[2020] IEHC 311

THE HIGH COURT
COMMERCIAL

[2018 No. 5922 P]

BETWEEN

ULSTER BANK DAC, PAUL MCCANN AND PATRICK DILLON

PLAINTIFFS

AND

BRIAN MCDONAGH, KENNETH MCDONAGH AND MAURICE MCDONAGH

DEFENDANTS

(NO. 2)

JUDGMENT of Mr. Justice Twomey delivered on the 23rd day of June, 2020

Introduction

1. This judgment is supplemental to the principal judgment delivered on the 6th April, 2020 (*Ulster Bank v. McDonagh* [2020] IEHC 185) and should be read in conjunction with that judgment. The same definitions as are used in the principal judgment are used in this supplemental judgment. In the principal judgment, this Court found that, subject to clarification regarding the application of the Civil Liability Act, 1961, Ulster Bank was *prima facie* entitled to judgment in the sum of €22,090,302.64 against the McDonaghs arising from an unpaid loan taken out by the McDonaghs in respect of the purchase of the Kilpeddar site in Co. Wicklow for the development of a data centre.

2. In the principal judgment (see para. 340 et seq.), this Court disagreed with the claim by the McDonaghs that s. 17(2) of the 1961 Act meant that Ulster Bank could not claim from the McDonaghs the difference between what it had received from CBRE and the total damage suffered by it. It also disagreed with the claim by the Bank that the provisions of the 1961 Act, regarding the effect of settlement with concurrent wrongdoers, do not apply to claims for unpaid debts. This Court did however find that, in principle, the 1961 Act could apply to the circumstances of this claim.

3. In light of the Court's conclusions, when delivering the principal judgment, this Court sought supplemental submissions from the parties regarding whether in the particular circumstances of this case, CBRE, which had provided a valuation report on the Kilpeddar site, was a concurrent wrongdoer with the McDonaghs for the purposes of the 1961 Act in respect of the unpaid loan, and if so, whether CBRE had a liability for the loss caused to Ulster Bank in excess of €5 million (the sum CBRE had paid in settlement of the claim against it by Ulster Bank), so as to reduce (pursuant to s. 17(2) of the 1961 Act) the judgment sum being sought by Ulster Bank from the McDonaghs.

4. Paragraphs 319 to 354 of the principal judgment outline the Court's analysis of the 1961 Act issue. It is not proposed to repeat that analysis herein, but it is helpful to note that, in broad terms, the unpaid loan sought by Ulster Bank from the McDonaghs was €27 million, prior to the Bank's receipt of the settlement sum of €5 million from CBRE, which thereby reduced the unpaid loan to €22 million (the sum sought in these proceedings by Ulster Bank from the McDonaghs). In percentage terms, the €5 million paid by CBRE of the outstanding loan of €27 million equates to approximately 18% of the loss or damage suffered by the Bank. However, it is crucial to note that this settlement between Ulster

Bank and CBRE was made without any finding of negligence against CBRE for its valuation of the Kilpeddar site or any admission of liability by CBRE in this regard, since Clause 2.1 of the Settlement Agreement states that:

> "the Parties agree to settle these proceedings without any admission of liability by any Party."

The first issue to deal with therefore in this supplemental judgment is whether CBRE, which settled the claim against it by Ulster Bank by paying 18% of the loss suffered by the Bank, is a concurrent wrongdoer with the McDonaghs in respect of the damage caused to the Bank (i.e. the non-repayment of the loan by the McDonaghs) for the purposes of the 1961 Act.

Applying s. 17 of the Civil Liability Act 1961 Act to the circumstances of this case

5. In its supplemental submissions, the Bank claims that even if this Court is correct in concluding that as a matter of principle the 1961 Act applies to the non-payment of debts (which the Bank disputes), on the facts of this case there is no evidence that CBRE is a concurrent wrongdoer. It also submits that even if CBRE were a concurrent wrongdoer, its liability for the unpaid loan is an extremely small percentage and thus nowhere near the 18% which it has already paid. On this basis, it claims that the 1961 Act has no impact on the liability of the McDonaghs for the remainder of the unpaid loan, namely €22 million and so judgment should be entered for this amount.

6. In their submissions, the McDonaghs claim that judgment should not be entered against them for €22 million arising from their failure to repay the loan on the grounds that CBRE is a concurrent wrongdoer with the McDonaghs in relation to the unpaid loan pursuant to s. 17(2) of the 1961 Act. As noted in the principal judgment, assuming that CBRE is a concurrent wrongdoer, then under s. 17(2) of the 1961 Act, in order to ascertain whether Ulster Bank is entitled to judgment for the full amount of its loss from the McDonaghs, the Court is required to engage in an exercise whereby it assumes that the McDonaghs have paid the Bank's claim in full and then considers what amount the McDonaghs would be entitled to recover from CBRE. The relevant part of s. 17(2) states:

> "the claim against the other wrongdoers [the McDonaghs] shall be reduced […] to the extent that the wrongdoer [CBRE] with whom the release or accord was made *would have been* liable to contribute if the plaintiff's [Ulster Bank's] total claim had been paid by the other wrongdoer [the McDonaghs]." (Emphasis added)

Applying these provisions of s. 17(2), the McDonaghs claim that if the McDonaghs had paid the Bank's claim of €27 million in full, the McDonaghs '*would have been'* entitled to all of that sum from CBRE, as the McDonaghs claim that CBRE was the party who was 100% liable for their failure to repay the loan.

Onus of proof

7. As a preliminary matter, the McDonaghs submitted that because the obligation is upon a plaintiff to prove its case (which the Bank has done, as evidenced by this Court's finding in the principal judgment that the Bank is entitled to judgment, subject to clarification of

the 1961 Act issue), the Bank must in addition show that CBRE's liability for the damage suffered by the Bank is no more than 18% or €5 million, so as to entitle the Bank to judgment of €22 million. If it fails to establish this further requirement, the McDonaghs claim that the Bank has failed to prove its case.

8. However, the onus on a plaintiff in a claim for an unpaid debt such as in this case, is to prove its case that the debt was extended to the borrower and was not repaid by the borrower. There is no onus on a plaintiff to disprove the defences which the defendant claims apply, which is the implication of the submission by the McDonaghs. Instead, the onus is on a defendant to establish any defences which it claims apply. In this regard see McGrath*, Evidence* (2nd Ed., Round Hall, 2014) where the author at para. 2-120 states, "*[…] proof of a defence to the action will lie on the party raising the defence*". This is because it is a well-established principle in civil cases that he who asserts must prove, which principle has long since been confirmed by the courts - see, for example, Clayton v. Cashman [2006] IEHC 360 where Peart J. stated at para. 106 that:

> "[The defendant] needs to discharge the onus of proving her defence to these proceedings."

9. In this case, Messrs. Kenneth and Maurice McDonagh and Mr. Brian McDonagh asserted in their respective defences in identical terms the following defence to the Bank's claim for judgment:

> "Further, by reason of the action taken by Ulster Bank against CBRE the agents who valued the Lands for Ulster Bank at or about the time of the grant of the facility to the [McDonaghs] of €21,500,000 and Ulster Bank's settlement thereof for a sum far below that of €4,847,315, the same amounts to a release or accord with a concurrent wrongdoer such as to discharge [the McDonaghs] from any liability under the said facility and [the McDonaghs] will rely on ss. 17 and 35 of the Civil Liability Act, 1961. If the said release and/or accord did not discharge [the McDonaghs] from any liability under the said facility, Ulster Bank is identified with the said concurrent wrongdoer, CBRE, such that the liability of [the McDonaghs] is reduced to the extent to which [CBRE] would have been liable to contribute if Ulster Bank's total claim had been paid by [the McDonaghs]."

10. Since this is the McDonaghs' defence, it follows that the onus is on the McDonaghs to prove what they claim in this defence, namely the following four conditions:

    (i) that CBRE was negligent,

    (ii) that CBRE's negligence caused the non-repayment of the loan by the McDonaghs (and thus that CBRE was a concurrent wrongdoer),

    (iii) that (as required by s. 17 of the 1961 Act) Ulster Bank entered into a release and accord with CBRE for 18% of the damage caused to the Bank, and,

    (iv) that CBRE is liable for 100% (or more than 18%) of that damage.

11. It is not for Ulster Bank to prove any of these four conditions. In particular, there is no onus upon Ulster Bank to prove (or indeed to assume) that CBRE is a concurrent wrongdoer and then prove that notwithstanding this assumption that the McDonaghs are liable for 100% (or at least 82%) of the non-repayment of the loan. To put the matter another way, it is not a matter for the Bank, having proved that the loan was extended to the McDonaghs and never repaid, to prove a negative, i.e. that the non-repayment of the loan was not caused by some other party, in this instance an alleged concurrent wrongdoer, CBRE.

12. Similarly, having established that the loan was extended to the McDonaghs and never repaid, it is not a matter for the Bank to prove that the non-payment of at least 82% of the loan was attributable to the McDonaghs.

13. It seems clear therefore that the onus is on the McDonaghs to establish a defence pursuant to s. 17(2) of the 1961 Act, and not for the Bank to disprove that defence. Accordingly, this Court will next consider whether the McDonaghs have discharged that onus.

14. The first step in this process is to consider whether the McDonaghs have established in their evidence before this Court that CBRE is a concurrent wrongdoer.

Was CBRE negligent/a concurrent wrongdoer with the McDonaghs for the unpaid loan?

15. As is evident from the principal judgment, to be a concurrent wrongdoer, CBRE must first be a wrongdoer, i.e. guilty of a wrong. In this case, the alleged wrong committed by CBRE is the alleged negligent issue of its valuation report on the Kilpeddar site, wherein it valued that site at €56 million.

16. However, no evidence was provided to the Court of the alleged negligence of CBRE in providing this valuation. What there was, was evidence of proceedings having been issued by Ulster Bank against CBRE in which it alleged negligence. Similarly, there was evidence of a Settlement Agreement (which agreement specifically denied negligence) between CBRE and Ulster Bank which dealt with the settlement of this claim. However, the settlement of a negligence claim is not evidence of negligence. There are many reasons why a party might settle a claim, so the settlement of a claim does not mean that the settling party accepts that it was negligent. Nor of course is the settlement of a claim evidence that a Court did, or would find, that the settling party, in this case CBRE, was negligent.

17. Furthermore, it is well established that to prove negligence against a professional such as a valuer, it is necessary for expert evidence to be provided to the Court (see, for example, *Reidy v. National Maternity Hospital* [1997] IEHC 143 at p. 15 and, more recently, *Morrissey v. Health Service Executive* [2020] IESC 6 at para. 6.13). In this case, the McDonaghs did not produce any expert evidence to the effect that CBRE was guilty of negligence when CBRE issued its valuation of €56 million for the Kilpeddar site. Therefore, there is no basis upon which this Court can conclude that CBRE was negligent when it issued the valuation report on the Kilpeddar site. Accordingly, there is no basis for

concluding that CBRE committed a 'wrong' for the purposes of the 1961 Act, so as to constitute it a 'concurrent wrongdoer' with the McDonaghs in relation to the non-repayment of the loan to Ulster Bank

18. For this reason, this Court concludes that the McDonaghs have failed to provide sufficient evidence for this Court to conclude that CBRE was a concurrent wrongdoer in relation to the 'damage' suffered by Ulster Bank for the purposes of the 1961 Act, namely the non-repayment of the loan in this case.

19. Accordingly, this Court has no evidence upon which to base a finding that the McDonaghs are entitled to rely on their defence grounded in s. 17(2) of the 1961 Act to claim that they are relieved from their liability to Ulster Bank because of the Bank's settlement with the alleged concurrent wrongdoer CBRE.

If CBRE were a concurrent wrongdoer, what is its proportion of liability for unpaid loan?

20. In case this Court is wrong in its conclusion that CBRE is not a concurrent wrongdoer, this Court will next consider what evidence there is to conclude that CBRE (assuming it is a concurrent wrongdoer) is liable for more than 18% (€5 million) of the damage caused to Ulster Bank (being the non-repayment of a loan plus interest of approximately €27 million), such that Ulster Bank is not entitled to judgment for the full balance of the outstanding loan of €22 million against the McDonaghs.

Evidence that CBRE caused the non-repayment of the loan?

21. In their submissions, the McDonaghs claim that CBRE's alleged negligent valuation report was the sole cause of the non-repayment by them of the loan, since they allege that if the McDonaghs had paid the Bank's claim in full (as one must assume for the purposes of s. 17(2) of the 1961 Act), they would have been entitled to recover the full amount from CBRE. On this basis, the McDonaghs claim that Ulster Bank is not entitled to pursue the McDonaghs for any of the outstanding loan.

22. As evidence of CBRE's alleged 100% liability for the non-repayment of the loan, the McDonaghs (in this context, Messrs. Kenneth and Maurice McDonagh) relied upon the fact that the obtaining of a valuation from CBRE was a pre-condition to the granting of the loan by the Bank to the McDonaghs. On this basis, they suggest that it is only because CBRE issued this (allegedly negligent) valuation of €56 million that the loan was extended by Ulster Bank. Accordingly, they claim that there is a 100% causal link between the issue of the (allegedly negligent) valuation and the non-repayment of that loan. In particular, they rely on the fact that Mr. O'Hanlon of Ulster Bank, in his evidence to the Court, agreed that the valuation report was a critical part of the lending decision by the Bank and that he agreed that if the Bank was not satisfied with the valuation it could have pulled out of the lending.

23. However, this evidence that the McDonaghs provided to the Court that the issue of the (allegedly negligent) valuation was an important pre-condition to the loan, is simply evidence of a pre-condition under the Facility Letter having been satisfied for the loan to be extended to the McDonaghs. It is of course *possible* that if this pre-condition had not

been satisfied the loan might never have been extended. However, this is not evidence that on the balance of probabilities, CBRE caused in whole or in part the non-repayment of the loan by the McDonaghs, let alone evidence that CBRE was liable for 100% of the non-repayment of the loan.

24. As further evidence of CBRE being 100% liable for the non-repayment of the loan, the McDonaghs relied on the fact that Mr. O'Hanlon accepted in his evidence before the Court that the CBRE proceedings had "*a relevance*" to the indebtedness of the McDonaghs. Similarly, the McDonaghs relied on Mr. O'Hanlon's acceptance that if the Bank had recovered the full amount of the loan in its proceedings against CBRE that this would have been credited against the outstanding loan and would have led to the expungement of the claim against the McDonaghs.

25. However, none of this is evidence that the CBRE valuation caused 100%, or indeed any, of the loss arising from the non-repayment of the loan. The CBRE proceedings were of relevance to the McDonaghs indebtedness for the simple reason that any amount recovered from CBRE (whether €5 million or €25 million) had to be (and was, in the case of the €5 million, albeit with some delay) applied by the Bank against the balance outstanding of the McDonaghs' loan. Otherwise, the Bank might, in its proceedings against the McDonaghs, recover more than its loss, which it was obviously not entitled to do. The fact that the CBRE proceedings were relevant for this reason (or that if there had been full recovery from CBRE this would have eliminated the loan) cannot be said to be evidence that the CBRE valuation caused (100% or indeed more than 18% of) the non-repayment of the loan.

26. In further support of their claim that CBRE was 100% liable for the non-repayment of the loan, the McDonaghs relied on the fact that the indebtedness being sought from the McDonaghs was the same as the indebtedness which was sought from CBRE and that the €5 million settlement sum received from CBRE was held in a suspense account by the Bank for some time before being applied to the outstanding loan. Mr. Ted Mahon of Ulster Bank gave evidence to the Court that this sum of €5 million was held in that suspense account as it would have been returned to CBRE if the Bank had recovered the full amount of the outstanding loan from the McDonaghs. However, the fact that the Bank sought the full loan from CBRE and held the settlement sum it received in a suspense account is not evidence that the CBRE valuation caused the non-repayment of the loan. This is simply evidence that Ulster Bank sought to recover the same amount from CBRE as it sought from the McDonaghs and that it held that sum in a suspense account, in case it recovered the full amount from the McDonaghs, in which case the Bank would have been required to return the €5 million settlement sum to CBRE.

27. The McDonaghs also placed some reliance, in their claim that CBRE is 100% liable for the non-repayment of the loan, on the fact that the Bank claimed the *full* amount of the loan from CBRE. However, just as a *claim* of negligence is not *evidence* of negligence, so too this is simply evidence that the Bank sought to recover its full loss from CBRE; it is not

evidence of a (sole or partial) causal link between the valuation report and the non-repayment of the loan.

28. Finally, and, more generally, in relation to the McDonaghs claim of a 100% causal link between the valuation report and the non-repayment of the loan, it is relevant to note that the McDonaghs referenced the claim by Mr. Moore of Ulster Bank that if the CBRE valuation had been lower than €56 million, the loan might still have gone ahead. This is because Mr. Moore suggested in his evidence that the borrowers *might have* offered to give additional equity. At para. 17 of their submissions, Messrs. Kenneth and Maurice McDonagh make the valid observation that there was:

> *"no evidence to suggest* any such additional equity would have been available or *that the borrowers would have proceeded with the transaction if CBRE had not valued the land at the amount it was valued."* (Emphasis added)

This submission by the McDonaghs is correct, i.e. there is no evidence to suggest that the borrowers would have proceeded with the transaction if CBRE had not valued the land at €56 million. This submission by the McDonaghs is very significant because the flip side of that submission is also correct, namely that there is no evidence to suggest that the borrowers or the Bank would *not* have proceeded with the transaction if CBRE had valued the land at less than €56 million. This is what the McDonaghs have to establish, but for which they have provided no evidence.

29. Thus, even if one assumes that the valuation of €56 million was negligent, there is absolutely no evidence to support the claim that the McDonaghs would *not* have proceeded with the loan from Ulster Bank in order to purchase the Kilpeddar site for €22 million if the valuation had been some other (allegedly non-negligent) valuation e.g. say €50 million or €40 million or €30 million.

30. So just as the McDonaghs are correct to imply that it is speculation for the Bank to claim that the McDonaghs *would have* given additional equity if the valuation was less than €56 million and so the loan would still have proceeded, it is equally speculation to say that the Bank would not have proceeded with the loan if the valuation was less than €56 million and thereby argue that that there is a direct and 100% causal link between the valuation at €56 million and the default on the loan.

Mr. Brian McDonagh's submissions

31. Mr. Brian McDonagh in his submissions argues that CBRE has a "*contractual liability*" for the debt. In support of this conclusion, he relies on Ulster Bank's Statement of Claim in its proceedings against CBRE in which the Bank claims to have relied upon the valuation provided by CBRE in the Bank reaching its decision to advance the loan to the McDonaghs. This he claims shows "*a contractual liability of CBRE to Ulster Bank in respect of the loan facility".* This is incorrect, the Statement of Claim is simply evidence of a claim by Ulster Bank that CBRE owed the Bank a duty of care and a claim by the Bank that it relied upon CBRE's valuation before it advanced the loan to the McDonaghs.

32. This is not evidence of a contractual liability on the part of CBRE to repay the loan taken out by the McDonaghs. There is absolutely no evidence of CBRE entering a contract to repay the loan taken out by the McDonaghs for the purchase by them of the Kilpeddar site.

33. In addition, and in reliance upon the Supreme Court cases of *O'Sullivan v. Dwyer* [1971] I.R. 275 and *Carroll v. Clare County Council* [1975] I.R. 221, Mr. Brian McDonagh also submits that CBRE should, because of its greater blameworthiness relative to the blameworthiness of the McDonaghs, be 100% liable for the non-repayment of the loan. In the *Carroll* case, at p. 227, Kenny J. stated that the jury (since in that case, liability was being determined by a jury) was to:

> "apportion the fault according to their view of the blameworthiness of the causative contributions to the accident and that it is to be measured and judged by the standards of conduct and care to be expected from a reasonable person in the circumstances."

34. However, while Mr. Brian McDonagh has placed reliance on these cases, it is clear from them that when determining the relative proportionate liability of concurrent wrongdoers for damage, the issue of respective blameworthiness only gets to be considered (along with the causative link between the concurrent wrongdoers and the damage in question), once it is clear that the damage has been *caused* by concurrent wrongdoers.

35. However, as previously noted in the context of Messrs. Kenneth and Maurice McDonaghs' submissions, no evidence was presented to the Court, by any party, of the CBRE valuation being negligent, or of that valuation having caused the non-repayment of the loan, and thus there was no evidence that CBRE was a concurrent wrongdoer.

36. It follows that the issue of the relative blameworthiness of CBRE and the McDonaghs for the damage caused to Ulster Bank does not arise for consideration, since this would only arise where CBRE is found to be a concurrent wrongdoer.

37. However, if this Court is wrong in this regard, even if there was evidence of CBRE being a concurrent wrongdoer, no evidence was produced to the Court of the blameworthiness of CBRE (relative to that of the McDonaghs) being such as to justify CBRE being held liable for causing 100% (or more than 18%) of the non-repayment of the loan.

38. This is because the only evidence that Mr. Brian McDonagh relies upon, to support his claim that CBRE are sufficiently blameworthy (relative to the McDonaghs) for the non-repayment of the loan, so as to justify a finding of 100% (or more than 18%) liability, does not in fact relate to the actions of CBRE at all. Rather the evidence to which he refers relates to Ulster Bank's actions.

39. This is because he relies on the fact that when Ulster Bank sued CBRE in respect of the allegedly negligent valuation, he claims that Ulster Bank should have joined, but wrongfully failed to join, the McDonaghs as a party. This failure to join the McDonaghs by

the Bank was wrongful, in his view, because any settlement of those proceedings between the Bank and CBRE impacted upon the loan which the McDonaghs were contractually liable to repay to Ulster Bank. In his submission he states:

> "It is not unreasonable to suggest that the methodology applied by Ulster Bank denied the [McDonaghs] a right to be heard and to fair procedures involving their property rights […] It is respectfully submitted that Ulster Bank in excluding the [McDonaghs] from the CBRE action acted as Judge in its own cause and thus denied a right to the most basic of fair procedures involving property rights as encompassed under Article 43 [of the Constitution]."

40. In a similar vein, Mr. Brian McDonagh supports his claim that CBRE was sufficiently blameworthy (relative to the McDonaghs) by reference to the alleged wrongful failure of Ulster Bank to disclose to the McDonaghs details of the Settlement Agreement it reached with CBRE. He also relies upon the Bank's failure to immediately apply the €5 million settlement it received thereunder to reduce the outstanding loan, since the Bank only did so when the settlement came to light in court proceedings in the related case of *Granja Ltd. v. McCann and Ors*. (Record No. 2014/10190P). In his submission, he states that it is:

> "at least arguable that there existed questionable conduct on the part of Ulster Bank in concealing the settlement agreement from [the McDonaghs]."

41. Regardless of the merits of the foregoing claims of wrongful conduct against Ulster Bank, it is clear that they are claims which are directed *at the acts and omissions of Ulster Bank* and therefore have no relevance to any claim that CBRE is so blameworthy for the non-repayment of the loan by the McDonaghs, so as to justify a finding by a court that it is 100% liable (or indeed more than 18% liable) for that non-repayment (even if there was evidence to support a finding that CBRE was a concurrent wrongdoer).

42. For all of the foregoing reasons therefore, the McDonaghs have failed to discharge the onus upon them to establish that s. 17(2) of the 1961 Act relieves them of liability for the non-repayment of the loan of over €20 million which they got from Ulster Bank.

Validity of appointment of Receivers

43. There is one other issue where Mr. Brian McDonagh seeks clarity, in his supplemental submissions, regarding the final orders. This issue is unrelated to the Civil Liability Act, 1961 and relates to the validity of the appointment of the joint receivers over the Kilpeddar site, since he notes that the Court, in the principal judgment, had not explicitly granted the following relief sought in the Bank's Statement of Claim:

> "A Declaration that the Second and Third Named Plaintiffs [the Receivers] stand validly appointed as joint receivers by way of Deed of Appointment dated 1 October 2014 over the lands comprised in Folio WW21790F and Folio WW36738F in Register of Freeholders of the County of Wicklow (the "Lands")."

44. However, the precise form of the final orders to be made by the Court arising from the principal judgment was left over to allow the parties to consider all the terms of the judgment and reach agreement, if possible, on costs and any other orders. Furthermore, the Court's decision regarding the validity of the appointment of the Receivers should be clear from para. 301 of the principal judgment, in which it is stated:

> "It seems clear therefore that because of the multiple breaches of the Compromise Agreement and because of Clause 4 of the Compromise Agreement, *Ulster Bank was not prevented from enforcing its security over the Kilpeddar site, which it did by appointing the Receivers*, and it was not precluded from seeking judgment against the McDonaghs for all sums due from the McDonaghs, i.e. without the benefit of the write-off in the Compromise Agreement." [Emphasis added]

45. As noted in the principal judgment, Clause 4 of the Compromise Agreement provided that if the McDonaghs breached that Agreement the Bank would be at liberty *"to take whatever steps it shall, in its absolute discretion, deem fit on foot of the Finance Documents, at law or otherwise*". At para. 37 of the principal judgment this Court noted that the "*Finance Documents*" included the Mortgage. The McDonaghs breached the Compromise Agreement and so Clause 4 was invoked by the Bank and the Receivers were appointed over the Kilpeddar site.

46. The only argument made regarding the validity of the appointment of the Receivers by Messrs. Kenneth and Maurice McDonagh was their claim the Compromise Agreement had not been breached by the McDonaghs and was still binding on the Bank and so the Receivers could not be appointed. It should be noted that this claim was also advanced by Mr. Brian McDonagh in his original defence to the proceedings. Since this Court found that the Compromise Agreement was breached by the McDonaghs, this Court dismissed this defence and found that the Bank was entitled to appoint the Receivers.

47. In his supplemental defence however, Mr. Brian McDonagh made a different claim to that in his original defence and alleged that there were outstanding title issues relating to the Kilpeddar site and that, on that basis, the appointment of Receivers was rendered impossible as "*clean title has to be proven before a receiver is appointed*". However, as is clear from the principal judgment, during the hearing of the action, Mr. Brian McDonagh adduced no expert evidence to the effect that there were any title issues with the Kilpeddar site or that flaws in the title would somehow affect the appointment by the Bank of the Receivers. In fact, the expert evidence provided on behalf of the Bank by Mr. Patrick Sweetman contradicted the claims made by Mr. Brian McDonagh in his supplemental defence. This is because Mr. Sweetman, a conveyancing expert, gave evidence that there were no flaws in the title of the Kilpeddar site.

48. In any case, during cross-examination, Mr. Brian McDonagh accepted the evidence given by Mr. Sweetman and withdrew his claim that there was any flaw in the title of the Kilpeddar site. It follows therefore that Mr. Brian McDonagh's claim in his supplemental defence, that there was a flaw in the title preventing the appointment of the Receivers, cannot stand in the light of his acceptance that there was in fact no title flaw.

49. The validity of the appointment of the Receivers was again raised by Mr. Brian McDonagh in his closing oral submissions to the Court. These submissions were heard by the Court on the final day of the hearing after three weeks of evidence had been heard. The main thrust of Mr. Brian McDonagh's closing submissions in this regard related to his claim that the Mortgage did not expressly permit the appointment of joint receivers and that therefore the appointment of the *joint* receivers over the Kilpeddar site pursuant to the Deed of Appointment is unlawful. This argument was not made by Counsel for Messrs. Kenneth and Maurice McDonagh and it was not advanced by Mr. Brian McDonagh at any stage during the hearing of the action and therefore amounted to a completely new approach by Mr. Brian McDonagh in his challenge to the validity of the appointment of the joint receivers. In his closing submissions, while Mr. Brian McDonagh accepted that the Mortgage allowed for the appointment of receivers (in the plural), he argued that there was no permission granted for the appointment of receivers on a joint basis.

50. However, the recent Supreme Court decision of *Taite v. Beades* [2019] IESC 92 provides clear support for the proposition that once a charge authorises the appointment of receivers, they can be appointed jointly, since at para. 43 Irvine J. dismissed the claim that a failure to expressly refer in a mortgage to the 'joint' appointment of receivers renders invalid their 'joint' appointment). At paras. 43 and 44 of her judgment, Irvine J. stated as follows:

> "It is likewise difficult to see how Mr. Beades might successfully defend the proceedings, as he indicated was his intention in the course of this appeal, based upon different wording in the deeds of mortgage and deeds of appointment. Clause 11.1 one of the mortgage deeds provides for the appointment "of a person or persons as receiver and manager or receivers and managers" whereas in the deeds of appointment Mr. Taite and Mr. Brennan were appointed as "joint receivers and managers". Mr. Beades maintains that the inclusion of the word "joint" in the deeds of appointment render the appointment of the receivers invalid.
>
> From a legal perspective it is difficult to see how the inclusion of the word "joint" in the deeds of appointment could render invalid the appointment of Mr. Tate and Mr. Brennan as receivers. The deeds of mortgage clearly contemplate more than one receiver and manager."

51. Similarly in this case, the use of the plural 'receivers' clearly contemplates the appointment of more than one receiver and so on the authority of *Taite v. Beades* there is no basis for claiming that the appointment of joint receivers is unlawful.

52. In addition, Mr. Brian McDonagh placed reliance on the judgment of the Supreme Court in *Analog Devices B.V. & ors. v. Zurich Insurance Co. & anor*. [2005] 1 I.R. 274 in support of his proposition that Ulster Bank should have included in the Mortgage an express power to appoint joint receivers and could have done so if they had wished. Mr. Brian McDonagh contends that the absence of such an express term leads to ambiguity in the Mortgage and that therefore the Mortgage must be interpreted in the McDonaghs' favour, i.e. the Bank is not entitled to appoint joint receivers over the Kilpeddar site. In

particular, Mr. Brian McDonagh relies upon Geoghegan J.'s judgment in *Analog Devices* at p. 282 *et seq.* where in setting out the principle of *contra proferentem* he observes that:

> "The principle of *contra proferentem* needs be resorted to, of course, only if there is an ambiguity."

53. It is the view of this Court that Clause 5(i) of the Mortgage is not ambiguous so as to invoke the principle of *contra proferentem.* The Mortgage clearly permits the appointment of 'receivers' over the Kilpeddar site. The fact that the Mortgage does not include the word 'joint' does not mean that the Deed of Appointment is void for providing for the appointment of the Receivers in a joint capacity. As is clear from the Supreme Court case of *Taite v. Beades*, the fact that the Mortgage was drafted in such a way as to allow for the appointment of more than one receiver must, on any interpretation, be held to allow for those receivers acting in a joint capacity and this is confirmed by the Deed of Appointment.

54. Accordingly, this Court rejects the claim that the appointment of the Receivers is invalid and would, as well as such other orders as are necessary, grant the relief as sought by the Bank in the Statement of Claim that the Receivers stand validly appointed as joint receivers over the Kilpeddar site.

Conclusion

55. In light of the foregoing, this Court concludes that:

(i) it has no evidence to conclude that CBRE was negligent in relation to its issue of a valuation report on the Kilpeddar site, and,

(ii) even if the valuation report was held to be negligent, this Court has no evidence upon which to conclude that the report was the cause of the non-repayment of the loan by the McDonaghs or the cause of more than 18% of the damage/loss suffered by Ulster Bank as a result of the non-repayment of the loan, and,

(iii) even if the valuation report was held to be negligent and CBRE was held to have caused some of the damage/loss suffered by the Bank, the Court has no evidence upon which to conclude that CBRE was sufficiently blameworthy (relative to the McDonaghs) for the non-repayment of the loan, such as to justify a finding that CBRE should be held liable for 100% of the loss/damage suffered by the Bank or indeed more than 18% of that loss/damage.

56. Accordingly, the McDonaghs have failed to discharge the onus upon them to establish that s. 17(2) of the 1961 Act relieves them of liability for the non-repayment of the loan of over €20 million which they got from Ulster Bank.

57. For this reason, this Court concludes that Ulster Bank is entitled to judgment without any deduction arising as a result of s. 17(2) and it will hear from the parties in relation to final orders and other matters arising from this judgment and the principal judgment.