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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **12/12/2025**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING S BENCH DIVISION
(COMMERCIAL LIST)

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[1] ~~SHERIDAN MILLENNIUM LIMITED~~
[2] ~~SHERIDAN ENTERTAINMENTS LIMITED~~
[3] ~~MARCUS WARD LIMITED~~
[4] ~~STRIKE FOUR (BELFAST) LIMITED~~
[5] PETER GERARD CURISTAN
[6] ~~MARIAN ANNE CURISTAN~~

Plaintiffs

-and-

IRISH BANK RESOLUTION CORPORATION LIMITED (in special Liquidation), formerly ANGLO IRISH BANK CORPORATION LIMITED

Defendant

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The fifth-named plaintiff represented himself
David Dunlop KC with Kevin Morgan (instructed by McGarrigle Legal, Solicitors) for the Defendant

Hearing dates 22-26, 29 and 30 September 2025, 1, 3, 6-8, 10, 13-15 October 2025

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SIMPSON J

PART 1 – INTRODUCTION

Background

[1] The backdrop to this case is the iconic Odyssey building on Queen s Quay, in what is now Belfast s Titanic Quarter. It is now known as the SSE Arena. Specifically, the case is about the fracturing of the relationship between developer and funding financial institution.

[2] Plaintiffs [1] to [4] in the title of this action are companies in the Sheridan Group of companies, all the shares in the Group being held by Mr Curistan (the fifth plaintiff) and his wife (the sixth plaintiff). The Group s core business was to create mixed-use developments, focusing on leisure and entertainment and it carried out such developments in Belfast, Dublin and Bournemouth.

[3] The first plaintiff, Sheridan Millennium Ltd. (SML"), went into administration on 14 April 2011. Through its administrator SML, by an assignment in writing dated 8 January 2015, assigned to Mr Curistan its right to continue this action. SML was dissolved on 18 August 2016. The second plaintiff, Sheridan Entertainments Ltd, was placed into compulsory liquidation on 16 September 2010 on foot of a winding up petition dated 1 July 2010. The third plaintiff, Marcus Ward Ltd., was placed into compulsory liquidation on 26 January 2012 on foot of a winding up petition dated 12 December 2011. The company was dissolved on 3 June 2017. The fourth plaintiff, Strike Four (Belfast) Ltd., was placed into compulsory liquidation on 16 September 2010 on foot of a winding up petition dated 1 July 2010 and was dissolved on 17 February 2017.

[4] The second, third, fourth and sixth plaintiffs have all discontinued their actions against the defendant.

[5] Mr Curistan was adjudicated bankrupt on 21 December 2012. As a result, inter alia, all his rights in relation to this action became vested in his Trustee in Bankruptcy. Again, by an assignment in writing dated 8 January 2015, those rights were assigned to Mr Curistan. As Mr Curistan is the only plaintiff left standing, I will refer to him throughout the rest of this judgment as the plaintiff.

[6] The defendant, now the Irish Bank Resolution Corporation Ltd. (in special Liquidation), was originally named Anglo Irish Bank Corporation Ltd. Hereafter I will refer to it either as the defendant" or the Bank." Following the financial and property market crash in 2008, the Irish Government, in December 2008, had to underwrite the losses being incurred by the Bank and it was essentially nationalised on 21 January 2009. The plaintiff is highly critical of the Bank, both in this action and generally. Inter alia, he accuses it of reckless lending and dishonest practice, and he notes that, after the effective collapse of the Bank, a number of its senior employees, including the CEO, were convicted of a range of offences involving dishonesty, and some were jailed.

[7] In 1998 the plaintiff, and associated companies, in conjunction with the Ulster Museum, Belfast, developed a bid to the Millennium Commission for lottery funds to create a landmark millennium project for Belfast on a 23-acre site at Queen s Quay, leased from Belfast Harbour Commissioners. The pleadings describe the subsequent development as a 650,000 square foot complex comprising a 10,000-seater indoor arena, a science centre (W5), an IMAX theatre, and an indoor pavilion with a 12 screen cinema, a mix of restaurants, ten pin bowling, night clubs and bars."

[8] Unlike in the plaintiff s previous developments, which were privately funded, significant public funding, including lottery funding was provided, but further finance for the project was raised from the defendant Bank. On 13 January 1999 a facilities agreement was entered into between Sheridan Millennium Ltd (SML") and the defendant for initial lending facilities. Further facilities were provided over the following years.

[9] The pleadings disclose a significant number of issues, both factual and legal. As it seems to me these issues are:

(i) Whether any of the actions of the Bank gave rise to an assumption on the part of the Bank of a fiduciary duty owed to SML or the plaintiff.

(ii) Whether any of the actions of the Bank caused it to become a shadow director of SML.

(iii) Whether or not two letters written by the Bank, dated 13 January 2009 and 14 September 2009, and headed Without prejudice - subject to contract" formed binding contracts between SML and the Bank, entitling the plaintiff to sue for breach of contract.

(iv) Whether the Bank was guilty of misrepresentation on occasions throughout its dealings with the plaintiff.

(v) Whether the Bank was guilty of fraud.

(vi) Whether certain actions of the Bank amounted to negligence on the part of the Bank.

(vii) Whether the Bank overcharged interest on loan accounts.

(viii) Whether the Bank mis-sold to SML an Interest Rate Hedging Product, known as a Swap.

[10] In a Reply to Notice for Particulars dated August 2017 the plaintiff sets out the losses allegedly sustained by SML, and claimed from the defendant by the plaintiff as assignee. These are:

(1) Loss of opportunity to sell to Propinvest (at £74 million) by reason of the defendant s preference for PBN s offer of £70 million;

(2) Interest overcharging 1999-2004: £975,497;

(3) Interest overcharging post 2004 (to be computed);

(4) Interest rate swap interest overcharge to SML due to mis-selling: £3,928,848 (noted by Mr Davidson to be £3,531,968);

(5) Underselling of Bournemouth lease — loss of £1,020,000 (noted by Mr Davidson as £500,000);

(6) Failure to pay SML s creditors (as per the agreement of 13 January 2009) — the defendant paid only £1.5 million out of the agreed figure of £3 million: £1.5 million;

(7) Further overcharging of interest on a figure of £6,640,459 rather than on the agreed debt write-down figure of £1.5 million, estimated at: £1,975,113;

(8) Interest charged to SML by delaying completion of disposal of assets for 11 weeks, estimated at £803,846 million;

(9) Legal and financial costs incurred prior to 2009, estimated at £1.5 million.

[11] I also note in passing paragraph 2.18 of a report from one of the plaintiff s experts, Mr Davidson, in which he says (having outlined these various amounts claimed as damages in the early part of his report):

> My main observation is the 75% of the claim appears to relate to the failed sale of the Odyssey Pavilion of £74 million …This obviously ignores the associated borrowings which would have been due for repayment to Anglo in the counterfactual scenario which were considerable and, for example, after December 2008 would have wiped out any net profits based on a £74m sale price."

[12] Further losses relating to the plaintiff are outlined amounting to some £1.4 million.

[13] There is then a claim for loss of future earnings calculated at £150,000 per annum for 15 years, damages for loss of commercial reputation and damages for loss of opportunity to share the upside with the Bank, discussed further below and the plaintiff also alleges that he has been deprived of option rights to significant development sites, which were subsequently sold at an undervalue.

Progress of the case

[14] I heard this case over sixteen days in September and October 2025. Although for a number of years since the action began in 2010 the plaintiff was (and the other plaintiffs were) represented by firms of solicitors and various counsel, by the time the case came on for hearing before me the plaintiff was a litigant in person. A couple of days were lost in the third scheduled week of the hearing due to indisposition on the

part of the plaintiff, but the plaintiff gave his evidence and then undertook the onerous task of presenting the case, calling witnesses and cross examining the Bank s witnesses without any professional assistance.

[15] In an effort to avoid Voltaire s warning that the best is the enemy of the good" I sought, in reviews of the case over the summer of 2025, to accommodate the plaintiff by allowing him to serve his witness statement in draft, so that the defendant could start working on its own witness statements in rebuttal, rather than insist on its being properly completed, and risking delay in the commencement of the case, which had long been listed to start on 22 September.

[16] The Trial Bundle consisted of 14 lever arch files, the Core Bundle 5 lever arch files. There were two witness statements files, a file known as the Swaps Bundle, and a Supplementary Bundle comprising of two further lever arch files. In addition, further documents were handed in during the trial in various additional bundles. The evidence was transcribed by stenographers and both an electronic version and a hard version of each day s transcript was made available.

[17] Following the ending of the evidence the defendant was to lodge written closing submissions by Monday 20 October. This was done in a document comprising some 130 pages, with accompanying authorities. In view of the length of the defendant s submissions, I allowed an extra week to the plaintiff to provide his closing submissions, meaning that they were due on 10 November, but a further extension was requested and granted. The plaintiff s written submissions, 178 pages, were received on 17 November.

[18] I confirm that I have read all the documents which were referred to by any witness at the trial either annexed to a witness statement or referred to in oral evidence, all additional documents referred by either party, whether by counsel for the defendant or by the plaintiff, during the case, the pleadings, the witness statements, the experts' reports and, where necessary, the transcripts. I have also read the closing submissions. Clearly, after such a lengthy trial it is not possible in a judgment to refer to all the documents or every point made, but my failure to mention any particular document or point cannot be taken as an illustration that I have ignored it in reaching my decision.

[19] The main evidence in the case stretched over the years 2004 to 2010 and in considerable detail. Bearing that in mind, this judgment, inordinately long as it is, nevertheless is just about as short as it could be to do justice to the parties.

[20] At this stage of the judgment I want to express my sincere thanks — as, very graciously, did the plaintiff at the end of the trial — to the defendant s counsel, senior and junior, and solicitors for the assistance in navigating the bundles. Particular thanks are due to Ms Lauren Young, of the defendant s solicitors' team, who had a magisterial comprehension of the bundles, for whom nothing was too much trouble and who also produced for me anything I asked for during the trial, with

commendable expedition. In addition, I want to acknowledge the help which was provided by the defendant s solicitors and counsel to the plaintiff, over and above the call of duty, in preparing the bundles and prompting the plaintiff from time to time when he had difficulty identifying a document which he wanted to use, either in his own evidence or in his cross examination of witnesses. In my view those actions were in the best traditions of both branches of the profession.

[21] I also wish to thank the stenographers who provided a daily transcript of the trial, which has made the task of searching for and finding relevant portions of the testimony a simple one.

[22] I cannot leave this part of the judgment without paying tribute to the plaintiff for the manner in which he conducted himself throughout such a prolonged trial. To undertake a hearing of this length on his own, without the help and support of a team, was a Herculean task, and he stood up to it valiantly, notwithstanding his suffering some indisposition during the hearing. I also commend the way in which, with good humour and good grace, he dealt with my reminders throughout his cross examination of witnesses that he should ask questions and not make statements. He should take immense pride and satisfaction in the way he conducted the case.

PART 2 — THE WITNESSES

[23] All the factual witnesses in the case provided detailed witness statements. Most helpfully, the parties were in agreement that those witness statements should be adopted by the witness when called to give evidence and could stand as the witness s evidence in chief.

[24] Having opened his case for just over a day, the plaintiff then gave oral evidence. His evidence lasted from just before lunchtime on day 2 of the trial, to just before the end of day 6, and he was subjected to searching cross examination.

[25] The plaintiff is a qualified chartered accountant with significant experience working with Price Waterhouse (as it then was) both in this jurisdiction and in Hong Kong. He left that firm in 1986 and began to concentrate on property development, particularly in the realm of leisure developments.

[26] He is the founding director and joint owner (with his wife) of the Sheridan Group of companies (the Group"), which was established around the mid-1980s. His many achievements include the development of the multiplex cinema complex on the Dublin Road in Belfast, the Parnell Centre in Dublin, a mixed-use leisure entertainment centre in Bournemouth, the Posthouse Forte Hotel in Ormeau Avenue, the Conway Hotel in Dunmurry and the Tannery development at King Street/Castle Street, Belfast (which was owned by one of his companies, Quito Developments Ltd.). The Group was widely lauded for its developments, including the Odyssey, which at one time was described as the UK s Leading Leisure Regeneration Scheme".

[27] The plaintiff was personally recognised for his achievements. In 2002, he was invited to become a Visiting Professor at the University of Ulster s Centre for Entrepreneurship; in 2003 Queen s University Belfast awarded him an Honorary Doctorate in Economics; in 2004 he won the Institute of Directors' award for the Entrepreneur of the Year in recognition of his sustained commitment to excellence and outstanding contribution to life in Northern Ireland."

[28] At the completion of his own evidence, the plaintiff called Mr Peter Holmes, who was a director of SML from 2000 and Chief Executive from about 2004. In cross-examination Mr Holmes stated that he had no professional qualifications, no experience of running a business of the nature of SML with tenants who were operating leisure facilities, bars, restaurants and the like, or of operating premises with intoxicating liquor licenses nor of taking responsibility for the running of such a business and identifying and sourcing a mixed variety of tenants for an entertainment complex. This aspect of the cross examination terminated with:

> Q. So, is it fair to say, Mr Holmes, that you hadn't experience of operating the head company, that is the managing company in the context of Sheridan, but equally you had no experience of actually operating the individual units either? This was all fairly new to you?
>
> A. Yes, it was."

[29] In his closing submissions the plaintiff took exception to this. He says that:

> Mr Holmes had been hired by me based on his previous career as a former senior civil servant who had significant experience within the public sector. … The Odyssey differed from my previous developments because of the significant public sector input, and I needed Mr Holmes s support in this area. The financial affairs of SML were dealt with by me and my finance team, not by Mr Holmes."

[30] The plaintiff s third factual witness was Mr Michael Bell, Fellow of the Institute of Chartered Accountants and a former equity partner in PWC. He first had dealings with the plaintiff in the 1990s when the plaintiff was a client of PWC and he had assisted the plaintiff during the period when the plaintiff was developing his vision for the Odyssey Project in Belfast." Following the retirement of another PWC partner, Mr Bell assumed responsibility as the Sheridan Client Engagement Partner in which role he worked closely with the Group. He resigned from PWC in 2007, left the partnership in 2008, and set up a private real estate development company. He is now the Chairman of that company, and is also Chairman of a renewable energy development company in eastern Europe.

[31] The plaintiff submitted reports from two experts. Mr Raymond Davidson FCA MAE is a Forensic Accountant, and the subject matter of his report was a Review and Assessment of the valuations, LTV [loan to value] and financial standing and viability of various entities at various points in time and various other matters." Two of those other matters were the allegations of interest overcharging and the financial impact of the Swap facility. The report is dated 17 February 2025. The plaintiff s second expert, Mr David Griffiths, provided his report on 7 March 2025. He is a qualified barrister, Member of the Chartered Institute of Arbitrators and a Member of the Royal Institute of Chartered Surveyors. He has some 30-years' experience working in the banking and property industries, including almost 13 years as Head of Property Finance at Bank Leumi where he was responsible for that Bank s property loan portfolio. His report deals with various banking matters, which he outlines in section 2 of his report.

[32] In the course of the trial Mr David Dunlop KC, senior counsel for the defendant, indicated that he would not require the plaintiff to call either of the expert witnesses and their reports could be accepted as their evidence. They would not be and were not cross examined.

[33] The defendant s principal witness of fact was Mr Ciaran McAreavey. He is a Fellow of the Institute of Chartered Accountants. He trained with Coopers & Lybrand (now PWC) before joining Ulster Bank in 1995, becoming director in corporate lending in about 2001. In May/June he joined the defendant Bank to take over the running of the Belfast office, as Area Manager for Northern Ireland. In particular he managed the loan facilities provided to the plaintiff and associated companies from 2006 until approximately October 2010. He was, therefore, the main contact between the Bank and the plaintiff in the period under examination in this case. He was called as a witness on 6 October and due to the delays caused by Mr Curistan s indisposition he finally finished his evidence on 14 October.

[34] In his role in the Bank he reported to Mr Joe McWilliams, Director of Lending who, in turn, reported to Mr Pat Whelan, Head of Risk, who was based in Dublin. Mr Whelan became the Managing Director of the Lending Ireland division in 2007. Earlier in his career Mr Whelan had managed the loans provided to the plaintiff and associated companies.

[35] The defendant called two expert witnesses. Mr Martin Reilly was the author of two reports, both dated 16 June 2025. He is a Chartered Accountant and partner in Deloitte Ireland LLP. The majority of his career has been focused on the financial services sector. One report dealt specifically with the allegation of interest overcharging by the Banks, the other dealt with the plaintiff s allegation that he was mis-sold Swaps.

[36] The defendant s second expert was Mr Andrew Blair and was also dated 16 June 2025. From December 1986 to December 2020 Mr Blair worked at Ulster Bank in a variety of roles dealing with corporate customer relationship management, credit risk and restructuring of distressed debt for customers in financial difficulties. He is

now involved with other companies in the field of corporate financing, and has undertaken consulting assignments for Deloitte Ireland LLP covering financial institutions regulated by the European Central Bank. Broadly speaking, the report deals with the relationship between the plaintiff (and the Group) and the Bank and actions taken by the Bank in relation to the sale of Odyssey.

[37] There were meetings of experts, all held on 21 August 2025. Messrs Davidson, Griffiths (for the plaintiff) and Reilly (for the defendant) met to discuss issues arising from their reports and relating to the Swaps allegations and interest overcharging allegations. A minute of each aspect discussed at that meeting, setting out areas of agreement/disagreement, has been provided. On the same date Messrs Griffiths (for the plaintiff) and Blair (for the defendant) discussed lending matters. Again, a minute of that meeting was provided.

[38] It needs to be understood that some of the issues which I was called upon to resolve involved purely factual matters in relation to which some of the expert evidence provided little, or no, assistance. This was recognised by the experts in the body of their reports.

PART 3 — THE EVIDENCE

[39] The best way for me to deal with the overall evidence given is to use the plaintiff s own evidence as the chronological narrative, and to insert into it matters which arise from other witnesses' evidence where relevant to my resolution of various factual matters. It is necessary to go into some detail in the narrative, as the events provide an important context for an understanding of the impugned actions on the part of the Bank.

[40] The plaintiff it was who had the vision for a millennium project in Belfast. Under his auspices the Group expended some £700,000 preparing a bid to the Millennium Commission for lottery funds for the project. The Group succeeded in its bid and was informed in June 1997 that it would be awarded £45million in lottery funding, conditional on an equivalent further sum being raised, a substantial part of which should be private funding. The total funding for the project was eventually made up of:

- £45 million lottery funding
- £16.9 million from the Department of Education
- £9 million from the Laganside Corporation, essentially infrastructural works to that value
- £2 million from the Sports Council
- £16.9 million from the Group — this being the private funding

[41] Since the vast majority of the money was from public funds it was not appropriate for the ownership of the project to be in private hands, so the Odyssey Trust Company Ltd. (OTC") was established in 1998. Its role was to hold and manage the investment of the project for the benefit of the people of Northern Ireland. Accordingly, it was OTC which entered into a lease with Belfast Harbour Commissioners for a 23 acre site on which the project would be constructed. Odyssey Construction Company Ltd. was set up as a special purpose vehicle for the construction of the project. It entered into a sub-lease with OTC. The property elements were sub-leased from OTC to Odyssey Property Co. (OPC"). OPC was wholly owned and controlled by OTC. In turn OPC entered into a sub-lease with Sheridan Millennium Ltd. (SML"). The various tenants in the Pavilion — the commercial space occupied by the tenants, including the cinema, IMAX, food and beverage outlets, night clubs etc. — would then enter into leases with SML, paying rent and service charges to SML. The income for SML would, therefore, derive from the rent and service charges paid to it by the various tenants.

[42] It is important to note, as it is relevant to the events later in time, that the sublease entered into between OPC and SML, unsurprisingly, at Clause 5.1 provided the landlord the right of re-entry in event of default on the part of the tenant.

[43] The Odyssey Arena opened in late 2000, followed by the Science Centre (W5), with the various units within the Pavilion and the IMAX cinema opening during the following 18 months.

[44] The plaintiff says that from relatively early on there were problems in the relationship between him/SML and OTC. There were snagging issues with the project: there were cracks in the floor of the Odyssey Pavilion causing injuries to visitors; numerous daily fire alarms, causing the building to have to be evacuated with resulting disruption and losses to businesses in the Pavilion — indeed one tenant (Warner Village) withheld in excess of £800,000 from SML s rent and service charges; there were many thefts of vehicles from the car park (which was under OTC s control) which resulted in the press labelling the car park a joy rider s paradise." This, says the plaintiff, would have discouraged potential visitors. SML began withholding payments to OTC to try to resolve issues, but this merely resulted in OTC issuing, in 2002, statutory demands for the outstanding amounts. The plaintiff says that this was to seek to cause maximum damage and embarrassment to him and SML. He also says that in due course independent consultants instructed by the Millennium Commission found justification in his complaints about the actions of OTC.

[45] He also points to another matter demonstrating OTC s failure to act in good faith. SML had an ATM terminal within the Odyssey Pavilion, which traded exceptionally well, bringing in some £250,000/£300,000 revenue per annum to SML. OTC built an ATM located at the entrance deflecting users away from the SML ATM and causing significant loss to SML.

[46] The ramifications arising from the poor relationship between the plaintiff and OTC will become apparent later.

[47] The plaintiff asserts that from the date of the opening of the Odyssey it was successful. He makes the case that contemporaneous Bank documents on which he relies show that the Bank was entirely satisfied with the performance of Odyssey, and that any criticisms which the Bank had about the operation of the Odyssey were because the Bank personnel did not understand the operation of a complex centre with a number of disparate businesses. For example, for the licensed premises, liquor licences had to be acquired, and, in Northern Ireland, that could take many months, even years; for all premises there were inevitable fit-out costs; and the centre had to attract businesses to it. All of this he says, as any person with experience in this type of complex business would have known, took time. He was critical in his closing submissions of what he sees as the Bank s failure to understand that the nature of the project was such that its funding was planned on the assumption that considerable additional funds would be provided as the units in the Pavilion were developed." He describes it as naïve in the extreme" for Mr McAreavey to have supposed that the initial allocation of £19 million of funding would be sufficient to see the development even to early maturity." He also makes the case that in the early years the LTV percentage was in the mid-70s.

[48] He says the relationship between him/SML and the Bank was positive. In his witness statement he says:

> The positive relationship held with the bank at that time is demonstrated through various credit committee papers, including credit committee applications throughout 2004 and 2005. Anglo Irish Bank also provided financial support on other projects being undertaken by Sheridan Group, and to that end had agreed in principle to act as funders on a significant redevelopment project in Queen s Quay, Belfast. In fact to assist in the redevelopment tender the bank provided a reference letter on 8 April 2005."

[49] The reference to Queen s Quay relates to the decision by Laganside Corporation to select SML as the preferred developer of the lands running along the river front beside the Odyssey. SML s proposed development included residential and office property, hotel and food/drink outlets and visitor attractions.

[50] It is the Bank s case that early cashflow problems developed in the running of SML. A major problem identified by the Bank is that a number of the tenants were Sheridan associated companies, controlled by the plaintiff. While they were, under the terms of their leases, obliged to pay rent to SML, in fact this was not happening and, as a result, this caused cashflow problems which, in turn, led to SML falling into arrears in the payment of interest to the Bank. There is in the papers a cashflow summary for the period 31 July 2005 to 30 April 2006. This forecasts a cashflow deficit

over the period of £2.317 million. What is also clear from contemporaneous documentation is that the need to obtain sound third party tenants was a regular refrain.

[51] All was going well, says the plaintiff, until February 2006. In that month Peter Robinson, then an MP, made a speech in the House of Commons, subject therefore to parliamentary privilege, accusing the plaintiff of money laundering for the IRA. The allegations were never repeated by Mr Robinson outside parliament despite the plaintiff challenging him to do so. Immediately thereafter the plaintiff says that the then chairman of OTC communicated to him that he should not openly associate himself with Odyssey and, says the plaintiff, unbeknownst to him the chairman of OTC told Mr Sean Fitzpatrick — then chairman of the Bank — to the effect that OTC was going to get rid of him (the plaintiff) at all costs.

[52] The plaintiff asserts (paragraph 21 of his witness statement) that:

> Following Robinson s accusation, Anglo Irish Bank completely changed its attitude and approach to the Sheridan Group and me. This was manifested in many ways. While I was unaware at the time, I subsequently discovered that prior to discussing the sale of Odyssey with me, the property was being touted for sale among existing bank customers. This was evidenced in a Memorandum prepared by Shane Donnelly."

[53] He considers (paragraph 22) that these actions of the Bank would have had serious detrimental consequences for the value of Sheridan Group s assets." He also asserts that it was a very serious breach of Anglo s duties, particularly concerning loyalty, conflicts of interest, good faith and confidentiality."

[54] It soon became clear to him, says the plaintiff, that the Bank no longer wanted to fund Sheridan Group" (paragraph 24). He says that at a meeting with Mr Pat Whelan of the Bank in late August 2006 he was told that Anglo did not wish to continue to support SML and [Mr Whelan] gave an ultimatum that Odyssey had to be sold within 18 months and, if not, an Administrator would be appointed." Paragraph 24 goes on to say:

> A discussion continued as to the process to be undertaken to market the property, and he volunteered that Anglo would approach selected Bank clients who may be interested in acquiring the Odyssey, while I should carry out a marketing campaign in the United Kingdom. As already stated, I was unaware at this time that Anglo had already been offering the property for sale and was led to believe that it would be beneficial to SML for the bank to approach its own customers."

[55] Because of the valuation of SML in May 2005 valuing the company, net of debt, at more than £40million, the plaintiff considered the Odyssey to be an attractive proposition and [he] did not have any concerns at being able to achieve a lucrative sale, whether through a customer of Anglo or an outside purchaser." Significantly, says the plaintiff, in February 2006 CBRE had valued SML s interest in the Pavilion at £82.5million — excluding options on the development sites (Queen s Quay) which were projected by the defendant to make additional profits of £15-£20 million.

[56] I pause in the narrative to note that one has to be a little wary of valuations of SML. By and large those valuations made assumptions about the rent roll and, as I have noted above, some rental payments which, on paper should have been coming into the coffers of SML, were not actually being received in full.

[57] It is very much the plaintiff s case that SML/Odyssey was a success and that it was the subsequent actions of the Bank which caused its downfall. This was met head on by Mr Dunlop KC in his cross examination of the plaintiff. The thrust of the initial stages of the cross examination was to set the Bank s subsequent actions, criticised by the plaintiff, in the context of a continuing worsening financial position of SML and associated companies in the Group.

[58] Mr Dunlop began his cross examination of the plaintiff by taking him to SML s obligations under its lease, establishing that SML s failure to pay rent, (without any deduction or set-off) or the service charges, gave the landlord (effectively OTC, as the owner of OPC) the right to step in and forfeit the lease. The plaintiff agreed with this.

[59] Mr Dunlop then took the plaintiff to the various documents relating to the provision of facilities by the Bank to SML, beginning with the original Facilities Agreement of 13 January 1999. Two facilities were granted: Facility A, £20 million Term Loan Facility; Facility B, £16.9 million Letter of Credit Facility. Effectively Facility A was to be used for construction, fitting-out works and interest roll-up. The repayment date for the loan was 31 December 2001, and by clause 11.1 the loan (if not previously demanded) had to be repaid by this date. The plaintiff accepted that this was a contractual obligation.

[60] Mr Dunlop took the plaintiff to the security provisions in clause 13. The Bank had first fixed and floating charges over the Borrower s property assets and undertaking" including SML s interest in the lease. Mr Dunlop put it to the plaintiff that the floating charge meant that the Bank had, among other rights, the right to appoint administrators or appoint a receiver under its fixed charge over the asset. The plaintiff clearly accepted this, as his answer was: " If they had all these rights and they felt that they should do something about it, why didn't they?"

[61] At clause 13.1.iv part of the security was an unlimited guarantee from each Guarantor countercovered by the Guarantors Security (if any) specified opposite its or his name in the Sixth Schedule."

[62] Following on from the original Facilities Agreement there was a significant number of supplemental agreements, on foot of which the loan facilities, and therefore SML s indebtedness, increased. Mr Dunlop referred the plaintiff specifically to the fifth, sixth and seventh of these. The seventh supplemental agreement, dated August 2004, increased the loan facilities from £44 million (in the sixth supplemental agreement) to £49 million, with a repayment date of 30 September 2004. By a new Facilities Letter of 13 October 2004, the loan increased to £50 million, and on that date also a further facility, in the nature of a cash advance, was agreed in the sum of £2.5 million to finance general working capital funding requirements and professional and Bank fees.

[63] On 29 October 2004 two guarantee facilities, each of £200k, were made available to guarantee (1) company liabilities to Northern Bank and (2) liabilities of the Bournemouth business. Further facilities included: 10 January 2005 a cash advance facility of £90k for general working capital requirements; 17 February 2005, €650k, working capital requirements; 18 April 2005, 3 guarantee facilities totaling £2.4 million relating to Northern Bank, the business in Bournemouth and further overdraft facilities with a bank yet to be designated by SML; 28 April 2005 4 separate cash advance facilities taking SML s indebtedness to the Bank to just under £55 million; 26 August 2005, taking the indebtedness to some £56 million; 24 May 2006, taking the indebtedness to just under £57 million.

[64] Moving forward in time, finally, a facility letter of 14 April 2009 took the indebtedness to £82 million, with personal guarantees from the plaintiff and his wife to the same amount, meaning that if SML could not pay its debts, the plaintiff and his wife would be personally liable. By clause 10, the loans were repayable on demand. All of these facts were accepted.

[65] So, according to Mr Dunlop, between May 2006 and April 2009 the indebtedness had increased by some £25 million.

[66] The plaintiff accepted that SML s revenue was derived from the rents paid by its tenants and from that revenue SML had to pay its own obligations under the lease. Mr Dunlop pointed out to the plaintiff that by 2009 the business had been trading for some 10 years, the plaintiff asserting that the bars and restaurants had only been trading for some six or seven years, but notwithstanding the fact that the business had been trading (for whatever duration) the loans from the Bank were getting higher. That meant SML s trading was insufficient to pay interest on the loans, not to mention any capital repayment.

[67] Mr Dunlop referred the plaintiff to the fact that seven of the units in the complex were operated by Sheridan associated companies and he put to the plaintiff that those companies could not pay their rent to SML so that SML, in turn, could not pay interest on the loans. The plaintiff s response was not to deny this, but to assert that the Bank overcharged interest, which is part of his claim.

[68] As noted above, the plaintiff had relied on several Credit Committee reports in support of his contention that the Bank recognised that SML was a successful business and was worthy of support. The plaintiff also relied on a number of valuations over the period prior to what has become known as the credit crunch in 2007/08 to show that the loan to value ratio was positive and the Bank s exposure could be met within the value of the company.

[69] Mr Dunlop also referred the plaintiff to various Credit Committee reports and memoranda within the Bank and relied on them essentially to show that SML was not a successful trading company, could not meet its obligations under the various facilities granted to it, as a result of which the Bank had to keep increasing the facilities.

[70] For example, in a memorandum of 30 September 2004 the Bank was noting that the history of the relationship with the borrower has at times been less that satisfactory with (1) slow progress on letting, (2) concerns over the reliance on Sheridan associated units, and (3) the history of rental/interest arrears." The plaintiff s response to the concerns about arrears of rents due to SML from tenants was that this was a complex building and starting up is always slow, but that is normal for this type of building. It was noted that the IMAX unit had failed to pay rent since the opening, a matter accepted by the plaintiff.

[71] In a Credit Committee Application of 11 October 2004 it was recorded that the borrower has a history of slow or non-payment of interest. It is for this reason that the Bank has not resisted Curistan s move to refinance to another institution in the past. It should however be stressed that until recently this has been on a backdrop of less than full occupancy combined with start-up costs/losses on trading operations within the complex." In answer to this the plaintiff said it was a difficult start but that they were sorting it out.

[72] The content of paragraph 36 of Mr McAreavey s witness statement was read to the plaintiff. It said:

> Pausing at this point, by October 2004 the Odyssey had been open and trading for almost 4 years. During that period the financial position of SML had deteriorated alarmingly. It was not only failing to adhere to the repayment obligations within the preceding facility letters, but was requiring ever greater facilities from the Bank in order to allow it to meet its liabilities to third party creditors as they fell due."

[73] When asked, the plaintiff said he did not disagree with this.

[74] In addition to the plaintiff s evidence on this point I note here that Mr Holmes, in cross examination, also agreed that in the period from 2004 to January 2006 the Bank was advancing more money to keep the company solvent."

[75] On 11 January 2006 the Bank wrote to the plaintiff noting total interest arrears of £400,748. The plaintiff was asked by Mr Dunlop whether he accepted that if arrears were rising SML was in breach of its contractual obligations under the facilities. His response was not to deny that but to assert that the arrears would have been less if the Bank had not overcharged interest.

[76] The plaintiff had to accept, as put to him by Mr Dunlop, that in January 2006 the fact that the Bank was making demands for repayment of interest could have had nothing to do with comments made in parliament by Peter Robinson MP, since those comments were not made until February 2006. Mr Dunlop also suggested to him that the Bank never accepted the truth of the allegations made by Mr Robinson. Bearing in mind that the Bank had sight of all the relevant bank accounts it would, said Mr Dunlop, have been a strange way to launder money where a business was, as SML was, losing money. Mr Holmes was also cross examined on this point and the following exchange took place:

> " Q… You weren t washing money. In fact, you were having to borrow more money. Isn t that right?
>
> A. I agree with that."

[77] Although Mr Holmes had said in his witness statement that the Bank was seriously concerned" about the Robinson allegations, in cross examination he admitted that he had no evidential basis for this remark.

[78] Having pointed out to the plaintiff that between 2006 and 2009 (ie after the Robinson allegations had been made) the company s indebtedness to the Bank increased from around £55 million to £82 million, the following exchange took place between Mr Dunlop and the plaintiff —

> Q. Your point is that in 2006 the bank was well secured because the value of the asset in 2006 was £20 million or £30 million more than the amount of the loan. Isn t that right?
>
> A. Approximately, yes.
>
> Q. So the bank could have got rid of you, got fully repaid, dismissed and got rid of any connection to Peter Curistan whatsoever without suffering any loss whatsoever on your analysis and would have been completely clear of you, but it didn t do that,

> and can I suggest to you, Mr Curistan, that demonstrates and illustrates that the bank did not attach a single piece of weight to anything said by Mr Peter Robinson. Your completely outrageous suggestion that the bank was prejudiced against you is something which is entirely a figment of your own imagination?
>
> A. It may well be.

[79] It is quite clear to me from that exchange, and from the fact that post-February 2006 the Bank continued to lend money to SML and to the plaintiff and to his wife, that the plaintiff s assertion that the attitude of the Bank changed towards him because of the allegations made in parliament by Peter Robinson is entirely without foundation. In the circumstances I reject any suggestion that the actions of the Bank were in any way predicated on or informed by the allegations made by Mr Robinson under parliamentary privilege in the House of Commons in February 2006.

[80] On 21 March 2006 a further letter from the Bank indicated that interest arrears now amounted to £501,501. The plaintiff accepted that in March 2006 the Bank could have put in an administrator since the company was in default.

[81] In a Credit Committee Application dated 23 May 2006 it is noted that SML had been placed on the watch list due to persistent arrears of interest, which peaked in March at around £900k, and also delays in securing third party tenants to replace the Sheridan associated tenants in the units in the Pavilion. The watch list is described as a device operated by the Bank to bring focus to non-performing clients."

[82] In a Bank internal memorandum of 30 August 2006 SML s cashflow was described as a major concern" for the Bank. The plaintiff was forced to accept that, at that date, cheques were bouncing, creditors were not being paid, and OTC was not being paid appropriately under the terms of SML s lease. In a further memorandum dated 27 September 2006 the Bank said:

> "… we have two options to consider:-
>
> (i) Immediate appointment of a receiver to realise our security; or
>
> (ii) To continue to provide support to the promoter … facilitating a disposal/refinance by the promoter within a reasonable (18 month) period."

[83] Cooney Carey is a Dublin firm of accountants, one of its partners being Tony Carey. It was commissioned by the Bank in late 2006 to provide a report on the Group s overall financial position. The report is dated November 2006. It noted the

lack of proper books of account within the Sheridan Group and the difficulty in having a proper understanding of the finances because of the lack of information. The plaintiff said that this was quite normal for this type of company, where managers moved around various entities. He said that PWC, as auditors, did not qualify the accounts of any entity, save one. In an email, copied to the plaintiff from Mr Carey and dated 21 November 2006, the accountant stated, inter alia, that the last audits were to 3 April 2005 (18 months earlier) and that there were [n]o management accounts of any nature since."

[84] Eventually, after some verbal skirmishing, the plaintiff was forced to accept, as a chartered accountant himself, that this was not a professional way to run a group of disparate businesses. There was some further questioning about the accounts of the Group, inter-company loans and the movement of funds between some 10 corporate entities. I found the plaintiff s answers to these questions less than convincing.

[85] The Cooney Carey report also highlighted that the Group has a cash flow requirement calculated at £6.5m by August 2007." The report stated, under the rubric Cash Flow":

> The Group does not have the cash flow available to meet its debts as they fall due. Liability has been taken on without the obvious ability to repay it. Creditors are overdue and banking positions are strained above authorised limited (sic). The Group is exposed to a number of parties who could call in funding at short notice — thereby placing pressure on committed bankers' to come to a rescue, all be it (sic) that such would not be their choice."

[86] The plaintiff accepted that there were cashflow difficulties but said that SML developed a plan to deal with this. He also said that 3 months later he had offers of £105m and £107.5m and that the business was strong and solid.

[87] The Cooney Carey report concluded:

> It is recommended that an exit strategy/program be presented by the Group' to the Bank by the 28 February 2007. This strategy should address and agree a process for the sale of/refinance of assets and should be accompanied by a pre-agreed price level that the Group' will accept. This to be the subject of monitoring at the discretion of the Bank."

[88] The plaintiff accepted that at that date (November 2006), in the circumstances ie arrears of interest, cheques bouncing, no cashflow, it was unlikely that any other bank would be interested in refinancing SML.

[89] A new Facility Letter, dated 21 December 2006 was produced. As noted above the new debt amounted to some £65 million. Among other conditions for the renewed borrowing, the Tannery was to be sold by 28 February 2007. This did not take place, so SML was in breach of this condition. The plaintiff says that the reason the sale did not complete by that date was because Mr Donnelly, of the Bank, was hawking Odyssey around with local developers" and when those developers got wind of a potential sale in receivership, they would not make any offer, hoping to pick up the asset more cheaply in a distressed sale. The plaintiff was forced to admit that he did not have a property expert or any expert valuation of the Tannery. In the circumstances there is no evidence before me to support any allegation that the actions of the Bank were responsible for the Tannery not being sold by the end of February 2007.

[90] In his closing submissions the plaintiff describes this facility letter, which he sets out in extenso, as aggressive and controlling" and says that it was designed to take total control of the business at both director management level and at a level of day to day operations…" Notwithstanding his expressed view, the plaintiff — as he said in his closing submissions with his 10 years accountancy practice experience and his 30 years business experience — accepted the facility, apparently without demur. He was not forced to accept it. This was December 2006, well before the property crash, and if the Bank s offer was so draconian it was open to the plaintiff to seek to dispose of the Odyssey, but he did not do so. Indeed, contemporaneously with this (as will appear below) the plaintiff had an offer of £81 million for the Odyssey alone.

[91] As I have noted above, and without going into the detail of any further contemporaneous documentation, the level of indebtedness continued its inexorable upward trajectory through 2007, 2008 and into 2009, peaking at £82 million.

[92] In the circumstances, I find that far from the plaintiff s assertion that SML had a positive relationship with the Bank being correct, in fact, SML was never a successful trading company and that this caused the Bank to have concerns about SML from early in the relationship. The evidence of Mr McAreavey was to the effect that when he joined the Bank in 2006 it was clear that SML was in breach of most of the financial obligations upon it; it had defaulted on repayments and was liable to have an immediate demand of all monies due and enforcement of the Bank s security."

[93] Indeed, as time went by, as shown above from the increasing financial indebtedness, the company appears to have been less and less able to pay its trading debts as they fell due or to meet its obligation to pay interest on the debt, far less any capital repayment, and the Bank frequently had to advance further moneys to pay creditors. I find that the evidence clearly shows that over a period of some years the Bank was in a position to, and could have, rendered SML insolvent and realised its security as a result of continuing breaches of SML s obligations under the various facilities granted to it. While the evidence shows that the Bank was keen, in 2006, to see the Odyssey sold within 18 months — essentially because of SML s poor

performance — it is clear from the actions of the Bank between 2006 and 2009 (as evidenced by the various agreements supplemental to the initial facility letter) that it continued to fund, not only SML, but some separate companies, associated with SML, occupying units within the Pavilion, and the plaintiff himself and his wife. As noted above, the funding of SML, and therefore its indebtedness to the Bank, increased from some £55 million in 2006 to £82 million in 2009.

[94] At paragraph 28 of his witness statement the plaintiff says: "… events on 8 February 2006 (the Robinson allegations) resulted in an ultimatum from [the Bank] that SML had to sell the Odyssey Pavilion within 18 months…" I have already indicated above my findings about the Robinson allegations, and I specifically reject the plaintiff s assertion that those comments resulted in an ultimatum. In my view, the evidence is clear that the Bank wanted an exit strategy because of the continuing poor performance of SML as a business and the necessity for increasing borrowing by SML.

[95] It is in this context that I now examine the two sales processes relevant to these proceedings.

Potential sales

[96] The plaintiff says that it had always been his intention eventually to sell the property and as early as 2003 he had instructed PWC to investigate the options. PWC s draft report is dated 12th February 2004. Mr Holmes, in his evidence, also accepted that the ambition in 2004 was that the Odyssey Centre should be essentially sold and Sheridan Millennium should then get out of the role of managing this complex entertainment centre." Following the PWC report the plaintiff says that SML sought to transfer a number of Group operated units in the Pavilion to third party operators with strong covenants." He says that leading London agents" were instructed in the sale process and he provided a list of companies who expressed interest. Mr Holmes attended the Cannes Property Fair International to seek to market the asset. Notwithstanding the attempts to sell the asset it is accepted that between 2004 and 2006 whatever interest was shown, it was not converted into a completed sale. The plaintiff accepted that from February 2004 onwards he had been unable to find a buyer. He said that each potential purchaser had its own reason for not completing.

[97] None of the above information appears in the expert report from Mr Griffiths. His analysis of the first question which he was asked to consider — "Whether the nature of the role played by [the defendant] in the sale/marketing of the Odyssey Pavilion went beyond the usual nature of the Bank s relationship with a client than that of a secured lender" — commences chronologically with the comments made by Peter Robinson MP in February 2006.

[98] At paragraph 4.22 of his report, having noted the appointment of Lisney on 23 January 2007, he says:

> At this stage of the marketing of both the Property and the Tannery was (sic) to be in the open market and there is no suggestion that Anglo intended to force a specific bidder on to [the plaintiff] but in carrying out its own marketing of these assets (if, as appears likely, it was doing so without [the plaintiff s] involvement), it is my opinion that this went beyond the remit of a lender as well as having the potential to have a detrimental effect on the price which the market would expect to be achievable."

[99] Notwithstanding what Mr Griffiths says about a potential detrimental effect on the market, as far as the Tannery is concerned, there is no expert evidence as to its valuation (as I noted above). Secondly, in fact towards the end of 2006, as noted in the Cooney Carey report, SML was in the process of receiving an offer from Moor Park Capital LLP in the region of £81m for the Odyssey property" — at a time when it was valued at £75.5m by CBRE. The Cooney Carey report also notes that the company considered the value to be £82m. Whether Mr Griffiths was not given this information or whether he considered it not relevant and chose not to refer to it is not clear to me, but in my view it removes any context for his assertions about the role of the Bank and the effects of its activities.

[100] Dealing with this Moor Park offer, within a bundle of documents handed into court by the plaintiff on the second morning of the trial was a letter from SML (signed by Mr Holmes) to a Mr Shemeel Kahn, of Moor Park Capital Partners LLP, dated 18 December 2006 in which the Moor Park offer was rejected; the company indicating that its preference was for 85+m." There is no evidence that Moor Park ever returned to the table, and in fact, in his cross examination, Mr Holmes agreed that the Moor Park story ends there."

[101] When cross examined about that letter the plaintiff initially said he could not remember. I find that that was not a truthful answer. Although the letter was signed by Mr Holmes, and not the plaintiff himself, I do not accept that the plaintiff would fail to recall the making of an offer of £81 million, the rejection of that offer and the indication to an interested potential purchaser that the company wanted a figure in excess of £85m; this particularly so in light of the fact that he had been trying since 2004 to sell the Odyssey, with no success whatsoever. Later, after some cross examination the plaintiff indicated that he would have discussed the offer at the time with Mr Holmes, the author of the letter to Mr Khan.

[102] The plaintiff was challenged by Mr Dunlop about why the letter to Mr Khan only appeared on the second morning of the trial and was not previously disclosed by the plaintiff. The following exchange took place:

> Q. I had pointed out to you it was strange indeed that you had produced that document on the morning,

given that there had been extensive discovery exercises in this case, not least that you yourself had raised this issue as a very significant issue about offers that were made in relation to property. You told the court yesterday -- and please correct me if I am wrong on this -- but you told the court yesterday you had come across the documents and that you hadn t recognised or realised that such documents were important or that you had to look for and obtain documents that you personally had and related to communications you had had with third parties about sales?

A. Yes.

Q. Is that a fair summary of what you said yesterday?

A. Yes."

[103] Mr Dunlop produced an affidavit, sworn by Ms Kara Anderson of McIldowies, Solicitors, which firm had acted for the plaintiff from at least 2022 but had come off record in July 2025. That affidavit, expressly stating that the deponent had been authorised by the plaintiff to make it, was sworn in support of an application for specific discovery of documents from the Bank. It stated: This request concerns another company that expressed an interest in purchasing the property in and around 2006/2007." (It was common case that this related to the Moor Park offer). Ms Anderson went on to depose:

> While the Plaintiff was made peripherally aware by the Defendant of some interest from this company, credit committee papers from March 2007 reveal that significant interest was expressed without any further follow-up from the Defendant. The Plaintiff is clearly entitled to details of any direct contact or offers made to the Defendant for the purchase of the Odyssey."

[104] In my view this instruction from the plaintiff to Ms Anderson was completely disingenuous. I find that the plaintiff well knew about the Moor Park offer and, indeed, his strategy was to ask Moor Park to consider increasing the offer, his preference being for 85m+." The suggestion by the plaintiff that it was only when he received discovery of the Bank s Credit Committee papers that he was fully aware of the extent of the offer is just wrong. The cross examination continued:

Q. Peripherally aware can I suggest to you, Mr Curistan, as you well know, means that you were vaguely aware. You didn t really know the

details. It was something that you became aware of from discovery of the bank credit papers, but it was something that you had no direct knowledge of yourself. That s what that means. A. Yes. You may interpret it that way.

Q. Thank you. That wasn t true, because you were not peripherally aware. In fact, the person who had direct knowledge of the offer made by Moor Park Capital was you?

A. I had a copy of a letter from them.

Q. Yes, a letter, Mr Curistan, which despite you seeking discovery from the Defendant to find out the details of that offer, a letter that you yourself had within your possession right until you disclosed it yesterday morning? A. I wanted to know what they had.

Q. Yes, but Mr Curistan, discovery works two ways. You can t -- you provided a list of documents. You provided discovery and you didn t provide that document, which you clearly had in your possession.

A. How did they know about Moor Park then?

Q. Because you told them. That s why it is in the bank credit notes, but what they didn t know and what nobody knew until yesterday was you had turned down an offer of something in the region of £81 million and you had said the reason you were turning it down was that you wanted £85 million plus?

A. So be it."

[105] The plaintiff also said in evidence that he already had an offer of £82.5 million (a reference to the Propinvest offer — as to which, see below) at the time he rejected the Moor Park offer. That evidence is not correct. When the letter was written to Mr Khan rejecting the offer, in December 2006, no such offer had been made by Propinvest — their offer of £82.5 million for the Odyssey was not made until April 2007.

[106] Mr Dunlop put it to the plaintiff that he could have sold to Moor Park and the Bank could not have stopped him from doing so and that it was his commercial decision not to sell. His answer was that the Bank wanted Alburn and he was waiting to see what Alburn would do. But that answer, also, was not correct. In the plaintiff s Amended Statement of Claim he says the The [Bank] introduced Noel Smyth, a director of Alburn Ltd., as a potential purchaser in early March 2007." The evidence also makes clear that no offer from Alburn was made until 26 March 2007. Accordingly, when the Moor Park offer of £81 million was made, and rejected, there was no other offer on the table, either from Alburn or Propinvest.

[107] I find as a fact that the plaintiff made the perfectly understandable commercial decision not to sell to Moor Park because he was hoping for a better price. I find as a fact that it is untrue that he did not sell to Moor Park because the Bank wanted Alburn or that he was waiting to see what Alburn would do. I also find that it is not true that he already had an offer of £82.5 million at the time of the Moor Park offer.

[108] In the initial stages of the sale process the plaintiff says he believed that the Bank were acting in his best interests, but that this was quickly exposed as a fallacy with disastrous consequences for me and SML." At para 31 of his witness statement, he identifies 3 parties who expressed what he calls serious interest" during the period May 2006 to April 2007, namely Legal and General (Investment Fund), introduced by a firm named Humberts Leisure, based in London; Propinvest Ltd., introduced by Beltrae Partners, a Belfast based firm of property consultants; and Alburn Ltd/Noel Smyth, introduced by the Bank. At paragraph 33 of his witness statement the plaintiff said that he was keen on pursuing the interest from Legal and General Insurance as they had expressed serious interest in acquiring Odyssey and were introduced to me by a well-respected London letting agent" ie Humberts. When asked if L&G had made an offer he said:

> No. Because Anglo Irish Bank, and I can't remember who it was, but basically said, you have got an offer of, a large offer from Alburn, it s there in black and white, we want you to look at that in detail and accept it, quite frankly.
>
> Now, Legal & General will take a long time to do due diligence and we need it sooner than later."

[109] When asked, the plaintiff was unable to point to any document showing any communication by the plaintiff or SML to the Bank about any contact with L&G.

[110] In the circumstances I reject the plaintiff s attempt to blame the Bank for any failure to progress the interest of L&G, and I have been referred to no document showing any offer made by L&G.

The Alburn process

[111] It is central to the plaintiff s case in relation to the Alburn process that the Bank was at all times aware of another, and higher, offer — from Propinvest. It is very much the plaintiff s case that the Bank had been determined to progress the deal with Alburn notwithstanding the higher offer from Propinvest as this, he says, would be to the benefit of the Bank, even though it would be disadvantageous to the plaintiff/SML. It is very much the Bank s case that at no time during the Alburn process was it aware of any offer or approach from Propinvest, and that the first the Bank became aware of Propinvest was in late 2008, after the Alburn process had terminated. In his Amended Statement of Claim the plaintiff pleads:

> 15M The defendant s strategy at this time was to ensure that the Odyssey Pavilion was sold to one of its own clients to improve the defendant s own security position and to that end the defendant expressed an unwillingness for [the first-named plaintiff] to entertain any offers that were not made by the defendant s own client base. This was despite the fact, as acknowledged by the defendant in credit committee papers in 2010, that there were numerous parties that expressed credible and bona fide interest in purchasing the Odyssey Pavilion at that time.
>
> 15N Again acting on the representations of the defendant [SML] subsequently entered into a conditional contract with Alburn in or about November 2007, with a long stop date of November 2008. Alburn ultimately declined to proceed with the transaction in November 2008."
>
> 15O … at the time the contract [with Alburn] was executed the defendant knew or ought to have known that Alburn would not be in a position to complete the transaction, and by persuading [the first-named defendant] to enter into an unfavourable contract, prevented a sale from proceeding with Propinvest or any other interested party"

[112] I can articulate no better the plaintiff s evidence about this than to set out what he says in a number of paragraphs of his witness statement:

> 32. Anglo had introduced NS/Alburn to me and were strongly advocating for Alburn to be selected as purchaser of the property. I met with Noel Smyth at Anglo s behest and frankly wasn t very keen, particularly as I had been informed by others in the industry that he could be difficult to deal with. Anglo however represented that he was a

long standing, respected bank customer and that they would be backing him in terms of funding.

33. I was keen on pursuing the interest from Legal and General Insurance as they had expressed serious interest in acquiring Odyssey and were introduced to me by a well-respected London letting agent. Anglo however showed no interest and failed to follow up on this, and I was advised by bank officials that Anglo believed that Legal and General would require significant time to undertake due diligence and make a firm price offer which seemed unnecessary as in and around the same period Alburn had made an offer to purchase Odyssey and the Tannery building (owned by Quito Developments Ltd.) for the sum of £105 million.

34. I was concerned about this offer as there seemed to be a lot of conditionality with it and it suggested that there would be a number of months of due diligence. At this time I was also in contact with representatives from Propinvest, who were very keen to purchase the property. I had a number of meetings with Propinvest in London and Belfast and they provided me with accounts evidencing more than £185m in the bank. An offer was received from Propinvest in April 2007 in the sum of £107.5 million, some £2.5 million higher than Alburn s offer and a suggested completion by June 2007. This offer was received on 18 April 2007.

35. It seemed to me that Propinvest was the obvious choice, but Anglo was continually pushing Alburn as the preferred purchaser. It was represented to me by Anglo that Alburn would be in a position to complete by the end of June, but in direct contradiction to this an exclusivity agreement was proposed to prevent SML from engaging with other purchasers until the end of June to allow Alburn to carry out further due diligence, without any contractual risk on the part of Alburn. There was absolutely no benefit to SML to enter into such an agreement particularly when there was another offer on the table.

36. When I expressed this to [Ciaran McAreavey, of the Bank] he firstly advised that Noel Smyth was a successful developer and long term customer of the Bank with a desire to close the transaction asap, and would have total support of the Bank in funding the purchase. He also tried

> to persuade me in relation to the exclusivity agreement, as he stated that Noel Smyth may walk away if this was not granted as he had many other opportunities to consider. Finally, he advised me that the consequences for SML and Quito would be serious if the Alburn offer was not accepted, and intimated that the bank may need to step in and appoint a receiver.
>
> 37. I felt that SML had no choice but to accept the Alburn offer and was forced to reject the more favourable offer from Propinvest. I had thought that the one positive in this was that the bank had represented that Alburn had the financial wherewithal to proceed with the purchase and that Alburn would be backed with Anglo funding, so I hoped that the sale would at least proceed swiftly.

[113] The plaintiff relies on an internal Bank email from Ciaran McAreavey dated 27 June 2007, the relevant part (for the plaintiff) being —

> I have been working personally on this case, supported by Morgan [McCandless] to try to keep Peter boxed in and focused on achieving an exit for himself (and for us) through the sale of Odyssey. We are very close to achieving that goal now and I think the contact from Peter is driven by the fact that <u>I have been putting a lot of pressure on him to ensure that he does not waiver (sic) on the proposal to sell to Alburn</u>."
>
> (The underlining is the plaintiff s)

[114] The plaintiff says that this shows the bank preferring Alburn to Propinvest, although Propinvest is not mentioned in the email.

Did the Bank know about the Propinvest interest?

[115] At this stage I need to deal with the issue of whether the Bank knew about the offer from Propinvest in the period from April 2007 to the end of the Alburn sales process in November 2008. As noted above, the plaintiff says the Bank was aware of it but put pressure on him to deal only with Alburn for its (the Bank s) own benefit; the Bank denies that it was aware of any involvement of Propinvest until late 2008, after the Alburn process was ended, and therefore could not have, and did not, force the plaintiff to accept the lesser Alburn offer.

[116] On 18 April 2007 a firm called Beltrae Partners wrote to Michael Bell who was then a senior partner of PWC and an independent advisor to the Sheridan Group, making an offer based on £23 million for the shares in Quito (the Tannery) and £84.5

million for the shares in SML (amounting to the £107.5 million referred to in paragraph 34 of the plaintiff s witness statement). The suggested completion was to be on or before 30 June 2007. That offer was made on behalf of a company called Propinvest. From the cross examination of the plaintiff, it appeared that the Beltrae letter only emerged for the first time as an exhibit to the plaintiff s witness statement served in August 2025. It had not been disclosed during the protracted discovery process.

[117] It is important to note that the letter does not appear anywhere in the Bank s voluminous discovery. In addition, there is no document within the Bank s discovery showing that the Bank was made aware of the Propinvest offer during the currency of the Alburn process.

[118] It is a fundamental part of the plaintiff s case that the Bank was told about the Propinvest offer and, notwithstanding that it knew of this higher offer, the Bank pressured the plaintiff to deal only with Alburn, to his and SML s eventual detriment — see paragraphs 35 to 37 of his witness statement above. In his closing submissions, describing the Propinvest offer as vastly superior to that of Alburn", he says:

> Given that I had clearly sought to achieve a situation whereby both the Propinvest and Alburn offers were presented on the same basis, it is not credible that I would have gone to all that effort and engaged so strongly with Propinvest if I was not going to present it to the Bank."

[119] In his opening he told me:

> " Propinvest were ignored, their offer was £2.5 million more. You will see in the banking expert s report and the forensics reports, our reports, they were a very, very strong company, they had £185 million cash in the bank and was capitalised at somewhere around a billion and they wanted to close the deal by the end of June. And that s in a signed agreement. In Mr McAreavey s affidavit [he says that] he didn t know about the offer. He did not know and Propinvest were ignored, even though we brought it to their [ie, the Bank s] attention, brought the offer to their attention."

[120] It was unclear to me in the plaintiff s opening precisely how the Bank s attention was drawn to this offer from Propinvest, this being a vitally important part of the plaintiff s case. Thus, the following exchange took place:

> MR JUSTICE SIMPSON: Sorry, just so that I m clear about this, one of the points that I did want to bring up with you,

Mr McAreavey says that it was much, much later he found out about the PropInvest offer. What do you say, do you say that he was made aware of it?

MR CURISTAN: He would have been made aware of it.

MR JUSTICE SIMPSON: No, no, do you say he was made aware of it?

MR CURISTAN: He was made aware of it.

MR JUSTICE SIMPSON: By whom?

MR CURISTAN: By me and Peter Holmes.

MR JUSTICE SIMPSON: How did you make him aware of it?

MR CURISTAN: I made it by word of mouth that we would have had another offer, it was Propinvest. Whether Peter would have been even more up to speed with that because he was dealing with the detail of that.

MR JUSTICE SIMPSON: But do you recall a conversation that you had with Mr McAreavey where you told him about PropInvest and an offer?

MR CURISTAN: Yes, because well, to put it maybe --

MR JUSTICE SIMPSON: Well, I don t want to put words in your mouth, Mr Curistan, just in case, but I just want to know whether you are saying that you told Mr McAreavey about Propinvest and the offer or whether Mr Holmes told him about it, or whether you can t remember?

MR CURISTAN: Well, I told him.

MR JUSTICE SIMPSON: You told him?

MR CURISTAN: Yes, but just to give you some form of, and I wouldn t say it s hard core evidence, but what it does say to me is that it s a clear indication that he knew that there were other people.

MR JUSTICE SIMPSON: No, and at the moment, I m just interested in the Propinvest one.

MR CURISTAN: Yes.

MR JUSTICE SIMPSON: Not the other people. But is it your case that you told Mr McAreavey that there was an offer from Propinvest and it was higher than the Alburn offer.

MR CURISTAN: Yes.

MR JUSTICE SIMPSON: You did tell [him] that. Do you remember whether that was in a phone call or in a meeting or in a casual conversation?

MR CURISTAN: I would say, well I don t want to give you estimates or statements which I m not a 100% sure, but generally I wouldn t be meeting Ciaran McAreavey, I would be ringing him, and vice versa. As a norm. As a norm. And that would be the position, I wouldn t, you know, go to see him.

MR JUSTICE SIMPSON: So it s your case that you told him in some telephone conversation, or other?

MR CURISTAN: Yes, that there was another offer came in.

MR JUSTICE SIMPSON: But did you mention the name, Propinvest?

MR CURISTAN: Yes, uh-huh. Propinvest was a very well-known company.

MR JUSTICE SIMPSON: Yes.

MR CURISTAN: And they were very, financially a very strong company.

[121] When first cross examined about this communication, the plaintiff did not say he told Mr McAreavey but said: I would have probably rang (sic) Pat Whelan…I would have informed Pat Whelan that we got a higher offer from a much bigger company." Later, when pressed about his memory of any telephone call, he said: I think I would have and I think Peter [Holmes] would have been very keen to make the call." The cross examination continued:

> Q. So just be absolutely crystal clear on this. You don t remember precisely when or how, but you re

absolutely certain on both that you communicated this to the bank, that there was an offer being made by Beltrae Partners of 107 million?

A. When and how I can t remember. I can t remember that long.

Q. Now the only way the bank would have known about PropInvest, because the offer was communicated to … your accountants, was if it was communicated to the bank. Now we have already established there is no e-mail or communication by writing to the bank, which leaves only the alternative of verbal communication. Now in your opening you suggested it was you. So you are saying that you, Peter Curistan, were the person that told the bank about this offer.

A. I would have contacted Peter (sic) Whelan in my view. We are going back years, whatever it is, twenty years ago or fifteen years ago. I can t remember if it was on the phone or whether I had lunch with him and we talked about it or not. Sorry if I can t remember."

[122] Mr Bell gave evidence in relation to the Beltrae letter. He said he was the introducer of Beltrae." The letter of 18 April 2007 is addressed specifically to him, and he passed it to SML. In cross-examination he agreed that in relation to that offer he had no meeting with any Bank personnel. When asked if he had communicated this letter to the Bank he said that he did not and that it was an offer to the shareholders (of SML). As to the specific point at issue in this section of the judgment he was asked:

Q. And consequently, you re clearly not in a position to establish on evidence that the bank was ever informed about the Beltrae offer in April 2007, are you?

A. I am not."

[123] Mr Holmes, in cross-examination, accepted that he had no evidence that the Bank was ever told about the Propinvest deal in 2007.

[124] The plaintiff says that the Bank was made aware of the Propinvest offer. In his closing submissions the plaintiff refers to a number of documents which, he says, shows that the Bank knew of the first Propinvest offer. He also asks the court to draw the inference that when Mr McAreavey referred to bluffing" in his discussions with

Mr Kinnaird in relation to the Alburn process in May 2008 (by suggesting that there was another interested party) in fact he was talking about the interest of Propinvest. I have looked again at those documents. None of them refers to Propinvest by name and it remains the case that there is no contemporaneous Bank document which refers to Propinvest during the currency of the Alburn process, thus the plaintiff s evidence is unsupported by any contemporaneous document. I have read again the exchanges with Mr McAreavey about this matter. In the circumstances I decline to draw that inference.

[125] At this point I also need to note, from the plaintiff s closing submissions, his reference to an email from Mr Maud of Propinvest to Mr McWilliams on 16 January 2009 in which Mr Maud states that we again visited the Odyssey" on 15 January 2009 and that it was clear that the management and attendant trading of the Odyssey has not improved since our last visit." The plaintiff points to the use of the word again" and since our last visit" and says:

> The fact that Mr McWilliams once more did not question or push back on these statements indicates that he was well aware of the original involvement of Propinvest…"

[126] In my view those words do not prove what the plaintiff would like them to prove. The fact that Mr McWilliams did not query the use of those words falls far short of proving, on the balance of probabilities, that the Bank was aware of the Propinvest approach at any time during the currency of the Alburn process.

[127] Mr McAreavey is adamant that he was completely unaware of any offer from Propinvest until late 2008. Having watched and listened to the plaintiff and Mr McAreavey giving evidence about this very important matter which was, in fact, fundamental to the plaintiff s case, the plaintiff s evidence has failed to persuade me that the Bank was aware of the first Propinvest offer. I preferred the evidence of Mr McAreavey. I have reached the very clear conclusion, for a number of reasons, that the plaintiff is wrong when he says that the Bank knew about the Propinvest offer during the currency of the Alburn process.

[128] First, it was clearly the plaintiff s case in opening that he communicated the information about the Propinvest offer to Mr McAreavey — there was no mention of Mr Whelan. Conversely, in his evidence, which was occasionally very vague, there was no mention of Mr McAreavey, only Mr Whelan to whom he communicated the information. Secondly, the plaintiff was unable to produce any document showing that the Bank was made aware of the Propinvest offer during the currency of the Alburn process, whether written by him or by Mr Holmes. If he genuinely had an offer from Propinvest, higher and seemingly better than the very conditional proposals put forward by Alburn, I would have expected at least one email where he communicated this fact to the Bank. The plaintiff was not slow to email the Bank about any matter which concerned him, or have Mr Holmes do so, and there are scores of such emails in the papers. I find as a fact that if the Bank had sought to persuade

or force the plaintiff to accept the (lesser) Alburn offer rather than the (greater) Propinvest offer there would have been some email or other written contact between the plaintiff and the Bank. I find it inconceivable that the plaintiff would not have registered a protest at such behaviour on the part of the Bank. Thirdly, the plaintiff was unable to refer to any internal Bank document indicating any awareness on the part of the Bank of the Propinvest offer in this period. Even if there had been oral information passed to the Bank about the Propinvest offer, I would have expected it to have made its way into some internal record in the Bank s documentation, particularly as the Bank was keen to see the Odyssey disposed of and its debt repaid. That there is no such record, in my view, speaks volumes. Fourthly, none of the documents which he highlights in his closing submissions refer to Propinvest, and I decline to draw the inference which the plaintiff wishes me to draw about the bluffing" conversation. The documentation is entirely consistent with the Bank being ignorant of the Propinvest offer and putting pressure on the plaintiff not to waver from the Alburn deal as that deal, as far as the Bank was concerned, was the only deal available. Fifthly, neither Mr Holmes nor Mr Bell was able to provide any evidence that either of them made the Bank aware of the Beltrae letter or PropInvest offer. Sixthly, when Propinvest appeared in late 2008 (which I deal with below) the initial introduction to the Bank was not couched in terms which would suggest that the Bank was being re-introduced to a company of which it had previously been aware; rather the introduction had all the hallmarks of an introduction for the first time.

[129] In addition, I note that the original Statement of Claim (before the present amendments) said the following in relation to the relevant period:

> In and around late 2006 and following discussions with the Defendant, the first Plaintiff, Sheridan Millennium Limited, determined that it would dispose of or sell the Odyssey Pavilion and IMAX, and commenced a process to effect the sale of the leases. During 2007 and 2008 a potential purchaser was identified but in or about late 2008 this process failed to conclude with the sale of the leases."

[130] That is the sum total of the pleading around the period of the Alburn process in the original Statement of Claim. There is no mention of Propinvest. In the circumstances of the case being made against the Bank, frankly, I find that remarkable.

[131] Further, even in the Amended Statement of Claim, in which the relevant paragraphs are 15I to 15O, there is no specific pleading that the Bank, being aware of the Propinvest offer, prevented SML from accepting that offer and selling to Propinvest. Indeed, in that Amended Statement of Claim there is no plea to the effect that the Bank was told about or that it knew about the offer from Propinvest in this period.

[132] I remind myself that the plaintiff has the burden of proving his case to me on the balance of probabilities. In fact, in the circumstances of this case the plaintiff s own evidence — even before taking into account the evidence for the Bank — fails to satisfy me to the appropriate standard that the Bank was made aware, in the period March 2007 to November 2008 ie the currency of the Alburn process, of the offer from Propinvest.

[133] I make it clear that I have not taken into account any expert evidence in coming to this conclusion. My finding relates to a pure matter of fact ie was the Bank aware of the Propinvest offer during the currency of the Alburn sale process? Expert evidence would not assist. The corollary of that finding is of course to consign to irrelevancy any expert criticism of the Bank which was predicated on the fact that the Bank knew about the Propinvest offer. This is particularly so in relation to paragraphs 4.23 to 4.61 of the report of Mr Griffiths.

Why did the plaintiff not sell to Propinvest?

[134] When challenged about why he did not simply sell to Propinvest, which had made a higher offer, the following exchange took place.

> Q. Why, Mr Curistan, did you not sell the Odyssey and the Tannery building to Propinvest for £107.5 million, being a higher offer?
>
> A. Because I wasn t allowed to.
>
> Q. Okay. So you weren t allowed to. Who was it prevented you? When you received that offer on 18th April 2007, who was it told you, You cannot sell to Propinvest at that price ?
>
> A. I essentially -- again Propinvest --
>
> Q. Just who, Mr Curistan? I m asking you who.
>
> A. I can t remember.
>
> Q. Sorry, Mr Curistan. Let s be clear about this. You can t remember who told you?
>
> A. I can t remember eighteen years ago. I'm sorry.
>
> Q. Mr Curistan, you don t remember who told you, but you are sure that you were told by someone in the bank, You cannot sell to PropInvest for £107.5

million. You must sell to a lower bidder ? That s your case?

A. Yes.

Q. And you can t remember who told you that?

A. I believe, and it s in writing, and I can show -- I can read it out if you wish.

Q. I just want to know can you remember who told you? Is the position you can t?

A. I believe it was Mr McAreavey.

Q. Mr McAreavey you believe. Mr Ciaran McAreavey told you that you must sell it to someone at a lower price. Then the next question, Mr Curistan, is why would you have accepted that?

A. Again, they put me under a lot of pressure not to do so, or else if I did, I would pay the consequences of receivership, etc. I didn t want to stymie the sale.

Q. A moment ago, you couldn t remember who told you it. Now you are telling us what, in fact, was communicated to you, that if you didn t do it, you would be put into receivership. …"

[135] The plaintiff was specifically cross examined about the particular 12-day period between 18th April 2007 (the date of the Beltrae/Propinvest offer to SML) and 30 April 2007 (the date of the Alburn/Noel Smyth offer). He said that in this period he was told by Mr McAreavey that he could not sell to Propinvest. He said:

A. He [Mr McAreavey] said, You can t sell to Propinvest, because you will get -- Noel Smyth will get very nasty and he will cause you a lot of problems and the bank will turn on you as well.'"

[136] Eventually, after some further skirmishing in the cross examination, the transcript shows:

MR JUSTICE SIMPSON: … I want to be clear what your evidence is. Are you telling me on oath that between 18th April and 30th April 2007 Mr McAreavey told you, You can t sell to Propinvest ?

A. Yes."

[137] Further cross-examination took place about the period between 18 and 30 April:

> Q. … Did Mr McAreavey tell you or not tell you that you couldn t sell to Propinvest?
>
> A. Yes.
>
> Q. Okay, and when did he tell you that?
>
> A. In between those twelve days that you were talking about.
>
> Q. So, between 18th April 2007 and 30th April 2007 Ciaran McAreavey said to you, You can t sell to Propinvest ?
>
> A. To that effect, yes.
>
> …
>
> Q. … Focus on the question, please, Mr Curistan. It is not funny, because you are accusing Mr McAreavey of saying something to you which you know fine well is a downright lie. It s totally untrue, isn t it, Mr Curistan?
>
> A. No."

[138] In his evidence in chief, Mr McAreavey denied that any such conversation took place. The relevant exchange between Mr Dunlop and Mr McAreavey is as follows:

> "… in summary what Mr Curistan has said is that between the 18th of April 2007 and the 30th of April 2007 on what he believes was a telephone call with you, you said words to the effect, you will see there set out, that you, that is Mr Curistan/SML, cannot sell to PropInvest and that you essentially had threatened him that he was subject to a requirement imposed by the bank, that the sale of the asset must be to Alburn and that he couldn t sell to Propinvest. Can I ask you, Mr McAreavey, for your comments, first of all, did such a telephone a conversation take place?

A. No, there was no telephone conversation like that. For a start, the bank was unaware of that offer from Propinvest in 2007. The first time I actually heard the Propinvest name mentioned was in December 2008, so I could not have been aware of Propinvest and I certainly didn t make any telephone call to Mr Curistan, as alleged"

[139] I have noted above that the original pleadings made no mention of this vitally important matter. The plaintiff was cross examined about this. The following exchange occurred:

Q. Do you know what, Mr Curistan? The interesting thing is this scandalous behaviour of the bank, this forcing to you sell at under value an asset you could have sold and escaped with millions of pounds in your pocket, do you know when the first time you made that allegation was? Can you remember?

A. No.

Q. July 2022, ten years after you commenced these proceedings, was the first time this issue was raised when you amended your pleadings.

A. Well, we amended pleadings. Exactly. Why would I have done it then? Because it was discovered. It took us twelve years.

[140] Thus, the plaintiff sought to explain why this was so by saying that it was only when the Bank provided discovery in 2017 or 2018 that he found this out. However, there is no document which shows that the Bank knew about the Propinvest offer in the period being discussed and, as I noted above, the Beltrae letter only came to light as an exhibit to the witness statement of the plaintiff served at the end of July 2025. There was a period of cross examination of the plaintiff where attempts were made to have him explain how documents disclosed by the Bank, which made no mention of Propinvest, prompted him to remember the conversation with Mr McAreavey in the 12 day period from 18 to 30 April 2007. Having watched him and listened to his evidence about this, and having re-read it in the transcript, I find his answers most unpersuasive.

[141] The plaintiff also identified an internal Bank memorandum from Maureen Harris to Mr McAreavey of 11 September 2007 as being one of a number of documents which made him remember the conversation. This memorandum runs to some four pages of close printing and goes into significant detail about the potential

deal with Alburn. Needless to say, there is no mention of Propinvest. I do not believe that this memorandum assists him in any way.

[142] Therefore, I find as a fact that the amendment to the Statement of Claim could not have come about and did not come about as a result of discovery of documents by the Bank and I find as a fact that nothing in the documents he identified could realistically have prompted him to remember this alleged telephone conversation. In the circumstances I am satisfied that no such conversation with Mr McAreavey as alleged by the plaintiff ever took place.

[143] The plaintiff was then asked why, when the exclusivity period with Alburn had come to an end on 30 June 2007 he did not simply then sell to Propinvest. The following appears in the evidence:

> A. Well, the issue there was that I was told quite bluntly by Mr McAreavey that the bank would not be particularly happy because Alburn is a very close client, Alburn wouldn t be particularly happy either and the bank went on to say that they would not give assistance in Parnell Street in the Parnell development that we had done. And there are many examples of being forced to do things by Anglo Irish Bank.
>
> …
>
> Q. So the exclusivity period ended on the 30th of June, so you are now telling us that after that period ended Mr McAreavey had another conversation with you in which he told you that even though the exclusivity period was done, that you still had to stand by the terms?
>
> A. Yes.
>
> Q. And that if you didn t do that, that he would ensure that the bank removed funding from other projects such as Parnell Street in Dublin?
>
> A. Yes.
>
> Q. So, the reason then you didn t ring Propinvest on the 1st of July 2007 was because what Mr McAreavey said to you once the exclusivity period had ended?
>
> A. Essentially, yes.

Q. And that would therefore mean, Mr Curistan, that Mr McAreavey, on a second occasion, not just once, but on a second occasion had essentially compelled you to remain in the agreement with Alburn and denied you the opportunity to sell to other bidders, such as Propinvest, who were prepared to pay more?

A. Yes."

[144] He agreed that this was shocking, but he did not tell his solicitor (from A&L Goodbody, which firm was acting for him at the time) about the call. Later he said that the threat — about not continuing further funding for the Parnell Street project was not made to him, but to Mr Holmes.

[145] Eventually he said that he told Mr Holmes about this call from Mr McAreavey. In cross examination it was pointed out to him that Mr Holmes s witness statement makes no mention of any conversation with the plaintiff about the call from Mr McAreavey. It was suggested to the plaintiff that this was simply a lie on his part, which he denied.

[146] When Mr Holmes gave evidence he was specifically asked about this. Sections of the transcript of the plaintiff s evidence were read to him, following which he was asked:

Q … Now, I have taken you to all those statements made by Mr Curistan. What you have said today in your evidence, Mr Holmes, is that the decision to go with Noel Smyth and Alburn was a decision in fact taken by Sheridan Millennium and that was a decision that was taken for commercial reasons?

A. Yes.

Q. Before you read [the] transcript, or before I told you about that, had you ever heard of a conversation taking place between Mr Curistan and the bank in which Mr Curistan had been threatened by Mr McAreavey?

A. No.

Q. And presumably then you didn t receive a phone call from Mr Curistan to say, Mr Holmes, I have been threatened by the bank and I have been

compelled to go with Alburn, rather than PropInvest ?

A. I have no recollection of that.

Q. Well, can I suggest, Mr Holmes, that would be the sort of thing that would stick in your memory, if it had happened, a threat being made by a bank official to Mr Curistan forcing him to sell to the under bidder? That would be something that you would remember, would it not?

A. It might well have been."

[147] In his evidence, Mr McAreavey was asked about this second conversation by Mr Dunlop:

Q… This is the second conversation, following the first conversation that he said took place in April, this is approaching the 1st of July or shortly after the 1st of July. So can I ask you, Mr McAreavey, did that conversation take place in the way described, or indeed at all?

A. That conversation didn t happen. I think from my perspective I was a senior manager within the bank that had come into this situation which was extremely difficult, a very distressed loan, I would have been delighted if a third party had come to the table to offer cash, its own cash to purchase the asset as it would have removed the biggest problem that I had in my lending book. So I would certainly not have dissuaded … SML from following an offer with a third party, but I certainly deny that that conversation happened."

[148] If such a conversation as has been alleged by the plaintiff between him and Mr McAreavey had taken place after the end of the exclusivity period, a conversation which the plaintiff accepted as shocking , I would have expected some record of it to have existed. The plaintiff could have, but did not, tell his solicitor about it. The plaintiff could have, but did not, email the Bank about it. The plaintiff says that the only communication he made about it was to tell Mr Holmes. Mr Holmes has no recollection of it and I agree with Mr Dunlop s question that this is something which, had it happened, Mr Holmes would have remembered. In all the circumstances I do not believe that there was any such conversation. I do not believe that Mr McAreavey rang the plaintiff after the end of the exclusivity period and made any such threat.

[149] Accordingly, I reject the plaintiff s allegations in relation to both alleged telephone conversations with Mr McAreavey.

[150] Far from being in any way forced by the Bank to continue to deal with Alburn I note from the evidence of Mr Holmes that it was SML s decision to do so, for commercial reasons. The relevant exchange took place in the cross examination of Mr Holmes:

> A. And on Monday the, whatever it was after that, we agreed that we would go with the bank s candidate, Mr Smyth, and I can t remember the reasons particularly for that, but I think we were, we had been encouraged by the bank obviously to look very seriously at this offer and I suppose in a sense there may have been this aspect of the deal from Beltrae, or whomsoever, that it had come in at late stage and there wasn t any sort of written undertaking behind it. So, I suppose logically, and I m trying to remember as much as I can, but logically we would go, there were two offers, one was an offer which we, which might have come through from Beltrae in a final stage, whereas we had an offer that was substantive from Mr Smyth.
>
> Q. So, what you are saying is that it was a decision taken by Sheridan then that it was, on balance, commercially had decided to go with Mr Smyth and Alburn?
>
> A. I think that is so. And I think we did feel that this was something that the bank had been encouraging us to take forward from, whatever it was, the 18th of March or whatever, the original deal. So in a sense it was, I suppose, you might say a safer bet in the sense that it was substantive, rather than unsubstantiated.
>
> …
>
> MR JUSTICE SIMPSON: So you had a formal substantive offer from Alburn?
>
> THE WITNESS: Yes.
>
> MR JUSTICE SIMPSON: But you had a less, or unsubstantial indication from Beltrae?

THE WITNESS: Yes, and obviously there was a, there was a promise, as it were, of a substantial background to that, but it still wasn t a substantive offer as the one from Smyth.
…

MR DUNLOP: But that, dealing with that evidence, Mr Holmes, would be a perfectly legitimate commercial decision to take, that at that level the more important issue was getting a sale?

A Yes.

Q. And the decision was taken by Sheridan that in terms of the beauty parade between the offers it had, it was going to go with Sheridan. That, you say, is a clear recollection that you had?

MR JUSTICE SIMPSON: With Alburn.

MR DUNLOP: With Alburn, sorry, with Alburn.

A. Yes, as far as I remember, yes.
…

Q. … What you have said today in your evidence, Mr Holmes, is that the decision to go with Noel Smyth and Alburn was a decision in fact taken by Sheridan Millennium and that was a decision that was taken for commercial reasons?

A. Yes."

[151] Accordingly, on the basis of the evidence given by and called by the plaintiff I am satisfied that Mr Holmes is correct when he says that the decision to sell to Alburn, in preference to Propinvest, was one taken by SML for commercial reasons.

[152] Mr Griffiths, in paragraph 4.60 of his report, says:

> If, on the facts, the Court decided that Anglo did provide advice and (sic) SML to accept the offer from Alburn in preference to Propinvest, which was offering £2.5 million more, then, in my opinion, a lender in that situation would be in a serious position, breaching its duty to an existing client, placing its interests before that of the client and

would go beyond the usual nature of the Bank s relationship with a client than that of a secured lender."

[153] However, given the evidence leading to the decision to go with Alburn which I have examined and my findings as recorded above, such criticism is unsustainable.

Why did the Alburn deal not complete?

[154] To return to the narrative, on 26 March 2007 Alburn wrote to the plaintiff putting forward proposals, subject to contract. It is the Bank s case, and I have found it to be so, that as far as the Bank was concerned at that date Alburn was the only interested party. The Alburn proposal envisaged completion by the end of June 2007. Alburn s proposals included:

- That Alburn would purchase the entire share capital of Quito (the Tannery) and SML (Odyssey) for £105 million (£23m Tannery; £82m Odyssey).

- A total of £4.5 million would be set aside in an escrow account, essentially to guarantee 3 years' rent for the Sheridan associated tenants.

- An exclusivity agreement to provide a period of 3 months to complete due diligence.

- All reasonable endeavours to complete no later than 30 June 2007.

[155] The plaintiff says he was not happy with the Alburn terms and discussed it with the Bank. He says Mr McAreavey told him that he had to do this or Smyth (of Alburn) would walk away and we will appoint a receiver." However, the plaintiff had to accept that at that date it would have been legitimate for the Bank to put in a receiver; SML was losing money every year; the interest rates charged by the Bank had been agreed by him; the only thing preventing SML going into administration or being rendered insolvent was the money being lent by the Bank. Insofar as the plaintiff suggests that this might be improper pressure, I reject such a suggestion. I am entirely satisfied, from the chronic cashflow problems and problems relating to arrears of interest and the increasing debt, that the Bank, anxious to have a deal completed with the only player on the field, was fully entitled to make such a point to the plaintiff.

[156] Alburn s March 2007 letter was followed up by a further document of 30 April 2007 setting out the full extent of Alburn s proposals, again subject to contract. The proposal was accepted by the plaintiff and Mr Holmes, both of whom signed the

document indicating their agreement to the terms and conditions contained in the letter. This included acceptance of the exclusivity period. The plaintiff makes the case that he was forced to accept the exclusivity period by pressure from the Bank but in cross examination both he and Mr Homes admitted that the exclusivity period was negotiated by SML and Alburn, with no input from the Bank whatsoever. Mr Holmes, in paragraph 19 of his witness statement had said that the exclusivity period was the Bank s way of ensuring that no other offers could be explored. However, after cross-examination on this point by Mr Dunlop, the exchange took place with me:

> MR JUSTICE SIMPSON: So, when I read the last sentence of paragraph 19 [of Mr Holmes s witness statement] — 'With hindsight it is clear that this requirement [for exclusivity] was a means by the bank to ensure that the deal with Smyth was protected and that Sheridan would not return to explore offers from other bidders' — that s just wrong?
>
> THE WITNESS: Yes."

[157] Interestingly, I note from a detailed letter sent by Mr Holmes to the Bank dated 9 January 2010, when he gives an historical overview of matters, Mr Holmes says of the exclusivity period:

> During this period of exclusivity, there were some approaches by local property interests regarding Odyssey, but none was of a nature or quality which would have been attractive in comparison to the terms being offered by Alburn." [emphasis added]

[158] Thus, lest there be any lingering suggestion that the exclusivity period deprived SML of the chance of a better offer (other than Propinvest, which was not known to the Bank), the above belies such a suggestion.

[159] Far from early completion of the deal with Alburn, the whole process progressed very slowly. When the plaintiff raised this with the Bank and suggested that other offers should be pursued he says that Mr McAreavey suggested that if he walked away from the Alburn process support from Anglo could fall away and SML would then be at risk of aggressive action from other parties." He also alleged, inter alia, that the consequences for SML and Quito [owner of the Tannery] would be serious if the Alburn offer was not accepted, and intimated that the Bank may need to step in an appoint a receiver."

[160] This is rejected by the Bank. Mr McAreavey says that there

> was absolutely no restriction on SML identifying a buyer or, indeed, securing a new lender to refinance SML. The

> Bank would have been delighted to secure repayment of its loan whether by sale or refinance. I have absolutely no doubt whatsoever that by 2006 the Bank had no desire to hold onto the Odyssey as a secured asset and was simply determined to try to obtain repayment of the loan which, by the end of 2006, was approaching £80 million."

[161] I accept both the logic and the truth of Mr McAreavey s evidence on this point and reject the plaintiff s allegations.

[162] On 26 September 2007 there was an Alburn/SML meeting to discuss the terms of the anticipated Odyssey contract. The plaintiff and Mr Holmes were in attendance as were their legal representatives. No person from the Bank was present. In cross examination Mr Holmes accepted that the contract conditions were negotiated between the parties — SML and Alburn — and their lawyers, and that the Bank was not involved in those negotiations and had no part in the terms of the contract; this notwithstanding the plaintiff s belief that the Bank had serious input" into the contract. When pressed in cross examination about this belief, the plaintiff was unable to identify any evidence to support it. I find as a fact that the Bank had no input into the terms of the contract between Alburn and SML.

[163] Eventually, on 13 November 2007, a contract was signed between SML and an entity called Alburn (NI) Ltd. (a £1 or £2 off-the-shelf company, therefore with no assets). The contract envisaged a completion date of 30 November 2007, but had a long-stop date of 13 November 2008. Funding of the Alburn proposal was to be by the Bank. A deposit of £1 million was paid by Alburn. Even on the date of the signature of the contract the Bank was expressing concerns. On 13 November 2007, in an internal memorandum, the Bank noted that there were still issues to be resolved. Those particularly highlighted were the consent of OTC and the ongoing cinema litigation. Mr McAreavey considered that the latter concern puts serious doubt on completion by Nov 30 and I will have to focus Sheridan s attention on this as they are not treating it with much importance."

[164] The plaintiff accepted that the Bank s serious doubt that the contract could be completed by 30 November was fair comment. It was also reflecting reality. In the event, the contract did not complete on 30 November 2007.

[165] The contract contained a significant number of conditions to be fulfilled by SML. For example: SML had to confirm that all outstanding debts due by it to OTC had been paid; that OTC s consent to the assignment was forthcoming; that OTC consented to the closing down of the IMAX theatre and to a change of use; that all disputes in relation to the property between SML and OTC had been resolved. SML had to provide evidence, to Alburn s satisfaction, that all the proceedings in relation to the cinema were resolved prior to the completion date.

[166] Clearly these were onerous conditions, but the plaintiff says that he was confident that we could address these and believed there would be no barrier to completion of the sale proceeding." He says, however, that Alburn/Smyth were deliberately stalling the process so as to renegotiate their offer price."

[167] Part of his case involves an allegation that when the Bank first introduced Alburn/Smyth as potential purchasers that introduction was accompanied by positive statements of his financial strength and experience as well as the high regard he is held in by senior personnel of Anglo Irish Bank, including [Mr McAreavey]." In fact, says the plaintiff, he subsequently discovered, from an internal Bank memorandum of 11 September 2007, that by then the Bank had still made no assessment of Alburn/Smyth s financial position and had not approved any funding from the Bank. The memorandum includes the following: "… we feel that it is necessary to provide a brief outline of proposed package while assessing the Bank s appetite to provide funding." (The underlining is the plaintiff s)

[168] The plaintiff also identifies what he called a number of red flags" within the Bank s internal documentation which, he says, were never communicated to him. On the contrary he says, at the time of the signing of the Heads of Terms I was still being led to believe by Anglo that there would be no issues with Alburn completing and that Anglo was going to be funding the purchase."

[169] At paragraph 47 of his witness statement the plaintiff deals with the following period. Again, it is appropriate to set out what he says.

> Over the next number of months I worked on fulfilling the contract conditions so that we could complete as soon as possible. We were successful in addressing the majority of the conditions with the only condition remaining concerning legal proceedings to be resolved in respect of the IMAX theatre. During this period, however, communications from Alburn were slow and sporadic. In or about June/July 2008, the proceedings regarding the IMAX were resolved and all conditions had been fulfilled. By this date however it seemed that Alburn s interest was waning. This is reflected in a Credit Report by Anglo Irish Bank dated June 2008 which stated:
>
> > Promoters have agreed sale of primary asset. However, progress has been slow with the enforceability of the contract now doubtful.
>
> And under Action Plan heading:
>
> > With the completion on the sale of Odyssey to Alburn on the originally agreed terms looking

> increasingly unlikely, the promoters have been instructed to re-engage with Alburn in an effort to renegotiate a sale in the short term. (emphasis added [by the plaintiff])

And pressure to close any deal with Alburn is enhanced on (sic), stating:

> While gravity of the current situation has been made clear to the promoters at local level, they are due to be met by the Bank at Director level to reiterate the importance of making positive progress.'"

[170] The document referred to by the plaintiff is actually a Watch List Case Monthly Report dated June 2008. This notes the Bank s exposure to be some £72.787 million, with current arrears of interest of some £3.3 million. The plaintiff alights on the phrase the promoters have been instructed to re-engage…" as evidence of the Bank taking control of the negotiations. However, as to this Mr McAreavey says, at paragraph [94] of his witness statement:

> So far as the funding arrangements for Alburn were concerned, it is clear that the Bank s internal processes concerning the basis on which a loan might be made to Alburn were highly confidential and were not matters that the Bank could disclose to SML. By the Autumn of 2007, I was concerned that no contract had been signed with Alburn not least because it was my impression that the market was softening and the price agreed in March 2007 was starting to look more and more expensive from Alburn s perspective. Events were beginning to unfold (including the failure of Bear Stearns in June 2007 and Northern Rock in September 2007) which in hindsight marked the start of the global financial crisis. These events were having an impact on the liquidity available in the UK banking market, particularly for large commercial property transactions, and began to impact on property valuations and bid levels on commercial property. The Bank gave no assurances to SML concerning the success of the Alburn deal and it is crucially important to bear in mind that the negotiations as to terms and conditions of the deal between SML and Alburn were conducted between those parties directly without recourse to the Bank. In the drafting of the relevant contracts, SML was advised by its own solicitors and the Bank was not involved."

[171] Having considered the contemporaneous documentation and the oral evidence, I accept Mr McAreavey s evidence on this point.

[172] After the contract had been signed on 13 November 2007, a copy was made available to the Bank. In his witness statement, at paragraph 95, Mr McAreavey identifies a number of matters which caused concern for the Bank. First, the purchasing entity was a SPV with no strength of covenant; secondly there was a long list of preconditions which needed to be satisfied within" the long stop period. At paragraph [96] and [97] he says:

> 96. As already noted above, the deal between Alburn and SML was negotiated between the parties directly. I was personally surprised when I read the contract because set against a market which appeared to be deteriorating, Alburn held considerable power to renegotiate the terms given the extensive conditions precedent and, more importantly, could walk away from the deal with very limited exposure because the counterparty to the contract with SML [ie Alburn (NI) Ltd] had no assets.
>
> 97. Ultimately these preconditions, combined with the deteriorating market backdrop, led to a very protracted and drawn-out sales process. Even though the Bank had communicated to Mr Curistan as far back as August/September 2006 that the Odyssey had to be sold by March 2008, the long stop date in the contract negotiated by SML was 30 November 2008. This effectively meant that the Bank was faced with the prospect of either continuing to fund SML in the hope the Alburn deal would complete, or allow SML to become insolvent with the inevitable collapse of the Sheridan group of companies."

[173] In my view the terms of the contract negotiated by SML were disadvantageous to SML and effectively gave the whip hand to Smyth. This cannot be laid at the door of the Bank — it is entirely due to the outcome of the negotiations conducted by SML and its advisers.

[174] Moving forward in time, on 28 July 2008 Alburn wrote to SML indicating that SML had failed to meet all the conditions in the contract. On the same date Alburn sent a further letter setting out different terms on the basis of which it might be prepared to re-negotiate. These new terms were not acceptable to SML and by mid-August 2008 it was clear that the Alburn process was ending. Mr McAreavey met the plaintiff and Mr Holmes and, on 18 August 2008, wrote an email noting that SML, having taken legal advice, were at the end of the road with Alburn. The plaintiff says, I had no interest whatsoever in having any relationship with Noel Smyth and/or

Alburn due to a complete lack of trust in both parties and unfortunately Anglo had total control of the finance and operational activities of SML and myself."

[175] During all this time the Bank continued to support SML financially. By the late summer of 2008 the contemporaneous documentation shows a worsening financial position — on 29 August 2008 SML notified the Bank that statutory demands were issued against three of the Sheridan associated tenant companies, requiring some £318,000 of further borrowings; on 1 September 2008 SML informed the Bank that OTC had issued a statutory demand against SML for some £255,000; on 5 September 2008 the Bank received a letter from a firm of solicitors acting for OTC and threatening to forfeit SML s lease. The Bank perceived this as a significant threat to its underlying security. Ultimately the Bank paid the outstanding debts to protect its security.

[176] Mr McAreavey says in his witness statement:

> 106. By this stage, I was personally very doubtful as to the merits of continuing to support SML. On 24 September 2008 I had sent an email internally within the Bank setting out my concerns about the Bank s position. … I would highlight that the Sheridan companies occupying commercial units were not only failing to pay rent to SML, but the Bank was having to fund Rates together with PAYE and VAT.
>
> 107. Despite my reservations, the Bank continued to support SML and elected to continue seeking some form of sale of Odyssey rather than put SML into an insolvency process."

[177] The plaintiff says that he had fulfilled all the conditions of the contract with Alburn and blames the Bank for the failure of the process to complete. The Bank denies that it was responsible in any way for the collapse of the Alburn deal, but in any event it makes the case that SML were never in a position to satisfy, and did not satisfy, the conditions which Alburn included in the contract negotiated between the parties and dated 13 November 2007. Mr Smith s letter clearly shows that, as far as Alburn was concerned, all the contractual conditions had not been met by SML so, on that basis, the transaction would not complete. I also note that the plaintiff agreed in cross-examination that this failure was nothing to do with the Bank.

[178] Alburn had paid £1 million deposit under the Heads of Terms. If the plaintiff was right, that SML had fulfilled all the conditions, then in not completing the transaction Alburn was in breach of the contract and it was open to SML to retain the whole of the deposit. Even if the plaintiff was advised, as he says he was, that to bring proceedings against an off-the-shelf company with no assets for breach of contract would be fruitless, nevertheless at least if he was right that Alburn was in breach, SML

could have retained the £1 million deposit. That SML did not do so but, rather, returned the deposit is testament to the fact that SML had not fulfilled the conditions.

[179] Just to complete the Alburn process picture, on 18 November 2008 Mr Smith (Alburn) wrote to Mr Whelan (Bank) saying Unfortunately our discussions and contract with Odyssey came to an end last week and we have now amicably and mutually terminated discussions between us." The letter ended with the assertion that Alburn could never get satisfaction on the outstanding litigation." In relation to the outstanding litigation Mr Dunlop asked the plaintiff: So that means, Mr Curistan, you were unable to satisfy the conditions of the Alburn contract?" The plaintiff answered Yes."

[180] In cross examination the plaintiff was pressed about this. The following exchange took place:

> Q. …When you come to present a case, Mr Curistan, you made a case and your case was, and continues to be, that you were in a position to complete with Alburn and that they, that is Alburn, walked away from the contract in breach of that contract?
>
> A. Yes.
>
> Q. And all the evidence that is available, can I suggest to you, including this letter and the correspondence we have looked at already is to the contrary, that in fact you couldn t satisfy the conditions and Alburn forfeited and took back their deposit and the parties mutually agreed and accepted that the contract was at an end?
>
> A. I disagree.
>
> Q. You disagree. But you have no evidence, you have no evidence and you did not call any evidence and your statement doesn t show any evidence of that being inaccurate?
>
> A. Yes."

[181] It is correct that no evidence was produced by or on behalf of the plaintiff to prove that all the conditions set by Alburn in the contract were met by SML.

[182] In all the circumstances I find as a fact that SML did not meet all the conditions in the contract, as a result of which Alburn was entitled not to complete and was entitled to the return of its deposit — which is what happened.

Overall conclusion on the Alburn sales process

[183] I find that the Bank was not aware in this period of the Propinvest offer and accordingly the plaintiff s case — that the Bank prevented him selling to Propinvest — is unsustainable. I find that the decision of SML/the plaintiff to go with Alburn was made for the reasons accepted by Mr Holmes, and not because of improper pressure from the Bank. I find that neither of the alleged telephone conversations between the plaintiff and Mr McAreavey occurred. I find that the Bank was in no way responsible for the failure of the Alburn deal to complete. I find that the deal did not complete because SML, who had been involved (with its lawyers) in the negotiations leading to the contract, was unable to fulfil all the conditions contained in the contract.

The PBN process

[184] It is common case that following the collapse of the Alburn process the combination of the value of SML (approximately £43.3 million, per the CBRE report of November 2008) and the total level of indebtedness of SML (approximately £73 million) meant that the company was some £30 million underwater", and this in the light of the continuing devaluation of property in the global financial crisis. In fact, in an email dated 18 October 2008 Mr Brian Lavery of CBRE notified the Bank that he did not think that a sale of the asset was then an option with the Odyssey.

[185] Meanwhile, both the Bank and SML were trying to identify third party entities which might be interested in acquiring SML/Odyssey. The plaintiff says in his Amended Statement of Claim at paragraph 16:

> On or after late 2008 the Defendant and the first Plaintiff agreed that the first Plaintiff would continue to seek a purchaser for the leases, but the Defendant would also continue to seek a potential purchaser from amongst its clients. In and around late 2008 or early 2009, the Defendant identified one of its clients, namely PBN Holdings Limited (hereafter PBN), a company … carrying on the business of property development … as potential purchaser of the leases, or in the alternative a company related to PBN…"

[186] I find it surprising that this important paragraph is not acknowledged by Mr Griffiths in his report when he criticises actions of the Bank during the PBN process. The failure to acknowledge that both parties were striving to find a potential purchaser in a worsening market is somewhat disappointing.

[187] The plaintiff says that during the next few months, ie late 2008 onwards, a further 13 interested parties expressed interest in acquiring the Odyssey leases from

SML, and he identifies these in a schedule provided to the court. At paragraph [52] of his witness statement, he says:

> Mr Peter Holmes … and I met Mr Pat Whelan (PW) … on 12 August 2008, at which time a range of options open to SML, and the Sheridan Group at large, was proposed. The discussion ultimately focused on the need to achieve the disposal of Odyssey to a third party within an eighteen month deadline set by PW."

[188] Tony Carey, of Cooney Carey, was commissioned by the Bank to provide a report on SML s and the Group s financial position. That report noted that the most recent audited accounts were more than two years prior to the date of the report, relating, as they did, to the period ending 2 April 2006. It projected that SML might require a further £18 million over the following 3 years and noted that other SML associated companies might also need funding.

[189] Around this time OTC, under the provisions of the lease, issued what is termed a step-in notice.' Although the plaintiff is of the view that the issuing of that notice was vigorously contested by SML, the Bank agreed to underwrite the payments to OTC of outstanding rent and service charges due from SML, again to protect its security. In a telephone call between Mr Holmes of SML and Mr Whelan of the Bank which took place on 22 October 2008 the Bank expressed its concern at the service of the 60-day step-in notice and the potential repercussions for the Bank. Mr Whelan indicated that a Bank client, Mr Pat Kearney (PBN), might be interested in acquiring the Odyssey. PBN was a group of companies owned by Pat Kearney and Neil Adair. Mr Adair had been a former employee of the Bank. Mr McAreavey, in his witness statement, described it as one of the Bank s top five clients in Northern Ireland with an impressive track record in commercial development.

[190] It transpires that a Bank official, Mr McWilliams, first met with PBN in early October 2008, at a time when it was becoming clear that the Alburn deal was not going to proceed. At the time the alternatives for the Bank were either to appoint an administrator and have, effectively, a fire sale of SML s assets or to continue to support SML and try to find a purchaser.

[191] Of this development, the plaintiff says in his witness statement:

> 59. This represents a significant moment in the disposal process. It is clear from subsequent discovery of documents that at 1 October PW [Mr Whelan] had already considered how the Bank s relationship with PK s [Pat Kearney s] company PBN (Holdings) Limited (PBN) might develop as a partnership between it and the Bank, with the Bank having a significant financial interest in the proposed relationship, indeed proposing what amounts to a

partnership between the Bank and PBN. PW s email of 7 November 2008 to PK is of great importance and clearly confirms that PK is PW/ Anglo s definite preferred purchaser, despite many other interested parties. In addition, this email sets out PW s intention to form a partnership with PK and to totally ignore their fiduciary duties to the principal SML. This is illustrated as follows:

> I met Peter Curistan on Wed last and I spoke openly about our concerns and our plans for Odyssey. I mentioned that you might have an interest, but only on the basis that he steps away completely. In typical Peter fashion he won t fight a battle he can t win, so he is interested in pursuing this. I told him to speak openly with Neil [Adair, director of PBN] on Monday, and let s see if there is the basis of a deal. My view is that the bank takes a shareholding with you in the development, and we can share some of our potential upside (if it materializes!) with him, but he effectively hands over the keys. This will allow him to salvage some pride and hopefully get something back for all his stress and hard work putting this together. I was very clear that any equity stake would be an allocation of the bank s shareholding and he would have no rights or ability to get involved in the future direction of the scheme. My idea is that we decide what can, or needs to be done to move it forward, and we split the equity. You get X for your management and expertise and we (the Bank) get X to pay back the existing debt and provide both of us with a return.'"

[192] I pause here to note, by way of context, what had been happening in the global financial markets. In the middle of 2007, the sub-prime mortgage crisis began in the United States. The problems spread to global credit markets. In March 2008, Bear Stearns, the American investment bank, securities trading, and brokerage firm was sold to JP Morgan in a fire sale", assisted by US federal financing. In September 2008 Lehman Brothers, the fourth largest US investment bank filed for bankruptcy. Meanwhile, in the UK, Northern Rock Building Society had had to seek financial support in September 2007 and was nationalised in February 2008.

[193] It is the plaintiff s case that the Bank assumed control, direction and management of this process of sale" to such an extent as to amount to shadow

directorship on the Bank s part. The Bank denies this. In his Amended Statement of Claim the plaintiff asserts:

> 19. The defendant so determined that the leases be sold to PBN notwithstanding that to the knowledge of the defendant there existed other and better placed potential purchasers both in terms of the security or recourse available into the context of (sic) financing a purchase of the leases and in terms of consideration for the leases.
>
> 20. The defendant further so determined that the leases be sold to PBN whilst failing to disclose to the plaintiffs the true nature of its relationship with PBN and/or one of the directors of PBN, in particular that the defendant had entered into an arrangement with a director of PBN, one Patrick Kearney, where the defendant had provided to Mr Kearney as part of a Golden Circle or Maple 10 a secret and non-recourse loan to purchase shares in the defendant.
>
> 21. The defendant so determined that the leases be sold to PBN whilst failing to disclose the true basis on which the defendant had identified and selected PBN as the party to how the leases were to be sold, including that the proposed deal would assist PBN with liquidity and solvency issues then being experienced by PBN."

[194] Mr Kearney was one of a group of Anglo customers, later to become known as Maple 10, each of whom was loaned some €45 million to buy Anglo s shares. Subsequently several of the Bank s employees were convicted of, and sentenced to imprisonment for, offences arising from these loans. The plaintiff says that the relationship between the Bank and Mr Kearney was significantly influenced by this loan. Of this relationship he says in his witness statement:

> 62. What is now clear is that the involvement of PK and his company PBN was part of an incestuous relationship steered by the Bank for both its and PK/PBN s interests, and entirely neglectful of the best interests of SML/SG. So much is evident from the subsequent chronology as the process evolved. The position of PK/PBN was consistently misrepresented by PW, and subsequently by Mr Joe McWilliams (JMcW) and CMcA, both in terms of a failure by them to reveal the Bank s direct preference for PBN s involvement, and the desire to ensure that the Bank benefitted, albeit at the expense of both me and SML, from the disposal of Odyssey and the linking of this to a financial relationship with OTC. The continued misrepresentation

by the Bank s officials was entirely driven by the desire to promote PBN s interests and those of the Bank, even at the expense of me/SML, regardless of their fiduciary duties."

[195] It would be difficult to exaggerate the deep suspicion which the plaintiff harbours as to the motivation of the Bank in relation to Mr Kearney of PBN or as to the relationship between them, which he describes above, and how this played out to the detriment, he says, of SML/him. A great deal of his rancour and many of his conclusions and submissions are fueled by this suspicion. He has referred the court to many criticisms of the Bank, all of which are in the public domain, arising from the Maple 10 scandal.

[196] The plaintiff identifies Seamus Jennings of CUSP as someone who had expressed interest in the property around October 2008. This interest, he says, was communicated to Anglo, but was unknown to the plaintiff. A company called Harcourt had also expressed interest. Of this company the plaintiff says: This again was not communicated to SML at the time and it seems that Anglo was not prepared to consider Harcourt, as OTC considered Harcourt a competitor so they thought by declining this deal they could get more favourable terms from OTC to benefit PBN."

[197] Mr McAreavey says he was unaware of 13 interested parties (referred to above as alleged by the plaintiff in paragraph 52 of his witness statement). An internal Bank memorandum of 4 December 2008 identified only 3 interested parties" — Paddy Kearney/Neil Adair (PBN Holdings Ltd.), Shamus Jennings (CUSP) and OTC. In the event Jennings never made a formal offer and OTC s proposal was almost derisory. There was also some interest from Harcourt (Pat Doherty) but this did not develop into any formal offer. That left only PBN.

[198] Mr McAreavey also denies that any period of 18 months was discussed, as asserted by the plaintiff in paragraph 52 of his witness statement which I quoted above in paragraph [187] of this judgment. I am satisfied from the materials and the evidence that there was no <u>further</u> 18 month period being discussed at this time (ie late 2008). The only 18 month period ever discussed was in August 2006, and I reject the assertion to the contrary made by the plaintiff.

[199] There was a meeting on 17 November 2008 involving Messrs O Neill and McWilliams of the Bank, the plaintiff and Mr Holmes. The following day draft Heads of Terms were sent by the Bank to the plaintiff setting out the Bank s proposals to facilitate the disposal to a third party of the interests in Odyssey Pavilion currently owned by SML and [the plaintiff s] exit from the project."

[200] The terms included the assignment of SML s leasehold interests to a new company (Odyssey Newco"), funding for this assignment to be provided by the Bank; funding a commercial vehicle owned by the plaintiff to the tune of €16.1 million in relation to the Parnell Centre in Dublin; the release of the plaintiff s personal guarantees in relation to the current borrowings of SML ; the provision by SML of

vacant possession of a number of Curistan connected units" in the Odyssey Pavilion; rents and service charges discharged at the completion date (31st January 2008). Term 9 provided for a 50:50 split of any profits after repayment of the debts to the Bank, ie should the Bank recover its moneys and should there be any subsequent profit, this would be shared equally between the Bank and the plaintiff.

[201] The document envisaged a completion date of 31 January 2009 (wrongly stated in the letter to be 31 January 2008). In cross examination the plaintiff agreed that this was a good offer made by the Bank and that he was happy with the proposals. This is consistent with his contemporaneous view in his letter of reply to the Bank s proposal in which he said:

> We were grateful for positive and constructive approach being taken by the Bank… and appreciate the consideration which has been given [by the Bank] to the current circumstances. We welcome the proposed initiative which seeks to achieve a desirable outcome for both the Bank and ourselves."

[202] Interestingly, one of the plaintiff s mantras is that the Bank was clandestinely trying to remove him from the Odyssey. However, as appears at least from the letter of 18 November the Bank made no secret of the fact that it was seeking his exit from Odyssey and in reply to the letter of 18 November the plaintiff expressed no surprise or alarm at the use of the phrase and your exit from the project."

[203] In his closing submissions the plaintiff says that central to the choice of PBN was the strategy to use OTC to force me out by capitalising on my challenged relationship with OTC." However, it is important to note that the reality of the situation was that OTC were just not willing to continue to work with the plaintiff. Since OTC s consent was required before any assignment could take place, there was no room for a solution which contemplated the plaintiff s continuation in the project. The plaintiff accepted this in cross examination:

> MR DUNLOP: … Mr Curistan, just pausing there, you have accepted the OTC was totally opposed to you and wanted you out. Isn t that right?
>
> A. Yes."

[204] In passing I note that at paragraph 120 of his witness statement the plaintiff alleges that the Bank (and PBN) used the failed relationship between me and OTC for their own purposes as a means of gaining advantage." I reject this assertion having considered all the evidence. It is clear beyond peradventure, as essentially was acknowledged by the plaintiff, that there was no possibility of OTC agreeing to any assignment if the plaintiff remained in any guise in the Odyssey.

[205] In December 2008 Mr Carey (of Cooney Carey) reported again. In relation to his report the following exchange took place in the cross examination of the plaintiff:

> Q… Mr Carey reviewed the cash needs in December 2008…This is the cash analysis that he undertook, another report the bank wanted to establish just what the position was. Page 1821, we can see again the problem was that you did not properly maintain company accounts, and he says:
>
> > Despite the group s improved systems and best efforts, it is exceptionally difficult to obtain an up-to-date, accurate and coordinated set of data in a speedy fashion. The level of inter-company balances and transactions in journals makes the accounting difficult to verify. The apparent use of funds from one company without particular cognisance of which company the funds belongs to creates a most difficult challenge. In effect, funds are utilised as if the group and the associates were one entity. It has been a significant period since audited accounts were produced and that hinders the availability of third party confirmations.
>
> Is that a fair description of the level of the accounts in Sheridan Millennium at that stage?
>
> A. Yes, going in as an outsider coming and looking at it, yes.
>
> Q. An outsider who was a chartered accountant. Isn t that right?
>
> A. Yes. I think so."

[206] There followed some exchanges between SML and the Bank. The plaintiff says, in paragraph 68 of his witness statement, that:

> "… the Bank was already looking to achieve a removal of Sheridan from selected units in Odyssey so that they could be offered as vacancies. [As it further transpired, the removal of me from the Pavilion was an important agenda for OTC. This was clearly orchestrated to appear as if the officials were working with me/SML, whereas, in practice,

> they were entirely prepared to sacrifice those interests in favour of PBN and the Bank. Even at this early stage, it is clear that contact between the Bank and the Trust was such that there was an agreed strategy in terms of PC leaving Odyssey.]"

[207] Quoting from internal Bank communications the plaintiff says (paragraph 68), and notes:

> By 15 December, the Bank officials way forward with PBN was already clearly determined and had been mapped out:
>
> > The way forward is for us to sign off on the deal for Peter to exit…, appoint PBN as the preferred purchaser and allow them to get into negotiations with Odyssey Trust in Jan to see what sort of concessions can be achieved ... We aim to complete the deal asap and while the deal with Peter aims for Jan 31, PBN have indicated that Feb 28 may be more realistic.
>
> By 17 December, the Bank s confidence of a successful outcome is apparent in the extensive minute from CMcA:
>
> > ... we have agreed with PC. … a deal which would facilitate his exit from Odyssey.'
>
> In the same document, the Way Forward is clearly set out:
>
> > We are proposing to agree a deal for Belfast clients PBN (Paddy Kearney and Neil Adair) to take ownership of and manage through development of the Odyssey Pavilion to maximise our recoveries ... we hope that together with PBN we will be able to negotiate concessions from OTC in return for removing PC. ... If we can agree PBN as preferred developer here, it is proposed that they would commence negotiations with Odyssey Trust in early January to see what concessions would be achievable, with an aim to complete a deal by Feb 28.

Conclusions

> ... our best option at present is to proceed with the restructuring and remove PC from the project as it is clear that none of the upside from OTC can be achieved if he remains involved ...
>
> 1. Consider exit deal for PC ...
>
> 2. Agree PBN as preferred bidder ...
>
> 3. Finalise deal structure with PBN by Jan 31
>
> 4. Deal completion by Feb 28 2009.'"

[208] The plaintiff says, at paragraph 69 of his witness statement:

> 69. The nature and consequences of this unilateral, prejudicial approach to me and SML are all too apparent. The stance adopted by the Bank officials has been one of significant misrepresentation. It is clear that the officials had arrived at an agreed approach which, on the surface, has given SML a role in the process. But the officials goal has been to maximize the benefit to the Bank of the link between PBN and OTC, even if this is at the expense of PC and/or SML. It is important in the subsequent sequence of events to note that the confirmation of PBN as chosen purchaser had clearly been made, even as early as the middle of December, and arguably, even well before this."

[209] The plaintiff was challenged about this statement by Mr Dunlop, after taking the plaintiff through the terms of the Bank s proposal of 18 November and the memorandum. The relevant part of the transcript reads:

> Q. Now standing back now, Mr Curistan — maybe you didn t understand the effect of that until you had gone through it now carefully. Are you still going to suggest to his Lordship that that was unfair and that the officials goal was to maximise the benefit to the bank?
>
> A. No, I think that it was a very sensible deal."

[210] Having considered the contemporaneous materials and the evidence both of the plaintiff and Mr McAreavey I reject the plaintiff s characterisation of the Bank s actions in paragraph 69 of his witness statement. I am entirely satisfied that the Bank, in light of the deteriorating global financial crisis and the deteriorating financial position of SML was hoping to get a deal over the line. As acknowledged by the

plaintiff, no such deal would be possible unless OTC were prepared to accept it. Therefore, the reality of the situation was that OTC had to agree.

[211] In my view the reality has to be recognised. That reality was first, that there was no possibility of a sale of Odyssey (as Mr Lavery had trenchantly pointed out); secondly, that there was no likelihood of another financial institution refinancing SML s borrowings in light of the then current valuation of the property. Therefore, whatever entity came in would have to be funded by the Bank. In effect, the Bank would simply be exchanging one borrower for another — the key difference being that the new borrower would have to be one with whom OTC would be prepared to work (unlike SML/the plaintiff). Without such a relationship OTC would not provide the necessary consent and no assignment could be effected.

[212] Propinvest also appeared on the scene. On 10 December 2008 (without revealing the name Propinvest) the plaintiff emailed Mr Whelan saying I have been approached by someone representing a UK developer/leisure operator who has indicated he would be interested in acquiring Odyssey…" On the following day the plaintiff emailed Mr McWilliams. His email read:

> I have been contacted by someone who could be keen on getting involved with Odyssey and the bank. The main contact is Connor McCullagh (sic) and I have recommended he contact you directly for a meeting. They seem to be a very credible organisation based in the UK with property and leisure experience and may well be worth meeting up with."

[213] On 12 December 2008 a Mr Conor McCullough of Beltrae Partners Ltd. emailed Mr McWilliams of the Bank. The email included the following:

> In terms of who I am, my company is called Beltrae Partners Limited…and I have had dealings with several of your colleagues over the years [names given] from deals we have done via our Dublin office, and several other Anglo people in Belfast via our Belfast office. Hopefully they will vouch for my credibility!"

[214] It is to be remembered that the plaintiff s case is that the Bank was informed of the first Propinvest approach in April 2007 following the Beltrae Partners letter to Mr Bell of PWC. I find it very surprising that if this was the case the plaintiff s two emails of December 2008 read as they do. In addition, if Mr McCullough knew of the earlier contact with the Bank dating from 2007, and was really re-introducing himself/Propinvest I would have expected him to have worded his email in a different way. In my view, as noted above, this is another pointer to the conclusion that the Bank was wholly unaware of Propinvest in 2007.

[215] At paragraph 65 of his witness statement the plaintiff says:

> Propinvest also again expressed interest in purchasing the property and carried out considerable due diligence. They met with me on a number of occasions and made significant efforts to communicate with Anglo regarding the offer, but Anglo continually rebuffed this interest."

[216] Mr Bell and Mr McCullough attended a meeting with Mr McWilliams on 16 December 2008. Mr Bell says:

> I remember the meeting exceptionally clearly because I have never had a meeting like it before in my business career, nor have I had one since. It was bizarre in the extreme. Mr McWilliams was extremely open…"very transparent"…He told us in no uncertain terms that they had made the decision that they were going to transfer the asset to an internal party of theirs. That was pretty shocking for us because our view … a bank has an obligation to look equally and fairly at all approaches. He made it very clear that that s what they were doing. And he made a statement which sticks in my mind, he said We are not like other banks.
> …
> … we were told in no uncertain terms that… the deal had been done, and we left the meeting surprised and disappointed."

[217] According to the plaintiff, the Bank told PBN to get close to and establish a relationship with OTC while, in contradistinction, Propinvest were told not to make any contact whatsoever with OTC. Mr McAreavey explained the Bank s position about this in cross examination by the plaintiff:

> Q. One of the key characteristics, one of the key criteria of your selection was that the proposed purchaser would have had to get on very well with the Odyssey Trust and the Harbour, etcetera, and work with them very closely; would that be right?
>
> A. That s right. I think that PBN were first contemplated by the bank as a potential party for this in late August, early September. As I think I have explained before, it wasn t until the 12th of December that Propinvest were introduced to the bank. PBN have clearly I think reached out to Odyssey Trust in that time period, had had a, I think

a positive relationship begin to develop. When the bank looked at other parties, including Harcourt, it didn t really want to bombard Odyssey Trust with, you know, a number of interested parties because it felt it might destabilise that situation. So until the bank felt that it was in a position where it would lend to a party and they were a realistic bidder, it didn t think it was appropriate for them to approach the Trust and that was the limitation that applied to Propinvest for the reasons that I have just described.

Q. Does it not seem bizarre that you want an open challenge to someone to purchase, a developer, an experienced one with the money, someone that you knew, one could go and speak at length to the key party in this process which is OTC, the key party and Harbour to a lesser extent. And one can't, that is not equality, is it?

A. It seemed appropriate in the circumstances. The Odyssey Trust had expressed reservations itself on Propinvest s financial standing, it didn t seem that they were a bidding party that they were keen to invite forward for discussions."

[218] In his closing submissions the plaintiff relies on the report from Mr Griffiths, particularly paragraphs 4.92 to 4.95. Essentially Mr Griffiths was criticising the actions of the Bank in not exposing the Odyssey to a wider market which might have elicited better offers" and for not pursuing the offer from Propinvest. He says that while it is a matter for the court as to whether the conduct of the Bank amounts to shadow directorship the Bank s approach is one which I believe banks would have been very careful to avoid."

[219] However, in my view this criticism, and the criticism voiced by Mr Bell, both fail to acknowledge the significance of the necessity of a positive relationship between any interested party and OTC and that that positive relationship appeared to exist between PBN and OTC.

[220] The plaintiff refers to a Credit Committee meeting on 9 January 2009 where the overall plan was presented for approval. He notes that the Bank referred to PBN as our preferred developer." He relies on this as part of his evidence going to show that the Bank had taken over the process, to the exclusion of SML.

[221] The Bank s position at this time is encapsulated neatly by a number of paragraphs in the witness statement of Mr McAreavey, thus:

123. I note §61 and 62 of Mr Curistan s affidavit. He suggests that there was some form of preference given to PBN over any other potential bidder. Firstly, I was completely unaware at that time of the circumstances of any MAPLE 10 loan to Mr Kearney and it therefore played no part whatsoever in any of my decision making relevant to this case. Secondly, while Mr Kearney was identified as a potential developer who might take over and run the Odyssey complex, PBN was the only party (aside from Propinvest) which showed any serious interest at that time in agreeing a deal with SML. Thirdly, the responsibility for finding a buyer lay with SML. The Bank was hardly disinterested in this process given the size of the loan to SML, and was making approaches and putting out feelers in order to try and assist SML to secure a buyer. The Bank would have expected SML to take similar steps since ultimately it was for SML to agree any deal. I reject completely the allegation that the Bank was seeking to prevent SML doing a deal with any other party. The Bank s sole ambition was to try and limit the level of loss it had sustained which, by the end of 2008 was looking to be a figure of around £30million plus. This was a huge loss on a single loan and while such losses may have later become common during the property market crash, the scale of this loss was considered to be a huge issue at the time. There was obvious concern among the lending team as to the consequences for each of us personally should the loss crystallise at those levels.

124. §63 to §69 of Mr Curistan s statement seeks to paint a picture that the Bank was imposing the PBN deal on SML and doing so for ulterior motives and that the Bank was acting unfairly and seeking to benefit PBN to the detriment of SML. This is a completely false and unjustified narrative. While I will deal with Propinvest below, the Bank was now fully aware that SML was essentially insolvent both on a cashflow and balance sheet basis. The Bank knew that an insolvency event for SML was likely to devalue the Odyssey even further. This was because each of the Sheridan companies trading the commercial units would also have faced insolvency owing to the collateral damage of SML becoming insolvent and Mr Curistan bankrupt on foot of his guarantees. The other key concern for the Bank was the risk of forfeiture proceedings by OTC.

> 125. The relationship between OTC and SML was very poor and the Bank had significant reservations that any deal going forward could be achieved if Mr Curistan remained involved in management or ownership of the Odyssey or any of its trading units. The picture painted at §69 of Mr Curistan s statement is also completely unrealistic. By the end of 2008, the Odyssey was valued at around half the value of the secured debt. SML was entirely dependent on bank credit for day to day funding. The Bank was having to fund other Sheridan companies for their own trading debts and it was quite obvious that OTC was keen to forfeit SML s lease and take over possession of the Odyssey, thereby rendering the Bank s security void.
>
> 126. The Bank had no agenda other than trying to minimise its losses and as set out above was prepared to provide incentives to Mr Curistan and SML to cooperate in that process with potential for Mr Curistan to share in any upside if the Odyssey could be taken over and operated successfully by a third party…"

[222] When I consider all the contemporaneous documentation, the financial position of SML and the evidence of the plaintiff, I conclude that this evidence from Mr McAreavey is an accurate representation of the factual position.

[223] On 13 January 2009 the Bank wrote the plaintiff a letter headed WITHOUT PREJUDICE - SUBJECT TO CONTRACT." The letter was subsequently signed by the plaintiff. It sets out the Bank s latest set of proposals to facilitate the disposal to a third party of the interests in Odyssey Pavilion currently owned by SML and your exit from the project." It goes on to say that the letter sets out the broad commercial terms of the Bank s proposals" and that, once agreed we propose to have contractual documentation drafted by our solicitors…"

[224] Notwithstanding the use of the words subject to contract , it is the plaintiff s case, as set out in paragraph 22 of the Amended Statement of Claim that the letter amounted to a lawful binding agreement and contract." Thereafter, in his pleadings he refers to this as the January Agreement." Paragraph 39 of the Amended Statement of Claim sets out what the plaintiff alleges to be 5 breaches of contract, being breaches of the provisions of the January Agreement.

[225] In a separate part of this judgment I deal discretely with the issue of subject to contract" in relation to this, and a later, letter.

[226] Propinvest, according to the plaintiff, were increasingly engaged. However, they were, he says, not given an even playing field.' He says Propinvest was told by

the Bank that PBN s offer was made on a recourse basis when this was not true. He says that although PBN was encouraged to form a relationship with OTC, Propinvest were forbidden so to do. He says, like the Alburn deal Anglo appeared to be pursuing its own interests and that of other bank customers over what was actually most beneficial to SML." Michael Bell (acting for Propinvest in Belfast) had noted coolness and dismissiveness in the Bank s attitude to Propinvest." At paragraph 76 of his witness statement the plaintiff makes the following case:

> Even at this stage, Propinvest was indicating both very positive interest and a financial proposal which was superior to that on offer from PBN, it is clear that the Bank s officials had already decided that the deal with PBN was the one they wished to promote, albeit they were continuing to misrepresent their position by suggesting that they were open-minded as to the outcome of the process. Although this was the officials stance, they consistently misrepresented their position to me and SML, suggesting that they were open to the Propinvest bid. … this was clearly not the case."

[227] It is the plaintiff s case that the Bank had, in fact, taken control of the sale process and that SML had been sidelined. He refers to an email from Mr Joe McWilliams (of the Bank) to Mr McAreavey which states:

> Spoke to Propinvest this morning, so you are clear to tell OTC that PBN have exclusivity. Can you stress to Robert Fitzpatrick [Chief Executive of OTC] that if we don t do a deal with PBN it s PC [ie the plaintiff], so no messing about." (The underlining is the plaintiff s).

[228] The plaintiff was not informed of this and was still engaging with Propinvest. He says that the Bank officials were using me as a whipping-boy to obtain leverage with the Trust rather than seeking to support my interests in the transaction."

[229] On 29 January 2009 HMRC notified SML by email that its liabilities to HMRC had increased to £1.569 million mainly due to an increase in the VAT on Sheridan Millennium" but also including Sheridan Developments and Sheridan Nightclubs. The email also said that the issue of winding up petitions had been suspended until 6 February 2009, but that if payment in full had not been received by that date, the winding up petitions would be issued.

[230] On 4 February 2009 the plaintiff had a call from Mr McWilliams in which, he says, there was discussion about perhaps winding-up SML and that I could be given an incentive to the tune of £500,000-£750,000 to have in my back pocket", and that Paddy Kearney was chosen as the preferred purchaser." He describes the offer of money as some underhand financial compensation to me" and that this approach

further underlines the officials determination to remove me from the equation as a means of putting pressure on OTC to ensure that the deal with PBN would proceed to the benefit, ultimately, of the Bank."

[231] On the same date Mr McWilliams indicated to Propinvest that We did not revert to you as your bid was substantially lower than our preferred bidder [PBN]." The plaintiff says that this was done entirely without reference to me." At paragraphs 89 and 90 of his witness statement the plaintiff sets out his view:

> 89. This favoured position for PBN (as against Propinvest) is made explicit in a detailed e-mail from CMcA dated 17 February. In this, he reports on the deal being negotiated with OTC to cement the partnership with PBN. This sets out a significant list of agreements being processed, with a proposal to conclude the deal by mid-April. As before, there is a precondition, namely that I am completely excluded from an interest in the Pavilion:
>
> > I would note that … OTC and PBN both conclude that they want PC completely gone out of the Pavilion and they will not participate if he retains even a covert interest in the Bowling Alley ..... OTC s position has hardened on this point given the car-park litigation and they will only give the concessions in [the] Pavilion if PC is gone for good.
>
> 90. Not only are the Bank officials not respecting their duty of care to me, they are actively seeking to undermine my position, and, in the process, are seriously abusing their position of power and responsibility and clearly fiduciary duties."

[232] On 13 February 2009 Mr McWilliams wrote an email to Glenn Maud (of Propinvest) indicating that Propinvest s bid was unsuccessful based on four factors. It is the plaintiff s case that this email is a succession of misrepresentations."

[233] In his evidence, both written and oral, the plaintiff has highlighted a series of emails and credit committee documents in late 2008 and early 2009 which, he says, show the Bank working, essentially behind his back, to further the PBN deal and the Bank s phrases such as our asset" to support his case that the Bank had effectively taken control of the process so as to put itself in the position of owing duties to him/SML. One which encapsulates his allegations is an email of 26 February 2009 from Mr McAreavey to Mr Whelan and others. Included in it are the following paragraphs:

> Over the last 3 weeks PBN, the Trust [OTC] (as head landlord on Pavilion and holders of development rights for the entire complex) and the Bank (as prospective funder to PBN) have been meeting to negotiate the terms of what might be available to PBN on acquiring Odyssey Pavilion. This extends to development rights over the car park and other ancillary lands around the Pavilion. A lot of progress has been made and we have achieved concessions with the Trust consenting to a number of things within Pavilion which will significantly improve our chances of making a full recovery, together with a 5 year development option over the surplus lands. These negotiations have momentum, a lot of goodwill and there is another session tomorrow.
>
> In that context it is concerning that [the plaintiff] wants to negotiate a different deal with Propinvest. The Trust have made it clear in our meetings that they would not support a bid from Propinvest and without the positive support from the Trust a deal can t be done that will maximise value in the Pavilion. Ultimately it is always [the plaintiff s] decision if he accepts the final deal on the table, but we are working with PBN and the Trust to put the best possible deal on the table for [the plaintiff] to consider. If Propinvest were bringing their own bank funding to the table that would be one thing, but they are not, they are asking for us to fund them and we have already decided that PBN s offer is better. While [the plaintiff] should have the final say in who he sells to, we should have the final say in who we will fund going forward.
>
> In my view [the plaintiff] is muddying the waters here and is having selective memory on what the deal agreed with him was … and the best thing is to get round the table to discuss the best way forward with all parties.

[234] The plaintiff also relies on another internal email of the same date wherein Mr Whelan says: We need to put [the plaintiff] back in the driving seat…" and We introduced Paddy [of PBN] at his request only", and an email of the following day from Mr McAreavey to Mr Whelan in which he says:

> If possible, I would like to be involved in a round-table discussion with you, Joe [McWilliams] and Tony [Carey] as I have the feel for where the Trust are in all of this and it is important to keep them onside to deliver best value for our asset over time."

[235] This shows, says the plaintiff, discussions about the sale process which do not include him and which tend to show that the Bank considered Odyssey to be its asset. All of this he prays in aid to support his case that the Bank owed fiduciary duties to him and that the Bank effectively became a shadow director of SML.

[236] In paragraph [94] of his witness statement he summarises the position to date:

> The Bank s officers have represented to me that its efforts in seeking to secure a deal on Odyssey are on my behalf. In contrast to this, it is irrefutable that the Bank officials were single-mindedly working for the benefit of the Bank, and were misrepresenting the position to me/SML as the means of securing their preferred outcome. Indeed, the misrepresentation is such that they were actually offering an incentive to OTC to agree a deal with PBN on the basis that the Bank can effect OTC's objective of the removal of me from the Pavilion, and the officials were using this as a bargaining tool."

[237] In his closing submissions the plaintiff sets out the detail of the Propinvest offer which demonstrated the skillset of the Propinvest team to develop the asset." The plaintiff severely criticises the Bank s attitude to the Propinvest offer, significantly better than that of PBN, accusing it of dismissing Propinvest. He makes the case that the Bank s attitude to Propinvest, and its refusal to accept the higher offer, was driven by their desire to deal only with PBN as their preferred candidate to the detriment of SML and the plaintiff. As I have already noted, he also criticises the Bank on the basis, he says, that the Bank encouraged PBN to build a relationship with OTC whereas Propinvest was told that under no circumstances should they go anywhere close to OTC.

[238] In answer to the continued criticism of the plaintiff about the Bank s approach to the Propinvest proposals in paragraphs 131 to 133 of his witness statement Mr McAreavey charts the development of proposals made by Mr Glenn Maud on behalf of Propinvest between 23 January 2009 and 6 February 2009. The initial proposal, while offering security of two assets in London, contemplated the Bank refinancing existing debt on those assets of some £160 million, exposing the Bank to further debt.

[239] Further proposals were made, and of the proposal made on 6 February, Mr McAreavey said in paragraph 134 of his witness statement:

> 134. This offer was definitely more appealing than the previous offers made by Propinvest, however, whenever we also looked at Propinvest s background and researched market intelligence it was clear that Propinvest was a fairly complex, opaque structure with offshore entities. Some of

the assets were also starting to show stress at that point and this was widely reported in the marketplace. Propinvest s overall financial strength was a concern for the Bank. In addition, given the scale of some of Propinvest s other projects, including the acquisition of the Citibank Tower in London in July 2007 (deal value reported at £1bn), the Bank was concerned about whether they would remain focussed on the Odyssey redevelopment project if market conditions continued to worsen.

135. A factor which has been ignored by Mr Curistan was that the proposals being put forward whether by PBN or indeed by Propinvest required the Bank to provide the funding. In essence, this meant swapping the majority of debt owned by SML into a new vehicle to be controlled and operated by the new operator. Critically, these proposals were being considered on a non-recourse basis so that the party making the offer was not investing its own cash or providing any guarantees with recourse to their own assets.

136. In those circumstances, the Bank was being asked to consider transferring a loan of over £70 million to a large offshore operation which was facing financial setbacks, was in negative equity and most importantly was completely unknown to the Bank. Conversely, PBN was an existing client of the Bank, the Bank had full transparency on PBN s balance sheet and the Bank had existing security over large parts of PBN s property portfolio. PBN was also one of the highest depositors of cash in the Bank s Belfast office which demonstrated that PBN could pay its current debts and liabilities as they fell due. When the Bank reviewed the proposals put forward by PBN and Propinvest in order to decide which deal the Bank was prepared to fund, ultimately the Bank considered PBN to provide a stronger financial covenant than Propinvest."

And at paragraph 138:

The point that Mr Curistan fails to recognise in his statement is that the Bank was entirely within its rights to decide to whom the Bank was prepared to advance funds. The suggestion repeatedly made is that, at least on paper, the Propinvest offer was higher than the proposal by PBN. The level of offer was, however, somewhat academic as

both PBN and Propinvest were not actually proposing to make any payment or inject any of their own capital."

[240] It was obvious that if the Bank accepted the Propinvest proposal of £72 million, as opposed to the PBN proposal of £70 million, the Bank would have to advance £2 million more of its own money. In cross examination of Mr Holmes the following exchange took place after a discussion about the above matters:

> Q. But in order to get that additional £2 million for Propinvest the bank had to agree to lend an additional £2 million to Propinvest, didn t it?
>
> A. Yes
>
> Q. And that, you I am sure would agree, is ultimately the decision for the bank to decide who it lends money to, it s not a matter for Sheridan to say to the bank, you must lend more money to one purchaser than another?
>
> A. That is correct.

[241] In my view that was not only an entirely reasonable answer from Mr Holmes, but also the only logical answer in the circumstances.

[242] Notwithstanding the plaintiff s criticisms in this case about the Bank s approach to the Propinvest proposals it is noteworthy that on 13 February 2009 the plaintiff wrote the following email to Mr McWilliams:

> Dear Joe,
>
> Further to our earlier conversation Peter Holmes and I have thought through our discussion and we would agree with you that while the amount [of PBN s proposal] is marginally smaller [than that of Propinvest] I think both Neil and Pat [of PBN] could maximise the value. Should you need any further clarification do not hesitate to contact me.
> Regards
> Peter"

[243] It seems to me, from that email, that the plaintiff, whether reluctantly or not, recognised the good sense of seeking to progress the PBN process.

[244] On the same date Mr McWilliams forwarded this email to Mr McAreavey, with the following text: This relates to the 3 offers we received for the Odyssey and PC [the plaintiff] deciding that PBN is the route to go."

[245] Owing to the concerns felt by the plaintiff and Mr Holmes, they sought information from the Bank about those parties potentially bidding for the Odyssey. Four bidders were identified: Harcourt, £70m; PBN, £70m; Shamus Jennings, sub £50m; Propinvest, £72m. Notwithstanding what he said in his email of 13 February 2009 (above) the plaintiff now makes the case that it is very difficult to see how [the Bank s criteria as set out in the Bank s reply] would not have preferred a major player such as Propinvest." He concludes, in his witness statement that:

> To all intents these officials have taken on Sheridan's role and become shadow directors. Throughout the period to date the officials have masqueraded in their role, apparently seeking to provide support for me and SML, whereas, in practice, their objective has been entirely contrary to this. In effect, they have used me as a means to further the deal with PBN and OTC which was beneficial to the Bank." (Paragraph 102)

[246] This leads the plaintiff to make the serious assertions which he did in paragraph 103 of his witness statement in the following terms:

> The extent of misrepresentation of the true facts of the process; the extent to which officials were using me as leverage to obtain their desired outcome with OTC; and the obvious intention to appoint PBN as the developer are startlingly clear. The officials' intention is dishonestly to seek financial benefit for the Bank at the expense of me and SML. The outcome for me and SML, as the process proceeds, is demonstrably that they, individually and corporately, will incur loss.
>
> The culmination of the selection process is misrepresentation by officials of the real position of me and SML regarding disposal, and a blatant misrepresentation of the comparative merits of the parties involved in the bidding process."

[247] But perhaps a more realistic acceptance comes from the cross examination of Mr Holmes:

> Q. So now at this stage, thereafter, you that is Sheridan, having selected PBN, it was hardly surprising then that the bank was engaging with PBN and OTC to

try and get that deal across the line, that would be sensible and to the benefit of not only the bank in reducing the bath it had to take?

A. Yes.

Q. But it was to the benefit of Sheridan Millennium because it was hoping to be able to implement the proposals of January 13th 2009 to allow it to exit the Odyssey with the possibility of developing Parnell in Dublin and reducing its overall liability, isn't that right?

A. Yes."

[248] Following a reference to Mr Kearney s involvement as one of the so-called Maple 10, about which the plaintiff was ignorant at the time, he alleges in paragraph 106:

> The Bank officials materially misrepresented the position of its relationship with PK and PBN. In all the negotiations, it was the interests of the Bank (and to a lesser extent those of PBN) that were pursued for its own benefit, and at the expense of its direct client, me and SML. Ultimately, I was again advised that if PBN was not agreed, Anglo would not support us further. Indeed, I recall one meeting I had with PK in Dublin where he told me if I did not agree, the company would be put into administration by the time I got to the train station to go back to Belfast."

[249] At a meeting involving Bank personnel, the plaintiff and Mr Holmes, and held on 5 March 2009, it was recorded (inter alia) that

> Background
>
> 1. Sheridan is in default of loan agreements - not currently generating sufficient funds to service facility
> …
> Decision making
>
> 3. Clearly and without any doubt - all decision making is in the hands of Sheridan.
>
> 4. The bank s only decision is held within the framework of the facility letter and is basically to call in the

loan if it is in default. But the bank did agree to work with Sheridan to find a solution.

5. As regards a new purchaser - the bank has the right to consider who it will lend to and on what terms.
…
Process

8. Sheridan advised best to sell off market in order to secure best deal. Work with Anglo to assist in finding a purchaser.
9. Now have sale opportunities - it is up to Sheridan to decide what it would like to do. This subject to the bank being happy that the most is being received for its security. Sheridan and Anglo agreed above is a fair summary.

Position developed during meeting

Anglo clarity

As there may be some confusion in prior communication - all agreed - have a fresh start and leave aside what has happened to date.
…
2. The Trust does not want to deal with Sheridan this obviously affects Sheridan s options.
…
Sheridan response

5. In general, want out with bank taking as small a bath as possible. Want to dispose, Odyssey had been bain (sic) of life over last 13 years. Process was outlined earlier is correct one to take - Sheridan want to promote same.

6. Specifically:

- Want to dispose and get out
- Want to hang on to the Bowl
- Want no PGs
- …
- Want profit share on upside

Consideration of offers

7. Anglo felt that the Profit Share item was a red herring - particularly given the base cost price.

8. Sheridan noted this was a prime reason why they judged the importance of the 72m offer over the 70m.

9. Given the difficulty of the confidentiality issues associated with some of the offers incorporating loan applications - it was noted and accepted that if the higher offer was taken as the base in a Profit Share calculation - then Sheridan have no concerns re what offer is accepted. The level of the offer therefore becomes a non-issue to Sheridan.

…

Time scale

13. Sheridan to explore its options and advise the bank what its proposals are by mid-week (in week commencing 9th March).

14. Agreed by all that to do nothing is not a viable option."

[250] In other words, in an effort to assuage any concerns the plaintiff may have had about the Bank accepting the lower of two proposals — ie the offer of £70 million from PBN rather than that of £72 million from PropInvest — when it came to sharing any profit, it would be on the basis of £72 million. In cross examination the plaintiff accepted that, therefore, there was no disadvantage to SML accruing from any decision to go with PBN. The matter is set out in paragraph 147 of the witness statement of Mr McAreavey in the following terms:

I understand Mr Curistan also alleges that the Propinvest deal would have had a better return for him. This is entirely inaccurate because even though the headline terms of the Propinvest offer were £2million higher than PBN s offer, this made no difference to Mr Curistan himself. I say this because Mr Curistan and the Bank had a proposed exit strategy and as part of the inducement offered to Mr Curistan to secure the terms of that deal (as set out in the 13 January 2009 letter), the Bank had proposed that any residual debt in SML which was not cleared by the sale or transfer of the Odyssey would be written down to an amount of £1.5million. Accordingly, the headline price at which the transfer of the Odyssey was effected would have had no direct effect on SML or Mr Curistan s position. At this point in time, the Bank s exposure to SML was approximately £74.5million. The fact that PBN or indeed Propinvest were making non-funded and non-recourse

> offers around £70million bore no resemblance to the market value of the Odyssey. This was because they were not open market offers, but were complex agreements to roll over debt into a new purchase vehicle with the same fixed security as already existed with a view to improving the value of the asset over time. Everyone involved at the time was absolutely aware that an open market sale of the Odyssey (particularly with the existing tenants who were in many cases not paying rent and been subject to regular statutory demands for Rates, PAYE and VAT) would have probably resulted in no offers whatsoever. It is also certain that no other Bank or funder would have contemplated lending monies against such a distressed asset."

[251] In cross examination the plaintiff indicated that he did not disagree with the content of this paragraph.

[252] At this stage I need to deal with another of the plaintiff s complaints about the Bank preferring the PBN deal over the Propinvest deal. This is the issue of recourse, which in his closing submissions the plaintiff says, is central to this case and the related abuse by the Bank." He is highly critical of the Bank in relation to this, accusing it of entirely misrepresenting to Propinvest the recourse position. In cross-examination of Mr McAreavey by the plaintiff he put to Mr McAreavey part of his banking expert s report. The following exchange occurred:

> MR CURISTAN: Mr McAreavey, this is our banking expert which the Defence has agreed with.
>
> > Apart from dealing only with its own pool of contacts (apart from Propinvest and Odyssey) which meant that the property was not being exposed to a wider market which might have elicited better offers, Anglo appear to have been deciding which option to put to Mr Curistan and whether directing operations. Anglo then decided not to pursue the offer from Propinvest even though it was made with full recourse, whereas PBN s offer had no recourse at all. Added to this, it appears that Mr McWilliams had given Mr Maud the impression that other offerers had offered recourse, which is not supported by the documents which I have seen. In my opinion that lacked any pretense at arm s-length relationship.

So that was the banking expert s conclusion of that particular nature of a transaction. Where the bank actually --

MR JUSTICE SIMPSON: No, but you need to ask him at least does he agree with that or what does he say about that?

MR CURISTAN: Yes, so what s your view on that particular claim?

A. I don t agree with the claim, so to take the separate parts of it — the bank had not agreed, the bank wasn t marketing the property at all, the bank was trying to bring forward clients from within its client base, at Sheridan s request, that might be interested in getting involved in this work-out. It was open to Sheridan to market the property to whomever it liked, and they introduced Propinvest and the bank considered Propinvest. The bank is entitled to decide who it will lend to. It cannot be expected just to lend to any party that Sheridan would bring forward, which seemed to be the expectation. And in relation to the matter of recourse and the Propinvest offer, ultimately there was correspondence between Mr Maud and Joe McWilliams on the basis that Propinvest were qualifying their offer of recourse by saying they would offer recourse but so long as it was being considered on the same basis as other parties. Other parties had specifically limited their recourse or actually decided there would be no recourse at that point and Joe McWilliams advised me that we had to consider the Propinvest bid on the basis of it being non-recourse."

[253] It is also important to note how Mr McAreavey deals with other related allegations made by the plaintiff. These are encapsulated in paragraphs [148] to [151] of his witness statement:

148. I have also noted the allegation at §102 of Mr Curistan s statement suggestion that the Bank officials had taken over SML s role and were acting as shadow directors. Indeed, at §101 he also suggests that the Bank blackballed Harcourt as another prospective bidder and finally at §103 alleges that the Bank officials were

dishonestly seeking financial benefit for the Bank to the detriment of Mr Curistan.

149. All of these allegations are without basis. As regards the suggestion that the Bank officials had taken over the role of SML and become shadow directors. I interpret that it is being alleged that the Bank supplanted the role of Mr Curistan as the Director of SML. In that respect, the Bank had no role in relation to the day to day affairs of SML. The Directors were at all times entirely free to operate SML as they wished, subject only to legitimate constraints imposed by the Bank in light of the fact that SML was in default of its loans. When SML was added to the Watch List, it was subjected to close scrutiny by the Bank and as will be apparent from the matters already set out above, SML was frequently faced with cash shortfalls so much so that the Bank was regularly being called upon to lend further monies to avoid insolvency proceedings issued by its creditors. The complaint that Mr Curistan seems to be making is that the Bank was improperly engaged in the putative sale process to PBN and precluded the Directors exercising their own judgment in the sale of the Odyssey.

150. That allegation is without basis. First of all, the Bank was not stopping and indeed could not prevent SML selling the Odyssey so long as that sale saw the repayment of the Bank s debt. Secondly, by the time of the putative agreement with PBN, the process was very far from a simple sale of an asset. The Bank was intimately involved in the process because, as Mr Curistan seems determined to ignore, it was the Bank that was going to be providing over £70million funding to any new purchase vehicle which was going to acquire the Odyssey complex. The role of the Bank was consistent with it weighing up and considering the terms and basis on which it would provide not only the loan funding, but also the further working capital that any new owner would require to try and rejuvenate the Odyssey and revitalise its assets. Thirdly, Mr Curistan mentions the potential option of a transfer to Harcourt and suggests that it is clear that Harcourt was blackballed by OTV.' I cannot comment on whether this is an accurate categorisation, but I do agree with Mr Curistan that OTC was keen to avoid the transfer of the Odyssey to Harcourt. I understood there was some tension between OTC and Harcourt relating to the wider

development of the Titanic Quarter, but this was outside the Bank s control, and the details of that tension were not known to me beyond the fact of its existence. Harcourt was the owner of Titanic Quarter, which represented a very large development site comprising c185 acres of former industrial lands on Queens Island. The Odyssey and Odyssey Arena occupy a large block of land at the access point to Titanic Quarter and to some extent these respective developments had some competing elements. It was a legitimate risk that if Harcourt were able to gain control of the Odyssey under a non-recourse arrangement, there would have been a conflict of interest and had they wanted to, they could have slowed down development of the Odyssey to the advantage of the Titanic Quarter. The important reality remained that in order for any deal to work, SML needed OTC s consent, and the Bank was not responsible for the relationship between OTC and Harcourt. For my part, it never appeared that Harcourt was hugely motivated and any interest they showed seemed somewhat peripheral.

151. Finally, the outlandish allegation that Bank officials were seeking to dishonestly obtain financial benefit for the Bank is totally unjustified. The Bank was well aware by the start of 2009 that it was highly unlikely to avoid a loss on the SML loans. My own focus at the time was entirely directed towards a mechanism by which the Bank s losses might be minimised. It was my hope at the time that the credit crunch was something of a blip and that asset prices might recover quite quickly and therefore the Bank was prepared to take a risk in seeking to continually prop up SML and try and find a way to allow the Odyssey complex to generate a profit. The Bank understood from the Cooney Carey Accountant s reports that there was underlying potential, if only the Odyssey could be run efficiently and good tenants secured who would be able to pay their rent and service charge. The Sheridan companies were not only failing to pay rent but were requiring life support from the Bank to meet their day-to-day liabilities. The suggestion that Bank officials such as myself and my colleagues at the time were acting dishonestly is quite unjustified and one that belies the fact that once the Alburn deal collapsed, Mr Curistan was very glad and expressed his thanks for the Bank s continued support."

[254] In the circumstances, I do not consider that the Bank s position in relation to the issue of recourse can properly be the subject of the criticism made by the plaintiff.

[255] The Bank also carried out some research into the financial position of Propinvest. It discovered articles in the financial press that Propinvest suffers refinancing setback" in February 2009 and Propinvest portfolio breaches interest cover covenant" in November 2008, part of which article said: Propinvest is negotiating with its banks and intends to repay all the senior and junior loans once [Glenn] Maud has completed a financing of his entire UK portfolio in a plan codenamed Project Sparkle."

[256] In paragraph 4.87 of his report Mr Griffiths says:

> By March 2009, it appears that Propinvest was experiencing financial difficulties as a result of the 2008 financial crisis and was trying to restructure its debt. Despite this, Propinvest continued to trade until 2011 and may well have been able to acquire and run the Property in 2008 and 2009."

[257] In my view this is pure speculation and is wholly unhelpful to the court. In any event, there appears to be no recognition in Mr Griffiths s report of the fact, as stated by Mr McAreavey, that the Bank, if it dealt with Propinvest, would have to lend a greater sum of its money than if it dealt with PBN, nor is there any recognition of the necessity that OTC would need to be content with the other party, or that OTC had expressed its concern about dealing with Propinvest.

[258] Mr McAreavey, in an internal email of 18 March 2009 noted, inter alia, some of the issues with Propinvest. These included:

> If the proposal for [the plaintiff] is that he either remains as owner of the Pavilion and Propinvest just manage it, or if he retains a minority equity interest, or if he remains in situ as a tenant, then I believe we will encounter the following:
>
> 1) None of the above concessions will be available — could cost us between £5m and £20m+…
>
> 2) OTC will likely contest the assignment of the pavilion lease to Propinvest given concerns over financial stability.
>
> 3) If OTC don t like the solution, there are still some breaches of the Pavilion lease and they could exercise their

step-in rights again (likely these would not stand up in court, but it may not stop them trying).
…

5) Given [the plaintiff] is championing Propinvest s bid, they will be likely to allow him to stay in situ in his units (initially for a handover period which will likely then extend). If that happens, we won t be paid rent and we will continue to pay void costs on [the plaintiff s] units…"

[259] He concluded the email:

> The key to working this deal out has always been in maximising the concessions the Bank can get from OTC. That is impossible to do if either they don t like the incoming developer (Propinvest) or if PC retains any interest in Odyssey (above the level of the back ended profit share we were going to give him). If PC retains any equity interest or leasehold interest in the occupational units, I believe the relationship with OTC will revert to that of a head-landlord who will be obstructive, rather than one that was willing to get actively involved and give concessions/facilitate the process.
>
> So, even if the deal with Propinvest is nominally higher by £2m upfront, unless they are providing significant recourse (seems recourse to Propinvest can t be undoubted with financial press[ure] on Propinvest, it can t look like the best deal for us upfront given OTC s attitude to Propinvest"

[260] Arising from the contents of this email Mr Dunlop cross examined the plaintiff and the following exchange is recorded:

> Q. …But what was happening was, the concessions that were being offered by OTC in terms of development opportunities being made available, if those had worked out, PBN and OTC would have been able to develop other property outside the footprint of the Odyssey Complex and there was a hope and expectation that in the fullness of time that might generate a bit of additional money, isn t that right?
>
> A. Yes.
>
> Q. [Quoting from the 18 March email]

It is very likely that if a deal is pushed through with Propinvest that they will not be able to secure any of these concessions prior to the deal being done.'

So the problem with Propinvest, aside from what we have just seen about their financial position, they were an English company, they were not close to OTC, were they?

A. No.

Q. Now, that meant that PBN, with a Northern Irish-based developer, Mr Adair, Mr Kearney, you have already told us that Mr Adair had actually got a personal relationship with other people who were then on the board of OTC, isn t that right?

A. I believe so, yes.

Q. Yes. Now, that, you will understand, Mr Curistan as a businessman, those personal connections are quite important, because they, that relationship in business opens up doors that may not be open to those who don t have the nature of connection, isn t that right?

A. Yes.

Q. So, PBN had a close connection to OTC, and indeed there were personal connections between the directors of OTC and Mr Neil Adair, one of the 50% owners of PBN, isn t that right?

A. Yes.

Q. So, if we look at the next paragraph

2. OTC will likely contest the assignment of Pavilion lease to Propinvest given concerns over financial stability.'

So Mr McAreavey was saying, look, OTC, even if we, that is the bank, and Sheridan are wanting to transfer to Propinvest, we think OTC will contest that, they will not

be agreeable to Propinvest taking over the lease, do you see that?

A. Yes.

Q. Now, would you agree with me that that would have been an absolute disaster, wouldn t it?

A. Yes.

Q. And the bank didn t control what OTC did, did it, the bank wasn t responsible for the actions of OTC, isn t that right?

A. Yes.

Q. [Quoting again from the email]

> If OTC don t like the solution. There are still some breaches to the Pavilion lease and they could exercise their step-in rights again (likely these would not stand up in court, but it may not stop them trying).'

So what McAreavey was saying was, what might actually happen is OTC, whether it s valid or otherwise, they might try and forfeit the lease because of perceived breaches in the lease, isn t that right?

A. Yes."

[261] Again, that is no more than a recognition of the reality of the situation and how, in fact, Propinvest was not really a viable option when OTC had to be on board. As I noted above, the plaintiff considers the issue of recourse to be central", but once again this ignores the reality of the situation — namely the necessity to keep OTC on board.

[262] In his closing submissions the plaintiff accepts that the relationship between himself/SML and OTC was not good" but he puts this down to construction/project management and operational issues which were the responsibility of OTC under the lease and which they failed to meet." He sets out examples of what he calls OTC s ineptitude." However, that may be and whatever may be the genesis of the fractured relationship, it remains a fact that the consent of OTC was a fundamental component of any way forward. He also criticises OTC for not acting in good faith in relation to their consent, but this was not a matter for the Bank nor within the Bank s control.

[263] In an internal email of 19 March 2009 Mr McAreavey recorded a discussion which he had with Mr Holmes on the outcome of the meeting of 5 March, and a subsequent meeting which the plaintiff and Mr Holmes had with Mr McWilliams. This included noting Mr Holmes as telling him: The meetings were to consider the offers for Odyssey Pavilion and consider the options. The principal interested parties were bids from Propinvest and PBN Holdings. Peter Holmes stated that Sheridan were proposing to pursue the PBN offer and were seeking to try and close the deal asap."

[264] In relation to this, the following exchange occurred in cross examination of the plaintiff:

> Q. So, after the -- when you set, as it were, all the previous discussions aside and started with a clean slate, everything was discussed. All the information was made available. Parties went through all the various options and the respective benefits and advantages of the two bidders, and it was you, that is Sheridan, through Mr Holmes which confirmed that they, that is Sheridan, were proposing to pursue the PBN offer. Isn t that right?
>
> A. Yes."

[265] On 23 March 2009 Mr McAreavey sent an email to Mr McWilliams stating:

> Just FYI. I got a call from Ian Kerr at Beltrae/Propinvest, who explained that a few weeks ago Peter Curistan had approached them saying the bank had changed its mind about forcing him to sell and Peter Curistan was asking Propinvest on his own behalf about exploring a sale deal/management deal for Odyssey. Ian said that they had become very frustrated with Peter Curistan and Propinvest had terminated those discussions last week."

[266] This led to the following exchange between Mr Dunlop and the plaintiff —

> Q. So, in terms of Propinvest, Mr Curistan, not only did Sheridan agree that the bank should proceed with PBN after two meetings and being given the opportunity to reflect and give instructions as to who it wished the deal to be done with, but, in fact, Propinvest had become frustrated with you and they terminated their discussions with you?
>
> A. Yes.

Q. You are agreeing with that?

A. Yes."

[267] I note that in the criticisms of the Bank s position by Mr Griffiths there appears to be no recognition of three fundamentally important facts: first, that OTC were not prepared to countenance any solution which involved the plaintiff remaining, in some way, in the Odyssey; secondly, that OTC expressed concern about Propinvest; thirdly, that it was Propinvest itself which terminated the discussions as a result of frustration with the plaintiff during the process. Further, in support of his contention that the Bank preferred PBN unfairly, at paragraph 4.80 of his report Mr Griffiths refers to the potential return for both the Bank and PBN, impliedly critical of the Bank, without in any way acknowledging that there had already been agreement between the Bank and the plaintiff that SML/the plaintiff would share any subsequent profit on a 50/50 basis with the Bank.

[268] The plaintiff s case, as set out in his witness statement, is summarised as follows:

> 103. The extent of misrepresentation of the true facts of the process; the extent to which officials were using me as leverage to obtain their desired outcome with OTC; and the obvious intention to appoint PBN as the developer are startlingly clear. The officials intention is dishonestly to seek financial benefit for the Bank at the expense of me and SML. The outcome for me and SML, as the process proceeds, is demonstrably that they, individually and corporately, will incur loss.
>
> The culmination of the selection process is misrepresentation by officials of the real position of me and SML regarding disposal, and a blatant misrepresentation of the comparative merits of the parties involved in the bidding process."

[269] Despite such an allegation, the plaintiff was forced to admit that part of the proposals being discussed, and with which the Bank was content, involved the Bank providing a loan to PBN of £70 million for the transfer, from SML, of an asset then worth around only £40 million, or even £36 million on the plaintiff s valuation, so that SML would effectively clear the vast bulk of its indebtedness to the Bank notwithstanding that the asset was valued at almost half of the debt figure. The following exchange took place in cross examination of the plaintiff:

> Q. Now is it not as an act of extraordinary generosity the bank was agreeing essentially to forgive

> Sheridan Millennium £30 million of debt by it, that is the bank, taking on the risk of a loan of 70 million for an asset worth 40 million?
>
> A. Yes."

[270] I pause here in this chronological narrative to record my views. The contemporaneous documentation, far from revealing some form of conspiracy involving the Bank, PBN and OTC actually shows a very considerable involvement throughout the process of SML/the plaintiff. I reject the plaintiff s suggestion that the Bank clandestinely wanted his exit from the project — the contemporaneous documentation shows that he was well aware of the desire that he exit, and there is no record of any protest from him at the time. Further, the plaintiff has accepted that a deal which allowed him to remain involved in the project was just not acceptable to OTC. Far from the Bank assuming control to the exclusion of SML/the plaintiff and to the detriment of their interests, I am satisfied that the Bank properly was trying to obtain the best deal available, bearing in mind SML s indebtedness to the Bank, and I am also satisfied that it was SML which made the decision to progress the PBN deal. In view of the attitude of OTC, Propinvest was not a viable alternative to PBN.

[271] When I look at the original Statement of Claim ie absent the further amendments and then look at the subsequent amendments it seem clear to me that the plaintiff has taken the Bank s discovery and used it to try to manufacture the present case against the Bank. He has latched on to phrases in the Bank s internal documents — such as our asset." It has to be remembered that the Bank did have an asset — its security over the leases held by SML. It was perfectly entitled to talk about our asset" and, in my view, it is quite incorrect of the plaintiff to try to categorise this as being the Bank referring to Odyssey in support of his assertions as to control.

[272] In this connection, I have also looked at the internal documents which appear in an appendix to the plaintiff s then solicitors (MKB Law) letter of 30 November 2017. That appendix identifies a large number of documents and the letter (where material) says:

> The [Bank s] control, direction and management of the process of sale … is demonstrated by reference to a representative selection of 68 documents (and this is not an exhaustive list…). Most, but not all, of these documents are emails, and the text of each has been set out…"

[273] Some of the documents are also referred to in Mr Griffiths s report.

[274] I have read these documents, which commence on 1 October 2008 (the start of the PBN process), in the context of the contemporaneous material made available to me in the course of the hearing and the factual evidence of the plaintiff and his witnesses, and the evidence of Mr McAreavey. The contents of the documents which

the plaintiff seeks to portray as having a sinister implication do not leave me with that impression. Rather, in my view, they relate to actions which one might reasonably expect a lending institution to take with a borrower deeply, and increasingly indebted, to try to find a way out of the difficulties. The encouragement of contact between PBN and OTC, which had to be kept on board, does not have, in my view in light of all the facts in this case, any sinister connotation — rather it was to try to facilitate an assignment which could not happen if Propinvest was the party involved — and I reject the plaintiff s attempts to paint those actions in such a light.

[275] To return to the narrative, the Bank had to agree to fund further payments to creditors to avert winding up petitions. A Credit Committee application in March 2009 indicates a figure of some £775k and in May a further £222k was required to maintain SML s solvency.

[276] It was anticipated in the budget scheduled for April 2009 that there would be changes to stamp duty (SDLT) which was likely adversely to affect the cost of the proposed deal with PBN. It was clear that the proposed deal would not have been completed in time to avoid the stamp duty changes. The resolution to this problem was to establish a special purpose vehicle— Odyssey Pavilion LLP (OPL") — and to transfer the asset into that vehicle as an interim measure. The rationale is set out in a letter, seeking approval, from SML to Odyssey Property Co. of 6 April 2009 in the following way:

> Sheridan Millennium is in advanced negotiations with PBN Holdings Limited…(PBN) regarding the sale of its leasehold interests in the Property to a limited liability partnership (the Purchaser) whose ultimate owner will be a special purpose vehicle (SPV) which will ultimately be associated with PBN by virtue of common shareholders (ie Patrick Kearney and Neil Adair). The reason why the acquisition is structured in this way is to take advantage of an SDLT tax saving scheme (the Scheme). The Purchaser is being advised by PWC in relation to the tax aspects of the transaction and we can confirm that the Purchaser and SPV will be constituted in Northern Ireland and subject to the law of Northern Ireland. We are, however, concerned that the Scheme may be closed out by the forthcoming Budget on 22 April 2009.
>
> To be sure of taking advantage of the Scheme, it will be necessary for the Pavilion Lease and the IMAX Lease to be assigned to the Purchaser on or before 21 April 2009. Unfortunately, it will not be possible for us to have concluded our negotiations with PBN by that date. As you are aware, PBN has ambitious plans for the Pavilion, the IMAX Theatre and the surrounding area which will need

to be fully explained and evaluated by yourselves, the Belfast Harbour Commissioners, the Millennium Commission and the Department of Culture, Arts and Leisure. That will take time. To be sure of taking advantage of the Scheme, we therefore wish to transfer the Pavilion Lease and the IMAX Lease to the Purchaser before those negotiations are concluded.

The initial shareholder of the SPV immediately following transfer of the Pavilion Lease and the IMAX Lease to the Purchaser will be Peter Curistan personally. Once our negotiations with PBN are concluded, Peter Curistan will transfer the shares in the SPV to PBN or its shareholders. At that time PBN will therefore assume control of the SPV and, in turn, the Purchaser."

[277] In his closing submission the plaintiff says that he had absolutely no input into the forming of OPL as it was in [the] total control of [the] Bank and their solicitors" Arthur Cox. In his evidence he said that the letter was drafted by someone else and simply signed on behalf of SML (by Mr Holmes). However, in cross-examination arising from the terms of this letter, the following is recorded:

Q. Now that transaction was undertaken on the basis of a valuation or a notional valuation of the Odyssey complex of £70 million?

A. Yes.

Q. And what happened was the bank -- OPL, this new entity, was set up, and the bank lent £70 million to OPL, and OPL then paid £70 million to Sheridan Millennium, and Sheridan Millennium then transferred the asset for £70 million?

A. Yes.

Q. Now the asset was worth £36 to £40 million at that time?

A. Thereabouts.

Q. So that transaction resulted in Sheridan Millennium Ltd getting £30 million above the market price for the asset, didn t it?

A. Yes.

Q. Yes. That could hardly be described as in any way disadvantageous to Sheridan Millennium, could it?

A. No."

[278] There was a flurry of legal activity to progress this. The plaintiff draws attention to an internal Bank email of 8 April 2009 noting that Newco (ie OPL) will actually be underwater", meaning that it would be insolvent at inception. At paragraph 113 of his witness statement the plaintiff says:

> In particular, the transfer of the asset was recorded at £70 million despite the fact that a formal CBRE valuation, commissioned by the Bank in November 2008, had placed a value of £43.3 million on the property. Given the passage of time, and the weakening of the market, the actual valuation at 21 April was likely to be closer to some £36 million. Despite this, the Bank sought collateral and personal guarantees for the full £70 million."

[279] The plaintiff says that the Bank misrepresented to him that the deal with PBN would be completed by end of May 2009. It was not. Around the 5 June 2009 a Memorandum of Understanding was drafted. It was between PBN Holdings Ltd., OTC and the Bank. The plaintiff says that neither he nor Mr Holmes was aware of any meeting leading up to the production of the MOU or the MOU itself. This is another matter upon which he relies to seek to show that the Bank controlled the process. However, the working towards and the drafting of the MOU was entirely appropriate in light of all the circumstances of the case as I have outlined them above.

[280] Further evidence of the Bank s attitude towards him, says the plaintiff, is contained in a document entitled Options Analysis" prepared by the Bank on 28 August 2009. Of it he says (paragraph 118 of his witness statement):

> The attitude of the officials can well be seen from the terms of the option assessment:
>
> > Follow security steps outlined above immediately, effectively taking PC out by the roots
>
> Note 3 to Option 1 again indicates the attitude to me:
>
> > A. Cox [Bank s solicitors] view is that the best protection against subsequent legal action from PC is that he is made bankrupt as he is unlikely then to get legal representation.

In the same Options Analysis paper dated 28 August 2009, it states at Option 1 Note 2:

> We may be able to lock out other bidders by agreeing exclusive funding with PBN prior to Administration (of SML), then allow a period of open marketing where PBN put themselves forward as ready to complete within say 4 week and the asset is marketed openly. If we get a higher cash offer, all the better and we compensate PBN some other way (eg cemetery).

In my view this type of proposed activity is one of fraudulent misrepresentation."

[281] As recorded in the note of the meeting of 5 March 2009 the plaintiff wanted to hang on to the [Odyssey] Bowl." However, it was clear that no deal could be achieved if the plaintiff, or a company connected to him remained in occupation of Unit 2, the Odyssey Bowl because, as it was put by Mr Dunlop in cross examination, as noted above, OTC was so opposed to Peter Curistan they wouldn t let any company connected to him remain in the Odyssey Bowl?", to which the plaintiff answered Yes."

[282] On 14 September 2009 the Bank wrote again to SML a further letter headed Without Prejudice - Subject to Contract." This contained many terms the same as or similar to those in the letter of 13 January 2009, with some additions. (The plaintiff characterises this letter as a legally binding agreement. As with the letter of 13 January 2009, I deal with this matter later in the judgment.)

[283] The Bank now proposed that £600,000 would be paid to the plaintiff to compensate him for providing vacant possession of the Odyssey Bowl. Since the principal stumbling block was the plaintiff s unwillingness to vacate the Odyssey Bowl, and the refusal of OTC to countenance his staying, this seems to me to be a reasonable attempt by the Bank to sweeten the deal for the plaintiff to encourage his departure and to remove the impasse. Even if this is the back pocket money referred to above, and was described as such, I do not consider that the offer of compensation can be categorised as in any way unlawful.

[284] In any event, in cross-examination the plaintiff accepted that he had demanded compensation.

> Q. So, at this stage the complaint you were making was about delay in relation to all of this being implemented. But one of the problems, Mr

Curistan, was that from February onwards you were keen that you would be able to remain in the Odyssey Bowl and were not prepared to vacate unless there was compensation was agreed and paid to you/whatever company ran the Odyssey Bowl, isn t that right?

A. Yes."

[285] On 23 September 2009 the Bank met PBN to seek to agree funding terms for the acquisition of Odyssey, but PBN proposed a number of fundamental changes to the previous proposed arrangements. These are summarised by Mr McAreavey in his witness statement at paragraph 176, but it is unnecessary for me to set these out here. Suffice to say that the profit share proposals were changing, and this would have had a knock-on effect on what SML might expect in its share with the Bank — ie the less the Bank received, the less it could share with SML.

[286] By October 2009 it was clear that PBN were seeking even better terms, and the Bank was unhappy about this. Meanwhile, in a letter to Mr McAreavey signed by the plaintiff and dated 15 October 2009 the plaintiff said: I am writing formally to confirm that I am prepared to complete the deal with PBN, but on the condition that the deal is completed by the end of October." In my view this sentiment as expressed by the plaintiff goes some way to giving the lie to the allegation that the Bank was controlling the process.

[287] Also in October a company called Coffer Corporate Leisure were in touch with the plaintiff expressing interest. Their letter of 23 October 2009 to the plaintiff referred to conversations" which they had had with the plaintiff on Odyssey and stating that Coffer personnel very much look forward to meeting with you next Friday 30th October." It is clear, therefore, that the plaintiff was continuing to contact other entities to see if they might be interested in acquiring Odyssey. I deal later in this judgment with the issue of subject to contract in the light of the plaintiff s assertions in his pleadings that the letters of 13 January 2009 and 14 September 2009 constituted lawful and binding agreements, but it is worth noting an exchange in cross examination arising from the Coffer letter:

Q. So, we are clear, Mr Curistan, you were of a view at least then that it was worthwhile for you, that is Sheridan Millennium and OPL, to discuss with other people the possibilities in relation to the Odyssey?

A. There is no exclusivity agreement.

Q. No, that s right, but the point was, Mr Curistan, there was no formal, final binding agreement

[between the plaintiff add the Bank] and you were aware of that, so that you were keeping your options open?

A. And I don t see anything wrong with that at all."

[288] I also make the point that notwithstanding the plaintiff s mantra about the Bank taking control of the process and effectively being a shadow director of SML, in fact contemporaneously the plaintiff was continuing to seek other potential offers.

[289] Mr McAreavey deals with the next developments with PBN in his witness statement, thus:

> 177. Discussions between PBN, the Bank and OTC continued throughout October and early November 2009. Throughout this period PBN sought to change the proposed funding terms with the Bank in relation to the purchase of the Odyssey numerous times cumulating (sic) in the meeting on 18 November 2009 between Jimmy O Neill and myself on behalf of the Bank and Mr Kearney and Mr Adair on behalf of PBN. At this meeting, PBN outlined further adjustments to the terms of the funding offered by the Bank in order to proceed with the purchase of the Odyssey including concessions on the existing facilities between the Bank and PBN.
>
> 178. At the conclusion of the meeting, I advised PBN that in my view we were too far apart in our positions and that elements of their requests were entirely outside the Bank s lending policy and would not be acceptable to the Bank s Credit Committee. In my opinion, discussions with PBN were at an end unless they were prepared to materially alter their position."

[290] In paragraph 124 of his witness statement the plaintiff gives as the reason for the PBN deal not completing, the following:

> As a consequence, and demonstrating the Bank s concern about PBN s financial position, and also the increased sensitivity in terms of PK s involvement in the Maple 10, PW phoned me on 19 November indicating to him that the Bank could not continue with the PBN deal on the grounds of the sensitivity of his involvement with the so-called Maple 10, and the terms requested to close the OPL deal. The Bank wanted me to end the transaction. I was left with no option other than to agree."

[291] In cross examination the plaintiff was pressed about this call and its content.

> MR DUNLOP: Let s be clear. Is it the case now, Mr Curistan, you don t remember that call? Is that the truth?
>
> A. I remember the call. The point I am making is I can t remember the detail of every content in it.
>
> Q. You don t remember what was said to you then in the course of that call. Is that right?
>
> A. No. I ve a fair idea.
>
> Q. It is fairly important. When you were asked about the detail of this, you were telling us a moment ago you didn t remember it. His Lordship then reminded you you had given evidence in your statement about it. I asked you about it and you said no , and your position now is you don t -- I am not actually clear what your position is anymore. Do you or do you not remember the call?
>
> A. There was a call or else I wouldn t have put it in my witness statement.
>
> Q. Your witness statement represents your evidence and represents what you remember, Mr Curistan. Isn t that right?
>
> A. Yes.
>
> Q. But you don t actually remember what happened during the course of that call or who said what?
>
> A. It was sixteen years ago.
>
> Q. That s fine. No-one is criticising you for not remembering the detail after this long, but is it the truth then, Mr Curistan, you don't remember the detail of the call? You won t find the answer on screen.
>
> A. How can I remember the detail of a call –

> MR JUSTICE SIMPSON: Mr Curistan, we only want to know -- it s not a criticism. Mr Dunlop is quite right, and I am also telling you it is not a criticism. I couldn t tell you what happened two weeks ago –
>
> A. I am the same, my Lord.
>
> MR JUSTICE SIMPSON: -- never mind what happened in 2009. All we are asking you is: is it your evidence that in relation to the call of 19th November 2009 you can t remember what was said?
>
> A. Yes."

[292] It seems that Mr Whelan resigned from the Bank on or about 8 December 2009. In a letter of 14 December 2009, the plaintiff wrote to Mr McAreavey indicating that he, the plaintiff, had asked Mr Whelan to work with SML on a temporary basis in relation to the Parnell Centre project and the Odyssey. As to his allegations about Maple 10, the plaintiff relies on two emails sent by Mr Whelan after Mr Whelan had left the Bank s employment and during the time when he was working on a temporary basis with the plaintiff. The first is dated 23 December 2009 and was sent by Mr Whelan to Mr McAreavey. It says:

> Ciaran,
>
> Peter C just rang me in a panic, apparently you sent him a nice Christmas Card!
>
> The only concern I have is that on the instructions of Peter Butler as acting head of risk, myself and Joe McWilliams were asked to tell [the plaintiff] to withdraw from the deal with PBN because Peter Butler felt the Bank could not deliver a non-recourse deal with PBN because of the sensitivities around the Maple 10.
>
> If this is no longer the view I can work with Peter to get the PBN deal back on track…"

[293] On 28 January 2010 Mr Whelan stated in an email:

> Myself and Joe were very happy to complete the deal with PBN, and I still believe Paddy Kearney would do a great job, however Peter Butler called me down to his office and explained he was uncomfortable with PBN taking over Odyssey because Paddy was one of the Maple 10."

[294] The evidence from Mr McAreavey in his witness statement is:

> 179. At §124 of his statement, Mr Curistan suggests that the reason for the Bank withdrawing from the deal with PBN was owing to the connection between PBN and Mr Kearney and his involved in the Maple 10. I cannot speak to the discussion he alleges occurred between Mr Whelan and him, but I am absolutely certain that the reason the PBN deal collapsed was because, as set out above, the Bank could not agree to the terms that PBN was seeking to impose by late November 2009. I was directly involved in these discussions, and I am absolutely certain that the Maple 10 issue or the involvement of Patrick Kearney in PBN was not a factor influencing the decisions that I took or indeed was relevant to the terms discussed at the meeting on 18 November 2009
>
> 180. Furthermore, I understand that on 19 November 2009 a heated exchange took place in the lobby of the Europa hotel between Mr Curistan and Mr Adair of PBN. The substance of the disagreement was that Mr Curistan was advising PBN that he was withdrawing from the deal. I became aware of this altercation on the following day when Mr Adair visited me in the Bank's offices in Belfast."

[295] Mr Whelan provided a witness statement in the proceedings. In the event Mr Dunlop did not call Mr Whelan, and no application was made to admit his evidence under the provisions of the Civil Evidence (NI) Order 1997. Accordingly, I have not considered Mr Whelan s witness statement. In the circumstances there is no evidence from Mr Whelan to contradict the plaintiff s assertion that Mr Whelan phoned him on 19 November indicating to him that the Bank could not continue with the PBN deal on the grounds of the sensitivity of his involvement with the so-called Maple 10, and the terms requested to close the OPL deal."

[296] On 24 November 2009 ie five days after the alleged 19 November phone call Mr Whelan, while still in the Bank s employment, wrote to the plaintiff stating:

> I refer to previous correspondence in relation to the above and I note your concerns regarding the delay to the restructure of your loan facilities with PBN Limited and the Bank.
>
> I note it is your intention to cease negotiations with PBN Limited <u>as a result of these delays</u>. (emphasis added)

> As you know the Bank has co-operated fully with [SML] and PBN and has met the Odyssey Trust on a number of occasions with a view to finalising the transaction. We are disappointed that the transaction could not be agreed but we understand your reasons for withdrawing from the negotiations.
>
> You mentioned in our discussion that you have received an expression of interest from the Coffer Group , and that this company has vast experience in the leisure industry, in particular as a result of its association with the Earls Court Development in London.
>
> I wish to advise that I have organised a meeting on your behalf with Mr Ciaran McAreavey, our Regional Manager in Belfast to discuss how a deal with the Coffer Group could be structured, for Wednesday, 25th November 2009.
>
> You expressed some concern regarding the ·possibility that the Bank may try to negotiate a separate deal with the Coffer Group, despite your introduction. I wish to confirm that this is not our intention, and the Bank will not attempt to conclude a deal with the Coffer Group which will exclude Sheridan Developments."

[297] I find it interesting that the plaintiff did not reply to this letter. In particular, in my view it is telling that there is no immediate riposte from him to Mr Whelan challenging the suggestion that the PBN deal was being ended because it was the plaintiff s intention to cease negotiations with PBN Limited as a result of" delays and that the Bank understood the plaintiff s reasons for withdrawing from the negotiations." If the telephone conversation which the plaintiff alleges he had received from Mr Whelan on 19 November had taken place, with the content as alleged by the plaintiff, I would have expected some prompt response from the plaintiff to the letter of 24 November taking issue with what was stated therein.

[298] On 22 December 2009 Mr McAreavey wrote a lengthy letter to the plaintiff setting out some of the history and expressing the Bank s concern at the current situation. In the course of that letter there is a reference to a meeting on 25 November 2009 attended inter alia by Adam Coffer, Peter Holmes and [the plaintiff], with the Bank being represented by Pat Whelan, Jimmy O Neill and me. At that meeting you advised the Bank that the proposed disposal of OPL to PBN was not now going to proceed, as you had withdrawn from the deal." At no time, contemporaneously, did the plaintiff take issue with this assertion and, certainly, there is no immediate suggestion from him of a telephone call from Mr Whelan and an assertion about Maple 10.

[299] In the event, even in the absence of any evidence from Mr Whelan, the plaintiff has failed to satisfy me that the PBN deal came to an end for the reasons given by him. In all the circumstances I prefer the evidence of Mr McAreavey as to why the PBN deal came to an end as is set out in paragraph 179 of his witness statement.

[300] I find that the PBN process did not complete because (1) the financial terms PBN was seeking from the Bank were unpalatable to the Bank and (2) in any event, the plaintiff withdrew from the deal due to the delays in the progress of negotiations.

[301] It is to be remembered, and was agreed several times by the plaintiff in cross examination, that all this time the Bank was continuing to fund SML to maintain its solvency.

[302] The plaintiff s case, in relation to the PBN process, is that the defendant assumed control of the process. In paragraph 17 of the Amended Statement of Claim the following is alleged in relation to the PBN process:

> At material times thereafter the Defendant assumed control, direction and management of this process of sale in a manner and to an extent which affected, to the knowledge of the Defendant, the rights and obligations of the Plaintiffs. The Defendant's control, direction and management of the said processes of the sale were such that the Defendant owed a duty of care to the Plaintiffs. Further and in the alternative the actions of the Defendant in and around the said sale were such that the Defendant acted as agent of the Plaintiffs and the Defendant thereby owed fiduciary duties to the Plaintiffs. Further and/ or in the further alternative, the Defendant's control, direction and management of the said process of sale was such as to amount to shadow directorship on the part of the Defendant in relation to the first Plaintiff."
> (The amended portion of paragraph 17 is that underlined)

[303] This is supported by Mr Griffiths. Having referred to contact between the Bank and Pat Kearney in November 2008 he says, at paragraph 4.18 of his report:

> This would appear to indicate that Anglo was both seeking to take over direction of the sale and was attempting to maximise potential profits for the Bank. This was, in my opinion, potentially to the detriment of SML of, in pursuing its own interests, Anglo failed to consider other viable bids."

[304] I mentioned above Mr Holmes s letter of 9 January 2010. That letter came into being as a result of a meeting on 8 January 2010 attended by Messrs McAreavey and O Neill from the Bank, and the plaintiff and Mr Holmes.

[305] In the course of that meeting it is recorded that:

> "Mr McAreavey asked what steps had been taken to ensure that the disposal had explored all possible opportunities in the market place. [The plaintiff] outlined the steps taken to ensure that all possible avenues were explored, and undertook to write to Mr McAreavey to set these out in greater detail. But he emphasised that there had been a full sweep of potential interest, many of whom had been given detailed information on the Pavilion and the opportunities arising by way of the development of Titanic Quarter. [The plaintiff] noted that he engaged a number of leading players in the leisure business in Great Britain such as Coffer Leisure and Humberts Leisure to find a buyer for the Odyssey Pavilion. [The plaintiff] noted that he had engaged with CBRE and Jones Lang Lasalle in relation to the disposal of the Odyssey Pavilion."

[306] Curiously, in light of the plaintiff s allegations about the Bank taking over control of the sale process, to SML s/his exclusion, this question appears not to have provoked any protest by the plaintiff.

[307] Important paragraphs in the letter of the following day from Mr Holmes to Mr McAreavey include:

> As requested I am setting out below the steps taken by Sheridan to seek the widest range of interest in Odyssey Pavilion, and to ensure maximum benefit from the disposal. We approached commercial agents to seek out parties interested in purchasing Odyssey Pavilion, and ourselves sought out companies and individuals who might see the Pavilion as a commercial opportunity. In addition, we were, from time to time, approached (mainly by individuals) in connection with the disposal of the property.
> …
> Following that [the decision in September 2006 to dispose of the Pavilion] we initiated a strategy to engage as wide a range of potentially interested parties as possible, and to support this provided detailed information on the Pavilion and, more generally, the Odyssey complex. In addition to the contacts referred to above, and detailed below, this

strategy included asking Anglo to identify from within its clientele any possible interested parties.

Looking to the commercial field, we engaged Coffer Leisure and Humberts Leisure, both leading players in the leisure business in Great Britain, whose range of contacts covered the major players in this field…

Arising from these, Coffers introduced us to Nomura Bank, with which we established a strong relationship, initially through the [Nomura] Bank itself and then through Moor Park (a subsidiary). However, following considerable initial interest, which progressed over a number of months to detailed negotiations, its involvement waned when it became involved in a major £1bn plus deal in Germany.

Humberts brought Xcape to Northern Ireland to determine its possible interest in developing leisure facilities alongside Odyssey and becoming partners in a joint venture. However, its consideration of local demographics led it to discontinue its interest.

At or about this time (early spring of 2007) there was interest from Taggart Holdings — then a major player in Northern Ireland development, and expanding rapidly — in establishing a joint venture relationship which would involve the purchase a (sic) major share in Odyssey Pavilion and other developments. Almost simultaneously, the Bank introduced Noel Smyth who quickly made clear his interest in both the Pavilion and the Tannery — a Sheridan mixed-use development in King Street, Belfast. His proposition was to purchase both properties. Alongside Smyth, Propinvest, a large GB property company sought details on the Pavilion and, following a visit, made clear its genuine interest in the property.

Given Smyth s initial offer for both the Pavilion and the Tannery, which exceeded those of both Taggarts and Propinvest, we decided in consultation with the Bank to go with Smyth, and agreed an exclusivity period with his Belfast company, Alburn.

Negotiations with Alburn were protracted, and it was not until November 2007 that a contract was agreed and signed.

During this period of exclusivity, there were some approaches by local property interests regarding Odyssey, but none was of a nature or quality which would have been attractive in comparison to the terms being offered by Alburn.

The deal with Alburn, which was conditional on several issues being resolved, dragged through into 2008. By the early summer, when the first signs of recession were evident, it became clear that Alburn was not willing to conclude the deal, and in August it indicated that it was not prepared to complete. While legal advice was taken, it was clear that there was no merit in pursuing Alburn by that route.

At this stage — September 2008 — we met again with the Bank to see if there were any other clients who might be interested in the property. By this time, the strength of the recession was becoming evident and disposal by traditional means looked increasingly doubtful.

Within a couple of months [after September 2008], the Bank notified us that a client s company — PBN —was interested in acquiring the Pavilion, and this led to detailed negotiations being begun. By January [2009] a framework was agreed. While this was proceeding, we were approached again by agents acting for Propinvest who informed us that Propinvest was interested in re-entering the field. Again, we provided detailed information to the company and met on a number of occasions with the Principals. Given this interest, and the potential for achieving a more attractive deal than that proposed by PBN, we approached Citygrove — a significant GB player in leisure — to determine if it had any interest, but its view was that the value of the Pavilion could not be equated to the proposed deal [with PBN]. We also checked with Coffers and Humberts to see if there was any other interest in the property.
…

You will see from the foregoing that we in Sheridan have made considerable and wide-ranging efforts to identify potential purchasers of the Pavilion, and that this has resulted in interest being canvassed across the UK and Ireland with a view to achieving the best possible outcome

> for the Bank and ourselves. As we indicated to you when we met, we are entirely convinced that the market has been fully tested over the period 2007 to date …
>
> If you require any further details on any of the approaches, that can readily be supplied."

[308] A number of points arise. First, the meeting took place, and the letter was written, well before the Bank s May 2010 letters of demand and the issue of the Writ in June 2010, and over a year before the original Statement of Claim in which there was contained any allegation of control on the part of the Bank. It is not unreasonable to infer, and I do infer, that it represented the attitude of the plaintiff in January 2010 before any legal dispute with the Bank arose. Secondly, the plaintiff did not protest, either in the meeting or in the letter, when asked by Mr McAreavey what steps had been taken to ensure that the disposal had explored all possible opportunities in the market place", along the lines that since the Bank had taken control of the process to the exclusion of SML/the plaintiff and had become a shadow director, why was the plaintiff being asked what steps had been taken. If the plaintiff genuinely believed at the time that the Bank had controlled the process, I would have expected some sort of protest when he was asked effectively to justify the steps taken by SML/him — even though at that time he was ignorant of the Bank s internal documentation. Thirdly, and importantly, in my view it shows that SML/the plaintiff was actively and comprehensively involved in the marketing of the Odyssey. It is the plaintiff s case that the Bank took control of the process, becoming effectively a shadow director and owing consequent fiduciary duties. This is a view supported by Mr Griffiths. However, nowhere in the plaintiff s witness statement or in Mr Griffiths s report is this meeting or this letter referred to. In my view the sentiments expressed in the letter show that, far from the Bank taking control of the process, it is clear that the plaintiff/SML was actively involved and consulting widely to try to obtain an approach which would better the PBN offer. I find it surprising that an expert, commenting on allegations that the Bank took control of the process, would not have dealt with the content of this meeting and this letter. It leads me to conclude that the letter was not made available to any expert on the plaintiff s side. If they had been made available to him and if he had considered them, I am of the view that his assertions might well have been quite different.

[309] I also refer again to my conclusions expressed in paragraphs [286] and [288] above about the allegations of control.

[310] In all the circumstances outlined above, I have concluded that the plaintiff s case that the Bank took control of this process, thus becoming a shadow director of SML or owing to him or SML fiduciary duties is just wrong.

[311] In relation to the next period of time, I think I also need to set out in full the plaintiff s evidence as contained in paragraphs 125 to 127 of his witness statement, in order to do justice to it.

125. Following this period, a mini Credit Committee met on 19 January 2010 to consider the SG [Sheridan Group] position. The Discussion Paper prepared for the meeting sets out the background to the SML/OPL/PBN deal, claiming (erroneously) that

> [The Bank] asked a third party accountant ... Tony Carey of Cooney Carey to administer a final round of the bid process where PC was asked to decide between 3 offers (Harcourt, Propinvest and PBN) and it was clearly agreed by PC and documented that the preferred bidder was PBN.

This is a blatant misrepresentation of the actual situation, where I was given no choice among the three bidders, but had a clear-cut option to choose PBN or have SML placed in administration.

Although there had been doubt expressed about the instruction to me to discontinue the deal with PBN, it is clear that officials were acutely aware of the sensitivity of the Maple 10 issue in connection with PK:

> 'The restricted circulation is due to there being some sensitive issues around a former staff member and also Maple 10.

The outcome of the Mini Credit Committee, for which this Paper was prepared, sets out the terms of the discussion and the conclusion reached:

- Credit Committee accepted the recommendations proposed in the Discussion Paper

- CC accepted the proposal .... and felt the bank had no option but to take enforcement action and step in and take control of the Odyssey Pavilion.

- ... the main focus of the bank is to first deal with stepping in and taking control of the Odyssey Pavilion by means of enforcement action, to sterilise the Odyssey Pavilion, achieve vacant possession on the units operated and connected with PC/Sheridan Millennium Limited and to commence an open marketing process on the Odyssey Pavilion.

> 126. This conclusion was subsequently ratified by the full Credit Committee on 9 February 2010. In effect, therefore, the subsequent negotiations with Coffer were a sham: the officials had no intention of concluding a deal. The focus was on the process to enforcement, together with a plan to bankrupt me, as set out in the assessment of 28 August 2009.
>
> 127. This decision highlights the gross misrepresentation of the Bank s position as portrayed by officials. While overtly continuing to seek an accommodation with Coffer, and representing this as the case to me, there was no intention of agreeing a deal. All the subsequent exchanges were undertaken, by CMcA and Mr John Berry [Anglo s Director of Property Finance] in the knowledge that they were blatantly misrepresenting the Bank s position."

[312] In a meeting with the Bank on 27 January 2010, in which the plaintiff and Mr Holmes were introduced to a Mr Kieran Dowling, who was replacing Mr McWilliams, SML sought a further facility of some £60k for the rates in relation to Strike 4.

[313] Paragraphs 188 and 189 of Mr McAreavey s witness statement deal with this aspect of the matter:

> 188. A meeting then took place on 27 January 2010 at which both Mr Curistan and Mr Holmes attended. The suggestion at §127 of Mr Curistan s statement that there was gross misrepresentation by the Bank, or that it engaged in a sham in its dealings with the Coffer Group is plainly wrong when one notes that he was told exactly what the Bank intended to do in the course of the meeting. It was quite obvious to Mr Curistan that the Bank s credit committee had decided it was not going to continue supporting SML. The core problem, in fact, with Mr Curistan s entire argument is that he is alleging the Bank was under some form of legal obligation to continue discharging the debts of not only SML, but other connected companies. The basis on which Mr Curistan sought to persuade the Bank to do so during the meeting was because he believed that it would reduce the losses that the Bank would otherwise suffer.

> 189. While a final decision from the Bank remained to be taken, Mr Holmes emailed me on 3 February 2010 to complain that there was a lack of engagement with Mr Coffer. … This is noted at §128 of Mr Curistan s statement. I would have thought that Mr Holmes would have been fully aware that the proposal that Coffer was putting forward was entirely dependent on the Bank providing 100% of the loan for it to acquire the Odyssey from OPC. It was obvious to me that the Bank s credit committee were not going to approve this loan which had been communicated to SML at the meeting on 27 January 2010. In addition, Coffer wanted a further large loan of up to £15m by way of capital expenditure to revitalise the Odyssey. I continued to engage with Coffer to investigate what deal might be achievable recognising at all times that this was going to be subject to credit approval. I both spoke to and engaged in emails with Adam Coffer on 4 February 2010. … I also sent an email to Mr Holmes updating him on the same day. …"

[314] In a further meeting between the Bank and SML on 5 February 2010 — requested by SML to discuss ongoing developments in relation to creditor pressure on the … Group" — it was stated that there was an imminent hearing of a winding-up petition on behalf of the rates authority in relation to Strike 4, that HMRC was likely to take action in relation to outstanding tax and that while OPL (owned by the plaintiff) had been making VAT returns, in fact there was no money to pay VAT liability as it had been used by the Sheridan Group for Group cashflow.

[315] Unsurprisingly, the bank was particularly concerned by this last matter and in an email to SML of 23 February stated, inter alia:

> While the Bank is seeking to work with Sheridan Group to find a solution to the current issues, within the constraints of the Bank s decision not to make any additional creditor funding available, one matter outlined at our recent meeting did cause me some concern. You indicated that Odyssey Pavilion LLP (OPL") has not been making payments on its VAT returns since it was constituted in April 2009. While we sought an explanation as to how this has transpired you were unable to give specific answers, but you advised that the VAT received by OPL on OPL s rental income has been released by the managing agent to Sheridan Group. You have indicated that these funds have been used by Sheridan Group to stay alive rather than to make the payment of the relevant VAT amounts owed to HMRC on OPL s behalf. We have asked

> that you clarify when the OPL VAT returns have been made and the net amount of VAT currently owing by OPL but have not yet received a response."

[316] Cross examined about this, the plaintiff did not dispute that VAT moneys were used to keep the Group alive and agreed that to take VAT paid as tax which was due to one company and to use that VAT to support other companies was not proper use of company funds.

[317] It transpired that, in fact, Coffer was offering only £55 million in a situation where the total SML indebtedness to the Bank was of the order of £82 million. In a letter to the plaintiff dated 16 April 2010 Mr McAreavey said of this offer:

> Having discussed the revised proposal, it is considered that the transaction structure would not meet the requirements of the Bank s Credit Committee in respect of risk sharing on the development funding. While the Bank remains open to considering other proposals, the structure of what has recently been proposed is not sufficient for the Bank to proceed with the transaction."

[318] Having reviewed the contemporaneous material, I reject any suggestion that the Bank s dealings with Coffer were a sham or in any way improper.

[319] Not only had SML long been unable to pay its debts as they fell due, but by April 2010 OPL was close to being unable to meet its own liabilities. In a letter from the Bank addressed to Mr Holmes dated 23 April 2010 the following is stated:

> "…
> There is currently insufficient cash in the rental account to meet the monthly interest payment due by OPL to the Bank on 20 April…There is currently a shortfall of [c £51k] in respect of the April interest payment. It will not be rolled up into capital as this would only make a bad situation worse. This sum is currently due and owing. Please note that the Bank requires the shortfall to be discharged forthwith.
>
> On 1 May the next quarterly payment of [c £253k] in relation to head rent/service charge/insurance costs fall due to be paid by OPL to Odyssey Trust. There is currently no cash in the rent account to meet the payment. Failure of OPL to discharge the head rent/service charge/insurance costs would have serious implications for the Bank.

> The Bank asked you in its letter of 16 April 2010, in your capacity as member/director, how OPL proposes to address these liabilities when they arise. We still await your proposals in this regard. Failure to discharge the shortfall in interest now and the head rent/service charge/insurance costs on 1 May 2010, will result in a position for OPL that it is unable to pay its debts as they fall due and is therefore insolvent. In order to protect the asset which is held as the primary security of the Bank, we require your proposals by return."

[320] Following some further correspondence which did not resolve outstanding issues, the Bank wrote

> (1) on 17 May 2010 to SML demanding payment of all moneys and liabilities now owing by [SML] to the Bank, in the aggregate sum of Stg£10,498,400.44 plus accrued interest of Stg£11,684.64 totalling to Stg£10,5l0,085.08.";
>
> (2) on 18 May 2010 to OPL demanding payment of all moneys and liabilities now owing by [OPL] to the Bank, in the aggregate sum of Stg£71,054,138.24 plus accrued interest of Stg£166,179.08 totalling to Stg£71,220,317.32."

[321] Neither debt was ever repaid and in cross examination the plaintiff admitted that neither entity could pay the indebtedness to the Bank. On 19 May 2010, an Administrator was appointed over OPL. On 14 April 2011 an Administrator was appointed over SML.

[322] In his witness statement, the plaintiff summarises much of his case, thus:

> 140. The Bank officials have successively blatantly misrepresented the true circumstances of the disposal process to me and PH, by:
>
> 1) misrepresenting their decision to identify PK (and PBN) as the preferred purchaser of Odyssey, to the exclusion of other bidders with better offers;
>
> 2) misrepresenting the relationship of the Bank by failing to reveal PK s involvement in the Maple 10 and, in consequence, the officials choice of PK/PBN;
>
> 3) misrepresenting Propinvest s bid terms by claiming that they were inferior to those of PBN, whereas they were markedly better;

4) misrepresenting Propinvest s financial and management capabilities to the advantage of PBN

5) misrepresenting that I had a role in the selection of the successful bidder, when, in practice, he had no option other than to accept PBN.

6) misrepresenting the timeframe for the transaction to complete, and thereby abusing my trust by having me, my wife and PH sign the disposal documentation believing that the terms would apply only to a very brief period;

7) misrepresenting that the disposal to PBN could proceed, when PBN had not even a draft contract;

8) misrepresenting that the officials were acting in the best interests of me/OPL when, in practice, they were using the removal of me from Odyssey as a lever to gain benefit;

9) misrepresenting that I had been required to terminate the deal with PBN;

10) misrepresenting that a decision to take enforcement action against Sheridan had been agreed in January 2010;

11) misrepresenting their relationship with Coffers in that there was no intention of doing a deal as a consequence of the decision referred to in (10) above.

141. I believe it is indisputable that the officials of the Bank, the individuals concerned, namely Messrs Whelan, Dowling, McWilliams, McAreavey and O'Neill, held senior positions in the Bank, and, as such, owed a duty of care to their customers. Given the extent of the financial relationship between the Bank and me, SML and [the Group], these officials not only had a general duty of care, they also had a fiduciary duty to respect and protect the interests of their clients, whether personal or corporate.

142. It is clear that from the beginning of the proposed disposal process the officials' focus and concentration was on improving the Bank s position at the expense of that of its clients. So much is evident from the earliest documentation, October 2008, where PW is taking control

> of the disposal process and is, even at that stage, planning what amounts to a partnership between the Bank and PK/PBN.
>
> 143. In the case of PBN, the officials were in full control of the process and were engaged at every point of the negotiations, to the exclusion of me/SML. Their motivation was entirely to benefit of the Bank, and to ensure that there was no undue interference from me and PH.
>
> 144. It is clear that where actions were in the Bank s interest the officials were fully prepared to use my poor relationship with OTC to act as leverage to obtain their objectives. Hence, there is clear evidence that they threatened OTC on several occasions on the basis that if OTC did not accede to their demands it would be left with PC.' This insidious threatening of OTC remained a signal part of the negotiations. The officials were prepared to sacrifice my interests to obtain their goals, without any consideration of their duty of care and fiduciary duty to their client."

[323] All of these allegations are firmly rejected in paragraphs 193 to 196 of Mr McAreavey s witness statement.

PART 4 — THE SUBJECT TO CONTRACT ISSUE

[324] This relates to the two letters written by the Bank to which I have referred above. On 13 January 2009 the Bank wrote to the plaintiff. The letter is headed Without prejudice - Subject to Contract." On 14 September 2009 after further events, the Bank wrote again setting out its proposals. Again, the letter is headed Without prejudice - Subject to Contract." For the purpose of this section of the judgment it is not necessary to quote from the letters in detail.

[325] As to the January letter, paragraph 22 of the Amended Statement of Claim describes this as a lawful and binding agreement and contract in writing." As to the 14 September letter the plaintiff says it constituted a further lawful and binding agreement with the" Bank. At paragraph 39 of the Amended Statement of Claim the plaintiff pleads, and particularises, allegations of breach of contract, thus:

> 39. Breaching the provisions of the January Agreement in particular:

(i) Failing to release personal guarantees from the fifth and sixth Plaintiffs in relation to the borrowings of the first Plaintiff.

(ii) Failing to write down the borrowings of the first Plaintiff to £1.5 million.

(iii) Failing to provide to the first plaintiff a loan of £1.5 million for a maximum period of three years.

(iv) Failing to provide additional funding to the first Plaintiff to cover trade creditor and tax creditor liability.

(v) Failing to provide adequate funding to a company owned by Peter Curistan to fund a project at the Parnell Centre Dublin to cover project costs including acquisition of units 1-6 within the mall area, stamp duty, legal fees and other eligible assets interest roll up until December 31 2010.

(a) Breaching the provisions of the September Agreement in particular:

(i) Failing to release the fifth and sixth Plaintiffs from personal guarantees in relation to the facilities of the first Plaintiff and the facilities of Odyssey Pavilion LLP.

(ii) Failing to provide funding to PBN Newco.

(iii) Failing to write down the borrowings of the first Plaintiff to £1.5 million.

(iv) Failing to provide to the first Plaintiff a loan of £1.5 million for a maximum period of three years.

(vi)(sic)Failing to provide additional funding to the first Plaintiff to cover trade creditor and tax creditor liability.

(vii) Failing to provide adequate funding to a company owned by Peter Curistan to fund a project to the Parnell Centre Dublin to cover project costs including the acquisition of Units 1 - 6 within the

> Mall area, stamp duty, legal fees and other eligible assets interest roll up until December 31 2010.
>
> (viii) Failing to fund an additional payment to the fifth Plaintiff to compensate him for the requirement to deliver vacant possession on Unit 2 within the Odyssey Pavilion.
>
> (ix) Failing to use best endeavours to achieve a sale of the leases to PBN whether by 30 September 2009 or at all. …"

[326] Accordingly, the status of the two letters is of fundamental importance to the plaintiff s claim in contract.

[327] In relation to the inclusion in both letters of the Subject to Contract" phrase the plaintiff says this was waived by both him and the Bank and, therefore, both documents constitute binding agreements. I leave aside for the purposes of this judgment the question of how both can be regarded as binding, when one was superseded by the other, and will deal only with the issue of waiver.

[328] First, in his oral evidence the plaintiff said this:

> MR DUNLOP: So Mr McAreavey said to you, even though we have no written agreement, even though the document is headed Subject to contract", don t worry, this document is now to be treated as a binding contractual agreement, or words to that effect.
>
> A. Basically, he said --
>
> Q. No, no, is that what he said to you?
>
> A. Well, just maybe listen. What I was going to say was that I have it in black and white, in writing, where he was, I think he was writing to Joe McWilliams or Pat Whelan, someone above him, to say, we have looked at this agreement, Peter and I agree that there's not much point in spending all the time to get solicitors to draft another X number of pages when all we want to do is to get on with getting the items dealt with and move on. That was a waiver I understand of the contract, subject to contract.'"

[329] In support of his contention the plaintiff identified an email in December 2008 and emails in January 2009.

[330] On 9 December 2008 Mr McAreavey emailed Mr McWilliams and Mr O Neill in the Bank. The email states (where material to this issue):

> One other thing we discussed on Friday was whether we should proceed to getting formal heads of terms drafted by solicitors. Both Peter C and I agreed that given how long it had taken to get to the letter we had, and given the level of detail/discussion, there was not a lot of point taking a further couple of weeks to get solicitors to draft more documents. Time would be better spent by getting the deal done. We have sent a copy of the HOT letter to Angus [Creed, solicitor] and he is to revert to us with any points on it which we can raise with PC if needed.
>
> Do you agree with that approach?"

[331] A number of January 2009 emails were also relied on. First in time was an email on 8 January at 3.30 p.m. from Mr McAreavey to Mr Holmes (copied within the Bank):

> Peter,
>
> Further to our discussion today I can confirm that the bank s Credit Committee has approved in principle the proposal to provide an additional 3 million to Sheridan Millennium Limited for additional creditor funding subject to the Heads of Terms letter we had recently sent you. We have arranged to meet at 3.00 pm at our offices tomorrow to discuss the detail of the associated terms and plan the completion process with a view of achieving drawdown of these funds."

[332] Next, an email of 13 January at 8.26 am sent from Mr McAreavey to Mr Holmes and various Bank officials. It read:

> Peter,
>
> I am writing to confirm that the Bank s Credit Committee has now approved £3.0m of additional funding for the payment of creditors subject to the Heads of Terms letter we had previously sent you. We are asking Tony Carey … to oversee the disbursements of funds and he is likely to be in contact with individual creditors over the next few days …"

[333] At 10.36 am Mr McAreavey emailed a letter to Mr O Neill asking him to get it printed etc. At 10.43 Mr O Neill replied:

I will do. Just one thing, should I take out that reference to Without Prejudice - Subject to Contract as we have discussed that we should just reply (sic) on the heads of terms rather than getting into legals on this."

[334] At 10.53 Mr McAreavey replied:

Think I would leave that in as a protection in case [the plaintiff] starts to mess around."

[335] When Mr McAreavey was asked in cross examination by the plaintiff about this matter the following exchanges took place:

Q. [by the plaintiff] …both of us agreed that it would be better to get on with complying with the conditions of it, than going to solicitors to get them to draft detailed documents; is that right, Mr McAreavey?

A. No, that s not the right characterisation of it. So this letter which is marked without prejudice subject to contract was essentially the framework for the relationship or the arrangement that was being proposed. Clearly, there are parts of this that would have to have detailed legal contracts drawn up, so the transfer of Odyssey Pavilion to a new entity, the arrangements around the residual debt for Mr Curistan and other matters, we took the view that the interim step that you could have done, my Lord, was to go through to a legal firm to have a non-binding heads of terms drawn up in more detail, we didn't really see the point at that step because this contract — or this document, that s a slip of the tongue — this document is clearly without prejudice subject to contract. The way that the bank viewed was that it was a roadmap for how we would progress. At any time, Sheridan or the bank could decide we are not making enough progress in this, and we could end the arrangement, but it was certainly not legally binding.

Q. So, you effectively, Mr McAreavey, didn t see it as a binding contract?

A. No, it was not a binding contract, it says, subject to contract at the top of it

…

Q. And do you not then want to reconsider that the without prejudice, subject to contract is really not applicable?

A. I think this is Mr O Neill asking me should we the remove the without prejudice, subject to contract status on the January 2009 letter and me saying, no. That s what it shows. So, no I don t accept that was --

Q. In case I mess around ; would that be it?

A. I think that the bank would use that type of protective language in making it clear that these are not legally binding arrangements when it is concerned potentially that the party on the other side will fulfil or try and claim that these are legally binding arrangements. So, it was appropriate in this circumstance clearly.

…

MR JUSTICE SIMPSON: … Did you regard yourself, Mr McAreavey, or the bank as being bound by these, what we have called the Heads of Terms or the letter as a binding contract?

THE WITNESS: No, I mean they were always labelled subject to contract and without prejudice and even if portions of the agreement had been performed, clearly for agreement to be binding had it not been without prejudice all of the conditions of the contract would have to have been performed. I think the bank s Credit Committee approval was just the first step, it was the first thing that set us off on this journey and my view is that each side, both Sheridan and the bank, could have decided not to continue on the journey at any point."

[336] There were also two telling portions of cross examination by Mr Dunlop in relation to the 13 January 2009 letter. The first relates to the loan facilities to be granted:

Q. …where Mr Curistan in the letter, which you are relying upon and have pleaded as forming a

binding contract, can you show anyone in this letter where the term of that loan is precisely agreed, the rate of interest in that loan is agreed, the repayment terms are agreed, and the security is agreed. Is it in that letter?

A. No.

Q. No. Would you agree that those are fundamental elements of a contractual agreement which you are trying to establish in relation to a bank loan?

A. In relation to the one point --

Q. In relation to a bank loan, the fundamental terms are repayment, interest, security, those are fundamental terms, are they not?

A. Yes.

Q. Yes. And they re not in that letter, are they?

A. No."

[337] The second portion relates to deliverables, such as vacant possession on some of the units, and the fact that plaintiff sought to renegotiate some of the terms contained in the letter:

Q. But you were needing to change, then, the nature of the agreement that was proposed because what was proposed couldn t be delivered by Sheridan Millennium, could it?

A. And Anglo couldn t deliver their elements either.

Q. That s fine, Mr Curistan, but the point is on your case then, neither party could actually do what was needed to put in place the agreement as proposed in January 2009, isn t that right?

A. It looks like it, yes."

[338] Turning to the relevant legal principles, in the case of *Joanne Properties Ltd. v Moneything Capital Ltd. and Anor* [2020] EWCA Civ 1541 the court said:

[17] Once negotiations have begun subject to contract', in the ordinary way that condition is carried all the way through the negotiations: *Sherbrooke v Dipple* (1981) 41 P & CR 173. As Lord Denning MR explained:

> But there is this overwhelming point: Everything in the opening letter was subject to contract. All the subsequent negotiations were subject to that overriding initial condition.

[18] In the course of the judgments both Lord Denning MR and Templeman LJ approved the proposition formulated by Brightman J in *Tevanan v Norman Brett (Builders) Ltd* (1972) 223 EG 1945 that:

> parties could get rid of the qualification of subject to contract only if they both expressly agreed that it should be expunged or if such an agreement was to be necessarily implied.

[19] Templeman LJ also approved a further passage of Brightman J s judgment in which he said:

> '… when parties started their negotiations under the umbrella of the subject to contract formula, or some similar expression of intention, it was really hopeless for one side or the other to say that a contract came into existence because the parties became of one mind notwithstanding that no formal contracts had been exchanged. Where formal contracts were exchanged, it was true that the parties were inevitably of one mind at the moment before the exchange was made. But they were only of one mind on the footing that all the terms and conditions of the sale and purchase had been settled between them, and even then the original intention still remained intact that there should be no formal contract in existence until the written contracts had been exchanged.

[20] Templeman LJ went on to say:

> Accordingly, in my judgment, the judge, with great respect, fell into the error which was adumbrated by Brightman J, namely of thinking

> that because parties got near a contract or conveyance, because parties assumed that they would go happily on until matters had become binding, therefore the subject to contract qualification either ceased to have effect or was replaced by a new contract. That, in my judgment, is not the position. It is always the case that in subject to contract negotiations one side or both from time to time speak as though there was a contract or would be a contract, and that is because everybody looks on the bright side and thinks a sale is going to take place. The fact of the matter is that for very good reasons the subject to contract' formula enables one to see at once whether there is or is not a contract—either a contract exchanged or conveyance executed and delivered—or whether parties are in the negotiation stage. Once one gets away from principle, then all is difficulty, and reliance on odd conversations and letters produces uncertainty in law.

[21] This court reaffirmed that approach in *Cohen v Nessdale Ltd* [1982] 2 All ER 97.

[22] In *RTS Flexible Systems Ltd* the Supreme Court held that on the particular facts of that case the equivalent of a subject to contract clause had indeed been waived; not least because the putative contract had been partly performed. But in terms of the general approach, Lord Clarke said at [47]:

> We agree … that, in a case where a contract is being negotiated subject to contract and work begins before the formal contract is executed, it cannot be said that there will always or even usually be a contract on the terms that were agreed subject to contract. That would be too simplistic and dogmatic an approach. The court should not impose binding contracts on the parties which they have not reached. All will depend upon the circumstances.

[23] He added at [56]:

> Whether in such a case the parties agreed to

> enter into a binding contract, waiving reliance on the subject to [written] contract term or understanding will again depend upon all the circumstances of the case, although the cases show that the court will not lightly so hold.
>
> [24] In *Jirehouse Capital v Beller* [2009] EWHC 2538 (Ch) Peter Smith J held that the subject to contract formula had been lifted by necessary implication. In so holding he applied the principle in *Cohen v Nessdale*. Whether he was right or wrong on the facts of that case does not concern us. His decision is simply an application of the principle to particular facts."

[339] Having listened to the oral evidence and examined the contemporaneous documentation, and bearing in mind the legal principles set out above, I have reached the conclusion that the plaintiff s contention that the parties waived the subject to contract stipulation is not sustainable. Even if the plaintiff thought he had waived the stipulation, I am satisfied that the Bank never agreed to waive the stipulation. I am conscious that the court should not impose binding contracts on the parties which they have not reached" and in the present case if I was to accept the plaintiff s contention that is exactly what the court would be doing. I am satisfied that Mr McAreavey s view that the Heads of Terms were clear enough to allow the matter to progress, with a view to a final contract eventually being entered into is correct. As he also made clear, if the Credit Committee did not approve of the matter, it simply would not proceed. This is the antithesis of a binding agreement.

[340] Accordingly I reject the plaintiff s contention that the parties agreed to waive the subject to contract stipulation in either the January or the September letter. Neither letter formed a binding contract.

PART 5 — THE PLAINTIFF S VARIOUS PLEADED CAUSES OF ACTION

Fraud/Misrepresentation

[341] In light of all of the above I turn to consider the plaintiff s causes of action as pleaded in the Amended Statement of Claim. In paragraph 29 the plaintiff says:

> The representations made by the Defendant as set out at paragraph 25 above — [that (in April 2009) the sale of the leases to PBN would be effected within a period of weeks and there would be an agreed level of compensation for the plaintiff for vacating the Odyssey Bowl] — were in all respects false and untrue and were made by the Defendant fraudulently knowing of their falsity or in the alternative recklessly and without caring whether they were true or

> false and with the intent that the Plaintiffs would rely upon them and thereby be induced to enter in to the contracts pleaded at paragraph 31 below and the Plaintiffs relied upon the said representations and were thereby induced to enter into the said contracts and further the Defendant is liable pursuant to Section 2 of the Misrepresentation Act 1967.

[342] Paragraph 29 is followed by particulars of Fraud" which I do not intend to set out, but their focus was on the Bank s determination to sell to PBN notwithstanding other bids and the concealing of the Maple 10 connection.

[343] In his closing submissions the plaintiff refers to misrepresentation and deceit in the sales process", misconduct in the [Swap]", conspiracy and abuse of power (shadow directorship)."

[344] I remind myself that, as in all other matters, the onus is on the plaintiff to prove his case on the balance of probabilities. However, in relation to serious allegations, such as fraud on the part of the Bank s officials, I am entitled to look for cogent evidence. In *Re Doherty* [2008] UKHL 33, Lord Carswell said:

> If any further clarification were required, it was provided by Lord Hoffmann in *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153… The House of Lords held that where past acts were relied on they should be proved to the civil standard of proof. Lord Hoffmann said at para [55]:
>
> > The civil standard of proof always means more likely than not. The only higher degree of probability required by the law is the criminal standard. But, as Lord Nicholls of Birkenhead explained in *In re H (Minors)(Sexual Abuse: Standard of Proof)* [1996] AC 563, 586, some things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent s Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian. On this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not.

[345] Lord Hoffmann, in *In re B (Children)* [2008] UKHL 35, with support from Baroness Hale of Richmond, reaffirmed in emphatic terms views which he had expressed in *Rehman*. In the course of his judgment, he said:

> [28] It is recognised … that a possible source of confusion is the failure to bear in mind with sufficient clarity the fact that in some contexts a court or tribunal has to look at the facts more critically or more anxiously than in others before it can be satisfied to the requisite standard. The standard itself is, however, finite and unvarying. Situations which make such heightened examination necessary may be the inherent unlikelihood of the occurrence taking place (Lord Hoffmann s example of the animal seen in Regent s Park), the seriousness of the allegation to be proved or, in some cases, the consequences which could follow from acceptance of proof of the relevant fact. The seriousness of the allegation requires no elaboration: a tribunal of fact will look closely into the facts grounding an allegation of fraud before accepting that it has been established. The seriousness of consequences is another facet of the same proposition: if it is alleged that a bank manager has committed a minor peculation, that could entail very serious consequences for his career, so making it the less likely that he would risk doing such a thing. These are all matters of ordinary experience, requiring the application of good sense on the part of those who have to decide such issues. They do not require a different standard of proof or a specially cogent standard of evidence, merely appropriately careful consideration by the tribunal before it is satisfied of the matter which has to be established."

[346] Having examined carefully the evidence in the contemporaneous documentation and the evidence given and called by the plaintiff I see no evidence of fraudulent activity on the part of the Bank s officials. I therefore reject any suggestion of fraudulent representation. In addition, I do not consider that the pleaded representations were either negligent or, as alleged, reckless.

[347] Further, the matters pleaded, in my view, do not amount to misrepresentations either at common law or under the provisions of the Misrepresentation Act 1967. I have set out in detail in the narrative above the events in and following April 2009 — OPL etc. — and the attempts to achieve a solution which was best for both the plaintiff/SML and the Bank. While there was certainly a desire that matters could be completed in a reasonable time, I do not consider that the expression of such desire, however confidently asserted, amounted to misrepresentation.

[348] Further, it is to be remembered that the urgency of the matter was brought about by the imminence of the April 2009 budget and its anticipated stamp duty changes which would adversely have affected the financial implications of the transfer. And it is to be remembered that the effect of the transfer was that SML received £70 million reduction of its debt to the Bank.

[349] In all the circumstances I reject the plaintiff s claims alleging fraudulent or negligent misrepresentation or misrepresentation under the 1967 Act.

Breach of fiduciary duty

[350] The starting point for any consideration is the relationship between the SML/the plaintiff as customer(s) and the Bank. Of this relationship Paget s Law of Banking states that: The essential relationship between a bank and its customer is contractual. It is not a fiduciary relationship." The plaintiff, in his closing submissions, contends that this is fundamentally inapplicable because the Bank s conduct created the special circumstances required by law" to impose a fiduciary duty and as noted above, the plaintiff asserts that various actions on the part of the defendant led to it owing to the plaintiff (and others) fiduciary duties.

[351] Without intending to be prescriptive, broadly speaking fiduciaries are persons or organisations who act on behalf of others and who are required to put the others interests ahead of their own, the paradigm example of a fiduciary relationship being that of trustee and beneficiary.

[352] In 2014 the Law Commission in its report Fiduciary Duties of Investment Intermediaries dealt with the meaning of fiduciary duty in Chapter 3. Where material it said (omitting citations):

> **WHO IS SUBJECT TO FIDUCIARY DUTIES?**
>
> 3.14 This is a notoriously intractable question, and is far from settled. A former Chief Justice of the High Court of Australia has said that the fiduciary relationship is a concept in search of a principle.' What is relatively clear is that fiduciary relationships arise in two main circumstances:
>
> (1) Status-based fiduciaries — where a relationship falls within a previously recognised category, such as a solicitor and client; and
>
> (2) Fact-based fiduciaries — where the particular facts and circumstances of a relationship justify the imposition of fiduciary duties."

[353] In the 34th edition of Snell s Equity the authors say: The categories of fiduciary relationship are not closed." The paragraph in the text (7-005) goes on to state:

> Fiduciary duties may be owed despite the fact that the relationship does not fall within one of the settled categories of fiduciary relationships, provided the circumstances justify the imposition of such duties. Identifying the kind of circumstances that justify the imposition of fiduciary duties is difficult because the courts have consistently declined to provide a definition, or even a uniform description, of a fiduciary relationship, preferring to preserve flexibility in the concept… Thus, it has been said that the fiduciary relationship is a concept in each of a principle.
>
> There is, however, growing judicial support for the view that:
>
> > a fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence.
>
> …Hence, it has been said that:
>
> > fiduciary duties are obligations imposed by law as a reaction to particular circumstances of responsibility assumed by one person in respect of the conduct or affairs of another.
>
> The concept enraptures a situation where one person is in a relationship with another which gives rise to a legitimate expectation, which equity will recognise, that the fiduciary will not utilise his or her position in such a way which is adverse to the interests of the principal."

[354] At paragraph 7-006 the authors state that

> "… banks … do not ordinarily owe fiduciary duties…But it is possible for the circumstances of the relationship between such a person and the other party to the relationship to justify the imposition of fiduciary duties, provided those circumstances are such that it is reasonable to expect that the fiduciary will subordinate his interests and act solely in the interests of the principal."

[355] Paragraph 7.008 begins with the words, which are a quote from *Bristol and West Building Society v Mothew* [1998] Ch. 1:

> The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary."

[356] It is fortunate that, in wholly differing factual circumstances, very recently the Supreme Court has considered the whole concept of fiduciary duties and provided significant guidance.

[357] In *Recovery Partners GP Ltd and another v Rukhadze and others* [2025] UKSC 10 Lord Briggs said:

> [16] The essential purpose of the rule that a fiduciary must not without his principal s consent keep for himself a profit from his position as such, and the related rule that a fiduciary must avoid placing himself in a position where his interest and his duty may conflict (usually called the conflict rule), is to protect or deter those who have undertaken an obligation of single-minded loyalty to someone else from being tempted by human frailty to fall short of that obligation. Authority for this may be traced all the way back to *Keech v Sandford* (1726) Sel Cas Ch 61; 25 ER 223.
>
> [17] I have taken the phrase single-minded loyalty as the hallmark of a fiduciary undertaking from *Bristol and West Building Society v Mothew* [1998] Ch 1, 18 per Millett LJ. It was a case in which claims for breach of duty of care and fiduciary duty were bundled together, so that it was a suitable platform for an explanation of what is special about a duty or relationship being fiduciary. He said:
>
> > A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the

> informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary.'"

[358] Lord Burrows said:

> [283] … As I have indicated above, at its core, a fiduciary duty imposes a duty of loyalty (or, if one wishes to emphasise the point, a duty of undivided loyalty or single-minded loyalty). It requires a sacrifice of self interest."

[359] In *Hopcraft and another v Close Brothers Ltd*. (and other appeals) [2025] UKSC 33 the Supreme Court said (at the numbered paragraphs in the judgment):

> [100] There must be the assumption of responsibility by the fiduciary to act exclusively on behalf of the other in the conduct of the other s affairs. This can arise where the fiduciary has expressly undertaken to exclude his or her own interest and those of third parties when so acting. That is what loyalty means and requires in this context. It can also arise where the objectively assessed circumstances enable equity to identify such an undertaking in the acts of the fiduciary.
>
> …
>
> [201] We understand why the Court of Appeal wished to encourage courts to focus on identifying whether the relevant obligation exists, rather than undertaking the sort of elaborate discussion of fiduciary relationships which had occupied the lower courts in the cases before it. It is also true to say that the expression fiduciary duty of loyalty is of relatively recent coinage, although the duty which it describes — to act in the principal s interests to the exclusion of one s own — has long been recognised. … it needs to be understood that what is critical in this context is the existence of a fiduciary duty of loyalty. It can be described as a duty to act disinterestedly, if by that is meant a duty to act in the interests of the person to whom the duty is owed to the exclusion of one s own interests…

[360] Clearly, in the factual circumstances of the present case, the plaintiff cannot argue that the defendant is potentially a status-based fiduciary." The question therefore is whether the actions on the part of the defendant and the particular facts

and circumstances which arise in this case and which I have identified above justify the imposition of fiduciary duties", and I bear the above guidance in mind.

[361] In paragraph 14a of the Amended Statement of Claim the plaintiff highlights a Credit Committee paper in July 2005 which recorded — "[the plaintiff] who is a trustworthy and established client — worthy of our continued support." In paragraph 14b the plaintiff describes the relationship between himself the Bank as one of trust and confidence", and he cites a letter from Mr Whelan dated 8 April 2005 referring to the very strong relationship between the Bank and the Group" and expressing every confidence that the plans you are preparing for Queen s Quay will further enhance your already strong reputation for delivering viable projects on time and to budget."

[362] This leads the plaintiff, at paragraph 14c of the Amended Statement of Claim, to assert that in light of the circumstances and nature of the relationship between the defendant and [SML], there existed a fiduciary duty owed by the defendant to [SML]."

[363] In paragraph 15e of the Amended Statement of Claim, referring to the event of August 2006 and following, when the Bank indicated that the Odyssey should be sold within 18 months, the plaintiff says: Mr Whelan of the Defendant stated that the Defendant would approach selected bank clients/customers who may be interested in acquiring the Odyssey. The Defendant was acting as the agent and/or providing advice, guidance and direction and therefore a fiduciary relationship existed." In paragraph 15I the plaintiff asserts that by introducing Noel Smyth of Alburn as a potential purchaser the defendant was assuming a fiduciary duty to [the plaintiff] and [SML]."

[364] In paragraph 17 of the Amended Statement of Claim the plaintiff refers to the PBN sale process and says:

> "… the actions of the Defendant in and around the said sale were such that the Defendant acted as agent of the Plaintiffs and the Defendant thereby owed fiduciary duties to the Plaintiffs."

[365] Finally, in paragraph 37A, dealing with the selling of the Swap product (with which process I deal below) the plaintiff alleges:

> The Defendant is also in breach of its fiduciary duties as it failed to disclose its own interest in the swap facilities as the Defendant generated significant undisclosed commission/profits from the said facilities."

[366] Bearing in mind the guidance as to what is normally required to establish a fiduciary duty, I am clearly of the view that what the plaintiff relies on here falls short of establishing that the Bank had ever assumed a duty to act in the interests of the plaintiff or SML to the exclusion of its own interests. Such assertions, in the factual

circumstances which I have outlined above, are unsustainable, and I reject the allegation that the Bank assumed, or owed, a fiduciary duty to the plaintiff or SML.

[367] In passing I should also deal with the allegations in paragraph 15e and 17 that the defendant acted as agent for the plaintiff or SML. The factual circumstances which I have outlined in considerable detail above do not show the defendant to have become the agent of either the plaintiff or SML. Rather, the role of the Bank was to seek potential purchasers and introduce them to the plaintiff/SML. I therefore reject any allegation of agency.

[368] In his closing submissions the plaintiff asserts that special circumstances , justifying the imposition of a fiduciary duty, are established by coercion and undisclosed conflict" and subordination by coercion and economic duress." While acknowledging that the Bank was entitled to apply pressure to SML to protect its secured position and compel a reasonable exit strategy" he submits that the:

> "… evidence proves…that this pressure immediately transformed into unlawful economic duress and managerial compulsion, forcing SML s directors to subordinate their fiduciary duty to the company to the Bank s immediate, self-serving instructions. The line was crossed, and the pressure became unlawful duress, business coupling the lawful threat of administration with a compelled, conflicted commercial outcome and concealment of material information."

[369] I have set out below the relevant legal principles relating to economic duress, but arising from the evidence which I have considered in detail, some of which I have rehearsed in this judgment, I am not persuaded that what the plaintiff adds in his closing submissions can result in the imposition of a fiduciary duty on the part of the Bank.

Shadow director

[370] In support of his allegations that the actions of the Bank resulted in its becoming a shadow director of SML the plaintiff, in his closing submissions, quotes Mr Griffiths s report, paragraphs 4.296 to 4.299. Mr Griffiths says this is demonstrated in a number of ways, for example by [the Bank s] actions in corresponding directly with OTC…" as outlined in paragraphs 4.297 and 4.299 and the setting up of OPL without input from the plaintiff.

[371] Section 251 of the Companies Act 2006 defies a shadow director in the following terms:

> **Shadow director**"

> (1) In the Companies Acts shadow director", in relation to a company, means a person in accordance with whose directions or instructions the directors of the company are accustomed to act.
>
> (2) A person is not to be regarded as a shadow director by reason only that the directors act on advice given by him in a professional capacity."

[372] Paragraph 17 of the Amended Statement of Claim pleads:

> Further and/or in the further alternative, the Defendant s control, direction and management of the said process of sale was such as to amount to shadow directorship on the part of the Defendant in relation to the first Plaintiff."

[373] In the Particulars of Breach of Duty and Negligence at sub-paragraph (gg) the plaintiff says that the Bank acted as a shadow director by unlawfully preferring the bid of PBN for the Odyssey leases" and in sub-paragraph (hh) the plaintiff says that the defendant acted as a shadow director from April 2009 to November 2009 by entering into negotiations with PBN and [OTC] in ways designed to disadvantage [the plaintiff] " by preferring the bid of PBN over potentially better offers.

[374] I have expressed above my views about the allegations made by the plaintiff that the Bank took over control of the process, and I have rejected those allegations. It is clear that the day to day running of the Group, and the business decisions, were made by the plaintiff or Mr Holmes in the normal way of things. In my view nothing in the actions of the Bank, as outlined above in detail, resulted in its becoming a person in accordance with whose directions or instructions the directors of [SML were] accustomed to act."

[375] Accordingly, I reject the allegations that the Bank was ever a shadow director of SML.

[376] There is an allegation, at sub-paragraph (pp) of the Particulars that the Bank acted as shadow director of OLP from its inception and caused OLP to trade while insolvent. OLP is not a party to this action, and I am not required to make any finding in relation to the allegation.

Economic duress

[377] The plaintiff alleges economic duress in relation to the Swap product. In paragraph 39(e) of the Amended Statement of Claim, dealing with the letter of 9 October 2008, the plaintiff pleads:

> In the event, the Defendant sent the written terms and conditions of the SW AP agreement to the fifth Plaintiff on or about 9 October 2008 and in so doing failing to afford the first and/or fifth Plaintiff any or any reasonable time to assimilate the said terms and conditions (given their length and complexity) and/or to seek and obtain advice thereon. It is further averred that the fifth Plaintiff signed the SWAP agreement by reason of the economic duress to which the Defendant (in particular in the person of Pat Whelan) subjected the first and fifth Plaintiffs from September 2008 to move to a sale of the Leases by the first Plaintiff to the entity which was (as pleaded above) the Defendant's preferred bidder for the Leases at the time, namely PBN."

[378] The tort of economic duress was recently considered in *Pakistan International Airline Corporation v Times Travel (UK) Ltd*. [2021] UKSC 40. In that case Lord Hodge, giving the majority judgment indicated that there existed in English common law the doctrine of lawful act economic duress as a basis for rescission of contract. The court identified the elements of the tort as being first, the making of an illegitimate, although lawful threat by one party to a contract; secondly, proof of sufficient causation between the making of the threat and the other party (the threatened party) entering into the contract, and thirdly, the lack of any reasonable alternative (other than entering into the contract) for the threatened party.

[379] The judgment further stated that the law generally recognised that a party s pursuit of its own commercial interests was justified in the setting of commercial bargaining and, accordingly, a demand which was motivated by the party s commercial interest would generally be justified. However, a threat would be illegitimate if it amounted to the kind of reprehensible or unconscionable conduct which, in the context of the equitable doctrine of undue influence, had been judged to render the enforcement of a contract unconscionable.

[380] At paragraph [52] Lord Hodge (with whom three of the other justices agreed) said:

> I therefore do not accept that the lawful act doctrine could be extended to a circumstance in which, without more, a commercial organisation exploits its strong bargaining power or monopoly position to extract a payment from another commercial organisation by an assertion in bad faith of a pre-existing legal entitlement which the other organisation believes or knows to be incorrect."

[381] I deal below with my findings on the Swap issue, but in my view, applying the law as set out by the Supreme Court to all the circumstances which I have outlined, I do not consider that the defendant was guilty of the tort of economic duress.

PART 6 — THE SWAP AND INTEREST OVERCHARGE ISSUES

[382] The total claim made by the plaintiff in relation to these two issues is set out in Mr Davidson s report as: Net interest overcharge and SWAP costs — £4,670,000."

[383] A Swap is a financial product known as an Interest Rate Hedging Product (IRHP"). Put simply, it is a financial instrument which enables someone to manage, or hedge , their exposure to fluctuating interest rates. It is important to recognise that it is an entirely separate contract to the loans made by the Bank to SML and that even if the loan is assigned to another party, the original party remains bound by the swap agreement, unless some specific action is taken, eg the novation of the swap or its early termination.

[384] It is the plaintiff s case, as articulated by Mr Davidson in his report is

> "… that shortly after the SWAP was agreed [in October 2008] the property transferred to OPL. The transfer was undertaken at a consideration of £70 million… I am instructed that the transfer to OPL was undertaken with the objective of mitigating [stamp duty] costs for the benefit of PBN. However, I am advised that SML was not informed that the SWAP could not transfer to the asset to which it was related. Hence, SML was left with the balance of 17 plus months of a two-year £60 million SWAP, and OPL with £70 million of debt. This meant that SML and OPL were together paying interest on some £130 million, on actual borrowings of approximately £70 million.

[385] OPL is not, and never has been, a plaintiff in this action and any issues in relation to that company are not for me to deal with.

[386] Products such as the Swap are subject the Conduct of Business Sourcebook (COBS") which is given the status of delegated legislation by section 138D of the Financial Services and Markets Act 2000.

[387] It seems clear that the impetus for the sale of such a product to SML came from the Bank. There is an internal email of 25 July 2008 from Mr McAreavey — its heading being Compulsory hedging' — stating: David Wilson of [the Bank s] treasury [department] has been asked to provide … brief details on any large unhedged exposures, as in London they are stepping up the pressure to hedge given sterling swap rates are down a good bit" and indicating that Mr McAreavey had given David the position on Sheridan…" Later, on 3 October 2008, David Wilson rang Mr Holmes to discuss hedging. I have to say that the contents of that telephone call could not be described as involving detailed information. The parties agreed to meet on Monday" — which would have been 6 October..

[388] An email of 6 October from Mr Wilson says the following:

> Spoke to [the plaintiff] and Mr Holmes.
>
> Seem keen on the swap idea on all of the debt in the 2 or 4 year area (currently 4.96%).
>
> I explained that there was paperwork which need to be signed and that I would need credit committee approval etc and he asked that that be started. He indicated that he would like to do something by Wednesday if possible. I also pointed the disadvantages of any swap such as break costs etc.
>
> I would suggest ideally that we get an ISDA form signed before the deal, although as it requires solicitor involvement and two director signatures that has the potential to slow things down. The ISDA will tie the swap in with the securities we have and will give us more comfort. ISDA can be a post event deal but given the size and nature of the potential deal it may be best to push on with that?
> …"

[389] On that same date Mr Holmes emailed Mr Wilson saying, Thank you for your very helpful introduction to the subject" and asking for information on the rate.

[390] Further telephone calls were made — 6 October, the plaintiff to Mr Wilson; 9 October, the plaintiff to Mr Wilson; 9 October, the plaintiff to a Mr Ajay Sharma; 9 October, Mr Wilson to Mr Holmes. The discussion on those, fairly brief, calls seems to be more about interest rates than anything else.

[391] That, from the documentation supplied to me, is the sum total of the explanations prior to the sale of the product. There was nothing in writing by way of advice, and the Bank has produced no such written advice. Mr Wilson did not give evidence as to what he said at the meeting on 6 October and Mr Holmes was not questioned about the content of the introduction.

[392] In an email of 9 October at 12.52 pm Mr Wilson noted that the plaintiff was off to speak to his adviser, will be back at 2 o clock, focusing on 2 or 3 year at this stage." The plaintiff was cross examined about this, the suggestion being that he took appropriate advice on the product before he returned and entered into the Swap. I found his answers woefully inadequate and unpersuasive. In fact, I do not believe that he sought or received any advice. Quite what his motivation is I cannot say and quite why he told the Bank that he obtained advice is a puzzle.

[393] The terms of the Swap were set out in a letter of 9 October 2008. The trade date was 9 October 2008, and the termination date was 1 October 2010. The Swap related to £60 million of the SML loan. The letter contains an acknowledgement that the client enters into the transaction relying on his own judgment and upon advice from such advisers as he has deemed necessary. It is signed by the plaintiff. The letter was accompanied by an ISDA (International Swap Dealers Association) Master Agreement.

[394] The plaintiff s Particulars of Mis-selling and Mis-applying in the Amended Statement of Claim include paragraphs (c) and (d), which allege:

> (c) This proposal was made by the Defendant knowing (in the person of Ciaran McAreavey) that the Defendant planned to facilitate the transfer of the Odyssey Pavilion and the IMAX assets from the first Plaintiff, via OLP (the contemplated Newco previously referred to in this pleading) to PBN by January/February 2009 and that in doing so PBN would be taking on indebtedness to the Defendant of some £70 million, in place, ultimately of the first Plaintiff. The Defendant failed however to advise the fifth Plaintiff and/or Mr Holmes that the liability of the first Plaintiff on foot of the SWAP transaction referred to above was not intended by the Defendant to transfer ultimately to PBN along with the assets to which it related and that the Defendant intended and expected (without at any time advising any of the Plaintiffs or Mr Holmes thereof) that the first Plaintiff would continue to be liable to the Defendant in relation to the said SWAP agreement even if the assets provided security in relation to that agreement were transferred out of the ownership of the first Plaintiff (via OLP to PBN).
>
> (d) The effect of the foregoing was that following the transfer of the said assets to OLP, OLP began paying interest to the Defendant on the sum of £70 million re-financed by the Defendant in relation to this transfer, whilst at the same time, the Defendant continued to charge interest to the first Plaintiff on the sum of £60 million referred to above, together with the residue of the first Plaintiff s debt (some £12.5 million) which by the terms of the January 2009 Agreement should have been reduced to £1.5 million."

[395] As to the last part of the final sentence, I have dealt above with the status of what the plaintiff calls the January 2009 Agreement."

[396] The plaintiff also alleges that the Bank failed to to afford the first and/or fifth Plaintiff any or any reasonable time to assimilate the said terms and conditions (given their length and complexity) and/or to seek and obtain advice thereon, and specifically the plaintiff alleges that the potential £2.7 million breakage costs were not explained to him/SML. However, from the report of Mr Davidson, it would appear that Anglo had not applied the breakage fee."

[397] The effect of the Swap in the world of changing interest rates at the time is neatly encapsulated by Mr Davidson when he says (paragraph 10.11):

> In short, it is evident that SML benefitted from having the SWAP product whilst the relevant LIBOR interest rates were above 4.72% (which was from when the product commenced on 9 October 2008 to 7 January 2009) and lost out when rates were below 4.72% which was from January 2009 onwards."

[398] It is part of the plaintiff s case that SML/the plaintiff were wrongly categorised by the Bank as professional clients (rather than as retail clients) under the terms of the European Union Markets in Financial Instruments Directive 2004/39/EC. The importance of the distinction is that retail clients are afforded much greater protection under COBS.

[399] Mr Davidson says I have not sought to specifically opine on the extent to which the SWAP product has been mis-sold…" — and, indeed, he properly did not take part in that aspect of the experts meeting which related to the SWAP issue. However, he does make clear in his report that there is no evidence that the Bank knew that interest rates would fall to a level which would render the SWAP useless ie that the Bank foresaw the calamitous fall in interest rates from January 2009. No such evidence has been drawn to my attention, and I find as a fact that the Bank did not foresee this, nor should they reasonably have done so.

[400] At paragraph 10(b) of his report he says that SML/the plaintiff were wrongly treated as professional clients.

[401] Mr Griffiths, in his report, expresses the view that the conduct of Anglo in selling the Swap to SML amounted to mis-selling. He says:

> There was no reference to Anglo s intention not to support SML beyond the short term. Accordingly, it is difficult to see Anglo s advice meeting the following criteria required by the [Financial Conduct Authority]:
>
> • The bank provided the customer with appropriate, comprehensible and fair, clear and not misleading

information on the features, benefits and risks associated with the IRHP in good Time before the sale.

- If the IRHP exceeds the term or value of any lending arrangements, the potential consequences were disclosed to the customer in a comprehensible and fair, clear and not misleading way.

- In relation to an advised sale: A) … B) The bank has taken reasonable steps to ensure that the personal recommendation is suitable for the customer."

[402] He is of the opinion that neither SML nor its directors could have been regarded as Professional. In his report he notes the Odyssey Options" memorandum of October 2008 and the Cooney Carey report of August 2008. He concludes:

> Under such circumstances, it is difficult to accept that SML s shareholders could have been construed as having €2m of equity, in order to satisfy the requirements of Professional categorisation.

[403] Mr Griffiths also says that SML should have been made aware that the Swap would continue for 2 years even if the property was to be sold and that advice as to the trajectory of interest rates was not made clear.

[404] In his report on this SWAP issue the defendant s expert, Mr Reilly explains the product in the following terms:

> An interest rate swap is a financial contract between two parties to exchange interest rate payments on a specified principal amity (called the notional) over a set period of time. Borrowers enter interest rate swaps primarily to manage interest rate risk, with the most common motivation being to hedge against interest rate fluctuation.
>
> A borrower with a floating-rate loan is exposed to rising interest rates, which would increase their interest payments. By entering a pay-fixed, receive-floating swap to lock in predictable interest payments, they have effectively converted their floating-rate to a fixed rate.
>
> **Example**
>
> A company has a £10 million floating-rate loan tied to LIBOR. They re concerned LIBOR might rise, increasing their costs. They enter into a swap where:

- They pay 3% fixed (to the swap counterparty).

- They receive LIBOR (from the swap counterparty).

The LIBOR payments they receive from the swap offset the LIBOR payments they make on the loan, effectively fixing their net interest cost at 3%."

[405] In a table in his report Mr Reilly illustrates how the 3% fixed on the example of the £10 million loan means that the borrower will pay £300,000 interest whether the LIBOR rate is 0% or 6% or anywhere in between.

[406] The first issue which I have to decide is whether it was appropriate for SML/the plaintiff to be categorised as a professional client", rather than as a retail client." The relevant definitions are found in article 4 of Directive 2014/65/EU of 15 May 2014 on markets in financial instruments, known as MiFID. I will refer to this as the Directive." The relevant sub-paragraphs are:

(9) client means any natural or legal person to whom an investment firm provides investment or ancillary services;

(10) professional client means a client meeting the criteria laid down in Annex II;

(11) retail client means a client who is not a professional client"

[407] Annex II provides, where material:

PROFESSIONAL CLIENTS FOR THE PURPOSE OF THIS DIRECTIVE

Professional client is a client who possesses the experience, knowledge and expertise to make its own investment decisions and properly assess the risks that it incurs. In order to be considered to be professional client, the client must comply with the following criteria:

I. CATEGORIES OF CLIENT WHO ARE CONSIDERED TO BE PROFESSIONALS

The following shall all be regarded as professionals in all investment services and activities and financial instruments for the purposes of the Directive.

(1) Entities which are required to be authorised or regulated to operate in the financial markets. The list below shall be understood as including all authorised entities carrying out the characteristic activities of the entities mentioned: entities authorised by a Member State under a Directive, entities authorised or regulated by a Member State without reference to a Directive, and entities authorised or regulated by a third country:

(a) …;

(2) Large undertakings meeting two of the following size requirements on a company basis:

— balance sheet total: EUR 20 000 000
— net turnover: EUR 40 000 000
— own funds: EUR 2 000 000

(3) …

(4) …
The entities referred to above are considered to be professionals. They must however be allowed to request non-professional treatment and investment firms may agree to provide a higher level of protection. Where the client of an investment firm is an undertaking referred to above, the investment firm must inform it prior to any provision of services that, on the basis of the information available to the investment firm, the client is deemed to be a professional client, and will be treated as such unless the investment firm and the client agree otherwise. The investment firm must also inform the customer that he can request a variation of the terms of the agreement in order to secure a higher degree of protection.

It is the responsibility of the client, considered to be a professional client, to ask for a higher level of protection when it deems it is unable to properly assess or manage the risks involved.

This higher level of protection will be provided when a client who is considered to be a professional enters into a written agreement with the investment firm to the effect that it shall not be treated as a professional for the purposes of the applicable conduct of business regime. Such

> agreement shall specify whether this applies to one or more particular services or transactions, or to one or more types of product or transaction."

[408] In the meeting of the relevant experts a number of matters were agreed. The appropriate legislation was identified by Messrs Griffiths (DG) and Reilly (MR). It was agreed that in order to be regarded as a professional client the only category into which SML could fall was category 2. The experts were unable to agree as to whether SML could be considered to have satisfied 2 of the 3 financial requirements set out in category 2. Both agreed, however, that SML satisfied the requirement of having a balance sheet total above €20.0m" and both agreed that it did not satisfy the requirement of having a net turnover above €40.0m." This led to the experts to conclude that " it is ultimately for the court to determine whether or not SML was correctly and properly classified as a professional client'" — effectively whether SML would satisfy the own funds: EUR 2 000 000" in Annex II.

[409] Mr Griffiths is of the opinion, as recorded in the minute of the experts meeting that there is no realistic possibility that SML, at the time the Swap was written, could have been considered by Anglo has having net assets of €2.0 million." The minute records his position, thus:

> Further, DG has seen no evidence as to why Anglo categorised SML as a professional client and, in particular, there is no evidence that Anglo considered the balance sheet of SML in making its decision as to how to categorise SML.
>
> Additionally, DG has seen no evidence to show that SML asked to be considered a professional client.
>
> Accordingly, in DG s opinion SML should have been considered as retail clients."

[410] On the other hand, Mr Reilly in the minute of the meeting, is recorded thus:

> MR stated that based on the evidence available to him the March 2008 accounts clearly indicate that at that time the financial position of SML was that which would cause them to meet the MiFID requirements.
>
> MR does not believe that a fluctuation in net assets driven by a potential asset impairment changes the nature of a company which meets the size of a professional client to one of a retail client. In fact, the material nature of the impairment only reinforces the complexity and sophistication of the underlying transactions.

> In addition, MR noted that the FCA independent review supports this position based on how they retrospectively assessed customers with regard to material swap transactions."

[411] Mr Reilly drew attention in his report to SML s —

> financial statements for the year ended 30 March 2008, the most recent financial statements prior to the trade date of the SML Swap:
>
> - Balance sheet total as at this date was £80,359,466, equivalent to €101,252,927; and
>
> - Net turnover for the year then ended was £4,328,303, equivalent to €5,453,662; and
>
> - Own funds as at this date were £8,016,911, equivalent to €10,101,307."

[412] In the voluminous documentation in this case I have not seen any document in which the Bank carries out any analysis of or consideration of the categorisation of clients prior to the sale of the product to SML. In addition to what Mr Griffiths said about the lack of information in the meeting of experts, in 3 paragraphs of his report Mr Griffiths draws attention to the paucity of information:

> 4.167. It would also be necessary (although I see only mention of it in the credit memoranda which I have seen rather than approval being sought) to record a Swap facility in credit presentations so that the Credit Committee would be aware of the interest rate risk and the duration of a Swap. Credit Committees need to be fully informed of all risk aspects of lending facilities and client relationships. Accordingly, I consider the omission of the Swap from the credit limits shown in Anglo's credit memoranda to be unusual and not standard practice.
>
> 4.168. For this reason, I am [un]able to provide my opinion as to how a banker would have viewed Anglo s conduct in terms of credit risk in relation to the writing of the Swap in October 2008. It is not even clear that the proposal to write the Swap was considered by a credit committee.
>
> 4.169. There is a deficiency of information in this case in relation to the process by which the Swap was written and

> I am not aware that the Anglo staff members who did so were either appropriately qualified or, if so, whether they followed the requirements of COBS."

[413] Notwithstanding that that criticism of the Bank was made in his report, and the Bank therefore was aware of it prior to the trial, I was not directed to any document which set out the process by which the Swap was written, nor any document where there was any assessment of the MiFID categorisation, nor any document which might have helped the Bank to assess whether SML s financial position had changed since 30 March 2008, nor any document to show the qualification or experience of the personnel who dealt with the plaintiff. Significantly, although Mr Griffiths s report highlights the absence of documents, Mr Reilly in his report does not identify any such document. In the circumstances I am driven to the conclusion that no such document exists.

[414] Importantly, therefore, there is no document which might reveal the thought process of the Bank, in October 2008, as to how the obviously worsening financial position of SML might have impacted on the categorisation of SML under MiFID. There is nothing to show the qualification or experience (in Swaps) of the person(s) in the Bank who made any relevant decision, or how such person(s) arrived at the conclusion that SML was a professional client. I noted above Mr Reilly s assertion in the meeting of experts that he

> does not believe that a fluctuation in net assets driven by a potential asset impairment changes the nature of a company which meets the size of a professional client to one of a retail client. In fact, the material nature of the impairment only reinforces the complexity and sophistication of the underlying transactions."

[415] As to this I say two things. First, there is nothing to show that fluctuations were ever considered by any Bank personnel, or what effect on the categorisation of SML such a fluctuation might have had. Secondly, while fluctuations in a number of years trading in what might be termed a normal financial environment for an organisation might well lead one to this conclusion, in 2008 the financial position of SML was of steady deterioration with no realistic possibility of improvement. Indeed, it is the Bank s consistent case that the position had continued to worsen for at least two years prior to this, and now, in 2008, there was a fall in the value of the property market, and therefore of the value of SML s underlying asset, coupled with the increasing cashflow and arrears problems.

[416] Further, the Bank called no witness to explain how it arrived at the conclusion that SML/the plaintiff were to be treated as professional clients. I am entitled to draw the inference, and I do draw the inference, that the reason for the absence of such a witness is because the Bank are unable to produce any such evidence. If the Bank had

been able to produce any such evidence, I am satisfied that an appropriate witness would have produced a witness statement and would have been available to be called.

[417] In all the circumstances I consider that if proper thought had been given by appropriately qualified personnel in the Bank in early October 2008 to the categorisation of SML, it would not have been categorised as a professional client. At the very least it should have prompted a discussion between the Bank and the client as to whether the client wanted to be so categorised, and an explanation of how this would reduce the client s rights.

[418] Accordingly, I am of the clear view that the Bank did not carry out any exercise properly to ascertain whether SML/the plaintiff should be treated as professional clients.

[419] The Bank seeks to suggest that the transcripts of the various telephone conversations show the impetus for the Swap was on the part of SML. I do not accept that having re-read the transcripts, but even if that were so, it does not absolve the Bank from adhering to the requirements of the legislation. Indeed, it may often be necessary for the provider of such a product to temper the client s enthusiasm until the Bank is clear that the client knows exactly what it is entering into. Frankly, when I consider the content of the telephone conversations which are contained in the Swaps Bundle, I find them very uninformative and lacking in any cogent explanation by the Bank of all the material aspects of the product.

[420] In the circumstances I conclude that the Swap product was mis-sold to SML.

[421] Mr Reilly deals with a further point in his report, in paragraph 8.1:

> Furthermore, in June of 2019 the FCA conducted an independent review into the supervisory intervention on Interest Rate Hedging Products, which was conducted by John Swift QC and was published on December 14th, 2021. The FCA s IRHP Review emphasised that only non-sophisticated customers — typically retail clients, should be eligible for redress schemes. The Review explicitly accepted that clients meeting the large undertaking criteria were capable of understanding and assessing the risks involved in complex financial instruments without the same degree of regulatory protection afforded to retail customers.
>
> The Review re-emphasises that client s eligibility for redress turns significantly on whether they are classified as non-sophisticated (eligible) or sophisticated (excluded). The FCA required firms to apply a two-stage test to

determine whether a customer was sophisticated (professional).

1. Sophistication Test

Customers were automatically considered sophisticated — and thus outside of the scope of review or redress if they met at least two of the following criteria:

- Turnover of more than £6.Sm;
- A balance sheet total of more than £3.6m;
- More than 50 employees.

2. Subjective Test

Even if a customer did not meet the automatic criteria, a firm could classify them as sophisticated, based on an individual assessment — if the customer has significant experience and understanding of products, demonstrated through prior dealings, financial knowledge, and professional advice.

3. Additional Refinement — £10 million IRHP value threshold

Furthermore, subsequent to the initial Review framework, an additional criterion was introduced which automatically categorised customers as sophisticated based on the value of their IRHP, even if they did not meet the original turnover, balance sheet, or employee test. Specifically:

- If the notional value of a customer's IRHP was greater than £10 million, the customer would be treated as sophisticated automatically, even if they otherwise fell below the original thresholds, on the basis that the size of the transaction indicates 'sufficient sophistication.'

This rule was introduced because the FCA and participating banks observed that customers agreeing to IRHPs of that scale were, by their nature, engaging in complex and large-scale financial risk management — implying sophistication, regardless of the company s size.

When applying the greater than £10 million IRHP value rule, with SML entering into an interest rate swap with a

> value of £60 million (hedging a portion of the approximately £73 million of existing loan facilities for a 2year period), it is clear that SML would be classified to be sophisticated with the swap exceeding the £10 million threshold."

[422] This leads him to have a fall-back position which, if I correctly understand it, allows him to say that even if SML was not a professional client, it was at least a sophisticated client. However, I do not consider that that is of assistance to me, for the reasons set out below.

[423] The Swift review was specifically a review of the FSA s Scheme for voluntary redress where banks had mis-sold Swap products. Having identified the initial scope of the Scheme it records:

> However, the FSA subsequently changed its mind. Following representations by some of the first-tier banks, the FSA agreed that the scope of the entire Scheme should be limited to non-sophisticated customers, defined in accordance with the Initial Sophisticated Customer Criteria. Under these criteria, customers would be classed as sophisticated if they had at least two of: (i) a turnover of more than £6,500,000, (ii) a balance sheet total of more than £3,260,000, or (iii) more than 50 employees. In addition, customers (even if they fell below the quantitative criteria) would also have been classed as sophisticated if the relevant bank was able to demonstrate that, at the time of the sale, they had the necessary experience and knowledge to understand the service provided and the type of the product, including their complexity and the risks involved."

[424] Thus, the whole concept of sophistication discussed by Mr Reilly relates specifically to the voluntary redress scheme and was not designed to alter, nor could it, the requirements under MiFID or the categorisation at the time of sale of the product. As Mr Swift QC says, his review

> has found no explanation why that change was agreed by the FSA. It was a very simple change — a stroke of the pen to change the defined expression Customers to exclude those who met the Sophisticated Customer Criteria' — but one that ultimately resulted in the exclusion of about a third of all relevant IRHP sales from the scope of the Scheme. … There was no consultation with customers or their representatives before the FSA agreed with the first tier banks to the limitation of the scope of the Scheme

[425] It seems an inevitable conclusion that the sophistication criteria came about as a result of the desire of first-tier banks to limit their liabilities within the voluntary Scheme. I do not consider it appropriate that I should adopt these criteria effectively to absolve the Bank from liability for mis-selling.

[426] As to the interest overcharging issue, the expert evidence of Mr Davidson (for the plaintiff) is that the Bank overcharged interest and the only issue for him was by how much.

[427] There is no cogent evidence before the court of the amount of interest overcharged, or whether, rather than the Bank owing money, in fact interest has been undercharged so that SML owes yet further money — both scenarios have been suggested but remain unproven.

[428] In the event, due to the lack of evidence deployed by the plaintiff, I am unable to reach a conclusion on this issue.

PART 7 — THE SET OFF ISSUE

[429] In light of my decision in relation to this issue both the measure of loss sustained due the Swap mis-selling or any loss which might have been sustained by the overcharging of interest become academic.

[430] There is no dispute that the plaintiff brings the action on behalf of SML as an assignee of the claim which, prior to its administration, SML enjoyed. I have noted the assignment in paragraph [3] above. The plaintiff brings his own claim as an assignee, the rights to the claim having been assigned to him by his Trustee in Bankruptcy, as noted in paragraph [5] above.

[431] The importance of these assignments is as follows. First as to SML s claims the Insolvency Rules (Northern Ireland) 1991 provide, where material:

> **Mutual credit and set-off**
>
> 2.086. —(1) This Rule applies where the administrator, being authorised to make the distribution in question, has, pursuant to Rule 2.096 given notice that he proposes to make it.
>
> (2) In this Rule mutual dealings means mutual credits, mutual debts or other mutual dealings between the company and any creditor of the company proving or claiming to prove for a debt in the administration but does not include any of the following—
> …..

(3) An account shall be taken as at the date of the notice referred to in paragraph (1) of this Rule of what is due from each party to the other in respect of the mutual dealings and the sums due from one party shall be set off against the sums due from the other.

(4) A sum shall be regarded as being due to or from the company for the purposes of paragraph (3) of this Rule whether—

(a) it is payable at present or in the future;

(b) the obligation by virtue of which it is payable is certain or contingent; or

(c) its amount is fixed or liquidated, or is capable of being ascertained by fixed rules or as a matter of opinion."

[432] Dealing with similar English provisions in *Stein v Blake* [1996] AC 243. Lord Hoffman said:

> Bankruptcy set-off … affects the substantive rights of the parties by enabling the bankrupt s creditor to use his indebtedness to the bankrupt as a form of security. Instead of having to prove with other creditors for the whole of his debt in the bankruptcy, he can set off pound for pound what he owes the bankrupt and prove for or pay only the balance."

[433] The effect therefore of the legislation, in the present case, is that unless any sum to be awarded in damages to SML exceeds the moneys owing by SML to the Bank, SML is not entitled to recover. In the present case, as set out above, the sum of £4.6 million is significantly below what SML owes the Bank.

[434] Insofar as the plaintiff has any successful claim, he is caught by the provisions of article 296 of the Insolvency (NI) Order 1989, which provides:

> (1) This Article applies where before the commencement of the bankruptcy there have been mutual credits, mutual debts or other mutual dealings between the bankrupt and any creditor of the bankrupt proving or claiming to prove for a bankruptcy debt.

> (2) An account shall be taken of what is due from each party to the other in respect of the mutual dealings and the sums due from one party shall be set off against the sums due from the other.
>
> (3) Sums due from the bankrupt to another party shall not be included in the account taken under paragraph (2) if that other party had notice at the time they became due that a bankruptcy petition relating to the bankrupt was pending.
>
> (4) Only the balance (if any) of the account taken under paragraph (2) is provable as a bankruptcy debt or, as the case may be, to be paid to the trustee as part of the bankrupt's estate."

[435] Since the Bank s claim against the plaintiff as at the date of his bankruptcy was in excess of £100 million, the plaintiff would not be entitled to any award.

[436] The plaintiff seeks to avoid this result on the basis that the debts and the very insolvencies that triggered the set-off are the direct result of the Bank s own tortious actions. The Bank cannot profit from the ruin it orchestrated."

[437] Since I have rejected the plaintiff s allegations against the defendant in tort, this argument, even if it had validity in law, cannot prevail.

PART 8 — THE PROHIBITION ON ASSIGNMENT IN THE FACILITY LETTER

[438] Loans advanced by the Bank were subject to the Bank s General Conditions Applicable to Every Loan Under … Under a Loan Facility Letter or Other Loan Agreement…" Clause 21.1 of the General Conditions provided:

> The Borrower shall not be entitled to assign or transfer all or any of its rights, benefits or obligations under the Facility Letter…"

[439] Each fresh facility was specifically stated to replace any previous facility.

[440] The Banks s case, therefore, is that the Administrator of SML is bound by the non-assignment clause and could not assign the cause of action to SML. Tempting though it might have been to find that the effect of this was that the plaintiff did not have standing to bring the case on behalf of SML, it would have been wholly inappropriate to do so and not to have dealt with the merits of the plaintiff's case.

[441] While it is clear from the papers that the General Conditions were attached to/accompanied some of the later facilities, I have not seen any evidence that they were attached to/accompanied the initial Facility Letter in 1999.

[442] What, if any, implication arises I make no finding. In light of my decision on all the other matters, this hardly matters.

PART 9 — REMAINING MATTERS

[443] In paragraph 38 of the Amended Statement of Claim the plaintiff says:

> The actions and omissions of the Defendant in and around the process of sale of the Leases as described above were in breach of the Defendant's duties to the Plaintiffs, were negligent, were in breach of contract, and further involved actionable misrepresentations, in consequence of which the Plaintiffs and each of them have suffered serious and ongoing loss and damage."

[444] There then follow more than 40 Particulars of Breach of Duty and Negligence.' An examination of these Particulars shows that the vast majority of them are simply individual assertions in relation to the two sales processes which restate the allegations contained within the plaintiff s other causes of action. In that respect they are in the nature of round up" allegations, so as to ensure that no stone is left unturned. Insofar as they are allegations of that sort, my findings have already dealt with them.

[445] As to sub-paragraphs (ii) and (pp), these relate to OLP. OLP is not a plaintiff and I say no more about these allegations.

[446] Sub-paragraph (kk) includes an allegation that Bank personnel deliberately pursued a course of action designed to lead to the liquidation of SML. I reject this allegation. It is clear from the actions of the Bank from at least 2006 onwards that far from seizing the many opportunities presented to it to follow an insolvency course, the Bank consistently propped up SML financially. I reject also the allegation in this sub-paragraph that the Bank made Northern Bank and Bank of Scotland aware of the transfer of Odyssey with the purpose of encouraging either or both of those banks to call in loans…" There is no evidence to support such a motivation.

[447] To be clear I reject all the allegations under the Particulars of Breach of Duty and Negligence" except those in relation to the Swap issue and overcharging interest issue, which I have dealt with in the relevant section of this judgment.

[448] The plaintiff also makes the case that SML was paying interest at rates which compared unfavourably to those rates charged to other commercial borrowers, which, he says, shows favouritism on the part of the Bank and was an example of SML being

unfairly and unfavourably treated. Such a submission fails to recognise that the Bank is a commercial organisation and is entitled, in the marketplace, to charge contractual rates of interest which its borrowers are prepared to accept. SML accepted all the contractual rates of interest which appeared in the facilities made available. I consider that there is nothing in this point.

[449] During the plaintiff s evidence issues arose about discovery of documents by the plaintiff. In his closing submissions the plaintiff raises issues about questionable redactions in documents disclosed by the defendant and whether there has been full discovery. I make it clear that I make no finding on any of these issues; they do not assist me in coming to my conclusions.

PART 10 — CONCLUSION

[450] Other than success in the Swap issue, which took up only a minute period of time in the trial, the plaintiff has failed to prove his case to me. Insofar as the Swap issue would entitle the plaintiff to damages, these are completely subsumed in the debt owed to the Bank, and so I make no award of damages to the plaintiff whether in his own claim or as assignee of SML s claim.

[451] In all the circumstances, I enter judgment for the defendant.

[452] I will invite written submissions on costs, unless the parties agree as to the order for costs. I make it clear that the usual rule is that costs follow the event except when it appears to the court that in the circumstances of the case some other order should be made as to the whole or any part of the costs" — see Order 62.