Neutral Citation No. [2015] NIQB 101 | *Ref:* **BUR9633**

Judgment: approved by the Court for handing down | *Delivered:* **11/12/2015**

*(subject to editorial corrections)**

2011 No: 2153

IN THE HIGH COURT OF JUSTICE FOR NORTHERN IRELAND

QUEEN'S BENCH DIVISION

Between:

MICHAEL ADRIAN TAGGART and JOHN DESMOND TAGGART

Plaintiffs;

and

ULSTER BANK (IRELAND) LTD AND ULSTER BANK LTD

Defendants.

("the Taggart Action")

2009/59937 and 2009/61625

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ULSTER BANK (IRELAND) LTD AND ULSTER BANK LTD

Plaintiffs

and

MICHAEL ADRIAN TAGGART and JOHN DESMOND TAGGART

Defendants

("the Banks' Actions")

BURGESS J

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Outline Background

[1] Michael Taggart (MT) and John Taggart (JT) (herein after collectively called either "the Plaintiffs" or "the Taggart Brothers" whichever the context requires) are and were at all times relevant to the events giving rise to these actions, directors and shareholders of Taggart Holdings Ltd, a member of the Taggart group of companies ("the Group"). MT was and is the holder of 51% and JT was and is the holder of 49% in the Group. The Group have been involved for many years as builders and developers.

[2] The Group in those early days was modest. However at all times, both from the outset and throughout the trading life of the Group, while corporate vehicles were used for developments, it is clear that the reality was that it was the two brothers who were the developers and the borrowers. No third party had any interest in any of the companies with which we are dealing. This at all times was known to the Banks.

[3] The Group consists of a large number of companies, the majority of which were formed to carry out either the development of particular sites, or to hold sites in a land bank for future development or onward sale having added value – for example obtaining planning permission. These sites or assets were not just in Northern Ireland, the rest of the United Kingdom, or Ireland, but in countries further afield.

[4] Funding for acquisitions and developments involved substantial borrowings from a number of banks including Ulster Bank (Ireland) Ltd and Ulster Bank Ltd ("the Banks") which are parties to the present proceedings. In turn the Banks' engagement was as part of a Club Banking Arrangement ("the Club") with the Bank of Ireland (BOI), in which each bank contributed one half of the credit extended to the Group, with the Banks being the Security Trustee for the Club. In that latter capacity the vast majority of day to day dealings, negotiations, discussions and arrangements were conducted between the employees of the Banks and the representatives of the Group. Nevertheless, from time to time BOI were present in discussions with the Group's representatives, and were involved in discussions with the Banks.

[5] The Banks were the Group's main bankers in the early days of its operations. However as the Group grew, and grew very substantially, particularly in 2005/06, borrowings were provided by a range of banks. By 2006 and thereafter, the evidence is clear that the credit extended by the Club facilities, and therefore as to half of that facility by the Banks, represented a very modest proportion of the Group's borrowings. Nevertheless, for a range of developments the Club provided a range of facilities including draw downs in respect of work in progress (WIP) where building was taking place. This source of funds assisted in providing cash to the Group to meet its obligations to suppliers of goods and services and service interest on borrowings.

[6] On occasion the Group entered into joint venture agreements in a Special Purpose Vehicle ('SPV') with third parties in respect of particular acquisitions. Those agreements included provision for banking loans and also funds provided by the parties to the SPV. However, as part of the Club's Facility Letters, the Club through the Banks was to be advised of any proposal by the Group to enter into any such acquisitions or developments and their consent obtained – seemly to ensure that at all times the Club had a clear overall view of the Group's activities in case that may adversely affect their position.

[7] As part of the lending/borrowing arrangements between the Club and the Group, two guarantees were entered into by the Taggart Brothers namely:

(a) A guarantee dated 27 October 2006 ("the First Kinsealy Guarantee"), which related to the acquisition of land at Kinsealy in the Republic of Ireland in October 2006. Due to circumstances to which I will return, the First Kinsealy Guarantee was replaced by a guarantee dated 30 November 2007 ("the Second Kinsealy guarantee"). The Banks claim that, pursuant thereto, the Taggart Brothers unconditionally and irrevocably guaranteed payment to the Banks, on demand, of all indebtedness of the Group, subject to a financial limit of €4.3m.

(b) A guarantee dated 8 August 2007 ("the 2007 Guarantee") under which the Banks claim that the Taggart Brothers unconditionally and irrevocably guaranteed payment to the Club, on demand, all the indebtedness of the Group, subject to a financial ceiling of £5m.

[8] The Banks' Actions seek to enforce the Second Kinsealy Guarantee and the 2007 Guarantee - which the Taggart Brothers resist for the reasons to which I will come.

[9] In outline the Taggart Action arises out of what they say were the actions, misrepresentations and mis-statements made by representatives of the Banks, particularly in the period of the spring of 2007 through to August/October 2007 ("the relevant period"), which they say were the catalyst for the Group entering into administration – and as a consequence a substantial loss on the part of the Taggart Brothers as the shareholders of the Group.

[10] It is alleged that the Banks expressed no concerns about the operation of the bank accounts or the Group's ability to meet its obligations, and as a consequence it is claimed by the Taggart Brothers that in ignorance of any such concerns on the part of the Banks they:

- Were induced into executing the 2007 Guarantee.

- Were induced in September 2007 into advancing personal funds to meet liabilities due by the Group to the Club.

- Have suffered substantial personal loss as a result of the Banks' actions both in stopping payment on a number of cheques and restricting borrowing under the Agreement hereinafter defined which contributed to the Group being put into administration in October 2008.

[11] Underpinning the Taggart Action are the assertions that if any concerns had been expressed, remedial action could and would have been taken, since:

(i) The Group was at all times in good and strong financial health, able to repay any amount that would be required;

(ii) The Taggart Brothers personally had very considerable, readily available personal assets which could also have met any concerns which the Banks may have had as to the financial standing of the Group - if that concern had been communicated to them; and

(iii) The Group and the Taggart Brothers were in a position to provide funds, for example by the sale of sites in a buoyant market, to bring any lending facility within any limit as the Banks required. Indeed, given the figures involved it would appear that the Club facility could have been cleared in full, though there is nothing in any of the correspondence or the meetings during the relevant period that required the Group to take such action.

[12] The Banks argue that, contrary to these assertions:

(a) the Group's finances were for some time, including before and during the relevant period, under considerable pressure, particularly in respect of cash flow to service interest on borrowing, not just in respect of development acquisitions involving the Club, but other developments and acquisitions; and

(b) the Taggart Brothers, the Board of the Group and the Financial Director of the Group, Mr Maurice McHugh, were fully aware inter alia of:

- All aspects of the Group's affairs;
- Breaches of covenants in the Facility Letters as hereinafter defined as regards overdraft limits;
- The use of facilities made available for one purpose being required for other purposes;
- Two cheques being stopped on one occasion and subsequently restrictions being placed on the purpose for which cheques could be drawn on the facilities;
- Other creditors threatening legal proceedings during the relevant period, including the seeking of the liquidation of the companies within the Group; and

- The Banks having serious concerns not just by reason of the above events, but also the Group's continuing failure to respond properly to the constant requests for information in accordance with the terms of the Agreement, the appointment at the Banks insistence of "reporting accountants" in June 2007, the request for the provision of the 2007 Guarantee, and the requirement for the introduction of personal funds.

All of that they say should be considered against the background where the Taggart Brothers and the directors were fully aware of their own financial position, the concerns being expressed by their Financial Director, what the information available to them was telling them about the Group's affairs, and how it would impact on their obligations to the Banks.

Previous Proceedings

[13] On 12 September 2008 letters of demand from the Banks were sent to the Taggart Brothers, requiring payment on foot of both guarantees. It was denied by MT on behalf of himself and JT that these were received. On 18 May 2009 pre-action letters were forwarded by the Banks' solicitors to the Taggart Brothers demanding payment. In evidence MT stated that again these also were not received. On 4 June 2009 a Writ of Summons was issued in respect of the 2007 Guarantee, followed on 9 June 2009 by the Writ of Summons being served in respect of the Second Kinsealy Guarantee. On 3 December 2009 the Statements of Claim in both actions were delivered and on 23 December 2009 the Banks made an application under Order 14 of the Rules of the Supreme Court for judgment to be marked in both actions.

[14] Thereafter, in proceedings before the Master, a considerable number of affidavits were filed whereby the Taggart Brothers sought to resist judgment being granted. Subsequently the Master ruled that judgment should be entered. However the Taggart Brothers appealed, and by order dated 22 June 2012, McCloskey J set aside the Master's order and directed the matters to proceed. Subsequently, pleadings and amended pleadings have been exchanged in all the actions, and applications made for discovery – with rulings made thereunder.

[15] During the course of the Banks' actions, on 7 January 2009 the Taggart Brothers issued proceedings against the Banks. The Taggart Action did not go any further at that stage, but all pleadings have now been closed.

The court's present remit

[16] It was proposed by the parties, and agreed by the court, that the first step in the determination of the disputes between the parties is for the court to establish a factual matrix in respect of the events up to, over and after the relevant period, based on the evidence it has heard and the reading of the voluminous documents available from a number of sources.

[17] MT was the sole witness for the Taggart Brothers in respect of all Actions. Mr John Taggart was unfortunately unable to give evidence as a result of ill health. From the documents I have read, in late 2006 and at least the early part of 2007 he was involved in all aspects of the Group's activities, albeit that his central role appears to have been that of the "hands on" builder/contractor. I have referred earlier to the documents that have been produced and the affidavits that were being completed during the earlier part of these proceedings. In respect of the latter aspect of these proceedings the affidavits of JT appear to be purely confirmatory of the assertions in the affidavits sworn by his brother MT, although there is one substantive affidavit made by him relating to the Kinsealy development and the execution of the Second Kinsealy Guarantee.

[18] As I have stated during the course of the previous proceedings numerous affidavits were completed by all parties which, as would be expected, included assertions relevant to the issues now before the court. I confirm that I have re-read all of those affidavits and the exhibits referred to in them. If I do not refer to any particular part of them it is not as a result of it not having been considered.

[19] Similarly, the court has re-read all of the voluminous documents which were exhibited to the court. I am advised that there are many other documents which, either by agreement or by interlocutory rulings of the court, have not been relied on by the parties. However, despite thousands of pages of emails, reports and correspondence there are absent many documents which the court would consider relevant both to the interaction between the parties as part of that day to day relationship of bankers/customer, and those which would have been generated as part of the normal operation of any business, particularly one of the scope and size of the Group. I would have expected the documentation to include Board minutes and communications between, in particular, Mr McHugh as the Finance Director and MT, given his absence on Group business. These would have had the potential of clarifying and disclosing the state of affairs within the Group as regards its operations generally, that is its financial and trading health, representations in dealings with the Banks, and its knowledge of its relationship with the Banks. Instead there is a paucity of such documentation.

[20] The adverse effect of the absence of these latter documents may, and I believe would have been alleviated to some extent by evidence from Mr McHugh as the Finance Director of the Group, and therefore 'the point man' of the Group in its dealings with the Banks on a virtual daily and overall basis. He was directly involved in the background to all of the issues to be determined by the court. He also above virtually everyone else in the Group had the oversight of all its operations, its financial position, the daily financial cash flows, the state of the banking accounts and the levels and purposes of the individual lending facilities. To the extent that there are documents available emanating from him, both reports and emails, I am satisfied beyond any reasonable doubt that his views would have been highly informed and would have accurately represented the views of the Group, and the Taggart Brothers in particular.

[21] In addition Mr McHugh was a close confidant of the Taggart Brothers, particularly MT who, in his evidence, confirmed that on a daily basis he was speaking to his financial director in whom he invested total trust and complete confidence.

[22] In the event Mr McHugh did not give evidence, although available to do so. Indeed during MT giving his evidence the indications were that Mr McHugh would give evidence, which at times impacted on his cross-examination. Also despite assertions in earlier affidavits of MT that Mr McHugh and others would be swearing affidavits to deal with the general affairs of the Group, only Mr McHugh and Mr McGuigan, the Chairman, did swear affidavits but only in respect of the Second Kinsealy Guarantee. Given that a considerable amount of communications were between him, representing the Group, and the main employees of the Banks dealing directly with him on the Group's accounts (Mr Gary Barr, Mr Henry Ennis and Mr Henry Elvin), all of whom gave evidence, the court is left with placing considerable weight on the Banks' witnesses as to communication between them and Mr McHugh, save if it were to conclude that there was other evidence contradicting any part of their evidence; their evidence defied belief; or the court were to consider that, based on what was said, particularly under robust cross-examination, they were witnesses lacking in credibility.

[23] In addition to Mr Barr, Mr Ennis and Mr Elvin evidence was given on behalf of the Banks by Ms Averil McCammon of McKee & Sons, solicitors for the Banks, whose evidence was directed to the Second Kinsealy Guarantee, and Mr Fergal O'Loan of Tughan & Co, solicitors acting for the Taggart Brothers at the time, inter alia, of the completion of the Second Kinsealy Guarantee.

[24] As we shall see from early 2006 KPMG accountants, became the auditors of the Group. However they subsequently provided other services for the Group. Relevant to these proceedings were their roles in seeking the recapitalisation of the Group, and in June 2007 their engagement in providing a report at the assistance of the Banks as to the financial position of the Group and its cash requirements going forward. In this latter role they were involved in discussions with the Banks, providing financial information of the Group's future requirements. In these roles a Mr John Hanson was closely involved together with other partners. Included in these discussions were meetings as the result of which capital was introduced by the Taggart Brothers which, together with the completion of the 2007 Guarantee, forms part of the complaints made by them against the Banks.

[25] Neither Mr Hanson nor any other partners gave evidence and therefore the court has had recourse only to documents from KPMG included in the papers.

[26] At the conclusion of the evidence, the legal representatives were given time to make written submissions on the evidence with a view to the court determining that factual matrix - which would then form in turn the framework for any legal argument.

Mr Michael Taggart

[27] It is appropriate at this stage of my judgement to comment on my assessment of Michael Taggart in the light of his evidence and everything that I have been able to ascertain from the papers – an assessment which informs my view as the level of his knowledge of events and issues as they arose from 2006 until and including 2009.

[28] For the reasons set out by McCloskey J in paragraph 2 of his judgment of 22 June 2012, I am satisfied that MT is and was at all relevant times an experienced businessman, whose business activities involved him in extensive dealings with financial and lending institutions. Indeed I am satisfied that MT was the dominant figure throughout the lifetime of the Group, a person of determination and ambition. This is not to be seen as being critical, rather that I have concluded that if, notwithstanding boards of directors in the Holding Company and/or the subsidiary companies, MT said that if something should happen, it did: and if he said that something should not happen, it didn't.

[29] I go further in stating that from his demeanour in the witness box it is clear that he is a careful man who, during giving evidence, took his time to read all documents to which he was referred before answering. He showed himself to be in total command of all events and circumstances surrounding all matters with which the court was dealing, and I believe the full ambit of the Group's activities.

[30] The events with which we are dealing in 2006/2008 arose at the end of a number of years trading during which from modest beginnings the Group developed and expanded. This was no fly by night operation, but one which regarded itself, and I have no reason to dispute it, as a high value commercial enterprise operating successfully in the building, construction and land development field. MT was the central, key figure in the Group's expansion, and as such would have had an intimate knowledge of the state of the Group's business at any time. He had access to all facts and information as to the daily operation of all aspects of the Group's affairs. As I have said above, he confirmed that he was in constant, seemingly daily contact with his Financial Director, Mr McHugh. He would have received all notices, agendas and papers circulated for board and other meetings, many of which he would have attended. In respect of those he did not attend he would have received briefings and minutes. I am also satisfied from his evidence that he was acquainted with all discussions that took place and representations that may have been made from time to time, as is inevitable in all business relationships, particularly as regards the position with the banking facilities and the discussions between the Group's employees and the Banks. In short he was aware at all times of what was going on within the Group. His role was not just strategic but operational.

Facility letters

[31] As stated at paragraph [5] above the Banks had been involved in the funding of some of the Group's operations for a number of years. For the purposes of these Actions, involving as they do in events between 2006 and 2008, that relationship was based on terms contained in a Loan Agreement dated 14 October 2004 (the Agreement) between (i) The Group, (ii) The Banks as agent for the Club and in other capacities and (iii) BOI, the terms of which I will return to later.

[32] In each of the following years the facilities under the Agreement were renewed after discussion, the new facility then being recorded in a Facility Letter executed by both parties. In addition, if a new facility was required for a specific development or purpose during that year, a Facility Letter would be issued and made supplemental to the Agreement. In 2005 there were two Supplemental Letters, and subsequently on 27 October 2006 the Banks wrote to the Directors of the Group setting out the terms for the on-going facilities, which were accepted by the Group, and the individual companies within the Group on the 27 October 2006. I will refer to this as the "2006 Facility Letter". Effectively the provisions of the 2006 Facility Letter formed the basis of the obligation on the part of both parties over the relevant time.

[33] It has not been claimed, and there is no evidence to the effect, that there were any additional terms or amendments to the terms of the Agreement or 2006 Facility Letter, either expressly or impliedly agreed between the parties. Given that the terms were grounded essentially on the Agreement, those obligations would have been crystal clear to both sides, knowledge supplemented of course by the terms being revisited for the purposes of completing the 2006 Facility Letter by the Directors and by the day to day operation of the facilities.

Terms of the Agreement/2006 Agreement

[34] At this stage I set out those provisions which I believe form the backdrop to the interaction between the parties and which may inform my determination of the facts. Others may well be relevant at a later stage in relation to any legal submissions.

[35] The following are the relevant clauses of the Agreement (incorporated into the 2006 Facility Letter) namely:

(a) Clause 1 defines the "Facility" by reference to a table of individual facilities setting out the amounts of each and whether the Facility was a demand loan or a term loan.

(b) Clause 3 set out the purpose of each individual facility. This was subject to two other clauses namely:

(i) Clause 2.1.1 which permitted the Group to seek approval to reallocate such amounts as agreed within the individual facility limits, subject to that agreement being in writing and to compliance with what are defined in the Agreement as "Financial Covenants": and

(ii) The provisions of Clause 7(7) ("Permitted Withdrawals") which provides:

> "All withdrawals or a drawdown of particular Facilities shall be used for the purpose for which those Facilities are available, but failure by the Borrower to comply with this clause shall not prejudice any rights of the Banks which shall not be responsible for monitoring or ensuring the use or application by the Borrower or any part of it."

(c) Clause 6 sets out in tabular form how each facility is to be repaid. Of particular relevance in this regard is what was to become known as Facility 11 under the 2006 Facility Letter which related to the purchase of the lands at Kinsealy. I will deal with this when dealing with the Taggart Action as it relates to the First and Second Kinsealy Guarantees.

I also record as potentially relevant to consideration of Facility 11 and the two Guarantees, the provisions of Clause 7(8) which states:

> "Notwithstanding this Agreement the Borrower hereby irrevocably and unconditionally authorises the Banks and the Account Bank from time to time to effect any payments or transfers required to be made pursuant to the Agreement to meet inter alia interest requirements and capital repayments, for and on behalf of the Borrower. Transfers between accounts shall not be effected without reasonable prior notice being given to the Borrower."

(d) Clauses 17.2 and 17.3 relate to the provision of accounts and information to the Bank. Clause 17.2 sets out time limits for supplying the Bank with annual Audited Group Accounts: Forecast Annual Accounts: monthly Group Management Accounts and monthly Sales/Booking Reports. Clause 17.3 provides for a wide range of information, including monthly progress reports and an obligation to provide any information which the Bank would reasonably require.

(e) As stated Clause 2 defined "The Facilities" and allowed, with consent, reallocation of amounts within individual facility limits. It provided that such an application would be subject to complying with Clause 17.32 (Financial Covenants). In the event Clause 17.32 was replaced by the terms

and provisions of a Facility Letter and Agreement dated 9 June 2005. The original provision stated:

> "(v) The loan to value ratio shall not exceed 70% of the facilities to any current valuation of the land and building assets which are secured by the Debentures and Mortgages."

This was amended to read as follows:

> "(v) The loan to value ratio shall not exceed 70% (excluding unzoned sites) of the facilities to any current valuation of the land and building assets which are secured by the Debentures and Mortgages."

It should be noted that:

- Whereas under the Agreement the loan facilities were provided up to £34,725,000.00, the 2005 Facility increased that ceiling to a substantially higher figure; and

- .'Unzoned sites' were specifically excluded, a change to the previous definition since previously the Group had no such sites.

"Debenture" was defined by the Agreement as the document executed by the Borrower as security under the Agreement, including without limitation any obligation in respect of any interest hedging agreement entered into pursuant to the Agreement.

"Mortgages" were defined as mortgages under the "Property Portfolio", that is those properties set out in a schedule to the Agreement, on a collective basis.

As stated the 2006 Facility Letter then excluded from that calculation "unzoned sites".

(f) Under the provisions of Clause 34.2.2 it is provided that notices should be sent to the Group and any communication should be made with the Group marked "for the attention of Mr Maurice McHugh", the Financial Director - that is the formal line of communication between the Banks and the Group was Mr McHugh, not the directors.

[36] At the outset there are two matters arising from the above terms and conditions. The first relates to the overall Facility which had a ceiling eventually of £50 million. This was not a general facility. Instead within that figure were a

number of compartments, each with its own purpose and with its own ceiling. One of these was what would be recognised as a current account with an overdraft limit, into which payments from trading were received and payments in respect of trading were made. It can act as an indicator of the cash flow position of the company. This account plays a central role in this case.

[37] The fact that part of the overall facility of £50m had not been utilised did not allow the Group to draw down any balance for any purpose it decided. Therefore if the overdraft limit on the current account was exceeded, it was not open to the Group, without the consent of the Banks, to draw down money earmarked for a different compartment, but at that point undrawn. As we will see consent was given by the Banks on a considerable number of occasions allowing withdrawals from another account, the Land Purchase Account, to meet excesses on the current account – that is amounts paid out by the Group over and above the authorised overdraft limit.

[38] At various stages in his evidence MT by his averments seems to suggest that he believed that the whole fund was available for whatever purpose the Group decided, and the failure of the Banks to allow access for any such purposes was a breach of the Banks' obligations. Therefore on occasions he points to the fact that in June 2007 £41.4m had been drawn down out of the total £50m Facility. In his first affidavit dated 13 September 2010, prepared for the purposes of the Order 14 proceedings, he alleges at paragraph 10 that the Group were operating within the facility of £50m. In the third affidavit dated 5 October 2010 he again stated that the Group were operating within the facility of £50m, since on 12 June they had drawn only £41.4m. In a deposition for proceedings in America (to which reference will be made later) he alleged that the Banks were not prepared to extend funds to the Group beyond £41.5m up to the £50m limit on the Facility. Based on these assertions he then went on to argue that the Bank was not allowing the Group access to that balance, effectively starving the Group of funds. That was in the context of excesses, that is balances above the permitted overdraft limit, and as we will come to see there were significant cash flow difficulties at different levels from early 2007, but particularly during the relevant period.

[39] I am satisfied from everything that I have read and heard in this matter that MT and the Board, including Mr McHugh, the Financial Director, were fully aware of the structure of the Facility, its purposes, its compartments and the limits within those compartments. Any claim based on a contrary position is unfounded and totally misleading.

[40] A second general point can be made at this stage based on the evidence. As we shall see LTV is a subject which is central to the disputes between the parties. The calculation is defined by the Agreement as amended by the 2005 Facility Letter. It was further amended when the Kinsealy Facility was advanced to the Group in October 2006 (Facility 11). This was for the sum of €13m, but it was agreed that any

amount due under this Facility would not be included in the "loan" aspect of the LTV calculation.

[41] One has to say that to make such a calculation with any certainty on any particular day would be based on the amounts debited to the accounts on that day (not taking into account cheques already in the system) and on the basis of values of land - which would not just be fluctuating but particularly so at that time. Indeed those values were based on valuations and the court assumes that those were hardly being received every day. The court therefore assumes that the exercise was carried out on whatever the loan was in a particular day using valuations previously provided and overall, on a spot check basis, with some margin being factored into the calculation where it fell in and around the 70% threshold. However the parameters were clear. Just as the 'loan' was defined by the amounts drawn less Facility 11, the only assets to be taken into account were those falling under "the Debenture" and "Mortgaged Properties" as defined in the Agreement.

[42] The evidence however discloses that MT seems at times to have taken a different view of these parameters. As we shall see he placed LTV right at the heart of the concerns he says were those of the Banks and which were under consideration during the relevant period. In an affidavit dated 5 October 2010, prepared for the Order 14 proceedings, and upwards of three years after the events now under dispute, he refers at paragraph 18 to the question of the calculation of LTV in the following terms:

> "18. Ulster Bank insisted that we engage KPMG to prepare a report in respect of the Group's LTV position. This however was only carried on the assets relevant to the Club Banks, which represented only about 15% of the Group's borrowings, £41m out of circa £275m. The estimated total value of the Group assets was circa £475-£525m. However the entire Group LTV was not in the end addressed since KPMG concluded that the Club Bank related assets at an LTV of 68% within 70% covenant."

[43] This approach is then reflected in two further paragraphs in this affidavit namely:

> "19. KPMG's report on the Club Bank assets is, as I have mentioned, dated 6 August 2007. …. I had expected KPMG to report on all of the Group assets and not the Club Bank related assets, but it might be that they did not do so as the Club Bank related assets loan to value was below 70%."

And:

> "20. In fact had KPMG assessed all of the Group's assets, I believe that they would have concluded that the overall LTV was only 30% or less."

[44] Juxtaposing the above two matters, the perceived attitude to the overall facility, and the approach to the value of the Group, could lead the court to conclude that MT took a view that the Group as regards the Club Bank facilities could effectively do with the facilities what it wanted, and that the Banks should not be worried since overall the Group had more than enough assets to pay them off, even if they did not have any security over them.

[45] It is difficult to characterise that approach. I do not believe it can be regarded as naïve given the experience of MT and indeed all others on the Board of the Group. It does however suggest a somewhat cavalier approach to the banking arrangements. Indeed, as we shall see, that potential attitude is more than reflected in the way in which excesses were allowed to manifest themselves on a regular basis, for substantial amounts, and where the Banks were being asked to provide funds from some of the compartments for purposes that they were never designed to service.

The Banks' Credit Structure

[46] It is important in following the evidence to identify the structure of the relevant committees in the Banks dealing with customer accounts.

- The day to day dealings with the customer were carried on with the Retail Management Team (RMT). For the purposes of the Group's accounts this was represented at different times during the period relevant to the Actions by a Ms McQuoid, Mr Gary Barr (Mr Barr), Mr H Ennis (Mr Ennis) and a Mr H Elvin.

- Above that was a Committee variously referred to as Credit Risk North (CRN) or Credit Risk Northern Ireland (CRNI). RMT reported regularly to this Committee and would seek agreement to recommendations made by them to proposals regarding the accounts of a customer. I will refer to this Committee hereafter as CRN.

- In turn CRN reported in certain events to what was called the Credit Committee or CQ ('CQ') which dealt with all Ulster Banks' business generated in Ireland. At times members of CRN sat on the CQ or attended its meetings. This would be in respect for example where an increase of some size in a facility was required, or where issues relating to an account were considered either of such importance or seriousness that they should be escalated to a higher authority.

The Evidence

[47] The disputes between the parties contain a number of issues many, if not all of which manifest themselves in the months before the relevant period. I have therefore sought to find a starting point and then to take individual periods of time to see how these issues were developing. The first time period is from in and around September 2006 until the end of the December 2006.

[48] In the last quarter of 2006 there was considerable activity within the Group both reviewing its performance in that year and looking forward to the strategy and requirements for 2007 and beyond.

[49] The annual report set out the historic trading performance showing an increase of turnover from £14m in 2002, to £31m in 2003 and 2004, £48m in 2005 and £112m in 2006. Projections in an annual presentation prepared by the Group and dated 15 December 2006 showed projected growth to £170m in 2007 rising to over £1b in 2011. The Group therefore was not proposing to stand still, but to embark on a very substantial expansion.

[50] The loan facilities from the Club were overdue for review at the end of September 2006, the delay being attributed to the considerable time and effort required by the Group's directors in the acquisition of two very large companies, Cecil M Yuill Limited (Yuill) and Fraser Estates Limited ("FEL"). It was also in October 2006 that Kinsealy was purchased by the Group with the benefit of a loan by the Club. Yuill and FEL both feature in events during the relevant period. A report prepared by KPMG entitled "Funding Strategy for Growth" prepared in December 2006, and the Annual Report of the Group dated 6 June 2007 ('the Annual Report') both attribute a large slice of the increase in 2006 of some 134% in turnover of the Group directly to the acquisition of Yuill and that earnings before tax had been "helped by the acquisition of Yuill and strong profit contribution from disposal of some of land bank in the Republic of Ireland".

[51] FEL is addressed in some detail throughout this judgement, given it was seen as a potential source of funding for the Group. While Yuill was featured as a possible source at times, it was not the subject of significant discussion nor was its financial status. However, during the course of reading the documentation, the position of the Group in relation to outstanding payments due for deferred consideration for the acquisition of this company, and banking covenants from that subsidiary company's bankers which required injection of loan funds from the Group, has given the court some insight in relation to other financial pressures in the Group at relevant times outwith the Group's involvement with the Club Banks.

[52] Perhaps it also should be noted that while other developments were referred to in the papers from time to time, very little if anything is known to the court as to the financial status of those developments, let alone any detail as regards its bank accounts, creditors, if any, and other financial details which may have assisted in

assessing the overall financial position of the Group, particularly in the context of the assertions that it had substantial resources which would have been available to satisfy any demands at any time made by the Club Banks.

Judgement's Structure

[53] In an attempt to follow as clearly as possible developments as regards the Group over this and subsequent periods I have addressed separately in each period the separate issues that I have determined are relevant to my determinations. The hope is that this will allow the role of any particular issue as it developed during the overall period to be followed, but also how each of those issues interacting with each other also developed over that period.

[54] The major strands would relate to:

- The Group's strategy;
- Its funding;
- Its cash flow;
- Requests for information;
- Excesses on accounts;
- LTV (loan to value);
- Kinsealy;
- FEL, Yuill and Taggart Homes (Manchester) Limited ('Manchester'); and
- The Republic of Ireland.

From time to time other individual issues would of course arise and where relevant I will address them.

September 2006-December 2006

[55] The strategy as set out in both Annual Reports was that the principal activity of the Group would continue to be that of house building, property development and commercial development in Great Britain, Northern Ireland and the Republic of Ireland. The Group was seeking to expand further in line with the projected turnover figures, with the intention of adding to what had been the substantial acquisition of Yuill (£60m), FEL (£88m) and in April 2007 a development in Millmount (£82m). However further acquisitions were in the pipeline during the period now under consideration including Kinsealy (Euro 19m) and various other sites of substantial value.

[56] The Annual Report referred to the financing of the Group's business being be by way of "working capital through retained earnings and borrowings at previous market interest rates". There was no mention of recapitalisation.

[57] However the question of funding and cash flow as one would expect was being addressed by the Board during the period now under consideration.

(1) At a Board meeting on 6 September 2006, attended, inter alia, by the Taggart Brothers, it was recorded:

> "Need to urgently look at spvs (special purpose vehicles under which third parties would introduce funds) for NI, R of I and Manchester to alleviate cash pressures in Group."

The Board also resolved that there should be no further land acquisitions entered into without Board approval.

(2) At the same Board meeting under the heading "2007 Finance Forecast" the minute recorded:

> "Looking quite weak at present – to be reviewed in line with five year plan initiative:
>
> - may need to look to accounting treatment of interest holding costs while land is waiting development."

(3) At the same Board meeting the subject of a Due Diligence of the Group was considered, with authority given to explore such a step through KPMG, accountants. A proposed scoping document dated 3 October 2006 was presented by KPMG and was taken forward. On 4 November 2006 Mr McHugh advised the Directors:

> "I think most of the major areas are covered. In terms of timing, I would seek to have our 07 and five year plan complete before the DD starts. You are therefore looking at early to mid-December 2006. I think we all need to accept it will likely make for painful reading but we are in the process of correcting a lot of our existing deficiencies."

It is noted in the context of repeated requests in subsequent months that Mr McHugh expected the 2007 budget and the 5 year plan for the Group to be available in December 2006.

[58] By e-mail of 14 September 2006 Mr McHugh in an e-mail to all of the directors, including the Taggart Brothers, stated:

> "In view of the advice received from KPMG this morning as sent to you an earlier e-mail and following discussions with Tracy, **no monies, be it**

> **deposit or otherwise, are to be paid out without the full approval of the Board of Directors**." (the emphasis is Mr McHugh's).

[59] In October 2006 Manchester was negotiating for a property in Carlisle. It appears from the documentation available that this had been contracted to be purchased with a completion date in November 2006. The local director had written to Mr McHugh expressing concerns that he had received negative feedback with respect to Taggart Holding Limited's ability "to see larger deals through". Mr McHugh was blunt in his response citing the completions of Yuill, FEL and other sizable land deals earlier in the year as evidence to show that the Group should have a reputation for completing large deals. However he did point out that to realise the full potential of the Group's investment in Manchester a thorough robust five year plan was required together with a need to get it "separately funded as outlined at our August 2006 Manchester Board meeting".

Having then addressed the preparation of such plans and their approval he continued that it would then be necessary "to get on the road to get our Manchester region separately funded against the five year plan with the Manchester based banker/finance house, again, as previously outlined at our Manchester Board meetings".

He concludes:

> "Bear in mind that our performance against our existing 2006 budget has resulted in major slippage against revenue targets for 2006 – something that we cannot afford to repeat in 2007 if we are to retain any credibility internally or externally. We need to be mindful of this in delivering a five year plan that is credible, fundable and deliverable within the timeframe set out in the five year plan.
>
> …. We are all confident in the ability of our Manchester operation to deliver significant growth to our overall operation with the full support of you and your team and the Taggart Board behind it. However, this has to be done in a controlled manner with a robust business plan at its core. Let us concentrate on the positive of getting this plan put to bed in the next week and work from there."

This was the objective in October 2006.

[60] On 17 October 2006 there is an e-mail relating to an acquisition by the Manchester company (the court is unaware if this is separate to the Carlisle

transaction or otherwise) in which Mr McHugh was advised, following an earlier e-mail of 27 September, that funds were required since the company "was again in breach of contract".

[61] In a document entitled "Taggart Holdings Limited – Funding Strategy for Growth" prepared by KPMG and dated 23 November 2006, suggestions were put forward by KPMG of a number of models to deal with financing of both house building and land acquisition. This covered the possibility of competitive process for refinancing of the entire Taggart Group: an injection of capital: introducing a single provider of debt and equity: the introduction of equity investors: and financing by maximisation of debt gearing and introduction of equity. It therefore is apparent that the Group, in line with the Board Minutes to which I have referred, was addressing the question of how the funding for the projected expansion of the Group referred to in the Annual Report was being considered.

[62] On 9 October 2006 the solicitor acting for the Group in Dublin had e-mailed the directors asking for confirmation of the availability of funds for the acquisition of Kinsealy as "time was of the essence", a Notice to Complete having been served by the Vendor on that day. It is clear that no financing was in place for this acquisition at the time of the Notice to Complete. The Banks had been approached but initially had turned the matter down in the context of LTV at that time. However this was overcome and the facility was provided allowing for completion on 27 October 2009 (together with the First Kinsealy Guarantee).

[63] In a General Manager's Report dated 1 December 2006 the directors of Taggart Homes Ireland Limited ('Ireland'), a subsidiary company in the Republic of Ireland, reported that the number of completed units was under the projected number (39 as opposed to 50 which had formed part of the financial assumptions). In a narrative as regards a site at Trim, it stated "new sales have been slow as similar in the entire Republic of Ireland market at the moment".

[64] I am satisfied from reading the above and indeed all of the e-mail traffic from that time which is available to the court, that while the Group had been clearly successful and had the objective of expansion, and seemingly substantial expansion within a relatively short timescale, there were financial pressures recognised within the Group's Board, pressures evidenced by individual transactions (as set out above) and the investigation of the refinancing or indeed recapitalisation of the Group.

[65] As I have stated the annual review of the banking facilities was overdue by reason of the time expended by the Board in the acquisition of Yuill and FEL – and other developments. On 28 September 2006 Ms McQuoid, a member of RMT, sought a meeting with Mr McHugh to get an update on the current developments and sites, together with the Group's expectations for the remainder of the year. A meeting was held on the 24 October 2006 prior to which a number of requests were made for extensive information, including management accounts and forecasts to the end of 2006. This began a train of requests by the Banks for information from the

Group, information to which they were fully entitled under the provisions of the Agreement, and indeed would be expected in any relationship between banker and customer. While some information was provided at this time I am satisfied that this was insufficient in a number of important respects, nor do I see any evidence which would satisfy me that the concerns being raised within the Group were being communicated to the Banks at that time.

[66] On 6 October 2006 Mr Barr in an e-mail to Mr McHugh raised two issues:

(i) He sought a response to an earlier enquiry regarding what appeared to be a different approach to the calculation of LTV: and

(ii) He raised the fact that the sterling account was overdrawn by some £715,000. Over the next months there is evidence of further excesses, including one on 18 October of an overdrawn amount of £1.4m in respect of a particular development. The issue of excesses therefore did not just arise in 2007, but instead became a feature over the succeeding months, leading to two cheques being returned and restrictions being placed on drawings from specific accounts, to which the court will come.

[67] Turning to the Banks' view of the Group during this period, following the meeting on 24 October 2006 CRN considered a credit application for the funding of Kinsealy, supported by RMT. This then was considered by CQ. The documents generated by this request, including the report from RMT dated the 25 October 2006, provide an overview of the Banks' issues relating to the Group as a whole, and in relation to the application for the loan to fund the acquisition of Kinsealy in particular. I will consider the second of these matters when I deal with the Kinsealy matter generally.

[68] It is necessary only to refer to a number of comments of the various Committees, when they met after the meeting of 24 October. It noted that the annual review reflected a 16 month period of business for the reasons already stated, and then sought a review for a period of 6 months. It noted the request to reinstate the Club facility at its previous agreed level of £25m (the Bank's share of 50:50 Club with BOI) and noted that the facilities had largely operated within agreed parameters although excesses were noted on various current accounts "largely the result of WIP (Work In Progress) funding drawdowns not being requested on time or from a failure to transfer money held on deposit either by UBG or other banks. No material concerns were raised." Having reviewed the previous trading for 2005, the outturn to August 2006, and the forecast turnover to year end, the Committee approved all existing facilities to £25m, subject to comments regarding the availability of 2007 budget and forecast, which were still outstanding.

[69] Under the heading of "Future Strategy" the Banks noted that business activity in the last 12 months had been driven by a desire to increase the Group's land bank and position itself for future growth in building out residential development sites.

That came after a period when turnover and profit was derived largely from land sales. The acquisition of Yuill and FEL was seen as representing one part of that strategy, "ramping up" as they did the land bank.

[70] Under the heading "Management", having noted concern in the past about the depth of the management team the Banks accepted that good progress had been made to strengthen that aspect of the business and also noted that the ambitious growth strategy embarked on in 2006 appeared to be paying dividends within increased debt, either off balance sheet or self-financing.

[71] Under the heading "Recommendation" it states:

> "Longstanding UBG connection that has a proven track record, strong business model and a history of profitable trading. Its MO has shifted in the last 12 months from creating profit through site enhancement (planning) and flipping assets towards a core activity of residential development. The acquisitions of Yuill and Fraser Estates leaving it strongly positioned from both land bank and unit completions perspectives. It is evident that the top tier management remain very ambitious and a key challenge for the RMT over the next 12 months will be to manage expectations over debt quantum while the Bank gains a better understanding of the newly enlarged business and the opportunities available.
>
> Whilst we remain comfortable with short term liquidity (based on the forecast 2006 out-turn) the picture in 2007 is less clear and reflective of the trading nature of the business. We do not doubt their ability to either sell units or enhance planning but the provision of the 2007 budget/forecast early in the New Year will undoubtedly assist in improving visibility.
>
> Renewal of the existing facilities, the reinstatement of the club facility of £25m and the equity facility D9 is approved subject to:
>
> ….
>
> Provision of 2007 budgets and a forecast term loan statement no longer than the February 2007."

[72] It is therefore apparent to the court that while the Banks had a reasonably optimistic view based on past performance and on some projected figures (the 2007 and beyond projections not being available) and the Group was proceeding in a direction acceptable to the Banks, nevertheless a signal was given to RMT from the higher Committees as to the key challenge for the following 12 months mainly to manage expectation over debt quantum, and the need for the Banks to get a better understanding of this newly enlarged business and the opportunities available - for which the 2007 budgets and forecast loan statement were necessary.

[73] This concern in relation to liquidity is confirmed in a General Purpose Report of the Banks dated 15 November 2006 in connection with a proposed acquisition by the Group of property at Carryduff. The acquisition was to be undertaken with the benefit of funds from a different Bank. Having noted the concern at the pace and diversity of the growth set out in the October Note, the consent of the Banks was given for this particular purchase albeit it records that "if expansion/diversification is too swift, the associated pressures on working cash flow can be significant." It then went on to state that although the Group were a long established operator nevertheless "liquidity should therefore be closely monitored going forward".

[74] There is no evidence that these matters were communicated to the Group, but they reflect the concerns already being expressed within the Group, reinforced by the KPMG report in 2006. From that date "Funding Strategy" was in front of the Group's Board. In those circumstances I cannot see that there was any requirement for the Banks to express any opinion on matters on which in any case they were awaiting information. They were matters which were in the minds of the Financial Director and the Board. In the event Mr Barr e-mailed Mr McHugh on 22 November 2006 asking if he had had a chance to put together the 2005 results breakdown as previously discussed, in addition to the figures for 2006 and the forecast for 2007, the subject of earlier requests.

January 2007/March 2007

[75] January 2007 commenced with the sale of property at Atlantic Wharf, Londonderry. This sale features large in relation to the First Kinsealy Guarantee, it being argued by the Taggart Brothers that the proceeds, some £6m, should have been credited to Facility 11 (Kinsealy) to reduce or eliminate that Facility, and with it the First Kinsealy Guarantee. I say "reduce", since if the acquisition of that property was funded from the Land Bank Account, about which no evidence was given, the outstanding loan attributable to it would have been first required to be repaid.

[76] However for the purposes of these Actions I will assume that at least part of these funds would have been made available for other purposes of the Group. In his evidence MT stated that the sale of Atlantic Wharf was the sale of "a site" referred to in the Repayment Schedule for Facility 11 in the Agreement/2006 Facility Letter. This is a discrete issue which I have examined and have set out in Appendix A so as not to deflect from my following the issues generally relating to the Group's affairs

at this point in my judgment. I note however that it was the Group which specifically asked for £1.2 million from these funds to be transferred to eliminate an excess on the overdraft account at that time, and therefore not to that extent at least to the credit of Facility 11.

[77] The relevance for my present purpose is that at the time of this request for a transfer an undertaking was given by Mr McHugh to Mr Barr that any request for transfers would in future be made in advance of issuing cheques which would lead to excesses being created.

[78] The documents available also show that at the end of December 2006 and the beginning of January 2007 there were board meetings at which cash flow and capitalisation were discussed. The minutes of the board meeting of THL dated 8 January 2007, a meeting called by MT to address cash flow, recorded a core banking facility for working capital of £35 million, to include Manchester (£12 million), Corporation Tax (£6 million) and finance costs of £6 million. The refinancing of Manchester as a separate facility was to start. The Republic of Ireland land bank was recorded as 'some considerable way from producing income streams and cash flow'. Indeed a later report in July 2007 from a director stated that the highest prices in the Republic had fallen by €30,000 since Christmas 2006. Disposal of all or part of the land bank in the Republic was considered. The minutes concluded with the following paragraph:

> **"Meeting concluded with 100% acceptance of the pressing need for each group board director to address the working capital issues of the group as the main priority of the board for the next 6-9 months"**
>
> (The underlining and bold print are in those in the Minutes)

[79] Issues with excesses again arose on 30 January 2007, and in that context the Group agreed to provide information to the Banks of any major cash requirements over £100,000 before the next meeting between the Group and the Banks. A day later, internal e-mails were exchanged about large sums due for taxes and other demands, one of which was for VAT in the Republic of Ireland. In an internal e-mail of 31 January 2007 a drawdown of €2m was being considered, but in the knowledge that it would meet only part of the demand for VAT, and hopefully would "buy time". It also discussed seeking an amount which would "give some space for other requirements".

[80] The above discussions led to a request for a drawdown of £3m which Mr Barr included in a General Purpose Report dated 2 February 2007, with a recommendation to permit the drawdown. The amount was to come from the Land Bank Account despite the fact that it was to pay VAT, corporation tax and "£760,000 to bring current account into nil".

[81] This request was permitted on 5 February 2007 although CRN counselled that the Land Bank Account was not there to meet such obligations, but acknowledged that part of the proceeds from Atlantic Wharf and the sale of another property had gone into the Land Bank Account.

[82] On 5 February 2007 Mr Barr advised Mr McHugh that the overdraft account was overdrawn by £2.04m (to include the VAT cheque) and asked for consent to affect the drawdown that had been approved. However some 10 days later, on 16 February 2007, the Group sought an additional £1.1m from the Land Bank Account to meet further corporation tax demands – making a total request of £4.1m.

[83] On 19 March 2007 the Group became aware internally that they had issued cheques in the previous weeks which had not been notified to the Bank despite previous assurances, and that this would result in an excess of £1.2m. It was hoped that £800,000 would be available from the sale of a property within a 2 week time period, but it was noted that credit balances on two other accounts could not be accessed because cheques had been written against them. The fund from which such funds would become available was, as before, the Land Bank Account, and the result was acknowledged to put LTV over 70%.

[84] The issue relating to this potential excess was put to Mr Barr on 21 March 2007 and, as before, he recommended that this should be permitted. CRN again agreed commenting however that it was "extremely inappropriate behaviour" to use the Land Bank Account for paying creditors. That was self-evident to all the parties, including the Financial Director and the Board.

[85] On 22 March 2007 the Group asked for an extension of the facility of the £1.2m which had been sought on 19 March 2007. Mr Barr again recommended that this be granted and proceeded to reallocate loan limits to facility drawdowns from the Land Bank Account. However while agreeing that this could be done CRN made clear that the excesses represented a lack of control on the part of the Group, and Mr Barr was told to manage the accounts until monies were repatriated to the Land Bank Account.

[86] Without more, and in the context of the excesses, the picture is of a Group with substantial strains on cash flows to meet its responsibilities under the Agreement to service and repay the various facilities. Consistently large excesses were being run up for current expenditure and liabilities, excesses financed by a loan facility made available for an entirely different purpose. Effectively the Banks were providing working capital to the Group well beyond the terms of the Agreement. This would have been obvious certainly to any one with the financial know how of Mr McHugh and the Taggart Brothers.

[87] There are two other observations to be made in respect of this period up to the end of March 2007.

(a) Mr Barr, who has been castigated by MT during the course of these proceedings as someone totally antipathetic to him and the Group, was the person who had to manage the situation of a customer who not only on a consistent basis overdrew on accounts, but on occasion did so without any notification – and did so despite being told that he would be notified. It is clear from internal reports and e-mails that until the end of March 2007, contrary to the accusation made against him, he went out on a limb to argue the Group's case. I am satisfied that without his support and efforts the Banks could have been well within their rights to prevent the future use of funds designated for one purpose being made available for purposes for which they were never intended.

(b) In response to the argument that no concern had been shown, over and above what the Group did not need to be told, on 19 March 2007 in the context of paying out cheques which required a further injection of £1.2m, it was agreed that there should be a meeting to "review the facility".

[88] I have then considered the documentation to see what the internal knowledge and views of the Group were during this period in relation to the issue of cash flow. There are a number of documents, but I refer to two, representing as they do the position as seen by Mr McHugh at the beginning of this period, January 2007, and at the end of the period, March 2007.

(i) In a document entitled "To List January 07 Maurice McHugh" there are number of headings only some of which require to be mentioned namely:

(a) Under the heading "Cash Flow" there is considered to be a need for UB/BOI bridging support over the next six months: an attempt "to get buy in from the rest of the Board on tough measures needed to get us through the next 18 months": and an attempt to get a credit line established to meet corporation tax payments in the middle of the month:

(b) Under a document headed "Five Year Plan – Restructuring", is an entry stating:

> "Need to re-emphasise <u>dire cash flow/trading position for 07</u> as a backdrop to what is realistically attainable in the next 12-18 months:" (The underlining is mine)

(ii) In an e-mail from Mr McHugh dated 21 March 2007 in reply to one from KPMG on the issue of "Capitalisation" to which I will return, in the context of cash flow he stated:

> "I think this is probably the most pressing issue we have. I have an uneasy feeling that there is a hugely unrealistic expectation within Taggart, myself included, as to what we actually can raise from capitalisation. I think we are looking at even larger projects, in some cases with longer and longer pay back times (Re Millmount 2 above) without realising that <u>we need to raise a hell of a lot of cash for our present and short to medium term working capital needs."</u>

There is no evidence that any of these views were communicated to the Banks who still awaited information.

[89] The contents of these documents disclose that the Financial Director, MT and indeed the whole Board were fully aware of the problems with cash flow, which was according to Mr McHugh "dire" not just in January 2007 but in the context of the period right through to mid-2008. I have not heard from Mr McHugh. MT at several points in his evidence said that he (Mr McHugh) could be given to a dramatic (my word not his) way of putting things. However this is an experienced Finance Director, highly competent according to MT, presenting agendas and views not just to the Board but to outside accountants and financial institutions. Even allowing for any possible modicum of hyperbole, it is quite clear to the court that there were major financial strains in this Group of which it was aware, continuing through the period to the end of March 2007, and, standing back at the end of March 2007, a Group which recognised that it had substantial need for working capital from some source.

[90] In the skeleton argument filed on behalf of the Taggart Brothers it is argued that if they had known the Banks had concerns about excesses they in turn would have been 'very concerned' – that is that if Mr McHugh had been told there were concerns, he would have alerted the Taggart Brothers, but that did not happen. It is said that if alerted they would have sought a meeting with the Banks 'to understand what those concerns were'. If necessary, information would have been provided and reassurance given to Credit.

[91] In his answers in direct examination MT asserted that he was never told directly by the Banks of any concerns whatsoever about excesses, LTV, cash flows etc. Even if that was right, it is absolutely clear that Mr McHugh was fully aware of the concerns of the Banks including in particular that there were problems with cash flow-described by Mr McHugh as dire. I agree with the assertion of MT that Mr

McHugh would have told him off any concerns, and yet in his evidence MT stated that he did not recall Mr McHugh raising any serious concerns, or concerns of any of the type to which I have referred. I do not accept that evidence. By his answers, at best MT was being disingenuous, at worst he sought to mislead the Court. I am satisfied that Mr McHugh would have brought all of these matters to the attention of the Taggart Brothers and the other Board Directors. Despite that knowledge and being aware of the Banks' concerns no meeting was requested by them, nor were any of the other steps that MT said he would have taken to address them.

[92] It was also a Group whose Board was fully aware that over the period now being considered there had been breaches of banking facilities on a substantial scale to meet the Group's current liabilities. In themselves, and from the content of the emails which I have seen, to suggest that all involved in the Group would have thought that the Banks would not have had considerable concerns is unsustainable.

[93] But these were not the only issues in this period as regards the Banks. Their demand for accounts, forecasts and five year plans for all of the Group and its subsidiaries had been sought from 2006 and continued throughout this period. But it was not only the Banks who were seeking this information. KPMG in order address the project they had been asked to undertake to raise capital were looking for it at the beginning and the end of the period under consideration. On 19 January 2007 KPMG in an e-mail to the Directors, including MT, referred to the November 2006 meeting and the presentation on capitalisation. In it they pressed for a clear and definitive timetable, otherwise the Group would not maintain great momentum. On 21 March 2007 the documents show that work on the forecasts as on-going throughout the period, but were being held back by the absence of information.

[94] Other concerns arose over certain aspects of different subsidiary companies namely:

(a) On 8 February 2007 Taggart Holdings Manchester Limited ("Manchester"), five year plans were being put together in order to look for refinancing which hopefully would allow its liabilities to the Club to be eliminated. In an internal memo it stated:

> "Generally the belief is that 200 units to financial complete in 2007 is very ambitious (given that we are in Feb already) and we need to apply some realism to 2007 and 2008 figures. We cannot present something to the banks and then be way off as the year unfolds."

The e-mail then in different parts asks whether any of the figures in relation to various developments and presumptions were "realistic" or likely to be delivered.

(b) On 14 February 2007 the Directors of Yuill wrote to a Mr Hart, the then Managing Director of the Group, in the context of a five year plan. He stated that it would "substantially breach the BOS (I) covenants and produces exceptionally high gearing without major improvements to profitability". The draft that was sent was sent with caution that it should not (my underlining) be put forward to the Taggart Board as a target that the Directors of Yuill considered "best case".

(c) On 7 February 2007 in addressing the revised 5 year plan for the Group the Board Minute refers to "a more aggressive sales target (results in earlier and more land transactions, head counts and accordingly more interest costs)".

(d) At a Board meeting of Ireland on 2 February 2007 there were a number of cautionary issues namely:

(i) Some sites recently reviewed do not stack up:

(ii) The impact on the target of delays on two sites, were expressed in terms that the chances of delay were real:

(iii) That a change to "Social Affordability" calculations in appraisals raised concerns of "huge negative impact" on those appraisals:

(iv) Prices were under pressure.

[95] At a further Board meeting of Ireland on 27 February 2007 the 2007 forecast for that company had not yet been adopted, and its dependency on key decisions being made on land purchases and construction timetables was again emphasised – as was the view that unless the criteria in the forecasts were met the 2007 and subsequent 5 year plan "will not be accomplished".

[96] Returning to capitalisation. On 21 March 2007 Mr McHugh agreed with KPMG, as I have set out above, that financing was the most pressing issue for the Group. However he went on to express the opinion as to the expectation of the Taggart Brothers as to the value of the Group for the purposes, for example, of raising equity from a third party. He stated:

> "I think this is probably the most pressing issue we have. I have an uneasy feeling that there is a hugely unrealistic expectation within Taggart, myself included, as to what we actually can raise from capitalisation. I think we are looking at ever larger projects, in some cases with longer and longer payback times (Re Millmount 2 above) without

> realising that we need to raise a hell of a lot of cash for our present and short to long term working capital needs. … I have to have the numbers for the 5 year plan completed for you to do your bit. However, I think it would be time well spent if you could spend half an hour to an hour with us early next week to dampen down our expectations. If you take the example of Ben Bailey, a quoted PLC in the same sector as us with T/over and profits not too far removed from what we achieved in 2006 (<u>and are unlikely to repeat until at least 2008 on present projections</u>) (my emphasis) Bailey is being valued at the moment (including some bid speculation in the price) at about £80 million stg. I may be mistaken, but I think that Michael and John expected the Taggart valuation to be way, way in excess of this. I don't want to see them disappointed, but neither do I want to see them basing decisions on a valuation that may be totally unrealistic. The sooner we can do this, the better."

[97] Certainly the Taggart Brothers were bullish, even against the background which has been painted in the various records above. Proposals for further substantial acquisitions were being considered and advanced to various banks for funding. In two presentations one can see some flavour of what was seen by them as the future for the Group namely:

(a) On 26 March 2007, notwithstanding Mr McHugh's e-mail only five days earlier, the projected units for Ireland was shown as rising from 84 with gross sales of £25m in 2007, to 513 with gross sales of £220m in 2011:

(b) In a presentation in relation to Manchester to the Royal Bank of Scotland on 28 March 2007 projected units of 128 on gross sales of £23m were estimated to rise to 510 units on gross sales of £108m by 2011

In addition another site was acquired through a SPV under which the Taggart Brothers signed personal guarantees of £80m on a joint and several liability basis.

[98] The views of Mr McHugh, a close confident of MT, shed an insight on the part of someone so intimately involved with the Taggart Brothers. As has been stated, the assertion by the Taggart Brothers is that both they personally and through their holding in the Group had more than sufficient assets and funds readily available to meet any concerns of the Banks, if they had been told about those concerns. What the documents and records show is that by the end of March

2007 it would have been clear to the Taggart Brothers and to the Board that there were substantial financial strains in the Group: that cash flow was particularly dire and would remain so into 2008: that excesses were being incurred on a relatively regular basis for substantial amounts to meet creditors, including corporation tax and VAT: that the Land Bank Account was being used for purposes for which it was not appropriate; that there were breaches of LTV as regards the Club: and that constant demands were being made for the budget for 2007 (the year in which all of these matters were arising), 5 year plans for the various companies: and details of the breakdown of accounts from the earlier year.

[99] In those circumstances I believe that the Directors, including the Taggart Brothers, would have known, without being told, that any lender would have considerable concerns as to the operation of the Group's accounts, not least in the absence of highly relevant information which was long overdue. In the event the documents show that Mr Barr was looking for information and expressing concerns.

[100] It also begs the question – with so many assets available for disposal in a buoyant market, why not bring the Group's cash flow into line by injecting funds, not necessarily by way of equity capital, but way of loan, subordinated if necessary? The amounts in question were not necessary to discharge the full £50m facility, but to allow the accounts to operate as they were meant to under the Agreement, an agreement revisited and renewed barely six months before the end of March 2007. Given the Taggart Brothers ability during this period to sign personal guarantees committing them to a liability of £80m each, the amount required to satisfy the problems with the Club Banks' accounts would have been very modest. On their case it was entirely in their own hands to overcome any problem. It appears they chose for reasons undisclosed not to do so.

April/May 2007

[101] On 28 March 2007 a presentation was made to the RBS Global Banking & Marketing (RBS) in respect of the refinancing of Manchester, which would have allowed for a substantial reduction in the exposure of the Banks. The refinancing of Manchester became a substantial factor in the events that follow, and therefore needs to be addressed as a separate issue.

[102] The introduction to RBS was made by Mr Barr on 28 February 2007, accompanied by the 2007-2011 Manchester 5 Year Plan, signed off by the Managing Director and others. There then followed an email stream between a representative of RBS on the one part and Mr McHugh and representatives of Manchester relating to valuations in the Plan and the impact on LTV.

[103] On 21 March 2007 Mr Barr in a note to CRN referred to the presentation being made to RBS on 28 March 2007. The court has read the agenda and the presentation document.

[104] On 30 March 2007 RBS sent to Mr McHugh and others Outline Terms and Conditions (OTCs) for the complete ring fencing of the Manchester operation. The aim was to capitalise Manchester from day one, with sufficient equity to carry it forward long-term - 7/10 years. The package was for £110m, of which £70m would be for land banking. The balance was to inter alia refinance existing debt facilities – that is, to repay the finance provided by the Banks.

[105] These were detailed proposals, but were subject to due diligence and, arising from that due diligence, RBS would require to be satisfied on a number of matters including LTV and other financial covenants. There was also included a condition precedent that an equity subscription of £4.8m would be made by THL. Given the proposed structure of the offer, THL (effectively the Taggart Brothers) would have a holding of 80% of the equity.

[106] Therefore at the end of March 2007 there was a substantial outline offer on the table, based on a 5-year plan dated one month earlier with the potential of the recapitalisation/refinancing of Manchester, in line with the expectation of the Banks. There is nothing on the file or in the papers to indicate that at that stage the OTCs were made known to the Banks.

[107] In the month of April 2007 enquiries were being made by RBS in relation to values and projected funding requirements. For reasons which will become clear, the court notes that while the OTCs were issued, RBS had a series of questions and requirements which required to be satisfied through a due diligence process. This was not an unconditional offer, putting on the table something which the Group/Taggart Brothers could accept without more, even if they did not like the terms.

[108] On 2 April 2007 the Taggart Brothers met with RBS to put together a 5-year plan for Manchester, the purpose of which, as recorded by RBS, was to seek "additional financial support in short/medium term without recourse to inter-company loans to bridge funding shortfalls – because of time lags in the income stream from house completions". The note relating to this meeting was copied to Mr Barr. This confirmed that there were funding shortfalls within Manchester and that given the nature of the developments being undertaken there were problems with the absence of income to service interest payments to the Banks. In the minute prepared by the senior director of RBS at the meeting she records:

> 'The business will be cash hungry in the short term until sales/income starts to flow …. in the early part of 2008. Consequently you would like to see if there is any way that are RBS could assist with additional finance to bridge the funding shortfall IQ requirement of additional company low is from TopCo.'

[109] In addition to RBS, the Ulster Bank itself had been approached to afford the Group new facilities in relation to Manchester on a stand-alone basis. On 13 April 2007 Indicative Terms were offered for the sum of £57m (to include a £1m overdraft facility), the balance to be divided between land bank and construction costs. However, it was an indicative offer to which a number of conditions were attached in respect of:

- Receipt of a series of accounts, reports and projections from THL;
- LTV (again set at 70%); and
- A "Capital guarantee" of £5m from the Taggart Brothers.

[110] (a) On 24 April 2007 Mr McHugh responded to the Ulster Bank indicative terms, although these had not yet been shown to or discussed by the Board. In the same email he referred to on-going discussions with RBS. He also raised the possibility of Manchester's refinancing moving ahead of the capitalisation of the entire Group. At this stage there were still outstanding a number of conditions which had to be met to the satisfaction of RBS – neither that offer nor the offer from the Ulster bank were offers which the Taggart Brothers/Group could accept.

(b) At some stage these negotiations moved within RBS to a different subsidiary – BOSI - and hereafter in addressing these negotiations I will refer to BOSI.

[111] By the end of April 2007, the Banks were therefore aware of steps being taken to address what clearly was an important issue not only for the Group, but also for the Banks, since all were aware that there was a significantly increased senior debt requirement for Manchester (up from £15m to £56m) in a 12 month period. In addition, the objective of the recapitalisation of the entire Group was being taken forward.

[112] During April 2007 other issues of concern continued to cause problems:

(i) 5-year plans for the companies in the Group (other than Manchester) and the accounts were still outstanding. On 23 and 24 April 2007 KPMG stated that they were "a fair way off from being in a position to sign off on the Group's accounts" and looked for a timeframe for their completion. At the same time Mr McHugh was telling Mr Barr that while the Republic of Ireland figures had been prepared, they were subject to a "possible significant change at the next board meeting". At that point the possibility of the sale of Kinsealy was mentioned.

(ii) A series of excesses arose most, if not all, without any prior notice being given to the Banks. It is clear that on occasion the Group were not in a position to rectify those excesses within a short period of time. On 25 April 2007 three accounts of THL were overdrawn to the extent of £2.421m against a limit of £540,000 on one. Even then there was a request to draw a further sum of

£120,000 for wages. Rectification was seen to require a period of months and even then it was disclosed that two further amounts had been posted of £50,000 and £113,000, without consultation.

Mr McHugh was told by Mr Barr that this was unacceptable and restrictions would have to be imposed (see below).

(iii) On 1 May 2007 Mr McHugh emailed Manchester's directors seeking an urgent review of Manchester's cash flow expressing his concerns that:

- His biggest concern was over sales and their timing saying that "we seem to be country mile off our budget and that is only 1 – 2 months ago" – the budgets that formed part of the documents on which RBS was considering the re-financing; and

- "Either the cash flow projections are correct which means we are a country mile off our budget or vice a versa". Mr McHugh sought resolution of the problem by the end of the day stating that he needed to report to the Banks within the next few days and must be "committed then to deliver". The meeting to which he was referring is referred to below which was arranged in the context of the excesses on 25 April 2007.

(iv) On 9 May 2007 Manchester was overdrawn with no approved limit. Funds were expected from WIP. THL asked for some part of those funds to be transferred to them, but that was not possible because of the level of the Manchester excess on its accounts.

[113] As before Mr Barr supported the Group through all of these excesses, evidencing a continued support for the Group in circumstances where more than ever he and the Banks could have taken a different course. It is clear he was under constant pressure to have the Group operate within the agreed terms of the Agreement. I am satisfied having listened to him giving evidence and from the email traffic that Mr McHugh would have been directly aware of the Banks' dissatisfaction and concerns – over and above what would have been abundantly clear in any case to any competent Financial Director or any Director of a company.

[114] This is clearly shown in two exchanges at the end of April 2007:

(a) Difficulties were arising in getting "suitable banking debt for Millmount" – an acquisition outside the Club Facility. Inter alia, Mr McHugh stated in an email to KPMG on 23 April 2007:

> "We are pretty strapped cash wise operationally as you are aware until capitalisation, and are over existing limits in our core facility with Ulster BOI. I am concerned that, if we approach Ulster (they will find out from the market

> anyway I suppose) it will make them nervous and they will look to put pressure on us to sort out our operating cash flows. I suspect that RBS might be a player in the overall Group capitalisation.
>
> All in all, our options are very limited and I am increasingly anxious about the impact our extensive and ever growing exposure to the Northern Ireland market will have on the success or otherwise of the Taggart Group capitalisation."

(b) Mr McHugh's concerns were real. I have referred to the large excess on 25 April 2007 of over £2m. Mr Barr in an Excess Referral on that day stated:

> "We fully recognise the decision (to allow the transfer of funds) is unacceptable with no short term regularisation proposal. We have relayed this message to the MD and advised that no more non-wages payments should be issued. He accepts our view of the current situation and has cancelled Divisional Board Meetings in England this week to address the situation with a view to holding a full Group Board meeting on Monday and meeting the Bank as soon as possible thereafter. (the underlining is mine)

While this request was signed off it was done so on the basis that no more non-wage payments would be made until a meeting was held by the Directors on Monday 30 April and a report then made to CRN with a decision made. The court accepts that the message referred to in the note was given to Mr McHugh in the terms set out in the Excess Report.

Other conditions were imposed in relation to the rectification of the excess. The representative of the Banks opined:

> "Overall the picture is clearly disappointing and either the customer (MD in particular) does not have control over the finances of the Group or he chose not to inform the bank. Either way, it is a cause of concern, and you should address this issue when you report."

[115] It is assumed that the meeting of directors did take place on the ensuing Monday, but no Minutes are contained in the documents. This is unfortunate since it would have been extremely valuable to have had details of the matters discussed and any conclusions reached.

[116] However on 4 May 2007 the meeting did take place between Mr Barr and Mr Ennis, representing Ulster Bank, a representative of BOI, and Mr McHugh and the Taggart Brothers representing the Group. Substantial documentation was provided prior to the meeting under 8 headings, set out in the index to the Agenda. These included a summary of the bank facilities for the overall group: term loan summaries; results for year ending 31st of October 2006: the entire Group's land bank's funding facilities: sales update: funding requirements for land acquisition: WIP funding requirements and a management structure. In short this was a comprehensive and overall view of the Group and its operations, necessitated I am satisfied by a realisation that the Banks had concerns and required detailed information about the Group in terms of trading in 2006, its operations in 2007 and its requirements going forward.

[117] Missing from the index however was a page included in the documentation entitled:

'7-1 TAGGART EXECUTION PLAN OVER NEXT 3 MONTHS – OVERALL"

It read as follows:

"1. **Focus on selective disposal of sites in ROI and NI to reduce exposure and generate cash for group.**

2. **No further commitments to site acquisition outside of**:-

- completing the sites left to fill the Taggart Homes Belfast 2 Ltd
- complete Millmount 2 Dundonald acquisition
- complete site acquisitions identified in Manchester plan

3. Complete group capitalisation process

- may have to move on Manchester prior to completion of group

4, S**trengthened board and management teams**

- At non-executive director level
- At Finance Director level and one other possible senior appointment

5. **Strong control of costs and overheads**

- including freezing of directors salaries and bonuses until July '07

6. **Review position at the end of June 07 with funding partners/advisers**."

All bold print was contained in the document which was signed by Michael Taggart, John Taggart, Mark Diamond, another director, and Mr McHugh. It was dated 4 May 2007.

[118] In his direct evidence MT asserted that this was an internal strategy document which had not been prompted by any concern raised by the Banks – this despite the warning given in the lead up to the meeting that non-wage cheques would not be met. Given the context in which it was prepared and signed, I reject that assertion. Instead I am satisfied that it was designed to indicate that the Board acknowledged there were considerable difficulties which required to be tackled, and this was a blueprint emanating from the Board as to how they intended to address them - and in so doing satisfy the Banks that their concerns were being addressed.

[119] Whether prepared for or after the Board meeting, the document is clear evidence that all of the directors were aware of the need to generate cash for the Group, to control costs and overheads, to recapitalise the business, and to curtail acquisitions. Capitalisation was separate from proceeding with the Manchester refinancing, which would see a substantial reduction in the overall facility with the Club, with the attendant reduction in servicing the balance facilities to which Manchester was making little contribution. While not specifically mentioned, it was also the intention to proceed with the sale of FEL, with the introduction of part of the proceeds as capital into the Group.

[120] The inescapable conclusion is that the Group's Board fully recognised the substantial cash demands and strains on the Group, the impact it had been having on the facilities - that effectively the Banks were providing working capital absent any introduction of new capital or adequate cash flows - and recognised that they required to have a plan to tackle all of those concerns. I referred earlier to the skeleton argument of the Taggart Brothers that they were unaware of the Banks' concerns. This is patently not the case. This document signed by each of the directors is a clear recognition that things were not right with the Group, and that steps required to be taken that were potentially in direct conflict with the aspirations of the rapid and substantial expansion of the Group. To argue otherwise leads me to conclude that it was an attempt by them to mislead the court

[121] In regard to the cash flow and LTV, the picture painted from the documentation throughout succeeding month, that is May 2007 and into the early

part of June 2007, was of a deteriorating situation with many excesses, the vast majority for which would appear to have been incurred without the Banks being advised that cheques were being written which, when presented and if met, would create excesses. On 16 May 2007 the Banks were advised that the Group was holding cheques for more than £650,000 (£557,000 of which related to Manchester). On the same day Mr Barr advised CRN that there was a £600,000 excess. He sought a transfer £1.5m from the Land Bank Account to meet this and to meet cash pressure on the current account until the cash flow could get stronger. It was acknowledged that the result of this would be that LTV would go to 73.9, reducing to 72.4 with the sale of a site in Mullingar.

[122] A note from CRN dated 21 May 2007 recorded that there 8 accounts in excess, but also stated that the Banks were left in no position other than to agree to the proposal, although the message needed to be sent to the Group in writing that the Banks were very dissatisfied with the position and wished to have accurate cash flows to show how the position could be remedied. There is no evidence on the papers or in the evidence given by Mr Barr that this message was given in writing to the Group.

[123] On 22 May 2007 with the consent of Mr McHugh the £1.5m was transferred from the Land Bank Account to the current account

[124] However, on the same day a site at Kildalkey, valued for LTV purposes at €6.5m was sold at auction for €3.5m. Even though this represented a profit for the site, the result was that LTV rose to 76.7%. This price was achieved despite the assertion that the Irish market was still buoyant. When Mr Barr expressed concern about such a substantial drop, Mr McHugh indicated that the Group were prepared to take whatever step was necessary to reduce their exposure, even accepting a reduced price. Such a drastic approach, incurring as it did such a large reduction in asset value for LTV calculations, could be seen as evidence of the Board's concerns about their ability to meet the necessary cash needs, and in that context raises the question, that if there were assets readily available as claimed and the market was buoyant, why incur any loss on the specific asset, or embark on a strategy of selling assets even at a loss?

[125] By 29 May 2007, despite the injection of £1.5m there was an excess of £1.576m on the current account due to cheques presented from the Republic of Ireland. The reason for this was that, apart from the impact on LTV, the substantially lower price for Kildalkey had not been factored into the original calculations of cash flow. A file note records that Mr Barr discussed this with Mr McHugh who recognised that the Group were in a difficult position. I accept that this discussion took place and that it reflected the position which CRN had asked to be conveyed, albeit in writing, in its note dated 23 May 2007.

[126] In its response to the report from RMT, CRN noted that serious thought now had to be given to returning cheques in order to control the account. They believed

that the customer had to work with the Banks and that there was an urgent need for meaningful cash flows and details of when cash requirements would peak. If the excesses were to rise further CRN would take the view that the matter should go to the Credit Committee (CQ), and that the Group should be warned to control the accounts to prevent CQ having to impose conditions. This would represent an escalation in the Banks' procedures for dealing with accounts giving concern, something which the Banks themselves clearly saw as a serious matter, and about which a warning needed to be given to the customer. However I find no record that this warning, which was an internal consideration which would not be known to the Group, was specifically given to Mr McHugh or the Group.

[127] Seemingly as a result of a conversation with Mr McHugh on the 29 May 2007, on 31 May 2007 Mr McHugh emailed Mr Barr (and copied this to Mr Ennis) giving details of some cash which would be coming in over the next week up to the end of June. He also indicated that he was going through every region of the Group's business with their respective financial controllers to present an updated plan of operations to the year end - and that this would be available the following week.

[128] However, on the same day the excess report showed that it was now standing at £1.659m and Mr Barr again spoke to Mr McHugh to again express his concern, something Mr McHugh acknowledged, saying that he understood the position. He also stated that directors' bonuses for 2006 had been deferred and only urgent essential payments had been made until approval of the £1.5 million sought the week before. Again on the basis of the assertions made on their behalf in the skeleton argument Mr McHugh would have advised the Taggart Brothers about these concerns. However notwithstanding that assertion, it seems that it was not considered that they should seek a meeting with the Banks.

[129] The following day one of the amounts referred to by Mr McHugh in his email of 31 May was paid to the Banks but some £600,000 had to go to the Land Bank Account, with only £200,000 going to help to reduce the excess. The excess then grew to £1.793m. Internally the RMT/CRN now considered that the covenant breaches had to be escalated to CQ given the lack of visibility of information as to how the excesses and LTV would be dealt with, and that the message required to be given to the customer that the Banks were close to having to control the account through the return of cheques. There is no evidence that such a warning was given to the Group.

[130] Nevertheless it was indisputable that by 31 May 2007 excesses were constant and indeed growing. The evidence is overwhelming that cheques were being issued in full knowledge that they would give rise to excesses beyond the limits imposed by the Agreement, but even more importantly would give rise to excesses to levels which the Banks had made clear were unacceptable, but which hitherto had been accommodated. It is of even greater concern that promises to keep the Banks informed of the decision to issue cheques were ignored. Any Financial Director should be fully aware of their bank position on any account, both as to what was

being credited or likely to be credited to those accounts, but also the impact of issuing the cheques against those accounts. That would be particularly so it you knew you were in financial difficulties with those accounts.

[131] I am satisfied beyond a reasonable doubt that at the end of May 2007 the Board of the Group, including the Taggart Brothers, knew full well that the concerns of the Banks extended well beyond LTV, to include, inter alia, cash flow difficulties and excesses. I am also satisfied beyond a reasonable doubt that on 31 May 2007 Mr Barr again expressed concerns about those excesses to Mr McHugh. And yet on 1 June 2007 Mr Barr discovered that the daily position on the accounts again showed an increased excess. Even worse, on 5 June 2007 it was discovered two cheques to a value of £350,000 had been presented which, if met, would have taken the account well over the level which the Banks had reluctantly agreed only two weeks earlier - that is the agreement to allow a drawdown of £1.5m from the Land Bank Account.

[132] As regards the refinancing of Manchester, Mr McHugh had responded to the 30 March OTCs on the 24 April 2007 setting out his views on the terms, stating that he had not discussed them with the Board at that stage. A number of issues were addressed by him since he could see some of them giving rise to difficulties, particularly (a) the proposed equity stake for RBS at the price suggested; and (b) that the condition precedent requiring THL to subscribe £4.8million in equity before any funds would be advanced would be difficult "before capitalisation is complete". On 8 May 2007 BOSI wrote asking about the position and on the 24 May 2007 they wrote again rehearsing what they saw as the then present position. They indicated they had tried to look at a short term cash solution which had difficulties, and then suggested two avenues for exploration which would have involved Yuill. However before proceeding down this route they stated that they wanted a definitive view from the Group as to whether BOSI were going to be long term funders to the Manchester operation, and in addition would be considered for other UK projects. It was stated that without clarity and direction it would be difficult, if not impossible to make an offer. They confirmed they had a strong appetite for equity participation in the Taggart Group, but sought an update on a timetable for the capitalisation project. There is nothing in the documents that showed any response from the Group before the end of May 2007. What is clear is that there was no unconditional offer for refinancing Manchester simply awaiting agreement by the Group

[133] As regards FEL, on the 14 May 2007 there was an internal meeting between Taggarts and BOI as the Bank involved with FEL, during which the possibility of a sale of shares in FEL was discussed in the context, according to the agent, of there being a huge demand for the land in question. A further meeting was held with the planners retained by the Group on 22 May 2007 to consider a way forward.

[134] Therefore by late May 2007:

- The refinancing of Manchester was on hold pending a response from the Group. However as Mr McHugh had acknowledged, the refinancing OTCs were giving difficulties not least in respect of the requirement to introduce £4.3 million equity, which hinged on the recapitalisation of the Group;

- BOSI were still raising questions as part of their due diligence;

- I could find no mention in any of the documents or evidence as to the position of capitalisation, save a general comment in an email from Mr McHugh asking RBS if the introduction of equity from another source which would reduce the Taggart share below 50% would cause any difficulties to BOSI; and

- The Group was considering the disposal of FEL in order to release a substantial sum after tax to the Group after such a sale.

[135] On the general financial front it is worthwhile standing back to reflect the position as it has unfolded up to and including the beginning of June 2007, since it forms the backdrop to events throughout June, July and August 2007. The picture disclosed to the court is one which could be considered somewhat chaotic, if not out of control, with no evidence of any attempt, let alone any action, to correct the problems in the short term. I am satisfied that the Board, including the Taggart Brothers, were fully aware of the position, yet in the absence of any evidence to the contrary, were taking no meaningful steps to deal with the short term or medium term problems of cash flow, nor any meaningful steps to bring their banking agreements and covenants under control. It was not the case of having to raise funds to discharge all the Club Banks' borrowings but rather keeping the current account within its limits without recourse to other facilities earmarked for other specific purposes, and to correct the transfers from that account. Again I ask at this stage, if the Taggart Brothers and the Group were each in a strong financial position, was the absence of dealing with the position with the Banks because they could not or would not take the necessary steps?

June/July 2007

[136] On 5 June 2007 the Banks returned two cheques totalling approximately £350,000. This was the culmination of the comments of RMT/CRN on 31 May 2007 referred to in paragraph [126] above. These cheques appear to have been issued in respect of WIP on a site in England where certificates had not been produced to the Banks. No warning was given by the Banks to Mr McHugh or anyone else in the Group. Given the longstanding relationship between them, and notwithstanding the history of excesses and failures on the part of the Group in relation to their management of the overdraft, I would have expected some prior warning to be given. Returned cheques have the potential to send out danger signals to creditors, both those directly involved but also through the grapevine which would undoubtedly exist within a trade or business such as the construction industry.

[137] Of course anyone writing cheques should know their bank position and, in the context of the prevailing state of the excesses and the current account of this Group, it seems inevitable that Mr McHugh should, even would have known that the funds were not there to meet these cheques.

[138] However after careful consideration I have concluded that the return of these two cheques has played no part in the subsequent problems of the Group leading to its administration. I do so for a number of reasons:

(a) No evidence was given to me by anyone as to any adverse reaction by suppliers at that time as a result of the two cheques being stopped:

(b) In a meeting with the Banks and on 8 June (to which I will come) the issue of the return of the cheques was not raised by MT – on his evidence:

(c) The amounts were paid within a day or so; and

(d) The KPMG report, to which I will come and which is dated 6 August 2007 states in respect of Northern Ireland customers, Republic of Ireland customers and Manchester customers that at that point there over £2m of cheques being held back for what was described in that report as owing for amounts "long overdue to suppliers". Indeed at that point in the Republic of Ireland and Manchester contractors were said to have been close to walking off sites. This chimes with earlier warnings from the company representatives in Dublin, and undermines assertions made by MT in the American depositions when he attributed concerns of suppliers and contractors to events in August 2007.

[139] In parenthesis one point requires to be addressed in relation to a note of the 19 June 2007 from Mr Barr where there is a reference to a decision on "29 May 2007" to return cheques totalling £300,000. Some issue was made that this evidenced that there had been an intention on the part of the Banks as early as 29 May 2007 to return these two particular cheques. This would have been difficult given that the cheques were not presented for payment until 4 or 5 June. This is clearly a typographical error and has no significance.

[140] On 5 June 2007 there was a meeting attended by MT and Mr McHugh on behalf of the Group and Mr Barr and Mr Elvin on behalf of the Banks. In his evidence MT states that there was a detailed discussion of cash movements, including payments to be made and received over the following three months. All of these discussions however were referred to by MT solely in the context of LTV – a theme which we will see re-occurring throughout the next months. When asked by Mr Simpson if excesses were discussed, his reply was that he "had no recollections".

At this stage the excess the following day, as we shall see, exceeded £2m. The context of this meeting was the stopping of the two cheques. I believe it is inconceivable that no enquiry would have been raised as to the reason for these cheques being stopped, and that it was because of that level of excess. I believe that this would have led to a discussion of what was now a series of excesses arising over many months.

[141] In this evidence MT give the most detailed description of this meeting in terms, inter alia, of how he got there, where he parked, what room it was held in and other minutiae surrounding such mundane issues – clearly to emphasise his memory of that meeting. And yet what was a fundamental issue for the Group, namely consistently and substantially exceeding their overdraft facility, to a point where two cheques were stopped, he stated that he had "no recollection". I treat that assertion with considerable scepticism.

[142] His evidence was that if he had known about this excess they would have been cleared easily by the sale of available assets, something we know did not happen. Instead his evidence was that after the meeting he perceived there was nothing serious to be concerned about, and the only issue was to provide cash provision over the next three months. He was reassured, he said, in the view expressed by Mr Elvin both in an earlier phone call and at the meeting saying in response to a direct question that to the best of MT's recollection, there was "no underlying reason" for stopping the cheques. For the above reasons relating to the excesses and their levels at that particular meeting, and the need for the meeting, it would be unusual to say the very least if Mr Elvin were to have expressed such an opinion.

[143] I have therefore concluded that the evidence of MT as to what was discussed at that meeting is partial.

[144] On 6 June 2007 there were excesses on 4 counts exceeding £2.150m, and that was before meeting the two cheques of approximately £350,000, referred to in paragraph [136] above.

[145] On 7 June Mr Barr 2007, in an Excess Report, sought a drawdown of £450,000 on the WIP loans account. That figure represented 100% on certificate for construction costs, although the provisions in the Agreement provided only for the right to draw down 70% on such certificates. Despite this, and despite the overall position, this was approved to allow the two cheques to be re-presented – and met. On 8 June 2007 the proposed meeting between the Banks and the Group took place. Figures were produced showing growing cash flow requirements (a deficit of outflows over inflows rising from £1.8m in May to over £15m in December 2007), due to start-up costs on sites such as Manchester which could not contribute to the inflows – a fact known to everyone from late 2006.

[146] In his evidence MT stated on a number of occasions that he had no recall of excesses being mentioned. Mr Elvin in his affidavits prior to the hearing and in his evidence to the court says that the issue of excesses was discussed. For the reasons I have already given in relation to 5 June meeting I am satisfied that the position of the overdraft and the excesses on that account would have been discussed, a view reinforced by the context for this meeting – the cash demands of the Group going forward. Again, notwithstanding detailed evidence as to the meetings arrangements, a series of issues referred to in the evidence of Mr Barr and Mr Elvin as having been discussed (for example the role of equity and the question of Manchester being taken out of the Club Facilities), questions about these issues met with a response of either "no recall" or "nothing of that nature was discussed". Again MT sought to set the whole discussion at that meeting in the context solely of LTV.

[147] This was a planned meeting to address a review of the Group with the Banks, and at its close a further meeting was fixed for 19 June 2007 in order that further information could be obtained. There is no note available from any participant other than Mr Barr, in the form of written notes seemingly made by him at the meeting. No Minutes from the Group were available to the court either in relation to what was discussed at the meeting or any follow up discussions by the Board arising from the review or in preparation for the meeting of 19 June. That there would have been discussions is obvious and whereas we will come to discuss the notes and reports made as part of the Banks' internal communications, the absence of anything from the Group is difficult to understand.

[148] Mr Barr's notes of that meeting record that he was referred to BOSI's OTCs in respect of the refinancing of Manchester which we know were received on 31 March 2007, although referred to by the representatives of the Group as having been received "several weeks earlier"; and he was advised that the refinancing of Manchester (which may by that stage have included Yuill) might take 4-6 weeks. The Banks were also advised that FEL was also earmarked for sale, with a good reaction having been received.

[149] Whatever else can be discovered from the evidence in relation to the discussion at that meeting and its outcome, having listened to the evidence of those who gave evidence and who were there, and taking into account the context of that meeting and the events prior to it, not least over the preceding few days, what is crystal clear to the court is:

(a) Cash flow was a major, if not the major concern, and how it was to be addressed;

(b) LTV was an issue, but not the only issue; and

(c) The twin approach of Manchester's refinancing (with the possible involvement of Yuill) and the sale of FEL in the context of capitalisation were an integral part of the way forward.

[150] On 13 June 2007 figures were produced by Mr McHugh addressing the LTV issue in the context of differences in valuation between those given by the Banks and those given by the Group, but which on either valuation showed a breach of the LTV covenant at that date.

Calculation of LTV

[151] It may be of some benefit at this stage to interpose in the next two paragraphs a comment regarding the basis upon which LTV was to be calculated, and in particular the inclusion or non-inclusion of the value of two "non-zoned/unzoned sites". On occasion Mr Barr in his Excess Reports and other documents refers to the presence of non-zoned sites as a potential comfort to the Banks in that they were not included in the Bank's calculation of LTV. However, that basis of calculation was agreed by the Group with the Banks at the time of the Agreement and in the 2006 Facility Letter. The court notes that BOI had taken a different approach, but that is of no consequence. While it may have afforded some comfort to the Banks, the fact remains that their offer to the Group, and accepted by the Group, was that in calculating LTV within the limit of 70% these two non-zoned sites were not to be taken into account.

[152] To the extent that this issue has been raised by the Taggart Brothers as something which should be taken into account by the Court, the court refuses to do so. They accepted the terms and the Banks were entitled to proceed on that basis – which is what they at all times did. There were no grounds for the Group to have any expectation that they would be taken into account. The Banks therefore were not at fault in taking that attitude or course.

Returning to June 2007

[153] On 13 June 2007 the Banks again stood back to review the situation generally arising from the events over the previous months and the information now to hand following the meeting of the 8 June 2007. Mr Barr in a detailed report set out the background to the Group, the fact that the Manchester sites were not yet income generating which was placing strain on the current accounts in having to fund 30% of the construction costs (70% being met on WIP certificates), and the significant Head Office costs, including salaries.

[154] He recorded that the Group's Board recognised the requirement for outside equity to be brought into the Group to support its growth plan (evidenced by the previous conversations and discussions over capitalisation generally and refinancing of Manchester), and in this context that earlier in the year (March/April) exploratory discussions were undertaken in relation to the financing of Manchester.

He also recorded that BOSI had made an offer to fully refinance Manchester, although there were certain elements of this unattractive to the Taggart Brothers. Nevertheless, negotiations were ongoing. He recorded that the plans for capitalisation of the overall Group had moved forward more slowly than anticipated and raised concerns, already recognised by the Group's Board, that Mr McHugh as well as Financial Director had also been asked to take over the role of Managing Director. He reported that the Board had agreed or decided to sell FEL, but that in the absence of a contracted sale for FEL the Board had been asked to expedite the refinancing of Manchester which would repay all Club Banks' debt associated with that division. In his direct evidence MT denied this connection either to capitalisation generally or the sale of FEL in particular. However the Execution Plan of 4 May 2007 signed by MT specifically refers to a possible move being needed on Manchester prior to the Group's capitalisation.

[155] Mr Barr also recorded the deterioration in the LTV position due to the excesses and the writing down of one of the sites, but that the Group had undertaken to sell a site in England and there was the possibility, hopefully the probability, of certain other inflows of cash. Revaluation of certain sites were also being undertaken to see what impact they may have on the LTV calculation, hopefully positive. He recorded the position regarding excesses and that weekly cash flows for the next 12 weeks had been sought in order to assess the peak possible excesses in that period. Proposals from Mr Barr and Mr Ennis were that:

- Taggart should appoint a Group FD as soon as possible noting this had been advertised.
- Updated valuations and assets be obtained by the end of June.
- That the heads of agreement received from BOS regarding Manchester be provided, with the objective that the refinancing be in place by the end of July 2007, if FEL was not contracted for sale.
- Noted the commitment that on the sale of FEL the Taggart Brothers would be lodging sufficient funds from their share of the proceeds to ensure no excesses/LTV breaches on Club Banks' facilities going forward, and that the Banks could then review the requirement for Manchester being refinanced.
- No further site acquisitions to be funded within Club Bank's facilities until LTV and excesses were regularised.

[156] He then went on to state that he and Mr Ennis had considered taking an additional personal guarantee support from the Taggart Brothers, but then continued:

> "However, we already hold a PG (personal guarantee) for €4.3m which we believe is sufficient at this time to provide personal recourse and commitment to our facilities. We will review this position upon receipt of the updated valuations."

[157] He then concluded by referring to the paramount importance of meaningful weekly cash flows being produced, underlining the fact that was still information outstanding.

[158] I will be dealing with the First and Second Kinsealy Guarantees in a separate appendix (Appendix A), but at this stage note that in commenting on what would have been the First Kinsealy Guarantee for €4.3m there seems to have been an assumption in what Mr Barr said that this was a guarantee in respect of all of the borrowings of the Group rather than simply Facility 11 – the equity aspect of the Kinsealy purchase. Whatever else arises in relation to the Second Kinsealy Guarantee as I set out in Appendix A, I have no doubt that the starting point in relation to the First Kinsealy Guarantee is that it related solely to Facility 11 and none of the other facilities. Suffice to say that if the requirement for a personal guarantee from the Taggart Brothers was required in the context of excesses on accounts other than Facility 11, then the personal guarantee at that time of €4.3m would not have met that objective.

[159] On 14 June 2007, the 12 week summary cash flow to the end of August 2007 was obtained for discussion.

[160] On 15 June 2007 the Banks received a briefing note from Eric Cairns Partnership confirming the wide distribution of marketing particulars of FEL, looking for initial expressions of interest within 10-14 days given the level of interest and enquiries seeking details already received.

[161] In their response to Mr Barr's report on 18 June 2007 CRN expressed serious concerns as to the lack of financial planning and control on the part of the Group while pushing forward with "a highly ambitious strategy of growth without ensuring an adequate capital base or cash flow to underpin that strategy". They accepted the matters set out in paragraph 155 above but added:

> "6. We note that the cash flows have now been obtained and RMT will provide further update tomorrow. We will defer decision on reporting accountants at LQE status until then, but again if we deem this to be necessary then we do not expect extensive negotiations with the customer to be required. I note that no penalty for covenant breach has been mooted and will expect this to be resolved. We also note the appointment of investigative accountants is a SLS trigger and that will be discussed further."

[162] On 19 June 2007 a meeting was held at which the Banks were represented by Mr Ennis, Elvin and Barr and the Group were represented by MT and Mr McHugh, and possibly the Chairman of the Group, Mr F McGuigan. The purpose of the meeting was to address further the Group's financial position with the benefit of the

additional information provided. I have carefully considered the evidence from all the parties present who have given evidence, and extract four matters of relevance to the issues under consideration by the court.

(a) The request for a £5m guarantee by the Taggart Brothers was raised for the first time. Whatever the reaction of MT at that point (and it is disputed as between a rejection and a seeming reluctance) the requirement itself must have raised alarm bells for the Taggart Brothers. Apart from the First Kinsealy Guarantee, which addressed a very specific issue of an equity loan over and above the 70% land bank loan for the acquisition, this was the first time such a condition was being imposed:

(b) Mr Ennis in his evidence said it was made clear that the Banks had "significant concerns". MT said he had "no recollection" of any such expression of concern. This meeting was a follow on from one eleven days earlier, where a raft of issues were discussed, not least the cash demands identified by the Group itself for its business over the next six months. If any such concern expressed as "significant" had been raised it flew in the face of MT's view of where matters stood following the meeting on 5 June 2007. Certainly in his evidence about other issues allegedly raised at this meeting, he had no problem in denying that they had been raised. I find his response difficult to understand, let alone accept.

(c) The role of KPMG as "reporting accountants" was raised – and agreed albeit reluctantly. In his evidence MT stated that the role was "to assist with cash flow up to Christmas - to provide visibility of where the Group was up to that date". We now know their remit went much further than that, and I will refer to it shortly in the chronology of events:

(d) That at the end of the meeting MT says he spoke to Mr Ennis about what might be the consequences of not signing the guarantee. Mr Ennis is alleged to have responded:

> "Well, obviously the worst that can happen is the Bank could pull the plug – or words to that effect."

He then continued in his evidence to me:

> "But not in a threatening way, My Lord."

I will return to this allegation later in terms of the assertions by MT in his affidavits filed for the purposes of the Order 14 proceedings, but comment at this stage:

(i) Mr Ennis denies he made any such comment, let alone threat:

(ii) If true, without the rider as to the absence of threat, it would have been a colossal signal that for the sake of a £5m guarantee, small in relation to the Millmount Guarantee and in relation to the assets it is maintained were available to take the Club Banks out of the picture altogether, the Group's affairs were under imminent threat.

(iii) In his evidence in the affidavits there is no mention of the absence of threat in the attribution of this statement to Mr Elvin. Instead in the affidavits not only was the attributes statement cloaked in threat, but as a threat which was very stark and very real.

The court could be forgiven in thinking that the role of such a stark threat, if indeed it was made as alleged, needed to be subsequently neutralised since it would have been as red a light and warning as it would be possible to imagine. Hence, I have concluded, the introduction of this rider in his evidence to this court reflects adversely on the credibility of MT in relation to his account of what was discussed at these crucial meetings, and potentially his general credibility.

[163] On 21 June 2007 Mr Barr, supported by Mr Ennis and Mr Elvin, again gave a full background picture to CRN following the meeting of the 19 June 2007. In it they confirmed that they had received the cash-flow forecast for the Group to the end of August 2007, which allowed for an assessment to be made within the existing facilities. The projections showed that excesses on the account were forecast to remain at or below £1.7m until the end of July 2007 after which it would increase to £2.7m due to large construction payments in Manchester and BOI interest due. They reported that it was evident that an overall regularisation proposal required equity input by the end of July 2007. The report then detailed the Group's proposal to which I refer in detail in Appendix B. At this point the Group obviously saw that it had a funding requirement of the order of £1.7m. Messers Barr, Ennis and Elvin put forward their own proposal to CRN that these funds be advanced from the Land Purchase Account.

[164] Included was the proposal that KPMG be retained by the Group in a different capacity than auditors. It was proposed that they provide a secondee into the Group's finance department. This had been discussed with KPMG who fully understood that the Banks required a review of cash flows and financial controls, in

addition to the timely reporting of financial information. It was also agreed that the Banks would have an open and direct line of communication to KPMG, who should identify any further areas of concern to the Banks directly. We will see that shortly thereafter the terms and conditions of this appointment were settled. This appointment was at the insistence of the Banks, and the court has no doubt that this was the result of the concern in the untimely reporting of financial information and a concern as to whether or not there was the financial control and transparency that the Banks not only required but were entitled to under the Agreement. The evidence shows that Mr McHugh was annoyed at this proposal. If there were no other signals, and there clearly were, nothing else would have made it obvious to the Directors that the Banks had a substantial and considerable concern as to the relationship between them and the Group.

[165] On 27 June 2007, CRN replied that they were minded to approve the £1.7m drawdown subject to conditions which are set out in full at paragraph 172 below, but which included commitments regarding Manchester, FEL and a £5m guarantee.

[166] In addition to their reply confirming their conditional agreement the release of the funds, CRN made two further points:

- That the facilities being granted were being extended to no later than 31 July 2007 when there would be an annual review. As it was, this date had been agreed at the beginning of the year.

- They noted in relation to excesses that 'the cash drain ramps up in August' and so the sale of FEL and refinancing of Manchester were urgent matters.

[167] The court notes that there is no evidence to suggest at any stage throughout this process so far that there was any indication that the Taggart Brothers were proposing to address the question of excesses by the introduction of any funds from their own resources, whether by way of equity or by way of loan.

[168] It is important to consider the basis of any agreement and the process by which the Banks were prepared to provide this further sum of £1,700,000 from the Land Bank Account. The Group was already in breach of its banking covenants with no prospect of early funds from any other source being identified in any of the documents seen by the court as at June or July 2007. Over and above the obvious concern of such a funding requirement, and the fact that the Banks were nevertheless prepared to discuss and agree to assist in relation to that funding requirement, there are two substantive points that requires to be made.

[169] First, in the past, when agreement was given for funds to be used from the Land Bank Account, those funds were then immediately released into the current account. On this occasion however the position was different. Agreement from the Banks to provide this further sum was highly conditional - that is additional conditions over and above those in the Facility Letter. These terms were contained

in a draft letter among the documents before the court dated 29 June 2007 addressed to the directors of the Group. I am not clear if this letter was sent on that date to the directors of the Group, but there is no doubt that it was sent by email on that date to Mr McHugh and the Chairman. On the evidence of MT I have no doubt this would have been brought to the attention of the Taggart Brothers on or soon after that date, more than a month before the 2007 Guarantee was signed.

[170] In his direct examination MT asserted that he could not say that at the end of June 2007 or beginning of July 2007 he saw that letter. I find it inconceivable that a letter of such importance, involving the Taggart Brothers in assuming personal obligations, would not have been brought to their attention. Indeed I would have expected it to have triggered discussion, and I am surprised that MT has difficulty in recalling both the letter and those discussions.

[171] In the event a letter in virtually the same terms (see paragraph 193 below) was sent to and received by the directors, including the Taggart Brothers, and accepted by them before the 2007 Guarantee was signed on the 8 August 2007.

[172] In addition to a series of general conditions, to which I now come, the funds could not be released into the current account until certain others, made conditions precedent, were satisfied.

The 'general conditions' were**:**

(a) Updated professional valuations in respect of two sites

(b) The appointment of a Group Finance Director.

(c) The Group would continue to progress the disposal of Fraser Estates Limited and update the Banks of progress in a timely manner.

(d) The Manchester Division was to be refinanced by 31 July 2007 with the Group updating the Banks on progress in a timely manner.

(e) Ensure that in future the Ulster Bank/Bank of Ireland club facility operates within all covenants including the 70% LTV covenant and that the Ulster Bank overdraft facility operates within its approved limit.

(f) To provide the 30% equity element required for the acquisition of the Royton site from outside Club facilities.

(g) All outstanding interest on Club bank facilities to be brought up-to-date.

And as regards the 'conditions precedent' it provided that:

(h) In advance of drawdown of the £1,700,000.00 the following pre-conditions had to be fulfilled:

- "Provision of joint and several personal guarantee for £5m from Michael Taggart and John Taggart
- The Group's solicitor to provide written confirmation that the Flimby site is subject to an unconditional contract for sale to Barretts for a minimum of £1,900,000 and to confirm completion date.
- LTV not to be in excess of 70%.
- No further site acquisitions are to be funded from within Club facilities until all terms and conditions outlined in this letter have been fulfilled."

Those were the extensive terms and conditions attached to the release of these funds.

[173] Secondly, inherent in all discussions were the refinancing of Manchester and the sale of FEL, which were work in progress. In the case of Manchester a completion date had been advised to the Banks as 31 July 2007. The intention was to take Manchester out of the Club Bank's facility – halving its exposure to the Group. In the case of FEL the intention was to introduce a sizeable sum as capital from the Taggart Brothers interest in the sale of FEL – that is to recapitalise the Group and through that give confidence to the Banks as regards the Group going forward. That sum as we shall see was shown in cash flow projections as £5m.

[174] The Taggart Brothers could have been in no doubt that the Club Banks were seeking to reduce their exposure, not just by refinancing Manchester through another bank, but were also putting a stop on the use of the Land Bank Account for any other acquisitions until all the conditions were fulfilled. In short the Land Bank facilities were being capped for a period during which the debt was to be reduced and the Group received fresh capital.

[175] Any suggestion that this agreement to release £1.7m from the Land Bank Account into current account was predicated only on LTV being brought into line with the Facility Letter is, based on the terms of the facility evidenced by the documents, unsustainable – it was merely one component in the overall conditions and one of the conditions precedent, with others.

[176] Indeed, if the only precondition for the provision of the guarantee was that LTV was at 70% or lower before drawdown, and if it is argued that the provision of the guarantee in order to allow drawdown was linked to LTV being at 70% - why do you require the guarantees? The answer is of course that it was an integral part of the overall package, part of a package that required them to be in place before

drawdown, with other conditions being required to be met on a different timescale. For the reasons set out in Appendix B, they were being asked for a guarantee so that that in the event of failure to commitments to the refinancing of Manchester and/or a failure to meet commitment to introduce sufficient funds from their interest in the sale of FEL, the Banks had the comfort of those additional funds being available.

[177] A further aspect of the 2007 Guarantee is dealt with in Appendix B and relates to wording in a RMT note which referred to this Guarantee being an 'interim' arrangement. It is argued that this related only to the position of LTV which it is said was rectified by September 2007 – at which date it is said the 2007 Guarantee lapsed. For the reasons set out in the Appendix I determine that this line of argument is misconceived.

[178] Another aspect raised by the Plaintiffs is the evidence of Mr O'Loan, solicitor, who dealt with the drafting and finalisation of the 2007 Guarantee on behalf of the Taggart Brothers. The exchanges between the respective solicitors charged with preparing the 2007 Guarantee makes no mention of LTV. There is no evidence that Mr O'Loan saw the terms of the £1.7 million facility. Any knowledge that he might have had presumably came from his clients. Yet the exchanges show that the only issue raised in terms of the duration of the guarantee was a request that it be time limited. When this was refused he asked for a review date to be agreed. This also was refused. The Guarantee was then signed. It would have been the simplest thing in the world for the position to have been made clear that the guarantee had been agreed to be operative until the LTV position was brought below 70% at some specified date or the happening of some specified event. That was never mentioned.

[179] Over and above the documentation available to me and as outlined above I have carefully examined the evidence of the witnesses in respect of the context and background to the taking of 2007 Guarantee. This included not just the evidence given to the court, but also in the affidavits sworn in advance of the hearings, in the case of MT in his evidence before the American court.

[180] In his first affidavit sworn on 15 March 2010, eighteen months after it was asserted by the Banks that letters of demand were sent on foot of both guarantees, more than ten months after pre-action letters are asserted to have been sent to both brothers: and nine months after the Writs were issued and served, MT states at paragraphs 5 and 6:

> 5. "I was getting married on 1 September 2007, a fact which was well known to the managers of the plaintiffs. My brother and I were due to leave the country on 8 August 2007. During the course of the evening of 7 August 2007 I received an urgent message from one of the employees of Taggart Holdings to tell me that my brother and I were required to be in Belfast on the following morning to

> sign documents which were urgently required. We arranged to delay our departure to France, and went as directed to that meeting in our Belfast offices. The events surrounding my wedding created intense pressure which impaired my capacity to have time to reflect on the significance of the Guarantee.
>
> 6. Upon arrival, we were presented with the personal guarantees upon which the Plaintiffs seek to rely, and were told by the Plaintiffs that we must sign the guarantees. We were told that if we did not sign the Personal Guarantees there and then, the Plaintiffs would stop all cheques drawn on the Group's bank accounts, and they would most likely 'pull the plug on the Group'. We were told that we did not have time to seek legal advice, and that we did not require to obtain such advice because the Personal Guarantees were only a temporary measure whilst an issue in relation to LTV (loan to value) was resolved between the Group and the Banks. Against the background of the pressure placed on my brother and I that the Banks would cease to support the Group against an agreed overdraft (whose limits had not been exceeded) would stop all cheques, and the personal pressure of preparation for my wedding, my brother and I reluctantly agreed to sign the Guarantees, and on the understanding that these were only temporary."

[181] I am satisfied that in the intervening period during which the assertions of claim were being made by the Banks and the Writs had been issued, MT had ample time to consider the background to the taking of the 2007 Guarantee. While the affidavit refers to his claim that it was of a "temporary" nature, the distinct impression left, and I believe was meant to be left, was that the brothers were being suddenly presented with a personal guarantee on the evening of 7 August 2007. That of course could not be further from the truth.

- None of the discussions, e-mails or indeed the letter of 26 June 2007 e-mailed to Mr McHugh and Mr McGuigan are referred to in the affidavit.
- There is no reference in the first affidavit to the fact that Tughan and Company were acting on their behalf in terms of drafting the 2007 Guarantee.
- There is no reference made to the fact that John Taggart had already signed the guarantee in July.
- It stated that the Banks had ceased to support the Group against an agreed overdraft (whose limits had not been exceeded), and yet from the beginning of 2007, and in the context of the introduction of the requirement of a

guarantee, from 5 June 2007 when the cheques were stopped and meetings then took place, it was quite clear that the overdraft limit was being exceeded on many occasions, and was heavily overdrawn throughout June and July.

- There was averment that he and his brother had not received the two pre-action letters, a necessary proof in subsequent actions. Indeed this assertion was never made until MT was giving evidence. That evidence I am satisfied was not accurate.

[182] It is difficult to imagine a more misleading representation given under oath to the court. The assertions stand MT in a poor light and inevitably the court must consider such misleading statements when considering his general credibility.

[183] In a second affidavit sworn on 5 October 2010, some seven months later, the picture is corrected to a considerable extent, in that the background commencing on 5 June 2007 is set out in some detail. It referred to frequent meetings and the fact that the requirement for a personal guarantee was raised at some stage throughout those meetings. Throughout the affidavit the thrust was to connect requirement to LTV alone and to the temporary nature of the guarantee. In addition at paragraph 28 it reasserted the allegation that during one of the meetings (at that stage MT could not remember exactly which one) he had asked what would happen if the Taggart Brothers did not sign the guarantee and Mr Ennis told him that the Bank would "pull the plug". As with the earlier assertion in the first affidavit there is no mention in this affidavit of a qualification to such a comment that it was not said in a "threatening manner".

[184] In addition to my conclusions referred to above in relation to the e-mail and documentary trail through June and July 2007, I discount the evidence of MT in relation to the execution of the £5m guarantee. As has already been stated on a number of occasions at different stages of the development of this affair, the court asks itself why in the face of such demands and when assets were so readily available, did they sign guarantees which they say they resisted so strenuously.

[185] **Therefore, I conclude that the assertion on the part of the Plaintiffs that the seeking or giving of the 2007 Guarantee was either unnecessary or linked solely to LTV does not bear examination.** I also conclude that in addressing the matter of the 2007 Guarantees the evidence of MT is deeply flawed and reflects poorly on his credibility.

[186] Taking stock at this stage, the Banks had consistently been meeting excesses arising from payment of overheads of this Group and other outgoings which allowed them to carry on their building operation, payments out of funds earmarked for a completely different purpose – and were continuing to be asked to provide those funds in the absence of any such funds from the proprietors/shareholders of the Group.

[187] During cross-examination comment was made in respect of a reference in one of the Banks' documents that if the Group did not like the terms that were being offered, the Club Banks would not stand in the way of it re-banking all the facility (that is not just re-banking Manchester). It was put that this evidenced a decision on the part of the Banks in June 2007 to get rid of the Group's accounts. That hardly reflects the decisions that had been taken over the previous six months to allow Land Bank facilities to be transferred to finance the working capital of the Group as the result of it exceeding its overdraft facility. It is hardly reflected in an agreement on certain conditions to extend that facility for a very substantial sum. In short in order to assist, not obstruct, the Banks had worked outside the Agreement/Facility Letters in order to assist the Group, but now wished as they approached the annual review to put in place an arrangement reflecting their intention to see the Group put their finances into proper order in line with the Agreement and Facility Letters. I am satisfied that the reference in question was no more than any financial institution in the position of the Banks would be considering – if you cannot work within the agreed arrangements perhaps you could consider negotiating new arrangements elsewhere. That could be the case after any review of any facility, and on the Taggart Brothers' case would have caused them no difficulty whatsoever. They were after all dealing with a number of other financial institutions in relation to other schemes of considerable value, at times greater than what was owed to the Banks.

[188] We then see over the following weeks the Group working within that proposed structure namely:

(a) The process for the disposal of FEL was progressing, although a "deferred paper" dated 30 June 2007 showed that time had slipped and that the projected date for the second round of bids had now gone out to the week commencing 20 August 2007:

(b) Excesses were falling in amount either in line or better than those projected – with the capability of being regularised from the £1.7m when drawn down:

(c) The Kildalky sale had completed and £950,000 had been released to the current account:

(d) The Group were noted to be working with the Banks during these weeks and managing their cash flow pending resolution of matters such as Manchester and FEL. Some valuations still require to be clarified, an important aspect in relation to the expected LTV calculation falling below 70%.

[189] One issue that was causing concern to the Group related to Ireland, the company operating in the Republic of Ireland. On 10 July 2007 a Director reported that prices had fallen by €30,000 per house since the previous Christmas, and that

the market for both new and second-hand homes was virtually non-existent. He was seeking a Board meeting which would require it to make "serious decisions", including possibly jettisoning staff. There is no evidence on the papers before the Court to show that this concern, which was clearly substantial and relevant to the assertions that it was a buoyant market in which to realise assets, was drawn to the Banks' attention, certainly at that time, although the sale of Kildalkey had incurred a loss of ½ of the value attributed to it in the calculations of LTV.

[190] A General Purpose Report within the Banks dated 16 July 2007 acknowledged that good progress had been made on a number of matters representing "<u>a welcome start</u>" (my underlining) to the matters to be addressed. Nevertheless while positive, the Banks' view was that the figures confirmed the Group's inability to finance their interest burden from sales, which highlighted the need to reduce the debt burden to manageable proportions as soon as possible – nothing new since it was reflected in the agreed steps being taken both with regards Manchester and FEL, and the reported on-going recapitalisation. It was also acknowledged that pressure on the accounts was expected in the last two weeks of July 2007 since payments would become due to suppliers and wages.

[191] On 19 July 2007 it was estimated that by the end of the month LTV would be at 70.06%, although some of the valuations, which informed a reduction to 70% or lower, were outstanding. However the Flimby sale proceeds were still due – see paragraph 172 (h) above (although confirmation was being sought that this contract was unconditional).

[192] By 20 July 2007 the money from Flimby had been received, and with satisfactory valuations, LTV was below 70%. JT at that stage had signed his personal guarantee, but MT still had to sign. By this stage the pressure for finance to meet suppliers and wages resulted in a request for £1.3 million to be drawn down.

[193] On 23 July 2007 the Banks sent to the Taggart Brothers a facility letter which was identical to the document of 29 June 2007, save that the reference to the funding of Rayton was to be from the Club, not from outside (and also subject to a proper valuation). While this would increase LTV to over 70% it was expected that this would be reduced within 4 to 6 weeks. The letter was accepted by the Taggart Brothers on 8 August 2007. It has never been disputed that they signed this letter.

[194] On 1 August 2007 there was a board meeting of THL which, inter alia, included on its agenda the KPMG report on the Group's cash flows; the restructuring of the Group, including the refinancing of Manchester and Yuill; and a financial update including the consolidated accounts to year to June 2007 with a forecast to the end of 2007. Surprisingly there are no minutes of this meeting in the documents available to the court. However following the board meeting, a Mr John Hanson of KPMG e-mailed Mr McHugh on 2 August 2007 setting out what he described as 'priorities and game plan'. He had obviously raised a number of questions at the meeting on the previous day, the answers to which he required in

order to finalise the report for the Banks, some of which he commented 'you may not want … in the report but you will then need to have something separately for the bank'. He then continued:-

- 6 The Bank need to see a clear reduction of the debt in a managed and controlled way and how to clear the debt at the end of the year is being managed out:
- 9 Are the bank aware of the extent of funding required - I know they received the previous forecast showing numbers of the magnitude we are now seeing but are they clear on the delays with BOSI and Frasers? Before going to see them perhaps a call from you or Frank to give them a heads up would be beneficial-you may already have done this."

August 2007

[195] The KPMG report was available to the Board of the Group on 6 August 2007 and available for the meeting with the Banks on 8 August 2007. In his evidence MT stated that the purpose of this report was to ascertain the LTV position. However in an affidavit of 5 October 2010 he stated at paragraph 15 that at the insistence of the Banks KPMG were engaged "to review the financial position of the Group, including cash flows and management accounts, and a report for the benefit of the Club Banks on the operation of the Group". I accept that at paragraph 18 it refers to the purpose of the report to address the position of the Group in relation to LTV, but it is self-evident that it was only one such issue. I have referred earlier to this misconception on the part of MT as to Group assets and debt as opposed to Group loans from the Club Banks and assets of the Group available to the Club Banks. In the same affidavit of 5 October 2010 all comment on the KPMG report was solely in relation to LTV, both as regards the general financial considerations and the role of LTV in the provision of the 2007 Guarantee. However there was no reference to other matters regarding "a cash crisis", to which I will come.

[196] In addition to the above comment in the affidavit of October 2010 we have seen in the preceding paragraph that the agenda of the Board meeting of the Group on 1 August 2007 referred to the report addressing cash flows, and in the e-mail of 2 August 2007 the author was quite explicit that the Bank wanted a reduction of the debt in a managed and controlled way.

[197] While cash flow can inform the level of debt/loan in terms of LTV, it is clear from this e-mail and the questions it raised (bullet points 6 and 9) that its remit was very much wider.

[198] In the event the terms of engagement addressed to the Board and signed on its behalf by Mr McHugh on 28 June 2007 (Mr McHugh being the person nominated in the Agreement to act on behalf of the Group) sets out the parameters. It is important to set out these in some detail since they were then an agreed way forward, identifying the concerns and issues that the Banks wanted addressed from

an independent source, concerns and issues that were identified to the Group's Board. The scope of the services is set out as follows:

- Provide assistance generally to the Managing Director on any financial matters facing the company.
- Critically review the financial situation of the group of companies as of 31 May 2007 (latest management accounts), and provide our written assessment together with our points of clarification to you and Ulster Bank. Further analyse any matters that arise.
- Critically review the company's weekly cash flow, highlighting and commenting on key assumptions together with applying appropriate sensitivities. Part of this review will identify asset disposals, trading income, essential creditor payments for the continuation of normal trading operations, creditor payments that are outside normal terms and identification of any crisis points likely to arise with respect to agreed facilities. Provide the written assessment each week to you and Ulster Bank (first assessment in week commencing 23 July 2007).
- Assisting company staff in the efficient management of the working capital cycle (stock, debtors and creditors).
- Provide assistance when necessary on sources of finance to ensure the smooth financial operation of the business.
- Attendance at weekly senior management meetings to discuss issues such as future cash flows: working capital pressures: progress of asset disposals: future projects: profitability and any other issues arising. We will document key actions points (first meeting week commencing 2 July 2007).
- Meet with Ulster Bank representatives when requested and provide the information outlined above, and meet with any other third parties as directed by the company.

[199] It will be seen that LTV is not mentioned specifically at any point in this document, although it could be seen as one aspect, but I believe only one aspect, of identification of crisis points likely to arise with respect to agreed banking facilities. It is also clear that it goes well beyond calculations of LTV into the very management of the company and its cash flows, assisting where possible in the operation of the business generally. That involved a continuous flow of assessments and information to the Banks. This was not a snapshot of the Group's activities or financial position at a particular time in the Group's affairs. I have referred above to MT's concentration on LTV seemingly ignoring the real thrust of this proposed report and involvement of KPMG, which evidences the Banks' concern about the Group overall financial position. These terms alone would have signalled in June/July 2007 real and serious concerns which, if not properly addressed, would have material impact on the Banks' position.

[200] We know from the Minutes of the meeting at which the issue of KPMG's expanded role was required, and in a subsequent email from him, that Mr McHugh was very unhappy with this proposed role – seemingly regarding it as an insult.

Mr McHugh I believe would have been fully aware that effectively KPMG were coming in as reporting accountants, keeping an eye on the business on a continuing basis, grounded on information provided to it by the Group. In a report of the Banks with regard to the proposed appointment of KPMG, they are referred to as "reporting accountants". That phrase does not appear in any of the documentation, but I believe that the role of KPMG fulfilled that of reporting accountants within its ordinary definition. I am also satisfied that Mr McHugh would have been aware of that role. I make the point because in examination MT acknowledged that if he knew 'reporting accountants' were being appointed to the Group that this would have been a very serious step, one in a potential process towards administration or insolvency. While the words were not used I am satisfied that with the appointment and involvement of KPMG on the terms as agreed, the Board would have been in no doubt that there were serious matters under consideration which, if not satisfactorily tackled (as the KPMG e-mail said "in a controlled manner") would lead to adverse impact on the relationship with the Banks and the continuation of banking facilities.

[201] In his evidence MT acknowledged that he received the report and read it. I would have been amazed if it had been otherwise, and the same applies to all members of the Board, in particular Mr McHugh as Financial and Managing Director.

[202] The report itself explicitly states that it is based on information provided by management of the Group. It states that its "primary source has been Group internal management information and representations made by management of the Group". It is specifically stated that the report differed from an audit. It records that management had confirmed to KPMG that the information given properly reflected the cash flow forecast for the Group for the period to 28 December 2007 – a fact reconfirmed by management to KPMG on 3 August 2007. The figures therefore on which the report was based were current.

[203] The report stated that the information given was that the overdraft facility at that point was £647,000 but that there were "approved additional amounts for drawdown to current account, but management are unclear as to the magnitude of this drawdown and any conditions attached to it". It went on to say that management would be seeking clarification from Ulster Bank. We are of course aware that an application had indeed be made for £1.7m to be drawn down, the subject of the letter of offer of 28 June 2007 and the subsequent negotiations culminating in the Guarantee, an integral part of the terms and conditions, being signed on 8 August 2007. If this "approved additional" facility referred to in the report was indeed the £1.7m then the amount and conditions were fully known to the Board at the time of the preparation of the report.

[204] The report then sets out cash flows against overdrafts in a series of graphs showing potential excesses. These graphs and figures are based on information given to KPMG by the management of the Group. They are unequivocal. These graphs not just reflected management information regarding inflows from sales of

assets and houses, but also two specific inflows - one from the refinancing of Manchester, which is shown to be due on 7 September 2007: and an injection of £5m from the proceeds of the sale of FEL, that payment to be available by the second week of November 2007. We know from the papers that over the previous months all of the reports and papers referred to the expectation of the taking Manchester out of the Club Banks' lending and the injection of funds from FEL, and had been constant features of the reports by Mr Barr and RMT to CRN.

[205] The report then makes references to payments due to creditors which were "long over due". These included some €618,000 in the Republic of Ireland: £419,000 in Northern Ireland: and £1.1m arising out of Manchester. It set out the steps that were being taken to address these issues, including a review of the Group's strategy and its five year plan. These are fundamental steps addressing not the issue of LTV, but going to the very core of the Group's business and its operation, in particular its cash position.

[206] That cash position was then examined under the headings of Northern Ireland and the Republic of Ireland. The cash flow for Northern Ireland until the end of 2007 was shown as £8.2m, but that included the £5m injection in November 2007 from the part proceeds of the sale of FEL. Out flows were £6.3m. Without FEL there would have been a substantial negative figure in relation of cash in Northern Ireland. The report also states that at that point no other building was on stream for 2007 or 2008.

[207] In the Republic of Ireland they were expecting cash flows inward of £8.5m but outflows of £11.9m, a deficit of £3.4m. It recorded how the funds were to be received from the building out of a number of houses which, when complete, exhausted the building operation in the Republic of Ireland. It also confirmed that as regards to the operation in the Republic of Ireland draw downs on the Bank facilities were in excess of the terms of the loan relating to such draw downs. The expectation of in-flows included sales of Dublin property and two other holdings in Rossan and Emmett Street.

[208] The report then sets out of a number of "Key Issues". Those relevant for the purposes of this judgment are as follows:

"(a) Consolidated cash requirement. Here there are three bullet points namely:

- The cash flow forecast shows a consolidated overdraft requirement of £4.3m by week ending 7 September 2007. Following refinancing of Manchester in week ending 14 September 2007, at which point the Manchester operation is removed from the Ulster Bank/Bank of Ireland Club Facility, the overdraft requirement is then forecast to reduce to £4m, rising to £.5.5m by week ending 19 October 2007. The forecast

assumes a cash injection of £5m from the proceeds of sale of Frazer estates in week ending 2 November to return the Group to a cash positive position.

- In the period required to complete the Manchester refinancing and the sale of Frazer Estates, it was represented that the Group was looking for the support of Ulster Bank/Bank of Ireland.

- By year end the forecast shows a further requirement for overdraft facility of £788,000, resulting from in-flows being insufficient to cover out flows. Management is stated to have initiated a number of actions to review and address the situation, including a cost reduction programme in ROI (including head count reduction), consideration of initiatives to bring forward 2008 ROI revenues into 2007, and a review of costs based in NI."

Any one reading this narrative can only conclude that the Group required substantial injections of cash, not to satisfy LTV, but to run the business. Without Manchester being taken out of the equation, additional cash was required both to service the interest on that particular facility and also to meet any deficiency in its trading. In short without the Banks' support there would be cash difficulties until Manchester was refinanced. Even with the refinancing, without the injection of the £5m from FEL the Group would be substantially overdrawn, potentially in the region of £4.5m by mid-November 2007, to which would have to be added what was then projected an additional overdraft (notwithstanding the FEL injection) by the end of the year.

This was additional cash, not available under the terms of the Agreement or any Facility Letter. At times MT asserts that the Banks were not allowing funds properly available to be drawn down. As the papers disclose moneys from the Land Bank Account were being used to provide cash flow – the latest example being the request that triggered the background to the 8 August meeting. Nowhere does the Report assert that there were funds available under any agreement by the Banks, but which were being withheld.

None of these matters is referred to by MT in any of his affidavits, and in his direct evidence he addressed solely the LTV point, not the cash position.

"(b) Creditor pressure:

- Creditor pressure has built to a critical level in ROI, NI and Manchester. Management of payments is made complicated for the regional Financial Controller as they do not have sight of the consolidated bank position on a daily basis. The decisions as to how much can be released to a supplier by each Financial Controller is made on a daily basis and requires consultation with senior management. Visibility of the position is further complicated as the forecast is prepared using cash book balance rather than bank balance.
- While some opportunity still exists to manage the pressure in NI, both ROI and Manchester are not able to push supplier payments out any further without risking serious damage to the business. Cheques totalling £2.1m are being currently being held back. Contractors are close to walking off site which will impact not only on income streams, from the ability to finish houses, but also potentially to the reputation of the business in the market.
- The focus of the management team must now clearly be on management of cash in the short term – it is essential that procedures, responsibilities and reporting lines are clear."

Having read all of the papers, including correspondence from solicitors and suppliers to the Group, it is quite clear that the Board was fully aware that they had a considerable problem, if not a crisis, on their hands in regard to their ability to pay creditors. That problem did not arise overnight or in the previous few months. It was instead the culmination of the pressure for cash identified by Mr McHugh from the early part of 2007. This has nothing to do with the refusal of the Banks to advance funds from those facilities which were earmarked for purposes other than the general running of the business. The overdraft facility was well exceeded even in the context of the withholding of cheques to such a substantial amount. Indeed reading some of the correspondence, two discrete examples are of some concern namely:

(i) A small amount of £1,000 for a valuation carried out in July 2007 - presumably for LTV purposes – was not paid and steps were being taken actively to recover that money.

(ii) In respect of an amount which was not disputed by management, solicitors were being asked to say it was disputed in order to buy time.

These are simply symptoms of the pressures arising in June and July 2007, all of which would have been very easily dealt with by the Group

by the sale of those readily available assets of the Group or the Taggart Brothers in a buoyant market. This would not only have addressed the issue of the excesses – that is over and above the overdraft limits – but also allowed for any risk of contractors leaving the sites to be removed altogether.

There can be no surprise about the requirement for further cash, even if the amounts in question may not have been appreciated. We have tracked the concerns of Mr McHugh from his expression that the cash position was "dire" in early 2007. It certainly was at the beginning of August 2007.

"(c) Development activity:

- .. The NI and ROI operations will be left with little or no income to cover a significant overhead cost …
- The mix of development in speculative activity across the Group appears to have become off balance due in part to a requirement to sell sites to generate cash resulting in a lack of sites available for building in the short to medium term.
- Once the current cash crisis (my emphasis) has been resolved management should review the key financial controls in the business and develop a clear strategy for the future profitable growth of the business. A programme of cost reduction has already been commenced in ROI and costs of NI are under review."

"(d) Forecasting:

- The Group needs to prepare cash flow forecasts much more frequently given its current cash position.
- Variances of actual cash flows against forecasts need to be reviewed more critically and actioned more quickly.
- Visibility of overdraft position is complicated as the Club facility is used by ROI, NI and Manchester operations. A consolidated cash position has not been clearly visible to all key managers.

[209] These forecasts address the need for the day to day operation of the business, particularly in financial terms to be overhauled, reflecting the problems identified in the Report of how the Group had operated in that operation up to that date: and the future required to be addressed, with the development of a clear strategy for future profitable growth of the business.

[210] But perhaps most pertinent of all is that part of the comment in relation to development activity which I have set out above. The accountants with the benefit of the figures given to them by the Group referred to the current cash crisis. The

major and paramount concern was lack of cash. Cash flow could not meet the demands of the business. That was the position even with the removal of Manchester and the injection of FEL money as it related to the facilities with the Banks. As another comment stated, right at the outset, in the period to the end of December 2007, to allow for the refinancing of Manchester and to allow for the injection of FEL money, the Group were looking for the support of the Club Banks. In short it was a request for a renegotiation of the facilities with the Bank on the basis that the Group required more cash. At this point LTV is not mentioned. The accountants were saying that without more cash the Group could not pay its debts as they fell due. Manchester and FEL would assist but they were on-going issues.

[211] This reflected the position which had become obvious over the previous months for all the reasons to which reference has been made. The excesses, the comments of Mr McHugh, the creditors, the bounced cheques. All clear signals as to what this Group required. According to the plaintiffs the provision of such funds was easy. By the sale of assets whether within the Group or outwith the Group this could be put right virtually immediately, certainly as regards a facility which sat at £40m or thereabouts. Yet despite all of those issues being present over the months, culminating in the advices from KPMG no such steps were taken. The responsibility for that cannot lie with the Banks, but firmly and squarely on the shoulders of the Board of Directors of the Group.

[212] MT himself has described the Club facility as being only a small proportion of the amount owed by the Group. There was a dispute as to how much those overall debts were. On two occasions the Banks had estimated the overall Group debts (that is the Club liabilities and liabilities owed to those other Banks financing other developments) at £340m, and then £311m. MT in his evidence claimed these figures to be exaggerated. Instead he estimated at that time the debts would have been just over £200m certainly below £250m. However in his affidavit for the Order 14 proceedings he estimated them at some £275m. In his evidence he estimated the value of the Group as £600m. In his affidavits for the purposes of the Order 14 proceedings he estimated that the value at that relevant time would have been between £475 to £525m.

[213] In many respects these figures were meaningless. I address them only in the context of the use MT made of such figures to allege that the Banks, particularly at CRN level, did not know how the business was being run or the state of the business. He put that down to failures on the part of Mr Barr, not just negligence on his part but of deliberately covering up his failure or mistakes to advise CRNI of the actual position. Many of the statements in his report are alleged to have been false, untrue and misleading. I will return to those allegations in due course. However in the present context, one might be forgiven for suggesting that MT was in an infinitely better position to know the value of his business and the level of his debt, and yet from an equity of some £350m-£400m, his affidavits reduced that to £100m - £125m.

[214] As the parties entered the meeting on 8 August 2007 there can have been no illusion on the part of the Board of the Group that their main problem was that they did not have enough cash to meet the day-to-day needs of the Group without injections of cash, and, as the KPMG report states, it was looking to the Banks for further provision of cash. LTV was no more than a small item and certainly not the driver on the part of the Banks as to their concerns and what it was they wished to see addressed by the Group. To centre on that point to the exclusion of everything that I have set out above in relation to the financial status of the Group is either disingenuous or reflects in the case of MT someone who either was not taking on board the information and advices he was being given, or was ignoring them.

[215] A meeting had been arranged between the Group and the Banks to discuss the KPMG report on 8 August 2007. In the run-up to the meeting the internal documentation of the Group continued to disclose major concerns, particularly from Mr McHugh. Inter alia:

- On 6 August he referred to being "crucified" by the cash flow in the Republic of Ireland and Northern Ireland because of "slipshod performances".

- On the same day he was complaining about the slowness in making planning applications, instancing Kinsealy which had been bought in October 2006 but in respect of which he was complaining that no planning application had still been lodged.

- On the previous day Mr McHugh wrote to a William Kerr that 'a lot would depend on whether we sell Frasers or not. Do not rule out the possibility we will hold unto it and develop it ourselves …… the goal posts have changed significantly'. Nowhere is this possibility disclosed to the Banks, who had received a Report that said the exact opposite – that it would be sold, a sale was near to agreement and part of the proceeds of that sale were included in the cash flow forecasts.

- On or about the same time he referred to the need for a major revamp of the sales team in Yuill since the present team were "not exactly filling our order book" in a market which was "a lot softer now as reality bites".

- Shortly before the meeting of 8 August he raised serious issues about the valuations of a site in the Manchester operation, a reduced valuation which in his words "blew LTV calculations clear out of the water", and where he stated that a serious revaluation of the Manchester operation was necessary since, only bad news coming out of it".

[216] There is nothing in the documentation produced to the court which evidences that any of these major concerns were brought to the attention of the Banks at the meeting of 8 August 2007, nor indeed at any time. Indeed given the role of the refinancing of Manchester and the sale of FEL on the cash flows that they had

produced on the information given to them by the Group, it is hard to come to any conclusion other than that these two matters were withheld from KPMG. I therefore believe that there is prima facie evidence that the Banks were misled by the Group as to the basis of the projections and that any agreement made on those projections was undermined by that non-disclosure. I say 'prima facie' since I have not heard from Mr McHugh the author of bullet points 2 and 5 above.

[217] Adding to the above concerns, on the day before the meeting an internal controller advised Mr McHugh that cheques for wages would not be paid until the 2007 Guarantee was signed. That of course was a pre-condition to the draw down which the Banks were prepared to permit from the Land Bank Account - on the terms and conditions which have already been addressed by the court, but which included the 2007 Guarantee.

[218] Mr Hanson was clear as to the problem. A file note dated the 7 August 2007 made by him of a call made to Mr Barr records that he said:

> '..creditor pressure was immense and immediate and support was required. <u>The requirement until BOSI/Frazer Estates could not be met within 70% LTV.</u>'

The underlining is mine in the context that MT's position was and continued to be that as long as LTV was in line with the Agreement's requirement, then there was no other issue of concern. Here the person who had investigated the Group's affairs was saying that support was required but if given could not be within LTV covenant until Manchester and/or FEL was brought successfully to a conclusion.

[219] The meeting was held on 8 August 2008. No record of that meeting generated by the Group has been made available to the court, whether by way of contemporaneous notes or follow up report to the Board, or minutes of the Board. This was a crucial meeting dealing with a comprehensive oversight of the Group, including its future needs. Try as I have I can find no proper reason why there is an absence of such documents. Instead what is available are handwritten notes from Mr Barr and Mr Ennis who attended the meeting for the Ulster Bank (representatives of the Bank of Ireland were also present, but no records of theirs were available to the court), and later an internal report was made to CRN. These documents show that a list of matters were discussed, including, inter alia, the reductions of staff in the Republic of Ireland, FEL, strategic plans, and negotiations with BOSI concerning Manchester. However, when it was put to MT in direct examination as to whether these matters, and those other matters referred to in the report to CRN, were discussed at the meeting, MT could either not remember, "did not know" or could not recall. All of these issues referred to in the notes and in the report to CRN were raised in the KPMG report, the consideration of which was the reason for the meeting. It is inconceivable that they would not have been addressed in the context of the cash issues facing the Group – "a crisis" – identified by the projected cash flows emanating from the Report.

[220] Instead, in his evidence MT concentrated on three issues about which he had a clear memory – LTV: an offer he said to sell Yuill which he said Mr Ennis rejected as unnecessary because it was "a good company … building 300 houses a year": and the 2007 Guarantee. Mr Ennis disputed that the offer of the sale of Yuill was raised at this meeting. Instead, he said in his evidence it was raised at a later meeting.

[221] Several points can be said arising from the above namely:

(a) In his evidence MT was clear about a number of matters totally immaterial to the purpose of this meeting, including what Mr Ennis was wearing that day.

(b) Given such a clear recollection of such minutiae it is difficult to understand why MT has no recollection or memory of discussions around issues critical to the Group's position, the problems it faced, and the cash requirements it faced.

(c) Notes made at the meeting, and I am sure there would have been, and/or Minutes of the next Board meeting, and/or a report to the Board, which I would have expected and which would have assisted the court, may well have assisted MT in his recollection of this meeting.

[222] Again I have concluded that the evidence of MT in relation to this meeting is partial and flawed. Given the cash flows and structure set out in the KPMG report, I can see no reason why the sale of Yuill would have had been raised, not least given the role of the refinancing of Manchester, for which a date was fixed, and the introduction of funds from FEL, on a date which was fixed. These would have removed any issues between the Group and the Banks subject to some on-going cash requirements which were to be discussed. I am therefore inevitably led to conclude that the evidence of Mr Ennis is to be preferred, and that no offer to dispose of Yuill was made at the meeting of 8 August 2007.

[223] As a side bar to the above MT was asked about an email from Mr McHugh to Mr Barr and others on 13 August 2007. I set it out in full since it was referred to in full by Mr Simpson in his questions to MT.

> "Gary
>
> Having had time to reflect on last Wednesday's meeting in Belfast over the W/E, I am still at a bit of a loss. If I understood Richard Ennis correctly last Wednesday and it was why I laboured the point, the position is as follows:
>
> (i) Taggart Holdings can continue to draw down funds provided it stays within its overall LTV covenant of 70%.

(ii) Depending production of BOSI bank terms for Manchester, UB/BOI may look to the LTV running up to 74/75% during the period of the Manchester refinance.

In relation to (i) this does not provide anything over and above our existing facility of £50m provided we stay within LTV covenants. I therefore have great difficulty understanding why, if nothing extra has been given, why we end up:

(a) debating about whether we can draw down £1.1m or £1.7m sterling;

(b) paying a £100,000 fee for facilities we already have.

(b) The principal shareholders, Michael and John Taggart, end up giving additional £5m in personal guarantees.

Perhaps either you or Paddy can give me an explanation of the above, because, unless I am missing something, we seem to be getting nothing in return for the extra fees and personal guarantees.

Regards

Maurice"

[224] I find this email extraordinary.

- First it seems to proceed on the basis that there was a facility for £50m that could be drawn down for any reason, at any time, provided LTV was kept within 70%. This flies in the face of every facility letter and the Agreement which, as I have set out, compartmentalised various sums within the ceiling of £50m. Each compartment identified the purposes to which the funds in that compartment could be put. The cash flow for the company was in a 'current' account, a compartment equivalent to a 'current account', which had an overdraft facility which was persistently exceeded and which gave rise to the negotiations in June and July 2007.

- Secondly, the reference to £1.1m refers to an email from Gary Barr to Mr McHugh on 10 August stating that in line with the facility of £1.7m now in place they were entitled to draw down £1.1m to meet the problems of creditors, wages etc which it was earmarked to address. What the Group

were getting in return for the fee and the 2007 Guarantee was access to funds which otherwise it was not entitled to – namely funds transferred from the Land Bank Account.

- Thirdly, Mr McHugh had been copied into the letters of June and July 2007, setting out the terms of the facility whereby £1.7m could be drawn down out of the Land Bank Account. He was also copied into the email traffic in relation to relation to the 2007 Guarantee, to the point that he was raising the possibility of it being time limited

[225] It is inconceivable that Mr McHugh, MT and the Board would not have known exactly what the Group were getting in return for the fee and the giving of the 2007 Guarantee. In evidence with regard to this email from Mr McHugh, MT still expressed ignorance as to why it was required - that despite the passage of time and access to all information and evidence of events leading up to the 8 August 2007 meeting. I find that assertion disingenuous at best.

[226] With all conditions attached to the release of these funds in place the facility was made available and drawn down as and when required.

[227] The cash flow structure incorporated into the KPMG report was predicated on the refinancing of Manchester on 7 September 2007. However, from the documentation it is obvious that this refinancing was in difficulty from soon after the 8 August 2007 meeting - if not before. Records show that KPMG on 15 August enquired from the Banks if Manchester could be held until November 2007, 'on the basis of a short term cash injection', seemingly from within the Taggart Group. It appears from the documentation that KPMG had been looking at taking short-term cash from funds relating to other projects not financed by the Club Banks, but believed there were problems with covenants attached to the facilities granted by those other banks. The Banks did not dismiss this enquiry, but wanted to see the exact proposals.

[228] That the Group knew that there were serious problems with cash flow is recorded in an email dated 16th of August from Mr McHugh to his Chairman. It expressed concern about people, including MT, purchasing properties at discount when the Group was 'in a very precarious position'.

[229] It appears from a hand written note by Mr Barr that there was a conversation on 21 August 2007 in which matters relevant to the outcome of the meeting of 8 August were discussed with Mr McHugh. The note records that no bridging finance was required 'at that time', but also that the refinancing of Manchester was still on track, including the target date of 7 September, notwithstanding the approach made the previous week by KPMG. I accept that this conversation took place.

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[230] By 3 September 2007 it is clear that the Group was running into substantial cash problems. E-mails show that at that time there were no funds available to pay creditors who had been waiting 'for some time' for payment, and a number were considering putting recovery of the debts due into the hands of their lawyers. In an e-mail of 10 September the amount of outstanding creditors was estimated to be £2.2 million. Looking at some of the documentation it is clear that substantial sums were due as far back as June and July 2007. The same emails disclose that it was recognised that the issue was dependent on the refinancing plans for Manchester, but even as at 3 September valuations were still awaited in relation to that refinancing process which, in an e-mail of 4 September, was seen as being one or two weeks away - beyond the date of 7 September.

[231] On 10 September 2007 Mr McHugh emailed Mr Barr, copying in the Bank of Ireland and the chairman of the Group, seeking a meeting on the following Friday "to review where we are in terms of short-term funding requirement for the Taggart Group". He indicated that he wished to request a bridging finance of around £2m "on the back of the Fraser deal" to enable the Group "to make pressing payments to suppliers up until the completion of Frasers which I expect to be around the middle of October (it is scheduled to close on Friday 5 October 2007 but I am allowing some slippage)".

[232] Mr Barr replied on 13 September 2007 agreeing to meet on the 14th. However, he also reminded Mr McHugh, the Taggart Brothers and all others copied into the email of the position following the meeting of 8 August and the Banks' then position of possible support for facilities. He recorded that it had been clearly established at that meeting that any progress in that regard would be subject, inter alia, to the Banks' satisfaction of credit approved terms by Bank of Scotland's offer to refinance the Group's Manchester division, together with documentation that the Group's Directors had accepted this offer, unless a more attractive offer could be negotiated within the envisaged timescale. He reminded everyone that it was the Banks' clear expectation, based on the meeting, subsequent discussions and the KPMG report, that the refinance would occur on either 7, or 14 September at the latest. As regards the latest request from Mr McHugh he was unclear as to the extent of the bridging facility. He made it clear that in the absence of the information and confirmation of the facility from BOSI, the expectation was that there would be instead firm, alternative repayment proposals for the requested bridging facility, and an accompanying definitive timetable for progress. He continued by stating explicitly that in the absence of this confirmation the initial view of the Banks would be that the request would not be supportable at that time.

[233] On 11 September KPMG e-mailed the Board, including MT, saying a meeting was necessary to discuss strategy to 'fund the business as a whole until FEL completes'. The writer did not know the cash flow forecasts at that time presumably in part because the projected date for the refinancing of Manchester had been missed, and completion was being projected to the end of September. However matters appeared to be more problematic than the date for completion. In his email

he referred to whether the original offer from BOSI was available for acceptance or alternatively whether something else might be possible.

[234] This latter suggestion appears to have been made in the context of a comment from Mr McHugh to the Board on the same day referring to mounting pressure on cash flow and saying they may have to run with the second offer from BOSI, but expressing doubts if that offer was still on the table. In addition he referred to FEL and developments the previous day, not expanded on, which meant that completion was not likely before the end of October.

[235] A meeting of the Board was convened for the evening of 11 September 2007. An email from Mr McHugh was sent to all Board members. At that time MT was overseas on his honeymoon, but given the seriousness of the position I would be extremely surprised if he was not keeping an eye on the business generally and would not have been copied in and received emails, including this particular email. In it Mr McHugh, in advance of the meeting, had jotted down what he said were some thoughts on areas that the Board would have to address "if we are to survive", some of which they may find unpalatable. The aim was to reach some sort of consensus internally so that there was a coherent plan of action "to get us out of our present situation without sounding off the alarm bells".

[236] The notes attached were in fact a paper headed "Taggart Restructuring Plan – September 11 2007". It addressed the position in relation to each of the Group's operations. I only require to set out those which I believe are pertinent to the questions that I am addressing namely:

(a) Under the heading <u>'North East UK Limited (incorporating CM Yuill Limited) 2'</u> it stated:

> "Sell Cecil M Yuill Limited
>
> - if above does not work, looking at selling a stake in CMY to help fund Manchester/rest of the Group."

[In parenthesis we now know that THL owed deferred consideration for the acquisition of Yuill, and were in breach of banking covenants of the bank funding that company – see Appendix D]

(b) <u>'Millmount'</u> – "need to repay Patterson loan is paramount". This issue is addressed by me separately in Schedule C attached.

(c) <u>'Second NI SPV'</u>. When addressing the specifics of this venture the comment is made:

"Ensure we do not complete the purchase of Antrim site … if, as is likely, the Fraser deal falls through." (The underlining is mine.)

(d) 'Taggart Homes Manchester Limited'

"Try to get revised BoSI deal over the line before the end of September 2007."

It then sets out a number of possibilities in the event that it failed in achieving that objective.

(e) 'Overall' I will deal with these in short form.

- Directors to forego 2006 bonus
- Seriously look at taking in outside/distressed investor which could be very painful for us all and lead us into a minority shareholding position/termination of some positions:
- Absolute embargo on staff recruitment without full unanimous Board approval.
- May have to abort filling Finance Director position.
- Look at every other option open to us to reduce costs, bring forward revenue streams and generate cash.
- Need to approach all banks to explain likely results for 2007 since Fraser's non-disposal will most likely result in a break even result for 2007.
- Need to review what 2008 is going to look like in view of changed circumstances of Group.

[237] From these notes it appears to the court self-evident that the refinancing of Manchester was by no means secured and its disposal of FEL seemed likely to fall through. Without more, the two main planks for the reduction of the Banks' exposure and the injection of cash which formed the basis of the KPMG report, and as a result informed the agreement of the Banks to go forward, were in trouble. However, there are other matters of concern as to the overall position of this Group with potential adverse consequences to the Taggart Brothers as set out in the final heading in the notes "overall".

[238] But there is a further matter the court has to consider. At 17:13 on 10 September in his email to Mr Barr and the representative of the Bank of Ireland seeking a meeting regarding funding by way of a bridging facility, reference was made to the completion of Frasers being expected around the middle of October. At 9:27 the following morning in his email to the Board he refers to that fact following 'yesterday's developments'. However four hours later at 13:34 on 11 September he emails the Board setting out the restructuring plan to which I have referred but which in respect of FEL states that it was likely that that deal would fall through. If right, then something dramatic clearly happened in those four hours. The court will

have to look to see what representations were made to the Banks at the meeting of the 14 September in relation to the state of play in FEL, an important factor in the KPMG report which formed the basis of the Banks' decision to continue support under the terms agreed at 8 August 2007.

[239] No minutes or notes are available as to the discussions that took place at that Board meeting of 11 September, nor have any minutes or notes of Board meetings thereafter been produced which might allow the court to consider the Group's position and proposals as to the way forward. Again the court has to express its surprise that, given the background to the serious issues which Mr McHugh had clearly identified, and the potential consequences if the issue of availability of cash was not addressed, this documentation is not available.

[240] What we do have is a Report prepared by Mr McHugh for the meeting of 14 September 2007 setting out inter alia:

- Cash flow forecast to December 2007;

- Funding requirement under four headings namely:
  - Immediately
  - FEL disposed off
  - End of 2007
  - End of 2008

- FEL disposal; and

- Action plan/options

[241] The cash flow forecast showed shortfalls for the week commencing 21 September 2007 of £3.7m, rising to over £8m by the end of November 2007 and then reducing to just over £4m at year end. These calculations were based on Manchester remaining unfinanced and no monies being introduced from the sale of FEL. If Manchester had been refinanced then the levels at the above dates would have been £3.4m, £7.5m and £7.2m respectively. LTV was shown as under 70% as at 14 September (that is 67.06%) but then rose to over 70% in the week commencing 5 October and remained over until the week commencing 14 December, when it dropped below 70% until the end of the year forecast.

[242] The funding requirement which was required to meet obligations to the end of September, to include outstanding cheques (£357,000), outstanding creditors (£1.672m) and work in progress for sub-contractors (£1.571m) was calculated at some £3.98m.

[243] In short there was an immediate cash hole which if not filled would lead to proceedings by sub-contractors (and potentially other action on their part) and debtors instituting proceedings. To address the problem Section 5 of the Report

and Section 6 of the Report adduced details of the sale of FEL and other options respectively.

(a) **Sale of FEL**

The calculations show a projected sale price of £123m, payable in two stages, £105.5m on 12 October 2007 and a balance of £17.5m payable in April 2008. On that basis the Taggart Brothers would receive £10.7m on 12 October 2007 and £10.9m in April 2008. The "proposal" was that £5.1m from the amount of £10.7m would be used to pay the Patterson debt (see Appendix C), with the balance being introduced to the Banks. In April 2008 the whole of the £10.9m would be available to be introduced.

Under 'Options' it was expected that the Heads of Terms for the sale of Frasers was to be signed that day, 14 September 2007, with completion on 12 October 2007. This, if right, sits uncomfortably with Mr McHugh's email and plan prepared three days earlier when it was stated that the proposed sale was unlikely to proceed. The 'Option' did however continue to address the steps that would be taken "if the deal falls through". However the Banks' expectations were that funds would be available in and around 14 October 2007.

(b) Under the heading of 'Options' there were also a number of steps that could be taken, the relevant ones for the purposes of the court's deliberation being:

- As regard Manchester, the Group would "try to refinance" with BoSI seemingly in line with the original draft Heads of Agreement in March 2007, which required an equity input from the Taggart Brothers of £4.8m.

- Yuill could be put on the market.

- The Group could be sold.

[244] This report appears to the court to be comprehensive in terms of all aspects of the Group's position and its need for an urgent injection of cash. As regards the two main planks in the KPMG Report, the basis of agreement for ongoing funding on the terms of the outcome of 8 August 2007 meeting, Manchester had not been refinanced and doubts existed over refinancing certainly with BoSI; and Frasers was seen as a source of funds to be introduced in and around 14 October, an injection of funds which would have had a very substantial positive impact based on the figures in Mr McHugh's report for the meeting of 14 September.

[245] No proposal was put forward in the paper for the introduction of cash from any other source such as the Taggart Brothers, either by way of loan or equity, notwithstanding their continuing case as to their ability at that time to meet any

shortfall or cash demand – and indeed for sums potentially to the extent of the Club Banks' facility as a whole.

[246] The court is again left in the position of having no contemporaneous notes of this meeting, other than some rough notes from an unknown source. There are no Minutes of Board meetings that would have followed that particular meeting, which is surprising given the outcome of that meeting was of some considerable significance in terms of the cash flow problems of the Group. The note that is in the possession of the court refers to the sale of some sites which were expected over what appears to have been the ensuing short period, and then two specific issues relevant to my considerations in this case namely:

- There is a reference to a "decision on Frasers at 26 October 2007"; and

- A meeting was to be arranged for the following Wednesday to look at figures for Yuill; a review of LTV; the position in relation to refinancing of Manchester; the timing of the FEL sale or refinancing; and "evidence of short term funding".

[247] The court also has an email from Mr Barr dated after the meeting on 14 September 2007 addressed to Mr McHugh in relation to LTV, where there appears to have been some differences in calculation. He also, in line with the note to which I have referred, refers to adjusted weekly cash flows and LTV being produced on the basis of Manchester being refinanced; on the basis of FEL sale; and "the investment by the shareholders and third parties". This latter comment would appear to mirror the reference in the note to "evidence of short term funding". It is also picked up in an email from the BOI's representative after the meeting and the report by Mr Barr to CRN on the meeting, both of which are dealt with below.

[248] Given the purpose of the meeting and the report from Mr McHugh, all of these are matters which the court would have expected to have been addressed, with some decision or plan of action being agreed or at least discussed.

[249] In his direct evidence MT told the court that he had returned from honeymoon specifically for this meeting with the Banks – a meeting arranged by the Group's Managing Director. I am satisfied that he would have been aware of the outcome of the Board meeting on 11 September 2007 and would have had sight of Mr McHugh's report prepared for the purposes of the meeting on 14 September 2007. The purpose of the meeting on 11 September and the contents of the report from Mr McHugh referring to the serious concerns around the cash position of the Group and the need for a bridging facility were fundamental to that earlier meeting and to the Report.

[250] However, in his direct evidence MT told the court that he found the attitude of the Banks had differed from that at the August 2007 meeting and that he "did not really understand" that change nor "what was really going on". He was asked by

Mr Simpson about LTV to which he replied that it had "lessened", but when asked about all of the other matters contained in the note he added he was not sure or could not remember if they were spoken about, or, if they were, in what terms. His answers all mirrored an uncertainty about these issues. However the one matter he was clear on was that no discussion had taken place about himself and his brother (the shareholders) introducing further equity or loan monies into the business.

[251] I find MT's evidence unhelpful and vague about matters of the Group needing an urgent injection of cash to pay bills of upwards of £2m, a cash flow shortage until the end of the year amounting at times to some £8m but reducing to £4m in December, and other issues all of which went to the very heart of the "survival of the business", to adopt the language of Mr McHugh. I am satisfied that MT would have been fully aware of the reason for any change in the Banks' attitude, encapsulated in Mr Barr's email of 13 September in response to Mr McHugh's request on 10 September 2007 for a bridging loan. It was quite clear that the forward plan worked out in August 2007 was well off-track, the fundamental points in that plan not being in place. I am certain LTV was discussed, since apart from the immediate position where it appeared to be under 70%, the same projection from Mr McHugh showed it was to rise from the beginning of October 2007 and continue above the 70% level until the beginning of December 2007 (and that is without factoring in the 'Kinsealy Factor (as defined in Appendix A paragraph [34]'). I will return to the issue to LTV and the role it played in the ensuing few days in a moment.

[252] However, before doing so I have to record with some regret that as with his evidence in relation to a number of events including, inter alia, the persistent excesses, the taking of the 2007 Guarantee, the issues around the Group which led to the appointment of KPMG and his averments in affidavits, I find MT an unsatisfactory witness who at times appears to want to rewrite history to fit his case. I say "with some regret" since in doing so he has been, perhaps inevitably, driven to attack others, including allegations in the case of Mr Barr that he, Mr Barr, acted, to put it mildly, in a deceptive and incompetent manner. This is the same Mr Barr who had argued the Group's case throughout all of the months leading up to September 2007, and who, as we shall see in a moment, following the meeting of 14 September 2007 attempted to ensure that the Bank could respond positively to the request for further funds.

[253] In paragraph [247] above I referred to the e-mail from Mr Barr to Mr McHugh dated 14 September 2007 seeking agreement on the calculation of LTV, and referring to figures required in relation to cash flows being available for the following Wednesday. On 17 September Mr Stewart, an internal accountant, wrote to the Board advising that the proceeds of sale of a particular property would be retained in order to ensure the facility stayed within 70% LTV. He referred to the fact that BOI were being consulted as regards the position of LTV. He advised that Mr Barr was preparing a paper for CRN, in conjunction with BOI, "requesting flexibility within our facility and, although he was reluctant to go into any detail, one element

of what they are asking the credit committee for is a relaxation of pre-sales requirement." However Mr Stewart went on to say that Mr Barr didn't want to go to Credit if LTV was above 70%, and in order to complete his paper he required further valuations. In short Mr Barr was both seeking to ensure LTV was in line with the August 2007 agreement, and was prepared to argue for flexibility for the benefit of the Group - hardly the actions of someone seeking to bring down the Group.

[254] On 18 September 2007 BOI wrote to Mr Barr agreeing a mutual position to go forward to both Credit Committees, a position which would have lifted some of the requirements formerly in place, the effect of which would be to release further substantial funds to the Group to assist it with meeting outstanding liabilities. Among the conditions attached to the position agreed between the Club Banks was a requirement for £1.5m to be injected by the shareholders to the Group. This reflects the note following the meeting of 14 September 2007 and the report by Mr Barr following that meeting, but as importantly this was the condition emanating from Bank of Ireland as well as from the Ulster Bank.

[255] In a report by Mr Tony Black, Senior Credit Analyst of the Ulster Bank, dated 18 September 2007, having set out a general overview, including stressing the importance of refinancing of Manchester and the sale of FEL in the context of cash flow, he stressed the need for a significant cash injection. The additional support sought by the removal of some of the previous requirements was to release funds to the Group's current account "to pay creditors", reflecting the e-mail from BOI on the same day.

[256] On 19 September 2007 Mr John Hanson of KPMG was to meet Ulster Bank and BOI to discuss the affairs of the Group. In advance of that meeting, he emailed the Board setting out, inter alia, a game plan, part of which was as follows:

> "3. Highlight the short term cash need to 31 December 2007 and the cash need to 31 December 2008.
>
> 4. Explore all avenues for short term funding and longer term funding.
>
> 5. <u>Ensure imminent cash injection from shareholders</u> (my emphasis) takes threats of legal action away (it is important no winding up positions are presented at all costs). Geoff – can you co-ordinate all legal proceedings, threats etc to ensure time is bought and the most efficient use of cash. Please bear in mind some contingency should be considered to hold some funds back for any other significant events that may arise (I know this is difficult)."

[257] That threat of legal proceedings is evidenced by correspondence from solicitors of various suppliers and sub-contractors and from the advice sought by the Group from Tughan and Co., its solicitors. Efforts were being made to buy time to address potential threats of winding up petitions. This appears to have been considered as a possibility since on 21 September 2007 Tughan and Company were advising on the impact of an insolvency procedure or insolvency event affecting THL in the context of FEL, a SPV with Goodbodys. They were advising that such an event would trigger an offer notice for their shares. Of course any sale of their shares, voluntary or involuntary, (and this was clearly being considered) still left the Taggart Brothers personally exposed on the guarantees, which, according to Tughan and Co., were collateralised by a number of properties held by the Taggart Brothers in their names. The extent of value of the securities pledged is unknown to the court. However, the scope for collaterisation would be considerable given the size of the debt guaranteed – and the inability therefore to access such properties for any other reasons.

[258] On 19 September an e-mail was sent from Mr Hanson to the Board following his meeting with the Club Banks. The salient issues were as follows:

(1) FEL – It recorded BOI's involvement as the bankers in that particular transaction and that in the event of the shares in the Company not being sold, a build out of the properties was to be considered – with the financing requirements that would flow from that. The implication of course would be that there would be no sum available to inject into the Group as provided for in the KPMG report, and in particular the cash flows to 30 December 2007.

(2) The Group debt. Mr Hanson reported that the fact that the Taggart Brothers were putting in funds was regarded by the Club Banks as a positive sign, but that they would want that money to be used for working capital and not to be taken straight out. He reported that the Banks were trying to free up monies in line with lifting some of the restrictions (referred to by BOI and in Mr Black's report) but with the condition that the Taggart Brother funds were going in and were being used to pay urgent creditors.

(3) He then records "substantial progress needs to be made by 5 October otherwise Ulster likely to refer this to their specialised lending unit". I will refer to this latter unit as SLS, the definition given to it in all of the reports and correspondence.

[259] The reference to SLS is an issue of considerable controversy between the parties. Mr Hanson's note sees no such moves before 5 October 2007, but subject to "substantial progress" being made, although he accepts in his e-mail that he could

not define what that phrase meant. Mr Hanson did not give evidence so as to clarify just what was said about the possible role of SLS.

[260] SLS is, as its name suggests, a specialised unit dealing with a small number of accounts on what might be described as a micromanaged basis, reflecting concerns which would not be managed in the normal way. As such it represents the top line of day to day oversight in a hierarchy of oversight of accounts. The referral to SLS in itself should not be an issue for any customer whose affairs, whilst problematical, nevertheless are being managed in accordance with an agreed plan. The consideration of the move of the Group's accounts to SLS reflects I am certain the position reached in September 2007 where, quite simply, the plan proposed by the Group, based as it was on the Group's own projections in August 2007, was well off track.

[261] The controversy revolves around the assertion by the Taggart Brothers that they would not have injected the funds required by each of the Club Banks as a precondition to the Banks altering their terms to allow funds to be made available to ensure winding up petitions against the Group were not presented, nor other legal proceedings instituted, nor subcontractors leaving sites. The Brothers say that entering SLS in itself spelt the death knell of the Group – that in effect the Club Banks were in 'work out', and that in such situations few, if any, account holders survive.

[262] But the question is - had the Group been moved to SLS on or before the injection of funds by the Taggart Brothers on 21 September?

(a) In his report dated 18 September (see paragraph [255] above) Mr Black, at bullet point 5 on page 1, states:

> "As per TER [Trouble Exposure Report] 19/09/07, transfer of this case to SLS is proposed."

Quite how Mr Black could refer to a document dated the day after his document is difficult to understand. However under his recommendations, he states:

> "The disposal of FEL to generate £5m of debt reduction and the refinance of Manchester operations to BOS are key to addressing liquidity issues. We are advised that BOS offer on Manchester was first made at the start of June, and thus has proved protracted. We do not have full visibility, either, on the sale of FEL. Certainly if the refinance of Manchester were not to occur by end of September, it must

> be considered that it may well not proceed, and in those circumstances the transfer of the case to SLS would seem appropriate." (the underlining is mine).

Therefore Mr Black's recommendation regarding SLS was predicated on the decision regarding refinancing of Manchester which at that stage he believed was to occur by the end of September.

This recommendation was to go with reports from other oversight groups (RMT and CRN) to Ulster Bank Credit Committee (CQ) who would make the final decision on a number of matters, including agreement to the relaxation of the conditions to afford further financing to meet creditors, and any referral to SLS. That meeting was not to take place until 25 September 2007, after the injection of funds into the Group by the Taggart Brothers.

(b) RMT (to include Mr Barr) signed off their report on 20 September including its recommendations for the meeting of CQ. No mention is made in the document about SLS at all. Its recommendation states:

> "The BOS refinance is the quickest way to achieve a significant reduction in exposure within the Club facility, but we note the additional comfort taken from management commitment to lodge £5m from the FEL sale. Although management and KPMG view it as highly unlikely that neither the refinance nor the FEL sale will occur, there remains the fall back position of a continued orderly site disposal programme to reduce Club debt."

It can be seen that rather than recommending putting this account into the hands of SLS as part of a 'work out' and the potential dismantling of the Group, RMT, and Mr Barr in particular, were advising that the refinancing of Manchester or the sale of FEL should go through and in any case the Banks' position was secured by an orderly disposal of assets thereafter.

(c) A meeting took place on 21 September 2007 of CRN to address the relaxation of the conditions to allow further facilities to be made available. This received the Committee's approval for recommendation to CQ and the note continues to make the following recommendation:

> "Apart from the proposed cash introduction from the Taggarts we do not have clear

> timescales of when the more significant sums will be received and therefore for the foreseeable future the cash position is likely to remain tight. Close monitoring remains necessary and we support renewal with transfer of connection control to SLS (as ratified by TER)"

The report then went on to recommend that, subject to other conditions, a transfer to SLS should take place. It remained however a recommendation.

Stopping at that point no decision had been made for the transfer of the Group's accounts to SLS. I believe there is therefore nothing inconsistent with the position of the Banks as expressed in Mr Hanson's note of 19 September 2007. At that date only Mr Black's recommendation of such a step, backed by CRN, existed (and then conditional on refinancing of Manchester by the end of September not taking place). There was no such recommendation from RMT. Mr Hanson's email advised that if substantial progress was not made by 5 October then a transfer to SLS was likely. I am satisfied that the Taggart Brothers were not misled by anything that was said at the meeting with Mr Hanson on 19 September. Rather they were put on notice that unless substantial progress was made across a number of matters over and above the injection of cash by the shareholders, then such a transfer was likely.

[263] On the 20 September 2007 there was a Group meeting, recorded in the documents from KPMG. Having referred to Capitalisation '(in a hurry'), seemingly from an equity investor, it recorded that

> 'Michael and John cash injection – now/alleviate creditor pressure/remove any threats of winding up/buy time/loan into which entity/when repayable/contingencies.'

It then states:

> 'Administration – is it possible to ring fence certain entities'

In short, the need for cash immediately was accepted and the Group itself was considering administration in a form where some entities could be ring-fenced. That was the degree of pressure that the Board was under.

[264] The Taggart Brothers introduced £1.4m on 21 September 2007. The court was advised by MT in his evidence that the source of funds was not the sale of any asset, but rather a loan taken out against the security of their respective homes.

[265] CQ met on 25 September 2007. In attendance were Mr John Boyd, Jonathan Milligan and Henry Elvin as members of CQ, Mr Barr and Ms McQuoid from RMT, Mr Andrew Shott from SLS and Mr Stephen Kennedy referred to as "Secretary". The minute is signed off by Mr Milligan as a credit representative on 9 October 2007 with countersignatures (which are illegible but which refer to UBL delegated executive 'CSC' (in each case) on 11 and 15 October respectively.

The summary records as follows:

> "In summary CQ said it is disappointing that we have reached this point. CQ suggested there seems to be a reasonable core business, but Taggart's position has been poorly managed, advised, controlled and communicated.
>
> CQ asked if SLS had been given any particular brief by RMT, and specifically if RMT feel we are now in an exit strategy or if there is the basis to further progress the relationship. CQ member suggested there is potential for the business, and/or relationship, but said first and foremost Taggart needed to deliver on the promises they make on Thursday. CQ said that we are an incidental part of the banking connection, noting we fund only 6% of lending, and suggested that they will not want a relatively minor lender dictating terms and this in itself may drive the relationship dynamic. It was noted that we have taken more than '6% of the pain' by virtue of our role as clearing bank. CQ agreed there was no formal steer being given to SLS from RMT around strategy.
>
> CQ noted however that it is important RMT and SLS develop a working relationship quickly so that the day to day management of cash was not allowed to slip. CQ noted this to be one of the first major property players to go to SLS in the current climate of market slow down, and suggested there are significant implications in how SLS 'played this' in terms of UB branding in the market place.
>
> CQ confirmed unanimous support of Credit Committee subject to RMT and/or credit risk conditions."

[266] The Minute recorded that RMT at that point were continuing to manage accounts on a day to day basis. Mr Shott from the SLS department had advised that the normal procedure is for SLS to meet with the clients, take over the file and that there is then a ten day window prior to formal handing over. It continued:

> "It was agreed RM (sic) should continue to manage the day to day account position. Ms McQuoid suggested that SLS

> should not be involved in the meeting scheduled for Thursday referring to how this might be perceived in the market place, but fully acknowledged that SLS should be involved after Thursday's meeting."

[267] It is clear from the Minute that no steer was being given to SLS by CQ or RMT as to the on-going strategy or the continuing relationship with the Group. Indeed in a note of 27 September 2007 SLS saw itself "being involved in agreeing strategy with RMT". CQ had confirmed there appeared to be a reasonable core business, if managed better, and at least one member of CQ saw potential for the business and forward relationship provided the plan to be proposed at a meeting the following Thursday (28 September 2007) was delivered. Clearly therefore the forward strategy was to a large extent predicated not just on the refinancing of Manchester and the sale of FEL in some form, but on what proposals the Group put forward at the meeting of 28 September 2007, their acceptance and how that agreed plan was carried into effect. This reflected the advices of Mr Hanson.

[268] It is alleged by the Taggart Brothers that prior to their injecting £1.4m into the Group on 21 September 2007 a decision had been made to involve SLS and in doing so that the position of the Club Banks was to proceed to a work out. Indeed the allegation goes deeper than that since MT in his evidence both to this court, to the American court and in various submissions in his affidavits has asserted that as early as May or June 2007 the Banks had determined to liquidate its position in an aggressive manner, starving the Group of funds due under the Agreement. That allegation has been demonstrated to be very wide of the mark considering the steps taken by both Club Banks which I have charted from the spring 2007 through August 2007 - and in particular subsequent to the August meeting.

[269] I am satisfied that following the meeting of the Directors on 13 September 2007 and the meeting on 14 September 2007 between the Banks and Mr Hanson, from whom I did not hear, the Board, including the Taggart Brothers, were fully aware of the Group's perilous position, a position totally unrelated to involvement of SLS. That perilous position was reflected in the immediate demand for funds to meet creditors whose debts were long overdue, including the pressure to avoid the consequences of a liquidation, a step arguably bringing with it a potentially considerable loss to the Taggart Brothers. There were also subcontractors threatening to walk off site. The path being followed by all parties was that the Taggart Brothers would advance part of the monies required, the rest coming from the Banks. The funds were to pay creditors, not repay any borrowing to the Banks, borrowings which increased when the Banks made their contribution. If these had not been the source then the funds would have had to be found from somewhere else, from the Taggart Brothers alone, or by an injection of funds from a third party. The former was never mentioned, despite, on their case, their ability to find the necessary funds from their own resources.

[270] The court has looked to see what steps the Group took immediately following the meeting of 14 September 2007, informed by the advices of Mr Hanson - to see if they shed light on the argument that there were steps that could have been taken, but which were not taken, if the Taggart Brothers had known that the accounts of the Group were to be transferred into the hands of SLS. The documents show that the Group set about looking for those funds and indeed funds to address the black hole in their cash flow over and above the amount required to meet creditors. Not only did they do that in relation to the Group's trading position, including proposed disposals, but the disposal of other assets not belonging to the Group and specifically the shareholdings in Millmount and FEL.

[271] As to steps to be taken as part of the Group's operations, proposals were prepared and contained in a Board Presentation dated 20 September 2007 made available for the meeting on the 28 September. I examine these in paragraphs [279] et seq. below.

[272] As to the position in relation to FEL and Millmount, emails show that on the 21 September 2007 Tughan & Co. was giving advice in relation to the consequences if there was to be an 'insolvency event' affecting THL, and what the provisions of the Shareholders' Agreement in relation to Millmount would allow if 'Taggarts looked to dispose of their equity stake". I believe it fair to conclude that the disposal of any holding in either Company was not one that would allow for funds to be available in a timeframe such as would address the immediate problems of creditors or subcontractors – problems that might well have informed the request for advice on 'insolvency events".

[273] It also becomes apparent that they were entering into negotiation for funds to be introduced by a third party. If those funds were to be immediately available there would not have been any requirement for an injection by the Taggart Brothers themselves from their own resources. On the other hand if funds were to be obtained from other sources which were not readily available, then the stark situation with respect to creditors potentially filing petitions for the liquidation of the Group was immediate and required immediate attention, as was the issue of subcontractors.

[274] I find no evidence that the position regarding SLS would have played any part in the decision of the Taggart Brothers to introduce funds. There was the need for immediate funds. The suggestion that if SLS had been involved at the time of the meeting of the 19 September 2007 they would not have put the monies in defies commercial reality. If it had, then who was going to pay the creditors and the subcontractors? Where was the money going to come from – that is not just the amount the Taggart Brothers were to provide but the amount which would then not be available from the Banks?

[275] Integral to the Banks' position after the meeting of 14 September 2007 and the meeting with Mr Hanson on 19 September 2007, were the proposals of the Group

and the carrying out of those proposals to be agreed at the meeting fixed for 28 September 2007. The Banks' position as to the oversight of the Group's accounts was to move it to its highest level – SLS - but informed as to its future strategy on those agreed steps and performance.

[276] By an internal bank document dated 15 February 2008 it is recorded that the transfer to SLS was not made until 16 October 2007. However, prior to that Mr Shott of SLS was in touch with Mr Hanson. By e-mail on 2 October 2007 Mr Hanson was advised by Mr Ennis that Mr Shott and a Mr Kieran Maloney from what he described as "the Structured Lending Division" (which is SLS) where "coming on-board", although the relationship between the Group and the Banks would continue with Mr Ennis and Mr Barr. The same e-mail stated that Mr Ennis had gone to great lengths to stress "nothing heavy i.e. shutters not coming down". This e-mail was forwarded to the Board on the same day.

[277] Looking forward, all the evidence is that the Banks operated a tight but constructive control over the accounts, one where there were approvals granted for advances over the next 7 or 8 months to meet creditors' demands, to head-off petitions to liquidate the Group, to pay wages and to allow completion of sites.

[278] I am therefore satisfied from reading all of the papers, including the on-going relationship between the Banks and the Group as will be seen in the following paragraphs, that indeed the shutters did not come down, that the Banks continued to work with the Group, no doubt in the interests of the Banks to ensure the maximum value was obtained from the assets held by them as security for their loans, and to meet all reasonable requirements for further advances to ensure the Group was given the best possible chance to survive. I am therefore entirely satisfied that the move to SLS was for the purposes of a more detailed day-to-day oversight of what were troublesome accounts for the Banks, arising from a continuous lack of working capital on the part of the Group. Against that background of constructive involvement, albeit with a view to liquidating the Banks' position, the court rejects the allegation of MT that he and his brother were misled into introducing the £1.4m on 21 September 2007, let alone by any malpractice or deceit on the part of the representatives of the Banks.

[279] On 28 September 2007 the Board made 'a Presentation' to the Club Banks. The copy of the Presentation in the possession of the court has some parts missing but I am satisfied the copy contains the relevant parts for the purposes of the court. A long list of action points were set out in relation to a wide range of properties, including those overseas; short term cash flow was set out on the basis of a long list of assumptions of funds that would become available; and then payments to be made were set out, again based on a number of assumptions. Some of those assumptions are of importance.

(a) A payment of €1.3m for further costs at a development at Trim, is assumed in the cash flow figures to be capable of being staggered over a period:

(b) Under 'Development Project Payments', assumptions are made that payments due will be staggered or deferred:

(c) Under 'Operating Payments' it states:

- Assume catch up payments to suppliers of €2,489,000 are staggered over the first four weeks. <u>The ability to stagger these payments is a key risk</u>: (the underlining is mine)

- Assume corporation tax liability for 2006 is staggered over two payments during the period:

- Assumes preliminary corporation tax liability for 2007 is staggered over two payments in November and December.

[280] The cash flow was based on "critical payments to suppliers of £2,489,000 being paid before the week ending 19 October" – three weeks after the meeting.

[281] The same paper then sets out disposal programmes amounting to some €5.6m. However the vast bulk of these disposals were not scheduled to be completed until late December 2007.

[282] I have picked out the salient matters in terms not just of the cash required, but the cash required within a period of some 3-4 weeks, and then on the basis that they are "critical" and "the ability to stagger them is a key risk". Those are the words used by Mr McHugh in his presentation, and I assume, I believe fairly, had the support of the Board in making that Presentation to the Club Banks.

[283] That risk is graphically borne out when on 17 October 2007 eight statutory demands were served by one creditor against eight of the companies within the Group. These demands were issued only after default in proposals which had been made first in August 2007 and then on 1 October 2007 (2 to 3 days after the meeting on 28 September) offering instalments. Correspondence in response to the Demands challenged that the sums were due, notwithstanding those earlier schedule of payments that had been offered. Indeed advice from their solicitors indicated that there were considerable difficulties in challenging the Demands other than to argue that the proposals had been put forward by someone who was not authorised to do so. Suffice to say that in due course arrangements were made to discharge these amounts on the basis of the sums claimed in the statutory demands. Other proceedings were threatened, including the threat of action which could ground a petition for the liquidation of companies within the Group.

[284] As I said earlier, without the amounts being released by the Banks, a pre-condition of which was the introduction of funds from the Taggart Brothers, it is clear that a real risk existed whereby the Group or several key and active companies within the Group would have faced petitions for liquidation. That view is reinforced when on 26 October a notice to terminate a contract by a subcontractor of a development in Hove in England was served due to non-payment of £416,333 - with the threat of the institution of proceedings to recover those funds. This was over a month from the Board meeting on 13 September when the Board members would have known of this debt, and after the injection of the funds from the Taggart Brothers.

[285] I repeat, in all of those circumstances the court does not believe that the day to day management of the accounts by SLS, even if that had been the case on the 21 September 2007, would have led to the Taggart Brothers not to inject the funds required. To have refused would have been to ignore the serious circumstances then facing the Group and the possibility of its demise.

[286] Returning to the meeting of 28 September 2007 the cash flows presented showed a requirement for substantial cash for core Group operations of £650,000 in the week commencing 23 November 2007, after the introduction of the £1.4m of cash by the Taggart Brothers (then received) and the Club Banks approved relaxation to various covenants which would release £800,000 of additional funding to the Group. A minute from BOI, not Ulster Bank, records the Group's proposed action plans over the weeks following the meeting in order to address that cash position. Over and above the matters referred to above dealing with disposals and the staggering of payments to contractors and suppliers the minute records:

> "1. Progression of the sale of Taggart Estates Limited scheduled to complete by 19 October 2007 – e.g. (the Group) would receive c. £10.7m of cash on completion (albeit £5m of this will be allocated to the repayment of a loan from Pattersons (private investors who provided £5m loan to the GG)), with remaining £10.9m to be received in April 2008.
>
> 2. Meeting to be held with BOSI to determine potential equity release from Yuill's:
>
> 3. Meetings to be held with Goodbodys and other potential equity investors in the Group."

[287] The report also recorded that Taggart Estates (the company holding the shares in FEL) had been agreed for sale to a particular purchaser with a £250,000 non-refundable deposit paid. It was on foot of that agreement that the completion date of 19 October 2007 was included under bullet point 1 above. BOI moved to down grade the Club facility in light of the then current cash flow position and "lack

of management of this position to date evident from within the Group". That position was to be reviewed on 2 November 2007 in the light of the sale of FEL.

[288] I note that in none of the papers or in the presentation of this case has BOI ever been criticised for their involvement or approach to the Group's accounts or in the way the Banks dealt with these accounts. This despite the fact that they were advised at all stages as to the facilities, and certainly from mid-2007 were involved in meetings and decisions as and when they arose. All of the decisions in relation to matters fundamental to the claims by the Taggart Brothers where decisions made by the Club Banks together.

[289] Within Ulster Bank the Committee received the presentation but raised issues regarding the position on the Manchester refinancing. It was noted that at the meeting on 19 September 2007 MT and the Chairman of the Group had met with BOSI earlier that week. The UB report indicated it was understood there was agreement in principle for this refinancing and it was believed that all the information had been provided to allow for that to be completed. This however sits uncomfortably with a number of facts namely:

(a) A handwritten note dated 28 September, the date of the Presentation, records "JH thinks (based on Yuill projection) that BOSI will not able to refinance Manchester". The court assumes JH is Mr Hanson.

(b) A note from Mr McHugh to Mr Hanson dated 9 October referring to "major slippages in Manchester's revenue which are ever increasing up to Christmas", which had just come to his, Mr McHugh's, attention:

(c) An e-mail of 11 October in which Mr McHugh stated that performance targets in Manchester had not just been missed but had not even been close for between 6-9 months.

[290] After the Presentation on the 28 September the internal e-mails of the Group show on-going attempts to crystallise just how much money was needed and, to use the heading of the e-mail string, "how much time does that buy us". The figures appear to have boiled down to either:

(a) £6m if the Patterson debt was not paid:

(b) £11m if the Patterson debt is paid.

I have set out the background to the Patterson debt in Appendix C. The original loan was in fact £4m on 27 April 2007, not the £5m referred to in the BOI minute. However by 21 September 2007, five months after the loan was made, the amount due had risen, with interest, to £5m, with interest accruing at 15% per annum (compounded annually) thereafter. The consequences of non-payment are set out in Appendix C.

[291] Clearly the Patterson debt was concerning the Board, since on 8 November 2007 Letters of Demand were sent to THL and the Taggart Brothers demanding payment of the sum then due of £5,098,629.92 - and pointing out to THL that an "event of default" had arisen. The Letters of Demand enforced the right to the transfer of the 50% stake of THL in Millmount to the Pattersons (with the right of the shares being re-transferred if full payment was made before 31 December 2007).

[292] Therefore, outwith the demand for funds to meet creditors and on-going outlay on the part of the Group, the holding Company was faced with potentially the loss of its interest in Millmount within a period of two months - and the Taggart Brothers were being faced with being exposed to a substantial claim on foot of their personal guarantees to the Pattersons.

[293] Also running in parallel with issues within the Group's facilities with the Club Banks and the Pattersons there is evidence that:

(a) by September 2007 FEL was in breach of its banking covenants leading to a proposal to BOI that interest be rolled up into the senior debt of £75 million; and

(b) there were pressures within Yuill such that renegotiating of its banking facilities would be required and part of the original consideration to be paid for that company which was deferred was pressing (with other legal claims). The issues around Yuill and the problems with it in terms of the obligations of THL - and therefore the demands for each to meet their obligations - are detailed and complex. I have therefore set these out in what I hope is succinct form in Appendix D.

While none of these are matters involving the Banks in their operation of the Group's facilities they nevertheless evidence part of the backdrop to the overall financial situation of the Group.

October 2007

[294] In the documentation available from KPMG it is obvious that they were trying strenuously to raise funds from private investors. A number of extensive documents were prepared for presentation to potential investors. They were looking for information from the Group not just for this purpose but keeping the Banks advised so that all options were kept open. There were constant meetings with representatives of both Club Banks, who were being asked for funding to keep those options open. Mr Hanson was however expressing concerns that information was not forthcoming as to how any such funds were to be used. I am satisfied that the involvement of the Club Banks was constructive. As Mr Holloway from KPMG said in an email to all the Board of the Group on the 18 October 2008, after such a meeting:

> ‘Following the bank meeting today I have some feedback and whilst there is goodwill and consideration will be given to making critical payments on sites we were not prescriptive enough today – the feedback also suggested that we had not prepared sufficiently for the meeting. ….. There were positive signs today but the bank left with a degree of disappointment that there was not enough (unreadable) in the meeting.’

[295] Returning to the period after the meeting of 28 September 2007, on 17 October BOI sought further revised cash flows. Ulster Bank was copied in and they in turn asked for further information in relation to one of the points raised by BOI. These figures were provided in and about 19 October 2007. However cash flow was so constrained that the Group now requested bridging finance of £700,000 to pay contractors and to make what are described in the Facility Letter subsequently issued on 23 October 2007 as “critical payments”. As evidence of the approach to which I referred that facility was agreed against the backdrop of the negotiations which Mr Hanson had advised the Banks were on-going for mezzanine finance of between £6m and £8m. The expectation on Mr Hanson’s part was that this would be raised by 2 November 2007. The bridging loan was required, in the words of Mr Hanson “to facilitate time to allow additional funding to be raised – although specific time frames have not yet been set, the above allows critical payments for around two weeks”.

[296] That risk was real. The documentation shows that on the 19 October 2017 Mr Maurice Diamond, a director of the Group, sent an email to the rest of the Board, stating:

> ‘We are potentially facing a very substantial claim on this site if we cannot make payments. We are at risk of [name of company] ‘determining’ the Contract which will freeze any work on site and result in not only a claim for Loss and Expense but also a claim for Loss of Profits.
>
> Paul, is there no way that the Club Bankers will help us out here? I believe they said it was not high priority as it was not delivering completions until next year. I don’t agree. I feel that if the Contract is Determined it will cripple us and tie up millions on the site for an indefinite period’.

[297] As we shall see funds were made available by the Club Banks to allow for a negotiated settlement of this claim.

[298] In a Facility Letter of 23 October 2007 conditions were imposed in terms of going forward, including a condition requiring greater visibility of key aspects of the Group’s affairs which “might involve third parties in a monitoring and reporting role to the Club Banks”. Mr Hanson sent an e-mail to the Board inter alia setting out the terms and how the Banks were to be informed as to which payments were made. In providing a copy of the schedule to the Club Banks KPMG indicated negotiations

were on-going with sub-contractors under which part of the funds would be used to ensure they, the sub-contractors, returned to the site of a development at Trim, and to avoid immediate legal proceedings in the case of two other sites. They concluded:

> "The company is attempting to find a balance between the avoidance of immediate legal proceedings, keeping key contractors on site, avoiding the determination of contracts which would incur significant future losses, and adding value to nearly complete developments."

[299] The next meeting was held on 26 October 2007. This was attended by all parties including representatives from SLS (UB), the equivalent committee from BOI, KPMG and the Board of the Group, including the Taggart Brothers. The note is initialled "MD" which may well refer to Mr Maurice Diamond, a director who was at the meeting. The salient points recorded in the minute were that:

- Any additional funding would have to be from mezzanine arrangements:
- The situation was "critical":
- That a further Statutory Demand had been received for the sum of £178,000:
- That the sale of FEL would bring in £20m free cash (although there is a reference to the purchaser of FEL putting forward a revised deal which seems to have proposed some deferral of consideration over and above the original figure to be deferred):
- The possible sale of Yuill:
- That the shares belonging to John Taggart could be sold with a loan back of some of the purchase monies.
- It was agreed that the Group were required to come back to the next meeting with a clear strategy of land sales.

A note at the end of the minute entitled "KPMG Meeting after Bank" recorded that the Taggart Brothers made a decision to sell Yuill, although I could find no evidence in the later documents that any such attempt was made.

November/December 2007

[300] The next meeting, again attended by representatives of the Club Bank and KPMG and the Board (other than John Taggart) was on 5 November 2007. The note on the files indicates that it was made by a representative of the Group with references to "can <u>we</u> sell the company?" and "this increases the £700,000 paid by Banks <u>to us</u> last week". The emphasis is mine. At this meeting KPMG reported on the discussions which had been taking place aimed at obtaining an injection of between £8m to £10m (the preferred number being £10m), the plan being to "get a deal this week and money next week".

[301] Four other matters are of interest:

(a) Under a heading "Kinsealy" the note states that there would be a "push for Letter of Offer". No mention is made in the note as to the price. However what is on the papers is that on 22 October 2007, some ten days before the meeting, Kinsealy had been valued by separate valuers, not at €21m but €13m. The writer of the note commented that the result of that valuation "would be to blow LTV out of the water".

(b) I can find no mention in the note of FEL. However 3 days earlier, on 2 November 2007, in an e-mail to Tughan & Co., Mr McHugh advised that "FEL has collapsed in all its guises".

(c) I can find no mention of Manchester other than a reference to the sale of Yuill "to be discussed internally this week" – a decision apparently having been made by the Taggart Brothers to sell this company as per the note after the meeting on 26 October 2007.

(d) Under the heading "Critical Payments" the Group had asked the Banks present at the meeting for £900,000 and not £862,000 as projected for the meeting. It continued "This increases the £700,000 paid by Banks to us last week".

[302] Notwithstanding that the meeting on 26 October 2007 referred to all additional funding coming from mezzanine finance, in the absence of such finance being available the Group were again short of cash. Following that meeting the Banks agreed a further loan of £100,000, the repayment of which, together with the previous additional payments, was to be made on 23 November 2007, the new projected date for the injection of funds.

[303] It is asserted by the Taggart Brothers in written submissions on their behalf that the outcome of the meetings in September 2007 was to make available all the funds then undrawn under the Banks facilities without restriction – save that there was no breach of LTV. The court can find no evidence that would support such a claim, a claim that would have required a fundamental shift in the position of the Club Banks from the inception of their facility arrangements. All the meetings to which I have referred point in a totally opposite direction. The Group had to return to the Banks for their agreement to make periodic amounts, which would have been unnecessary if such an agreement had been made. Even then those amounts were tied to Mr Hanson's attempts to obtain mezzanine finance from third parties within time scales measured in weeks. I have concluded that this may be a further manifestation of assertions made at times by MT that he saw the overall facility as one pot from which he could draw no matter what the purpose of each compartment was constricted to address.

[304] All of the above meetings and the steps outlined paint a serious picture confronting the Group, namely that notwithstanding the injection of funds by the

Taggart Brothers: the relaxation of the terms of the facility arrangements to allow further payments to be made: the attempts being made to raise funds from financing of Manchester, the sale of FEL, and the disposal of assets, and the advances made by the Banks, the August 2007 plan was right off course. The Group were being threatened with winding up petitions: they were seeking an arrangement to stagger payments to creditors and sub-contractors: and they were faced with a sub-contractor terminating a contract and a statutory demand for over £400,000. Even their solicitors were threatening to stop work unless substantial outstanding legal fees were paid.

[305] During the course of this judgment I have been stopping at various points to take stock and see just exactly where the court finds itself in relation to allegations made against the Banks by the Taggart Brothers that they, the Banks, were the reason for the difficulties facing the Group. By the beginning of November 2007 it is quite apparent that the only thing keeping this Group afloat and keeping it from liquidation based on demands by creditors, was the agreement of the Banks to advance funds over and above those which they were contractually obliged to provide. I accept that it would have been in the Banks' interests to ensure the Group survived, and that developments on land held by the Banks as security should be completed since this would generate substantially more funds than if those developments were not completed. As was stated in one Minute, the Banks saw themselves as locked in to advancing funds over and above their contractual liabilities in their self-interest.

[306] However that does not detract from the fact that looking at all of the steps taken from May 2007 until November 2007, apart from the introduction of £1.4m on 21 September 2007, monies borrowed against their homes, there is no mention let alone any step taken by the Taggart Brothers to introduce any of the funds which they stated they had in abundance. In written submissions on their behalf it is asserted that in late September/early October 2007, if the Brothers had 'not been fundamentally misled', they could have repaid the amount due to the Club Banks <u>in full</u>. To have any semblance of credibility the court would have to consider how they would have allowed the situation to arise whereby

- The real threat of the liquidation of several of the key, active companies in the Group would ever have been allowed to arise.
- The meeting of directors in September 2007 was addressing how the Group could survive.
- The situation would have arisen that, since June 2007 or earlier, creditors would have been kept waiting for months for payment, leading to subcontractors threatening to walk off site;
- The Banks were being asked to make periodic critical payments, incurring charges and interest, when apparently the cash was available;
- KPMG were hunting for investors to meet a hole of millions of pounds in the Group's cash flow identified since at least August 2007;

- In not one note of any of the frequent meetings over this time, which included BOI as well as the Ulster Bank and Mr Hanson, was there any suggestion that the entire debt, not just enough funds to stay within the agreed facilities, was available for payment.

[307] Indeed looking forward it was only late in the day in 2008, that any reference is made to the introduction of funds from the alleged sources. Apart from the possibility of the sale of JT's shares in the Group and the loan back of the proceeds to the Group as part of a package of funds from a third party, it is only at that late stage is there evidence on the papers that the Taggart Brothers proposed the sale of assets belonging to them, and then in a proposed restructuring which would have seen creditors getting nothing. I will come to this later.

[308] The position is that either those funds were not available or alternatively they were available but the brothers chose not to introduce them to avoid all of the above problems and others. Instead they have chosen to lay the entire blame at the door of the Banks.

[309] This is also a convenient point to address another part of the written submissions made on behalf of the Taggart Brothers that in "late 2006 and into 2007 a negative attitude evolved within the Banks' credit department towards Taggart Group which was not communicated to the Taggarts/Group Board". There is no evidence to substantiate such an allegation. Instead the evidence points to the Banks being concerned that the Group was not complying with their obligations under the various Facility Agreements and, despite communicating those concerns as I believe the evidence I have rehearsed to date shows, the on-going failure on the part of the Board to address these. Those concerns were shared by the main person involved with the banking arrangements, Mr McHugh, and were in turn communicated by him on various occasions to the Board. For reasons best known to the Board, including the Taggart Brothers, and for reasons not disclosed to the court, they chose not to take steps to meet their obligations and indeed compounded them by ever increasing excesses. The problems which were inherent in that attitude gave rise to the role of KPMG in June 2007 and are evidenced in the report from KPMG in August 2007. The issues identified in that report did not arise overnight or indeed in the months immediately prior to it. They had been growing from the beginning of the year. Indeed, from late 2006 and into early 2007 it was Mr McHugh himself who was stressing the issue of cash flow, particularly in the context of a change of strategy whereby a land bank approach was increasing, inherent in which was the absence of cash flow from such assets until such times as they were sold.

[310] Rather than taking a negative attitude which might have been to prevent any excesses from as early as 2007, with the return of cheques issued at times in the knowledge that would lead to excesses, the Banks sought to co-operate, but on conditions which, on the evidence I have seen, were either ignored or which did not trigger action such as would have allowed them to be addressed. And all of that, on the basis of the argument put forward by the Taggart Brothers, in circumstances

where they had ready access to very substantial funds, even to the point of being able to liquidate the Club Bank facility in full at any time – including up to and including September/October 2007.

[311] I believe from this point on I can address progress in more general terms than hitherto since a pattern is established. The approach adopted by Club Banks during September/October 2007 continued during November and December 2007 with further advances being made for critical payments of wages and other liabilities of £50,000 on 28 November 2007; £100,000 on 3 December 2007; £597,706 on 12 December 2007; £276,000 on 19 December 2007 and £280,000 on 19 December 2007.

[312] In each case the advances were made in the context of the continuing negotiations by KPMG for mezzanine finance from a number of sources. They continued to give periodic updates to the Club Banks. As each further payment was made, the times for repayment of that amount together with the previous periodic payments were extended to dates before which it was believed by KPMG would allow further financing from third parties to be available.

[313] Again during November and December 2007 the documentation shows continuing demands being made on the Group in particular from the tax authorities both in the United Kingdom and the Republic of Ireland; and of course the repayment of the Patterson debt by 31 December 2007 was approaching.

[314] This action is of course against the Ulster Bank, which has at its heart fierce and personal criticism of Mr Barr in his handling of the Group's accounts. But the banking facilities related to the Club Banks – that is it included the Bank of Ireland, who have not been criticised in any way by the Taggart Brothers in these proceedings. Nor is there any allegation that they did not understand 'the business', a claim which would have been difficult to make given the role of BOI not just as one of the Club Banks, but also as the main bankers for FEL. It is as if it is suggested that BOI played no part in the handling of the Group's affairs. Nothing could be further from the truth. In the preceding months it is clear they were present at meetings, for example with the Board and Mr Hanson. The evidence is that their input was sought in respect of all steps which the Banks were being asked by the Group to support. At all times they were clearly considering their position, not least since in their own individual capacity they had advanced funds for other developments. So we see that in a memorandum dated 18 December 2007 it is recorded that there had been a net reduction in the debt of £5.3m, mirroring the amount set out in the projected sales referred to in the Presentation in September 2007. At that point the Club Banks' exposure was some £30m but on a worst case scenario, with the appointment of a receiver, it was estimated there would be an anticipated loss of just under £7m to the Club Banks. An internal memorandum from the equivalent of SLS it was recorded that:

> "Cash flow projections prepared by KPMG, on a worst case basis, highlight an immediate funding

requirement of £10m. Whilst we understand creditors could be stretched further if the Company was in a position to make some upfront payments, there is a significant and immediate funding requirement. KPMG have been seeking to secure an equity/mezzanine investor at a level of circa £8m for 6-8 weeks and currently in discussions with three parties."

[315] The details of the parties to possible mezzanine financing were set out, including a Mr John McCann, to whom I will come shortly. However, the note recorded that there was minimum information on the proposed investments and delivery within the required timeframe was considered remote. While there was agreement to paying a substantial sum to meet wages on 21 December2007, reflected in the advances referred to in the previous paragraph, BOI in December 2007 were preparing for potential insolvency of the Group if mezzanine/equity injection was not available.

[316] The involvement of BOI and its stance as to the running of the Group's accounts gives weight to the view that the approach of the Banks throughout was in accordance with reasonable and practical banking practice and until the end of 2007 was based on supporting the continued trading of the Group albeit on a different scale and within a different structure.

[317] The note crystallises the cash needs of the Group going forward but also the upfront payments which required immediate funding. Again, there is no indication that apart from seeking funds from a third party, which had now been ongoing for some time without coming to fruition, funds were being offered by the Taggart Brothers notwithstanding their ability, on the submissions made to the court, that even in October 2007 they could have discharged the entire debt due to the Club Banks.

Introduction of funds from January 2008 onwards

[318] On 21 December 2007 a further email from BOI to KPMG (copied to the Ulster Bank) noted that Mr John McCann had advanced some £750,000 by way of an unsecured loan to the Group that day. The representative from BOI wrote that while this was a positive sign, there could be no question in any negotiations with any third parties for the advance for monies by way of mezzanine loan or equity that the Club Banks would agree to release any part of their security.

[319] This process of further advances and negotiations for the introduction of funds continued through January and February 2008. The documents show what appears to be significant progress with Mr McCann, including the possible sale of the shares of Mr John Taggart - initially at or about the price of £17m with a loan backed by him to the Group of some £14m, £6m of which would go to trade

creditors. By 15 February 2008 the projections from KPMG saw the Club Banks repaid by the end of May 2008, regarded by the Banks as optimistic

[320] On 18 February 2008 Mr Shott, of Ulster Bank SLS, stated in his report:

> "5. Funding Request
>
> All sales proceeds are being used for debt retention.
>
> It is requested that £325,000 of funding is made available to finance complete work at TRIM and fund further sales.
>
> 6. Conclusion
>
> The cash position within the company is critical and equity is needed for the business to survive.
>
> The bank strategy remains to reduce debt via asset sales, and funding the build out of sites against contracted sales. Clearly better prices are being achieved from sales than if the business was in administration, and so the investment from Friends First would be positive, as it will provide some stability.
>
> The management continue to remain co-operative."

[321] The funding request was recommended by Mr Shott and later agreed by CQ. The reference to "Friends First" related to part of the package being put together by Mr John McCann.

[322] By 21 February 2008 Mr McCann's offer had been restructured to allow certain obstacles to be removed in relation to assets held by the Club Banks as security, although even then Mr McCann and the Taggart Brothers accepted that further finance may be needed to be raised if all the assets were to be held that were currently in the Group. Mr John Taggart's shares would be transferred, but seemingly at a lower price than formerly suggested, and then with some part of the consideration to be dealt with through an earn-out agreement. However, the money paid to JT would be re-introduced by way of loan with the aim, as before, of making a substantial payment to trade creditors.

[323] Of some interest in the offers that were being considered and put forward by Mr Hanson on behalf of the Group was the possibility for the repayment of the Kinsealy debt by re-financing of Kinsealy by Mr McCann. This apparently had come about as a result of internal negotiations with the Taggart Brothers. This does beg

question as to why Kinsealy was involved since MT has been adamant throughout that since early 2007 it had already been repaid. I have approached this in that part of the judgement set out in Appendix B.

[324] The response of the Ulster Bank is found in a report from Mr Shott on 22 February 2008, on this occasion dealing with a funding request of £575,000 - £75,000 to complete houses already contracted and £500,000 to build out as and when contracted sales arose. He recommended that payment be made and in due course it was sanctioned. His conclusion again remained that the Bank's strategy was to reduce debt via asset sales, and funding the building out of sites against contracted sales – as evidenced by the response to the request. As before, he acknowledged that better prices were being achieved from sales than if the business was in administration, and "the pending equity investment would be positive as it would provide some stability".

[325] Whatever else can be said, the attitude of both of the Club Banks continued as before to advance funds and to resist any step towards receivership or liquidation in order to allow the Group, and in particular the Taggart Brothers, to continue with its operations into the future. This reflected MT's argument that there was long term value in the Group. Notwithstanding what appeared to be "a deal" in late February 2008, negotiations on a cash injection continued. While the Club Banks continued at times to sanction funds, they were not without their concerns. Again I have considered the view of BOI, not a party to these proceedings. On 11 April 2008 they advised Mr Hanson and the Board that:

- The piece meal funding of the Group was unacceptable.
- They had raised concerns that funds which had been promised to be introduced had not been introduced.
- They were expressing concern that a winding up petition had been served by the tax authorities in the Republic of Ireland on Taggart Holdings Ireland Limited.
- They were asking for visibility as to the extent and timing of the Group's funding requirements and proposed cash injection.
- They asked for a full list of creditors analysed by age and the proceedings, if any, that had been issued.

BOI made it clear that unless projections were based on realistic/deliverable assumptions and those were received urgently BOI "would be unable to consider further funding requests".

[326] Notwithstanding the above the Club Banks continued to assist with an advance of £304,000 on 15 May 2008 to allow for the completion of the TRIM development.

[327] On 19 May 2008 KPMG presented a proposal to the Club Banks in relation to the on-going funding of the Group, supplemented by a further paper two days later

on 21 May 2008 making some adjustments to the original paper. The main components were:

- The sale of the shares in Taggart Estates (formerly FEL) with completion expected in June 2008, with funds then introduced to reduce the Club debt, fund working capital and a loan to assist with WIP and interest.
- The sale of Kinsealy with a hoped for completion in July 2008 at a price of around €10m.
- The introduction of funds from Mr McCann.

This deal as structured saw funding being required in July 2008 and October 2008, but with a repayment of the Club Bank debt by November 2008.

[328] Running in parallel with these events was a review by BOSI in relation to Yuill – see Appendix D. The bank had concluded that unless THL introduced funds to meet breaches of Yuill's facility terms and to meet £2.075 million of deferred consideration due to the vendor of Yuill to THL, TNE, the subsidiary of THL which held the shares in Yuill, would face insolvency, and a receiver or administrator would require to be appointed.

[329] On 26 June 2008 THL advised BOSI that it could not make the payments and MT advised that there was no cash available to invest in either TNE or Yuill.

[330] In an internal note made by Mr Shott (SLS) on 12 June 2008 he advised the cash flow showed a funding gap of some £2m over the next 4 months – presumably the July 2008 through to October 2008 dates referred to by KPMG. He advised the Group had been told any funds made available would only be used to build out where a value was added, but not for the payment of credit arrears or overheads. His aim was set out in the following terms:

> "The bank's strategy will continue to be to seek debt reduction from asset sales, financing the build out of the active sites as and when sales are contracted, assuming we can get some assurance around the short term survival of the business.
>
> The cash position within the company is critical and a further injection of cash is needed. The bank's strategy remains an exit strategy, preferably via an orderly wind down, through asset sales, but if necessary via appointing a receiver."

[331] However, by 7 July 2008 an internal memorandum of BOI referred to the source of funds (I believe Mr McCann) of £4m since December 2007 would no longer be available. In the absence of that funding it was the view of <u>BOI</u> that the Group was insolvent.

[332] This was certainly the view of Mr Diamond, a director of the main Board who, on 4 July 2008 sent an e-mail to the rest of the directors, Mr Hanson and Tughans, in which he stated that following a meeting with Mr McCann on 27 June 2008, and poor offers for Manchester properties, the Group could not make its cash flow work. He recorded the various meetings between the meeting with Mr McCann and the date of his e-mail, and referred to the advice of Mr Hanson, with which he agreed, that Receivers should be called in. That position was reinforced by legal advice from two firms of solicitors. Mr Diamond's view was that the Banks should be asked to appoint receivers, but noted that MT had indicated he would not do that as he was still working with Mr McCann to achieve refinancing. In those circumstances he resigned his directorship and attributed the position of the Group to "the current economic climate being in such a decline". There was no attribution to the Group's position being the responsibility of the Club Banks.

[333] MT did continue in his quest to find investors culminating in (a) a contact being advised to the Club Banks on 28 July 2008 who was keen to look at the proposition of investing and (b) Mr McCann on the same date returning with a new offer in writing, clearly drawn by his lawyers.

[334] There is nothing on the papers to assist the court in what might have been involved in the possible new investor referred to in sub-paragraph (a) in the preceding paragraph, but the written offer from Mr McCann involved:

- The purchase of the Club Banks securities in Northern Ireland for the sum of £8m. However, in order to protect the proposed purchaser's position from many potential creditors of the company the sale would have to be structured though "a suitable form of Administration/receiver or liquidator".
- The purchase of the Club Banks securities in the Republic of Ireland for the sum of £10m (with an up-lift formula), but on the basis of the Banks retaining the debt.

On 15 August 2008 a report from Mr Shott (SLS) recommended the acceptance of this offer.

[335] I again stop to examine an issue raised in evidence that on 30 July 2008 a note from Mr Shott relating to the bank's strategy and a reference to a receiver having been lined up. However, if anything, BOI were ahead in relation to any such possible course of action. An internal note of 7 July 2008 advised:

> "Taggart Holdings Group
>
> - In the absence of third party funding Group is insolvent.
> - Club Banks seeking co-operation/agreement of Directors for a formal insolvency process.

- BWC briefed as potential administrators/LPA receivers. Clearance received from Group Internal Audit.
- Downside for Club Banks in insolvency estimated at £6m to £8m (50/50 BOI/Ulster)."

The note then went on to deal with Taggart Holdings Belfast One Limited an SPV Goodbodys.

[336] In addition, given that earlier that month Mr Diamond, Mr Hanson and two firms of solicitors advised the Board that such a step should be taken, it would have been more remarkable if the Banks were not also considering that option and setting preparatory steps in progress.

[337] At this point, in the absence of any funds coming from Mr McCann or indeed from any source, including the Taggart Brothers, the Group was regarded as insolvent. There had been no firm offer of an injection of cash on the table, Mr McCann having stopped introducing cash. The Banks foresaw a loss of around £6m. Other than MT's faith in obtaining a white knight to rescue the position it can hardly be surprising that after months of negotiating for such an injection since September 2007 (ignoring the supposed recapitalisation programme and other refinancing proposals which had come to nought) the Club Banks were each preparing (i) to ensure their losses were minimised and (ii) they were in a position to protect their interests.

[338] On 28 August 2008 a Mr Anthony Carey entered the email string following a meeting with Mr Kieran Maloney (SLS) the previous day. He presented a one page summary of a case that he wished to put forward on behalf of the Taggart Brothers to the Banks on the basis that they would be better off if they supported the Group, rather than proceed down a route of receivership/liquidation. Inherent in the proposal or structure was the Taggart Brothers either charging personal assets or selling them – seemingly in Luxembourg and Florida although family homes were also referred to – with the proceeds being advanced into the company.

[339] This possible way forward was not dismissed out of hand by Mr Maloney. He spoke to the Board seeking further information about the assets that were proposed to be made available and other information in relation to the proposal. On 1 September 2008 Mr Carey again wrote, this time acknowledging that the proposal could involve a problem relating to bridging between the time of the Banks undertaking further advances and the introduction of any such funds from the Taggart Brothers' assets. However, inherent in the proposal was a further issue which required to be addressed and that was the other creditors of the Group. This was dealt with by him in the following terms:

> "In order to make the above workable Taggarts would have to provide you with:

- Indication that a scheme had been agreed with old creditors – they will be told that their money is lost and they should participate in an attempt to get it back.
- That any of the old creditors – whose services are needed – would participate and only seek payment from the (1) account for current costs approved by you.
- Indication that on-going costs have been reduced to a minimum – but that the company can still operate to enable you to realise your assets."

He concluded by acknowledging a lot more detail was required but sought a reaction in principle.

[340] Nothing further appears on the papers available to the court in relation to this matter. Clearly without each creditor's agreement the Group were wide open to individual actions, including petitions for the liquidation of the Group. In those circumstances it perhaps is easy to understand why not just the Banks but Taggart Brothers would not wish to introduce funds. The court also suspects that if such an approach was feasible it would have been considered by the two sets of solicitors in July 2008, in both of which there were specialist company rescue skills.

[341] The court does not require to record any further steps after this date since no further successful steps were taken to avert the appointment of administrators in respect of the Group.

[342] The court does not require to record any further steps after this particular date since no further successful steps were taken to avert the appointment of administrators in respect of the Group.

Conclusions

[343] At the outset of the judgment I refer to both the witnesses who gave evidence and the large number of documents, all of which inform my decisions. The respective positions of the parties are contained in their written Opening Statements and in their Closing Submissions on the evidence. I am very grateful to all counsel for the comprehensive arguments and counter-arguments which have been of great assistance to the court.

[344] As reading my judgment will show I have used the documentation to act as a road map allowing me to identify:

- What issues were arising and when?
- Who knew what and when?
- What people were involved at various stages and what they were saying?
- What steps are documented as being planned and/or undertaken? and
- What representations were being made by the parties and others?

[345] The documentation has also allowed me to use it as a touchstone to test the assertions of witnesses in their evidence both in court and in affidavits sworn by them in previous proceedings. That has allowed me to address the credibility of those witnesses, and in turn to address the respective claims and counter-claims.

[346] It will be seen that I have structured the judgment in a chronological order commencing in late 2006 through to the appointment of the administrators of the companies in the Group. As I have moved through the evidence chronologically, I have drawn conclusions on the credibility of witnesses in respect of a particular matter, and either the position or the conclusions I had reached at that point in time in relation to claims and counter-claims. This incremental route has then allowed me to gather together those conclusions to arrive at my final determination.

[347] There are three areas covered in my conclusions, two specific and one general. The specifics are the Second Kinsealy Guarantee and the 2007 Guarantee – as defined in my judgment. The general area is that which covers the basis of the claims made by the Taggart Brothers against the Banks.

The second Kinsealy Guarantee

[348] I have addressed this matter as a separate, freestanding issue. Rather than involving it in the general narrative of the judgment itself, I have set it out in a separate appendix – Appendix A. At this stage I need only set out my conclusions which are contained at paragraph [55] of Appendix A namely:

- That the First Kinsealy Guarantee related solely to any liability that arose on Facility 11 in its ordinary operation.

- That no consideration was afforded by the Banks either to extend the circumstances in which the personal guarantees could be enforced; or the increase in that amount from €4.08m to €4.30m.

- At best therefore the extent of the Second Kinsealy Guarantee is any amount due on Facility 11 and no further.

- Atlantic Wharf was not 'the site', the proceeds of which were to be used to reduce or extinguish the amount due under the Guarantees

- Notice of the above changes regarding the increased fines should have been given to the Taggart Brothers. However, the questions on which I will hear argument are:

  - Whether the Banks can rely on an assumed knowledge or consent on the part of Mr McHugh to the change? or

  - Can the Banks rely on a presumption that the Taggart Brothers had the potential to be aware of the change through the operation of the various Group bank accounts? or

  - If the Taggart Brothers were aware that the loan existed at the time of the execution of the Second Kinsealy Guarantee, can the Banks rely on that knowledge?

    - A calculation should be carried out as to the impact on Facility 11 if the repayment schedule had not been altered unilaterally by the banks.

    - As I set out in Paragraph [56], in the event that a determination is made that on some basis an amount is due under the Second Kinsealy Guarantee, there may be issues in and around the absence of separate independent legal advice, and what was or was not told by Mr O'Loan to the Taggart Brothers at the time of signing the documents. This would require to be determined in a different forum. I believe this could be dealt with very quickly given the fact that proceedings against Tughan & Co by the Taggart Brothers had been held pending the outcome of these proceedings, and the issue is a nett one. The parties could be invited in due course, if necessary, to allow this aspect of the arguments to be decided by myself after a further hearing.

The claims in the Taggart Actions (to include the 2007 Guarantee)

[349] The court can only fully address the financial status of THL as it relates to its dealings with the Club Banks. While there is some knowledge of, for example, Yuill and its financial position and banking covenants, the court does not have an intimate knowledge as to the position in relation to SPVs entered into by the Group with other parties – and how they were faring at any particular time. What is clear in relation to the Group is that there was a shift in their strategy as far back as early 2006 which underlaid a push for growth. A number of areas of that strategy by their very nature – apartments or land purchased for the purpose of adding value through planning – made no contribution to the cash flow of the Group. In addition, as can be seen in the judgement, house building numbers were declining in both parts of Ireland, a hitherto valuable source of cash flow. Overarching these considerations was of course the requirement to service the interest on the various accounts in respect of the borrowings which reached close to £40 million.

[350] Even in respect of house building the Group had to find, first of all, part of the purchase price (since the Land Bank account contributed no more than 70% of that price) and secondly a contribution to work in progress since the draw down from the WIP account was only allowed as to 70% of the certificates. The issue of cash flow or cash resources was being raised within the Group itself from 2006. It retained KPMG at the end of 2006 to look at the question of recapitalisation and, as time went on, refinancing. Even accepting that the Taggart Brothers and the Group had a nett value and even if that was substantial, it is self-evident from the paper trail as set out in the judgment that this Group needed cash and that was known to the Board from 2006.

[351] A quick snapshot of the evidence shows that the position of cash was seen by the Financial Director in early 2007 as "dire" – and the Board were fully aware of this as it moved from one problem ("crisis" – not my word) to the next problem. It arrives as will be seen in the judgment at a point where creditors were left waiting for their money for long periods of time, and that there was a growing number of cases being referred for legal proceedings, including Statutory Demands which would provide grounds for petitions to liquidate the Group. Indeed, it arrived at a point where sub-contractors were threatening to leave sites, and in some sites did leave.

[352] The snapshot shows that it reached a stage in June 2007 where KPMG, against the wishes of the Financial Director, were retained to give transparency not just as to the Group's then position but its future position – a transparency hitherto missing despite the requests for information of projected cash requirements by the Banks. It also reached a stage earlier than June 2007 when strategies were being considered by the Board to address these very cash requirements. This led to a decision in March 2007 to refinance the Manchester Company, and in so doing to take it out of the Club Bank facility.

[353] In June 2007 FEL (Fraser Estates) was seen as a route to the injection of capital for a sum of upwards of £11m – although latterly there is an indication to which I will come that building out Fraser Estates had not been abandoned as a possibility.

[354] All of these issues were obvious to the Board, not least since their Financial Director was constantly telling them about them. They did not need to be told by anyone, the Club Banks or anyone else, that they had severe cash problems, problems which as far as the Club Banks were concerned were giving rise to more frequent and greater excesses over the facilities agreed between them. LTV, whatever its problems with calculations, is acknowledged in the Opening and Closing Statements on behalf of the Taggart Brothers to have been breached on occasions. That added to the Banks' concerns. However, it was not the sole, let alone the major, issue that Mr Michael Taggart sought to make it throughout his evidence.

[355] While protocols, or good manners, might have required direct contact whether with the Taggart Brothers personally, or the Board or other representatives, the documents show a series of meetings involving the Banks' representatives and the Board (including the Taggart Brothers) where the agendas and the outcomes recorded show the wide range of concerns being communicated face to face to the Group by the Banks. These issues did not arise out of the blue one day in June 2007, but rather were a constant, ever present set of issues requiring decisions to be made to get the cash position of the Group stabilised and the Group recapitalised.

[356] To the above I conclude, again as evidenced from the documents and the evidence of Mr Michael Taggart, that he and the Board throughout all of the relevant period were aware of the Banks well documented concerns through Mr Michael Taggart's confidant, Mr McHugh, the meetings of the Boards and meetings with the Banks.

[357] I can however turn to more specifics in relation to the conclusions that I have reached.

(a) The facility afforded by the Banks to the Group was not a general facility. Rather it was compartmentalised in a series of individual loans for specific purposes, on specific terms, and where necessary with specific methods of repayment. On occasion MT sought to argue it was a general facility. That was entirely wrong. The fact is that if some money was left in a particular compartment it did not mean it was available for purposes other than that ascribed to it in the Facility Agreements. Any change could only be with the Banks' consent, and then on the terms which they attached to that consent.

(b) "Unzoned Sites". These were introduced into the definition of LTV by the Facility Letter of 9 June 2005. The reason was that until then there had been no such sites. This was fully known to the Board and to Mr McHugh. As will be seen in my judgment I find no grounds for the Group believing that these would be included in LTV calculations.

(c) LTV calculations were based on specific criteria linked (a) to the loans made by the Club Banks to the Group, and (b) the securities held by the Club Banks over the assets of the Group. Any other loans or any other assets are of no relevance. MT at times seemed to portray a belief that as long as the overall asset value of the Group exceeded its overall debts, there was no other problem. That is wrong, and there was and is no basis for believing that this was to be the basis of the calculation of LTV.

(d) At paragraph [44] and [45] I record as follows:

> "[44] Juxtaposing the above two matters, the perceived attitude to the overall facility, and the approach to the value of the Group, could lead the

court to conclude that MT took a view as regards the Club Banks facilities that the Group could effectively do with the facilities what it wanted, and that the Banks should not be worried since overall the Group had more than enough assets to pay them off, even if they did not have any security over them.

[45] It is difficult to categorise that approach. I do not believe it can be regarded as naïve given the experience of MT and indeed all others on the Board of the Group. It does however suggest a somewhat cavalier approach to the banking arrangements. Indeed, as we shall see, that potential attitude is more than reflected in the way in which excesses were allowed to manifest themselves on a regular basis, for substantial amounts, and where the Banks were being asked to provide funds from some of the compartments for purposes that they were never designed to service."

(e) I am satisfied that from 2006 the Banks were seeking extensive information of management accounts and forecasts, all of which they were entitled to under the Facility Agreements. I am also satisfied there was a failure on the part of the Group to address these requests adequately right through to the end of June 2007 when KPMG were appointed to prepare the in-depth report to which I have referred earlier, in order to afford the transparency of the Group as it then stood, and the position going forward.

(f) I am satisfied that from the outset the Board was fully aware of the demands they faced with regard to cash flow. I am satisfied that throughout the virtual daily contact between Mr Gary Barr (and latterly Mr Elvin and Mr Ennis) the concerns of the Banks were well known, without any necessity for them to be put in writing.

(g) To meet the specific complaint of the Taggart Brothers not being directly approached (rather than indirectly through Mr McHugh, the Finance Director, who was the person identified in the Facility Agreements as the conduit for the relationship), they were at a number of Board meetings, meetings with KPMG and meetings with the Bank at which all of these matters were discussed and, whilst at times the documentation is sparse, what documents are available show they were fully engaged with those concerns.

(h) I am satisfied that excesses occurred before the start of 2007 but grew in frequency and size through the first six months of 2007.

(i) My conclusion as to what was shown in the documents to be the position at the end of the period January to March 2007 is set out at paragraphs [99] and [100] in the judgment. There I state:

[99] In those circumstances I believe the Directors, including the Taggart brothers, would have known, without being told, that any lender would have considerable concerns as to the operation of the Group's accounts, not least in the absence of highly relevant information which was long overdue. In the event the documents show that Mr Barr was looking for information and expressing concerns.

> [100] It also begs the question – with so many assets available for disposal in a buoyant market, why not bring the Group's cash flow into line by injecting funds, not necessarily by way of equity capital, but by way of loan, subordinated if necessary? The amounts in question were not necessary to discharge the full £50m Facility, but to allow the accounts to operate as they were meant to under the Agreement, an agreement revisited and renewed barely six months before the end of March 2007. Given the Taggart Brothers' ability during the relevant period to sign personal guarantees committing them to a liability of £80m each, the amount required to satisfy the problems with the Club Banks' accounts would have been very modest. On their own case it was entirely in their own hands to overcome any problem. It appears they chose for reasons undisclosed not to do so.

(j) Based on the documents my conclusions as to the position at the end of April/May 2007 are set out at paragraphs [134] – [135] of the judgment, namely:

> "[134] Therefore by late May 2007:
>
> - The refinancing of Manchester was on hold pending a response from the Group. However, as Mr McHugh had acknowledged, the refinancing OTCs (outline term conditions) were giving difficulties not least in respect of the requirement to introduce £4.3m of equity, which hinged on the recapitalisation of the Group.
>
> - BOSI were still raising questions as part of their due diligence in respect of Manchester.

- I could find no mention in any of the documents or evidence as to the position of capitalisation, save a general comment in an email from Mr McHugh asking BOSI if the introduction of capital from another source which would reduce the Taggarts' share below 50% would cause any difficulties to BOSI; and

- The Group was considering the disposal of FEL in order to release a substantial sum after tax to the Group after such a sale.

[135] On the general financial front it is worthwhile standing back to reflect the position as it has unfolded up to and including the beginning of June 2007, since it forms the backdrop to events throughout June, July and August 2007. The picture disclosed to the court is one which could be considered somewhat chaotic, if not out of control, with no evidence of any attempt, let alone any action, to correct the problems in the short term. I am satisfied that the Board, including the Taggart Brothers, were fully aware of the position, yet in the absence of any evidence to the contrary, were taking no meaningful steps to deal with that short-term or medium term problem of cash flow, nor any meaningful steps to bring their banking agreements and covenants under control. It was not the case of having to raise funds to discharge all the Club Banks borrowings but rather keeping the current account within its limit without recourse to other facilities earmarked for other specific purposes, and to correct the transfers from that account. If the Taggart Brothers and the Group were each in a strong financial position, was the absence of dealing with this position with the Banks because they could not or would not take the necessary steps?

(k) Before turning to June 2007 I refer to my conclusions as to the two cheques stopped by the Banks on 5 June 2007, referred to in the plaintiffs' Opening of the case as "the first indication of concern, prior to which the Banks had been supportive and had agreed to waive breaches of LTV and overdraft limits". In summary I make 2 points:

- Such a view, and the conceded view of the Banks' support to that date, flies in the face of the assertion in the Closing argument that "a negative attitude had evolved from late 2006 into 2007 which was not communicated to the Board".

- That it flies in the face of the events and communications that form the basis of my conclusions on the Group's affairs through to and including the end of May 2007.

[358] I have concluded that the return of the two cheques played no part in the subsequent problems of the Group leading to its administration. I do so for a number of reasons:

(a) No evidence was given to me by anyone as to any adverse reaction by suppliers at that time as a result of the two cheques being stopped.

(b) In a meeting with the Banks on 8 June 2007, (to which I come in my judgment) the issue of the return of the cheques was not raised by Michael Taggart – on his evidence.

(c) The amounts were paid within a day or so.

(d) The KPMG report dated 6 August 2007 states in respect of Northern Ireland customers, Republic of Ireland customers and Manchester customers that at that point there were over £2m of cheques being held back for what was described in that report as owing for amounts "long overdue to suppliers". Indeed at that point in the Republic of Ireland and Manchester contractors were said to have been close to walking off sites. This chimes with earlier warnings from Group representatives in Dublin, and undermines assertions made by Michael Taggart in American depositions when he attributed concerns of suppliers and contractors to events in August 2007.

I agree that even if there was no legal requirement to advise the customer that cheques would be stopped, in the circumstances of this case where these cheques were written and issued in full knowledge of funds not being available, and when the Group knew it was well above the amount over which the Banks had not taken such action but had warned about it, the Banks were fully within their own rights to return these two cheques.

(e) In June 2007 issues and concerns reached a climax in the appointment of KPMG with a wide remit to report on the Group's affairs. I will return to the outcome of that when I deal with the Report which was dealt with at a meeting of the Board of the Group in August 2007 and at a meeting between the Group and the Banks on 8 August 2007. At this point however I turn to the question of the 2007 guarantee signed on 8 August 2007.

The 2007 Guarantee

(f) The evidence of MT in regard to this was flawed, inconsistent and implausible. That criticism is compounded by an opening affidavit sworn in the context of the Order 14 proceedings, and executed long after the Guarantee was called in, in which by omission a totally false picture was given to the court as to the background of the requirement for the guarantee and its execution. The evidence is further compounded by what I consider to be answers in his cross-examination falling short of the truth as to the receipt

of pre-action letters of demand. I have set out all of my reasons for reaching my conclusions in paragraphs [166]-[185] which rejects the Taggart Brothers' assertion that the seeking or giving of the 2007 Guarantee was either unnecessary or linked solely to LTV. In addition, in respect of a supporting argument, based on a suggested interpretation of Banks' documents, I have set out in Appendix B my reasons as to why such documents support the Banks' case rather than undermine it.

I therefore determine that the 2007 Guarantee is perfectly valid and binding and that the amount due under it is fully owed to the Banks by the Taggart Brothers on a joint and several basis.

(g) At paragraph [186] I take stock to comment that by the beginning of July 2007 the Banks had consistently been meeting excesses arising from payment of overheads of this Group and other outgoings which allowed it to carry on its building operation, payments out of funds earmarked for a completely different purpose – and were continuing to be asked to provide these funds in the absence of any such funds from the proprietors/shareholders of the Group.

(h) By 6 or 7 August 2007 the KPMG report was available to the Board of the Group, and was discussed by it at a meeting with the Banks on 8 August 2007. This was a critical meeting since the Report, based entirely on information provided by the Group, purported to set out its financial position as at that date and annexed calculations of cash flow to the end of 2007 and beyond. It disclosed debts of over £2m due to creditors, many of which "were long overdue". It showed negative nett cash flow even with the inclusion of funds from the sale of FEL and the removal of the Manchester facility, which would follow from its long awaited refinancing. At paragraph [208] of the judgment I set out the key issues addressed by the Report including consolidated cash requirement, creditor pressure, development activity and forecasting.

At paragraph [210] of the judgment I refer to the fact that the accountants, with the benefit of the figures given to them by the Group, referred to "the current cash crisis". The major and paramount concern was lack of cash. Cash flow could not meet the demands of the business even with the removal of Manchester and the injection of FEL money. Indeed, the Group were looking for further support from the Club Banks in what appeared to be a request for a re-negotiation of the facilities with the Banks on the basis that the Group required more cash. At that stage LTV was not even mentioned. The Accountants said that without that cash the Group would not be able to pay its debts as they fell due.

At paragraph [211] I record that I believed this reflected the position which had become obvious over the previous months including the excesses, the comments of Mr McHugh, the pressure from creditors and the bounced

cheques – all clear signals as to what this Group required. According to the Taggart Brothers the provision of such funds was easy. By the sale of assets whether within the Group or outwith the Group, this could be put right virtually immediately, certainly as regards the facility which sat at £40m or otherwise. Yet despite all of these issues being present over the previous months culminating in the advices from KPMG, no obvious steps were taken. The responsibility for that cannot lie with the Banks, but firmly and squarely on the shoulders of the Board of Directors of the Group. To insist, as MT did throughout, that LTV was the central issue, to the exclusion of everything else in relation to the financial status of the Group was either disingenuous or reflects in the case of MT someone who either was not taking on board the information and advices he was being given, or was ignoring them.

Added to the above picture, contradicting the continuing assertion of MT that only LTV was an issue, the court has set out in the judgment emails from Mr McHugh on the day before the meeting of 8 August which:

- cast doubt on the refinancing of Manchester, notwithstanding that this particular facility was shown as disappearing within 4-5 weeks in the cash flow projections prepared by KPMG; and

- not only cast doubt over the projected sale of FEL, but even commented that it might not be sold.

These issues, fundamental to the basis of the ongoing relationship between the Group and the Banks were not communicated to the them, and for the reasons I have set out in my judgment at paragraph [216] there is prima facie evidence that they were not disclosed to KPMG.

(i) By early September 2007 it was clear that the Group was running into substantial cash problems. In an email of 10 September 2007 the amount of outstanding creditors was estimated to be £2.2m, and the documentation makes clear that substantial sums had been due as far back as June and July 2007. By this stage the question of bridging finance was on the table. A proposed Restructuring Plan created by the Group and dated 11 September 2007 showed Manchester as by no means secure and FEL likely to fall through. Without the input from these sources Mr McHugh's own calculation in a report of 14 September 2007 showed cash shortfalls arising to over £8m by November 2007. Creditors were serving Statutory Demands which could ground petitions for the liquidation of the Group; contractors were threatening to leave sites; and legal advice was being taken about the impact of insolvency proceedings and insolvency events – which could have had ramifications for the SPV in relation to FEL.

(j) In April/May 2007 Taggarts had entered into a SPV for the development of a site in Millmount. The deposit of £4m was borrowed from Patterson Brothers

on terms which saw interest escalating substantially and an end game whereby their shareholding in the SPV could be taken off them. The repayment of that loan was due by January 2008. By September 2007 this was causing Mr McHugh concern and indeed in late 2007 the Patterson Brothers exercised their rights, which was only staved off by a settlement utilising outside funds in early 2008.

(k) From 2006/early 2007 THL was also in breach of an Investor Agreement entered into for the purchase of the shares of Yuill, the building company in North East England. THL was in breach of its banking covenants through its failure from early 2007 to inject £3m into the company, and also through 2007 and into 2008 it defaulted in payments of millions of pounds in respect of the deferred consideration due to the vendors of the shares in that company to THL. None of these amounts were in the event ever paid and that investment was lost with a residual debt of several million pounds due to the financing bank.

(l) The Taggart Brothers introduced £1.4m on 21 September 2007. As I record at paragraph [268] of my judgment it is alleged by the Taggart Brothers that prior to that injection a decision had been made by the Banks to involve their special lending unit known as SLS. The Taggart Brothers allege that in doing so the decision of the Club Banks was to proceed to a workout and that the Banks had determined to liquidate their position in an aggressive manner, starving the Group of funds due under the facility agreements. The allegation is that if the brothers had known a decision had been made to involve SLS they would never have injected the £1.4m. However, that injection was made in the context of the Banks also injecting funds by way of permitting borrowing from compartments not designed for that purpose. The joint purpose being to meet the immediate and immense pressure from the creditors to which I have just referred and the threat of proceedings which could have led to petitions for the liquidation of the companies. None of these monies went into the Banks to reduce the borrowings. Rather the indebtedness to the Banks rose to avert the very consequences which would have severely prejudiced the Taggart Brothers.

As I have said the allegation is made that a decision had been made prior to this agreement on their part to introduce the funds, a move they said which would be the death knell of the Group. They alleged that they were misled (or more accurately Mr John Hanson was misled). I cover this scenario in my judgment. At this stage it is sufficient to say:

- Mr Hanson did not give evidence, and in his report to the Taggart Brothers following the relevant meeting the prospect of the involvement of SLS was clearly set out.

- While recommendations were made by committees in the lower regions of the Banks' credit structure, the committee making the ultimate decision did not do so until after the introduction of the funds.

- No steer was given by that committee to SLS as to how to progress the relationship between the Group and the Banks.

- If the funds, not just from the Taggart Brothers, but also from the Banks had not been injected, the Group was faced with a number of creditors potentially presenting petitions for liquidation.

- After SLS was involved they are shown to work closely to assist the Taggart Brothers salvage their position by the introduction of funds from third parties – with indications from time to time of agreement on the part of the Banks to certain proposals if they had indeed progressed.

- As one of the elements of the future injection of third party funds involved Mr John Taggart agreeing to inject loan funds of over £8m at one stage over £11m from the sale of his shares to the new investor, notwithstanding that SLS was involved.

I reject the argument that the potential involvement of SLS (or even if SLS had been involved and the Taggart Brothers had known it before introducing funds) played any part in their decision to introduce these funds. For the avoidance of doubt I am satisfied that there was no attempt to mislead Mr Hanson, nor is there any evidence that he was misled.

(m) The evidence through the later part of 2007 until the administrators were appointed did not disclose steps on the part of the Banks to prevent any refinancing by the Taggart Brothers. Certainly the Banks were proceeding on the basis of realising their securities to their best advantage. However, that included permitting further borrowings by the Group to keep sites alive. It involved giving time for the Group to find its white knight with the assistance of KPMG.

(n) By July 2008 the advice of the lawyers, KPMG and one of the Directors of the Group was that the Group was insolvent – that Director attributing its decline to "the economic climate". Nowhere until these proceedings was the blame in any form led at the door of the Banks – Banks who represented at most 15% of the total borrowings of the Group.

[359] The above conclusions were guided by the documentary trail and in turn that has enabled me to test the credibility of the witnesses – added to which there is as ever the assessment made of the general demeanour of any witness in answering questions particularly under cross-examination. Before moving to my final decision

of the facts in the claim against the Banks by the Taggart Brothers I will make some comments as to the evidence I received.

[360] In the case of Michael Taggart I have set out his general background at paragraphs [27]-[30] of my judgment. In summary I am satisfied that he is and was at all relevant times an experienced businessman, whose business activities involved him in extensive dealings with financial and lending institutions. I am also satisfied that he was the dominant figure throughout the life time of the Group, a person of determination and ambition. That is not to be seen as being critical, rather that I have concluded that if, notwithstanding the existence of Boards of Directors, if Michael Taggart said that something should happen it did, and if he said that something should not happen, it did not. His demeanour in the witness box showed him to be a careful man who took his time to read all documents to which he was referred. He showed himself to be in total command of all events and circumstances surrounding all matters with which the court was dealing, and I believe the full ambit of the Group's activities.

I have no reason to dispute that the Group was a high value commercial enterprise operating successfully in the building, construction and land development field. As the central figure in the Group's expansion Michael Taggart had an intimate knowledge of the state of the Group's business at all times, having access to all facts and information as to the daily operation of all aspects of its affairs. He was in constant, seemingly daily contact with his Financial Director, Mr McHugh. He would have received all notices, agendas and papers circulated for board and other meetings, many of which he would have attended. In respect of those which he did not attend he would have received briefings and minutes. I am also satisfied from his evidence that he was acquainted with all discussions that took place and representations that may have been made from time to time, as is inevitable in all business relationships, particularly as regards to the position with the banking facilities and the discussion between the Group's employees and the banks. In short I am satisfied he was aware at all times what was going on within all divisions and subsidiaries of the Group and that his role was not just strategic but operational.

[361] It will be apparent both from the judgment and in some of the remarks I have recorded in these conclusions, where I have referred in relation to specific events and issues, that I have been highly critical of his evidence - which I have described variously as partial, implausible, inaccurate and I believe at times falling short of the truth, either by way of omission or more directly. It gives the court no pleasure to come to those conclusions. It recognises the undoubted trauma and distress that the descent from great success to virtual ruin must have had on him and his family. The events occurred during a time of a febrile market in land and property – which with the benefit of hindsight was unsustainable, and I venture to suggest should have triggered alarm bells for anyone with any professional insight, if only at the degree of price inflation and the level of debt being incurred.

[362] Standing back - everyone, not just developers but lending institutions, played their part, although the more experienced and more informed the borrowers the more the responsibility lay full square on their shoulders as to their actions. In this case the Banks seemed to have acted with a greater lack of restraint in terms of breaches that might be the case when dealing with those of more modest circumstances. On reflection where concerns were to be put in writing they were not – but that did not arise from some conspiracy or deceit but rather, I suggest, laxness, probably borne out of a close, personal and daily relationship. But what such shortcomings did not do was to shield the Group or its Boards or its employees in particular the Taggart Brothers from any of their problems, or the concerns of the Banks.

[363] I believe it is a human trait that where we encounter problems we seek to remember things as we hoped they were, rather than what they were – and after the passage of time this can sometimes come to a point where we believe those recollections, even if they are incorrect. I believe Mr Michael Taggart sought to shape events to what suits the case he wants to make – seemingly always laying the blame at the door of others, not himself. At times listening to him I concluded that he believed that what he was recounting was accurate, even in the face of insuperable evidence that it could not be.

[364] However, even allowing for that precipitous fall, and even allowing for what otherwise might be a bona fide and genuine mis-memory, to achieve his end, to make his case, he needed a scape goat – he needed to personify the blame he attributed to others. He chose the bank official most closely involved with the Group's affairs. In particular, perhaps inevitably given his constant involvement with the Group affairs, he centred his accusations primarily on Mr Gary Barr. To make his case Mr Barr has been portrayed inter alia as deceitful, as someone who hides facts from those above him, and someone who did not understand the Group's business – all highly personal derogatory criticisms. To a lesser extent, but nevertheless as personally, Mr Ennis and Mr Elvin are criticised.

[365] In adopting this course Mr Taggart does himself and Mr Barr a considerable dis-service. It is quite clear from the documents, some of which I have recorded in this judgment, that Mr Barr went the extra mile to help this Group through the cash crises of its own making. He went out on a limb time and again to support the Group even when the evidence is that understandings given to him as to the correcting of excesses and other breach of covenants were not fulfilled. That approach has been used as a weapon against him by those who over time consistently ignored or breached their obligations.

[366] I have found no evidence to sustain those criticisms, particularly those against Mr Barr. The theme of these were that he was "obsessive" about the Group and in particular the Taggart Brothers – presumably implying some great personal antipathy, not just to the corporate identity but as I say the Taggart Brothers. If he was greatly concerned as time went by, then that was understandable. If he did

become annoyed or had feelings of having been let down, the grounds are there for all to see why he may well have had such feelings. But there is no evidence that up to the beginning of October 2007 when he stepped back from dealing with the Group's accounts, his actions or approaches to this Group were negative, let alone malign.

[367] Of course the one criticism that rightly can be made was the decision, and I believe it was a decision given the steps required to be taken, to access the Facebook account of Mrs Taggart. That action was crass. Even given the fact it occurred long after his involvement with the daily affairs of the Group, and even against the backdrop of highly personal attacks on him by the Taggart Brothers, that action on his part was indefensible and something of which he should be thoroughly ashamed. However, it does not in any way impinge on the issues with which the court has to deal, namely his attitude and actions and those of the other bank officials during the course of the Group's activities up to the date of the administration in 2008.

[368] It will be apparent from everything that I have said, and the conclusions that I have set out (all of which are set out in greater particularity in the judgment itself) that I found no evidence of mendacity or deceit on the part of any official in the Banks, or that any of them made any misleading statement to the Taggart Brothers or any member of the Group in connection with the facilities or the operation of those facilities. It remains a mystery to the court as to why two highly intelligent businessmen with seemingly considerable wealth, when faced with what in the scheme of their affairs were relatively modest financial demands to put right the covenants they entered into with the banks, did not take any steps to do so. Signals were flashing red from the beginning of 2007, if not the end of 2006. It stemmed from a strategy that they chose to adopt from the middle of 2006. That strategy required cash flow and additional financing of which the Board were fully aware at the end of 2006. That manifested itself right through 2007 and 2008, and yet apart from the granting of the 2007 Guarantee and apart from the introduction of £1.4m in September 2007, there is no evidence that any of that wealth which the court was told was so readily available was ever introduced into the Group.

[369] The bases of the general claim by the Taggart Brothers against the Banks are set out in the Opening prepared by the plaintiffs in this matter supplemented by their closing submissions on the evidence. The skeleton arguments set these out as follows:

(i) "The absence of any concerns being expressed to the Taggart Brothers or the Taggart Boards", supplemented in the closing argument by the allegation of the absence of any such concerns being expressed in writing. I find that there are no grounds to substantiate this claim. Indeed the evidence is that they were fully aware throughout of those concerns. The absence of writing at any time claimed was of no consequence given the meetings that were taking place, and the other contacts with the Group.

(ii) "The absence of any direct contact with Michael Taggart". I reject this assertion or that it forms the basis of any claim against the Banks.

(iii) "The absence of any notice being given about the two cheques which were returned in June 2007". I have rejected this claim and find that there is no evidence to indicate that the stopping of the cheques in any manner adversely affected the Group in its operation, or that it contributed in any way to the eventual putting of the Group into administration.

(iv) "The ability not just to meet any excesses or breaches of banking covenants if required at any time from personal assets, but the ability indeed to fully pay any amount due to the Club Banks under the Club Facilities". If true, it was because the Taggart Brothers chose not to utilise those assets to meet their obligations.

[370] The above determines the evidence as it relates to the Taggarts' Actions, the 2007 Guarantee, and the Second Kinsealy Guarantee. I will now afford both sides the opportunity to read and absorb the judgement and then fix a date for review

[371] I will reserve the issue of costs until such times as all matters have been dealt with.

APPENDIX A

The Kinsealy Guarantees

[1] This section of the judgment addresses the circumstances in which the First Kinsealy Guarantee was taken and subsequently replaced by the Second Kinsealy Guarantee.

[2] For the purposes of determining the terms of the First Kinsealy Guarantee I have considered the email traffic, the draft documentation and the internal reports of the Banks prepared by RMT and CRN and the evidence given by the witnesses.

[3] The court's conclusion as to the liability of the Taggart Brothers under the First Kinsealy Guarantee has not been assisted by what in my opinion was confusing wording in documentation, a confusion which I believe can only be unravelled by a consideration of the internal bank documents, evidencing what would appear to be the Banks' intentions, on the one part, and the advices given by Tughan & Company, Solicitors, to the Taggart Brothers in relation to the First Kinsealy Guarantee, on the other part.

[4] The issue of any potential involvement by the Club Banks in the purchase of Kinsealy arose on 17 October 2006. At that time Mr Barr indicated to Mr McHugh that the Banks would "pass" on this potential banking facility. Kinsealy was purchased for €19m and, as I have stated above in paragraph [62] a Notice to Complete was served by the vendor in circumstances where it appeared the Group had not put in place their full funding requirement. There is some indication that they had a potential facility for 70% of the purchase price, but it is clear that they were seeking 100%.

[5] When it was made clear that the Banks had time to consider the possibility of banking this purchase, further work was carried out and on 24 October 2006 a recommendation was sent to CRN. The report, as it related to Kinsealy, contained the following assertions and recommendations, namely:

> "Drawings on the Club facility are expected to increase significantly in the short term given that the proposed draw down of €19m to assist with the acquisition for €19m of a residential development in Kinsealy, Co Dublin. Further details on the site are included in the "Current Transaction" section below.
>
> The request to draw down for Kinsealy will result in a temporary LTV breach at 74.5% which will be regularised by increased site fines on completion of contracted site sales at the Group's on-going residential developments in

Ballycarry, Co Antrim, (known as Forthill) and Trim (known as Rushford Manor) as detailed in the "Security" section of this paper. We are also proposing to take a J and SPG from the shareholders (Michael Taggart and John Taggart) to cover the temporary LTV breach."

The reference to 'J and SPG' is to joint and several personal guarantees.

[6] Further in the report it then states:

> "Club Facilities
>
> Kinsealy Site Acquisition
>
> We are proposing to provide a new B9 €2.15m loan to Taggarts to assist with the purchase of a residential development site at Kinsealy, Co Dublin, for €19m (agreed off-market). We are advised that Lisney have valued the site at €21m (bank satisfaction with their report is a CP of draw down). The proposed B9 loan is UB's 50% share of the required €4.3m equity requirement for the purchase. It is proposed that balance of purchase monies of €14.7m (€7.3m each bank), being 70% of the value of the site to be drawn from the existing A9 land-bank loan facility.
>
> Proposed margin of the B9 loan is 5%, reflecting the fact that drawings on this facility will result in an LTV in excess of the covenant. A 1% draw down fee (UB share €95k being 1% of the total UB funding requirement) will also be charged."

[7] Further in the report under the heading of "Security" it states:

> "We include at Appendix 4 an LTV Schedule which shows a current LTV of 69.8% (excluding a short-term refundable VAT bridger of £714k in relation to a recent site purchase).
>
> On this basis LTV at proposed exposures including the Kinsealy site and related debt is 74.5% which is 4.5% in excess of covenant. Our calculation attributes no value to two un-zoned sites in Kinnegad which were valued at a combined total of €7m last year. We note BOI include these sites in their security calculations at €7m, and on this basis, LTV at proposed exposures would be 69.3%,

and therefore within covenant – we are not proposing to include these values within our security calculations.

To achieve a reduction in LTV to within 70% covenant, we are proposing to take additional site fines from the Forthill and Rushford developments where a total of 83 units are now contracted for sale. Required additional site fines to repay the €4.3m are £25k or €36k from each of the contracted units. Taggarts have provided us with an expected completion date for each unit in these developments and on this basis we would expect LTV to be back within covenant by March 2007. It has also been indicated that a site will be sold in the near future to reduce LTV.

To further protect our position, we are also proposing to take a J and SPG from MT and JT for €4.3m, being the amount of the two banks equity contribution to the Kinsealy acquisition."

[8] Under the heading "KP Key Risks/Policy Exceptions" it states:

"**Loan to Value/Security**

LTV is currently 69.8% (excluding the £714k refundable VAT bridger). The proposed draw down of loans for the acquisition of the Kinsealy site would result in an LTV of 74.5% as shown in Appendix 4.

Regularisation of the proposed LTV breach will achieved from increased site fines from the Group's Forthill and Rushford Manor schemes. These two schemes comprise a total of 170 units of which 120 are contracted for sale (37 Forthill, 83 Trim). Almost all of the remaining units are either not yet released or are booked with contracts out for signing.

The proposed additional site fines for these 120 units are €36k/£25k per unit. We have proposed to review this repayment structure if any existing sites are sold or re-valued. Taggarts have provided us with a schedule of expected completion dates for the two schemes which, if met, will result in steady reduction of the LTV with regularisation by March 2007."

[9] Based on the report a recommendation was then made by Mr Barr, Ms Maureen McQuoid, a Mr Harry Elvin, representing RMT.

[10] On 25 October 2006 CRN approved the proposed loans (4.3m euro in respect of the equity input and the balance in respect of 70% of valuation from the Land Bank Facility) subject to a satisfactory report from Lisneys, satisfactory report from the Planning Consultant and the execution of the joint and several personal guarantees from the Taggart Brothers. The valuation report and the consultant's report were received and were satisfactory.

[11] In the body of the recommendation and approval from CRN under "Risks" it states:

> "**Risks**
>
> *Liquidity*
>
> Headroom within the Hunting Line (A9) has remained tight since the acquisition of the Kinnegad site based on the overarching 70% LTV covenant given that we have attributed no value to it in our calculations until planning is received (BOI do include this site). Following the proposed acquisition under consideration here LTV will move to 74.5% and therefore in breach of covenant. Waivers sought on basis that an accelerated site fines repayment programme at the Forthill and Rushford developments will achieve a return to covenant compliance by March 2007, in addition a further land bank site will be sold in the interim. It is of further comfort that the two principals have agreed to provide J and S Personal Guarantees for €4.3m being the total of the two banks' equity contribution into the deal. These PGs to remain until such time as this element of the debt sought is repaid."

[12] Reading the Banks' documents together there appears to be a contradiction in what the personal guarantees in respect of Kinsealy were intended to address. As stated above the financing was split into two sums, €4.3m as part of an equity input, and therefore a new facility, and the balance which would be drawn down on the Land Bank Account (Hunting Line). This amount represented 70% of the purchase price, 70% being the limit imposed in respect of that particular facility. It is accepted in both documents that LTV would overshoot to 74.8% and therefore a mechanism was devised whereby LTV would be brought back below 70% by taking additional site fines over and above the amount to which the Banks would normally have been entitled under the terms of that facility.

[13] In the report from RMT it quite specifically refers to the First Kinsealy Guarantee as being required to "cover the temporary LTV bridge". On the face of it therefore if the Banks had retained the additional site fines, to an amount which would allow the LTV to reduce to 70% - which they calculated to be in March 2007 – the guarantees would lapse. An additional approach would be from the sale of a site, not defined at any stage through all of this process, presumably, although not stated, where an amount over and above that required to discharge any advance from the Loan Bank Account for the acquisition of that site, was available to bring LTV into line.

[14] However, as can be seen above in paragraph [11] CRN expressed the role of the First Kinsealy Guarantee in different terms, namely that it would "remain until such time as this element of the debt sought is repaid". This element of the debt can only refer to the sum being advanced under Facility 11 as an equity injection, not the draw down from the Land Bank Account. There is therefore nothing in the CRN response which links the guarantees to a reduction to below 70% of the LTV, either by reference to the site fines or to the sale of a site.

[15] While negotiations were proceeding in relation to provision of the necessary facility to purchase Kinsealy, the conveyancing process was also continuing. The conveyance in fact was into the name of Taggart Homes (Kinsealy) Ltd ('THK'). The facility letter, dated 27 October 2006 was addressed to the Directors of Taggart Holdings Ltd ('THL') and its subsidiaries as set out in Annex 1 to that letter. THK was included in that Annex. In fact this company was not a subsidiary of THL, instead the shareholders were the Taggart Brothers. Nevertheless the funds were advanced to THL/THL (Ireland) who then made what they considered to be an intercompany loan to THK. The documentation reflected the supposition that THK was a subsidiary, in that THL and all of the subsidiaries completed Deeds of Accession and THK executed a Debenture over its assets, including the Kinsealy site.

[16] Jumping ahead for moment in 2007 it became apparent that an error had been made and that I am entirely satisfied that it was this error and nothing else that sets the backdrop for the steps then taken to replace the First Kinsealy Guarantee, with the Second Kinsealy Guarantee. I will come to that shortly.

[17] On 27 October 2006 a facility letter was sent, as I have stated, to the Directors of Taggart Holdings Ltd and its subsidiaries. The terms were made supplemental to the Agreement and a number of intervening Facility Letters to the Agreement, but now incorporating the Kinsealy facility. Facility 11 is referred to at page 2 of the letter as:

> "11. €4,300,000 for Taggart Homes (Ireland) Ltd."

[18] Under the heading 'Facility', Facility 11 is referred to as a "demand loan for €4,300,000, the borrower being Taggart Homes (Ireland) Ltd" and under paragraph 3 headed '**PURPOSE**' it states that it was "a new loan facility to assist with the

funding of the acquisition of a site at Chapel Road, Kinsealy, Co Dublin." Of greater significance to the issue now being considered were the provisions in relation to repayment of this facility contained in paragraph 6 of the Letter where, in reference to Facility 11, it states:

> "This facility is to be repayable on demand. Interest payments are to be met as they all (sic) due. The facility shall be repaid at €36,000 (or sterling equivalent) per completion at the Forthill and Rushford Manor development or from the sale of a site, whichever is the earlier."

[19] Nothing in the letter refers to the role of LTV - specifically the role of the payments of the additional amounts from the sites at Forthill and Rushford Manor or the sale of "a site" are not referred to in the context of LTV. To all intents and purposes reading this document in isolation would lead the reader to believe that the repayment would be repaid as set out in this schedule. Certainly given the number of sites contained in these two developments, the amount of €4,300,000 could have been repaid from this source alone. As to repayment by way of a sale of a site, that clearly would depend on what site, what price and what "equity" would be left after payment of any amount to the Loan Bank Account attributable to the original purchase of that site.

[20] As part of the documentation to complete the facility the solicitors for the Banks and for the Taggart Brothers addressed the terms of their personal guarantees. Amendments clearly show that whereas initially "indebtedness" would have made the Taggart brothers liable for all liabilities of Taggart Holdings Ltd to the extent of €4,300,000, this was amended, an amendment which was accepted, to restrict the liability to the repayment of the amount due under Facility 11 to the extent of £4,300,000. As would be expected there was no reference in the guarantee documentation as to the way in which that indebtedness was to be repaid, but the provisions of the 27 October 2006 Facility Letter were incorporated by way of recital.

[21] In none of the correspondence between the solicitors nor in the personal guarantees was any reference made to the guarantee being "temporary" in the sense that it was expressed in the RMT report, namely until LTV was brought back under 70%.

[22] On 26 October 2006 in an email to Maurice McHugh, Mr O'Loan of Tughan & Company, solicitors, set out in a note the principal points for the Taggart Brothers to be aware of when entering into the guarantee – a copy of which was attached. It pointed out the change from an earlier draft sent by the solicitors for the Banks curtailing the obligations to €4.3m facility being provided to Taggart Homes (Ireland) Ltd in respect of the Kinsealy transaction. It confirmed that the brothers were guaranteeing the repayment of the €4.3m together with interests and costs, with no limit on the amount of interests and costs for which they may be liable. The

guarantee was to be in addition to any other security the Banks then held and then the note continued:

> "The guarantee continues in effect until all of the sums guaranteed are paid – as pointed out above, Michael and John are guaranteeing all of Facility 11 to the Bank so this means the guarantee will be in effect until all of Facility 11 is repaid or discharge (sic)."

It then goes on to explain their liability in certain other circumstances, not relevant to the present matter under consideration.

[23] I am satisfied that whatever proposals or representations were being made by RMT as to the role of the guarantee in relation to LTV, the personal guarantee, based on the 27 October facility letter, reinforced by the legal advices given by Mr O'Loan, provided for the personal guarantee to remain in existence until the full amount of €4,300,000 plus any accrued interests and costs was paid.

[24] We now know that a number of such payments by way of increased site fines were credited to Facility 11 by the Banks in accordance with the terms of the Facility Letter. However, that situation was to change, seemingly on a unilateral decision by Mr Barr on behalf of the Banks. In addition it has been argued on behalf of the Taggart Brothers that the sale of a site at Atlantic Wharf in Londonderry in January 2007, sold at a price upwards of £5m more than its valuation in the LTV calculations, and therefore clearly well in excess of any amount that may be payable to the Land Bank Account attributable to the original purchase of the site, was a source of funds to effectively liquidate Facility 11. Suffice to say at this stage the funds were not utilised for that purpose.

[25] I am satisfied on the evidence, including that of the Banks' own witnesses, that when the change was made in relation to the site fines, the interests of the Taggart Brothers were never considered, let alone taken into account either directly with them or indeed with Mr McHugh on their behalf. With the stopping of the taking of the site fines and with no other funds from any site being utilised, Facility 11 was not reducing, instead the site fines and all other funds were being lodged to the other accounts of Taggart Holdings. Without more, the effect was that First Kinsealy Guarantee became a guarantee for all of the borrowings of THL to an extent of €4.3m plus interest and costs. Such a situation was totally contrary to the original purpose of the First Kinsealy Guarantee, whether one addresses that through the eyes of RMT or through the eyes of CRN.

[26] I referred earlier in my judgment (at paragraph 35(c)) to clause 78 of the Agreement that "transfers between accounts shall not be affected without reasonable prior notice being given to the Borrower". I will return to the knowledge of Mr McHugh, and potentially the knowledge of the Taggart Brothers, in a moment, but it will be necessary for the court to decide what the legal consequences are for this

unilateral change to repayment of Facility 11, particularly in relation to the site fines, and its impact, if any, on the liability, or the extent of the liability, of the Taggart Brothers under the First Kinsealy Guarantee.

[27] I then turn to the question of whether Atlantic Wharf was the "site", or could be considered to be "a site", referred to in the repayment schedule in the Facility Letter of 27 October 2006. Factually:

(a) By letter dated 13 December 2006 the solicitors acting in the sale on behalf of the Group wrote to the Ulster Bank advising that they were enclosing a cheque for £3,199,903.07 representing one half net balance purchase monies in the transaction and asked that it be lodged "to the credit of the account of Taggart Homes Ltd in settlement of your bank's existing mortgage/charge on the above property. It then confirmed that they were sending a similar cheque to the Bank of Ireland. This of course would have been substantially greater than anything required to discharge the original amount due on the mortgage on the purchase of the property, but there is no indication that the solicitor had instructions from any source to divert these funds, or any part of them, to the credit of Facility 11; and

(b) On 4 January 2007, acknowledging that all of the proceeds had been lodged to the Land Bank Account, a specific request was made by the Group to transfer £1.2m of those funds to the current account of THL. That not only diverted part of the funds to a source other than Facility 11, but at no point in the documentation or in the evidence has any indication been given of an instruction to the Banks to transfer any part of the funds of Atlantic Wharf to the credit of Facility 11.

[28] In the earlier stages of the proceedings relating to the €4.3m Guarantee created initially by the First Kinsealy Guarantee a number of affidavits were filed by MT, some of which referred to the First Kinsealy Guarantee. Affidavits were also received from Mr John Taggart and from Mr Maurice McHugh. In the context of the repayment of Facility 11 there is no mention in any of the affidavits by any of the deponents as to the use of monies from Atlantic Wharf for this purpose. I would have expected that if the argument was that there was no debt to be guaranteed, because the amount in Facility 11 had been discharged, this would have been the first line of defence raised, and the source of the funds to arrive at that situation would have been identified.

[29] Also amongst the documents is the transcript of proceedings in America brought by Tughan and Company against Taggart Naples I, LLC, an American company which had granted a mortgage to Tughan and Company in respect of fees. It is not necessary for me to go into the details of those proceedings, save that during the course of them reference was made both to the 2007 Guarantee and to the First Kinsealy Guarantee (and its replacement by the Second Kinsealy Guarantee).

Included in the answers given by Mr Taggart, under oath, no mention was made of Atlantic Wharf as a source of funds which would have satisfied entirely the amount due under Facility 11, and therefore the necessity for the Second Kinsealy Guarantee being avoided.

[30] However there are additional assertions made by Mr Michael Taggart both in the affidavits to which I have referred and in the American proceedings. He indeed did argue that the facility had been liquidated, but said that the source of those funds was the payment of the site fines set out in the repayment schedule in the October 2006 Facility Letter. Indeed he mentioned that a "structured repayment schedule" had been agreed which would have allowed for Facility 11 to be liquidated by July 2007. While the structured settlement is not detailed, I believe it would be fair to assume that he is referring to the payment of the site fines referred to in the above Facility Letter.

[31] Mr McHugh in his affidavit referred to the circumstances of the taking of the Second Kinsealy Guarantee. He was directly involved in relation to the reasons why the Second Kinsealy Guarantee was required and the potential methodology by which the difficulty which was thought to have arisen would be resolved. He, the person in charge of funds coming into the Group, specifically the Atlantic Wharf proceeds, does not mention anything about his understanding that Atlantic Wharf represented "a site" or "the site" identified as the source of the funds repaying Facility 11.

[32] Therefore any assertion that Atlantic Wharf proceeds were intended to be or agreed to be the source of the liquidation of Facility 11 has no basis whatsoever.

[33] However different considerations arise in relation to the stopping by the Banks of crediting the site fines referred to in the Facility Letter to the repayment of Facility 11. During the course of examination and cross-examination it was agreed that it was for the court to decide if that was a unilateral decision. **I determine it was a unilateral decision**. It may have been in the eyes of Mr Barr to the benefit to the Group, in that it meant a better cash flow for it and also a lower interest rate. In the written submission on behalf of the Banks it also states that in taking this action it improved the LTV position as regards the Group. It is an interesting point. Facility 11 was not to be included in the loan figure for the purposes of the LTV calculation, since it was a separate loan for a different purpose. Therefore any reduction in that facility by payment into it of the site fines, while reducing the amount owed on that facility, would not have reduced the 'Loan' aspect of the LTV calculation. However the valuation of the assets available to be included in the 'Value' aspect of that calculation would have been reduced by the amount of the increased fines. That figure would, on the argument of the Taggart Brothers have eventually reached 4.3 million euros (the amount of Facility 11). This could mean a recalculation of all LTV figures from the commencement of the payment of the increased site fines, so that by the time we reach July/August/September 2007 the 'Value' aspect would need to be reduced by 4.3 million euros, thereby increasing the

percentage of LTV. However that is dependent on Facility 11 not being included in the calculation of the 'Loan'. I will refer to this in my judgement as 'the Kinseally Factor'.

[34] Having struggled with the various calculations I have concluded that it is not in fact a matter for my determination, not least since, despite that while arguments over the calculations of LTV did manifest themselves during the course of the trial, no actual calculations were made the subject of examination. Instead I have considered the provisions of the Facility Letters starting with the Agreement. These provided that any diverting of funds from identified sources required notice to be given to the Group. I am satisfied that no specific notice was given to Mr McHugh as the Finance Director, and the person identified in the Agreement to whom all notices and communications were to be addressed <u>as regards the Group</u>. I emphasise that this related to the liabilities of the Group, not any personal guarantee. There was no provision to cover that eventuality, and what is clear is that no direct notice was given to either of the Taggart Brothers of a decision which would have a substantial impact on their personal liabilities to the Banks.

[35] In the absence of such notice the court can only guess at what might have been their reaction if this had been drawn specifically to their personal attention. I accept that in their position they had the information available to them to ascertain that, despite the disposal of a considerable number of sites in the two developments generating very large sums of money, Facility 11 was being reduced by only an extremely modest amount – and if seen and appreciated would have rung alarm bells. However in the absence of any evidence from Mr McHugh, who had the day to day control and knowledge of each Facility, I am reluctant to speculate as to the state of his knowledge, let alone what he might have imparted to the Taggart Brothers, their evidence being that they were not consulted. Indeed it may be that in the circumstances pertaining to cash flow generally throughout the period of 2007 up to and including August/October 2007 that his attention may have concentrated on the Group's position.

[36] However I have concluded that given the impact on the personal position of the Taggart Brothers it should have been brought specifically to their attention, affording them the opportunity to seek legal advice in the same way as they were afforded that advice when entering into the guarantee, a fundamental term of which was the method of repayment. Even if Mr McHugh was told, and had agreed the change, that could only bind the Group. In the submission from the Banks it is suggested that 'it would have been better if they had been contacted personally'. It however goes beyond that position. They should have been told and the Banks should have satisfied themselves that they agreed with that change. It is also submitted that Mr Barr believed it had been mentioned. I do not accept that submission. Mr Barr could not have been clearer in his evidence when he accepted that he had not considered the personal position of the Taggart Brothers, notwithstanding that he believed he was assisting the Group, which undoubtedly he was.

[37] I therefore have determined the factual situation that no notice was given to the Taggart brothers about the change and indeed no consideration was given to their position. I will hear legal argument as to what the consequences of that should be.

[38] I will move in a moment to the circumstances around the taking of the Second Kinsealy Guarantee, but first address an issue raised by Ms Avril McCammond, solicitor acting on behalf of the Banks in the taking of the new Guarantee. I put to her that the liability of the Taggart Brothers under the First Kinsealy Guarantee was limited both to Facility 11 and to the limit of €4.3m. While agreeing that this was the direct consequence of the obligations under the First Kinsealy Guarantee, she indicated that she also believed that under the terms of the Guarantee there were circumstances, albeit indirect circumstances, whereby the Guarantee would be available to the Banks to meet obligations arising from defaults in any part of the Taggart Group. It is certainly an interpretation that had not occurred to the court, nor do I believe it occurred either to the Banks or to the solicitors involved both for the Banks and for the Taggart Brothers at the time of the taking of the First Kinsealy Guarantee. The sole consideration of CRN, to which I have referred above, related to the repayment of Facility 11, and the repayment of that Facility alone. When advice was given by Tughan and Company by way of letter to both brothers, there was nothing in that advice which referred to this somewhat indirect potential liability being included in the terms of the First Kinsealy Guarantee. The court is also satisfied that if any such extended liability was intended it would have been spelt out in the documentation – that is in the exchange of emails before completion and the guarantee itself.

[39] Therefore to the extent that the court requires to determine the extent of the First Kinsealy Guarantee, it is not prepared to agree that it bears any interpretation extending it, as opined by Ms McCammond or Mr O'Loan. Rather it extended solely to the repayment of Facility 11 by the mechanism referred to in the October 2006 Facility Letter.

[40] What Ms McCammond did agree was that even on her interpretation of what might have been the position of the liabilities, whether direct or indirect, it would be limited to the amount that Facility 11 stood at the time any such event arose. Therefore the level that this account <u>should</u> have been at if there had been no change to the repayment arrangements, still requires to be calculated as part of the determination by the court as to the liability of the First Kinsealy Guarantee at the time that the Second Kinsealy Guarantee was sought.

[41] I referred earlier to the circumstances in which the difficulties arising from the First Kinsealy Guarantee was discovered in and around July 2007. It was at that date it was discovered that THK was not within the Group structure. The problem was seen purely as a corporate problem, not a problem in relation to the personal guarantees. I agree with the submission made on behalf of the Taggart Brothers that

the personal guarantee and its role arose very late in the day, even within what was already a speedy attempt to resolve that corporate problem. I also remind myself that all discussions were between the solicitors acting for the Banks and those acting for the Group.

[42] A number of potential routes were examined by them in order to overcome what was then perceived to be a legal difficulty. I am satisfied that the sole intention arising from this difficulty was to place the Banks back in the position they thought they were in at the time the First Kinsealy Guarantee was taken. No documents have been produced internally or externally as far as the Banks were concerned under which the Second Kinsealy Guarantee was intended to extend the liability of the Taggart Brothers over and above the liability they had in the First Kinsealy Guarantee.

[43] In her evidence Ms McCammond stated that:

> "I have always expressed my view there wasn't a widening of the guarantee as far as I was concerned."

It may be of course that that would accord with what she stated was her interpretation of the First Kinsealy Guarantee by way of the indirect route to which I have referred. However there is no evidence that any direct instruction was given to her to make this guarantee one which specifically exposed the Taggart Brothers to any debt or liability to the Banks on the part of any of the companies within the Group to the extent of €4.3m (as provided for in the Second Kinsealy Guarantee). She says that the change in wording between the two guarantees, because a change it was, was drawn to the attention of Tughan and Company who were acting on behalf of the Group. Mr O'Loan in his evidence accepted, as he was bound to accept, that this was different wording.

[44] The Second Kinsealy Guarantee also affected an extension to the liabilities under it, this time in relation to the financial limit. It is agreed that at the time of the Second Kinsealy Guarantee the amount due on Facility 11 was €4.08m, not €4.30m, that reduction arising from the limited number of additional site fines that had been credited to the account before the change was affected. On the interpretation of the position, agreed by Ms McCammond and Mr O'Loan, the amount that should have been included was the amount then standing to the debit of Facility 11, and that would have been the amount of "refinancing" that was required to affect the correction of the corporate issue. The difference was highlighted to Mr O'Loan by Ms McCammond but nevertheless the documentation retained the figure of €4.03m. No explanation was given as to this provision.

[45] In the written submissions on behalf of Banks it is suggested that the above is of little or no consequence, because this was a "new Facility" with new monies being advanced to the Group, not tied to Facility 11. I reject that assertion. This was a mechanism solely to rectify the mistake made in October 2006. This was not a "new

facility" in the sense of creating out of nowhere a new advance, as if the First Kinsealy Guarantee had never existed. I remind myself that this was in November 2007 at a time when the relationship between the Banks and the Group, including the Taggart Brothers, were undergoing difficulties. I do not believe that the Taggart Brothers in that situation would have exposed themselves to any greater personal liabilities beyond those they already had, certainly not without careful explanation and advice – liabilities which arose purely in the context of replacing a personal guarantee executed a year earlier in very specific circumstances and in completely different bank/customer environment.

[46] Did they receive legal advice as the Banks submit, or were they afforded the opportunity to receive it? Mr O'Loan explained that he did refer to the personal guarantee and its impact on the Taggart Brothers, including its greater liabilities. No notes are available as to what is said – another example in this case of basic and simple procedures of recording being ignored.

[47] A number of issues were raised in the evidence of Mr Taggart before the court, and also in the affidavits to which I have referred. Many of these relate to allegations against Tughan and Company, all serious, but some more serious than others. The court requires to be careful in considering such allegations in the context of these proceedings, since it may well be, depending on the outcome of these proceedings, that others may be contemplated by the Taggart Brothers. It would therefore be wrong of the court to express any opinion, or to come to any conclusions, without the right of Tughan and Company to make further representations other than those Mr Fergal O'Loan made in answer to direct and cross-examination before me. Certainly he was at pains to indicate that he did not see himself as acting for the Taggart Brothers, and did not speak to them personally about the guarantees other, on his evidence but contradicted by MT, than at the meeting when a substantial number documents were completed in order give effect to correction of the original documentation. He said in evidence that in that conversation he had with the Taggart Brothers he told them that they were entitled to independent legal advice, but that they had said that was not necessary – and signed the appropriate attachment to the guarantee confirming that position.

[48] In stark contrast, MT asserted in evidence that there was no mention of the guarantee, and consequently no mention of its terms or the question of independent advice. Indeed he went further and claimed either the personal guarantee was not there or was hidden. This is not the first time that he had made such an allegation – it was claimed in the American depositions referred to me earlier in this Appendix.

[49] These are amongst the serious allegations to which I have referred, grounded it seems (at times hinted at) that Tughan and Company had "changed horses" at some stage in the light of the property collapse and them being more interested in looking after the Bank's interests.

[50] I have listened carefully to the evidence and regret that Mr Taggart asserted that the documents were hidden deliberately. If not, that is they were in the bundle but they did not see let alone sign them, this would be even more serious in terms of presumably an allegation that their signatures were forged. There was no evidence before the court to ground such an accusation were it to be made. As the submissions on their behalf describes there were voluminous documents which required completion to give effect to this rectification. If Mr Taggart has no memory of signing this document it may be it got lost in that pile of documents and signatures. However it does him no credit whatsoever to make the allegation that it was hidden.

[51] The meeting that day with Mr O'Loan was estimated to have lasted between 10 and 15 minutes. During that time some 70 documents required signing – and one would hope some explanation given for their impact, if only in the context of the Taggart Brothers signing in their capacity as signatories on behalf of the Group. The impact of the terms of the personal guarantee extended very considerably the personal liabilities of the brothers. I have determined that if something was said about the need for any resigning of the personal guarantee, it would first and foremost have been in the context of the corporate problem – and in that regard the execution of the document would have had no adverse effect on the Group's liabilities. Given that potential personal liability and given the circumstances of the number of documents to which I have referred, I would need to be persuaded that any meaningful "advice" or "guidance" on the need for independent advice was given.

[52] Assuming there was a liability under Facility 11 still due in the November 2007 the duty of care, if any, of Tughan and Company to the Taggart Brothers would need to be argued and I would require to offer both sides the opportunity to make legal submissions. Based on that determination I could then determine if any such duty was discharged.

[53] As far as the Banks are concerned they argue that the document was returned executed by the Taggart Brothers, with the signature witnessed and the need for independent legal advice waived. In those circumstances they say the Taggart Brothers are bound. I accept that decision as legally correct as regards the guarantee documents, but I do not accept that I cannot go behind those documents for the purposes of determining the liability of the Taggart Brothers under the Second Kinsealy Guarantee part of the forms.

[54] It is of course inherent in the case of the Taggart Brothers that the amount due under this guarantee had been paid off no later than July 2007. That was the case made by MT during his evidence, stating that he had no knowledge of the fact that site fines had not been credited to Facility 11. There is one potential piece of evidence that could be seen to militate against that assertion namely that while the Drawdown Authority was amongst the documents signed in the offices of Tughan & Co, the Supplemental Facility Letter which allowed the new arrangement to be put

in place was in fact signed on 22 November 2007, a week earlier. This was a new Facility Letter to include all facilities totalling £50,300,000. It set out each of the 'compartments' and included Facility 11 (4,086,000 Euro) and Facility 12 (19 million Euro). The letter of offer was accepted by THL and each of its relevant subsidiary companies, and was signed on their behalf by Michael Taggart and Michael McHugh.

[55] Pulling all these strands together, I will set out my decision on the factual matrix within which I will afford the parties the opportunity to place legal argument before me. The facts as I have determined them are:

(a) That the First Kinsealy Guarantee did not have the indirect impact referred to by Ms McCammond, and related solely to any liability that arose on Facility 11 in its ordinary operation:

(b) That no consideration was afforded by the Banks either to extend the circumstances in which the personal guarantees could be enforced., or the increase in the amount from €4.08m to €4.30m:

(c) At best therefore the extent of the Second Kinsealy Guarantee is in respect of any amount due on Facility 11 and no further:

(d) Atlantic Wharf was not 'the site' the proceeds of which were to be used to reduce or extinguish the amount due under this Guarantee

(e) Notice of the above changes effected by the Second Guarantee regarding the increased fines should have been given to the Taggart Brothers. However the questions on which I will hear argument is

- Whether the Banks can rely of an assumed knowledge or consent on the part of Mr McHugh to the change: or
- Can the Banks rely on an assumption that the Taggart Brothers had the potential to be aware of the change through the operation of the various Group bank accounts; or
- If the Taggart Brothers were aware that the loan existed at the time of the execution of the Second Kinseally Guarantee, can the Banks' rely on that knowledge?

A calculation should be carried out as to the impact on Facility 11 if the repayment schedule had not been altered unilaterally by the Banks.

[56] In the event that a determination is made that on some basis an amount is due under the Second Kinsealy Guarantee, there may be issues in and around the absence of separate, independent legal advice, and what was or was not told by Mr O'Loan to the Taggart Brothers at the time of signing the documents. This

would require to be determined in a different forum. I believe that this could be dealt with very quickly given the fact that proceedings against Tughan and Company by the Taggart Brothers have been held pending the outcome of these proceedings and the issue is a net one. The parties could be invited in due course, if necessary, to allow this aspect of the arguments to be decided by myself after further hearings.

APPENDIX B

The 2007 Guarantee

[1] I have set out in paragraphs [162] – [185] in the main judgment the background to the Banks requirement for the provision of a guarantee from each of the Taggart Brothers of £5 million on a joint and several basis - as a precondition to the release of £1.7 million from the Land Bank Account in July/August 2007.

[2] At paragraph [177] I referred to a separate argument of the Plaintiffs arising from the word 'interim' in relation to these guarantees. In an opening statement dated 18th of November 2014 it was submitted on behalf of the Plaintiffs at paragraphs 36-39 inclusive that:

> "33. At the meeting of 19 June 2007 the Taggarts were told by Henry Elvin that the Bank's Credit Division required them to provide a £5 million personal guarantee.
>
> 34. The issue of a potential personal guarantee in this amount was first raised as a term of the £56 million refinancing package offered to the Taggart Group in April 2007 for the Manchester operations (outside the pre-existing Club Bank facility).
>
> 35. The guarantees were signed on 8 August 2007.
>
> 36. The Taggart case on the enforceability of the £5 million guarantee is, in summary, that:
>
> > (a) the Bank misrepresented and did not disclose the true nature of affairs pertaining to their banking relationship when it sought and obtained the £5 million guarantee.
> >
> > (b) Secondly, the £5 million guarantee was (like the Original Kinsealy Guarantee) to cover a temporary LTV breach, which, if it occurred, had regularised by September 2007 and therefore the £5 million guarantee was discharged at that time. In particular, on 8 August 2007 Richard Ennis told Michael Taggart that the £5 million guarantee was required because the KPMG report which had recently been received was forecasting a LTV breach for a short period going forward. Richard Ennis said it would be a temporary

requirement until the anticipated LTV breach had been regularised.

37. It is clear that the assertion and averments that there was a representation that the guarantee was to be for a temporary period was made from the very first time that an affidavit was sworn by Mr Taggart.

38. The temporary nature of the guarantee receives support from the banks own internal documentation- none of which was available to Mr Taggart at the time of swearing the above affidavit. In the 'General Purpose Report' of 21 June 2007 there is a clear reference to the 'interim' nature of the personal guarantee. This is in the context of the Banks stated expectation that (even on their erroneous calculation of LTV) it would fall below 70% within a short period-which is what, in fact, occurred.

39. The proper inference to be drawn is that the guarantee was to fall immediately the LTV ratio fell below 70%, which occurred within a very short period."

[3] The above argument is supplemented in the skeleton argument submitted after the evidence was given. At paragraph 55 it supplements the assertion in the earlier document as to what Mr Taggart was told by Mr Elvin at a meeting on 19 June 2007. His evidence was that he, Mr Taggart, was reluctant to agree to it and asked for an explanation and was told that Credit wanted the £5 million guarantee. He did not agree to provide the guarantee at this meeting. At paragraph 56 references are made to Mr Taggart's evidence in court that he agreed to sign the £5 million guarantee as a temporary guarantee to cover the LTV breach, his understanding being that when the breach was repaired the guarantee would dissolve. At paragraph 59 it states that Mr Fergal O'Loan (of Tughan & Co., solicitors) in his evidence agreed that his understanding was that the guarantee was linked to LTV.

[4] I turn first to the submission in paragraph 34 (a) above, and can deal with this briefly. I have set out all of the background relating to the relationship between the Group and the Banks from September 2006 to June 2007. I have also set out my conclusions as at the end of June with regard to the directors' knowledge as to the concerns of the Banks. I confirm that I find no basis for an argument that the directors were unaware of the true state of affairs pertaining to their relationship with the Banks at the time that the £5 million guarantee was sought.

[5] I next turn to the argument based on the use of the word 'interim' in the General Purpose Report of the 19 June 2007. Any consideration requires an examination of the context of the use of this word. The paragraph in the report in which it is used reads as follows:

> "Both of the above proposals for regularisation are being taken forward by Taggarts with substantial progress expected by July 31 2007. In the interim, we have also agreed that Michael and John Taggart are to provide personal guarantees to a level of our satisfaction. We have discussed this with Credit and it has been agreed that the level of £5 million joint and several guarantees is considered appropriate in the circumstances."

[6] It is clear from the terms of this paragraph in relation to the personal guarantees is set in the context of proposals for 'regularisation', and the position that would be protected until that 'regularisation' was complete. It is also clear from the heading of this part of the Report that it is dealing with excesses, not LTV. Having set out the excess possession at the date of the Report, it is recorded that there is growing capital pressures with a projected weekly cash flow. The note then continues as follows:

> "The excess is projected to remain at or below £1.8 million until the end of July, after which it increases to £2.7 million due to large construction payments in Manchester and BOI interest due. It is therefore evident that an overall regularisation proposal requires equity input by the end of July. In this regard we have received the following proposals from the Group,
>
> - Manchester to be refinanced by Bank of Scotland. Taggart had previously received heads of terms from BOS which include mezzanine and equity funding but did not progress because Taggart were unhappy with the terms of the equity element. As a result of the recession BOS has nine being already engaged to progress of obtaining credit approval (confirmed by KPMG). Taggart expect this to be in place in late July at which time UB/BOI Club exposure would reduce to less than £20 million and LTV would reduce to comfortably within covenant. We would

note that RBS had also previously looked funding Manchester …...

- The sale of Fraser Estates is being progressed by Eric Cairns .... Taggarts would receive £20 million after all costs and taxation are taken into account …. This sale is being progressed as a company sale and as a consequence will require due diligence by any proposed purchaser… Timescale for completion therefore is likely to be outside of the cash flow presented as part of this paper. Nevertheless, we will be in a position to assess whether sufficient progress has been made towards a sale within the next few weeks. Taggart are committed to injecting sufficient funds from this sale to our facilities to ensure on-going funding needs are capable of being met."

[7] These proposals represent 'both the above proposals for regularisation' being then taken forward by Taggarts. It is obvious that the interim period referred to is the period between the date of the Report and the completion of both aspects of the Group's proposals to regularise the excesses.

[8] Therefore the reference to 'interim' in the Report, rather than assisting the Plaintiffs instead ties the request for the personal guarantee to the regularisation of the accounts as regards excesses - and in particular the Group's proposals as to how that was to be achieved.

APPENDIX C

The Patterson Loan

[1] The court benefits from an e-mail of 1 June 2007 from Tughan & Co. to Mr McHugh copied to the rest of the Board of the Group, including the Taggart Brothers. This was the latest in an exchange with Mr McHugh starting with an e-mail the previous day from the solicitors to Mr McHugh asking how matters were progressing for the repayment of the Millmount loan from the Pattersons. In his reply Mr McHugh sought details of the latest date for its payment and advised that the Group were looking at a number of options. The e-mail in reply from Tughans stated as follows:

> "Just to confirm the details with respect to the loan:
>
> - The £4m loan was advanced on 27 April 2007.
> - As at today's date the repayment amount is £4.5m.
> - If the loan is repaid in full within six weeks (8 June) the repayment amount is £4.5m.
> - If the loan is repaid in full within 9 weeks (29 June) the repayment amount is £4.6m.
> - If the loan is repaid in full within 12 weeks (20 July) the repayment amount is £4.7m.
> - The loan is repaid in full within 15 weeks (10 August) the repayment amount is £4.8m.
> - If the loan is repaid in full within 18 weeks (31 August) the repayment amount is £4.9m.
> - If the loan is repaid in full within 21 weeks (21 September) the repayment amount is £5m.
> - Thereafter, interest accrues on the balance of £5m at 15% per annum (compounded quarterly).
>
> The lender is entitled to exercise its security over the shares if the loan is not repaid within 12 weeks (20 July). However you are still entitled to have the shares returned to you after that point provided the loan amount is repaid in full. (The amount to be repaid would continue to accrue on the schedule set

out above until repayment notwithstanding that the lender has taken control of the shares).

If the loan is not repaid in full by 31 December 2007, then you forfeit the shares entirely and cannot demand their return. In addition the lenders are entitled to procure the termination of the Taggart building contract in respect the Cairnshill property – such determination shall be made without any liabilities arising as a consequence of such termination (in other words, you have to terminate the building contract and agree not to pursue any claims which may arise as a result of that termination).

In short the first key date is **20 July 2007** – if the loan is not repaid by this date, the lender is entitled to exercise the security of the shares but you can still demand that the shares are retransferred to you provided the loan is repaid in full.

The second key date is **31 December 2007** – if the loan is not repaid by this date, you forfeit the shares entirely."

[2] In reply Mr McHugh stated on 1 June:

"FYI – we really need this to be repaid before 20 July."

[3] It will be seen in the body of the judgment that payment was not made on 20 July. Indeed on 8 November 2007 the amount due was £5,098,629.92 and letters of demand were received by THL and the Taggart Brothers seeking the shares in the company and advising that an "event of default" had arisen.

[4] On 27 December 2007 a statutory demand was sent to the Taggart Brothers individually enforcing their guarantees for the debt then due of £5,189,040.68.

[5] A document dated 14 March 2008 records that a settlement was reached on 11 February 2008 by which, having acknowledged that there had been defaults, Mr John McCann was to replace the Pattersons by means of a repayment of the Patterson debt by him in two tranches. However the Taggart Brothers appear to have joined to that settlement to guarantee the debt now due to Mr McCann.

[6] The body of the judgment will record the role of Mr McCann in the negotiation of mezzanine funds to the Group of which the payment of the Pattersons debt was a feature.

APPENDIX D

Cecil M Yuill Ltd ("Yuill")

[1] Yuill was one of the largest house builders in the North East of England with Headquarters based in Hartlepool. At the time of the acquisition of the company by the Group it was building solely in the North East of England.

[2] The acquisition was completed in February 2006 with funding from BOSI. The shares in the company were acquired by a new company, Taggart Homes North East Ltd (TNE), formed was a subsidiary of THL.

[3] The acquisition was funded with senior and mezzanine debt, together with facilities for working capital and land acquisition advanced by BOSI. On the papers this appears to have been in the region of some £55m. In addition THL advanced by way of loan notes/equity £7m, with a covenant to advance by way of loan £1m more in September 2006 and £2m more in September 2007.

[4] In addition to the covenants to advance further funds by way of loan the consideration for the company included a £6m deferred payment to the vendors. There was also an earn-out payable to the vendors dependant on Yuill's performance after the take-over. In October 2007 Mr McHugh had advised BOSI that as Yuill had out-performed budget in 2006 and would do the same again in 2008 a further payment of £2m in 2008 and £2m in 2009 would also become payable by way of deferred income to the vendor.

[5] In a summary to an internal note of BOSI dated 12 October 2007 it records that the Yuill business needed a significant amount of cash from the end of 2007 through to the end of February 2009. As at 12 October 2007 the company was in breach of its banking covenants. The failure to introduce the £3m which should have been paid (£1m in September 2006 and £2m in September 2007) gave rise to difficulties in respect of the banking covenants including in relation to LTV. That issue regarding LTV had not arisen before this since land acquisitions were behind what had been originally scheduled. However, by not putting in the £3m there was a breach of the original Investor Agreement, which automatically triggered a default on all of the facilities. That gave rise to increasing the then current margins in terms of interests. It is recorded that the Taggart Board were aware of this but had not been formally notified of the default. In fact this issue of the banking covenants was known to THL as far back as January 2007 when Mr McHugh acknowledged the breaches and that a renegotiation with BOSI of the facility and the covenants would be required.

[6] The note also records that the £6m deferred payment was due in June 2007 together with the earn-out. There was concern as to whether the funds would be available in respect of that payment.

[7] On 23 October 2007 BOSI were concerned that, although Yuill was trading well, the Taggart Group seemed to be in a serious position regarding cash flow and capitalisation. The Bank were concerned to ensure that their position in Yuill was safeguarded, particularly that there should be no leakage of cash out of this company into the Taggart Group.

[8] Some two weeks prior to 12 October 2007 a 5 year plan had been received from the Group and a meeting had taken place with the Directors, including the Taggart Brothers on 10 October to discuss the position. This model showed that even if LTV were to increase to 80% the business would still need a substantial amount of equity (£10m?) in 2008. That was based on scheduled repayments of £5m and the £2m earn-out payment. It was noted that in the model produced by the Group LTVs hit almost 90% in August 2008 and that the model showed no injection of any additional equity over the next 5 years.

[9] There then followed a period of months when BOSI investigated their position in relation to the proposal from the Group including addressing the issue of the level of LTV; what they were to do about the repayments on the original acquisition debt; what penalties would be imposed; and what would happen if the Group were unable to rectify the equity short fall.

[10] Matters progressed until 22 January 2008 when further proposals were received from KPMG. At this date they were operating a finance function for the Group since the beginning of January 2008 following Mr McHugh's departure. The cash flow projections then furnished were being proposed as a short term plan to provide stability to the Group and allow it to provide equity to Yuill, while also satisfying their other bankers and investor requirements in order to repay any arrears outstanding.

[11] This proposal was obviously based on coming to an agreement with Mr John McCann to purchase the shares of John Taggart, with the majority of the share price being left in the Group as a loan. On that basis the proposal was made seeking agreement that payments of the outstanding £3m equity/loan could be spread over a period of time; asking that penalty fees could be paid later in 2008; an agreement to purchase the tax losses from the Group by Yuill at £1.7m; and an agreement that the Club Banks could take a second charge over the Yuill assets.

[12] In the file note of BOSI putting forward these proposals and seeking approval to certain aspects of them it was made clear that there would be no agreement to any second charge on the Yuill assets, and that an assurance was sought that the necessary documentation was put in place to confirm the right of BOSI to set off the debt due to them as against a deposit account recently opened by Yuill. The purchase of the tax losses was agreed but subject to the condition that sufficient monies were left to clear arrears and further payments through 2008.

[13] This does not appear to have moved forward until on 24 April 2008 in an internal email it is recorded that TNE was in serious trouble and unlikely to meet its interest bill, 'let alone anything else'. It continued that "the bank is unlikely to get all of its money back if Taggart's cannot get more equity. The current company Taggarts will probably be unable to put equity into this company, as it effectively ignored it since the original transaction, and in effect the bank has not relationship managed this client very well, and did not spot early warnings and changes in strategy."

[14] Matters then appeared to have continued to be the subject of negotiation and in a document entitled "Overview of transaction between John McCann and Taggart Holdings Ltd", which is undated, one aspect of the structure which would have involved the use of Yuill funds to make deferred payments was not acceptable since those funds in the deposit account were to be used to pay off or off-set against the BOSI debt. I fast forward to a report from PWC commissioned by BOSI dated 17 June 2008 which records inter alia:

> "TNE faces an imminent significant funding need as a result of:
>
> (a) Key point £7.5m deferred consideration earn out payment.
>
> (b) The £2.5 million capital repayment to BOSI.
>
> Estimated realisations under an insolvency procedure in NE and Yuill in the present property market would almost certainly crystalise a significant shortfall for BOSI.
>
> Should an appropriate arrangement be unable to be agreed with Taggart Holdings (THL), TNE would face insolvency as it will not be able to pay its liabilities as they fall due. In these circumstances the banks position would likely be best protected by the appointment of an Administrative Receiver or an Administrator to TNE to control the asset realisation process.
>
> We note that the bank has been advised that the present breaches would enable it to demand repayment of its facilities and presumably to exercise its security against TNE and Yuill should it decide to do so."

[15] In the light of the report BOSI set in train a number of steps. On 19 June 2008 MT wanted to meet but on 24 June 2008 a demand note was sent in respect of the loan of £3m, payment of which was in default. At a meeting on 26 June 2008 the Group advised that it could not make payment and in relation to Yuill BOSI would

be taking over negotiations. The indication of its inability to make the payment was, according to the BOSI note, communicated by MT. A number of options were then considered both in relation to restructuring, a pre-package receivership of TNE or a pre-package receivership of Yuill. On 21 August 2008, due to the failure to make the payments in September 2006 and September 2007, the failure to advance funds for the loan due on 30 June by TNE and other breaches of financial covenants, BOSI moved to pursue the option of a pre-package receiver sale by Yuill which, according to PWC, would proceed in the absence of any proposals. That was put in a "without prejudice" letter to the Directors of THL on 12 September 2008. The consequences would be that once BOSI was paid in full, including any amount due on foot of the guarantee given by BOSI in respect of the deferred consideration of £6m in 2009, there would be no funds left to repay any loan or other amounts due by TNE to THL. This is what transpired.