THE HIGH COURT

COMMERCIAL

[2023] IEHC 242

[2021 850 P]

[2022 68 COM]

BETWEEN

BRIAN MCDONAGH,
MAURICE MCDONAGH
AND KENNETH MCDONAGH

PLAINTIFFS

AND

ULSTER BANK IRELAND DAC,
NORMAN GINNELLY,
PAUL MCCANN,
PATRICK DILLON,
CBRE,
PROMONTORIA ARAN,
LINK ASI LIMITED,
CONOR MAHER
AND
ALAN MONAGHAN

DEFENDANTS

Judgment of Mr. Justice Quinn delivered on the 12th day of May 2023

1. In July 2007, the plaintiffs purchased a 33 hectare site at Kilpeddar, Co. Wicklow where they planned to develop a data centre. They borrowed €21.5 million from Ulster Bank Limited ("the Bank"), the first defendant, and invested a further sum of €4.5 million.

2. In these proceedings the plaintiffs allege that a valuation of the Kilpeddar property made by the fifth named defendant, CBRE, in July 2007 in connection with the acquisition

and financing of that property was made negligently and in breach of contract. The fifth named defendant had valued the lands at €56 million.

3. This judgment relates to an application by the fifth named defendant for a determination of a preliminary issue in the proceedings that the plaintiffs' claim is barred pursuant to the provisions of s. 11 of the Statute of Limitations 1957.

4. In parts of this judgment, I shall refer to the Plaintiffs as the McDonaghs and to the fifth named defendant as CBRE.

Procedural matters

5. The procedural history is relevant to understanding the current state of the pleadings, and the information before the court on this application.

6. The proceedings were commenced by the issue of a plenary summons on 12 February 2021.

7. A statement of claim was delivered on 14 March 2022.

8. On 10 June 2022, the defendants, with the exception of the fifth named defendant CBRE, issued an application returnable before this Court on 20 June 2022 for an order pursuant to O. 63 (A) r. 4 of the Rules of the Superior Courts 1986 as amended, directing the entry of these proceedings in the Commercial List of the High Court. No order was made on the return date, but on that day the plaintiffs issued and served a Notice of Discontinuance of the proceedings against all the defendants except the fifth named defendant. The Motion for entry was adjourned to 27 June 2022. On that day the court was informed that the entry motion was not proceeding and an order was made for the refund to the defendants of the stamp duty paid on the notice of motion.

9. On 24 June 2022, the fifth named defendant issued an application for an order entering the proceedings in the Commercial List. This application was returnable for 4 July

2022 and on that day, McDonald J. made the order entering the proceedings in the Commercial List and approved a timetable for exchanges of pleadings.

10. On 23 July 2022 the plaintiffs delivered an amended statement of claim, significantly amending the original statement of claim in light of the discontinuance of the proceedings against all defendants except the fifth named defendant.

11. On 27 September 2022 the fifth named defendant delivered its Defence.

12. Following exchanges of particulars and interrogatories, the fifth named defendant issued the application which is now before the court. On 5 December 2022, McDonald J. made an order approving a revised timetable in connection with the hearing of this application and fixed 21 March 2023 as the date for its hearing.

13. The notice of motion now before the court is for orders in the following terms: -

(1) An order pursuant to O. 25, rr. 1 and 2 and/or O. 34, r. 2 and/or the inherent jurisdiction of this Honourable Court directing the trial of a preliminary issue on the Statute of Limitations 1957 as amended ("the Statute of Limitations").

(2) Directions as to the hearing of a preliminary issue.

(3) A declaration that the plaintiffs' claim is statute barred pursuant to the provisions of the Statute of Limitations.

(4) An order dismissing the proceedings herein pursuant to O. 19, r. 28 of the Rules of the Superior Courts and their inherent jurisdiction, on the basis that the plaintiffs' claim is statute barred pursuant to the provisions of the Statute of Limitations.

14. This was the application which McDonald J. listed for hearing on 21 March 2023. He also directed that the parties agree a Statement of Facts and exchange affidavits and legal submissions in advance of the hearing of the motion.

15. There is no order of the court directing the trial of a preliminary issue. The Court pointed this fact out to the parties at the opening of the application and all of the parties

submitted that in circumstances where affidavits had been exchanged, a Statement of Facts agreed, the parties had exchanged written legal submissions on the substantive question of the application of the Statute of Limitations, and the court had fixed two days for the matter, they were ready to address the substantive question and requested that the court treat the hearing of this motion as the trial of the preliminary issue. This state of affairs goes some way to explaining why the affidavits exchanged on this application and now before the court were so concise. In light of the position adopted by both sides, I acceded to their request to treat this application as the substantive hearing of the preliminary issue as to whether the claim is statute barred.

Agreed facts

16. Before the court on this application was a Statement of Agreed Facts which had been submitted to the court on 20 March 2023, together with appendices. The parties confirmed to the court that this was the final and agreed version of the Statement of Agreed Facts.

17. Also before the court on this application were an affidavit grounding the application sworn by the defendant's solicitor, Mr. Casey, on 29 November 2022 and a replying affidavit of Mr. Maurice McDonagh apparently received by the defendants on 30 January 2023 in unsworn form which the defendants confirm had been sworn and was in the course of being filed. I accepted an undertaking by the plaintiffs' counsel to file that affidavit. Before the court were the pleadings which include the plenary summons, statement of claim, an amended statement of claim, and a defence, and a Notice for Particulars delivered by the defendants on 9 July 2022 and replies to that notice for particulars dated 16 September 2022 together with 18 attachments referred to therein.

18. The Statement of Facts referred also to proceedings, which I refer to as the 'Judgment Proceedings', in Ulster Bank Ireland Limited and Others v. McDonagh and Others [2018] 5922. In those proceedings the Bank sought recovery of a debt €22,090,302.64 from the

plaintiffs. On 6th April 2020 Twomey J. [2020 IEHC 185] held that the Bank was entitled to judgment. The court also held that the Bank was entitled to appoint receivers over the property when it did so on 1st October 2014. The judgment of Twomey J. was upheld on those matters by the Court of Appeal. (6th April 2022 : 2022 IECA 87) Since those proceedings, and the fact of the judgment of Twomey J. were referenced in the Agreed Statement of Facts, a number of important events cited and found in the judgments are incorporated into my description of the facts.

This application

19. On the determination of a preliminary issue the court is required to take the plaintiffs' case at its height. In that context, the defendant makes a number of concessions only for the purpose of this application. For example, in its Defence the fifth named defendant denies that it was engaged by the plaintiffs for the purpose of valuing the property and asserts that it was engaged by Ulster Bank Ireland Limited alone to provide a valuation and appraisal of the property.

20. Similarly, the fifth named defendant denies that it owed or assumed any duty of care to the plaintiffs. It asserts that the valuation report was correctly carried out and that it fully discharged its duties. It also asserts that if there was any breach of duty and if the plaintiff suffered loss, no causal connection existed between the breach and any loss suffered by the plaintiffs.

21. These issues are not in contention for the purpose of determining this application. The question of the application of the Statute of Limitations turns firstly on identifying the date on which the cause of action accrued and secondly a submission by the plaintiffs of fraudulent concealment of their right of action. Similarly, my recital of certain facts is not a finding such as would determine the question of liability, which would be a matter for trial if this application were to fail.

22. The defendants say that if any cause of action accrued arising from their valuation, whether in contract or in court, it accrued in 2007 when the valuation was issued and when the plaintiffs entered into the transactions for the acquisition and financing of the property in July and August 2007. They therefore submit that proceedings commenced on 12 February 2021 are statute barred.

23. The plaintiffs assert that the cause of action in negligence only accrued when they suffered loss as a consequence of the valuation. They say that their losses accrued on a number of possible dates, all within six years prior to the commencement of the proceedings. They say they suffered loss on 6 April 2020, when the High Court (Twomey J.) declared that the Bank was entitled to judgment against them jointly and severally for a sum of €22,947,207.85. They cite also the date of 1 February 2021, when the Kilpeddar property was sold for a sum of €3 million.

24. My conclusion is that the plaintiffs suffered loss and the cause of action accrued at the latest on 1 October 2014 when the Bank appointed receivers over the property. That finding is sufficient to dispose of the preliminary issue and the action. I conclude, as detailed later in this judgment, that the plaintiffs incurred loss on dates earlier than this, but 1 October 2014 is the latest date on which, on any view of the events which occurred on and before that date, it can be said that loss occurred. Therefore these proceedings commenced 12th February 2021 are statute barred.

The original transaction and engagement of CBRE

25. Between March and July 2007, the plaintiffs sought investment funding from the Bank for the proposed purchase of the Kilpeddar lands. The Bank indicated that it would require a valuation of the lands by a suitably qualified valuer.

26. On 11 July 2007, the plaintiffs instructed CBRE for the purpose of preparing a valuation of the lands.

27. On 12 July 2007, the CBRE issued a letter of engagement to the plaintiffs to confirm their instructions to carry out a market valuation of the property.

28. On 18 July 2007 CBRE issued a Short Form Valuation Report expressing an opinion of value of the property at €56 million, exclusive of VAT.

29. On 20 July 2007, Ulster Bank issued a formal instruction letter to CBRE requesting a valuation of the lands.

30. On 20 July 2007, the Bank issued a facility letter to the plaintiffs for a total amount of €21.5 million.

31. The facility letter records the total consideration for the acquisition of the site at Kilpeddar in the amount of €22 million excluding costs.

32. The facility letter recorded that the facility would be reviewed in August 2008, and it provided for security to include a first legal charge over the site and other security.

33. The conditions precedent in the facility letter included a requirement for an independent valuation addressed to the Bank confirming a valuation of minimum €56 million.

34. On 30 July 2007, CBRE issued a Valuation Report stating their opinion of the value of the site as at 25 July 2007 in the amount of €56 million.

35. The report was addressed to Ulster Bank Property Finance.

36. The report included also a statement concerning "reliance" as follows: -

> "This report is for the use only of the party to whom it is addressed [ie the Bank] for the specific purpose set out herein and no responsibility is accepted to any third party for the whole or any part of its contents".

37. On 30 July 2007, the plaintiffs paid CBRE's fees in an amount of €10,000.

38. On 3 August 2007, the acquisition of the property was completed, and the plaintiffs executed a mortgage of the Kilpeddar property in favour of Ulster Bank.

39. Not having been repaid, the plaintiffs borrowing with Ulster Bank was restructured by a new facility letter dated 5 January 2009, for a higher amount of €21,855,000.

40. Between 2009 and 2013 the plaintiffs failed to comply with the repayment obligations under the revised facility letter.

13 March 2013 Compromise Agreement

41. On 13 March 2013, the Bank and the plaintiffs entered into a Compromise Agreement.

42. Under the Compromise Agreement, the plaintiffs entered into a number of covenants and commitments with the bank, including the following: -

- The plaintiffs acknowledged the debt owing to the Bank pursuant to the original facility and confirmed the security granted to the Bank (Clauses 1 and 2).
- To make a cash payment of €250,000 (Clause 3.3).
- To dispose of all of the properties charged to the Bank, being commercial and residential properties, for the best price reasonably obtainable, by "target date 3", namely 31 July 2015 and to remit directly to the Bank the entire proceeds of such sales net only of taxes and costs (Clause 3.61).
- The plaintiffs agreed to procure the engagement of agents approved by the Bank for the purpose of marketing the property at Kilpeddar for sale on the open market "with the intent of having the sale of same concluded no later that target date 2, (being 31 July 2014") (Clause 3.7).
- The plaintiffs gave further covenants in respect of their assets and affairs, the mandating of rent accounts, the sale of artwork in the case of Kenneth McDonagh, and certain other specific asset disposals by Brian McDonagh including a property in Portugal.

43. The Bank agreed in Clause 4.1 that the agreement when fully implemented would be in full and final settlement of the accounts as between the Bank and the plaintiffs.

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

45. The Compromise Agreement refers to an appended "Updated Statement of Affairs" sworn by the McDonaghs. The copy of the Compromise Agreement before the court on this application does not include the statement of affairs. It recites that the statement of affairs detailed all assets of the McDonaghs, defined to include "any real or personal property". In Clause 3.1 of the agreement the McDonaghs covenant that the statement of affairs is true and accurate, they acknowledge that the agreement is entered into by the Bank in reliance thereon and that they will on the effective date of the agreement confirm that they have no other unencumbered assets.

46. The judgment of the Court of Appeal [2022] IECA 87, summarises the effect of the Compromise Agreement as follows: "The liabilities of the plaintiff to the bank, then standing at the time in the region of €25 million - were to be written off in return for a payment by the McDonaghs' of approximately €5 million of the debt and the sale of certain properties, including the Kilpeddar lands, by a target date."

47. Twomey J. refers to the McDonagh's assets at the time of the agreement having been valued at approximately €5 million.

48. The Kilpeddar property was not sold by the deadline in the Agreement. On 26th September 2014 the Bank demanded repayment of its loan. On 1 October 2014, the Bank appointed receivers over the Kilpeddar property.

49. Whether the plaintiffs breached the Compromise Agreement and the Bank was entitled to demand repayment of the loan and appoint receivers has been the subject of extensive dispute between the plaintiffs and the Bank, and the subject of several sets of proceedings between those parties and others.

50. In his judgment of 6 April 2020, [2020] IEHC 185, Twomey J. declared the bank entitled to judgment against the plaintiffs (defendants in those proceedings) jointly and severally in the sum of €22,947,207.85. Twomey J. also made two declarations as follows. Firstly, that the plaintiffs were in breach of the Compromise Agreement and secondly, that the receivers appointed by the Bank were and continued to be validly appointed as receivers.

51. Subject to certain modifications in relation to the quantum of the judgment, the Court of Appeal upheld the judgment of Twomey J. and, importantly, the declarations that the plaintiffs were in breach of the Compromise Agreement and that the bank was entitled to appoint receivers on 1 October 2014.

The Ulster Bank proceedings

52. On 26 June 2013, the Bank issued proceedings against CBRE claiming that the valuation report, of 30 July 2007 was made negligently. (2013/6511 P), the "Ulster Bank proceedings". I shall return later in more detail to those proceedings.

53. On 22 January 2016, the Ulster Bank proceedings settled. CBRE paid the Bank €5 million plus €350,000 for costs without any admission of liability.

The Judgment Proceedings

54. On 11 April 2018, the Bank's solicitors wrote to the plaintiffs making a formal demand for a sum of €27,470,404.15.

55. On 6 June 2018, the Bank credited against the plaintiffs' account, the sum of €5 million received by it pursuant to the settlement with CBRE.

56. On 2 July 2018, the Bank issued the Judgment Proceedings against the plaintiffs, (2018 5922 P), seeking recovery of the balance of the debt of €22,090,302.64. On 6 April 2020, Twomey J. granted judgment in the amount of €22,947,202.85 against the plaintiffs.

57. On 1 February 2021, the Bank disposed of the lands for a sum of €3 million.

58. On 12 February 2021, these proceedings were issued by the plaintiffs against Ulster Bank Limited and others (and subsequently discontinued against all defendants except CBRE).

Court of Appeal

59. On 6 April 2022, the Court of Appeal delivered its judgment upholding the findings of Twomey J. regarding the breach of the Compromise Agreement and the validity of the appointment of the receiver.

60. The Court of Appeal held, inter alia, that recovery by the Bank from CBRE did not affect the legal liability of the McDonaghs under the loan agreements. It noted that the Bank had recovered by settlement the sum of €5 million plus costs and that the Bank had credited the McDonaghs with the benefit of that settlement. It observed that there was "no sense in which it was required to do so".

61. In the joint judgment of Murray J. and Collins J., they said the following: -

> *"Either way, it must be the case that recovery from CBRE did not affect the legal liability of the Defendants under the loan agreements. The (allegedly) negligent conduct of a valuation by CBRE did not release the Defendants from any part of their loan obligation. They were advanced a loan by the Bank and they were legally obliged to repay it. The fact that the Bank recovered monies from CBRE was a matter between the Bank and CBRE. In point of fact in this case the Bank did credit the defendants with the benefit of the settlement with CBRE. That was a matter for it. There is no sense in which it was required to do so. Not to do so, would have resulted*

in a windfall to the Bank had it obtained full recovery from the defendants, but that windfall was a detriment to CBRE not the defendants who remained liable for the debt. It would have resulted not of any failure in the allocation of responsibility as between the defendants and CBRE, but as a consequence of CBRE's failure to require reimbursement to the extent that monies were recovered from the Defendants. To put it another way, had the action against CBRE come to trial it would have been incumbent on the Bank to establish that it could not recover fully against the Defendants. Absent such proof, the Bank could not have established any loss. No such requirement was imposed on the Bank in seeking to recover the debt from the Defendants. It was a matter for the Defendants to sue CBRE if they believed they had any cause of action against it. All of this is a consequence of, and <u>demonstrates, the dissociation of the claim against CBRE for negligence and the claim in debt against the Defendants".</u> (emphasis added)

62. The Court of Appeal noted at para. 7 that on 26 September 2014 the Bank had demanded payment of the entire debt from the defendants (the McDonaghs) and had appointed the receivers on 1 October 2014.

63. In the context of arguments regarding the validity of the security relied on by the Bank, the Court observed in paragraph 202 as follows: -

> "Even if there had never been a charge, the Bank would have been entitled to seek the sale by the McDonaghs of their assets, in circumstances where they were so heavily indebted to the Bank and where they were not in a position to service that debt".

<u>Granja Limited</u>

64. The Compromise Agreement required that the plaintiffs dispose of the lands at Kilpeddar by 31 July 2014.

65. In the Judgment Proceedings, the McDonaghs asserted that on 13 June 2014 they had sold those lands by signing a document described as a "Heads of Agreement". The Heads of Agreement purported to be an agreement to sell the lands to a company referred to as Granja Limited for a price of €1,501,000.

66. Twomey J. held inter alia the following: -

(a) That the Heads of Agreement were not a binding contract for the sale of the lands.

(b) That the Heads of Agreement did not constitute compliance with the requirement in the Compromise Agreement to sell the lands by 31 July 2014.

(c) That as the McDonaghs had failed to comply with the terms of the Compromise Agreement, the Bank was entitled to demand repayment of the loan.

(d) That the appointment of the receivers on 1 June 2014 was valid.

(e) That Granja Limited was a "front" for Brian McDonagh and therefore not a contract for the true sale of the property at an open market value as required by the Compromise Agreement.

67. Counsel for the plaintiffs on this application fairly acknowledged that the "Granja" affair serves the plaintiffs no credit. He referred to the fact that the transaction has been found to be a sham. In stating this, he invited the court to refrain from finding that the McDonaghs has truly sold, or even sought to sell, the property for €1.5 million. Undoubtedly the transaction was found to be a sham but I consider it relevant that for several years and in various courts the plaintiffs sought to maintain the validity of that Heads of Agreement, and claim that they had sold the property in June 2014 for €1.5 million. This is inconsistent with the assertion now made that there is no evidence that by that time the value of the lands had fallen below €26 million (being the aggregate of the Bank debt and the plaintiffs' investment). I would not decide this application based only on this inconsistency but it is clearly relevant that the plaintiffs put their signatures to a purported sale of the property in

2014 at €1.5 million and went to great lengths to assert that this was a true open market sale complying with the Compromise Agreement.

68. Later in 2014, Granja issued proceedings seeking specific performance of the Heads of Agreement. That action went to trial in March 2018, but was ultimately discontinued. (2014 10190 P).

Ulster Bank Ireland Limited v. CBRE & Ors (the Ulster Bank proceedings) 2013 6511 P

69. On 26 June 2013 the Bank issued proceedings against CBRE and others.

70. This summons was not served until after the correspondence referred to in the next paragraph.

71. On 4 December 2013, McCann Fitzgerald solicitors for Ulster Bank wrote to CBRE, a Mr. Gary Solan and Badger Hollow Developments Limited. They referred to the amount of €21.5 million lent to the McDonagh brothers to fund the purchase of the site at Kilpeddar and security taken. They referred also to the Valuation provided by CBRE valuing the property at €56 million. They asserted that the Bank had relied on the CBRE valuation and a report of Mr. Solan in making the lending. They stated that the then current value of the Bank's security over the property did not meet its exposure.

72. McCann Fitzgerald then enclosed "a protective writ", being a copy of the Summons, and stated that having fully reviewed the matter, their client was satisfied that CBRE and/or Mr. Solan were responsible for its loss. They called on CBRE and Mr. Solan to admit liability for breach of the duty of care owed to the Bank and notified them than unless the Bank received an acknowledgment of liability and proposals to compensate the Bank, the enclosed proceedings would be served.

73. On 8 April 2014, the Bank delivered its statement of claim alleging negligence, breach of duty and breach of contract and seeking damages for the difference between the market value of the lands and the amount loaned to the plaintiffs.

74. On 28 October 2014, CBRE delivered its defence. It denied that a contract had come into existence between the Bank and CBRE, asserting that: -

> "The plaintiff (sic) was engaged by the borrowers (at the insistence of the plaintiff) to provide the valuation report dated 30 July 2007 and it was the borrowers who paid for the valuation report".

75. On 22 January 2016 the Ulster Bank proceedings were compromised by a settlement agreement between CBRE and Ulster Bank Limited. CBRE paid the Bank €5 million plus a sum of €350,000 in respect of legal costs, without any admission of liability. The settlement agreement was implemented in full, and the proceedings were discontinued.

76. The settlement agreement contained the standard form of confidentiality clause as follows: -

> "*2.6 The parties agree that this settlement is private to the parties and their respective financial and legal advisers and is to be kept confidential by the parties and their advisers who will not at any time divulge, publish or reveal to any person, firm or company the terms of the settlement (save that either party may disclose the terms of settlement to other entities within its corporate group) and who shall use their best endeavours to prevent the disclosure or publication of the settlement sum or this agreement or any part thereof by others and the parties shall keep with complete secrecy the terms of this settlement save as may be required by law or save as may be required for enforcement of this settlement*".

<u>Correspondence arising from Ulster Bank proceedings</u>

77. The Statement of Agreed Facts refers to a series of emails and other communications between the McDonaghs and CBRE and the Bank in which the McDonaghs enquire about the Ulster Bank proceedings and their settlement. The plaintiffs now rely on these exchanges in support of an allegation of fraudulent concealment by CBRE of their cause of action, for the

purpose of submissions pursuant to s. 71 (1) (b) of the Statute of Limitations 1957. For reasons stated later in this judgment, I do not consider that the exchanges of emails and related correspondence recited in the Statement of Agreed Facts carry the importance which the plaintiffs attach to them but I shall summarise them below.

78. On 1 June 2016, the first named plaintiff, Brian McDonagh emailed Mr. Enda Luddy of CBRE stating that he had learned "from a recent court search" that the Ulster Bank proceedings had been settled. Mr. McDonagh raised a series of questions with Mr. Luddy in relation to the settlement and its detail.

79. On 28 November 2017, the plaintiffs made an application to Ulster Bank plc "pursuant to s. 4 of the Data Protection Acts" requesting a copy of any information retained by Ulster Bank and in particular information in connection with court proceedings issued by Ulster Bank against CBRE in connection with a loan for the purchase of the Kilpeddar lands.

80. On 15 December 2017, the plaintiffs submitted a data subject access request pursuant to s. 4 of the Data Protection Acts to CBRE requesting "any information maintained by it in relation to the valuation provided by CBRE in the year 2007 and requesting information in connection with court proceedings in which CBRE were involved in connection with the lands."

81. On 28 February 2018, CBRE replied providing certain documentation and information in relation to the valuation provided by it in 2007. In respect of information concerning the court proceedings CBRE stated as follows: -

> *"CBRE has not enclosed all the information you requested. Pursuant to s. 5 (g) of the Data Protection Acts, this information is protected by legal professional privilege. The materials containing information are legitimately privileged in respect of other legal advice/litigation. For that reason, this constitutes a 'claim of privilege that could be maintained' and therefore such material may be withheld".*

82. On 8 March 2018, reference was made to the settlement of the Ulster Bank proceedings in the course of the trial of the Granja specific performance proceedings (Granja Limited v. Paul McCann, Patrick Dillon, Ulster Bank Ireland Limited, Brian McDonagh, Kenneth McDonagh and Maurice McDonagh, 2014 10190 P). During the hearing of those proceedings before Haughton J. the Bank's, counsel Mr. Fanning SC, asserted that the settlement terms between Ulster Bank and CBRE were confidential. The court noted that: -

> "If the outcome was that there was a recovery against these accounts (being the accounts of the McDonagh brothers at Ulster Bank Limited) well then to that extent it is not confidential, it is relevant".

83. On 28 May 2018, the payment of €5 million made by CBRE to the Bank pursuant to the settlement was credited against the plaintiffs' liabilities to the Bank. On 6 June 2018, the plaintiffs received a revised statement of account from Link ASI Limited on behalf of the Bank showing that a sum of €5,040,364.96 had been lodged to the plaintiffs' account, leaving a balance of €22,090,302.64.

84. On 7 June 2018, the Granja specific performance proceedings were again before Haughton J. and reference was made again to the fact of the settlement of the Ulster Bank proceedings. On this occasion, Haughton J. noted that on a previous occasion he had expressed disapproval of the fact that information concerning the amount of the settlement had been withheld.

85. On 8 June 2018, AMOSS Solicitors for Ulster Bank wrote to Mr. Brian McDonagh enclosing a copy of the statement of account dated 6 June 2018 and drawing to the plaintiffs' attention the fact that a credit adjustment had been made on 28 May 2018 in the amount of €5,040,384.98. Messrs AMOSS explained that the reduction incorporated the settlement sum received by Ulster Bank from CBRE on foot of "separate legal proceedings", thereby reducing the balance as of that date, 6 June 2018, to €22,090,302.64.

86. On 2 July 2018, the Bank issued its judgment proceedings against the McDonaghs, 2018 5922 P, for the amount of €22,090,302.64.

87. On 9 August 2018, Mr. McDonagh emailed Mr. Luddy at CBRE referring again to the fact that a settlement had been entered into between CBRE and Ulster Bank in 2016. He continued: -

> *"I have attached a copy of your invoice which CBRE were paid by myself, Kenneth and Maurice, as we were your clients in the matter.*
>
> *We believe the settlement from your insurance company should have included the McDonaghs in the negotiations as we were your clients.*
>
> *We also believe that the settlement should have been made to the McDonaghs, and consequential losses arising for the error rest with CBRE".*

88. On 20 August 2018, Brian McDonagh issued a further data request to CBRE pursuant to Article 15 of the General Data Protection Regulation (GDPR) Regulation EU/2016/679.

89. On 14 November 2018, CBRE responded to Mr. McDonagh. The Statement of Agreed Facts recites that in the reply of 14 November 2018, CBRE continued to deny any information in relation to the Ulster Bank proceedings, stating that it was "protected information".

90. As part of the discovery process in the Judgment Proceedings the McDonaghs had requested from Ulster Bank documentation relating to its loss "including but not limited to all documentation relating to proceedings taken by Ulster Bank against CBRE arising out of the latter's valuation of the lands at or about the time of the grant of the facility".

91. On 1 February 2019, AMOSS Solicitors for Ulster Bank wrote to Messrs Gallagher and Company, solicitors then acting for Kenneth McDonagh and Maurice McDonagh, noting that the discovery request in relation to this aspect of the case had been narrowed down to discovery of "the pleadings in the CBRE proceedings together with the settlement agreement

('the agreement')" entered into between CBRE and Ulster Bank. Messrs AMOSS continued as follows: -

> *"Our client is agreeable to providing discovery of this amended category. However, the agreement contains a confidentiality clause, and we are required to seek the consent of CBRE before agreeing to discover same. We have sought the consent of CBRE to discover the agreement and they have refused to agree to same. Accordingly, you will be required to bring a motion seeking discovery of the agreement. Please note that our client will not be objecting to such an application".*

92. The McDonaghs issued an application for an order for discovery documents of the pleadings in the Ulster Bank proceedings and the settlement agreement entered into between CBRE and the Bank.

93. On 17 May 2019, the McDonaghs received discovery documents from the Bank including a copy of the settlement agreement of 22 January 2016 between Ulster Bank and CBRE.

94. On 17 November 2019, Brian McDonagh emailed AMOSS, solicitors to Ulster Bank, and referred to the proceedings between Ulster Bank and CBRE and to the fact of a settlement of €5 million plus costs. He continued: -

> *"These were not credited to our account until 2018 according to the letter we received from AMOSS solicitors.*
>
> *Can you please confirm by return what settlement Ulster Bank received from the second named defendants in the 2013/6511 P case.*
>
> *Surely to remain consistent, the settlement received by your client should have been disclosed to us and like the CBRE settlement of €5million, should be lodged against our purported outstanding debt.*

The fact that your client accepted €5 million without the authority of the borrowers needs to be raised in the upcoming court case and whilst the borrowers would not have settled for this amount, we neither were consulted on the settlement received from the second named defendant".

95. On 6 December 2019, in the hearing of the judgment proceedings, counsel for the McDonaghs cross – examined Mr. Feidhlim O'Hanlon, of Ulster Bank Limited. He put to him certain questions in relation to the Ulster Bank v. CBRE proceedings and put to Mr. O'Hanlon that "As a matter of principle, these proceedings had a relevance to the indebtedness to the McDonaghs, is that correct?".

96. Mr. O'Hanlon replied "At the end, yes".

97. On 11 December 2019, Mr. J.P. Moore of Ulster Bank Limited was cross – examined by counsel for the McDonaghs and acknowledged under cross – examination that when asked whether there was a conflict between CBRE and the Bank he said "Yes, there might well have been, yes".

98. The Statement of Agreed Facts recites that the transcript of the hearing on 19th December 2019 records that the Bank in the course of a witness statement in the Judgment Proceedings had "considered whether the Bank was entitled to conceal the full and final settlement with CBRE." Although the extract from that transcript appended to the Statement of Agreed Facts refers to "concealment", it is not clear from the transcript who exactly made this statement, except that it was not said to be CBRE.

99. I shall return later to the relevance of all this correspondence when considering the plaintiffs' assertion of fraudulent concealment on the part of CBRE.

The plenary summons

100. The plaintiffs were not represented in these proceedings by solicitors or counsel until the hearing of this application. That is relevant when it comes to reading and understanding

the text of their pleadings. There is somewhat of a disconnect between the endorsement of claim on the summons, and the statement of claim and the amended statement of claim. This is only partly explicable by the discontinuance of the proceedings against all the defendants except CBRE.

101. The plenary summons identifies claims stated to be made against all of the defendants for "breach of duty and breach of statutory duty".

102. Particular claims are made against Ulster Bank Ireland DAC, Paul McCann and Patrick Dillon for "concealment of a breach of contract" in relation to the Ulster Bank proceedings against CBRE.

103. Claims are made regarding misrepresentations alleged to have been made to the plaintiffs by Ulster Bank on 13 March 2013 when the Compromise Agreement of that date was entered into, including an allegation of failure on the part of Ulster Bank to reveal at that time that it had not completed registration of a charge on the Kilpeddar lands.

104. Further allegations are made of misrepresentations by the Bank and the receivers regarding the manner in which the lands at Kilpeddar were sold, complaints regarding the removal of a sum of €325,000 from the bank account of the first named plaintiff, Brian McDonagh, and allegations of misrepresentations on the part of a Mr. Maher of Link ASI in the Judgment Proceedings.

105. The plaintiffs seek certain declarations that the Compromise Agreement was void *ab initio*, and that Mr. Paul McCann was not contractually entitled to act as a receiver to realise security.

106. As far as concerns the only surviving defendant, CBRE, the following paragraphs are relevant: -

> *"12. Failure refusal and/or neglect on the part of Paul McCann to reveal his ongoing contractual relationships with CBRE when accepting his deed of appointment from*

Ulster Bank Ireland DAC to realise the security of the said Ulster Bank Ireland DAC in circumstances where the said Paul McCann was entitled to rely on the terms of a report presented by CBRE. The terms of the CBRE report also granted Paul McCann a duty of care. Paul McCann was appointed as a joint receiver on the 1st of October 2014, when proceedings in relation to the CBRE report over the lands to which he was appointed were in being. Paul McCann through his non – disclosed contractual relationship with CBRE failed to reveal that he was conflicted in his duties as receiver and further failed in his agency with the plaintiffs to invoke the duty of care granted to a receiver over the subject property in the CBRE report to which he was entitled to rely. At all material times, Norman Ginneley of Ulster Bank DAC was aware of the terms of the letter of engagement between Ulster Bank Ireland DAC and CBRE, having signed the said letter of engagement on behalf of the said Ulster Bank Ireland DAC. Having full knowledge of the terms of engagement including the duty of care confirmed by CBRE to the bank and its receivers, Norman Ginneley failed, refused and/or neglected from the 1st day of October 2014 until the 22nd day of January 2016 to adjoin the Joint Receivers to the litigation as between Ulster Bank Ireland DAC and CBRE as agents of the borrowers who were by contract covered by the duty of care".

"14. The plaintiffs seek a declaration that Ulster Bank DAC in omitting Paul McCann and Patrick Dillon as co – plaintiffs in proceedings as against CBRE and others in proceedings bearing record number 2013 / 6511 P (the Ulster Bank proceedings) breached the terms of the Mortgage Deed, prevented the said Plaintiff from access to the right to be heard, and fair procedures through their agents the said Paul McCann and Patrick Dillon who were acknowledged to have duty of care protections afforded

to them in their capacity as the bank's receivers by the said CBRE in the engagement terms as agreed with Ulster Bank DAC".

"17. The plaintiffs seek a declaration that the contractual position of Paul McCann with CBRE and his failure to rely upon the terms of the said CBRE report including the valuation of €56 million upon which he was entitled to rely on the confirmations of CBRE, obstructed the right of the plaintiffs to redeem their mortgage through the proceeds of remedy to which the said Paul McCann was entitled to seek".

"19. The plaintiffs seek a declaration that they hold an entitlement to the invocations of s. 35 (1) (h) of the Civil Liability Act as against Ulster Bank Ireland DAC as a concurrent wrongdoer and that the said Ulster Bank Ireland DAC under its release or accord with CBRE dated the 22nd day of January 2016 is fully liable to the plaintiffs for the sum of €56 million in damages as the specified valuation of CBRE in the terms of its report to the said Ulster Bank Ireland DAC".

"20. The plaintiff seeks further damages as against all the within defendants for the misrepresentation, non – disclosure of material facts pertaining to s. 62 (2) of the Registration of Title Act, unlawful disposition of properties through misrepresentation causing economic loss, breach of express terms of the Mortgage Deed, and failure to invoke the contractual rights of the receivers to a duty of care under the terms of a report presented by CBRE, valuing the subject Folios at €56 million whereby the said damages above the valuation figure are to be decided by this Honourable Court".

107. These allegations appear to be a claim against Ulster Bank – no longer a party in the proceedings – for not joining the McDonaghs as plaintiffs in the Ulster Bank proceedings. This is based on a circuitous proposition that the receivers were agents of the McDonaghs who had an interest in recovering against CBRE, and that the Bank and/ or the receivers ought to have utilised that agency to extend the benefit of those proceedings to the

McDonaghs. This is an interesting and challenging proposition on which I am not required to adjudicate in this application. Its significance for this application is that it rests on an assertion that the McDonaghs had by 26 June 2013 (the date of commencement of the Ulster Bank proceedings) suffered actionable loss arising from the CBRE valuation.

First Statement of Claim

108. Although an amended Statement of Claim was delivered on 23 July 2022, after the discontinuance of the proceedings against all defendants against CBRE, it is relevant to refer to certain of the contents of the first statement of claim which was delivered on 14 March 2022. In para. 25 of that statement of claim, the plaintiffs referred to the Ulster Bank proceedings (2013 6511 P) for "inter alia damages for negligence/breach of duty/breach of contract, CBRE's valuation report dated 30th July 2007".

109. In para. 26 the plaintiffs allege the following: -

> *"The first named defendant (Ulster Bank Ireland DAC), which was the author of the instruction letter setting out the detailed terms of reference for the valuation report by the second named defendant (then meaning CBRE) was fully aware that the plaintiffs had also suffered detrimental financial loss as a result of the alleged negligent valuation provided by the second named defendant. The first named defendant concealed and/or failed to inform the plaintiffs herein about the contents and/or existence of the instruction letter and also failed to advise and/or join the plaintiffs herein to the High Court proceedings 2013 6511 P, Ulster Bank Ireland Limited v. CBRE & Ors., where the first named defendant was claiming that were it not for the negligence of the second named defendant and/or Gary Solan and/or Badger Hollow Limited the first named defendant would not have occurred (sic) the losses which they did".*

110. The plaintiffs allege in para. 37 as follows: -

"Had the plaintiffs been aware of the specific requirements and undertakings stipulated by the first named defendant and accepted by the second named defendant and contained within the letter of instruction for the valuation report, sent from the first defendant to the second defendant on or around 20 July 2007 the plaintiffs would have initiated legal proceedings against the second named defendant prior to the signing of the Compromise Agreement and would never have entered into the Compromise Agreement with the first named defendant on the 13th of March 2013".

(emphasis added)

111. Again, these paragraphs are a claim firstly that the McDonaghs suffered loss by entering into the Compromise Agreement on 13 March 2013, and secondly that they ought to have been joined as plaintiffs in the proceedings commenced by Ulster Bank against CBRE on 26 June 2013. This means that the plaintiffs consider that by that time, they had suffered a loss. It is inconsistent with the proposition that their loss only occurred many years later.

Amended statement of claim

112. In the amended statement of claim delivered on 23 July 2022 the plaintiffs repeat number of the events and claims referred to above. They then plead in para. 6 as follows: -

"The plaintiffs engaged with CBRE for the purpose of obtaining an initial valuation followed by a detailed valuation report for the property. This valuation report was an essential component to allow the plaintiffs to evaluate whether the property was a suitable investment opportunity and would provide suitable security for the proposed investment of their own funds and the additional investment funding required to complete the purchase of the property. These plaintiffs in return for the professional services of CBRE paid for the Valuation report in the amount of €10,000 plus VAT".

113. They refer to the engagement of CBRE and the valuation report showing a valuation of €56 million for the property.

114. In para. 14, they plead that they were entitled to rely on CBRE to exercise reasonable skill and care in the provision of its advice to the plaintiffs and the Bank and they continued: -

> *"Both the Bank and these Plaintiffs shared a common bond of a legitimate expectation to realise the full commercial fruits specified in the CBRE report, whereby the Bank would be repaid with all its entitlement to principal and interest and these Plaintiffs would realise the full valuation of the property as specified by CBRE as an expert in its field in the provision of said valuation".*

115. The plaintiffs then plead that in reliance on the valuation they invested circa €4.5 million of their own monies and borrowed €21.5 million from Ulster Bank.

116. The plaintiffs refer to the fact that in the Ulster Bank proceedings, CBRE had pleaded that it had no contract with the Bank and that its engagement was with the plaintiffs.

117. The plaintiffs say that at no time prior to May 2019 were they aware of the <u>contents</u> of the litigation as between Ulster Bank and CBRE.

118. The plaintiffs then refer to the correspondence in which they sought from the Bank and from CBRE by way of data access requests information relating to the Ulster Bank Proceedings and the settlement (described in paragraphs 77 – 99 above). The statement of claim recites that it was only in response to a motion for discovery in the judgment proceedings that the plaintiffs obtained a copy of the settlement between Ulster Bank and CBRE.

119. In para. 28, the plaintiffs refer to the judgment of Twomey J. They continue: -

> *"This judgment confirms the loss of the plaintiff's investment funding <u>from the date of the judgment.</u> The Bank on foot of the judgment has disposed of the Asset Property and various other properties of these plaintiffs as a result of the underlying failure of CBRE misrepresentations in its engagement with these Plaintiffs".* (Emphasis added)

120. In para. 29, they continue as follows: -

"From the date of the judgment and the subsequent dispositions it is claimed the legitimate expectations of the Plaintiffs to the fruits of the investment were denied. The expectations were grounded upon a reliance and trust in the professional knowledge represented by CBRE in its engagement with these Plaintiffs to which the entity acknowledged said engagement in a Defence to the proceedings of the bank in 2014. It is further claimed that until the first day of February 2021 these Plaintiffs were unable to particularise the full extent of the damage as a result of the misrepresentations made by CBRE under its acknowledged engagement with these said Plaintiffs". (Emphasis added)

121. It is significant that the plaintiffs plead that they "were unable to particularise the full extent of the damage" until 1 February 2021. It is not claimed or alleged that loss had not been suffered before that time.

122. The plaintiffs then provide "Particulars of CBRE breaches of its confirmed engagement with the plaintiffs and breach of its duty of care towards the said plaintiffs". They recite in paras (a) to (s) the representations and failures they allege on the part of CBRE including at (d) that CBRE "failed to properly advise the Plaintiffs as to the suitability of the Property as an investment, and/or misrepresented its value in order to meet the demand of the Bank's facility letter to the detriment of the Plaintiffs".

123. Of central importance is the description in the statement of claim of the "loss and damage suffered by the plaintiff" which is described as follows: -

"*By reason of the negligence and/or breach of duty and/or breach of contract and/or misrepresentation and/or negligent misstatement on the part of the fifth named Defendants the Plaintiff has suffered considerable loss and damage.*

- *Had the Plaintiffs been advised of the true value of the Property they would not have invested their money and would not have borrowed the sum of €21.5 million.*
- *The value of the property never constituted proper security for the sums invested and borrowed by the plaintiff.*

As a consequence, the plaintiff has suffered significant losses. The full extent of the loss and monetary damage suffered by the plaintiff has now been quantified after the disposal of the property the subject matter of these proceedings". (emphasis added)

124. Under the heading of "Particulars of Plaintiffs' Loss and Damage" they plead the following: -

"

1) *The Ulster Bank Ireland Limited obtained a Judgment against the Plaintiffs in the sum of €22,090,302.64.*
2) *Loss of chance – the Plaintiffs had a legitimate expectation to believe that the Value of the land, at the time of the Valuation, was €56 million.*
3) *€4.5 million invested by the Plaintiffs in developing the project thus far.*
4) *Damage to reputation.*
5) *Consequential losses as a result of the actions of CBRE. "*

125. The plaintiffs claim damages for negligence and breach of duty, for breach of contract, for negligent misstatement and/or misrepresentation, for conspiracy and damages under other headings.

Defence

126. On 27 September 2022, CBRE delivered its defence. This is a full defence in which CBRE denies any liability in contract, tort or otherwise. It denies that it was engaged by the plaintiffs. It pleads that it owed a duty of care only to the Bank.

127. The defendant denies negligence and all of the claims made in relation to the meaning and effect of the Ulster Bank proceedings and the settlement thereof, which it states was made without admission of liability. It also denies that it was under any obligation at any time to inform the plaintiffs of the Ulster Bank proceedings or the settlement thereof.

128. By way of preliminary plea, the defendants plead that the claim is statute barred pursuant to the provisions of the Statute of Limitations 1957, and pleads that the plaintiffs' cause of action, which it denies, accrued more than six years before the commencement of the proceedings.

The affidavits

129. On this application there are before the court only two affidavits. One sworn by Mr. Tom Casey of A&L Goodbody Solicitors on behalf of the defendants on 29 November 2022 and a replying affidavit, sworn on 30 January 2023 by Mr. Maurice McDonagh, the second named plaintiff.

130. For the reasons mentioned in para. 15 above, these affidavits are somewhat limited. Mr. Casey describes the history of the proceedings and refers to the circumstances in which CBRE provided a valuation.

131. Mr. Casey points out that it is CBRE's case that any contract claim accrued on the date of the alleged breach of the contract, namely the date of the valuation report, 30 July 2007. On this application the plaintiffs have accepted that any claim for breach of contract is statute barred.

132. In respect of tort, Mr. Casey says that the plaintiffs' claim that they suffered damage by the very fact of entering into a transaction "that was wholly unsuitable for them". He says that they state that "they would not have invested their money and would not have borrowed the sum of €21.5 million but for the valuation report". In those circumstances, CBRE submits

that the cause of action in tort accrued either on the date of the report, 30 July 2007, or entry into the transaction on 3 August 2007.

133. The defendants submit that in the alternative, the loss occurred at the time the plaintiffs entered into the Compromise Agreement in March 2013. They further submit that the inaccuracy of the valuation and any damage arising therefrom had crystallised by the time Ulster Bank demanded repayment of the plaintiff's loans on 23 September 2014 and when they appointed receivers on 1 October 2014.

134. Mr. McDonagh's affidavit addresses two points.

135. He describes what he refers to as the contrasting defences offered by CBRE in these proceedings and in the Ulster Bank proceedings. In the Ulster Bank proceedings CBRE had denied a contract with the bank and asserted that it had been engaged by the borrowers. This is to be contrasted with the plea now made by CBRE which denies that it was engaged by the plaintiffs.

136. Mr. McDonagh states that the plaintiffs only became aware of the Ulster Bank proceedings in or around 2015. He says that numerous attempts were made to acquire details of those proceedings or of the resulting settlement agreement and that these attempts were unsuccessful until they brought a motion for discovery against Ulster Bank in the judgment proceedings. The plaintiff submit that this amounts to fraudulent concealment, and stops time running until details of the settlement were revealed in May 2019.

Statute of Limitations 1957 as amended

137. The relevant provisions of the Act are sections 11 and 71.

> *"11–(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued –*
>
> *(a) actions founded on simple contract*

(2) (a) *subject to paragraph (c)* (which concerns defamation) *and to section 3(1) of the Statute of Limitations (Amendment) Act 1991* (which concerns actions for damages in respect of personal injuries), *an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued."*

138. The defendant submits that in an action for breach of contract the cause of action accrues on the contract being breached, regardless of whether damages occurred at that time. They submit therefore that any contractual claim is now statute barred in circumstances where the breach of contract alleged is the provision of a negligent valuation of the property in July 2007. This proposition is not disputed by the plaintiffs.

139. The parties agree that for a cause of action to accrue in negligence it is not sufficient that the harmful act or omission has occurred, but damage must also have occurred.

140. The defendants submit that in this case the act complained of is the giving of the valuation on 30 July 2007 and that on a proper construction of the plaintiffs' claim as pleaded the damage occurred when the plaintiffs purchased the property at Kilpeddar, borrowed €21.5m and invested a further €4.5m of their own money into the property. The defendants say that the plaintiffs' case is that they would not have entered into the transaction were it not for the negligent valuation on which they placed reliance at that time. On this submission they claim that the cause of action accrued at the latest on 3 August 2007 when the purchase of the property was completed and the plaintiffs incurred the debt of €21.5m.

141. The defendants submit in the alternative that the plaintiffs suffered damage when they entered into the Compromise Agreement in March 2013. The Compromise Agreement obliged the plaintiffs to dispose of their assets including the Kilpeddar property and to remit the proceeds to Ulster Bank. It is submitted that it had become clear at that point that the

valuation of €56m for the property provided in 2007 had transpired to be inaccurate and that they had suffered the loss claimed by completing the transaction and drawing down the loan.

142. The defendants further submit that the inaccuracy of the valuation and any damages arising therefrom had crystallised by the time Ulster Bank wrote to the plaintiffs on 23 September 2014 informing them that they were in breach of the Compromise Agreement and at the latest 1 October 2014 when Ulster Bank appointed receivers over the property.

143. The plaintiffs submit that the burden of proof on this application rests on the defendants, and they have not advanced any evidence to show that the plaintiffs had suffered loss in 2007. They refer to fluctuations in the property market after the time of the valuation. They submit that the mere possibility of loss or exposure to risk does not constitute damage sufficient to complete the tort of negligence without a "present adverse effect on value." They submit that in a case where the loss is prospective or contingent in character it does not constitute damage even if such loss is probable.

144. The plaintiffs submit that only when it can be established that the value of the lands fell below the amounts borrowed and invested by the plaintiffs could it be demonstrated that the plaintiffs had suffered a loss. They submit also that if it were established that the property had a realisable value lower than €56m, but still higher than the aggregate of the amount borrowed, and interest, and the amount invested the plaintiffs would have suffered no loss (apart from damages for breach of contract, and it is accepted that the breach of contract claim is statute barred.)

145. The essence of the plaintiffs' submission is that the defendants have not identified any date earlier than 13 February 2015 (being a period of six years prior to the commencement of these proceedings) on which there is evidence that the value of the property was lower than the amounts borrowed (and interest) and invested by plaintiffs, which would have given rise to actionable loss.

When did the cause of action accrue?

146. The court was referred to the extensive case law concerning the question of when a cause of action has accrued, with particular reference to economic loss cases. I have been referred to the judgments in McDonald v. McBain [1991] 1 ILRM 764, Croke v. Waterford Crystal Limited & Ors. [2008] IEHC 474, Gallagher v. ACC Bank [2013] ILRM 145, Komady v. Ulster Bank [2014] IEHC 325, Brandley v. Deane [2018] 2 IR 741, Cantwell v. Allied Irish Banks [2020] IESC 71 and Smith v. Cunningham [2021] IECA 268.

147. References were made to a number of cases from other jurisdictions with particular emphasis on the part of the plaintiffs to the judgment of the Court of Appeal (EW) in Ubaf Limited v. European American Banking Corporation [1984] 2 AII ER.

148. The principles referred to in those cases and which are most relevant to the facts of this case may be summarised as follows: -

(1) The six – year limitation period in a negligence action (apart for a claim for personal injuries) runs from the date on which the cause of action has accrued. (S. 11(2)(a) of the Act of 1957.)

(2) The Act contains no definition of the "accrual" of a cause of action, but the time limit runs only from the date on which a tort has become actionable by reason of the occurrence of loss or damage. See Cantwell v. AIB, (per O'Donnell J.) and Brandley v. Deane (per McKechnie J.). There is no 'discoverability' test.

(3) Certain torts are actionable per se. Negligence is not such a tort and it has only become complete and actionable where and when damage has occurred. Without such damage, no cause of action has accrued.

(4) Evidence is required before a determination can be made that loss has occurred. (see Ubaf v. European American Bank Corporation, as cited with approval by O'Donnell J. in Cantwell).

(5) In identifying the date on which a cause of action has accrued, it is necessary to establish that every fact which it would be necessary for the plaintiff to prove at trial in order to support his right to a judgment of the court, must have come into existence (See Collins J. in Smith v. Cunningham and Finlay C.J. in Hegarty v. O'Loughlin).

(6) In many cases the harmful act or event and the occurrence of loss or damage will arise simultaneously. This may be obvious in cases of physical damage to property, or may become obvious in certain other circumstances, such as where a flawed title has been acquired due to the negligence of a solicitor. In economic loss cases it will frequently not be the case that the damage has occurred simultaneously with the harmful act.

(7) A mere possibility or a contingency of loss is not sufficient to ground an action (per Fennelly J. in Gallagher v. ACC Bank, McKechnie J. in Brandley v. Deane, and Collins J. in Smith v. Cunningham).

(8) Where a transaction involves both benefits and burdens loss or damage arises if and when the "balance" is adverse to the plaintiff. In a negligent valuation case, such as this, that balance becomes adverse when the value of the property falls below the aggregate of the debt incurred, together with interest, and the plaintiffs' own investment and the debt or investment is lost.

(9) The fact that the quantum of loss or damage is unascertained on a given date does not mean that loss has not occurred on or before that date. There are many cases where a court at trial is required to determine quantum which includes damages for future losses. Certainty of the quantum of the loss does not preclude accrual of the cause of action. In Smith v. Cunningham, Collins J. emphasised that there will be cases in which damage sufficient to ground a cause of action will have occurred well before the point at which the quantum of loss has become known or capable of definitive quantification.

Value evidence

149. The defendants have been unable to refer the court to any evidence that immediately on completion of the transaction in 2007 the property was not worth €56m. It is said that there were extensive fluctuations in the property market generally before and after August 2007, and that the planning history of the Kilpeddar property was such that it was particularly vulnerable to value fluctuations.

150. Before I leave the question of the value of the site, there are at least two indicators that on dates after 2007 and before 13 February 2015 the value of the property had fallen below the aggregate of the plaintiffs' borrowings from Ulster Bank and their investment:

(1) The Compromise Agreement is based on the proposition that the Bank would waive the balance of the debt in return for a cash payment of €250,000 and the remittance of the proceeds of sale of the McDonaghs' assets, including the Kilpeddar site. The assets were noted by Twomey J. and by the Court of Appeal to have a total realisable value of €5m. Therefore the Agreement, if honoured, effected a significant write down of the debt to reflect the realisable value of the charged assets.

(2) On 13 June 2014 the McDonaghs put their signatures to a Heads of Agreement to sell the property for €1.5m. In submissions, their counsel sought to dismiss the relevance of this transaction because it was later found to be a sham, yet the McDonaghs have persistently asserted that it was a true sale complying with the requirement to market and sell the property on the open market.

151. The submission that there is no evidence of loss by reference to value in 2007, whilst correct in itself, ignores the evidence that before 13 February 2015, the property did not have the value ascribed in the 2007 valuation or value equating to the total debt and investment.

The pleaded loss

152. In the absence of definitive evidence as to the true value of the property on 30 July 2007, the defendants focus their submissions on a construction of the pleadings that the plaintiffs allege that they suffered an immediate loss on completion of the transaction in August 2007 by acquiring the property, entering into the loan facilities and drawing down the loan from Ulster Bank Ireland and investing the borrowed monies and their own monies of €4.5 million into the project. In support of this argument, they refer to the following content of the statement of claim.

153. In para. 6, the plaintiffs plead that they engaged CBRE for the purpose of obtaining an initial valuation followed by a detailed valuation and they say: -

> "This valuation report was an essential component to allow the plaintiffs to evaluate whether the property was a suitable investment opportunity and would provide suitable security for the proposed investment of their own funds and the additional investment funding required to complete the purchase of the property".

154. In the particulars in para. 30 at (d) they plead that the defendants "failed to properly advise the plaintiffs as to the suitability of the property as an investment and/or misrepresented its value in order to meet the demands of the bank's facility letter to the detriment of the plaintiffs", and at (c) they allege that the defendants "failed to properly discount the value of the property to take account of key deficiencies in infrastructure and services".

155. Most importantly, the defendants rely on the plaintiffs' allegation that had they been advised of the true value of the property, they would not have invested their money and would not have borrowed the sum of €21.5 million. The statement of claim says : -

> "The value of the property <u>never</u> constituted proper security for the sums invested and borrowed by the plaintiffs".

It continues: -

"As a consequence, the plaintiff has suffered significant losses. The full extent of the loss and monetary damage suffered by the plaintiff has now been quantified after the disposal of the property the subject matter of these proceedings".

156. The assertion that the value of the property "never" constituted proper security for the amounts invested and borrowed, is a claim that the plaintiffs had incurred their loss on the date of acquisition of a property which, on their case, even then constituted insufficient security both for the bank loans and for their own investment.

157. The defendants submit that the words the "full extent of the loss and monetary damage suffered by the plaintiff has now been quantified after the disposal of the property" means only what it says and not that the loss, being an actionable loss, and whenever quantified, did not occur at the time when they entered into the transaction.

158. I agree with the defendants that the plain meaning of paragraph 30 is an allegation that the plaintiffs suffered their loss on the day they entered into the transactions in August 2007.

159. Earlier in this judgment I have quoted extensively from the summons and the first and second statement of claim. In particular I have described the plaintiffs' allegation that the failure of Ulster Bank DAC to include the receivers, in their capacity as agents of the plaintiffs, in the proceedings commenced on 26 June 2013 against CBRE amounted to a breach of the terms of the mortgage deed.

160. These complaints are expanded upon in the first statement of claim delivered on 14 March 2022 where it is stated in para. 26 that at the time when Ulster Bank issued its proceedings against CBRE and others, the Bank "was fully aware that the plaintiffs herein had also suffered detrimental financial loss as a result of the alleged negligent valuation provided by the second named defendant". The plaintiffs complain that Ulster Bank failed to join them in the 2013 proceedings against CBRE, being proceedings to recover that loss.

161. It is clear from the summons and both versions of the statement of claim, that the plaintiffs hold the position that when the proceedings were issued by Ulster Bank on 26 June 2013, the plaintiffs had by that time, at the latest, incurred a loss for which they were entitled to be compensated. This must rest on the proposition that every fact necessary to establish the cause of action had by that date come into existence, the requirement stated by Collins J. in Smith v Cunningham and Finlay C.J. in Hegarty v. O'Loughlin (op cit)

Events of 2013 and 2014

162. In the Judgment Proceedings the plaintiffs sought to contend that they had complied with the terms of the Compromise Agreement. They asserted that by executing a Heads of Agreement with Granja on 13 June 2014, they had achieved that compliance.

163. The plaintiffs protested that the Bank were in breach of the Compromise Agreement when the bank served its demand for repayment of the loans on 23 September 2014 and appointed receivers on 1 October 2014.

164. Those contentions were all rejected by the High Court (Twomey J.) [2020] IEHC 185 and Court of Appeal [2022] IECA 87.

165. In the Compromise Agreement, the plaintiffs committed to certain deadlines including a critical deadline of 31 July 2014, by which they would sell the property at Kilpeddar, and the proceeds were to be applied in reduction of their debt to the Bank.

166. By this agreement the plaintiffs committed to the disposal of the property without pursuing the data centre development which on their case was an essential part of the overall plan for exploration of the site, which in turn would have presented the opportunity to achieve repayment of the Bank and profit by their investment.

167. In para. 24 of the statement of claim, they say that they were induced "under threat of bankruptcy to enter into a Compromise Agreement on the 13th March 2013".

168. It is clear from these assertions that the plaintiffs recognise that the Compromise Agreement was a watershed event on the occurrence of which they lost any residual control of the property and the opportunity it presented. Instead, on their account, they became compelled to agree to the disposal of the property without developing its potential.

169. It is arguable that between the date of the Compromise Agreement and the appointment of the receiver, the plaintiffs still had the opportunity to repay the debt and potentially secure releases of their obligations under that agreement and releases of the Bank's security. But the debt was not repaid or further restructured during that period.

170. Any expectation of "redemption", such as the plaintiffs may have maintained into 2014, was finally defeated when the Bank demanded payment on 23 September 2014 and the receiver was appointed on 1 October 2014.

171. In their many complaints about the Compromise Agreement and the validity of the receivers' appointment it is clear that the plaintiffs regarded the event of the appointment of receivers on 1 October 2014 as an adverse event causing loss.

172. The plaintiffs submit that none of the events of 2013 or 2014 prove that the value of the property had fallen below the aggregate of the amounts which they borrowed and invested and recorded there is no proof that a loss had occurred on those dates. In fact there is evidence that by then the value of the property was lower. (See paragraph 150 above.)

173. It is submitted that the mere fact of the appointment of a receiver does not of itself prove anything in relation to the value of an asset over which the receiver is appointed. That is generally correct, but in this case the receiver's appointment, triggered by the plaintiffs' defaults, deprived the plaintiffs of any measure of control which they would otherwise have retained over the asset and therefore any prospect of developing the property in accordance with their original plans. The fact that the plaintiffs persisted in the course of the Judgment Proceedings in challenging the actions of the Bank, albeit unsuccessfully, illustrates that they

regarded the appointment of the receiver as a wrongful act which occurred in 2014 and which caused them losses.

174. The fact that the precise amount of the shortfall as regards the loan only became clear after the Bank had obtained its judgment and after the property had been sold at a price of €3 million does not alter the fact that the plaintiffs had suffered the loss of their investment on the occurrence of the events of 2013 and 2014.

Fraudulent concealment: s. 71 (1) (b) of the Statute of Limitations Act 1957

175. Section 71– (1):

> *"Where, in the case of an action for which a period of limitation is fixed by this Act, either –*
>
> *(a) the action is based on the fraud of the defendant or his agent or of any person through whom he claims or his agent, or*
>
> *(b) the right of action is concealed by the fraud of any such person,*
>
> *the period of limitation shall not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it."*

176. "Fraudulent concealment" within the meaning of s. 71 (1) (b) does not require actual fraud or deceit. I have been referred to the summary of the test in the judgment of Peart J. in Komady v. Ulster Bank where he stated the following: -

> *" . . . where the facts necessary to found a cause of action have been concealed from a plaintiff by the defendant so that it would be unfair for that plaintiff to be held to have had knowledge of them, or to be expected to have made inquiry in that regard, and where it would be unconscionable for the defendant to be permitted to rely upon the plaintiff's delay in discovering those necessary facts, time will not be considered to have commenced for the purpose of the Statute until the facts became known. It is clear also that no moral turpitude is required on the part of the defendant. But, as*

Lord Denning stated in Kitchen v. Royal Air Force Association [1958] 1 WLR 563 it is "clear that the phrase covers conduct which, having regard to some special relationship between the parties concerned, is an unconscionable thing for the one to do towards the other"".

177. Whilst the onus of proof in this application rests on the defendants in relation to the establishment of the date on which a cause of action accrued, for the purpose of s. 71, the onus of proving fraudulent concealment rests on the plaintiffs.

178. All of the submissions of the plaintiffs regarding fraudulent concealment relate to failure of the defendants to disclose the existence of the Ulster Bank proceedings against them commenced in 2013 or of the settlement in 2016. They say that they first became aware of the existence of the proceedings only in 2015. They do not say how they become aware, although in his email of 1 June 2016 Mr. Brian McDonagh referred to having made "a recent court search". It is said that it was only after they made a series of data access requests and only after the intervention of Haughton J. in the context of discovery applications in the Judgment Proceedings, that they obtained on 17 May 2019 sight of the settlement agreement between the Bank and CBRE.

179. The Settlement Agreement is quoted extensively at paragraphs 75 and 76 above. It is a settlement only of the Bank's claim against CBRE and contains no information as to the plaintiffs right of action against CBRE. The confidentiality clause is standard, and is precisely the form of such clause one would expect to see in such an agreement.

180. It is pleaded in para. 21 of the amended statement of claim that on 22 January 2016 the bank settled its case against CBRE "to the detriment of the plaintiffs herein". No details of this "detriment" are provided. When particulars were sought of the detriment the plaintiffs simply referred the defendants to the settlement agreement itself.

181. In terms of any connection between the substance of the Ulster Bank proceedings and these proceedings, the most which the plaintiffs say, in the first statement of claim at para. 40 is that the uncovering of the "secret settlement agreement" revealed that the Bank had "misappropriated proceeds of the settlement, €5 million, which should have been applied to reduce the plaintiffs' account with the first named defendant". Clearly that invokes no fact touching on the cause of action against CBRE.

182. Insofar as the Bank did not credit the plaintiff's account with the amount of the settlement, which the Court of Appeal held that the Bank was not obliged to do, until June 2018 (being more than two years after the date on which the settlement monies were paid to the Bank) this goes only to questions of liability as between the plaintiffs and the Bank, now finally determined by the Court of Appeal.

183. The plaintiffs submit that in the context of the Ulster Bank proceedings documents must have come into existence relevant to the liability or potential liability of CBRE, such as particular of the allegations of negligence (or even of breach of contract) and expert reports. That case concerned a claim of liability to the Bank and not to the plaintiffs. The proposition that material may have existed which would reveal "a right of action" in the plaintiffs is entirely speculative.

184. Whilst Haughton J. considered that the amount of the settlement was relevant to the state of the McDonaghs' account at the Bank, that was a matter between the McDonaghs and the Bank. The unrelated proposition that CBRE were under any manner of obligation to disclose to these plaintiffs, the fact of the Ulster Bank proceedings, details of those proceedings or documents obtained or generated in the course of those proceedings, is an entirely different matter and a step too far. There is no evidence of concealment of "the right of action", or of any facts relevant to such a right, even in the "no moral turpitude" sense referenced by Peart J. in Komady v Ulster Bank (op cit).

185. Finally, I have already concluded that the cause of action accrued when the plaintiffs, by their own default, lost their opportunity to avail of the property the subject of the valuation to repay the Bank debt and to profit from their investment, on the occurrence of events in 2013 and 2014 and at the latest on 1 October 2014 all of which were known to the plaintiffs. The existence, progress or settlement of the Bank's claim against CBRE are not facts which reveal the cause of action, and the plaintiffs have not pointed to any such facts concealed by CBRE.

Conclusion

186. The cause of action accrued at the latest on 1 October 2014 when the Bank appointed receivers to the property at Kilpeddar. On the occurrence of that event, the plaintiffs suffered the loss of their investment in the property and lost the opportunity to avail of the write down of the balance of their loan which had been afforded to them by the Compromise Agreement of 13 March 2013.

187. The fact that the plaintiffs have persisted in their assertions that the Bank breached the Compromise Agreement and was not entitled to appoint the receivers is of no assistance to them in this regard for two reasons. Firstly, the High Court (Twomey J.) and the Court of Appeal have rejected those assertions. Secondly, events of 2013 and 2014 were watershed events in which the plaintiffs lost their opportunity to develop the property.

188. The plaintiffs complain that they were not joined in the Ulster Bank proceedings against CBRE commenced in 2013. Therefore, they themselves hold the position that by the time those proceedings were commenced in 2013, they had incurred actionable loss derived from the negligence of CBRE.

189. These proceedings were commenced more than six years after the cause of action had accrued. There has been no concealment of the right of action, such as would defer the commencement of the limitation period pursuant to s. 71 of the Act.

190. I shall make a declaration that the plaintiffs' claim against CBRE is barred pursuant to the provisions of s. 11 of the Statute of Limitations 1957 and I shall make an order dismissing these proceedings.