THE HIGH COURT

COURT 25

RECORD NO. 2017/7866P

DECLAN O'MAHONY, DIAMOND DEVELOPMENTS LIMITED, BRIDE VIEW DEVELOPMENTS LIMITED, AMBLEDENE LIMITED AND KATHLEEN O'MAHONY

Plaintiffs

and

PROMONTORIA (GEM) DAC

Defendant

APPROVED JUDGMENT DELIVERED BY MR. JUSTICE HAUGHTON ON THURSDAY 8TH FEBRUARY 2018.

MR. JUSTICE HAUGHTON: Good afternoon. Gentlemen,

I don't have a typed up judgment but we have a stenographer in court.

INTRODUCTION

This is an action for specific performance of an alleged agreement dated 20th June 2017 and there is a full Defence and a Counterclaim against the Second Plaintiff for 39 million odd. This is my ruling and judgment in respect of the Defendants' application for a direction and a dismissal of the proceedings on the basis that after closing of the Plaintiffs' case, their case is not made out on the balance of probabilities. The application was made on Day 4 after hearing the Plaintiff's three witnesses who underwent cross examination on the basis that the Defendants' witnesses would testify and give certain specified evidence on matters in dispute between the parties.

It therefore came as a surprise to the Court and also seemingly Counsel for the Plaintiffs when the application for a direction was made by Mr. MacCann who indicated that the defence would not be going into evidence. He submitted, therefore, that the Court must decide his application on the balance of probabilities on the basis of the evidence before it. He conceded that this meant that the Defendant could not pursue its counterclaim against the Second Named Plaintiff.

Some debate ensued as to how the Court should approach his task. In his response, Mr. Sreenan for the Plaintiff submitted that because of the manner in which the cross examinations were conducted, it was not open to the Defendant to apply for a direction without going into evidence and on indicating that evidence would not be called. He submitted that it would be fundamentally unfair and unjust to apply the test of balance of probabilities in circumstances where Mr. O'Mahony's good name and integrity were impugned in cross examination and the Defendants' witness statements. He submitted that such a process would be unfair, as Mr. O'Mahony would be deprived of the opportunity through cross examination of defending his good name and integrity. He, therefore, suggested that the Court should apply the lower test of whether the Plaintiff's evidence disclosed a *prima facie* case.

TEST: BALANCE OF PROBABILITIES OR *PRIMA FACIE* CASE

In the course of argument, I considered *Hetherington v Ultra Tyre Service Limited* and at page 541 of that decision, Chief Justice Finlay said the following:

> *"If a Defendant to an action being tried by a judge sitting without a jury applies for a direction on the basis of the evidence adduced by the plaintiff is not sufficient to establish a case against him, I think it is reasonable for a judge, if he sees fit on a trial to enquire from that person as to whether he intends to stand on that application. If he indicates that he intends to give evidence in the event of the application failing, the Judge may well properly defer the decision on the issue as to whether a case is being made out by the Plaintiff until he has heard all the evidence."*

Judge McCarthy agreed, stating:

> *"I agree with the judgment of the Chief Justice. In respect of the latter part of it, I would like to express my own view that in any claim for damages for negligence, a trial judge should ordinarily decline to make any finding on the issues of negligence unless and until all parties have been heard by way of evidence and submission on such issues.*
>
> *In the case of a single defendant where there is an application for a nonsuit, the trial judge should decline to rule on such an application until he has heard all the evidence that either party wishes to adduce. The parties seeking the dismissal of an action should be put to his election as to whether or not he would call evidence."*

This decision was considered more recently by the Supreme Court in the case of *Schuit v Mylotte* and in particular, in the judgment of Mr. Justice O'Donnell. It is not, I think, necessary to go into the facts of that matter, where there were several defendants with claims of contribution inter se. At page 10 of his judgment, he states:

> *"While it is undoubtedly easier to address these matters in hindsight, it does appear to me that the complexity of this case illustrates the wisdom of the approach taken by McCarthy J. in Hetherington, where he seemed to consider that the appropriate course for the Court to take when it had been indicated, particularly in a multi party case, that the Defendants intended to go into evidence, was simply to adjourn the application until all the evidence was heard. Furthermore, there is much sense in the course which is often adopted on an application for a nonsuit. If the Court is disposed to grant the application, it gives its reasons for so doing, but if it is concluded that the application should be rejected, the Court gives its decision but does not given reasons at that stage because it is considered that it may distort the trial and the prospect of compromise if the Court gives its views on the state of the case at any given stage."*

It is clear from these authorities that if a Defendant seeks a direction in a civil matter, firstly the Court must be informed as to whether, in the event that a direction is refused, that Defendant intends to call evidence. Secondly, if so, that the Court may decide the application by deciding whether the Plaintiff has made out a *prima facie* case, but it may defer deciding the application until after the defence evidence is called.

However, neither of these propositions support this Court addressing the current application on a *prima facie* basis. It seems to me, as I stated in the course of argument, that I must approach this ruling, which is effectively my final judgment, on the basis that the Plaintiffs must establish their case on the balance of probabilities. This, indeed, is an approach that finds support in the judgment of President Ryan in The Court of Appeal in *O'Leary v HSE* 2016 IECA 25.

At paragraph 55, he says:

> *"The next question is whether the cross examination could have denied the Defendants the opportunity of applying for a nonsuit. There is no logical basis on which this could be the case, but the question as to whether there is some rule of practice or procedure which might apply in favour of the Plaintiff in the circumstances. I am specifically concerned with the issue of cross examination. Counsel for each of the Defendant parties put to the Plaintiff's two experts certain statements that their witnesses were going to make or that were contained in the reports from their expert witnesses whereby it would contradict the experts giving their evidence. This did not constitute going into evidence and neither is there some other rule that would prevent the parties applying for a direction. Indeed, it would have been remiss of Counsel not to put their case to the expert witnesses but by so doing, they were not advancing down a path that stopped them making the case at the end of the Plaintiff's evidence that they did not have a case to meet. It would be a rule that was unjust and unfair and would make no sense if such were the case. There is no such rule."*

And he went on to state in the following paragraph:

> *"Such putting of the defence evidence is always done with the implied but unspoken (usually, but not always) understanding that this evidence would be given,*
>
> *if necessary, if it comes to that in the course of the case. There is always an implicit reservation of that kind. Even if there were no suggestion or even understanding implicit or otherwise to that effect,*
>
> *how could a defendant in justice and fairness be shut out from making an application that there was no case to meet in the event that there was some failure of the plaintiffs' proofs? The Trial Judge's role is to ensure that fairness prevails and so no unjust advantage is taken of the Plaintiff.*
>
> *On the other hand, the nature of litigation is that one party presents and the other party defends and if the claimant does not succeed in making out a prima facie case, then the other party is entitled as of right to have the action dismissed. To do otherwise is to impose on a defendant an obligation to prove a negative but the defendant is obliged, in the case of a claim made against him or her, to positively demonstrate by evidence that he or she was not to blame. In the circumstances, there is no such application."*

If the Plaintiffs do make out their case on the balance of probabilities, then they are entitled to succeed. The fact that the Defendant has chosen not to call witnesses, despite the manner in which the Plaintiffs' witnesses were cross examined, is something from which the Court may draw one or more appropriate inferences. This, combined with the opportunity that Mr. O'Mahony has had to give his own evidence and answer to cross examination, in my view, affords him some opportunity to establish and defend his good name and reputation. While he may not regard this as sufficient, this is not a defamation action, it is an action for breach of contract and the Court's primary task is to decide the contractual issues presented by the Pleadings and the evidence.

STATUS OF DISCOVERED DOCUMENT AS EVIDENCE
Three other matters should be mentioned. First, on Day 1, I rose briefly to enable agreement to be reached between the parties on the basis upon which the discovered documentation could be admitted into evidence. When I resumed, Mr. MacCann confirmed agreement that the admission of the discovered documentation would be on the *Moorview* basis. This, just to be clear, is set out in the judgment of Mr. Justice Clarke (now Chief Justice Clarke) in one of the many *Moorview* manifestations and this one is reported at 2008 IEHC 2011 at paragraph 3.4 where he says:

> *"This issue has been the subject of a minor debate at case management hearing. On the occasion in question, I had suggested that an appropriate model might be that adopted in Bula v Tara Mines and Fyffes v DCC. In both of those significant commercial cases, the parties agree that documents discovered by them could be introduced in evidence, not only without formal proof of the existence of the document but also as prima facie evidence of the truth of the contents of the documents concerned, subject to the right of the party concerned to seek to explain or even dispute the meaning of the contents of any relevant document by other evidence."*

Accordingly, the Defendants discovered documents referenced in the Plaintiffs' case are *prima facie* evidence as to the truth of their contents, subject only to the Defendants' entitlement to dispute the accuracy or veracity of that content. But of course, as the Defendants' witnesses have not given evidence, they have effectively forfeited the opportunity to dispute the accuracy or contents of any of the relevant documents. I am therefore entitled to treat such documents as evidence of the truth of their contents.

REDACTIONS:
Second, insofar as three or perhaps four relevant documents of the Defendants are redacted, this was not an issue pursued by the Plaintiffs in any interlocutory motion and I therefore consider them as they stand.

EXEMPLARY DAMAGES CLAIMED:
Thirdly, Mr. Sreenan submitted, by reference to extracts from the transcripts, that the manner in which the defence had been conducted now justified an award of exemplary damages.

UNCONTROVERSIAL BACKGROUND FACTS AND PLEADED CLAIMS/DEFENCE
From the uncontroversial evidence given by Mr. O'Mahony, and some of his evidence obviously was disputed, the background to these proceedings is that he is a Cork based developer since about 1978 and, along with the Second, Third and Fourth Named Plaintiffs, held substantial development borrowings from AIB. The Fifth Plaintiff, who is the wife of the First Named Plaintiff, is in a different position. She was not a borrower and my references to

"the Plaintiffs" excludes her, save when I expressly refer to her. She was joined solely because she has an interest in one of the properties concerned.

While the Plaintiffs had been very successful, with the recession development work ceased and the loans and security were transferred to NAMA in December 2009.

On 1st October 2014, the Plaintiffs entered into an Agreement with NAMA, actually NALM, the Settlement agreement or "2014 settlement". Under this, the Plaintiffs agreed to cooperate in the disposal of secured property. There were three conditions precedent:

Firstly, that an ancillary dwelling house on a plot beside Mr. and Mrs. O'Mahony's home at Moneygourney, Douglas, be charged to NALM by way of First Legal Charge as security for Mr. O'Mahony's obligations. It is solely because Mrs. O'Mahony had a beneficial interest in this property that she is a co Plaintiff.

Secondly, Mr. O'Mahony had to pay €70,700 to NALM by way of debt reduction.

Thirdly, Mr. O'Mahony had to furnish an evaluation of one apartment.

MR. O'Mahony also gave certain assurances and agreed to make full disclosures of his assets and liabilities in a Statement of Affairs. I am satisfied that Mr. O'Mahony complied with all of these conditions. He was also required to make two payments to NALM. This arises under Clause 7.1 of the agreement, which provides that "DOM shall pay to NALM the sum of €60,000 in the following manner:

> (A) €30,000 to be received by NALM on or before 1st January 2016.
>
> (B) €30,000 to be received by NALM on or before 1st January 2017."

Clause 10.1 is a significant clause headed "Residual Debt and Ancillary Dwelling House". It says:

> *"If at the end of the work out period NALM is satisfied, as reasonably determined by NALM in its own discretion and that the connection has complied with the terms and conditions of this agreement and its obligations thereunder, NALM will, on the expiry of two years from the end of the work out period:*
>
> (a) release the connection from its obligations in relation to the residual debt and will release all security, rights, guarantees and obligations given by connection associated therewith, and
>
> (b) will release the charge over the ancillary dwelling house."

Clause 11 should be referred to because it sets out events of default and one of these is notable at subclause (h):

> *"Any material breach or material noncompliance by the connection with any part of this agreement, the occurrence of which shall be determined solely by NALM and which breach or noncompliance is not the direct result of fault on the part of FM.", which I think is a reference to financial monitor, who is a Mr. Donal O'Sullivan.*

Also of note is Clause 6.8, because this features in an e mail from Ms. McNamee which I will refer to later. It reads:

> *"The connection shall be obliged to notify the FM of all expressions of interest of offers, to include unsolicited offers, to purchase any or all of the secured properties within three working days of learning of any such expressions of interest or offers, save where a sales agent has been appointed to dispose of a particular asset, in which case the sales agent will be required to send regular updates (fortnightly updates are anticipated) noting the level of interest from potential purchasers and any offers received."*

In effect, therefore, under this 2014 settlement, after the work out period, all sales would have taken place and after a further period of two years, the Plaintiffs would be released of all debt and Mr. O'Mahony and his wife would be left with their family home and the ancillary dwelling house free of debt.

Also under the settlement, Mr. O'Mahony was to receive remuneration by way of salary up to the end of 2015 and, thereafter, ad hoc consultancy fees for work done for NALM in relation to the sales. I am satisfied on the evidence that Mr. O'Mahony in fact paid the first payment of €30,000 by way of set off against consultancy fees. This was confirmed in writing by NALM. Secondly, that Mr. O'Mahony made the second payment of €30,000 to NALM in December 2016. I am satisfied that prior to June 2017, Mr. O'Mahony and the Plaintiffs fully complied with all their obligations under the 2014 settlement agreement.

However, not all the secured properties were sold. Sales ceased in or about May 2016. I am satisfied that this was at the behest of NALM, which was undertaking a review of disposals. Mr. O'Mahony was consulted and agreed to this, even though it delayed the start of the two year period. The four remaining properties were sites with development potential, all of which were vested in the Second Plaintiff. Firstly, Midleton or, Lakeview, a 26 acre site with an old listed house and by far the largest and most valuable site. Secondly, Monsfield in Rochestown. Thirdly, Curraheen, also known as Bridgefield, a one acre site and, fourthly, Lisnagar, the Rathcormack site.

NALM also held, of course, the ancillary dwelling house at Moneygourney as security.

Before the Defendant acquired the loans and security, Mr. O'Mahony tried unsuccessfully to reach agreement with NALM to acquire these residual properties debt free for €4m but his offer was declined. By Assignment and Deed of Transfer dated 27th January 2017, the Plaintiffs' loans and all security were transferred by NALM to the Defendant who also thereby succeeded to NALM's rights and obligations under the 2014 settlement. Thereafter, the Plaintiffs' claim is that on 20th June 2017, the Defendant agreed, in consideration of €6m, to transfer the residual loans to the Plaintiffs and release all of the security, leaving the Plaintiffs debt free. It is claimed that the Defendant wrongfully repudiated this agreement on 22nd August 2017. The Plaintiff's claim is pleaded thus in the Statement of Claim, starting from paragraph 15:

> *"15" Between on or about 28th March 2017 and on or about 20th June 2017, the Plaintiffs and the Defendant negotiated the terms of an agreement for the release of the Plaintiffs' indebtedness and security therefor.*

On or about 22nd May 2017, the Plaintiffs made a formal offer to purchase the development loans and the release of the security therefor and the ADH for the consideration of €6m ("the offer").

16....

17. On or about 20th June 2017, the Defendant, its servants or agents communicated to the Plaintiffs the Defendants' formal acceptance of the offer and agreed to execute a Deed of Loan Sale and Deed of Release in respect of each property, forming security

for the loans, without qualification or condition.

18. The material terms of the release, which were unconditionally agreed by the parties, were as follows:

1. The Plaintiffs agreed to pay to the Defendant the sum of €6 million.

2. A 10% deposit would be payable.

3. The Defendant would release the Plaintiffs from the development loans and release the properties forming security for the loans.

4. The closing date was 31 August 2017.

5. A&L Goodbodys' legal costs, for which a quote was given, were to be paid by the Plaintiffs.

6. The anti money laundering material was to be submitted prior to the closing date.

19. Further and in particular, between about 10 August and on or about 14th August 2017, certain of the terms of agreement were varied by agreement of the parties, namely the following:

A. Deposit of €60,000 would be payable.

B. As the Defendants' ownership of the development loans had not been registered in the Property Registration Authority, the release agreement would be structured as a settlement and release of the properties and indeed drafted accordingly by A&L Goodbody.

C. The settlement deed would be executed by 25 August 2017.

D. The Plaintiffs would be responsible for additional drafting fees of A&L Goodbody, which were again quoted.

E. The monies would be paid by the Second Plaintiff and the anti money laundering material provided would relate to the Second Plaintiff.

20. Pursuant to the said agreed variations, the Defendants servant or agent, A&L Goodbody, provided a draft of what it described as the proposed settlement deed for comment on or about 18 August 2017. The Plaintiffs complied with and/or were ready, able and willing to comply with their obligations under the Release Agreement and to agree and execute the settlement deed.

21. It was an express or implied term of the Release Agreement that the Defendant would act in good faith and make all reasonable efforts to agree the terms of and execute the relevant deeds so as to give effect to the said agreement. In addition, the Defendant, its servants and agents at all material times owed the Plaintiffs a duty of care in the provision and execution of the necessary deeds and performance of the release agreement."

The Plaintiffs then plead a wrongful repudiation of the release agreement at paragraph 22 and gave particulars in which they say at (A):

"The Plaintiffs had complied with all conditions of the Release Agreement and were ready to agree and sign the settlement deed on 25 August 2017 and complete the release agreement on 31 August 2017.

(B) On or about 22nd August 2017, without warning or excuse, and immediately after being informed of the source and method of funding, the Defendant, its servants or agent, informed the first Plaintiff that it would not complete the release agreements.

(C) In particular, the Defendants' agent informed the first Plaintiff that "the Boss" was in the Belfast office that morning and had made a decision that he was "not proceeding with this deal".

The Defence fundamentally denies that there was any binding agreement and paragraph 11 reads:

11. It is admitted that in or about 28th March 2017 and in or about 20 June 2017, the Plaintiffs and Capita Asset Services Ireland Limited ("Capita") negotiated the terms of a proposed agreement for the potential release of the Plaintiffs' indebtedness and related security. However, it is denied that a legally binding and finalised agreement was ever concluded.

12. It is denied that Capita is a servant or agent of the Defendant, incapable of binding the Defendant, and awaits proof thereof at the trial of the action.

13. It is admitted that on or about 22nd May, the first Defendant made an offer to purchase "the remaining assets or loan notes".

14. The Defendant refers to paragraph 18 of the Statement of Claim and pleads as follows:

(A) It is admitted that on or about 20th June 2017, Capita sent an e mail to the First Defendant headed "Heads of Terms and KYC" ("The Heads of Terms")."

Then it sets out what the e mail expressly stated.

"The Loan Facilities referred to in this e mail are managed by Capita Assets Services (Ireland) Limited as service provider for and on behalf of and in accordance with the instructions of Promontoria Limited or Promontoria BV. Capita has no authority to bind, commit or conclude contractual arrangements on behalf of Promontoria".

They then plead at (B):

"(B) It is denied that the material terms of any release agreement were unconditionally agreed by Capita on behalf of the Defendant, whether in the Heads of Terms or otherwise.

(C) Further and in the alternative and without prejudice to the foregoing, if the material terms of release agreement were unconditionally agreed by Capita on behalf of the Defendant with the First Named Plaintiff (which is denied), the alleged material terms were not performed by the Plaintiffs or any of them. (D) Without prejudice to those pleas, the Heads of Terms provided for a closing date of 31 August 2017. In this regard, if the e mail of 20th June 2017 contains the material terms of a release agreement (which is denied) the Plaintiffs failed to perform the material terms on or before the closing date of 31 August 2017.

(E) In the circumstances, it is denied that any legally binding agreement was entered into by or on behalf of the Defendant with the Plaintiffs, or any of them."

And the rest of paragraph 18 is then denied.

In response to paragraph 19 of the Statement of Claim, they plead at (A):

"It is admitted that between on or about 10 August and 14th August 2017, the parties further engaged with one another. In this regard, if an agreement had been entered into between the parties on 20th June (which is denied) the engagement between the parties thereafter amounted to a mutual abandonment of that earlier agreement.

(B). Without prejudice to the foregoing, it is pleaded that the further engagement between the parties after 20 June 2017, the Heads of Terms were supplanted by later agreements which were entered into "without prejudice and subject to contract/contract denied" and thus never resulted in a legally binding agreement between the parties.

(C) Further and in the alternative and without prejudice" and so forth, it is pleaded that "the agreement was for payment by the Plaintiffs of a sum that was less than that due to them in respect of their indebtedness to the Defendant. No new consideration was provided in respect of any such later agreements and indeed the Plaintiff failed, refused or neglected to perform same."

I should say in passing here that this reflects the law as set out in Pinnel's case, but it was not a defence that was actually pursued in argument by Mr. MacCann.

"(D) without prejudice to the generality of the foregoing, the Defendant will rely upon the rule in Pinnel's case, such that any asserted promise to pay by or on behalf of the Plaintiffs, or any of them, a part of the undisputed debt does not amount to a satisfaction in respect of the remainder of the debt."

And my previous comments apply to that. Then the remainder of paragraph 19 was denied.

At paragraph 16 of the Defence, it was pleaded:

"If a concluded legally binding agreement was entered into between the parties (which is denied), it is denied that the Plaintiffs complied with and/or were ready, willing and/or able to comply with their obligations thereunder, or under variation thereof, whether as alleged in paragraph 20 of the Statement of Claim or otherwise."

It is common case that on 7th September 2017, the Defendants served on the Plaintiff a Notice of Termination of the 2014 settlement agreement, purporting to terminate on the basis that the Plaintiffs were now refusing to consensually sell the remaining properties and that this was a material breach constituting default. Material breach and the entitlement to such notice is denied by the Plaintiffs.

MR. MacCANN'S GROUNDS FOR SEEKING A DIRECTION

Following the Plaintiffs' evidence, the basis upon which the direction was sought by Mr. MacCann was essentially threefold. Firstly, that there was no binding contract and the e mail of 20th June 2017, in response to an offer from Mr. O'Mahony by e mail of 22nd June 2017, was a counter offer, with new terms. In particular, payment of a 10% deposit, on exchange, on 6th July 2017 and a requirement that the SPV (special purchase vehicle) purchaser was to be confirmed.

Also, that while Mr. O'Mahony may have been prepared to deal on the basis of the e mail of 20th June 2017, he never communicated his acceptance and, further, that there was no implied acceptance. He also argued that the deposit was a material term. He submitted that the non agreement over deposit is evidenced by Plaintiffs' solicitor, Ms. Elaine O'Driscoll, who placed a written comment on the first draft of the Loan Sale Deed and as a result of later e mail exchanges, on the amount of the deposit marked "subject to contract/contract denied" meant that there was not any agreement in respect of that item.

Secondly, Mr. MacCann argued that as matters progressed, the proposed deal was restructured and became technically different. Initially, there was to be a loan sale deed and the release of security. However, the Defendant was not yet registered in the property registration authority as owner of the charges, registration was pending. At the Plaintiffs' solicitor's request and for the Plaintiffs' benefit, the proposed deal was now to be effected by a deed of settlement and release, whereby the loans would be settled for a deposit of €60,000 and a balance paid on closing of €5,940,000 and the charges over the remaining of the properties released, with additional cost being paid to A&L Goodbody, the Defendants' solicitors.

This, it was submitted, was a new structure, which was so different from the previously agreed structure that there could be no binding agreement.

Thirdly, Mr. MacCann argued that even if there was a binding agreement, the Plaintiffs had not proved that they were ready, able and willing to complete on 31st August 2017. In particular:

(A) The purchaser was not identified because the funder, Mr. Michael O'Flynn and his company, O'Flynn Construction Limited, were said to be contributing about €1 million of their own funds and €5 million from their funder, Avenue, could not identify the SPV that was investing or to invest in Diamond Developments Limited, in whom vested the title to the Midleton site.

(B) No contract was signed between the Plaintiffs and Mr. O'Flynn, or O'Flynn Construction.

(C) The Capital Gains Tax clearance had not been obtained.

(D) No Family Home Protection Act consent had been executed.

(E) No apportionment account had been presented.

(F) No Section 72 Declaration was ready.

So from a conveyancing perspective, it was not proved that the Plaintiffs were ready, able and willing to complete. In particular, Mr. MacCann argued that the claim must fail because there was no direct evidence before the Court such as balance sheets or bank statements to prove that the Plaintiffs or their funders were in funds and no evidence whatsoever was presented from Avenue to demonstrate their agreement to invest or their readiness to pay the money on or before 31 August 2017. The legal basis for these submissions was addressed in closing submissions and will be considered later, where appropriate.

MR. SREENAN'S RESPONSE
In response, in essence, Mr. Sreenan argued that the evidence on the balance of probabilities was such that the Court should be satisfied that:

> 1. The confirmed offer was Mr. O'Mahony's e mail of 22nd May 2017 and the e mail of 20th June was an acceptance of Heads of Terms, showing agreement on the three Ps; the parties (being the Plaintiffs and Promontoria), the parcels (being the four properties) and the price (€6 million). Further, it showed agreement on a completion date of 31st August 2017.

He placed emphasis on the Advisory Note 134 that authorised the Defendants' agent, Capita, to convey Promontoria's decision to sell for €6 million and which referred to "one installment" and made no reference to a deposit.

The e mail of 20th June 2017 was not subject to contract or contract denied. The reference to exchange by 6 July 2017 related to the Loan Sale Deed, the document that would effect the deal. He submitted that no contract for sale in the conventional sense of a contract with special conditions and Law Society General Conditions was contemplated. There was just to be implementation by a Loan Sale Deed and Release.

Secondly, he argued that the balance of details in the e mail of 20th June 2017 were just details concerning the events of completion; the exchange, the deposit and the provision of anti money laundering information.

Thirdly, Mr. Sreenan argued that it is to be regarded that if the e mail of 20th June is to be regarded as a counter offer, it was in fact accepted because the Defendants' and the Plaintiffs' solicitors, on their parties behalves, then engaged and progressed the transaction documents with a view to moving to completion. He argued that A&L Goodbody would not have been asked to start work and incur fees without agreement in place.

Fourthly, he argued that the later introduction of "subject to contract" in e mails from A&L Goodbody on 30th June 2017, and later in e mails between the parties discussing a reduced deposit, could not affect the validity of the June agreement.

Fifthly, he argued that the Defendant was never concerned about the deposit. This, he submitted, was evident from the [Advisory] Note 134 and the tenure of later e mail exchanges on the subject. It was not an issue.

Sixthly, once the deposit was re negotiated to a non refundable €60,000, there was in fact a variation agreement on the revised deposit which replaced the original €600,000 deposit.

Seventhly, even if the original term requiring a 10% deposit still stood, by its agreement to variation, the Defendant was, by 10th August 2017 estopped from seeking anything other than €60,000 on exchange and it was by then a non event.

Eighthly, on the evidence, the Defendant did not treat the deposit as a precondition of contracting the sale. It was not a material term and as the Plaintiffs were never given the opportunity to exchange or complete, there was never any question of breach.

Ninthly, as to change of structure, he submitted that this was not a material change in the contract, it was just a different conveyancing mechanism for achieving the same end and, in any event, it was an agreed change relied on by the Plaintiffs' and the Defendants' solicitors, and subsequent adoption of "subject to contract" or "contract denied" could not alter this.

10. He submitted that the Plaintiffs' fallback position on this was that if the change in structure was not legally binding, the Defendant was nevertheless obliged to close on the basis of the Loan Sale Deed and releases as originally contemplated.

11. As to issues raised over whether the Plaintiffs were ready, able and willing to complete, Mr. Sreenan argued that the proper test is whether, but for the wrongful repudiation of the agreement, on the balance of probabilities, the Plaintiffs would have been ready, able and willing to complete to pay the €60,000 deposit on exchange and to pay the balance on closing.

On the assumption that the Defendant would have been ready, able and willing to complete, and that its solicitors would have reverted to agree the terms of the deed of settlement and release, he argued that on the evidence, it was the wrongful repudiation that prevented finalising the deed of settlement and exchange happening on 25th August. Time was never of the essence in respect of the payment of the deposit and he submitted that there was no point in the Plaintiffs or their solicitors turning up to close on the 31st August as the Defendants were clearly not willing to close at that point in time.

12. He urged the Court to accept the evidence of

Mr. O'Flynn as to his willingness and ability to fund the closing and identify the funding SPV and comply with anti money laundering and to accept his reputation and credibility. Mr. Sreenan noted that alleged inability to pay the €6 million was never raised as a reason for the Defendant withdrawing from the deal and he stood on Mr. O'Flynn's track record.

13. In relation to Capital Gains Tax and The Family Home Protection Act, Section 72 Declarations and apportionments, he argued that these points were entirely without merit and that they were all matters for closing and relied on Ms. Elaine O'Driscoll's evidence of the Plaintiffs' ability to satisfy these requirements.

14. He asked the Court to note the evidence that Mr. O'Flynn is still a committed funder.

15. He argued that exemplary damages should be awarded on the basis of the manner in which the defence was conducted in court and the imputation that Mr. O'Mahony was not up front.

DRAWING INFERENCES
Again, I will refer to the law relied upon later in this judgment, but before finally turning to the evidence, I accept the submission that the Court can draw inferences *inter alia* from the fact that witnesses who might be called are not called, but the Court should do so cautiously. In *Smart Mobile Limited v ComReg* 2016 IEHC 338, the case that came before

Judge Kelly involved a number of experts and two of the Plaintiffs' experts were not called, although their witness statements had been furnished.

At page 96, Kelly J. says:

> *"In Fyffes v DCC & Others, Laffoy J. had to consider such a proposition. In that case, Fyffes argued that the Court should draw inferences from the failure of the Defendants to call witnesses on key issues in the case. She considered that the principles outlined in the Wisniewski v Central Manchester Health Authority [1998] Lloyd's Reports Med. 223 provided helpful guidelines for the Court. The principles in question were set forth by Brook LJ as follows:*
>
> > *'1. In certain circumstances, the Court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.*
> >
> > *2. If a Court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, abused by the party who might reasonably have been expected to call witnesses.*
> >
> > *3. There must, however, have been some evidence, however weak, by the former on the matter in question before the Court was entitled to draw the desired inference. In other words, there must be a case to answer on that issue.*
> >
> > *4. If the reason for the witness's absence or silence satisfies the Court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect his or her absence or silence may be reduced or modified'."*

Judge Kelly then stated:

> *"I likewise find these guidelines helpful and insofar as it is necessary to do so in this case, I propose to apply them. They have a particular relevance in the case of witnesses who provide statements of proposed evidence but are not, without explanation, called to testify."*

I also adopt those statements of principle.

In relation to the caution, however, that should be exercised in drawing such inferences, I do take into account the judgment of Cregan J. in *Flynn v NALM* 2014 IEHC 408 and I must also bear in mind that the core submission that no evidence was called because it was not required, that was Mr. MacCann's submission, was not required as the Plaintiffs' case was not made out on the balance of probabilities is the reason that is given for not calling evidence. This is said to be the explanation for why those witnesses were not required to testify and it is one that I do consider in the context of drawing inferences.

FINDINGS ON THE EVIDENCE CONCLUDED CONTRACT ISSUE
My findings then on the evidence, particularly in relation to the first issue, Document 661 is an internal Defendant document headed "Diamond Developments Limited (0193) Declan O'Mahony" and it shows that following acquisition of the loan portfolio, the Defendant was well aware of the content and import of the 2014 settlement agreement and of the properties secured which are listed as assets, although it shows some uncertainty on the part of Promontoria as to whether Mr. O'Mahony's second payment of €30,000 had been paid, I am satisfied that this payment was in fact made by Mr. O'Mahony to NALM in December 2016. The evidence shows that the Defendant used Capita Assets Services (Ireland) Limited (later renamed Link ASI) as its main agent in dealing on a day to day basis with borrowers and Mr. O'Mahony dealt mainly with Capita's Mr. Jonathan McWhinney and later Ms. Fiona McNamee. The Defendant also used Cerberus (or CES) as advisors.

I am satisfied, however, that the authority of Capita and CES to contract on behalf of the Defendant was limited and that Mr. O'Mahony, while unclear as to the scope of their work and the precise extent of their authority, knew that it was limited.

The Defendant first approached Mr. O'Mahony for a meeting, an e mail from Mr. McWhinney on 23rd March 2017 contains this approach. The meeting occurred on 3rd April 2017 and was attended by Mr. O'Mahony and a colleague accountant, Eugene Gregor, and by Mr. McWhinney and by Mr. Terry Byrne and Mr. Graham Cullen, both from CES. The meeting was minuted by the Defendant. Mr. O'Mahony, in evidence, said it lasted only twenty minutes and only the first two minutes were devoted to introductions and explanations as to the role of Capita and CES. Mr. O'Mahony described the meeting as effectively information gathering. He agreed with the record, commenting that Mr. Terry Byrne did most of the talking.

The record confirms the attendees. It sets out the connection name. The connection encompasses all of the Plaintiffs, other than the Fifth Named Plaintiff, and prominently named is Diamond Developments Limited. It refers to an overall par debt of €63.6 million. That is in the introductory part of the minute.

There is then a record of what took place and Mr. Byrne records having given introductions of himself in the roles of CES and Capita, and then handed over to Mr. O'Mahony.

> *"Mr. O'Mahony: I sent a letter to NAMA re having someone finance it. I made an offer of €4m to NAMA in June 2016 but they wouldn't sell it to me.*
>
> *Mr. Byrne: Market has moved in our favour, we have a model. €4m won't cut it. NAMA have valued it higher.*
>
> *Mr. O'Mahony: I was looking at a loan sale. Rochford is landlocked, will be for six years. Rochestown, we have the only site.*

Mr. Byrne: That's Midleton? We have the adjacent site. I will talk to our RE team.

Mr. O'Mahony: I may take back just Midleton.

Mr. Byrne: We have another site beside it. Would you want it too?

Mr. O'Mahony: The Bowen site was in receivership. There is a listed house in the middle of Midleton. Any plan may involve restoring the house. Could spend €1 million on the house alone. Zoning includes provision for a school.

Mr. Byrne: There may be a marriage value between the two.

Mr. O'Mahony: I was going to look at it for NAMA, the value of both together. John Barry built the site beside it. John Bowen paid €750,000 for the site. This needs access through my lands to develop it.

Mr. Byrne: The land behind your site is worth more to you than anyone else. Frank will look at it. We may go and see it.

Mr. O'Mahony:"

There is a reference here to DOB but it should DOM, in other words, Mr. O'Mahony.

"Monsfield site is hard to value. I paid my last €30,000 due under my settlement in January. The PDH is to be released two years after the sale of the last asset.

Mr. Byrne: We have had interest. We will give you a number. Or we may go to market, we may need to test market.

Mr. O'Mahony: I'll cooperate but need treated fairly. Mr. Byrne: You're okay if we test the market? There are a substantial number against Monsfield or Rochestown, we'll come back. Won't take long. You can set out your timings. Would need to be end of Q2."

Which I take to be the end of June 2017.

"Mr. O'Mahony: Yes."

And that's the end of the record. It gives an impression of what took place at that meeting. What I find significant is that the Defendant arranged this meeting and clearly wanted to realise profit from this NALM connection. It seems from the evidence that

Mr. Byrne was driving the agenda. He expressed the Defendants' interest in the words "we will give you a number" and this meant that the Defendant, through Capita or CES, would tell "you" the figure for which they were prepared to sell the residual properties and loans under discussion to Mr. O'Mahony and his companies. He was indicating that, alternatively, they may go to the market. In other words, sell themselves, or test the market. Thus, the Defendant was in the driving seat. The €4m previously offered to NALM wouldn't "cut it". Mr. O'Mahony was cautious because he had limited means. The Defendant must have been well aware of this because it had his declared Statement of Affairs of 10th September 2013, which was annexed to the 2014 settlement agreement. So Mr. O'Mahony merely stated "I will cooperate, but I need to be treated fairly."

I am satisfied that Mr. O'Mahony was up front with the Defendants agents at this meeting and, in particular, in the information he gave about the various sites where he detailed some of the disadvantages, such as the disadvantage in Midleton with the listing of the old house. But that the Defendant was in a hurry to realise its interest in the loans and properties is also evident. They would "come back" quickly and "would need to be the end of Q2". In other words, Mr. Byrne wanted finality by the end of June 2017.

I am satisfied that at this stage Mr. O'Mahony would have been happy enough if the Defendant had simply sold off the properties under the 2014 settlement. His primary wish was to be debt free and he had no wish to buy if the price was too high or one which he could not afford.

Following this, Mr. O'Mahony, on request, provided NALM confirmation of his last payment of €30,000 in December 2016. Then on 9th May, Mr. McWhinney wrote a significant e mail rejecting the €4m offer but inviting an offer "at or above €6 million". In this e mail, he refers to Declan (that's Mr. O'Mahony) and the €4m offer. He says:

"Following a review of the information presented, Promontoria has now reverted to Capita with their decision. Capita can confirm that Promontoria has declined the offer as it does not, in their view, represent a realistic offer in respect of the value of the real estate. My client, therefore, invites a significantly improved offer by Friday 19th May 2017 and has stated that any offer would need to be at or above €6 million. In the event that you do not wish to make a revised bid at this level, Promontoria intend to take these to market with Savills as agents."

This deadline again demonstrates the importance to the Defendant of a speedy disposal. The e mail goes on:

"This decision has been made solely by Promontoria and is delivered to you by Capita Assets Services (Ireland) Limited in our capacity as service provider to Promontoria."

Again, it appears from this that Promontoria were driving this process and they were calling the number.

The e mail proceeds:

"Please note that the contents of this e mail are entirely without prejudice to, and shall not be construed as a waiver of any rights and remedies available to Promontoria under the facility documents and legislation and/or otherwise conferred by law. Promontoria expressly reserves all such rights and remedies, whether arising now or subsequently, and all such rights and remedies are exercisable at the discretion of Promontoria."

It will be noted that this rider did not appear in the later e mail of 20th June 2017.

"...Mr. McWhinney and should you have any queries in respect of the above, please do not hesitate to make contact with me."

Mr. O'Mahony well recalled getting this e mail and his evidence was that he then had to assess whether and where he could get €6m, and time was very tight. He was, he said, going to be cautious, but he was prepared to go with it and he had spoken to people about the possibility of raising finance and, in particular, had been introduced to a Mr. Seamus Geaney, a

Cork developer, and it appeared to him that Mr. Geaney was prepared to invest and on that basis, he did make an offer. In his e mail to Mr. McWhinney of 18th May 2017, he says:

"Jonny, in response to your e mail of 9th May,

I confirm I am willing and able to revise my offer to €6 million. As you are aware following meeting on

3 April 2017 with Mr. Byrne, Cerberus and yourself, I engaged the services of Brendan McGinn. I needed someone familiar with this process to assist and advise and bring to a successful conclusion for both parties."

Following this, Mr. O'Mahony later confirmed his offer and in an important e mail of 22nd May, he wrote to Mr. McWhinney.

"Further to your e mail of 19th May, I would like to respond as follows. I hereby confirm my formal offer of €6 million to purchase the remaining assets and loan notes, a full and final settlement of all outstanding liabilities. I confirm the source of funding of

€6 million is from Mr. Seamus Geaney, property developer, Carrigtwohill, Co. Cork. The funding will be from the disposal of two sites within his associated companies in respect of which contracts have been signed and completion will occur before 31 August 2017.

My solicitor is Elaine O'Driscoll, Managing Partner, P.J. O'Driscoll & Sons, 72 South Mall, Cork. She has been fully briefed on this offer and is in a position to immediately engage with solicitors. I envisage a completion date of 31 August 2017. As the timescale is tight, an early response would be much appreciated."

In response to that, Mr. McWhinney replied on the 23rd May:

"Thanks for this additional information. Note that the deal is still subject to formal Promontoria approval and we will revert in due course."

Two observations should be made about this. First of all, Mr. O'Mahony in his e mail of the 22nd May, was very up front about his funder and the dependence on this funding on the sale of two sites. Secondly, in the response, Mr. McWhinney describes what is developing as "the deal". The deal, and it was now only subject to Promontoria approval. But before moving on from this, there is some importance attached to the earlier e mail from Mr. McWhinney to Mr. O'Mahony that led to this firm offer and that is an e mail of 19th May 2017, where Mr. McWhinney said:

"Declan, many thanks for your e mail, which we have discussed this morning."

That was the e mail which was an indication of the €6 million offer.

"You have indicated that you have secured funding from a private but undisclosed source and that while funds may be drawn down in stages, you would expect to be in a position to close the deal, if approved, in a single transaction by 31 August 2017. You are still talking to your tax and legal advisors around the structure of the deal, whether to progress by way of asset purchase or whether you wish to acquire the loans. It is important that you formalize the terms of your offer as soon as possible when we can seek formal approval and, beyond that, go into legals. We also require details of your funder. You have indicated that you will have a formal offer with us by next week and ideally in the early part of this week."

Clearly, from his response, Mr. O'Mahony understood the key elements of what was required by Promontoria. Also, he was, in his response, up front in relation to the funding. The reference to a single transaction is significant because it is later reflected in the authority that Promontoria gave in relation to the approval.

Two other things should be noted about this e mail of the 19th May. Firstly, there is no mention of a deposit at this stage. It is clear that the key requirements for Promontoria were receipt of €6 million by 31 August 2017. Secondly, it was put to Mr. O'Mahony by Mr. MacCann that Mr. McWhinney would say that for there to be a deal, there would have to be formal legal executed contracts and that Mr. McWhinney told Mr. O'Meara this on several occasions and that this was what was meant by "go into legals". Mr. O'Mahony was emphatic in his denial that this was ever discussed or that he understood this to be the meaning of "go into legals". I accept Mr. O'Mahony's uncontested evidence on this point. I find as a fact that "go into legals" did not infer entering into formal contracts in the conventional sense but rather refer to the parties' lawyers dealing with the legal documentation required to implement and give effect to the transaction and to close the deal, as it were, by 31st August 2017.

In sending his formal confirmation of his offer on the 22nd May, I am satisfied that Mr. O'Mahony did not send this until he had firm agreement from Mr. Geaney to provide funding. I also accept Mr. O'Mahony's evidence that his agreement with Mr. Geaney was that he, Mr. O'Mahony, would retain a 20% stake and it was to be a joint venture.

After this exchange, Mr. O'Mahony was pressing Mr. Geaney as to the disposal of his sites. He said in evidence that he couldn't afford to risk losing his deal by not closing on 31st August 2017. I accept his evidence that Mr. Geaney understood Mr. O'Mahony's need for a solid commitment to funding. I further accept Mr. O'Mahony's evidence that this commitment "wobbled" or "stumbled" and was withdrawn probably on 7th June 2017. I identify this date because on 7th June Mr. O'Mahony was still putting pressure on Mr. Geaney in response to Mr. McWhinney's query in his e mail of 6th June as to whether the sale of the two sites was on track to complete by 31st August 2017. I accept that this was a delicate situation for Mr. O'Mahony at the time and the suggestion was put to him that he wasn't up front with Mr. McWhinney at this time. This, I believe, was unfair and unwarranted in the circumstances, given the commercial circumstances.

The timing of Mr. Geaney's withdrawal is also given support by the fact that Mr. O'Mahony looked for alternative funding and, as a

first step, obtained a valuation of the four sites from Ms. [Isobel] O'Regan of Savills on 8th June. Ms. O'Regan's valuations were as follows: Midleton €6 million, Monsfield €500,000, Rathcormack €400,000 and Bridgefield or Curraheen, €100,000. Armed with this valuation, Mr. O'Mahony approached Mr. John O'Sullivan in Westboro Capital and as we will see, Westboro wrote a letter on the

14th June confirming that they could access the

€6m funding.

It is necessary, however, to consider first the e mail sent by Mr. McWhinney to Mr. O'Mahony on the 6th June 2017 in which he said:

> *"Declan, the approval request for this deal is progressing. My client has raised a number of additional queries. Can you please come back to me on these this afternoon?*
>
> > *1. Funding. What is the latest position on the sales of Seamus Geaney's two sites? Are they on track to complete by 31 August and is there anything you can provide to us to give us comfort on same?*
> >
> > *2. Timing. Formal Promontoria approval is being sought for a 31 August completion. Have you other mezzanine finance or short term lending options to provide bridging if the Geaney sales do not complete? 3. Deposit. Our client seeks a 10% deposit upon signing to demonstrate your commitment to the deal. Can you confirm that be paid across to A&L Goodbody upon formal Promontoria approval of the deal. They will issue the Draft Loan Sale Deed upon approval of the deal."*

Mr. O'Mahony in his evidence confirmed that this e mail was sent, received and read by him, and that is what he was told. He said that he got the feeling from talking to Mr. McWhinney (because he had occasional telephone calls) that Promontoria were very anxious to deal on the basis of €6 million but also to close on the 31st August 2017.

I regard this e mail as a key document because in it, Capita introduced reference to a deposit of 10% upon signing. The sequence envisaged is:

> (1) The Promontoria approval of the deal.
>
> (2) The issuance by A&L Goodbody of a Draft Loan Sale Deed and,
>
> (3) Payment of 10% deposit upon signing of the Loan Sale Deed.

Indeed, this timing is confirmed in Clause 2.2 of the first Draft Loan Sale Deed, which was furnished by A&L Goodbody to Ms. O'Driscoll, the Plaintiffs' solicitor, dated 30th June 2017. Mr. O'Mahony could not recall in evidence whether he expressly agreed to pay the deposit. I find that:

> 1. From 6th June on, Mr. O'Mahony knew that a 10% deposit would be payable as part of the deal on signing the Loan Sale Deed.
>
> 2. That the Plaintiffs continued to negotiate and work towards a deal on the basis that such a deposit would be part of it.
>
> 3. That Mr. O'Mahony never questioned that there was to be such a deposit in the approval or in the deal. 4. I also accept Mr. O'Mahony's evidence that he did not regard the deposit as material and that it never became a material part of the discussions between himself and Mr. McWhinney prior to 20th June 2017.

These findings must be considered in the context of Promontoria and its agents driving the negotiating dictating the terms would be a better characterisation and that the key terms known and understood by the Plaintiffs and the Defendant and its agents were that €6m would have to be paid by 31st August 2017 for release of the loans and security.

I find on the evidence that a deposit of 10% on signing the Loan Sale Deed became part and parcel of the Plaintiffs' proposal and, as a result of the e mail from Mr. McWhinney, became superimposed on the offer formalised by Mr. O'Mahony in his e mail of 22nd May 2017.

In coming to this conclusion, on the evidence as presented, I am mindful of the following. Firstly, this was not a conventional sale that would involve a conventional agreement for sale with special conditions and Law Society General Conditions of Sale or a deposit payable at an early point in time. The concept of agreement in e mails without deposit followed by Loan Sale Deed, which effects the sale of loans, is very different and what was contemplated here was payment of the deposit on signing of the Loan Sale Deed by the Plaintiffs and shortly thereafter, payment of the balance on closing.

Secondly, the relative unimportance of a deposit from Promontoria's perspective is very evident from Advisory Note 134 approving the sale with payment by one installment of €6 million and without any reference whatsoever to a deposit payment. Indeed, Capita, whose name is given as CMT in the advisory note, shows that it prepared that note and did not even bother to include a recommendation in relation to a deposit.

Thirdly, as will be seen when Mr. O'Mahony sought to renegotiate the deposit, it is evident from e mail exchanges that Mr. McWhinney and Ms. McNamee of Capita had no difficulty agreeing on behalf of Promontoria

a non refundable deposit of 1% or €60,000.

Fourthly, Mr. MacCann placed emphasis on Comment E02 placed by Mr. O'Mahony's solicitor, Ms. Elaine O'Driscoll, on A&L Goodbody's First Draft Loan Sale Deed, which he sent back on 28th July 2017. Having drawn a line through Clause 1.1.6, defining deposit to mean a non refundable deposit of €600,000, she commented in the margin:

> *"We understand that it is agreed between the parties that no deposit is payable."*

Her explanation under cross examination appears on Day 3 at page 166 in the transcript. She is being cross examined by Mr. MacCann and she says:

"I'd say the first conversation I had with him [Mr. O'Mahony] about a deposit was when I got in the document from A&L Goodbody on 30th June 30th of is that right? Yeah, 30th June.

Q. 30th June, that's right, so some ten days later.

A. Yeah, and I was reading through it I think I sent it on to him and I was reading through it and I remember coming to the bit about non refundable deposit and I was a bit shocked to see that. So I did say to him, I did say to him; 'There's a non refundable deposit in this document' and he made some comment like 'Oh, that's not right, that's not right, I didn't agree that.' But I suppose it was, like, 600,000 of a non refundable deposit sounded very bizarre to me.

Q. Well, whether it was refundable or otherwise, you didn't know anything about what he had said to the other side apropos a deposit?

A. Again now that conversation that I had with him where we discussed the deposit, we would have been discussing everything else as well in relation to the Deed and the various things I was looking for. So if we were 45 minutes on the phone, I'd say two minutes or less was on the deposit issue and it was more about the nonrefundable, I was hung up on that."

Now this is an explanation that I accept, and it is the fact that the deposit was described as non refundable, which gave rise to alarm and, in my view, primarily motivated the comment on the side of the draft document.

Fifthly, prior to 20th June 2017, Mr. O'Mahony in fact obtained access to funding for €6m.

Turning again to the chronology, and the funding issue, the letter that Mr. O'Mahony obtained from Westboro Capital on 14th June 2017, stated:

"We wish to advise we have been engaged by Mr. Declan O'Mahony to facilitate the purchase of the following assets from Cerberus for the sum of €6 million"

And it then listed the four assets.

"We would like to confirm that we are in a position to access this quantum of funding, subject to normal due diligence. If you have any questions, please do not hesitate to contact us."

Now, Mr. O'Mahony's evidence was that a copy of that was sent by Mr. Sullivan of Westboro Capital to Mr. McWhinney, and it is indeed addressed to Mr. McWhinney.

Mr. O'Mahony then gave evidence that he received a telephone call from Mr. McWhinney on a date between 14th June 2017 and 20th June 2017 wherein he (Mr. McWhinney) confirmed that that letter was acceptable. Now Mr. MacCann put it to Mr. O'Mahony that Mr. McWhinney would say he knew nothing about the change of funder at this point. Mr. O'Mahony agreed he did not expressly say to Mr. McWhinney that Mr. Geaney was no longer funding. I find that it was at least implicit from the furnishing of the Westboro letter and the absence of any mention thereafter of Mr. Geaney. Mr. O'Mahony did not mislead, nor could it be said in the absence of evidence to the contrary, that he misled Capita on this aspect. In any event, it seems to me that nothing of substance turns on this point, or indeed on whether or not the Plaintiffs were putting in place mezzanine finance. Ultimately, the source of financing and identity of the funder would only become relevant at the time of payment of the deposit and on closing.

On 16th June, James Murphy of Capita e mailed Mr. O'Mahony asking for endorsements on the property's insurance to note Promontoria's interest. Mr. O'Mahony forwarded this to his insurer on the 19th June accordingly.

From the Defendants' Discovery, Document 543, we then see the Advisory Note number 134, dated 16th June 2017. This is a critical document because on its face, it was prepared by Capita, described as CMT, with its recommendation to Promontoria and the document sets out the authorisation signed on behalf of Promontoria to Capita to conclude a contract with the Plaintiffs.

It gives a description at the top by reference to Diamond Developments Limited and the connection number and it details the assets concerned. It then sets out background information, part of which is redacted. In that, it says at the last bullet point:

"The central promoter of Diamond Developments is Declan O'Mahony, who now wishes to take back all remaining assets by way of a loan sale."

The next line says: "The type of AN loan sale." The proposal or request is then stated. "This paper seeks approval for an offer from Declan O'Mahony to purchase the loans and attaching security for €6m."

The next box is headed "details deal terms, terms of contracts", and there are two bullet points. The first reads: "Payment to be made by one installment of €6m to PGD", which is Promontoria, "by 31 August 2017."

The second bullet point:

*"Upon receipt of the full payment, all security will be released and the borrowers will have no further liability to PGD." The next box is headed "costs" and reads "ALG...", that's A&L Goodbody. "...to act for Promontoria (or PGD) in the loan sale for €12,000 plus VAT and outlay. These costs will be for the purchaser. * ALG to prepare releases at the panel rate of €400 plus VAT and outlay per property. These costs will be for PGD."*

So those were essentially the authorised terms from Promontoria's perspective. The next box is headed "Metrics" and is blanked out, other than the words "collections at €6 million." The next box "Pros", which presumably would set out the advantages for Promontoria of the proposed deal is blanked out. Then there is a recommendation from Capita. The first bullet point:

"CMT recommends that PG DAC approve the above and DPO offer of €6 million."

DPO appears to stand for debt pay off.

Second bullet point:

"CMT recommend ALG to act for PG DAC in drafting loan sale docs for €12,000 plus VAT and outlay.

CMT additionally recommend ALG to act, providing release of €400 plus VAT and outlay per property."

Then, although the signatures themselves are blanked out, it is clear that there is a signature for the advice or recommendation, that is to say from Capita, and the date given for that is 16th June 2017. There is then a box: "Asset manager, Promontoria Holding, 142 BV" and again, there seems to be a signature that is blanked out, part of which can be seen, and it is dated 19th June 2017. It will be noted that there is no reference to a deposit in this authorisation.

From this, it is clear that Capita was expressly authorised to contract with the Plaintiffs to take back all of the remaining assets by way of loan sale for one installment of €6m plus payment of A&L Goodbody's set fees for the Loan Sale Deed and Release. Although redacted, it is readily apparent that it was signed by an asset manager on behalf of the Defendant and date stamped 19th June 2017. It is notable that there is no reference in the recommendations or authorisation to the requirement of any deposit and on its face, Capita did not seek authority for a deposit and Promontoria did not require it. If nothing else, this demonstrates how unimportant a deposit was to Promontoria and Capita.

The following day, Mr. McWhinney sent the e mail of the 20th June 2017. It is addressed to Mr. O'Mahony and it refers to the connection and says:

"Declan, I can confirm that Promontoria Gem DAC (Promontoria) has made decision. Please note this decision has been made solely by Promontoria and is delivered to you by Capita Assets Services (Ireland) Limited in our capacity as service provider to Promontoria."

There is then in heavy lettering a heading "Heads of Terms".

"Promontoria approve the loan sale with details as follows:

purchase price, €6 million.

purchasing entity, TBC", which I take to mean "to be confirmed".

"please confirm ASAP.

exchange by 6th July 2017.

10% deposit payable upon exchange.

completion by 31 August 2017.

Eimear Bell of A&L Goodbody will act for Promontoria in the loan sale and they are drafting currently, aiming to have a Draft Loan Sale Deed (LSD) with your solicitor this week. This will include a full schedule of loans and properties to be included. Please note that this deal has been approved on the basis that Promontoria's legal costs will be for you.

A&L Goodbody will act for Promontoria and they have quoted as follows:

Loan Sale Deed €12,000 plus VAT and outlay, although this could rise, dependent upon the amount of negotiation and terms of the documents.

Deeds of Release €400 plus VAT and outlay per deed of release."

There then follows a section in the e mail headed "KYC", which stands for "know your client", and it reads:

"As regards KYC, in order to accept deposit and completion monies, Capita will need to submit a KYC (anti money laundering) pack to include:

The name of the purchasing entity

If an SPV, we will need a copy of each directors' and shareholders' passport, plus a copy of a utility bill or bank statement for each, less than three months old, both stamped and signed as certified by a solicitor.

We will need to see formation documents to include certificate of incorporation, memo and arts., a CRO document confirming the names of the directors and share holders.

We will also need confirmation of the precise source of funds, i.e. the specific origin of the purchase monies.

The attached AML template letter to be completed by your solicitors' headed notepaper and signed to be addressed to PG DAC.

Only once Capita obtain approval on this KYC pack will Promontoria be in a position to accept funds and close out the Loan Sale Deed. We will be grateful if you could get this to us as soon as possible.

Kind regards,

Jonny."

The e mail contained the standard small print clause at the end as follows:

> *"The loan facilities referred to in this e mail are managed by Capita Asset Services (Ireland) Limited, a service provider for and on behalf of and in accordance with the instructions of Promontoria Ltd. Promontoria BV Capita has no authority to bind, commit, or conclude contractual arrangements on behalf of Promontoria."*

While the Defendant places some reliance on this, in my view, it is misplaced. The express authority of Promontoria to Capita to communicate this document and its terms clearly overrides this boilerplate limitation on authority. I find that in contrast to Capita's e mail of 9th May, and this e mail was not without prejudice, and secondly, the e mail was not subject to contract or contract denied. Thirdly, it was not subject to any conditions precedent. Fourthly, it did not introduce any new material terms or conditions. Fifthly, the references to "exchange" must be read in context, in particular by reference to a Loan Sale Deed in the ensuing paragraph. It meant exchange of the Loan Sale Deed, upon which the deposit would be due.

Sixthly, the terms related to exchange, and the term related to A&L Goodbodys' fees, and the KYC terms, related to conveyancing and implementation.

Seventhly, the reference to 10% deposit was not a new term for reasons that I have already stated.

Eighthly, the e mail on its face did not request or require any further confirmation or acceptance from the Plaintiffs. Indeed, it expressly provided for the next step, which was to be the provision by A&L Goodbody of the Draft Loan Sale Deed "this week".

Ninthly, it contained the parties, Promontoria Gem DAC, and the Connection 067 Diamond Developments Limited. It contained the parcels by reference to the connection and previous correspondence, in particular Mr. O'Mahony's e mails. It set out the price of €6 million. Insofar as the deposit might be said to be legally required, it provided for 10% deposit on exchange. Tenthly, there was no verbal or written response to this e mail from Mr. O'Mahony such as the Defendants argue was required to communicate acceptance to the Defendant. In direct evidence, Mr. O'Mahony gave his understanding on receipt of this e mail. He said at Day 2, page 97 of the transcript:

> *"A. I was saying, great, I am now after getting a formal acceptance of my offer and that I advised my solicitor accordingly that this document had come in and could she just get on, I was at all times just emphasising how the 31st August was the important thing to complete."*

Further, in his witness statement at paragraph 38, he states:

> *"The e mail of 20th June 2017 therefore sets out the terms of the agreement by which the Plaintiffs would be released from their indebtedness to the Defendant". And, of course, at the start of his direct evidence, he adopted his witness statement.*

I find that Mr. O'Mahony's subjective understanding and belief was that there was, by this e mail, a concluded and legally binding agreement. At this point, I should say that I found Mr. O'Mahony to be a good and honest witness. He was aptly described by Mr. O'Flynn in his evidence as a "straight talker" and I accept his evidence as sound.

THE LEGAL POSITION

What then is the legal position based on these findings up to and including 20th June 2017? In arguing that the e mail of 20th June was a counteroffer and not an acceptance of Mr. O'Mahony's offer, Mr. MacCann referred the Court to McDermott On Contract Law, Second Edition, and at paragraph 2.73, the authors state under the heading "Acceptance":

> *"Acceptance may be defined as a final and unequivocal expression of agreement to the terms of an offer. Two aspects of acceptance must be considered; the fact of acceptance and the communication of acceptance."*

At paragraph 2.75, the authors add:

> *"The general rule is that an acceptance is not valid unless made with the intention, as objectively assessed, of accepting the offer."*

Further on in the text at paragraph 2.88, the authors deal with counter offer and state:

> *"If the response to the offer is anything less than a clear and unequivocal acceptance of the exact terms of the offer, then the response will be seen as a counter offer. This counter offer may then be accepted or rejected by the person who made the original offer. Like an offer, the counter offer, unless otherwise specified, is open for a reasonable length of time or until revoked. In Tansey v College of Occupational Therapists, Murphy J. stated the principle in the following terms:*
>
> *'Ordinarily, a communication in the course of negotiations leading to a contract which contains conditions not previously agreed by the party to whom the communication is addressed will fall to be treated as a new or counter offer rather than an acceptance.' Where a counter offer is made, it amounts to a rejection of the original offer which is thus no longer open for acceptance. There are three Irish cases which illustrate these principles."*

And the authors then go on to deal with that.

I accept that the Court's task is to carry out an objective assessment. I also accept that a clear counter offer cannot amount to acceptance. Both Counsel referred me to pages from Chitty on Contracts, the 32nd edition, from paragraph 2.026 onwards, which I find helpful in relation to the course of negotiation and its relevance to acceptance. At paragraph 2.026, again a passage that Mr. MacCann relied upon, it is stated:

> *"Acceptance defined:*
>
> *An acceptance is a final and unqualified expression of assent to the terms of an offer. The objective test of agreement applies to an acceptance no less than to an offer. On this test, a mere acknowledgment of the receipt of an offer does not amount to acceptance."*

Then at paragraph 2.027 under the heading "Continuing Negotiations" , the author states:

> *"When parties carry on lengthy negotiations, it may be hard to say exactly when an offer has been made and accepted. As negotiations progress, each party may make concessions or new demands and the parties may in the end disagree as to whether they had ever agreed at all. The Court must then look at the whole correspondence and decide, whether on its true construction, the parties had agreed to the same terms. If so, there is a contract, even though both parties or one of them had reservations not expressed in the correspondence. The Court will be particularly anxious to hold that continuing negotiations have resulted in a contract where the performance which was the subject matter of the negotiations has actually been rendered. In one such case, a building contract was held to have come into existence, even though agreement had not yet been reached when the contractor began work. During its progress, outstanding matters were resolved by further negotiation. The contract may then be given retrospective effect so as to cover work done before the final agreement was reached."*

At paragraph 2.028 under the heading "Negotiation After Apparent Agreement", the authors state:

> *"Businessmen do not, any more than the Courts, find it easy to say precisely when they have reached agreement and may continue to negotiate after they appear to have agreed to the same terms. The Court will then look at the entire course of negotiations to decide when an apparent unqualified acceptance did in fact conclude the agreement. If it did, the fact that the parties continued negotiations after this point does not effect the existence of the contract between them. For example, in one such case, the subsequent negotiations showed only that the parties wished to discuss the implementation of the agreement and that one of them wished to improve the terms that had been agreed. The position would, of course, be different if continued negotiations could be construed as an agreement to rescind the contract. A fortiori, the binding force of an oral contract is not affected or altered merely by the fact that after its conclusion, one party sends to the other a document containing terms significantly different from those that had been orally agreed."*

Then under the heading "Acceptance By Conduct", at paragraph 2.029, it is stated:

> *"An offer may be accepted by conduct. For example, an offer to buy goods can be accepted by supplying them. An offer to sell goods made be sending them to the offeree can be accepted by using them and an offer contained in a request for services can be accepted by beginning to render them. Where a customer of a bank draws a cheque which will, if honoured, cause this account to be overdrawn, the bank, by deciding to honour the cheque, impliedly accepts the customer's implied request for an overdraft on the bank's usual terms. But conduct will only amount to acceptance if it is clear that the offeree's alleged act of acceptance was done with the intention ascertained in accordance with the objective principle."*

That last sentence is one that is particularly relied on by Mr. MacCann.

CONCLUSIONS OF FIRST ISSUE
I must, as I have already done, look at the whole correspondence and decide if, on its true construction and objectively considered, the parties had agreed to the same terms. Of course, I do not have the benefit of evidence from the Defendants' witnesses. However, there were business people on both sides. Promontoria was driving for a quick sale at €6m. I am satisfied they had what they wanted by 20th June 2017 and the Advisory Note 134 evidences their agreement and the essential terms and their intention to enter binding legal relations and their authority to Capita to communicate this and the essential terms to

Mr. O'Mahony and the Plaintiffs. They were, of course, already in legal relations with the Plaintiffs under the terms of the 2014 settlement. This new agreement had the effect of varying that legal relationship and if and when completed, of bringing the 2014 settlement to an end.

Nor do I consider, in the light of the negotiation and in particular the e mail from Mr. McWhinney introducing the 10% deposit term and the continued negotiation thereafter, without demur from Mr. O'Mahony, that the e mail of 20th June 2017 introduced any new condition or any new material term. The intention to create legal relations is also clear from the e mail of 20 June. It is not headed "subject to contract" or "contract denied". That heads of agreement can constitute a binding agreement was not really disputed. In *Danbywiske & Others v Donegal Investment Group*, Mr. Justice Brian McGovern in a judgment delivered on 16th January 2015, addressed this issue from paragraph 12 onwards in his judgment. He says:

> *"The Heads of Agreement has many indicia of an agreement. Its very title, Heads of Agreement, indicates a consensus."*

And he then deals with aspects particular to the heads in his case. At paragraph 13, he says:

> *"It is worth noting that in the defence and counterclaim, the defendant did not plead in terms that the Heads of Agreement did not constitute a legally binding agreement but rather sought to plead that the terms of agreement, which would permit the Plaintiffs to exercise the option, had not been complied with.*

14. The heads of agreement is not drafted by lawyers but did reflect what was agreed between the parties and was signed by a representative of the parties. The agreement is not one which requires being in writing for it to be binding."

And he then deals with particular facts in that case.

At paragraph 15, he says:

> *"The court was referred to the case of Rossiter & Others v Miller 1874 80 AER 465, where the House of Lords confirmed that a contract has been concluded if the parties have reached agreement on all the essential terms. Simply because the parties envisage recording those terms in a subsequent formal document does not render the concluded agreement or bargain unenforceable. This decision was adopted in the High Court by Kenny J in Law & Others v Robert Roberts & Co., 1964 IR 292. This judgment was upheld on appeal."*

I took a similar view in my judgment in Nolan Transport v AIB, 2016 IEHC 2013, in relation, in that case to indicative heads of terms [see particularly paragraphs 117 on to 122]. I find that the parties agreed all the essential terms and intended and agreed that all of the terms in the e mail of 20th June 2017 were binding. Words used such as "terms", "Promontoria approve", "this deal has been approved" all connote and demonstrate the finality of the agreement and this was their bargain. There was no need for further acceptance, nor any further need for discussion or negotiation. The wording used and the circumstances of this case are such as to lead me to conclude that there is a binding contract and in this case, it is probably stronger than the circumstances considered, for instance, by Morris J. in the *Aga Khan* case (unreported) 25th July 1991 cited by Mr. Sreenan.

ACCEPTANCE BY CONDUCT
whilst Mr. Sreenan relied in the alternative on conduct post 20th June 2017, which he argued demonstrated acceptance by the Plaintiffs, I will address this briefly. Firstly, he relied on Mr. O'Mahony's receipt of an e mail informing Ms. O'Driscoll and instructing her to act. I find that Mr. O'Mahony did telephone her on the 20th June to inform her of the deal and also that he forwarded the 20th June 2017 e mail to her on the 22nd June and that he rang her then to stress to her the need to complete on or before 31st August 2017 and that she would be hearing from A&L Goodbody.

Ms. O'Driscoll then received an e mail from A&L Goodbody on the 30th June, prominently headed "subject to contract, contract denied", and enclosing a Draft Loan Sale Deed for her to review. Ms. O'Driscoll was already Mr. O'Mahony's retained or outstanding solicitor. In any case, I cannot see how his private communications with Ms. O'Driscoll on 20th and 22nd June could constitute communication of acceptance to the Defendant or its agents.

Secondly, it was argued that Promontoria engaged A&L Goodbody immediately and fees were being incurred by Promontoria for which Mr. O'Mahony could be liable under the contract. However, this liability could only arise if there was an agreement. If there was none, Promontoria would have to bear the costs incurred. It seems to me that further demonstrates that the Defendant regarded itself as contractually bound and hence supports the contention that the letter of 20th June was not merely a counter offer. However, it cannot be relied upon as communication of acceptance by Mr. O'Mahony by conduct, if, contrary to my ruling, the e mail was only a counter offer.

DEPOSIT TERM AND VARIATION
The next question is whether the 10% deposit was a term of the contract, notwithstanding firstly the fact that the Defendants' Advisory Note 134, did not expressly authorise the deposit, but rather referred to one installment of €6 million and, secondly, notwithstanding the later re negotiation of the amount of the deposit in correspondence, much of which was marked "subject to contract".

As to the first of these, while the parties may agree that a deposit was not an important or essential term, it became a material term simply by virtue of the e mails of Mr. McWhinney of 6th June and 20th June 2017. It is also thus described in paragraph 18 of the Statement of Claim. The evidence heard and considered does not lay bare all of the interaction between Promontoria and Capita. What can be said at least from the Plaintiffs' perspective and an objective reading of the e mails of 20th June is that Capita stated it had actual authority to communicate a deal that actually included a term requiring payment of a 10% deposit payable on exchange. In my view, the Plaintiffs cannot have it both ways. If, as I have found, the 10% deposit was part of the concluded contract, they cannot seek to negate that in reliance on Advice Note 134. As to the second point, it is necessary to outline my relevant findings as to what occurred after 20th June 2017. The legals commenced as between the solicitors on 30th June, Ms. Deirdre Kelly of A&L Goodbody forwarded by e mail headed "subject to contract, contract denied" the first Draft Loan Sale Deed to

Ms. O'Driscoll. Ms. O'Driscoll's did not adopt "subject to contract". On 7th July, Ms. O'Driscoll raised numerous queries to which Ms. Kelly responded on 11th and on 25th July, various documents of title were released to Ms. O'Driscoll on accountable trust release. Ms. O'Driscoll e mailed her comments on the Draft Loan Sale Deed on 28th July 2017 and in her response, on the 1st August 2017, Ms. Kelly responded in relation to the deposit thus in her e mail:

> *"From our client's perspective, it is not agreed that no deposit is payable by the buyer. We have been instructed by our client to advise you that they are willing to proceed with a deposit of €200,000 rather than 10% of the purchase price, i.e. €600,000 as initially discussed between the principals. We understand that this new deposit figure of €200,000 is nonnegotiable and that our client will also communicate this to the debtors or buyer.*
>
> *Kind regards,*
>
> *Deirdre."*

However, Mr. O'Mahony's evidence was that he had a prior conversation with Mr. McWhinney on or before 5th July, in which the deposit amount was raised and this led to Mr. McWhinney e mailing Mr. O'Mahony on the

5th July in the following terms:

> *"Declan, many thanks for the update on this and please keep us updated on developments. As regards the deposit, my client ordinarily expects a 10% deposit on signing. You have indicated that this may be a problem for you. Can you please liaise with Elaine and confirm the amount you can pay upon exchange. I can then seek approval from my client. Timing remains 31 August for final completion. If any issues on this, call it out now.*
>
> *Regards, Jonny."*

This e mail demonstrates just how unimportant to Capita and the Defendant was the amount of deposit payable upon exchange. As Mr. O'Mahony said in evidence, and I accept his evidence, it was not an issue.

The negotiation then continued, at this stage between Capita and Mr. O'Mahony directly.

On the 1st August Mr. McWhinney e mailed Mr. O'Mahony saying:

> *"Declan, legals are progressing on the loan sale. However, please note that there has been no agreement from my client's side that this deal would proceed without a deposit being paid upon signing. The deal was approved on the basis of a 10% deposit being paid, €600,000. However, in the interests of moving this matter forward, my client will agree to a deposit of €200,000 being paid upon signing. I would be grateful if you would please confirm to Elaine O'Driscoll's office that this acceptable."*

Again, I note that this e mail was not marked "subject to contract" or "contract denied".

Mr. O'Mahony responded on the 4th August:

> *"Hi Jonny, when you rang me last Friday, you said you would not be looking for a 10% deposit, but I could give €100,000. I am surprised you are now looking for €200,000. Declan."*

I accept as correct Mr. O'Mahony's oral evidence that €100,000 was the figure mentioned by Mr. McWhinney in a conversation as being an acceptable deposit and that this took place on the previous Friday. Also on the 4th August, Ms. McNamee, on behalf of Capita, because Mr. McWhinney was out of the office, responded, saying:

> *"Hi Declan,*
>
> *As you may see, Jonny is out of the office at the moment. I am dealing with the matters in his absence. Could you please outline how much you are willing to pay as a nonrefundable deposit. Our client is pushing for €200,000. Many thanks, Fiona."*

That e mail was also not headed "subject to contract, contract denied". Mr. O'Mahony responded at 11:50:

> *"Hi Fiona,*
>
> *Non Refundable deposit was never requested in Heads of Terms per e mail of 20th June 2017. I am most anxious to have this agreement completed by 31 August. Can you follow up to make sure all items as requested by my solicitor are satisfied. I will be back in my office on Tuesday next,*
>
> *Regards, Declan."*

Then at 15:03 on the same day, Ms. McNamee e mailed

Mr. O'Mahony.

> *"Could you reach €100,000 as Jonny discussed in your last call? A 10% deposit was included in the HOT (Heads of Terms) as per 20th June. Our client feels that a non refundable deposit of €100,000 would be a fair compromise. Please take comfort in the fact that our client wished to have this agreement reached by 31 August also."*

Again, not headed "subject to contract" or "contract denied."

Then on the 10th August, Mr. O'Mahony responded to Ms. McNamee by e mail.

> *"Hi Fiona,*
>
> *I am prepared to pay a deposit of 1%, €60,000 payable on usual terms when contract has been agreed. I have been informed by my solicitor that amendments to the contract she requested have not yet been responded to. A meeting early next week in Dublin between your client and your solicitor, myself and my solicitor, would be very beneficial to make sure that the timescale for completion, 31 August, can be achieved. Can you request your client's solicitors to contact mine to organise suitable time and date for this meeting?*
>
> *I can make myself available any time next week, Regards."*

To which Ms. McNamee responded later in the same day. "Declan", and this then has the heading, "Without Prejudice, Subject to Contract, Contract Denied."

> *"PGD will accept your offer of €60,000 as a nonrefundable deposit and we can proceed on this basis. An all parties call may be advisable for tomorrow afternoon instead. What times would suit you and your solicitor for said call tomorrow? Note that our solicitor is off on annual leave today.*
>
> *Additionally, can you please confirm your funder? We require this information for our client and additionally for KYC requirements.*
>
> *Many thanks, Fiona."*

Ms. McNamee introduced the "Without Prejudice, Subject to Contract, Contract Denied" in this e mail. I am satisfied that this can only possibly be related to the deposit issue. Mr. O'Mahony in his reply on 11th August also used, "without prejudice, subject to contract and contract denied" and in that e mail, he said: "Hi Fiona, I note solicitor's client has begun annual leave. My solicitor is on holiday until Monday next. That's why I was suggesting a meeting as to the holiday period is making it very difficult to adhere to a time frame." And so forth.

I make certain findings from this evidence. Firstly, the negotiation concluded with Mr. McWhinney, confirming that the deposit point is now agreed and that is evident from the last e mail in this tranche from Mr. McWhinney dated 11th August 2017, in which he says in the third paragraph:

> *"With the deposit point now agreed, we await comments on the Loan Sale Deed, along with a definitive list of any documents O'Driscolls believe to be still outstanding. We think they have all requested. Goodbodys have been instructed to contact Caroline on your side this morning to seek comments, et cetera. You might also give them a push."*

Secondly, it is very evident that the level of deposit was unimportant from Promontoria and Capita's perspective. Thirdly, the introduction of "without prejudice, subject to contract and contract denied" was not intended to relate to the contract terms which

I found were concluded and binding on 20th June 2017 and it is, I believe, absurd to suggest otherwise. Fourthly, the new deposit had been agreed and the most that could be argued in terms of the effect of the "subject to contract" was that €60,000 instead of €600,000 needed to be inserted in the document effecting the contract, which by this time was a settlement deed. This was merely a conveyancing step. In her e mail of 18th August 2017, admittedly headed "subject to contract and contract denied", Ms. Andrea Brennan of A&L Goodbody, who was now dealing with the matter, wrote to Ms. O'Driscoll as follows.

> *"Dear Elaine, I refer to my e mail below and attach a draft of the proposed settlement deed for your attention. I am instructed that my client requires a settlement deed as signed and the deposit paid on or before Friday 25 August 2017, with the balance of the sum due on or before 31 August 2017. I would be obliged if you would review the attached draft settlement deed and revert to me with any comments you may have. Our client is anxious that the settlement deed is*

finalised and executed as soon as ever possible. Accordingly, I look forward to hearing from you."

It can be seen, therefore, that the new deposit of €60,000 had in fact been inserted in the draft settlement deed that accompanied this e mail and it is in Clause 1.1, which refers to a deposit of €60,000 and also by inference in the definition of "settlement sum", which is now the €5,940,000. Also, it is expressly apparent from the requirement in Clause 2.1 that the deposit be paid as a condition precedent prior to the settlement date of 31st August 2017.

I have already accepted as correct the proposition from Chitty that re negotiation of a term post contract does not affect the existence of the original contract, that that is the general position. Mr. MacCann argued that the re negotiation should be construed as rescinding the contract, if there was any, on the 20th June 2017. I reject this argument. So far as the re negotiation of the deposit is concerned, the correspondence and e mails hold no hint that the parties regarded this re negotiate as undermining, let alone rescinding, the deal. I am satisfied that Mr. O'Mahony's unthinking inclusion of "without prejudice, subject to contract and contract denied" in his e mail of the 11th August, cannot be construed as having any meaning. It certainly did not express any intention to rescind.

I am also persuaded by the authorities of *McInerney v Roper* and Mr. Justice Hamilton (as he then was) unreported, 31st July 1979 and the authority of *Jodifern v Fitzgerald* to similar effect, firstly that agreement can be reached, notwithstanding use of subject to contract, and secondly, that subject to contract introduced after agreement cannot negate the original agreement.

In particular, in *Jodifern*, which is reported at 2003 Irish Reports at 321, the subject was addressed by

Mr. Justice Keane (as he then was) and particularly at page 327, he says:

> *"Since neither document was headed with the fatal rubric "subject to contract", the principles laid down by this Court in Boyle v Lee would not apply and the two documents would constitute a note or memorandum sufficient to satisfy the requirements of the statute of frauds. The subsequent correspondence undoubtedly envisage that to provide for matters which were relatively peripheral, a further agreement would be executed but that did not in any way negative the existence of a concluded agreement for the sale of the land, the essential terms of which were set out in the two contracts."*

He also, on that page, confirms his approval of the dictum of Lord Blackburn in *Rossiter v Miller*, which also feature in the judgment of Judge McGovern in the case already mentioned. At page 328, he notes that the passage from Lord Blackburn was approved by Kenny J. in *Law V Roberts*, in a judgment which was subsequently and unanimously upheld by this Court. He then says:

> *"In such a case, provided a document exists that is capable of constituting a note or a memorandum sufficient to satisfy the Statute of Frauds and which does not contain the words "subject to contract", the principles laid down by this Court in Boyle v Lee do not apply, as was made clear in the judgement of O'Flaherty J. in the latter case."*

In my judgment, the e mail evidence that agreement was actually reached between Mr. O'Mahony and Capita, subject only to the new deposit term being inserted into a formal implementing document, namely the settlement deed, that was the agreement. I should add that the present case is very different from Boyle v Lee 1992 IR 555, where the parties had agreed that there would be a deposit, but left it to their respective solicitors to agree the amount. That was also a conventional sale where Chief Justice Finlay held that the amount of the deposit was "too important a part of the contract for the sale of land to be omitted", and that was the sale of lands in Dublin. Mr. MacCann also relied on *Mulhall v [Haren]* 1981 IR 364, where it was held that an initial letter containing the words "subject to contract" was inconsistent with the recognition of the existence of a concluded contract. Keane J. (as he then was) also held that a solicitor inserting "subject to contract" in such a letter was acting within the scope of the authority. While I fully accept this latter proposition, the facts in that case were very different to the present ones. The letter in *Mulhall* was pre contract. In the present case, the insertion of "subject to contract" by Ms. Kelly was not destructive as it were retrospectively of the agreement made on 20th June 2017.

CONCLUSIONS ON DEPOSIT VARIATION
I conclude on this issue firstly that variation of the deposit from €600,000 to €60,000 was agreed and binding on all parties, subject only to its formal incorporation into the settlement deed. Secondly, that "subject to contract" used in the course of that re negotiate did not negate the agreement of 20th June 2017.

CHANGE OF STRUCTURE
I now turn to the subject of change of structure. This is a consideration of Mr. MacCann's submission that the change of structure negotiated between Ms. O'Driscoll and Ms. Kelly, and later Ms. Andrea Brennan, both of

A&L Goodbody, was such a fundamental change as to negate the earlier agreement, if there was any agreement. He argued that it supplanted it, but as this new agreement was subject to contract and contract denied, it was never a concluded agreement.

The test as to whether a variation is merely that or may destroy the whole contract, or give rise to recision, would seem to depend on the intention of the parties to be derived from the evidence as a whole and the nature and extent of the variation. In *Redfern v O'Mahony* 2010 IEHC 253, McGovern J. adopted the following statement from Chitty on Contract at page 40 of his judgment. Paragraph 77:

> *"In Chitty on Contracts, 29th ed., paragraph 22.028, the author states: 'A recision of the contract will also be implied where the parties have effected such an alteration of its terms as to substitute a contract in its place. The question of whether a recision has been effected is frequently one of considerable difficulty, for it is necessary to distinguish a recision of the contract from a variation which merely qualifies the existing rights and obligations. If a recision is effected the contract is extinguished. If only a variation, it continues to exist in an altered form. The decision on this point will depend on the intention of the parties to be gathered from an examination of the terms of the subsequent agreement and from all the surrounding circumstances. Recision will be presumed when the parties enter into a new agreement which is entirely inconsistent with the old or if it is not entirely inconsistent with it, inconsistent with it to an extent that goes to the very root of it."*

I also adopt the approach indicated in that passage.

Turning to the evidence, the e mail of 20th June 2017 contemplated implementation by a Loan Sale Deed and releases. Under the Draft Loan Sale Deed, the Defendant agreed firstly to sell to the Plaintiffs the loan accounts. That is Clause 2.1. And these were the

scheduled loan agreements and security documents, consisting of various charges, guarantees and also the 2014 settlement agreement. Secondly, the Defendant agreed to execute and deliver releases or transfers, being such releases or transfers as were necessary to release the loan assets to the Plaintiffs.

It became apparent that the Defendant was not actually registered in the Property Registration Authority as owner of the relevant charges and that registration was pending. Capita requested Mason Hayes+Curran, their solicitors, or Promontoria's solicitors handling the registration application, to expedite matters and this is evident from Ms. Fiona McNamee's e mails of

19th July 2017, 4th August and 14th August 2017, but it became clear that the registration was unlikely to be completed in time. This was raised in correspondence between solicitors and in her e mail of 11th July, headed "subject to contract, contract denied",

Ms. Deirdre Kelly suggested by way of substitute a letter of comfort. However, this was not acceptable to Ms. O'Driscoll. The reason was that a funder might not accept such a title and would want to be registered as owner of the charges.

On 14th August, Ms. O'Driscoll rang A&L Goodbody and spoke to a solicitor there, Mr. Neal Breslin, and suggested the solution was to proceed by way of release. She did not consider that this gave rise to any new agreement. That was her evidence. Then on 15th August, Ms. Andrea Brennan e mailed "subject to contract", indicating that the Loan Sale Deed was no longer proceeding and she had been asked to prepare the "relevant settlement deed." She noted the additional costs, to which the Plaintiffs had no objection. She followed this up with an e mail, also headed "subject to contract", on 18th August 2017, enclosing a draft proposed deed of settlement and release and in that e mail, she said:

> *"I refer to my e mail below and attach a draft of the proposed development deed for your attention. I am instructed that my client requires that the settlement deed is signed and the deposit of €60,000 paid on or before Friday 25th August 2017, with the balance of the settlement sum due on or before 31st August 2017.*

I would be obliged if you would review the attached draft settlement deed and revert to me with any comments you may have. Our client is anxious that the settlement deed is finalised and executed as soon as ever possible.

Accordingly, I look forward to hearing from you. Regards Andrea."

The draft settlement deed was attached and in it, we see recitals, Recital E:

> *"The debtors have agreed to pay and the lenders agree to accept the sum of €6m, plus the lender's costs, in full and final settlement of the secured liabilities on the terms set out in this deed."*

Charged assets are defined to include the property and security listed in the Fifth Schedule. Deposit is defined to mean the sum of €60,000. The secured liabilities are defined to mean "all sums of money for the time being owed and all liabilities or obligations incurred or to be carried out by the debtors to the lender under the facilities and the guarantees".

The "settlement sum" is defined to mean "the sum of €5,940,00." There is then a "stand still period" which means "the period from receipt of the deposit until receipt of the settlement sum, unless terminated earlier in accordance with Clause 4." "Total settlement sum" is defined to mean "the deposit, the lender's costs and the settlement sum."

Clause 2 sets out conditions precedent and there are two of these. At Clause 2.2.1:

> *"The debtors must pay the deposit in cleared funds to the account prior to the settlement date or any such account as directed by the lender in writing."*

It is interesting to note that as drafted, this did not require the deposit to be paid on signing of the deed of settlement, notwithstanding that that was envisaged in the original agreement. It is now payable up to but prior to the settlement date.

The second condition precedent is at 2.1.2.

> *"The lender's costs incurred in connection with the negotiation per execution of the deed and all documents must have been paid on or before the date of the deed."*

Then Clause 3 sets out the terms of settlement.

> 3.1. "The debtors agree that they shall:
>
> 3.1.1 Satisfy each of the conditions precedent outlined in Clause 2.1 hereof, to the extent not waived by the lender on or before the date of this deed.
>
> 3.1.2 On or before the settlement date, pay or procure the payment of the settlement sum in cleared funds into the account or such other account as directed by the lender in writing.
>
> 3.2 The lender shall apply and accept a total settlement sum in full and final settlement of the secured liabilities."

Clause 5 then is headed "Release" and says at 5.1:

> *"In consideration for payment of the total settlement sum by the debtors, but for the avoidance of doubt, only with effect upon receipt of the total settlement sum, the lender shall irrevocably and unconditionally..."*

And then there are four items set out.

> 5.5.1 is: "Release and discharge the debtors from all obligations, liabilities, costs and claims under the security, the facilities and the secured liabilities, and the lender agrees that it shall have no further right or action against the debtors in relation to the facilities.
>
> 5.1.2. Release and discharge assets to the debtors free from the security and all claims and demands under the security.

5.1.3. Release and discharge the guarantors for all obligations, liabilities, costs and claims under the guarantees.

5.1.4. Execute and deliver to the debtors as soon as is reasonably practicable a deed of release in respect of each security registered at the Land Registry Or Registry of Deeds in a form acceptable to the lender.

5.2. The lender agrees at the additional cost to the debtors to execute all documents and do all acts and things as the debtors may, within one month from the settlement date, reasonably require to give effect to the provisions of this deed."

So the draft settlement differs in that instead of a transfer of the loans or loan assets, the Defendant applies and accepts €6 million in full and final settlement of the secured liabilities; and instead of releases or transfers of the loan assets, the Defendant in Clause 5 agrees to release the Plaintiffs from the facilities or liabilities and to release the charged asset and each registered charge and to release all guarantees.

So far as releases are concerned, I find it difficult to discern any meaningful difference between the Loan Sale Deed and the [Draft] Settlement and Release. Certainly from the Defendants' perspective, there is no material difference other than additional legal fees which the Plaintiffs agree to discharge. The change from Loan Sale Deed to payment of €6 million to settle the debt is a change of structure, but again it does not involve any meaningful change from the Defendants' perspective. The significance of a change in structure for implementing the deal needs to be viewed in the context of the core contractual terms. These were that in consideration of €6m, Promontoria would relinquish all its interests in the loans and security such that the Plaintiffs would, so far as the Defendant was concerned, hold the secured assets free from the debt after closing on or before 31st August 2017. These were the parties' original intentions. I am satisfied that it mattered not one whit to the Defendant whether this was achieved through Loan Sale Deed and releases, or settlement of debt and releases. The correspondence leading to the variation does not evince any intention by the Plaintiffs or Defendants to rescind the original deal. I find that this change in structure was not fundamental or significant. It was purely a change in conveyancing mechanism better suited to achieving the mutually desired end, given the delay in registration of the Defendant as owner of the charges in the PRA. It was prompted by the Plaintiffs' solicitor, and taken up and agreed to by the Defendants' solicitors. If support were needed for this conclusion, I find it in the decision of Murphy J. in *O'Connor v P. Elliot & Co. Limited*, 2010 IEHC 167, where a change in mode of transfer for tax reasons was held not to be a matter of substance. At paragraph 9 of his judgment, he states:

> *"Indeed, while the provision with regard to changes resulting from tax advice might be regarded as effecting the mode of transfer or, by way of an analogy, as to the intent of the parties, the issue of a mode of transfer was not made an issue in the evidence of either the principals nor the solicitors on behalf of the principals. It would follow from the evidence that the mode of transfer did not effect the agreement. No reference was made to the title of the Plaintiffs' premises."*

For the same reasons given earlier in this judgment, in the context of variation of the deposit, the variation of implementation in the structure was actually agreed and the continued use of the "subject to contract" label cannot negate this, or negate the existence of the contract that became legally binding on 20th June 2017.

Even if, contrary to this view, the change in structure was never agreed, the consequence of this would not have been to undermine or negate the original agreement. Rather, the Defendant would have been legally obliged to complete by way of Loan Sale Deed and release in line with the 30th June draft prepared by A&L Goodbody, as refined following exchanges between the parties' solicitors.

READY, ABLE AND WILLING TO COMPLETE

I turn now to the third ground for seeking direction, namely the ready, able and willing to complete argument. Mr. MacCann submit that in law, the Plaintiffs had to show on the balance of probabilities that they were ready, able and willing to complete. Firstly, on the date of completion, that is to say 31st August 2017 and, secondly, at the date of action. He relied on two cases, the first is *Jackson V Veitch* (1858) Irish Jurist New Series 201, which is a decision that is mentioned in Mr. Farrell's excellent book on Specific Performance. There, the Defendant agreed to sell a lease in premises to the Plaintiff for £105. The Plaintiff paid £50 and was allowed into possession, but when no assignment was forthcoming, he sued for specific performance. He claimed to be ready, able and willing to complete at all times. The judgment of Monaghan J. in favour of the Defendant is short in detail, it takes up four lines, and does not expand or analyse any principles of law. From reading the full report, it seems that the argument that found favour was: "No tender of the assignment or purchase money by the Plaintiff was shown or revered as also that it did not appear that the Defendant was ever requested to make the assignment."

The decision is so different in detail and so lacking in reasoned judgment and so distant in time as to be of little assistance to the Court in this case.

Mr. MacCann next referred to the decision of *Morrow V Carthy* 1957 Northern Irish Reports 174. The head note indicates the facts.

> *"On the sale of a bungalow by public auction, it was a condition of sale that the deposit should be paid immediately after the sale. The bungalow was knocked down to the Plaintiff who, after signing the agreement, stated his inability to pay the deposit immediately. He was thereupon given an hour to produce the deposit. After the lapse of an hour, the Plaintiff not having returned, the bungalow was resold to another person. Later, the Plaintiff returned and tendered a cheque for the deposit, but the cheque was refused and he was told the bungalow had been resold to another.*

In the action, the Plaintiff claims specific performance of his original contract or, alternatively, specific performance of the contract as rectified in relation to the condition concerning the payment of the deposit."

McVeigh J. held firstly that the term in the conditions of sale relating to the payment of a deposit required a payment of cash and as this condition was not being waived, the Plaintiff had not shown he was ready, able and willing to perform his obligation.

At page 178 of the judgment, McVeigh J. refers to this further. He says:

> *"The Plaintiff now contends in paragraph 3 of the Statement of Claim that he was then, and is now, ready and willing to perform his obligations under the agreement, but as I hold that the obligation under Condition 4 was not waived and was not complied with because cash was not offered, the question arises as to whether the Plaintiff was ready to comply with the contract. It is necessary for the Plaintiff to plead that he is ready and willing to carry out the contract. (See Halsbury)"*

And he quotes it then. He then says:

> *"In the case of Cort v Ambergate Railway,*
>
> *Campbell C.J. said; 'In common sense, the meaning of such an averment of readiness and willingness by Plaintiffs must be that the noncompletion of the contract was not the fault of the Plaintiffs and that they were disposed and able to complete it, if it had not been renounced by the Defendants."*

McVeigh J proceeds:

> *"The Plaintiff in this case was not, in my opinion, ready, even within the time which he alleges was given to him to get the deposit."*

Then in the next paragraph, he says:

> *"I accordingly hold that his failure to perform his obligation or show that he was ready to perform it at the critical time disentitles him to specific performance. The repudiation of the contract by the Defendants did not, in my view, excuse the Plaintiff from showing performance or readiness to perform at the material time."*

And he ends that paragraph, saying:

> *"He had not got the money to pay the deposit or by any means, so far as the evidence goes, of obtaining credit."*

On the facts, of course, that was a very different case and I am satisfied that the ratio decidendi was that the Plaintiff in that case was in breach of a

Condition 4 in that he failed to come up with cash. However, I do accept the general proposition that the Plaintiff in a specific performance suit must be ready, able and willing to complete and must generally plead this, and it is notable that it is pleaded in this case.

The Plenary Summons interestingly, in this case, was actually issued on the 29th August 2017, some two days before the completion date. The Statement of Claim was delivered on the 2nd October 2017 and it is at paragraph 23 that it is pleaded that the Plaintiffs entered the release agreement and that this agreement concluded on the 20th June 2017, and that the Plaintiffs were ready, able and willing to complete the release agreement. And it is pleaded that the Defendant, its servants or agents, unilaterally and without cause, purported to repudiate the release agreement.

I am satisfied on the evidence that the agreement and performance of it were on track in mid August 2017. Around this time, Mr. O'Mahony had secured Mr. Michael O'Flynn of O'Flynn Construction Co. as funder for €6m. In response to repeated requests from Capita for details of the funder, Mr. O'Mahony e mailed a Mr. Peter Jordan of Capita on the 21st August 2017 as follows:

> *"Diamond Developments has entered into an agreement with O'Flynn Construction Company, or a related company, OFC, for the purchase by OFC of certain assets and the provision by OFC of funds in respect of same."*

At this point, the Plaintiffs were contract compliant. Out of the blue, at 11:30 a.m. on the 23rd August 2017, Mr. O'Mahony received a call from Mr. McWhinney, who informed him that "The boss was in the Belfast office that morning and he had made a decision that he was not proceeding with the deal." I am satisfied that these were the words used and this constituted a repudiation of the agreement concluded on the 20th June 2017.

It was a wrongful repudiation because there was no good or justifiable reason for it and the Defendant has not gone into evidence to suggest otherwise. I will advert later to the reasons for repudiation emerging from discovered documentation, but none of these could justify the repudiation in law.

Ms. O'Driscoll wrote in protest on 23rd August.

A&L Goodbody replied on 24th August, denying that there was a concluded agreement and requesting confirmation that the Plaintiffs would cooperate in consensual sale of the assets under the 2014 settlement.

Ms. O'Driscoll replied on the 25th August, calling on A&L Goodbody to confirm by 5:30 p.m. that the Defendant would complete, in default of which the Plaintiff would seek immediate redress. A&L Goodbody replied on the 25th August at 15:46 denying a concluded agreement and repeating their request for cooperation on sales. On the 29th August, Ms. O'Driscoll wrote, enclosing the Plenary Summons and reserving the right to seek injunctive relief to restrain enforcement of security. On 30th August, a further similar letter was sent and on the same day, A&L Goodbody replied, confirming authority to accept service of proceedings.

Also on the 30th August, Mr. Michael O'Flynn, seemingly at the behest of Mr. O'Mahony, rang Mr. Brian Berg of Capita. Mr. O'Flynn thought their conversation was off the record. The purpose was to assure Mr. Berg that he and his company was the funder and that "We would be in a position to complete" and "we were there to do the actual deal". Mr. Berg was adamant that there was not going to be any completion.

In response to a question from Mr. MacCann about financing arrangements, the following exchange took place with Mr. Michael O'Flynn. At page 46 of the transcript, question 83, Mr. MacCann asks:

> *"Q. Well, let's look at your financing arrangement. This is something you say you didn't do after the 22nd that you would otherwise have done in order to get that financing in place.*
>
> *A. No, we progressed all that week.*
>
> *Q. So it is not a finance issue that resulted in you not being able to complete on 31st?*
>
> *A. No, we progressed all that week on the basis that it was going to complete, but we weren't aware of the detail of the difficulties on the other side, so we were progressing on the basis that it was going to happen, and I think come 29th/30th, you can't complete without people willing on both sides to complete a deal and it was obvious that these*

difficulties weren't going to go away and hence my call to assure him that we were going to do this.

Q. Well, if Promontoria had turned around on the 30th August and said 'Okay, well, let's complete tomorrow then', would you have been in a position to complete the following day?

A. Well, it is very hard to complete if there is no engagement in the days leading up to completion. You don't get out of the bed in the morning and say:

'I'm going to complete today' or 'I am going to sell or buy today.' There is a certain... (interjection)

Q. Well, what did you have to do to complete?

A. There was just paperwork, money to be transferred, things like that, but that doesn't happen in a few hours, but we were able to do it, if there was a completion genuinely set by the parties.

Q. When did you find out that the deal that the Plaintiffs contend for was not going to go ahead?

A. I think Mr. O'Mahony was still optimistic, right up to the final day, that it was going to complete.

Q. Okay. So were you then working towards being in a position to do that?

A. We were working towards it, yes.

Q. And you continued to work through to the end of August in the hope that the deal would complete?

A. We continued to work on the basis that perhaps this is going to happen, but we.....(interjection)

Q. What were you personally doing during those last nine days in August in order to have this deal ready to complete, you personally? You can only talk about your own knowledge, so what were you doing to get ready to complete?

A. We were finalising our paperwork."

I am satisfied that the Court is entitled to take into account all relevant circumstances when considering whether a purchaser is to be deprived of a right to specific performance in the face of a defence that, on the closing date, he was not able, ready and willing to complete. I emphasise the passage approved by McVeigh J. In *Morrow* and *Campbell C.J.*, where he said:

> *"In common sense, the meaning of such an averment of readiness and willingness by plaintiffs must be that noncompletion of the contract was not the fault of the Plaintiffs and that they were disposed and able to complete it, if it had not been renounced by the Defendants."*

Noncompletion was not the fault of the Plaintiffs in this case. They were, in my view, through the involvement of Mr. O'Flynn and his companies, disposed and able to complete it. Common sense must be applied and the Court is entitled to take into account the nature of the transaction, the size of the consideration, and above all, in this case, the fact of wrongful repudiation. Moreover, I accept the evidence of Ms. O'Driscoll that completion can and does take place with electronic fund transfer, which is virtually instantaneous and that the arrival of funds into an account can be approved by a screenshot. Both she and Mr. O'Flynn gave evidence of how quickly, a matter of hours, a CGT certificate can be obtained in urgent cases, particularly in Cork.

As to the Plaintiffs's readiness to proceed, using

Mr. O'Flynn and his company as funder of €6m, I entirely accept the evidence of Mr. O'Flynn who I find to be a most impressive witness. Mr. MacCann suggested that he could not show that he was ready, able and willing in the absence of bank statements and/or accounts to show the liquidity of O'Flynn Construction Limited, who were contributing about one million, or evidence from Avenue, the funder, of its liquidity and agreement to fund €5 million, or of any documented agreement with Mr. O'Mahony to fund the deal. I reject these arguments. There can be no hard and fast rule as to the evidence that may prove readiness and ability to fund a deal on closing. I am satisfied on the balance of probabilities that there was a strong oral agreement and commitment from Mr. O'Flynn and his company with Mr. O'Mahony to pay €6 million to fund the deal, payable through Diamond Developments Limited, and that Avenue were in place to fund some €5 million. Avenue had a track record with Mr. O'Flynn and this included their funding of a previous deal, which actually involved Cerberus. I am satisfied that but for the wrongful repudiation, Mr. Berg's and A&L Goodbodys' confirmation of that repudiation, that on and up to the 30th August, funding would have been arranged and in place for closing on or before 31st August. I accept Mr. O'Flynn's evidence that: "We were in a position to pay the money. There is no question about that."

That is a quote from the transcript. I am satisfied of Mr. Flynn's evidence that he remains a willing funder to complete the deal is evidence that the Court is entitled to take into account. Asked about this by Mr. Sreenan, he said on Day 2 at page 35:

> *"Absolutely. I made an agreement and I am going to stick with it and I am going to see it through to the end."*

I would add that Promontoria's attempt to rely on this defence is wholly unmeritorious. It relies to a large extent on their own wrongdoing. Furthermore, the discovered documentation reveals no concern whatsoever in relation to the Plaintiffs' ability to come up with the money.

NON MONETARY ISSUES ON CLOSING

As to the other requirements of closing, the precise name or identity of the SPV providing the investment to the Plaintiffs, this was not vital and I am satisfied could have been provided at exchange. The CGT clearance, it is generally applied for late in the day and could have been obtained very quickly. The Family Home Protection Act declaration was a routine matter for closing and the same applies for the apportionment account. These were essentially matters for closing or conveyancing and on Ms. O'Driscoll and Mr. O'Flynn's evidence, I am quite satisfied that on the balance of probabilities, the Plaintiffs were disposed and ready to complete but for the repudiation and even thereafter, and that they will be in a position to complete.

ORDER FOR SPECIFIC PERFORMANCE

I will, therefore, order specific performance of the agreement evidenced in the e mail of 20th June 2016 with two variations:

1. The substitution of a 10% deposit on exchange, with a deposit of €60,000 payable in the manner identified in the Draft Settlement and Release.

2. The substitution of the Loan Sale Deed and Release by the Draft Settlement and Release as the mode of completion. The version of the Draft Settlement sent by Ms. Brennan of A&L Goodbody to Ms. O'Driscoll on 15th August and Ms. Brennan's follow up e mail on the 18th August requiring signature or exchange and the payment of the deposit of €60,000 on the 25th August led to a detailed response from Ms. O'Driscoll in her e mail of 21st August 2017, with which she attached the draft with her comments and changes. It is apparent from the Discovery documentation, I believe this is document 000023 000040 that consequent on this,

Ms. Brennan took on board and incorporated many of the comments and changes in her revised draft. As her revised draft settlement was the most refined draft created prior to repudiation, or the closing date, in my view, it most accurately reflects the conveyancing position that should be adopted subject to further agreed refinement in normal course between the parties. In ordering specific performance, I direct that this draft be the basis for resumption of the transaction. I will hear Counsel further on the time periods

I should direct for finalising the form of this document, firstly on the exchange, that is to say the signing by the Plaintiffs and payment of the deposit of €60,000, so the time period for that and, secondly, the time period for closing.

NOTICE OF TERMINATION OF 2014 SETTLEMENT
Two other issues remain to be considered. The first of these is the validity of the Notice of Termination of the 2014 Settlement Agreement served by Promontoria on Diamond Developments Limited, Ms. O'Driscoll and Mr. O'Mahony on 7th September 2017. The relevant parts state on the second page:

> *"As you are aware, under the terms of the NAMA settlement agreement you are obliged to cooperate with PGD with a view to realising the assets charged by the security. However, in breach of the NAMA settlement agreement, you have refused to consensually sell the assets the subject of the security and have issued proceedings against PGD seeking to claim that it was bound to enter into a new settlement agreement. We vigorously deny that we are bound by any settlement other than the NAMA settlement agreement and intend to fully defend the proceedings brought against us."*

Then follows a heading "Notice of Termination".

> *"In light of your material breach of the NAMA settlement agreement, which amounts to an event of default as therein defined, we hereby give you notice of termination of the NAMA settlement agreement in its entirety. In accordance with the terms of the NAMA settlement agreement, termination shall occur 48 hours after receipt of this notice. Receipt of this notice is deemed to occur 24 hours after same has been sent by or on behalf of PGD."*

It is not necessary to read that any further.

The breach alleged in that notice is two fold. Firstly, its' refusal to consensually sell the assets and, secondly, it seems to rely on the issue of these proceedings.

As I found for the Plaintiffs, the second ground cannot stand. As to the first, the agreement of 20th June 2017 was fundamentally a variation of the 2014 settlement in the sense that if the agreement was completed, the 2014 settlement would be at an end. The effect of the 20th June agreement was to suspend the obligation of the Plaintiff to cooperate with sales by Promontoria to other parties pending completion. If the Plaintiffs failed in their contractual duty to complete, which I have found they did not, then their obligations under the 2014 settlement to cooperate in sales would be resurrected. Moreover, there is no suggestion that prior to 20th June, the Plaintiffs were in breach of the 2014 settlement. On the contrary,

I am satisfied that prior to that date, Mr. O'Mahony's co operation with NALM and subsequently the Defendant was exemplary and beyond reproach.

The purported Notice of Termination dated 7th September 2017 was therefore invalid and it is appropriate to make a declaration as to invalidity under the prayer in the Statement of Claim seeking further and other relief.

EXEMPLARY DAMAGES THE LAW
The second issue is the Plaintiffs claim for exemplary damages. In this case, the Plaintiffs have not proven any special damage. Mr. Sreenan argues that the Court can award exemplary damages in a breach of contract case. He says it can do so where the Defendants' conduct, in particular conduct of the case, has been egregious, which he argues is the case here. He submits that such punitive damages should be awarded to mark the Court's displeasure. Mr. MacCann opposes this, arguing that exemplary damages are only appropriate in cases of tort or breach of constitutional rights and that, in any event, the Court should have regard to the factual background, including the high level of the Plaintiffs, that's to say Mr. O'Mahony's indebtedness, which he put to him was in the order of €63 million.

The main Irish decision is that of *Conway v INTO* 1991 2 IR 305, where at first instance, Judge Barron awarded £1,500 exemplary damages to each of 70 claimants, who were children deprived of enrolment in Drimoleague National School due to unlawful strike action. It will be noted that the claim was for breach of constitutional right not by the State or a State institution, but by a teachers' organisation. Chief Justice Finlay addresses the question from page 316 onwards and at the bottom of the page, he says:

> *"Having considered the submissions on exemplary damages and also the authorities to which we were referred,*

I have come to the following conclusions as to the principles of law which are applicable. In respect of damages and tort or for breach of a constitutional right, three headings of damages in Irish Law are, in my view, potentially relevant to any particular case. These are:

1. Ordinary compensatory damages being sums calculated to recompense a wrong to a plaintiff for physical injury, mental distress, anxiety, deprivation or inconvenience, or other harmful effects of a wrongful act, and/or for monies lost or to be lost and/or expenses incurred or to be incurred by reason of the commission of the wrongful act.

2. Aggravated damages, being compensatory damages, increased by reason of:

(a) the manner in which the wrong is committed involving such elements as oppressiveness, arrogance or outrage, or

(b) the conduct of the wrongdoer after the commission of the wrong, such as a refusal to apologise or to ameliorate the harm done or the making of threats to repeat the wrong, or

(c) conduct of the wrongdoer and/or his representatives in the defence of the claim of the wronged plaintiff up to and including the trial of the action.

Such a list of the circumstances which may aggravate compensatory damages until they can properly be classified as aggravated damages is not intended to be in any way finite or complete. Furthermore, the circumstances which may properly form an aggravating feature in the measurement of compensatory damages must in many instances be in part recognition of the added hurt or insult to a plaintiff who has been wronged and in part also a recognition of the cavalier or outrageous conduct of the Defendant.

3. Punitive or exemplary damages arising from the nature of the wrong which has been committed and/or the manner of its commission which are intended to mark the Court's particular disapproval of the defendant's conduct in all the circumstances of the case and its decision that it should publicly be seen to have punished the defendant for such conduct by awarding such damages, quite apart from its obligation where it may exist in the same case to compensate the plaintiff for the damage which he or she has suffered, I purposely used the above phrase "punitive" or "exemplary" damages because I am forced to the conclusion that notwithstanding relatively cogent reasons to the contrary, in our law punitive and exemplary damages must be recognised as constituting the same element."

It is under that third heading of punitive or exemplary damages that Mr. Sreenan makes his case.

Insofar as that may be transposed to contract law, there are some passages in McDermott's Contract Law, Second Edition, 2017, that also assist me. From page 1480 onwards and I take this up at paragraph 23.138 where the authors refer to Irish case law.

"There is little Irish authority on the question of the availability of exemplary damages in contract law. In Garvey v Ireland, a Garda Commissioner was summarily dismissed from his post. It was held that this was an arbitrary and unconstitutional action on behalf of the Government and exemplary damages were awarded against the State. McWilliam J. stated:

'Damages appear to me to be conveniently grouped under three headings:

1. Special damages, which includes all pecuniary loss caused by a wrongful act.

2. General damages which, where appropriate, include recompense for such things as physical suffering, injury to reputation, consequential loss, et cetera. 3. Exemplary damages which may in certain circumstances be awarded for the aggravated nature of the wrongful act."

On the facts of the case, McWilliams J. concluded that an award of exemplary damages should be made. He said:

"I am satisfied from the judgments in Rookes v Barnard that I should award what I have described as exemplary damages to the Plaintiff, but that these must be related to the injury which the Plaintiff has suffered by reason of the arbitrary and oppressive conduct of the Government. Having regard to the view that similar injury would, to a large extent, have been sustained by the Plaintiff had he been lawfully removed from office, I will award £500 for this part of the claim."

At paragraph 23.139, the authors refer to another decision.

"In Headline v Eircom, 19th July 2002, McCracken J declined to award exemplary damages for breach of a franchise agreement and stated:

'I accept that the Defendant breached the franchise agreement and quite possibly did so deliberately. However, I do not think that it did so in such a manner as to constitute oppression of the kind which deserves exemplary damages and I think the behaviour of both parties in this dispute left a lot to be desired'."

The authors then go on to comment on a Law Reform Commission report.

"In its report on aggravated, exemplary and restitutionary damages", and that is report

LRC 60 of 2000, "the Law Reform Commission noted that although Garvey may not be sound authority for extending the availability of exemplary damages in all contract cases, it does suggest that the prohibition on exemplary damages for breach of contract may not be absolute."

The authors then refer to other jurisdictions and it is apparent, for instance, from paragraph 23.1.41 that the Supreme Court in Canada, at least in a wrongful dismissal case, has been willing to award punitive damages.

Under the heading "Reform" at paragraph 23.1.43, the authors say:

"In its report on aggravated, exemplary and restitutionary damages, the Law Reform Commission noted that the argument can be made against the award of exemplary damages in contract cases. The contract is quintessentially a matter of private law which concerns only the parties to it and that in the breach of a contract, there is no public element which would justify a deterrent measure such as exemplary damages."

The Commission concluded:

"The Commission considers that an extension of exemplary damages to contract cases would be at odds with the

traditional concept of contract law as having an exclusively private law character. We do not favour such a radical extension of the availability of exemplary damages. The commission does not, however, recommend that exemplary damages for breach of contract should be prohibited by legislation. Rather, any possible development of the law on this matter should be left to the Courts where it can be judged on a case to case basis."

It seems to me that it would be an artificial distinction to say on the one hand that the manner in which a defence of an action in tort or for breach of constitutional right is conducted in open court may lead to an award of exemplary damages, yet to say on the other hand this cannot arise in relation to an action for breach of contract, also defended in open court. There is the public element in both of them. There is also clear precedent for the award of exemplary damages in *Garvey* and I am persuaded by

Judge McCracken's willingness to award exemplary damages in a breach of franchise case, a pure breach of contract case, had he been of the view that the breach was oppressive. I am persuaded that that does open to the Court a jurisdiction to award exemplary damages in an appropriate case. The fact that a claim for such is not pleaded cannot bar this, and that is clear from the judgment of Chief Justice Finlay in *Conway* at page 320.

APPLICATION TO THE FACTS
The manner in which and the reason why the Defendant repudiated the deal in this case, so far as can be ascertained from the evidence, and discovered documents is, I believe, relevant and I make certain findings on this.

On 22nd August, Mr. O'Mahony asked Mr. McWhinney why the deal was being pulled. He was just told he was not being up front. In what respect he was not told. He said this sickened him, he was shocked, and when he rang Ms. O'Driscoll to inform her, she was initially in disbelief and thought he was joking. I entirely accept, notwithstanding cross examination to suggest otherwise, that Mr. McWhinney said this and used the words "big boss". The identity of this decision maker has never been identified, nor has any advisory note been discovered to support the position or authority of such individual to take the decision to pull out of the deal.

An e mail from Mr. Terry Byrne of CES to Mr. McWhinney of 22nd August 2017 bearing the time 7:55, it may or may not have been at that time or a bit later, says:

"Jonny, can you please dig out the DSA..." (Debt settlement agreement) "...for this connection." And the connection is Diamond.

"We have heard that Declan is trying to flog the three sites for €10 million."

There was no evidence given to this Court of the source of this hearsay "we have heard". I accept Mr. O'Mahony's denial of this and that when he saw this Discovery, he was upset. This upset was very evident in his response under cross examination. At 9:29 on that day,

Ms. McNamee of Capita responded to Mr. Byrne's e mail.

"Terry, Declan came back to us stating the following. 'Diamond Developments Limited has entered into an agreement with O'Flynn Construction Co. or a related company, OFC, for the purchase by OFC of certain assets and the provision by OFC of funds in respect of same'. Please see the DSAs (debt settlement agreements) attached. Please note the following provision in the CMA connection management agreement."

And she then quotes Clause 6.8.

"The connection shall be obliged to notify the FM of all expressions of interest or offers, to include unsolicited offers to purchase any or all of the secured properties within three working days of learning of any such expressions of interest or offers, save where a sales agent has been appointed to dispose of a particular asset, in which case."

Ms. McNamee then says:

"It would follow that the obligation to notify would now be to Capita, and we have not been made aware of any further offers to purchase the assets beyond our agreed deal with him. We will not speak to the borrower until we have discussed this with you this morning.

Many thanks,

Fiona."

It was following that that Mr. McWhinney rang Mr. O'Mahony and pulled the deal. He e mailed

Mr. Byrne at 15:36 on the 24th August, saying:

"Terry, the deal has been pulled. ALG (Goodbodys) have..."

And then the rest of that e mail is redacted. The response from Mr. Byrne to Mr. McWhinney simply says: "Did they sign a Heads of Terms?" This should be noted. It is implicit that the Defendant withdrew from this deal without Mr. Byrne, who is clearly an important individual, even being aware as to whether or not there were binding Heads of Terms.

I infer from these e mails that the real reason that the Defendant pulled out of its bargain was that it objected to the possibility, which they perceived, based on hearsay, that Mr. O'Mahony would profit possibly up to €4m from the deal.

Advisory Note 0244 of the 6th September 2017, the day before the Notice of Termination was served, is illuminating. In the section dealing with background information, the third bullet point reads:

"The agreed DPO (debt pay off) has been abandoned as an off market offer has been received which may allow PGD (Promontoria) to recover considerably more than the €6 million loan sale consideration."

Later on in that advisory note, there is a box "Details, deal terms, terms of contracts" and in the first bullet point appears the following.

> *"CMT (Capita) proposed for Promontoria to discharge ALG's invoices for aborted DPO and settlement agreements. These costs were originally for the borrower. However, this deal was abandoned due to an off market offer for the subject properties, which was significantly in excess of the proposed €6m deal."*

Mr. MacCann cross examined Mr. O'Mahony on the basis that this off market offer did not relate to any offer received by Promontoria and related, if anything, to their belief that the Plaintiff had received offers. There is no evidence adduced before the Court that backs that up. I am driven to the conclusion on the evidence that Promontoria was motivated to abandon the deal because of a belief that it could realise significantly more than €6m. In other words, it was greedy for more profit and would not countenance the Plaintiffs taking that profit.

The swiftness with which the Defendant moved after 22nd August to instruct agents to sell the property is also marked in its ruthlessness.

As to the conduct of the case, and this is not a personal criticism in any way of eminent Counsel who are obviously acting on instructions, it was a feature of the cross examination of Mr. O'Mahony firstly that the evidence was put to him on numerous occasions on the basis that his evidence would be refuted by what a defence witness "will" say. The clear impression given was that the defence witnesses would be called and, of course, subjected to cross examination. On Day 3 at the close of the Plaintiffs' evidence, I arranged for an early start the next day in order to start in an attempt to finish with the Defendants' witnesses on that day. There was no hint of a direction application, which came as a surprise at the start of Day 4.

Secondly, on many occasions Counsel put it to Mr. O'Mahony that he had not been "up front" with the Defendant and Capita and that he was not being "up front" with the Court in his evidence. This was a polite way of attacking his credibility, his integrity, his honesty and his truthfulness under oath. For the Defendant not to call any witnesses to give evidence to back up these allegations was egregious misconduct of proceedings in all the circumstances. This is perhaps best exemplified by a question where at one point, Mr. O'Mahony was asked in cross examination on the advisory note of 6th September:

> *"My clients (i.e. Promontoria and/or Capita), whether they were right or wrong, they understood that you were flipping the properties for €10 million and playing them for fools."*

If the Defendants were to adopt such a righteous approach to the defence of these proceedings, they should have had the honesty and strength of character to go into evidence in open court.

Lastly, I was struck by Mr. O'Mahony's evidence that he had no option but to pursue these proceedings and that in order to fund them, he had to cash in his pension and borrow from his wife and his brother. No financial loss from this was proven but it was a consequence of the Defendants' conduct. The oppressiveness of the Defendant in the period 22nd August to 7th September 2017 and their conduct of the defence before me demonstrates a callousness and disregard for the Plaintiffs, and in particular Mr. O'Mahony, that justifies an award of exemplary damages and I propose to make one. However, I am mindful that the purpose of such an order is to mark the Court's displeasure. It is punitive. It is to express disapproval of the Defendants' conduct and it should not be excessive. While I might be of the view that a much greater award would be proportionate, I note the relatively small awards of Mc William J. in Garvey and Barron J. in Conway. I will award €20,000 exemplary damages to the First Named Plaintiff, Mr. O'Mahony. Finally, I will dismiss the counterclaim against the Second Named Plaintiff.

END OF JUDGEMENT