey Point is concerned the project, as previously outlined, involved both a residential and a retail element. That project had run into difficulties prior to the appointment of Mr. Jackson as receiver. Little progress in construction had taken place for some time prior to that time. Furthermore, significant difficulties had arisen in relation to the title of the Cunningham Group to an important aspect of the property in question.

14.2 As this title issue has some relevance to subsequent events it is necessary to set it out in some more detail than might otherwise be the case. The site which had been assembled for the Bailey Point project had, on its immediate western boundary, a hotel known as the Burrenmount Hotel. The Bailey Point project itself had a car park planned as an integral part of the development which was perceived to be essential to the sale and marketing of both the residential and retail elements.

14.3 Indeed it is worth noting in passing that the evidence established that all parties agreed that there are somewhat different considerations from a cash flow point of view in the development of an apartment complex as compared with a housing estate complex. It is, in practical terms, very difficult to sell on apartments until the entire development is near completion (subject only, perhaps, to the fit out of some of the apartments). While sales can be put in place at any time, either off the plans or while the apartment complex is under construction, such sales cannot complete until such time as the complex as a whole is nearing a finished stage. This is not the case in respect of the development of housing estates where it is often possible to complete the sale of some houses provided that the roadways leading to those houses are finished and even though further houses planned for the development are either in the course of construction or, indeed, have not even had construction commenced. The consequences on cash flow for the development of an apartment complex are clear. A builder engaged in the construction of a housing estate has a reasonable expectation that houses first completed can be sold and the money banked long before the entire development is finished. Thus the cash flow generated by early sales can assist in the construction of later units thus significantly reduce the overall need for borrowing

in the course of the project. Where, as here, the apartment complex was, in effect, a single building it seems to have been accepted by all concerned that there would be no meaningful cash flow generated in respect of Bailey Point until it was all complete.

14.4 It is in that context that the car park was also relevant in that it was clear that sales were unlikely to be capable of being completed in both the residential and retail sides of the development until the car park was available or, at the very least, a clear date for the car park becoming available was known and commitments in that regard could be given.

14.5 The principal title problem which arose (there were others but the evidence does not suggest that they were particularly serious) concerned the means of entry into the car park which, it would appear, used some land which was part of the Burrenmount Hotel site.

14.6 It should be emphasised that it is unlikely that any sales of property within the Bailey Point could have been finalised without dealing with the title problem. It is inevitable that solicitors acting for purchasers, whether of the residential or retail sections (and in the latter case it seems to have been contemplated that leasehold interests would have been involved) would require to be satisfied as to the title of any material part of the development. Clearly the entrance to the car park was such a material part and it is inconceivable that any sales of either residential or retail elements of the development could have been completed unless and until the title problem had been solved.

14.7 It has to be said that the evidence tendered on behalf of the Cunningham Group in respect of precisely of what happened in relation to title to that entry was extremely confusing and frequently contradictory. Insofar as there is any clarity in the evidence it would appear that an initial approach was made to the owner of the Burrenmount Hotel by Mr. Frank Cunningham a brother of Mr. Cunningham who was heavily involved in the Bailey Point construction project. It would appear, certainly on the evidence currently before the court, that some form of verbal agreement may have been entered into by Mr. Frank Cunningham with the owner of the Burrenmount Hotel (since deceased). That agreement would appear to have been for the purchase of the Burrenmount site which may have been intended to have been incorporated in some way into the Bailey Point development by the construction of additional units on it. Be that as it may it would appear that a further verbal agreement took place during the course of the construction of the Bailey Point site itself which permitted the necessary portion of the Burrenmount property to be used for the purposes of an entry to the car park. At differing times in the evidence that agreement was described as being one simply to allow access during building or one which might have provided title to a more permanent form of access. Unfortunately the former owner of the Burrenmount site died in the course of the timescale with which I am concerned and it would appear that, in the immediate run up to the receivership, Mr. Frank Cunningham, with the assistance of Mr. Elio Malocco, attempted to enter into a further agreement with the deceased's widow for the purchase of the Burrenmount site. For completeness it should be noted that the minutes of certain crucial meetings of the Cunningham Group make it clear that Mr. Cunningham informed the remaining members of the Board that Mr. Frank Cunningham was now the owner of the Burrenmount site and that they would have to deal with him. Subsequently Mr. Frank Cunningham issued proceedings, in his own name, seeking specific performance of what was said to be an agreement for the purchase of the Burrenmount property. It should also be noted that, at various stages, attempts were made by senior officials within the Cunningham Group to come to an arrangement with the owners of the Burrenmount property concerning the entrance. At varying times optimism was expressed that it might be possible to do such a deal at a relatively modest sum of money but in the end no such deal was actually concluded.

That was the situation which faced the receiver on his appointment.

14.8 The allegation against Mr. Jackson under this heading concerns the manner in which he dealt with the sale of Bailey Point. What Mr. Jackson sought to do was to invite purchasers to take over the Bailey Point project as it stood so that such purchaser would complete and sell on the development. As indicated earlier Mr. Jackson entered into arrangements with Mr. Duffy for such a sale after a sales process to which it will be necessary to refer in due course. However no final contractual arrangements were ultimately entered into for reasons for which it will be necessary to explore. Ultimately First Active went into possession as mortgagee (although there is a dispute concerning the circumstances surrounding that possession to which it will be necessary to refer in due course). The ultimate sale was a contract between First Active and Mr. Duffy which, it is said, was at an under value. The case as against the receiver and First Active under this heading is therefore connected. It is said that First Active sold the property at an under value. It is said that the way in which Mr. Jackson handled the original dealings with Mr. Duffy impaired the position of First Active and thus contributed to (or on one view caused) the sale at an undervalue. Under this heading it seems, therefore, that it is logical to include the Cunningham Group's claim as against First Active for the sale of Bailey Point at an undervalue and to deal with that issue first. In the light of the resolution of that question I would propose to go on to consider the case against Mr. Jackson. I propose to turn first, however, to the case in respect of Malahide Road.

14.9 As pointed out earlier the sale of an asset at an undervalue is undoubtedly, in principle, a matter that can be fixed in liability against a receiver. It is also, in principle, a matter that can give rise to a liability on the part of a mortgagee in possession who sells as such.

14.10 However, the factual starting point for any contention under this heading had to be that there was evidence so as to satisfy me (either on a *prima facie* case basis as against First Active or on the balance of probabilities against Mr. Jackson) that the ultimate sale of Bailey Point to Mr. Duffy was, in fact, at an undervalue. The evidence put forward on behalf of the Cunningham Group to that effect came, as I have indicated, from Mr. Phelan, who is undoubtedly an experienced auctioneer and valuer. However, it became manifestly clear in the course of the hearing before me that Mr. Phelan had only been asked to value Bailey Point on the basis of there being a clear title to Bailey Point and there being no other difficulties connected with its sale. It was clear that Mr. Phelan had not been briefed in respect of any matters such as title or other difficulties connected with the sale which could undoubtedly have impacted upon the value which would have been likely to have been achieved for the property.

14.11 It should be recalled that Mr. Jackson, as receiver, had reached an agreement in principle (although short of a binding contract) with Mr. Duffy at a relatively early stage of the receivership. Thereafter difficulties ensued, not least because of proceedings maintained by Mr. Cunningham through the auspices of Porterridge (to which it will be necessary to refer in due course) which cast doubt on the ability of the receiver to sell the property to Mr. Duffy. Those proceedings ultimately resulted in a decision of the Supreme Court (see *Salthill Properties Ltd v. Porterridge Trading Ltd* [2006] IESC 35) which determined that the entitlements of Porterridge as lessee of the commercial portion of the Bailey Point development were behind those of First Active in priority. Thereafter First Active went into possession as a mortgagee in possession and sold the property itself.

14.12 I shall start by setting out the rather unusual sequence of events which surrounded the evidence given by Mr. Phelan as to the value of Bailey Point at the time when it was ultimately sold by First Active to Mr. Duffy. There would not appear to have been any difference between the relevant parties but that the normal approach to valuing a party constructed development such as Bailey Point was to consider the ultimate value of the development when completed (i.e. the likely sale price that could be achieved for the

various retail and residential units) and to deduct from that the cost of completing the development, together with other incidental costs such as stamp duty, interest costs and the like, and also to make some reasonable provision for a profit on the part of the purchaser. That seems to be an entirely sensible way to approach the valuation of a property such as Bailey Point as of the time of the receivership. It is precisely the way that a reasonable purchaser would be likely to look at the property. Such a purchaser would calculate what he would need to spend to purchase the property together with any costs of purchase. The purchaser would then look at the likely costs of completing the construction, together with interest costs that would apply over the likely time span of the project, and would finally have regard to the necessity to make some reasonable return on his investment having regard to the likely price that could be obtained for the various units at the end of the day.

14.13 Mr. Phelan carried out such an exercise both in relation to the value of the property as of the time of the original agreement in principle for sale between Mr. Jackson as receiver and Mr. Duffy, and also as of the time of the sale by First Active as mortgagee in possession, again to Mr. Duffy. However, Mr. Phelan had to accept in the course of cross examination that a number of matters were omitted from his calculation. As a result of those concessions Mr. Phelan subsequently produced a second set of calculations.

14.14 The following Table sets out the second set of calculations.

TABLE

RE: BAILEY POINT

Site Costs €30,000,000.00

Acquisition Costs

(a) Stamp Duty @ 9% €2,700,000

(b) Legal Fees @ 1% €300,000

(c) Finance for 12 months @ 4.25%

Site cost (a) and (b) €1,402,500.00 €4,132,500.00

€34,132,500.00

Development Cost €8,000,000.00

Finance on Development cost

For 6 months on half-sum basis

@ 4.25% €85,000.00

Developers profit €4,000,000.00 €12,085,000.00

Value of Completed Development €46,217,500.00

14.15 While that Table does take on board a number of the concessions originally made in cross examination, it is also fair to say that Mr. Phelan has, in that Table, decreased, for no apparent reason, the level of profit which he attributes to the developer (from €5m to €4m). It did not seem to me that Mr. Phelan was able to give any real explanation for that reduction when he was subsequently re-cross examined in relation to the figures produced in that Table. He had earlier confirmed that the profit which he considered appropriate was as found in his earlier calculations, and it is very difficult to see how he could legitimately reduce his view as to the profit which a purchaser might expect. In the same context Mr. Phelan had suggested during examination in chief that a developer might expect a profit of 15% on such a project. The profit specified in the Table is less than 10%. Mr. Phelan was not able to give any explanation for the discrepancy. It should be noted that Mr. Phelan was asked to produce a version of the Table which assumed that a stamp duty scheme could be put in place which would have allowed a share sale to take place thus, potentially, reducing the rate of stamp duty and consequentially increasing the value of the site. The only way in which a share sale could have taken place would have been with the total co-operation of Mr. Cunningham who was the relevant shareholder. Having regard to the trench warfare that was in place between Mr. Cunningham and all other parties at the relevant time, it seems to me that the idea that a share sale could realistically have been put in place was wholly fanciful. First Active as mortgagee in possession (and indeed Mr. Jackson as receiver before them) only had an entitlement to sell the interest of the Cunningham Group itself in the property concerned. Those parties could not, of themselves, give effect to a share sale. It seems to me, therefore, that there was no basis for suggesting that any likely reasonable purchaser would have approached the matter on there being any realistic prospect of giving effect to any saving in stamp duty by means of a share sale scheme.

14.16 Likewise I should also note in passing that Mr. Phelan also produced another version of his calculation which had regard to certain figures that had been included in a report from a Mr. John Mulcahy, the auctioneer and valuer intended to be called on behalf of the defendants should that eventuality arise. It seems to me that this later calculation simply involved indicating that while Mr. Phelan and Mr. Mulcahy broadly agreed on the overall end value of the project they did, to some extent, disagree on some of the component parts, but in circumstances where the variation in respect of the component parts went in both directions so that the total bottom line was not significantly different. Mr. Phelan's alternative calculation simply took the best case scenario from the point of the Cunningham Group by cherry picking the higher figure in respect of each component part from his and Mr. Mulcahy's figures. It would, of course, equally have been the case that a much more pessimistic view could have been taken by cherry picking the least advantageous figure from both. It did not seem to me that that exercise was, in truth, of any value. I did not really understand Mr. Phelan to suggest that it represented a proper estimate of the value of Bailey Point in any event.

14.17 All in all, therefore, Mr. Phelan's revised value as set out in the Table needed, in my view, even on a *prima facie* case basis, to be reduced to reflect a higher level of profit for the developer on the basis that no real explanation had been given as to why the anticipated profit of a developer was reduced between his earlier calculations and those set out in the Table.

14.18 However, in addition, Mr. Phelan accepted under cross examination that a range of factors connected with the property which stemmed from a campaign waged by Mr. Cunningham and persons acting on his behalf, together with concerns about title to the car park to which I have already referred, would undoubtedly have had an effect on any purchaser. Mr. Phelan made it quite clear that his valuation was based on an unproblematic sale of a property with a clean title. On any view of the evidence, and even taking the case, so far as First Active is concerned, at the high watermark of the Cunningham Group's contentions, there were certainly material matters relating to title and the fact that there had been very significant acrimony indeed over the property from the time of the appointment of the receiver, that would be bound to impact on any sale. Mr. Phelan was unable to give any view as to the extent to which those matters might have affected the likely sale price. The reason for this was that he had not been briefed in respect of those matters and, in the main, such matters were only brought to his attention in the course of cross examination. He did, however, accept that, as a matter of fact, many of those factors would have some effect on the price, but was unable to estimate the amount.

14.19 In those circumstances there just is no evidence as to what the true sale price of the property should have been. Even Mr. Phelan's Table needs, for the reasons which I have already analysed, to be discounted to reflect the profit issue which I have already addressed. It needs to be further discounted by an unspecified amount to reflect the title and difficulty of sale problems which Mr. Phelan himself accepted would have affected the value. It is unnecessary to enter into a detailed analysis of those problems and the extent to which they might have affected the sale value because there is simply no evidence put forward on behalf of the Cunningham Group as to what effect it ought properly be conceded does flow from those problems. If it were a case where Mr. Phelan had suggested a 5% reduction in price and the defendants had gone into evidence suggesting a 20% reduction in price, then it might well be necessary to conduct a detailed analysis of the various factors that might lead one to favour one or other of those views. However, given that Mr. Phelan was not even in a position to offer a tentative view as to the appropriate reduction, it follows that there was just no evidence as to what the proper sale price would have been. The actual sale price to Mr. Duffy in 2005 was €25.74m so that the "shortfall", on Mr. Phelan's undiscounted figures, was €4.26m or just under one sixth. It is by no means unrealistic to regard the factors identified as being sufficient to explain such a gap. In any event there was, as I have pointed out, just no evidence to suggest that those factors were insufficient to explain that gap.

14.20 There is, therefore, no factual basis on the evidence for taking the view that Bailey Point was sold at an undervalue. In passing it should be noted that it was clear on the evidence that subsequent to the purchase of the residential portion by Mr. Duffy (it will be recalled that the sale of the commercial units has not yet completed), Mr. Duffy was required, in practice, to alter his plans to get round the problem that occurred by reason of the Burrenmount title issue.

14.21 In summary, therefore, I was not satisfied that the Cunningham Group had even made out a *prima facie* case that the ultimate sale of Bailey Point was at an under value. On that basis the claim in that regard, both as against First Active and against Mr. Jackson, necessarily had to fall. However, in addition I was not satisfied that Mr. Jackson had done anything wrong that could have contributed to a sale at an under value, even had there been a shortfall established.

14.22 No criticism was made by Mr. Phelan of the way in which the property was offered for sale by Mr. Jackson, even though he did suggest that the price originally obtained by Mr. Jackson was below what he would have expected. However, where a property is properly marketed then no criticism can be made against a fiduciary vendor of the sale price achieved unless some aspect of the way in which the property was sold can be pointed to as being improper and as having given rise to a failure to achieve what might otherwise have been expected.

14.23 The only other criticism made of Mr. Jackson was that he, in effect, gave Mr. Duffy a strong position by, on the one hand, entering into an agreement in principle with him without tying him down to a binding contract, so that, it was said, Mr. Duffy was able to use his position in relation to the property to obtain an advantage in respect of the ultimate sale by First Active. Obviously such a case could only be successful if it transpired that the sale by First Active was at an under value and for the reasons which I have set out, I was not satisfied that any case in that regard had been made out.

14.24 However, in any event, I am not satisfied that the evidence disclosed any aspect of the handling of the property by Mr. Jackson, which fell short of an appropriate standard. Mr. Jackson was faced with a very difficult situation. This was not a simple straightforward sale. Mr. Cunningham commenced litigation which clearly had a significant effect both on the ability to put the sale through in the ordinary way and on the reputation of the property as being one which could be purchased without risk of litigation. I see nothing in the evidence which would allow me to conclude, on the balance of probabilities, that the way in which Mr. Jackson handled the sale of this property fell short of the standard that a receiver should apply.

14.25 In passing it is appropriate to touch, at this stage, on the sequence of events which ultimately led to the sale by First Active as mortgagee in possession. As briefly outlined earlier, issues arose between Mr. Jackson as receiver and Porterridge as to the priority between the interest of the receiver (deriving his entitlements from First Active as debenture holder) and those of Porterridge. First Active had, of course, obtained its interest as debenture holder from Salthill. Likewise, Porterridge had obtained its interest as leaseholder from Salthill. There was, in my view, no evidence before the court of any credibility from which it could be inferred that the leases granted to Porterridge by Salthill had any purpose other than to facilitate a possible tax benefit which might have been obtained. It was clear that qualifying leases had to be in place by the operative date in order that the possibility of obtaining the relevant tax advantages might be maintained. It is striking to note that when a sale of the commercial units was subsequently contemplated, Michael Lynn and Company, on behalf of the Cunningham Group, indicated that a sale of the leases was not available. It was clear on the evidence that the leases in question would not, in fact, have qualified for the tax relief concerned because the beneficial interest in Porterridge was, at all times, held by Mr. Cunningham (possibly jointly with his wife). Likewise the beneficial interest in Salthill was at all material times held by Mr. and Mrs. Cunningham. Salthill and Porterridge were, therefore, connected companies and no tax benefit would, therefore, have been available.

14.26 In any event, Porterridge asserted its entitlement to the leases such that the receiver was advised to bring an application before this Court to determine the relevant priorities as and between the debenture and those leases. The matter was decided in this Court by Laffoy J., (*In Re Salthill Properties Ltd* [2004] IEHC 145) and on appeal by the Supreme Court for whom McCracken J. spoke (*Salthill Porperties Limited v. Porterridge Trading Limited* [2006] IESC 35). The outcome of those proceedings was that the leases, while not found to be invalid, were nonetheless held to rank in priority behind the interests of First Active as the debenture holder. The existence of those proceedings naturally placed a significant barrier to progressing contractual arrangements between Mr. Jackson and Mr. Duffy. Those difficulties provide an explanation as to why First Active may well have felt it more advantageous to go in to possession as a mortgagee in possession and sell as such. Those events also explain the reason why it was not until 2005 that contracts were ultimately entered into.

14.27 It should also be noted that the existence of Case C, in which Porterridge sought to contest, on a variety of grounds, the entitlement of First Active to sell the commercial units explains why the ultimate contract entered into between First Active and Mr.

Duffy was split, as and between, on the one hand, the residential units (in respect of which no claim was, at the relevant time, being maintained by the Cunningham Group which could have affected the validity of a sale by First Active to Mr. Duffy) and, on the other hand, the commercial units which were potentially caught by the claim being made in Case C. It is for that reason that the sale in respect of the commercial units has not, even as yet, closed. It should also be noted that I held in *Porterridge v. First Active* [2006] IEHC 285, that most of the claims then being made in Case C were caught by the so called rule in *Henderson v. Henderson* (1843) 3 Hare 100, and could not be maintained. However, thereafter, the Cunningham Group obtained leave to amend the pleadings in Case C to put forward a claim in fraud (initially the so called fraudulent scheme claim), which had the potential to affect the validity of the sale of the entirety of Bailey Point to Mr. Duffy and which, therefore, had the effect of making it difficult for Mr. Duffy to sell on the apartment units. Up to the time of the making of that claim there was no barrier to the completion of sales in respect of the apartments units, because there was no claim being made which could have affected Mr. Duffy's title to those units. After the amendment to Case C that situation changed.

14.28 However, to return to the substance of the claim in relation to Bailey Point, I came to the view that, independently of my finding to the effect that there was no evidence of a sale at an under value, I would also have been prepared to find in favour of Mr. Jackson under this heading as a result of the absence of any evidence to satisfy me on the balance of probabilities that Mr. Jackson had fallen below the standard appropriate to a receiver.

14.29 Having now set out the reasons why I was persuaded to grant a non-suit to First Active in respect of the core issues as against the bank and in favour of Mr. Jackson insofar as the core issues against him are concerned, it now remains to deal with a series of other issues which remained alive as of the close of the Cunningham Group's case. Before the hearing concluded I invited counsel for the Cunningham Group to divide those remaining issues into those which were, on the one hand, in whole or significant part dependent of the core fraud and contract claims, and on the other hand to those which were stand alone claims which needed independent consideration. Very helpfully, counsel for the Cunningham Group did so.

14.30 I, therefore, propose dealing first with those additional issues which were significantly dependant on the core claims in that, having regard to the failure of those core claims, there are only limited additional comments to be made in relation to such issues. I will refer to those issues as the dependant claims. Thereafter, I will turn to the remaining stand alone claims. I turn first, however, to the dependent claims.

15. Dependent Claims
(i) Improper Purpose

15.1 The claim under this heading centres on an allegation that First Active enforced its security for an improper purpose and not for the purpose of effecting repayment of its loan. The claim, as such, is dependent on the fraud claim**.** The claim of improper purpose as originally pleaded by the Cunningham Group was amended. The Cunningham Group originally contended that First Active enforced its security not for the proper purpose of effecting repayment but as a part of the alleged fraudulent scheme between it and Mr Duffy.

15.2 However, as previously pointed out, the claim in relation to the fraudulent scheme was abandoned. In support of the remaining part of this claim, the Cunningham Group pointed to a conversation alleged to have taken place between Mr. Cunningham and Mr. Holmes of First Active on 16th August, 2002. The Cunningham Group alleged that during this conversation Mr. Holmes made it clear to Mr. Cunningham that First Active was motivated by a desire to ensure that the Cunningham Group did not profit from the relevant developments. In its submissions, First Active drew from the evidence of Peter Jennings, the Cunningham Group's Banking expert, who expressed the view that the records of First Active at the time leading up to the appointment of the receiver and the other surrounding circumstances prevailing at that time suggested that First Active was not motivated by any objective other than its overriding objective to recover money. The Cunningham Group, in response, argued that Mr. Jennings' evidence was immaterial as he was not privy to First Active's motivations for enforcing the security.

15.3 I am, of course, required at this stage, so far as First Active is concerned, to take the Cunningham Group's case at its height. I was required, therefore, for the purposes of considering the non-suit application on First Active's behalf, to accept that a conversation along the lines suggested by Mr. Cunningham did take place. However, even if such a conversation did take place it must be recalled that it would have represented a single conversation which occurred in very fraught circumstances following on from extremely difficult meetings on the 15th August, and where those meetings themselves had come at a conclusion of a particularly fraught period in the relationship between First Active, the Cunningham Group, and Mr. Cunningham personally. While it is, of course, correct to say that Mr. Jennings was not privy to First Active's motivation he was, after all, called by the Cunningham Group as a banking expert who was invited to indicate inferences that might properly be drawn from banking documentation considered with the expert eye of an experienced banker. It should also be noted that Mr. Jennings, like the other expert witnesses called on behalf of the Cunningham Group, was, on any view, not given a complete picture of all relevant facts. Some additional matters were, therefore, drawn to his attention in the course of cross examination. In the light of his consideration of the banking documents and in the light of the established factual circumstances which led up to the appointment of the receiver, Mr. Jennings gave the opinion that the bank had little option but to appoint a receiver in the circumstances which had then arisen.

15.4 It seems to me that, even without the benefit of expert banking evidence, that position would be clear to any well informed person with reasonable business experience. A view to that effect is simply strengthened by the fact that an expert banker came to the same view, having had the opportunity to read with a banker's eye the internal documentation of First Active.

15.5 Taking all of that evidence and setting against it a single occasion in relation to which I was required, for the purposes of this application, to accept that Mr. Holmes may have expressed himself in harsh terms, it did not seem to me that the evidence came anywhere near establishing a *prima facie* case to the effect that First Active had exercised its entitlement to appoint a receiver for an improper purpose. On that basis I was of the view that First Active were entitled to a non-suit on that aspect of the case.

(ii) First Active as Mortgagee in Possession

15.6 The claim under this heading concerns the validity of the entry into possession by First Active of certain commercial units Bailey Point on 20th August 2004. One aspect of this claim was dependent on the fraud claim and was properly, it was accepted, subsumed under the claim of "improper purpose", the Cunningham Group's argument being that if there was a fraud, then First Active's entry into possession was tainted by that fraud and was for an improper purpose. Those aspects of the claim under this heading fell for the same reasons as the fraud and improper purpose claims fell. The balance of the claim under this heading is a freestanding cause of action which centred on the manner of taking possession by First Active and what is said to be the impossibility of the Receiver acting as agent of the mortgagee. or of the Bank's replacement of the Receiver as mortgagee. That independent claim is addressed in the next section at subdivision (ix).

(iii) Mr. Cunningham's claim in relation to the Guarantees

15.7 This issue centres on the claim that the guarantees issued by Mr. Cunningham in or after August 2002 were rendered void or voidable by the alleged fraud by First Active. That aspect of the claim obviously fell with the fraud allegation itself. Mr. Cunningham also contended that there was a failure by First Active to disclose unusual features of the contractual relationship between it and the Cunningham Group, thereby rendering the guarantees voidable and asserted as a consequence that Mr. Cunningham had rescinded his guarantees. The agreement concerned, that of 16th August 2002, had the effect of reducing the level of Mr. Cunningham's personal exposure on foot of the guarantees previously given by him. The specific unusual circumstances alleged are twofold and are, firstly, to the effect that First Active changed its standard terms and conditions in the facility letters of 16th August, 2002 unilaterally (from those in previous drafts) and without notifying Mr. Cunningham or his advisers, and secondly, the fact that First Active had actively considered receivership in March 2002. In general it was accepted that a creditor is under no duty to disclose material facts to a surety. It was, however, argued that there may be such an obligation in limited but, as yet, undefined circumstances. Reliance in that regard was placed on *Royal Bank of Scotland v Etridge (No.2)* [2000] A.C. 773, where Scott L.J., at paragraphs 185 to 188, stated that such an obligation should extend to:-

> "Unusual features of the contractual relationship between the creditor and the principal debtor, or between the creditor and other creditors of the principal debtor, that would or might affect the rights of the surety."

Mr. Cunningham argued that such was the case in these proceedings and that the alleged non disclosure rendered the relevant guarantees voidable.

15.8 It was First Active's case that the relevant matters were issues with which Mr. Cunningham was familiar and were matters which were clearly known either to him or to his advisers or which he would have been able to ascertain without difficulty. On the question of receivership, First Active submitted that, far from being a matter not disclosed to Mr. Cunningham, the likelihood of receivership was raised on a number of occasions between late 2001 and March, 2002, once in a discussion between Conor Holmes and Mr. Cunningham at a meeting of 23rd October, 2001, in letters from Michael Lynn to Pat Caslin and Albert Reynolds on 11th and 12th March 2002, respectively, and again in a memo sent to the directors of the Cunningham Group from Pat Caslin on 11th March, 2002. First Active argued that it could not be claimed that these were features of which Mr. Cunningham was unaware or which entitled him to rescind the guarantees. In relation to the standard terms issue, First Active referred to the fact that Mr. Cunningham's advisers, Mr. Beattie and Mr. Lynn, went through the 16th August, 2002 facility letters with him and that Mr. Cunningham's advisors were aware of the demand nature of the facilities.

15.9 In a separate argument Mr. Cunningham further contended that the relevant guarantees were voidable and had been avoided on account of alleged misrepresentation by First Active, specifically that First Active would fund the Salthill development to completion and advance funds of up to €45 million to allow this to happen. Mr. Cunningham submitted that such alleged misrepresentation did not have to be fraudulent or negligent to give rise to a right to rescind.

15.10 The allegations concerning misrepresentation obviously fall along with the claim in fraud. While it is true to say, as was argued on behalf of Mr. Cunningham, that it is possible, in certain circumstances, to obtain rescission of a contract on the grounds of an innocent misrepresentation, my findings in relation to the fraud claim were that were was no representation at all, and that even if there was a representation it was not false. In those circumstances I was satisfied that there was no misrepresentation of any sort, let alone a fraudulent one. The latter argument made for the invalidity of Mr. Cunningham's guarantees, therefore, falls along with the fraud claim as against First Active.

15.11 I was prepared to accept, for the purposes of argument, that *Royal Bank of Scotland v. Ethridge* applies in this jurisdiction so that there may be circumstances in which a creditor is obliged to explain to a surety unusual features of the arrangements between either the creditor and surety or the creditor and debtor, which might have the effect of affecting the surety's position.

15.12 So far as the receivership question was concerned the only evidence was to the effect that the threat of receivership was well known to all concerned. That threat had been made directly to Mr. Cunningham and had been made with some force to all of the directors of the Cunningham Group (including Mr. Cunningham) prior to and in the immediate run up to the meeting of the 15th August. The whole reason why that meeting was so fraught was that the consequences of failing to reach an agreement was, to everyone's knowledge, a high likelihood of receivership. There was, therefore, just no evidence to suggest that the Cunningham Group and Mr. Cunningham personally were not aware that there was a real risk of receivership in the event that the negotiations which took place on the 15th August did not succeed. There was, therefore, in my view, no evidential basis for the suggestion that there had been any failure to disclose the real possibility of receivership. On that basis the question of whether there would have been a duty to make such disclosure just does not arise on the facts of this case.

15.13 Likewise I have already set out the reasons why I did not consider, so far as the rectification claim was concerned, that the alteration included in the facility letters of the 16th August in relation to the demand nature of the facility could be regarded as having misled anyone. Mr. Cunningham was represented by Mr. Beattie at those negotiations. Mr. Beattie understood that what was being negotiated was a demand facility. A demand facility is what was ultimately put in place. Mr. Cunningham could not, therefore, have been misled, for the facility letters corresponded, in this as in all other regards, to what his advisors understood had been agreed. Under this heading, also, there is, therefore, no evidential basis for the suggestion that there was failure to disclose a material fact to Mr. Cunningham and the question of whether and to what extent disclosure might be required in such circumstances did not, in my view, therefore arise.

15.14 In summary, therefore, there was, in my view, no basis put forward for establishing a *prima facie* case to the effect that the relevant guarantees were void, and First Active were, therefore, in my view entitled to a non-suit so far as that aspect of the claim was concerned as well.

(iv) Validity of Cross – guarantees from Malldro, Drake, Poppintree or Springside

15.15 This claim was dropped by the Cunningham Group in April 2008 but was revived and is dependant on the fraud claim. While the Cunningham Group originally challenged the validity of the relevant resolutions in respect of guarantees given by Valebrook and Springside, that aspect of the claim was not persisted with so that, as of the close of the hearing, the remaining challenge to the relevant guarantees rested on allegations of non-disclosure and misrepresentation and is closely linked, therefore, with the issue of the guarantees given by Mr. Cunningham.

15.16 For the reasons set out in the previous paragraphs I was not persuaded that either the Cunningham Group or Mr. Cunningham had made out a *prima facie* case in relation to the relevant allegations of non-disclosure or misrepresentation. It follows that the

remaining claim under this heading also fell on the same basis.

(v) Additional Claims against Mr. Jackson in relation to Bailey Point and Malahide Road

15.17 The Cunningham Group submitted that it was a consequence of the fraud and improper purpose claim that Mr. Jackson was improperly appointed as receiver. There was, of course, also the freestanding claim for negligence, not dependent on the fraud claim, relating to actions of the Receiver at the Bailey Point and Malahide Road sites.

15.18 I have already set out the reasons why Mr. Jackson was entitled to a non-suit in respect of the free standing claim against him. The remaining aspect of the claim under this heading was, as indicated, dependent on the fraud or improper purpose claims which, for the reasons which I have already set out, also fail to meet the *prima facie* case test.

15.19 I was, therefore, satisfied that all of the claims under this heading had failed to meet such a test and that Mr. Jackson was entitled to a non-suit in respect of such claims.

15.20 That deals with those issues which were significantly connected with the core claims as against both First Active and Mr. Jackson. It follows that I should next turn to the free standing claims.

16. Independent Claims
(i) Shadow Directorship

16.1 The Cunningham Group asserted that First Active was a shadow director of the Group, that it owed the Cunningham Group certain duties as a consequence and that it acted in breach of those duties. In relation to this claim, the Cunningham Group sought to rely on a number of incidences which were said to show that First Active went beyond being the Cunningham Group's banker and became a shadow director.

16.2 These incidences included the appointment of the board of directors of the Cunningham Group, the exclusion of Mr. Cunningham from any part in the management of the Cunningham Group, the appointment by First Active of quantity surveyors and project managers chosen by it to run sites and First Active's insistence on the sale of Finglas.

16.3 First Active strongly contested the suggestion that it was a shadow director of any of the plaintiff companies or that it was in breach of any such alleged duty.

The Companies Act 1990, ("the 1990 Act") defines a shadow director as:-

> "…a person in accordance with whose directions or instructions the directors of a company are accustomed to act… unless the directors are accustomed so to act by reason only that they do so on advice given by him in a professional capacity"

16.4 A number of specific potential liabilities are imposed on shadow directors under the 1990 Act. A shadow director can be disqualified or restricted from acting as a director, can be made liable for reckless trading in a winding- up and is subject to certain restrictions in carrying out financial transactions with the company. While the position of shadow director has been considered in a number of Irish decisions, to date there is no recorded decision considering the definition of shadow director in any great detail. In this respect decisions from the English courts may be of assistance. The definition of "shadow director" in the equivalent English legislation, s. 22(5) of the Company Directors Disqualification Act 1996, is materially identical to that contained in the 1990 Act and in *Re Hydrodam (Corby) Limited*, [1994] 2 BCLC 180, Millett J stated:-

> "A de facto director, I repeat, is one who claims to act and purports to act as a director, although not validly appointed as such. A shadow director, by contrast, does not claim or purport to act as a director. On the contrary, he claims not to be a director. He lurks in the shadows, sheltering behind others who, he claims, are the only directors of the company to the exclusion of himself. He is not held out as a director by the company. To establish that a defendant is a shadow director of a company it is necessary to allege and prove:
>
> (1) who are the directors of the company, whether de facto or de jure;
>
> (2) that the defendant directed those directors how to act in relation to the company or that he was one of the persons who did so;
>
> (3) that those directors acted in accordance with such directions; and
>
> (4) that they were accustomed so to act.
>
> What is needed is first, a board of directors claiming and purporting to act as such; and secondly, a pattern of behaviour in which the board did not exercise any discretion or judgment of its own, but acted in accordance with the directions of others."

16.5 There has never been a finding by an Irish court of a shadow directorship against a financial institution. The Cunningham Group submitted that this Court should follow the test outlined by Millett J in an article written extra-judicially, *Shadow Directorship – a Real or Imagined Threat to Banks* (1991) Insolvency Practitioner. The test, which it is said emerges from the authorities, is directed to the question of whether a bank is merely attaching conditions to its support or, on the other hand, managing its customer's affairs. In the relevant article, Millett J. noted that, when a corporate customer of a bank appeared to be in financial difficulties, it would be normal for the bank to send in an investigator, demand reduction of its debt, demand security or further security and give advice to the customer on ways to improve its position. In *In Re Tasbian Ltd* (No.2) [1993] BCLC 297, an application to institute disqualification proceedings, the English Court of Appeal held that there was an arguable case that a "company doctor", appointed by the company's bankers (who held a secure loan) acted as a de facto or shadow director. The company doctor reported on the company's financial position to the company's bankers and advised on measures which the company was to take in order to trade its way out of difficulties. The Court of Appeal considered that a number of factors, taken cumulatively, established an arguable case that the company doctor was a de facto or shadow director. The factors relied on included the fact that the company director was appointed and paid by the company, that he had negotiated a moratorium with creditors, monitored trading and assisted the board of directors, engaged in negotiations with the Revenue and with regulatory authorities, that he had become a signatory to the company's bank

account and that he had advised on the transfer of the company's workforce.

16.6 First Active on the other hand maintained that it acted properly and in protection of its commercial interests, attaching legitimate and commercially sensible conditions to the continuation of its support and that these conditions amounted to normal and commercially sensible banking practice, not giving rise to a shadow directorship. First Active submitted that it did not have a hands-on role in the Plaintiffs' affairs, distinguishing it from that of the company doctor in *Re Tasbian Limited*.

16.7 In *Re PFTZM Ltd (In Liquidation)* [1995] BCC 280, the English High Court considered the question of whether officers of a financial institution, which had provided funding to the company in question, were shadow directors. After the company got into financial difficulties, it was agreed that officers of the financial institution would attend weekly meetings of the company. The deputy judge concluded that the officers were acting to protect the commercial interests of the financial institution but not as directors of the company and that all the financial institution has done was to impose terms on which it was prepared to continue the company's facility in light of threatened default but the board still retained the power to accept or reject the financial institution's terms.

16.8 It seemed to me that the facts of *Re PFTZM*, rather than those of *Re Tasbian*, appear to be more analogous to those of the current proceedings. The Cunningham Group claimed that the Board of the Group was accustomed to acting in accordance with the instructions of First Active. In relation to this claim, First Active pointed to the evidence of Pat Gillen who stated in his direct evidence that, during his time on Board, he considered himself as working for the Cunningham Group and not working for First Active. The Cunningham Group argued that Mr. Gillen's evidence be treated as irrelevant. As the only independent director of the Cunningham Group called to give evidence, Mr. Gillen's evidence could not be anything but relevant.

16.9 It is necessary to turn, therefore, to the specific instances on which the Cunningham Group places reliance for its contention that the Board was accustomed to act in accordance with the directions of First Active. The first matter on which reliance was placed concerned the appointment of the independent members of the Board of the Cunningham Group itself. There was some dispute between the parties as to the precise role played by First Active in this regard. In cross examination it was suggested to Mr. Cunningham that the true genesis of the appointment of independent members to the Board of the Cunningham Group came from professional advice tendered to the Cunningham Group in the context of a projected significant expansion in the scale of its operations. I was, of course, required, at this stage, to accept the Cunningham Group's case at its height. However, even on that basis it seems clear that the original idea for the strengthening of the Board of the Cunningham Group came from its advisors although the concept may well, if one accepts Mr. Cunningham's evidence, have been taken up and run with by First Active. Likewise it is clear, on Mr. Cunningham's own evidence, that it was he and his advisors who sourced the members of the Board although again, on his case, the identity of the members was vetted by First Active. The height of the Cunningham Group's case under this heading is, therefore, that First Active strongly supported the appointment of independent members of the Board and had a role in vetting the identity of those who were to be appointed. I cannot see that there could be any basis for suggesting that those facts give rise to a legitimate finding that First Active acted as a shadow director. A lending institution is more than entitled to satisfy itself, in relation to a corporate borrower, that there is sufficient strength in the Board and senior management of the borrower concerned to justify extending significant facilities to that borrower. Supporting, even very strongly, such measures and playing a role in vetting the calibre of those to be appointed amounts, in my view, to nothing more than the exercise of legitimate concern in respect of the management strength of the borrower.

16.10 So far as the exclusion of Mr. Cunningham from an active role in the management of the company's sites is concerned, that too needs to be seen in context. Firstly, it is clear, on all the evidence, that the initial requirement for the exclusion of Mr. Cunningham from a role in the Malahide Road site came not from the Board or First Active but from the Cunningham Group's customer i.e. NABCo. It was well known to First Active that NABCo had expressed significant concerns in relation to Mr. Cunningham's involvement. In that context it is hardly surprising that First Active were highly supportive of the Board's view that, in order to retain the apparently lucrative NABCo contract, Mr. Cunningham should be so excluded. Insofar as matters developed in to 2003, it was equally manifestly clear to First Active that the complete breakdown in relations between Mr. Cunningham (advised, apparently, in many respects by Mr. Mallaco) and the in the independent members of the Board had led to a situation where the Cunningham Group was finding it virtually impossible to function. In those circumstances it is more than reasonable for a lender to express, even in trenchant terms, its view that its continuing support is dependent on those management difficulties being sorted out.

16.11 So far as First Active's involvement in approving individual payments to be made by the Cunningham Group to its creditors is concerned, there is little doubt but that the factual basis relied upon by the Cunningham Group is correct. A situation was reached where the Cunningham Group had to make schedules of proposed payments available to First Active and enter into negotiations with officials of First Active as to how much money would be available for drawdown, and in respect of which creditors the drawdown concerned could be legitimately earmarked. I can fully understand the frustration (of which detailed evidence was given) which the relevant officials of the Cunningham Group, such as Ms. Hynes and Mr. O'Brien, felt on having to deal with their creditors under such constraints. However, the fact is that the Cunningham Group was entirely unable, at the relevant time, to make any payments from its own resources. It was wholly dependent on bank drawdown to meet any of its liabilities. There was also little doubt but that the position of the Cunningham Group in relation to First Active was highly leveraged at the relevant time. In those circumstances it does not appear to me to be unusual for a lender to wish to ensure that any drawdowns are being directed in an appropriate manner from its perspective. In relation to each of the above matters, it seemed to me that, in the main, Mr. Jennings, the Cunningham Group's banking expert, accepted that, in the relevant circumstances, a bank was entitled to have specific concerns in relation to the corporate governance of a borrower, to insist that the Board of the Directors of the borrower manage the company and that a construction industry borrower's site be managed by independent professionals.

16.12 The final detailed matter of complaint is the allegation that First Active insisted on the sale of Finglas. First Active, in this regard, pointed to the evidence of Mr. Jennings where he noted that, where a customer's exposure became excessive, it would be normal and inevitable for a bank to seek that the exposure be brought down to acceptable levels. While it is undisputed that the sale of Finglas was a precondition to further funding from First Active, the sale itself was supported and approved by the Board in order to secure that funding, not because the Board was accustomed to act in accordance with the instructions of First Active. The statutory test of shadow directorship is as to whether First Active was an entity in accordance with whose instructions the directors of the Cunningham Group were accustomed to act. The actions which a lender may take must be viewed in the context of the circumstances pertaining at the relevant time. Actions which might be unusual in one set of circumstances might be regarded as entirely expected in another set of circumstances. In the ordinary way a lender having a view on the precise way in which a site might be managed would be unusual. Where, however, difficulties have arisen which have put a significant contract of the borrower at risk, then it is clear that a lender's legitimate concerns concerning management may be more widespread. That is but one example, relevant to the facts of this case, of context.

16.13 In all the circumstances I was not satisfied that either individually or cumulatively any of the instances relied on provided a basis for the suggestion that the Board of the Cunningham Group was accustomed to act on the instructions of First Active. Rather

First Active sought to protect its own position as lender by imposing conditions which, in the context of the all of the relevant circumstances, were, in my view, reasonable. For those reasons it seemed to me that the Cunningham Group had failed to establish a *prima facie* case to the effect that First Active was a shadow director.

16.14 While dealing with the evidence of Mr. Jennings it is, perhaps, appropriate that I should also note that much of Mr. Jennings evidence seemed to me to be wholly irrelevant to the issues which arose in this case. It may well be that the reason for the inclusion of much of this material in Mr. Jennings witness statement arose from the fact that he had been asked, in a very tight time schedule, to respond to certain general questions. It may well be that there was insufficient time to do more than simply incorporate in his witness statement those questions, the answers to them, and a small number of general comments. Be that as it may it is appropriate that I should record that much of Mr. Jennings' evidence was directed towards a question concerning whether First Active had applied a sufficiently rigorous analysis to the potential borrowing of the Cunningham Group prior to entering into the various lending arrangements between the parties. I was not, I have to say, convinced by Mr. Jennings' evidence to the effect that there had been a lack of rigour in the assessment process. However, it did not appear to me to be appropriate to reach any real view on that issue, as it was wholly irrelevant to any of the issues in the case. No allegation was made by the Cunningham Group to the effect that First Active should not have lent money, or should have considered lending money in a different way or on different terms. Indeed, quite frankly, it seemed to me that Mr. Jennings' evidence in this regard was wholly at variance with the complaints made in the witness box by Mr. Cunningham, which was to the effect that First Active were unreasonable in its refusal to make further funding available. Be that as it may, it seemed to me that the vast majority of Mr. Jennings' evidence was irrelevant to the issues. To the extent that that was not so and where appropriate I have set out Mr. Jennings' evidence and indicated what reliance was placed on it.

(ii) Sale of Finglas as a Breach of Trust

16.15 Under this heading the Cunningham Group advanced a claim that First Active was in a fiduciary position in relation to the vendor companies in respect of the sale of Finglas, that it profited from that sale in taking a share of the purchaser's profits and that this amounted to unlawful self-dealing which, it was said, even in the absence of fraud, is a breach of trust by First Active. The Cunningham Group submitted that the existence of a fiduciary duty arose by virtue of the relationship of banker and customer, by virtue of First Active being a shadow director of the Plaintiffs, and by virtue of the advice given by First Active to the Plaintiffs to sell the Finglas properties. First Active submitted that it did not owe any fiduciary duties to the Cunningham Group in respect of the sale of Finglas and that the relationship between the Cunningham Group and it was a normal banker/ client relationship. First Active further submitted that, while the sale of Finglas was a condition for further funding, the Cunningham Group was not advised by First Active in relation to the sale and that the circumstances did not give rise to obligations on the part of First Active above those which apply in any bank/ client relationship. First Active submitted that a fiduciary relationship should not be lightly imposed so as to improve the remedies which might be available to a claimant, relying on *Norberg v. Wynrib* (1992) 92 DLR (4th) 449. First Active further argued that, even if a fiduciary relationship arose, the fact that First Active provided funding to the purchaser of Finglas, the terms of which included a fee based on uplift in the value of the property, did not constitute a breach of any fiduciary duty. To this end First Active submitted that it was a well established principle that there is no breach of fiduciary duty where a fiduciary, such as a director of a company, acquires an asset which the principal has decided not to purchase, *Regal Hastings Limited v. Gulliver* [1942] 1 All E.R. 378. First Active submitted that, therefore, there is no breach of fiduciary duty where a fiduciary acquires an asset which a principal has resolved to sell and where a fiduciary obtains an indirect interest in the value of the property.

16.16 I was not satisfied that any evidence supported the contention that First Active owed a fiduciary duty to the Cunningham Group in respect of the sale of Finglas. For the reasons which I have already set out I was not satisfied that there was any evidence to support even a *prima facie* conclusion that First Active was a shadow director of the Cunningham Group. Likewise it does not seem to me that there was evidence to support even a *prima facie* conclusion that the characterisation of the position of First Active in relation to the sale of Finglas could properly be described as advice to sell. Rather the position was, as Mr. Jennings accepted, that First Active had a view that the Cunningham Group had grown very quickly and was exposed to very significant debt. First Active was the subject of requests from the Cunningham Group to provide yet further funding to complete Malahide Road and Bailey Point. In those circumstances it seems to me that the only proper characterisation of First Active's insistence on a sale of Finglas was that it was a normal banking requirement designed to ensure that the companies' debt did not go beyond a level which First Active considered to be sustainable. There is no evidence to suggest that that was not First Active's *bona fide* view of the matter. It is not appropriate, therefore, to even form a *prima facie* conclusion that there is evidence to support the view that First Active "advised" a sale of Finglas. Rather it is absolutely clear that First Active simply insisted on a sale of Finglas as a means of ensuring that the Cunningham Group's debt did not become unsustainable in circumstances where it was clear that the Cunningham Group would require significant further funding for other projects then in hand.

16.17 On that basis alone I was satisfied that there could have been no breach of fiduciary duty on the part of First Active in respect of the sale of Finglas and was prepared to allow a non-suit in respect of the that aspect of the case. However, lest I be wrong in that conclusion I should also deal with the question of whether there might be said to have been any breach of a fiduciary duty which might be found to exist.

16.18 I was not satisfied that there was any evidence to support such a contention even on a *prima facie* basis. It is true that the party which ultimately purchased Finglas was customer of First Active and raised finance for its purchase of Finglas from First Active. Clearly First Active would have anticipated making certain profits out of its banking relationship with that customer. However, there is no evidence to suggest that the banking arrangements between First Active and the customer concerned were in any significant way unusual. The Cunningham Group had decided that its best course of action was to sell Finglas. The fact that that situation was in no insignificant part due to the fact that First Active required such a sale as a condition for affording further funding for Malahide Road and Bailey Point is neither here nor there. The commercial decision taken by the directors (and Mr. Gillen strongly supported this view in his evidence) was that the best interests of the Cunningham Group was to go along with the terms on offer from First Active, to sell Finglas, and to thereby obtain sufficient facilities to finish the other projects in hand. The Cunningham Group had, therefore, decided, for good and sufficient reason, to sell Finglas. In those circumstances it seems to me that First Active properly relied on *Regal Hastings Limited v. Gulliver*. On that basis also I was satisfied that First Active were entitled to a non-suit under the heading.

16.19 Before leaving the sale of Finglas it is appropriate that I comment on some further matters. Firstly, complaint was made by Mr. Cunningham in the course of his evidence in relation to the price obtained for Finglas. Obviously the fact that Finglas might have been sold at an undervalue would have been relevant to one possible way of viewing a claim that might arise under this heading. In particular, Mr. Cunningham placed reliance on the fact that he had introduced Harcourt Developments as a potential alternative purchaser. A number of comments need to be made in this regard. Firstly, Harcourt Developments was introduced at a very late stage in the process. Secondly, there were a number of complicating factors concerning a comparison between any potential bids on offer. Not least amongst these was the question of arrears of rent from the various tenants within that portion of the Finglas Shopping Centre owned by Cunningham Group. It was clear on the evidence that there were significant such arrears at the relevant time which were well in excess of €.5m. While much of the arrears concerned were ultimately collected, it seems clear that the extent to which

those arrears were considered collectable was a matter of some debate at the time in question. The various offers on the table from time to time varied as to the position of the purchaser concerned in relation to those arrears. Any comparison between the price on offer needs to have proper regard to the uncertainty concerning those arrears, and the party who was to get the benefit or take the risk as the case may be, of that uncertainty. I am not satisfied that there was any sufficient evidence to establish a *prima facie* case that Finglas was sold at anything other than its proper value. It follows that no claim could be maintained in practice unless Finglas did not have to be sold at all. Obviously, if the Cunningham Group had been able to make out a case to the effect that Finglas should not have been sold in the first place, then the current value of Finglas might have some relevance to the case. However, so far as the allegation that the manner of sale of Finglas (rather than the fact of sale) amounted to a breach of trust (or any other wrong) is concerned, I was satisfied that there was no *prima facie* evidence of any loss or other adverse consequence to the Cunningham Group. Neither was I satisfied that any *prima facie* basis had been established for any case to the effect that the Cunningham Group were entitled to damages based on a scenario whereby Finglas would not have to have been sold at all at the relevant time. Even on the height of the Cunningham Group's case, the Group was very heavily borrowed and could not have proceeded with Bailey Point and Malahide Road without realising additional funds other than by increased borrowing. Finglas was the only possible source of the relevant funds.

(iii) Breach of Banker Customer Relationship

16.20 This aspect of the Cunningham Group's claim originally concerned three issues:-

> (i) an alleged failure to provide Springside with a deed of release even though it had discharged its debt,
>
> (ii) an alleged failure to give advice with reasonable skill and care; and
>
> (iii) an alleged unauthorised transfer of funds between the accounts of different Cunningham Group companies.

16.21 No evidence was given in respect of the first two propositions and this claim became limited to an allegation that First Active transferred funds from the sale of Finglas to the Salthill account. First Active submitted that the proceeds were applied in accordance with the agreement of each of the Cunningham Group companies concerned and that no issue was raised by the Cunningham Group at the time. In response to this the Cunningham Group submitted that the transfer could be proven from First Active's statement of accounts.

16.22 It is true that funds from the sale of Finglas did end up in the Salthill account. However, it is inconceivable that those dealing with the financial affairs of the Cunningham Group were not well aware of precisely where its funds were going and into which account or accounts the funds were ultimately placed. There is no evidence that even a polite query was raised by anyone within the Cunningham Group at the time to suggest that the funds had found their way into an inappropriate account. The only conceivable inference from this fact is that the ultimate destination of the funds was in accordance with the agreed understanding of all relevant parties at the time. There was no evidence to counter such an inference. There was, therefore, even on a *prima facie* basis, no evidence to support this aspect of the claim. On that basis I was satisfied that First Active were entitled to a non-suit on this aspect of the claim as well.

(iv) Crystallisation

16.23 This is a freestanding cause of action as to the validity of the appointment of the Receiver over part of Bailey Point. The Cunningham Group contended that the floating charge under all debentures executed by Salthill in 1999 crystallised on 22nd December, 1999 by virtue of the execution of leases in favour of Porterridge. Clause 19 of the debentures provides:-

> "If, without the prior consent in writing the Bank, the Company creates any encumbrances over any of the Secured Assets not expressed to be subject to fixed Charge under this Debenture, or attempts to do so, of if any person levies or attempts to levy any distress, attachment, execution or other legal process against any of such Secured Assets, the floating charge created by this Debenture over those Secured Assets shall automatically, without notice, be converted into a fixed charge instantly such events occurs."

It is said that the execution of the relevant leases without the consent of First Active caused the crystallisation provided for in that clause. The Cunningham Group further contended that any property acquired by Salthill after that date, which was not covered by a fresh debenture, was free of any claim by First Active.

16.24 First Active submitted that there was a subsequent debenture entered into on 20th December, 2001 between Salthill and First Active in relation to property acquired after the debenture of 12th November, 1999. First Active further argued that there was no evidence of any further property having been acquired by Salthill after 1999, other than that which is the subject of the December, 2001 debenture. In reply, the Cunningham Group sought to rely on an affidavit of Peter Dempsey which sets out the details of the property said to have been acquired after the Porterridge Leases had been executed. This affidavit was sworn in relation to the proceedings in Case H, the Kanwell well-charging proceedings. The introduction of this affidavit into evidence was contested by First Active on the grounds that it was not sworn in relation to these proceedings and would negate case management directions. In relation to this First Active referred to decision of the Supreme Court in *Phonographic Performance Ltd v Cody* [1998] 4 I.R. 504 which, it is said, makes it clear that, where there is a *bona fide* desire to cross- examine, any discretion that a court might otherwise have had to admit evidence on affidavit is curtailed.

16.25 First Active further argued that if execution of the Porterridge Leases caused the floating charge to crystalise, this crystallisation was subsequently reversed and the charge "decrystallised", as First Active had neither appointed a receiver nor had it waived the crystallising event, but had allowed Salthill to carry on business in the normal way. This issue is linked to that concerning property outside the scope of the debentures to which I will now turn. I will deal with the issues arising under both headings together.

(v) Property Not within the Scope of the Debentures

16.26 This is a freestanding cause of action as to the validity of the appointment of Mr. Jackson as receiver over part of Bailey Point and is dependant on the admission of the Affidavit of Peter Dempsey to which I have referred. The Cunningham Group argued that some of the property at Salthill and certain property owned by Moorview in Tallaght were not covered by the debentures executed by the Cunningham Group and First Active. The Cunningham Group submitted that the scope of the debentures was a matter of record, with the title documents exhibited to the Kanwell well-charging proceedings in Case H.

16.27 First Active submitted that even if any property fell outside the scope of the debentures, such property was captured by a

floating charge, which crystallised on the appointment of Mr. Jackson. The Cunningham Group contended that this floating charge on property did not entitle First Active to enter as mortgagee in possession. First Active argued that the property formed part of the "secured asserts" within the meaning set out in the debentures.

16.28 It seems to me that the two issues which have arisen under items (iv) and (v) are, at least in part, dependent on a procedural complexity which was not adverted to until submissions at the close of the proceedings. It is true to say that a significant portion of the evidential basis for the Cunningham Group's claim under these headings was to be found in the affidavit of Mr. Dempsey sworn in case H to which reference has already been made. The admissibility of that affidavit in these proceedings was, as pointed out, an issue of some controversy.

16.29 The question which, it seems to me, was not really adverted to either by myself or by the parties during the case management process was as to the extent to which any of the subsidiary proceedings which were commenced by special summons (and thus were *prima facie* intended to be tried on affidavit) were to be regarded as having been remitted for plenary hearing on oral evidence. On one view it might be inferred that this was the case. It was clearly intended that, in principle, and subject only to such exceptions as might be agreed between the parties and approved by the court, all of the proceedings were to be heard together. On that basis it might be said that it was implicit that those proceedings commenced by special summons had been remitted to plenary hearing, and that any evidence which was sought to be tendered in respect of the relevant issues would require to be presented in the ordinary way by means of a witness or by documents which had been admitted in evidence without proof.

16.30 On the other hand there does not appear to have been any specific consideration of this question and no formal order remitting any of the relevant proceedings to plenary hearing was made.

16.31 In my view, taking a rigid view either way would give rise to an injustice. If I were to rule that Mr. Dempsey's affidavit could not be relied on, then the Cunningham Group might, with some legitimacy, have claimed that, in the absence of a formal order remitting the matter for plenary hearing, it was entitled to assume that the relevant proceedings would be heard on affidavit and that, therefore, in that limited regard, affidavit evidence was admissible notwithstanding the general plenary nature of the proceedings.

16.32 On the other hand if I were to rule that the affidavit of Mr. Dempsey was admissible, then same could amount to a significant prejudice to First Active who would, in those circumstances, have been deprived of an opportunity to cross examine Mr. Dempsey on the understandable basis that, from their perspective, the entire proceedings were plenary and affidavit evidence would not be admissible.

16.33 It was because of that difficulty that I felt unable to deal with these issues at the time when I indicated to the parties that I was prepared to grant a non-suit in respect of all other issues in these connected case, with the exception of those issues which had either been abandoned or expressly deferred. Having reflected further on the matter it seems to me that the only just course of action to adopt is that it should now be clarified that the issues arising under headings (iv) and (v) should all be heard at a plenary hearing but that the Cunningham Group should have the opportunity to tender evidence in respect of those issues at such hearing. First Active will, of course, then have the opportunity to cross examine any witnesses tendered and consider whether, in the light of such evidence and such cross examination, it would wish to pursue a non-suit application at that stage in relation to those issues or, alternatively, go into evidence itself.

16.34 It is, perhaps, regrettable, that despite the elaborate case management in this case one minor set of issues has "fallen between the cracks". However, in the overall scheme of things it seems to me that the best course to adopt is the one which I have outlined. In substance, therefore, if not in form, these issues will be treated as not having been the subject of a hearing and will fall to be considered along with the remaining issues which were specifically excluded from the main hearing.

(vi) Second Appointment the Receiver

16.35 This issue concerns the appointment of Mr. Jackson on 25th September 2003 pursuant to a debenture dated 3rd May, 2002. First Active argued that the appointment was expressly stated to be in respect of the undertaking, property and assets charged in the 3rd May, 2002 debenture. The Cunningham Group contended that there was an apparent absence of a second deed of appointment. First Active submitted that a deed of appointment was appended to the précis of evidence of Mr. Jackson.

16.36 I was not satisfied that there was any legitimate factual basis for the Cunningham Group's claim under this heading. First Active were able to point to a deed, apparently valid on its face, which would deal with any of the contentions made on behalf of the Cunningham Group under this heading. No oral evidence was given by the Cunningham Group to suggest that a relevant deed did not exist, or that the deed relied on by First Active was invalid. In those circumstances, and in the light of the fact that First Active was able to produce the deed in question there was not, in my view, any *prima facie* factual basis for the claim under this heading established and I was, therefore, also prepared to grant First Active a non-suit under the heading.

(vii) Kanwell fit out Claim

16.37 This is also a freestanding cause of action not dependent on the fraud claim. In these proceedings, Kanwell sought to recover as against First Active and / or Mr. Jackson in respect of goods supplies by Kanwell for the fit out of show apartments at the Salthill site.

16.38 The basis of the claim is, it is said, derived from a so called retention of title clause which was alleged to have been included in favour of Kanwell in its arrangements for the fit out of the apartments in question. On that basis it was said that the goods included in the fit out remained with title to Kanwell. In those circumstances it is argued that the respective taking of possession initially by Mr. Jackson, and subsequently by First Active and the final sale by First Active of those apartments was in breach of the retention of title clause allegedly included in the Kanwell agreement relating to the fit out to which I have referred.

16.39 The only evidence in respect of there being a retention of title clause was a statement in the evidence of Mr. Cunningham to that effect. No written retention of title clause was produced. No attempt was made to explore the nature or terms of the retention of title clause itself.

16.40 Counsel for First Active argued, correctly in my view, that the jurisprudence of the courts in respect of retention of title clauses does not give rise to a situation where there is automatically an entitlement to enforce as against third parties a retention of title claim in respect of all circumstances. It was, it follows, necessary for the Cunningham Group to establish more than the mere existence of a retention of title clause in order to substantiate a claim as against First Active and/or Mr. Jackson under this heading.

No evidence as to the circumstances that might be relevant in deciding whether the clause was effective as against third parties was, in fact, given. For example in both *Bernard Somers v. James Allen (Ireland) Limited* [1985] I.R. 340 and *Lennox v. Grahame Puttick Engines Limited* [1984] 1 W.L.R. 485 the relevant court had to consider whether goods supplied had become sufficiently incorporated into other property so as to render a retention of title clause ineffective. No evidence was given as to the nature of the goods concerned on the facts of this case. Certainly the term "fit out" suggests that the goods, or at least part of them, may have been incorporated into the apartments concerned. In those circumstances I was not satisfied that Kanwell had discharged the onus of proof on it to establish a *prima facie* claim in respect of the relevant allegations as against First Active and/or Mr. Jackson. I should emphasise the there was *prima facie* evidence of the existence of some form of ill defined retention of title clause. It would not have been appropriate for me, on an application such as this, to reject Mr. Cunningham's evidence in that regard. The evidential failure of Kanwell was not, therefore, in that regard. It was in relation to its failure to establish a *prima facie* case on the facts concerning circumstances in which that clause could be effective as against a receiver or mortgagee in possession that the claim, in my view, fell short of the standard required. On that basis I was also prepared to give First Active a non-suit in respect of this aspect of the claim.

(viii) Sale to Bernard Duffy

16.41 Along with the claim in relation to the effect of the alleged fraud on the part of First Active on the sale to Mr. Duffy of the site at Salthill and the allegations concerning the sale of that property at what was said to be an undervalue, there were two further distinct issues, not already dealt with, arising out to the sale to Mr. Duffy.

(i) The Profit Share agreement

16.42 The sole issue in relation to this matter is whether the Cunningham Group adduced sufficient evidence for the claim that First Active received or agreed to receive monies from Mr. Duffy comprising of a profit share on the sale of Salthill which it did not account for or intend to account for to the Cunningham Group. In relation to this claim, the Cunningham Group relied on First Active documentation referring to an "arrangement fee" intended to be received from this transaction which, it was submitted, supported the case that there was a profit sharing agreement. The Cunningham Group further relied on documents showing that Mr. Duffy was an acquaintance of Colm O'Riordan of First Active and documents discussing an arrangement "fee" or profit share to be paid to First Active. In support of this claim, the Cunningham Group suggested that there were a number of other offers for the site at Salthill.

16.43 First Active submitted that the Cunningham Group offered no evidence in support of this claim save for the evidence of Mr. Jennings. Mr. Jennings gave evidence to the effect that a bank which negotiates the sale of its borrower's property cannot at the same time negotiate a profit share for itself, since that would be likely to reduce the sale price. First Active further submitted that the final contracts for the sale, completed in 2005, contained no profit share arrangement and that the documents which the Plaintiffs sought to rely on were dated from 2003 and 2004. It was said that up May, 2005 there was not an agreement in the sense of a legally enforceable contract for the sale of the site at Salthill. First Active finally submitted that the only other basis on which this aspect of the claim could be maintained was if it could have been established that there was another undocumented arrangement between it and Mr. Duffy. However I had already ruled that it was not open to the Cunningham Group to make such a claim. See *Moorview Developments Ltd & Ors -v- First Active PLC & Ors* [2008] IEHC 211.

16.44 As I had already pointed out in the judgment to which I have just referred, it is at least arguable that a financial institution may place itself in a difficult position if it exercises an entitlement to sell a property on foot of its rights under a debenture, mortgage or the like while, at the same time, offers finance to a potential purchaser unless it is clear that there is no significant interaction between the two transactions. A financial institution exercising its right of sale is obliged to attempt to secure the best price. Where there is a straightforward sale to the highest bidder and a straightforward financing arrangement to such bidder on ordinary commercial terms, then it is highly unlikely that it could be said that there was any interaction between the two matters. If anyone was prepared to offer a better price then they would have done so. Equally the purchaser could, doubtless, have obtained its finance from some other source on the same or very similar terms. In such circumstances it would not be possible to draw any inference of a connection between the two transactions such as might lead to the conclusion that the sale price was depressed by reason of terms in the lending contract, such that the bank would make the same overall return but would not have to account to its original borrower in respect of the extra profits earned by the reason of more onerous terms in the lending contract to the purchaser.

16.45 As has been pointed out earlier there was, in fact, no final sale entered into on foot of the arrangements tentatively agreed between Mr. Jackson as receiver and Mr. Duffy in 2003. The bank document to which reference has been made was a document which referred to an arrangement fee in the form of a profit share on part of the Bailey Point site, which in the course of the proceedings came to be known as the "back site". The substance of the agreement between the receiver and Mr. Duffy was to the effect that there would be an uplift in favour of First Active in the event that the back site realised over a certain specified level of return. There is nothing wrong in itself with such an arrangement. However, had such an arrangement ultimately been put in place, and had it transpired that the uplift had gone to the benefit of First Active in a way in which it did not have to account for those monies as a reduction in the Cunningham Group's liabilities, then there would, in my view, have been a *prima facie* case to the effect that there was a secret profit. It would, in those circumstances, have, in my view, been necessary for First Active to establish by evidence that the amount secured on the sale was not in any way adversely affected by the fact that there was a profit share negotiated in favour of First Active in its capacity as lender, which would not have accrued to the benefit of the Cunningham Group.

16.46 However, the fact is that arrangements based on the agreement tentatively entered into between Mr. Jackson and Mr. Duffy did not, in fact, ever come to fruition. When legally enforceable contracts were finally entered into in 2005, there was no provision for an arrangement fee such as that which was contemplated in 2003. There is, therefore, no evidence that First Active, when actually selling as mortgagee in possession, received any sum by way of uplift in the form of an arrangement fee for its own benefit and in such a manner that the relevant uplift would not have accrued to reduce the Cunningham Group's liabilities. The factual basis for a claim under this heading does not, therefore, arise on the evidence and for those reasons I was satisfied that First Active was entitled to a non-suit.

16.47 I should not leave this topic without recalling that I had declined to allow the Cunningham Group to pursue a claim under this heading as against Mr. Duffy because I was not satisfied that the Cunningham Group had established a basis for making out such a claim. It is true that a limited number of the documents which passed between Mr. Duffy, or more particularly his advisors, on the one hand, and the receiver and/or First Active on the other hand, in 2003, did make reference to an arrangement fee being paid arising out of any uplift in the return from the back site. However, there was not, in my view, any reasonable basis for inferring that Mr. Duffy thereby intended to enter in to an arrangement whereby First Active would itself profit in circumstances where the Cunningham Group would not benefit from the payment of any such uplift. It must also be recalled that the original arrangements entered into between Mr. Duffy and Mr. Jackson involved a much more significant uplift provision in relation to the sale of the residential part of the development. It was manifestly clear from all of the internal documentation that the prospect of receiving such an uplift was

included by Mr. Jackson and his assistants in all of the calculations which they carried out in relation to projecting the ultimate outcome of the receivership. There was, therefore, no conceivable evidential basis for any suggestion that Mr. Jackson was involved in an arrangement whereby he, as receiver, was to obtain any such uplift for his own benefit. Rather all the evidence pointed in the opposite direction and was to the effect that Mr. Jackson intended to account for any such uplift as part of the receivership. It was for that reason that I declined to allow any amendment to make such an allegation as Mr. Jackson.

16.48 From Mr. Duffy's perspective it must be noted that there is no evidence to suggest that Mr. Duffy ought to have considered the provisions tentatively negotiated with Mr. Jackson in respect of the uplifts relating to, on the one hand, the residential element, and, on the other hand, the back site as being different in their nature. Both were simply part of the commercial terms which Mr. Duffy was prepared to agree with Mr. Jackson. There was never, therefore, in my view, any evidential basis for pursuing a secret profit claim as against either Mr. Duffy or Mr. Jackson. There was the possibility of a basis for pursuing such a claim as against First Active for the reasons which I have sought to analyse. However, given that the arrangements which might have given rise to such a possibility did not, in fact, ever come into play in the sense of forming part of a concluded contract, it did not seem to me that an evidential basis had been established for a claim as against First Active such as would have cleared the *prima facie* case threshold.

16.49 It follows that I was also persuaded that First Active was entitled to a non-suit on this aspect of the claim as well.

(ii) The alleged Stamp Duty Fraud

16.50 This claim related to an allegation that First Active and Mr. Duffy colluded in relation to the price of the units at Salthill in order to evade stamp duty or to attract a lower level of stamp duty than properly should have arisen. In their submissions, the Cunningham Group referred to correspondence and e-mails sent between Mr. Duffy and officers of First Active in relation to the price of the residential units, which the Cunningham Group say are an attempt to set the price at a false level so as to evade stamp duty. The Cunningham Group also claimed that this proved that the dealings between Mr. Duffy and First Active were not at arms length and were for an improper purpose. First Active and Mr. Duffy submitted that this claim did not form part of the pleaded case against it and, therefore, should not be maintained.

16.51 The case made by First Active and Mr. Duffy in respect of pleading was, in my view, correct. It is important to note the sequence of events concerning the raising of an allegation in respect of the alleged stamp duty fraud. The Cunningham Group made such an allegation in written submissions filed prior to the trial and in opening the case. At the close of the opening, I indicated to the various defendants that I proposed to deal with each of the issues raised in the opening unless an objection was taken at that stage based on a contention that an issue referred to in the opening was not pleaded. A number of points were raised by the respective defendants in that context. As I have noted there had been a reference to an allegation of stamp duty fraud in the written submissions filed on behalf of the Cunningham Group on which the opening was based. The relevant portion of the written submissions appeared in a section which was stated to be referable to issues raised against Mr. Duffy (prior to the commencement of the proceedings the parties had agreed on the issues which required to be tried arising out of the pleadings – those issues were numbered and made referable to the defendant or defendants to whom the issue concerned was relevant). Counsel for Mr. Duffy objected to the reference to the alleged stamp duty fraud on the basis of absence of pleading. In the course of responding, counsel for the Cunningham Group stated that the reference to the alleged stamp duty fraud was for the purposes of seeking to establish the general circumstances of the case on which, it was said, it was intended to urge that the court should not assume that First Active was an upright financial institution which was unlikely to have engaged in fraudulent activity.

16.52 It was my understanding (and indeed it would appear to have been the understanding of each of the defendants), that the response of counsel for the Cunningham Group amounted to an acceptance that the stamp duty fraud allegation was not a separate cause of the action or claim in these proceedings. Indeed, counsel for First Active, in making his submissions on the non-suit application, referred to the fact that the stamp duty allegation had only been put forward on the basis to which I have referred. No disagreement was expressed on behalf of the Cunningham Group with that proposition. Furthermore, it should be noted that in respect of certain other aspects of the case as opened, which differed from the case as pleaded, the Cunningham Group sought, and in certain respects was given leave, to amend the pleadings. No such question arose in relation to the stamp duty fraud which seems to me to confirm the understanding which everyone, with the exception of the Cunningham Group, appears to have had which was to the effect that the allegation of stamp duty fraud was not a stand alone claim. In those circumstances, it does not seem to me that any separate claim placing reliance on the allegation of a stamp duty fraud was properly before the court.

16.53 I would wish to emphasise that I am not in any way satisfied that a case had been made out on the evidence for this claim in any event. I say this in fairness to First Active. However, it is just not acceptable for a party which has expressly disavowed making a fraud claim to attempt to resurrect it in submissions made after its evidence has closed. In those circumstances I do not propose honouring this claim with any further analysis. Strictly speaking it is unnecessary to allow First Active a non-suit in respect of this issue because it does not arise in the first place on the pleadings.

16.54 I then turn to the final independent issue being the remaining claim in respect of the Porterridge leases.

(ix) Porterridge Leases

16.55 The commercial units in question at Bailey Point (the "Units") were covered by leases granted in December, 1999 by Salthill in favour of Porterridge (the "Porterridge Leases"). I have already addressed the circumstances in which those leases came into existence. First Active contended that these Leases were granted without their consent and in breach of the negative pledge clauses contained in debentures executed between 1999 and 2001 by Salthill in favour of First Active. First Active submitted that Porterridge has no standing to challenge First Active's possession as the Porterridge Leases were and are void against First Active. As a general principle, a lease created by a mortgagor without the authority of the mortgagee will be void against the mortgagee. In *Sadiq v. Hussain* (Court of Appeal, unreported, 12 February 1997), the Court of Appeal (per Waite LJ) reiterated this principle as follows:-

> "A lease granted by a mortgagor in breach of a covenant in the mortgage against exercise of the power of leasing is void, unless or until the mortgagee indicates by words or conduct that he is waiving the illegality."

First Active maintained that there was no question of having waived the illegality as such a waiver would necessarily involve First Active having consented to the Leases.

16.56 On the basis of this argument, it was submitted that First Active were entitled to enter into posession of the Units. It was submitted that the relevant mortgage debenture pursuant to which First Active entered possession of the Units, that of 21st October 1999, contained a clause providing for First Active to become a mortgagee in possession. Clause 12.2 of the debenture allowed First Active (following the occurrence of an enforcement event) to do any act that a receiver is permitted to do under the debentures,

notwithstanding the appointment of a receiver, and clause 9.4.1 of the debenture allow a receiver to take immediate possession of the property charged. First Active further argued that it had the power to enter into the Units as mortgagee in possession following from the general rule that, subject to contractual or statutory limitations, a mortgagee under a legal charge is entitled to seek possession of the mortgaged property at any time after the mortgage is executed, by virtue of the estate vested in them. Porterridge contended that First Active did not take the correct steps to actually take possession of the Units. Porterridge argued that the taking of possession must either be by order of court or by peaceable entry. In repsonse, First Active stated that where a mortgagee is in a position to effect entry and take possession in a peaceable manner, no court order for possession is required, *Ropaigealach v. Barclays Bank plc* [1999] 4 All ER 235.

16.57 In that context there is a further claim that First Active failed to enter into possession peaceably. It is said that Mr. Jackson did not enter into possession peaceably and that property was damaged during the taking of possession. While First Active accepted the proposition in principle that it was entitled to exercise a right of re-entry only when it could enter the property peaceably, First Active submitted that an unpeacefull entry into possession would not negative or invalidate First Active's possession but rather might give rise to a claim in damages. Porterridge further contended that it was not permissible for First Active to take possession without first terminating the receivership and that there is an inconsistency in Mr Jackson's position as receiver and as agent of First Active qua mortgagee in possession. Porterridge also relied on the argument that the acts upon which First Active point to as entry into possession were the acts of Mr Jackson acting as agent for First Active and that this amounted to a conflict of interest, as Mr. Jackson was an agent for Porterridge at the time. Porterridge submitted that the conflict arose in relation to the Receiver's interest in achieving the best price for the property as against First Active's interest in its client, Mr. Duffy, and obtaining a profit share (for reasons already set out I rejected this argument). Porterridge argued that there was a "fatal incongruity" in the argument that a receiver can at the one time be agent for a company in receivership and agent for the bank. In support of this proposition, Porterridge sought to rely on the decision of Barr J. in *Bula v. Crowley* [2002] IEHC 4. At page 68 of this decision Barr J set out the two disinct relationships, as he sees them, in a receivership:-

> "First, that between the appointing mortgagee and the Receiver which relates to the fundamental objective of the receivership, being entry into possession of the company's assets for the purpose of sale in the interest of the mortgagee. In practical terms *vis-á-vis* mortgagee and mortgagor the control over the company's assets exercised by the Receiver amounts to possession of the debtor's secured assets by him which in turn in practical terms is possession by the mortgagee who appointed him.
>
> The second relationship is that between the Receiver and third parties arising out of the receivership. Debentures normally provide, as in the instant case, that such dealings are conducted by the Receiver as agent of the company in receivership. The mortgagees have no right to interfere in the receivership in that regard. In my view there is no inconsistency between the foregoing relationships which represent long established commercial good sense."

16.58 It was submitted by First Active that these paragraphs simply reflect the fact that where a receiver deals with third parties as agent for the company, the mortgagee cannot interfere with such relationships and as such provides no support to the Cunningham Group's claim.

16.59 In substance, therefore, the arguments under the heading come down to two questions. Firstly, was there peaceful possession by Mr. Jackson? Secondly, was there anything unlawful about the manner in which possession was handed over by Mr. Jackson as receiver to First Active as mortgagee in possession in circumstances where Mr. Jackson was immediately reappointed as agent of First Active in their capacity as mortgagee in possession?

16.60 As to the first issue there was some evidence of a number of incidents at the property including one where proceedings were maintained in relation to persons associated with the receiver. However, none of that evidence related to the circumstances in which Mr. Jackson initially went into possession. There is a significant difference between an original entry into possession and a maintenance of possession once secured. The reason for this distinction is important. There is no doubt that, as a matter of law, a receiver properly appointed (like a mortgagee subsequent to an act of default in accordance with the terms of the mortgage) is entitled to enter into possession. There is nothing wrong, therefore, with entering into possession as such. What may be wrongful (and there remains the question as to what the appropriate remedy may be) is entering into possession in an unpeaceful manner even though a legal right to enter into possession exists. It is not the fact of entry into possession but the manner of its exercise which may be unlawful.

16.61 It follows that once possession has been peacefully obtained a very different situation exists. The person is then properly and lawfully in possession and is entitled to maintain that possession by the use of the same degree of force that any other person, lawfully in possession, may be entitled to exercise in protection of their property. The fact, therefore, that there may been subsequent unpeaceful incidents involving those on Mr. Cunningham's side and representatives of the receiver is neither here nor there so far as the lawfulness of Mr. Jackson's possession is concerned. There is just no evidence to suggest that the original entry into possession by Mr. Jackson and his agents, when Mr. Jackson was originally appointed as receiver, was anything other than peaceful. I have already disposed of all the arguments to the effect that Mr. Jackson's appointment was unlawful. It follows that Mr. Jackson was a lawfully appointed receiver entitled to enter into possession, and there is no evidence to suggest that his original entry into possession was anything other than peacefully obtained. That, it seemed to me, fully disposed of the first argument. Mr. Jackson was clearly in lawful possession of the property as receiver. There was, in my view, no *prima facie* case to the contrary.

16.62 As to the second argument the suggestion is that there was, somehow, a legal difficulty in Mr. Jackson, as receiver, handing over possession to First Active as mortgagee in possession. It does not seem to me that the passage cited from Barr J. in *Bula v. Crowley* offers Porterridge any assistance in this regard. While it is true to say that a mortgagee has no right to interfere in the receivership in the sense of interfering in the relationships between the receiver and third parties arising out of the receivership, that does not, in my view, provide any support for the proposition that a mortgagee who is entitled, independently of the receivership, to enter into possession itself as a mortgagee in possession, is not entitled to do just that, and to require the receiver to give up possession. The receiver is, of course, in one sense, an agent of the company. However, the company itself was obliged to give up possession to the mortgagee and there was nothing inconsistent, even to the extent that Mr. Jackson was receiver of Porterridge, in Mr. Jackson giving up possession in that capacity and on behalf of Porterridge in favour of First Active as mortgagee in possession. The fact that Mr. Jackson also acted as agent for First Active thereafter seemed to me to be of no relevance. I was, therefore, also satisfied that this second ground entirely lacked merit.

16.63 For those reasons it seemed to me that Porterridge's claims which sought to question the validity of the possession taken by either Mr. Jackson or First Active entirely lacked merit, such that no *prima facie* case had been established. Those claims were, in my view, therefore, properly the subject of the non-suit.

17. Conclusions

17.1 It follows that with the exception of the limited issues concerting the scope of the debentures in respect of Bailey Point and allied issues, each of the questions which were at trial was properly the subject of a non-suit and it was for those reasons that I indicated as such to the parties as soon as practicable after the conclusion of the hearing.

17.2 It also follows that all that remains for hearing in these connected proceedings are the limited issues which I have identified concerning the scope of the debentures and allied issues, together with the questions which have been deferred by agreement between the parties and with the approval of the court and as I have set out in Schedule 2.

17.3 I propose hearing counsel further as to the precise orders which should be made in each of the connected cases to reflect this ruling, and as to the manner in which the issues which remain for decision should be progressed to trial.

Schedule 1

List of Linked Cases

Case B - Brian Cunningham v First Active plc (2003 No. 9017P)

Case C - Porterridge Trading Limited v First Active (2004 No.18785P)

Case D - First Active plc v Brian Cunningham (2005 No. 272S)

Case E - Kanwell Developments Limited v First Active plc and Salthill Properties Limited (in Receivership) (2005 No. 1850P)

Case G - Brian Cunningham v Springside Limited, And By Order Arthur Cox and First **A**ctive plc (2005 No. 2463P)

Case H - Kanwell Development Limited v Salthill Properties Limited (In Receivership) (2006 No. 379SP)

Case I - Porterridge Trading Limited v Salthill Properties Limited (In Receivership) High Court (2003 No. 12429P) Supreme Court (2004 No.492)

Case J - Porterridge Trading Limited v Bernard Duffy (2006 No.1645P)

Case K - Moorview Development Limited (In Receivership) v Brian Cunningham (2005 No. 793S)

Case L - Valebrook Development Limited (In Receivership) v Kanwell Development Limited (2007 No. 1577S)

Case M - In the Matter of Porterridge Trading Limited & Companies Act 1963 – 2006 (2007 No. 383COS)

Case N - Valebrook Developments Limited v Brian Cunningham (2007 No. 9299P)

Case O - Valebrook Development Limited (In Receivership) v Keelgrove Properties Limited (2007 No. 2283S)

Schedule 2

Deferred Issues

1) Keelgrove shareholding - Case O - Valebrook Development Limited (In Receivership) v. Keelgrove Properties Limited (2007 No. 2283S)

2) Kanwell well-charging Application - Case H - Kanwell Development Limited v. Salthill Properties Limited (In Receivership) (2006 No. 379SP)

3) Security held by First Active in Springside - Case G - Brian Cunningham v. Springside Limited, And By Order Arthur Cox and First **A**ctive plc (2005 No. 2463P)

4) Case K - Moorview Development Limited (In Receivership) v. Brian Cunningham (2005 No. 793S)

5) Case L - Valebrook Development Limited (In Receivership) v. Kanwell Development Limited (2007 No. 1577S)

6) Case M - In the Matter of Porterridge Trading Limited & Companies Act 1963 – 2006 (2007 No. 383COS)

Schedule 3

List of Previous Judgments

1. Moorview Developments Ltd & Ors v. First Active PLC & Ors [2008] IEHC 274

2. Moorview Developments Ltd & Ors v. First Active PLC & Ors [2008] IEHC 211

3. Kanwell Developments Ltd v. Salthill Properties Ltd [2008] IEHC 3

4. Porterridge Trading Ltd & Ors v. First Active & Ors [2008] IEHC 42

5. Porterridge Trading Ltd v. First Active PLC [2007] IEHC 313

6. Porterridge Trading Ltd v. First Active & Ors [2006] IEHC 285

7. Moorview Developments Ltd & Ors v. First Active PLC & Ors [2005] IEHC 329