



**UNAPPROVED
THE COURT OF APPEAL**

**Record Number: 2017/322, 323, 471
2018/481**

**Faherty J.
Murray J.
Pilkington J.**

BETWEEN/

BRENDAN O'ROURKE

**PLAINTIFF/
APPELLANT**

- AND -

**DIANE O'ROURKE (REMOVED BY ORDER OF THE COURT),
DERMOT O'ROURKE, PERLE O'ROURKE AND ULSTER BANK IRELAND
DAC**

**DEFENDANTS/
RESPONDENTS**

-AND-

Record Number 2018/479

BETWEEN/

ULSTER BANK IRELAND DAC

**PLAINTIFF/
RESPONDENT**

-AND-

BRENDAN O'ROURKE

**FIRST NAMED DEFENDANT/
APPELLANT**

-AND-

MOUNTVIEW CONSTRUCTION UK LIMITED

SECOND NAMED DEFENDANT

JUDGMENT of Ms. Justice Faherty delivered on the 14th day of March 2022

1. There are five appeals before the Court, four of which are brought by Brendan O'Rourke ("hereinafter "the plaintiff" or "Brendan O'Rourke") in the High Court proceedings bearing record number 2016/10451P (hereinafter "the Equity Proceedings"), with the fifth appeal brought by Brendan O'Rourke as defendant in the High Court proceedings bearing record number 2012/9106P (hereinafter "the Bank Proceedings"). For ease of reference, in relation to the four appeals in the Equity Proceedings I will refer to the "substantive appeal" and "the procedural appeals".

Background

2. The Equity Proceedings were commenced by Equity Civil Bill on 10 August 2012. The plaintiff sought declaratory and injunctive relief relating to property known as "Furness Hall", Naas, County Kildare. The reliefs included:

- (a) A declaration that Brendan O'Rourke has a legal and beneficial interest in Furness Hall;
- (b) An injunction restraining the fourth named defendant ("the Bank") from interfering with the property; and,
- (c) An order for directions in relation to the validity of two mortgages dated 16 September 2004 and 12 February 2008 in respect of Furness Hall.

3. The Bank Proceedings were commenced on 7 September 2012 whereunder the Bank sought, *inter alia*, injunctive relief restraining the defendants from trespassing on the lands at Furness Hall held by the Bank as mortgagee in possession on foot of a mortgage made on 16 September 2004, a declaration that the Bank's title as mortgagee in possession was unaffected by the claims advanced by Brendan O'Rourke in the Equity Proceedings and damages for trespass and nuisance.

4. By her judgments dated 25 October 2018, 3 November 2018 and 5 December 2018 and Order of 5 December 2018, O'Hanlon J. dismissed the claim in the Equity Proceedings, allowed the second and third defendants and the Bank their costs, and ordered Brendan O'Rourke to make interim payments on foot of the costs order. Undertakings were given by the defendants' solicitors to the effect that in the event of taxation realising a smaller sum than that directed to be paid on account, any such overpayment would be repaid. An application for a stay on all of the orders was refused by the trial judge, a decision that was upheld by the Order of this Court on 25 January 2019.

5. By her judgment and Order dated 5 December 2018 in the Bank Proceedings, O'Hanlon J. granted the Bank an interlocutory injunction restraining Brendan O'Rourke and Mountainview Construction Limited ("Mountainview") from remaining on or entering or occupying Furness Hall.

6. Before turning to the judgments, and to better understand the issues in the appeal, it is appropriate to set out in some detail the background to the institution of both sets of proceedings and their procedural history to the dates of the relevant judgments.

Background

7. Brendan O'Rourke and the first defendant were married on 7 August 2004. The second and third defendants are the parents of the first defendant.

8. On 10 June 2004, some two months or so prior to the marriage, the second defendant, (otherwise “Dermot O’Rourke”) agreed to purchase Furness Hall for a sum of €3.65m. He paid a booking deposit of €70,000. The contract for sale dated 9 July 2004 shows him as the purchaser in trust. The purchase of Furness Hall was funded by a loan facility of €2.92m from First Active plc (the predecessor to the Bank) with the balance of the purchase price, including stamp duty, fees and expenses, provided by Dermot O’Rourke and the third defendant from their personal funds. Documents generated by First Active on or about 13 July 2004 show that the purpose of the loan was to “part fund the acquisition of a residential property at Furness Hall... The property will be acquired by way of a discretionary trust controlled by Mr & Mrs Dermot O’Rourke as trustees for the benefit of their daughter Diane O’Rourke. The acquisition price is €3.65m plus fees and stamp duty. The borrowing requirement is €2.92m (80% of cost).” The term of the loan was to be “[u]p to 20 years but subject to review after 3 years or on dissolution of the trust structure”. Repayment of the loan was to be by way of interest only for years 1-3 with monthly capital and interest payments thereafter to amortise the loan.

9. Details of the proposed trust structure and the purchase were set out in an email sent to First Active on 13 July 2004 by Mr. Paraic Madigan of Matheson Ormsby Prentice Solicitors, the solicitor then acting for the second and third defendants in respect of the purchase of the property. The email outlined “both the tax consequences of the proposed transaction and the salient provisions of the enclosed discretionary settlement”, as follows:

“ 1. TAX CONSEQUENCES OF PROPOSED TRANSACTION

The purpose of the proposed transaction is for Mr. O’Rourke to assist his daughter Diane in the purchase of a dwelling in tax efficient manner and in particular to ensure that she obtain an exemption from Capital Acquisitions Tax ...without incurring additional tax expenses.

The structure of the proposed transaction is as follows:

- a) Mr. O'Rourke will create a discretionary settlement listing all of his children, their spouses and their children as potential beneficiaries.
- b) The property will be acquired by the trustees and taken in their names.
- c) The trustees would then permit Diane to occupy the residence on an annual basis. It is my view that this free use of property does not, pursuant to the CAT legislation, give rise to any adverse tax consequences.
- d) After Diane has occupied the property for three years, the trustees can then appoint the property to her absolutely."

Mr. Madigan went on to advise that the discretionary settlement would provide that Dermot O'Rourke would settle certain funds on discretionary terms, that he and the second defendant would act as trustees, that the trustees would stand possessed of the trust fund and the income arising thereof for the benefit for any one or more of the beneficiaries as the trustee shall from time to time appoint, "that any monies settled may be invested in stock, funds, securities, or other investments or property of whatever nature, including the purchase of a dwelling house for any of the beneficiaries." The draft discretionary settlement also contained other provisions including that the trustees would have the usual additional powers in relation to managing the trust fund and that they would have the power to borrow money. On foot of the provision of the draft terms of the settlement, First Active was requested to confirm that it was in a position to provide finance to the trustees on the terms of the proposed settlement.

10. In a letter of the same date to Dermot O'Rourke, with the subject heading "Discretionary Trust", Mr. Madigan wrote as follows:

“Further to our recent discussions in relation to your wish to purchase a house for your daughter Diane, I now enclose in Appendix 1 details of the proposed structure, in Appendix 2 a draft of the proposed discretionary settlement and in Appendix 3 a draft letter of wishes.

1. PROPOSED STRUCTURE

The structure as outlined in Appendix 1 is that you, as settlor, would settle certain funds on discretionary terms which the trustees, currently propose to be you and Perle, would use to purchase the property.

Diane would then be given a licence to occupy the property on an annual basis provided that she occupied the property for 3 years from the date of the gift and did not at the date of the gift own any other property, the property could be appointed out to her in three years free of Capital Acquisitions Tax... In addition, as explained in Appendix 1, no Capital Gains Tax... or additional Stamp Duty... should be payable by the trustees on this appointment. In other words, the only tax cost will be the SD payable on the purchase of the property.

2. DISCRETIONARY SETTLEMENT

I enclose at Appendix 2 a draft discretionary settlement. [The] salient provisions of the settlement are as follows:

- (i) You, as settlor, will settle certain funds on discretionary terms for a class of beneficiaries which include Diane, her husband and any children they may have.
- (ii) The trustees may appoint the capital and income of the trust fund to any of the beneficiaries as they see fit.
- (iii) The trustees have the usual powers in relation to making investments.
- (iv) None of the beneficiaries can compel the realisation of any investments.

(v) The trustees are provided with the usual indemnities.

(vi) The settlement is professed to be irrevocable.”

The document went on to refer to a letter of wishes.

11. An internal document generated by First Active on 14 July 2004 referred to the acquisition of a substantial property and a borrowing requirement of €2.9m. It went on to state:

“DOR is purchasing the property for his daughter through a discretionary trust as part of his tax planning and is being advised in this by Matheson Ormsby Prentice. We have been furnished with a copy of the structure which our solicitor is to be satisfied. We understand that after 3 years the trust can be collapsed and the property will pass to DOR’s daughter, though the Bank’s consent will be required to this.”

Under the heading “Repayment Structure/Capacity”, it was stated that:

“Interest only will be in years 1-3. Currently this amounts to €117,000 per annum which will be met by DOR. Thereafter monthly capital and interest payments of €240,000 will be required (based on €2.92m at 4% over 17 years).

The issue with repayments is that whilst DOR has substantial net worth in a wide variety of assets and an annual income of over €380k together with ad hoc lump sums from land sales which probably average over €1m per annum, his daughter who will ultimately own the property would not have an income level commensurate with the anticipated debt level. However, DOR’s intention is to make further substantial bullet payments arising from anticipated land re-zonings over the next 3 years.”

12. The Diane O’Rourke Discretionary Settlement (otherwise referred to as the Diane O’Rourke Discretionary Trust (“the DORDT”) or (“the Settlement”)) was duly established

on 21 July 2004. The settlor was Dermot O'Rourke and the trustees were himself and the second defendant, Ms. Perle O'Rourke.

13. First Active approved the loan application for Furness Hall on 23 July 2004. The security for the loan was a mortgage over the property, the personal guarantee of Mr. Dermot O'Rourke and a signed-over mortgage protection policy on the life of Diane O'Rourke for the term of the loan.

14. On 7 August 2004, and plaintiff and the first defendant were married.

15. The mortgage as between the second and third defendants and First Active was duly executed on 16 September 2004.

16. On 16 September 2004, Dermot and Perle O'Rourke entered into a licence agreement with Diane O'Rourke. This was described as supplemental to the DORDT dated 21 July 2004. Paragraph C of the recitals provided that the trustees wished to exercise the discretion vested in them pursuant to clause 2.8.4 of the DORDT to permit certain of the beneficiaries to reside in "any dwelling house...which is for the time being subject to the trusts" and noting that the licensee Diane O'Rourke was "a member of the class of discretionary beneficiaries of the Settlement". Para. 3 of the Agreement, headed "LICENCE FOR OCCUPATION" provides as follows:

"The Trustees permit the Licensee to occupy the residence known as Furness Hall, ... such occupation being to the Licensee personally only for the period of one year commencing on the execution of this agreement and determining one year from the date of the commencement of this agreement".

17. On 16 September 2004, Brendan O'Rourke and the first defendant, Ms. Diane O'Rourke, signed a family home declaration pursuant to the Family Home Declaration Act 1976 ("the 1976 Act") declaring that Furness Hall was their family home. Para. 6 provided as follows:

“The property is subject to a trust and licence but not (sic) tenancy or proprietary interest in favour of any person or body corporate arising by virtue of any arrangement, agreement or contract entered into by either of us, or by virtue of any direct or indirect financial or other contribution to the purchase thereof, or by operation of law, or otherwise, and the property is held free from encumbrances.”

At para. 7 they declared that “the effect and import of this Declaration” was understood by them and which “has been fully explained to us by our solicitor”. On the same date, Dermot and Perle O’Rourke signed a declaration that Furness Hall was not their family home.

18. On 16 September 2004 also, a “DEED OF CONFIRMATION” was entered into between Diane O’Rourke and First Active which was described as supplemental to the mortgage entered into between Dermot and Perle O’Rourke and First Active. Paragraph C of the recitals to the Deed stated that Diane O’Rourke “at the request of the Borrowers” had agreed to execute the Deed of Confirmation “for the purpose of confirming the Mortgage and further assuring the Mortgaged Property to the Mortgagee as security for the secured monies...” Prior to the execution of the Deed, Brendan O’Rourke executed a “CONSENT TO DEED AND CONFIRMATION” confirming that he was the lawful spouse of Diane O’Rourke the named beneficiary in the Deed of Confirmation. Pursuant to para. 4, he “fully and freely” gave his prior consent for the purposes of s.3 of the 1976 Act, to the Deed of Confirmation “in relation to such (if any) beneficial estate, right, title and interest as the within named beneficiary has in the Mortgaged Property which said Deed of Confirmation is intended to be executed” after the giving of his consent.

19. The plaintiff and Diane O’Rourke took up residence in Furness Hall in September 2004.

Events post the acquisition of Furness Hall

20. On or about 17 July 2006 Mr. Dermot O'Rourke evinced his intention to make a cash contribution to the Settlement which would be used to reduce the First Active borrowing on Furness Hall. As noted in a letter from Mr. Madigan to Dermot O'Rourke dated 13 July 2006, hitherto the majority of the funding contributed by Dermot O'Rourke to the Settlement was treated as a loan to the trustees. Having duly confirmed his intention to contribute to the Settlement, on 17 July 2006 Dermot O'Rourke furnished a cheque to the trustees in the sum of €1m which he wished "to contribute to the Settlement as additional settled property" receipt of which was duly acknowledged by Dermot O'Rourke and Perle O'Rourke *qua* trustees. At a meeting on 17 July 2006, the trustees resolved that these additional settled funds would be used for the purposes of reducing the balance on the mortgage due to First Active and on the said date a cheque in the sum of €1m was signed by Dermot O'Rourke payable to First Active and furnished to his solicitor for transmission to the First Active mortgage account.

21. It is common case that on 6 June 2007, Dermot O'Rourke requested a transfer of €1m from the mortgage account, which since June 2006 had showed a credit balance of €1m due to the payment made in July 2006, to be paid into a named personal account of Dermot O'Rourke in Allied Irish Bank. This was duly done.

The second loan facility

22. On 22 November 2007, Dermot O'Rourke wrote to the Bank (by then the successor to First Active) in the following terms:

"The trustees of [the DORDT], owners of [Furness Hall], have been reviewing the position following confirmation that the property has an open market value of €7/€7.5million.

The trustees have spent over €2million on refurbishing the property and are now consideration refinancing Furness Hall.

The facility currently existing is €2.9million.

We are contemplating increasing the facility to €4.2million, which equates to 55%/60% L. T. V. If this proposal is of interest to your team, you might let me have a draft term sheet. The additional facility could be treated as a 3yr loan, as the trustees are considering making a substantial reduction on the mortgage within that time scale.”

Dermot O’Rourke and Perle O’Rourke duly applied for a refinancing facility on 20 December 2007.

23. A valuation conducted by Coonan Estate Agents, undertaken at the behest of the Bank in December 2007, valued the property at €7m.

24. An internal Bank report prepared in connection with the loan application and for the purposes of transmission to the Bank’s Credit Committee, stated that the purpose of the report was, *inter alia*:

“1. To seek approval for an equity release in the amount of Stg £400,000k for the purpose of further property investment...

2. To refinance existing FA debt of €2.92m ... and seek approval for an equity release in the amount of €1.3m ... secured on a detached residential property on 2.75 acres located at Furness Hall, Naas, Co. Kildare... with an OMV of €7m and LTV of 60%.

3. €3.8m to reflect DOR’s overall [exposure] to First Active in respect of ...residential properties purchased by Dermot for his children.”

25. Under the heading “Furness Hall, Naas, Co. Kildare”, the document went on to state:

“...In July 2004, the Bank approved a residential facility in the amount of €2.92m to assist in the acquisition of a substantial, detached property on 2.75 acres located at Furness Hall... The Property was valued at €3.65m in July 2004 but DOR subsequently carried out extensive refurbishment works and the property is now worth an estimated €7m.... The value of €7m will be confirmed by a formal updated valuation report addressed to the Bank as a condition precedent.

...DOR acquired Furness Hall for his daughter through a discretionary trust as part of his tax planning and was advised by Matheson Ormsby Prentice in this regard. We understand that the trust can be collapsed any time after the initial 3 year period and the property can pass to his daughter, though the bank's consent will be required for this. The facility is fully guaranteed by DOR.

...Given the substantial uplift in the Furness Hall value, DOR is seeking approval for an equity release in the amount of €1.3m for further property investment, which will increase the overall facility balance to €4.220m resulting in an LTV of 60% based on the uplift in the Property value to €7m.

...The original facility in the amount of €2.92m (Facility A) which was advanced over a 20 year term with monthly payments of interest only for the first 3 years and capital and interest payments thereafter has 17 years remaining. With regard to this proposal, the equity release facility (Facility B) will be advanced over a 3-year term at a rate of 5.20%... with monthly payments of interest only in the amount of €5,633 for the term of loan. As with Facility A, repayments will be met by DOR in his personal capacity.”

A further internal Bank document dated 7 January 2008 referred to Dermot O'Rourke having purchased Furness Hall “for his daughter through a discretionary trust as part of his

tax planning and was advised by Matheson Ormsby Prentice solicitors in this regard” and that “Dermot has extensively refurbished and improved this property over the past few years.”

Under the heading “PROPOSAL”, the document states:

“This is therefore a proposal for a mortgage through First Active in the total amount of €4.22M by way of ‘split facility’ - €2.92m to refinance RFC [account]... over 16yr term with initial 3yrs ‘at interest only’ and €1.3m for capital equity release purposes over a 3yr term...”

26. For the purpose of the refinancing, Dermot and Perle O’Rourke swore a family home declaration to the effect that Furness Hall was their family home within the meaning of the 1976 Act. Paragraph 6 of the declaration states:

“The property is not subject to any trust, license, tenancy or proprietary interest in favour of any person or body corporate arising by virtue of any arrangement, agreement or contract entered into by either of us, or by virtue of any direct or indirect financial or other contribution to the purchase thereof, or by operation of law, or otherwise, and the Property is held free from encumbrances.”

27. In the loan offer letter of 14 January 2008 to Dermot O’Rourke, as part of the specific conditions pertaining to the loan offer, the Bank required a “[r]eceipt confirming that existing loan with First Active... has been discharged to be obtained by the Solicitor...” As reflected in a “Mortgage Count Redemption Statement effective to 11/2/08”, the amount required to redeem the 2004 facility was €2,931,113.21m.

28. The 2004 loan facility was repaid by the furnishing of a cheque for €2,931,932.29 sent to the Bank by Dermot O’Rourke’s solicitors on 13 February 2008, following which the balance of the funds advanced on foot of the 2008 loan facility were transferred an account of Dermot O’Rourke with AIB.

29. A bank statement relating to the 2004 loan account shows that the 2004 facility was redeemed by a credit of €2,921,932.29 and that a refund of €43,150.23 was made to the mortgagors in or about August 2008.

Default on the repayments

30. It is common case that as a result of the financial collapse in 2008, repayments on the loan facility on Furness Hall could not be maintained and ultimately the Bank sought to enforce its security. The second and third defendants as mortgagors did not dispute the Bank's entitlement to do so, nor did Diane O'Rourke. She duly vacated the property in or about July 2012, giving up the keys to the Bank.

31. It should be noted at this juncture that by the time of the institution of the Equity Proceedings on 10 August 2012, there were already other extant proceedings between Brendan O'Rourke and Diane O'Rourke. It is common case that subsequent to Diane O'Rourke having yielded up possession to the Bank, when its agents attended to take possession (in circumstances where Dermot O'Rourke and Perle O'Rourke had already surrendered the property to the Bank) Brendan O'Rourke, who to that point in time had been abroad, was in occupation of the property. This triggered the commencement of the Bank Proceedings on 7 September 2012. Brendan O'Rourke occupied the property from in or about July 2012 until January 2019 during which time he rented the property out and took the benefit of the rent and brought construction machinery in connection with his business onto the site.

The claims advanced in the Equity Proceedings

32. Para. 8 of the Equity Civil Bill pleads that as a result of the marriage of Brendan O'Rourke and Diane O'Rourke, the second and third defendants "gifted" the premises at Furness Hall to them "to be held by them equally". Paras. 10 – 15 state:

“10. At all material times hereto, the Plaintiff believed and was led to believe that the said premises belonged to the Plaintiff and the First Named Defendant. As a consequence of this belief and acting on representations made to him by the Second and Third Named Defendants, the Plaintiff undertook either directly or indirectly substantial works including repair and renovation works of the said premises.

11. On the 1st August 2012, the Fourth Named Defendant, its servants or agents, attended at the premises occupied by the Plaintiff herein at Furness Hall, Naas and in a menacing and intimidating manner attempted to break the gate locks with a hammer. The Fourth Named Defendant wrongfully sought to interfere with the Plaintiff’s lawful right, entitlement and peaceful enjoyment of his right to reside in the said premises at Furness Hall...

12. The Plaintiff has only now become aware that the Second Named and Third Named Defendants obtained two mortgages of the said premises at Furness Hall... on two occasions, by a mortgage deed dated the 16th September 2004 for the sum of €2.92million and by a mortgage deed dated the 12th February 2008 for €4.302million respectively.

13. At no stage did the Plaintiff herein consent to a mortgage or any mortgages on the said premises... either in his own right or in conjunction with any or all of the respective Defendants.

14. At no stage did the Plaintiff receive in his own right any correspondence and/or legal notification from the Fourth Named Defendant in respect to the alleged interest of the Fourth Named Defendant in the premises.

15. At no time was the consent of the Plaintiff sought to the mortgage of the said premises. The Plaintiff will contend that the Fourth Named Defendant knew, or ought to have known, that the said premises were the family home of the Plaintiff

and the First Named Defendant and further that the Plaintiff and the First Named Defendant had a beneficial interest in the same.”

33. In an affidavit sworn on 20 November 2013 for the purposes of discovery, the plaintiff avers, at para. 2, that at his and the first defendant’s wedding “(...recorded on video)”, he “was led to believe by the second named defendant that he had purchased a family home at Furness Hall... as a wedding gift”. In the Bank Proceedings pleadings, which were admitted by agreement in the within proceedings, the plea advanced at para. 8 of Brendan O’Rourke’s amended defence and counterclaim was that “on or about the 7th August 2004 [the wedding day], Dermot O’Rourke, on the occasion of his daughter’s marriage to [Brendan O’Rourke], informed the party... that he was making a gift of property to [Brendan O’Rourke] and his new wife”.

34. This is also set out in the plaintiff’s affidavit sworn 7 May 2013 in the Bank Proceedings, where he avers, at para.10, to “[his] belief at all times that the premises at Furness Hall was my family home and further that the premises had been gifted to myself and my wife as was evidenced by the public pronouncements by [Dermot O’Rourke] at my wedding ceremony which is evidenced by a video and by the presence [of named personnel of the Bank’s predecessor, First Active]”.

35. In its defence to the Equity Proceedings delivered on 20 June 2013, the Bank denied that Brendan O’Rourke has any legal or beneficial interest in Furness Hall and pleaded that the second and third defendants never made a gift of the property to Brendan O’Rourke.

Para. 3 provides:

“It is denied that the plaintiff believed or was led to believe that the said premises belonged to or would belong to himself and the first defendant or that this was represented to them or that, the consequence of the alleged or any belief or acting on the alleged or any representations of the second and third defendants, the

plaintiff undertook either directly or indirectly substantial works to the said premises, as alleged in paragraph 10 of the endorsement of claim or at all, and the alleged works are denied.”

36. The Bank admitted that in July/August 2012 its servants or agents attended at Furness Hall for the purpose of taking possession but denied the allegations of intimidation or menacing acts on its part. It pleaded that Brendan O’Rourke was in possession of all or part of Furness Hall without title and was trespassing thereon. The Bank denied that the plaintiff only became aware of the mortgages on the property as of the date of the issue of the Equity Civil Bill. It further denied that it had any actual or constructive notice of any beneficial interest of the plaintiff in the said premises as alleged in para. 15 of the endorsement of claim to Equity Civil Bill.

37. The defence of the first, second and third named defendants was delivered on 20 November 2013. The second and third defendants denied any, or any suggestion of, a gift of Furness Hall to Brendan O’Rourke or that any representations were made to him. The first defendant denied any legal or other ownership of Furness Hall but acknowledged her beneficial interest in the property under the DORDT. She denied that Brendan O’Rourke had any beneficial or legal ownership of the property. All three defendants denied that Brendan O’Rourke only became aware of the mortgages on Furness Hall at the commencement of the Equity Proceedings and in that regard referred, *inter alia*, to the Deed of Confirmation he executed on 16 September 2004 and pleaded that the plaintiff had been advised by the first defendant in 2007 of the existence of the second mortgage.

The progress of the action

38. By Order of the Circuit Court (Linnane J.) dated 24 November 2015, the Equity proceedings were transferred to the High Court where they proceeded under record no. 10451P/2016. In May 2016, the Equity Proceedings and the extant other proceedings

between Dermot O'Rourke and Diane O'Rourke (which had been linked to the Equity Proceedings by Order of the Circuit Court (Linanne J.) were listed for hearing in November 2016. On 17 July 2016, by Order of the High Court (Noonan J.), the plaintiff's appeal against the Order linking these other proceedings and the Equity Proceedings was dismissed. In the event, these other proceeding were compromised in or about January 2017 culminating in a High Court Order of 20 January 2017.

39. By Order of 28 October 2016, O'Hanlon J. granted liberty to the plaintiff to deliver replies to the defences filed by the first second and third defendants and the Bank. The replies were delivered on 14 November 2016.

40. On 26 October 2016, the plaintiff issued a motion seeking orders consolidating and linking the Equity Proceedings and the Bank Proceedings. That application was refused by the High Court (O'Hanlon J.) on 17 November 2016. The plaintiff's appeal against that refusal was dismissed by the Court of Appeal on 29 March 2017.

The trial of the Equity Proceedings

41. The trial of the Equity Proceedings commenced in the High Court on 24 May 2017. It ran for twenty-eight days, concluding on 27 July 2018. At an early stage, the trial judge made a number of orders.

42. By Order of 24 May 2017, she struck out the plaintiff's reply to the defence of the first, second and third defendants and dismissed the proceedings as against the first defendant. She also made an Order striking out his reply to the Bank's defence. On 25 May 2017, she refused the plaintiff leave to amend his statement of claim. These are the Orders that are the subject of the procedural appeals and are addressed later in this judgment, as is Brendan O'Rourke's appeal of the Order of the High Court of 5 December 2018 in the Bank Proceedings granting the Bank interlocutory injunctive relief in respect of Furness Hall.

The High Court judgment

43. Notwithstanding that it was pleaded that Furness Hall had been gifted to the plaintiff and Diane O'Rourke, it is common case that the trial did not proceed on the basis that there had been any completed gift of the property to Brendan O'Rourke. As the trial progressed, the claim evolved from the claim that the plaintiff had been led to believe at his wedding that the property was being gifted to him and Diane O'Rourke to an assertion that the promise or gift of Furness Hall was made in the course of various meetings between the couple and Dermot O'Rourke prior to the wedding, meetings which both Dermot O'Rourke and Diane O'Rourke contested in their evidence. The evolutionary nature of the plaintiff's claim was noted by the trial judge at para. 130.

44. The plaintiff's primary claim was a claim of a beneficial interest in Furness Hall under the doctrine of proprietary estoppel. The case advanced was that Dermot O'Rourke had represented to Brendan O'Rourke on a date or dates prior to the latter's marriage to Diane O'Rourke that Furness Hall was or would become the property of the plaintiff and Diane O'Rourke, and that on foot of the representations made, the plaintiff had expended money and carried out works on the property.

45. At paras. 87-101 of her judgment, the trial judge noted and cited jurisprudence on the doctrine of propriety estoppel including *Ramsden v. Dyson* (1886) LR 1 HL 1229, *Gillette v. Holt* [2001] Ch. 210, *Sledmore v. Dalby* [1996] 72 P&CR 196 and *Finnegan v. Hand* [2016] IEHC 255 where White J. quoted from Biehler, "*Equity and the Law of Trusts in Ireland*" (2016) (6th Ed. p. 831) in explaining the constituent elements of the doctrine. It is, I am satisfied, uncontroversial to say that that the trial judge understood that the issues arising for determination were (1) was there a representation made in the terms claimed the plaintiff, (2) was there reliance thereon by the plaintiff to his detriment and (3) would it be unconscionable not to recognise the asserted reliance.

46. As the judgment reflects, the trial judge proceeded to determine whether the asserted representations had in fact been made and whether monies which had been expended by the plaintiff could in fact be said to have been expended on foot of any representation. She duly found that neither had been established.

47. The trial judge's factual findings commence at para. 104 of her judgment. In the first instance she noted that it was not in dispute that Dermot O'Rourke (in trust) agreed to purchase Furness Hall and that documentation generated by First Active on 13 July 2004 for the purpose of a mortgage indicated that the property was to be acquired by Dermot and Perle O'Rourke as trustees for the benefit of their daughter Diane O'Rourke. The trial judge accepted "the evidence in full of Dermot O'Rourke particularly with reference to his evidence that he had concerns about the marriage between his daughter Diane and the plaintiff."

48. She addressed the evidence given by Dermot O'Rourke in relation to the establishment of the DORDT and his concerns about the durability of the marriage in the following terms:

"105. The second named defendant made it clear that there was a possibility of a transfer in the future but that until he was sure the marriage would last there was no question of him giving beneficial ownership to anybody. This is very credible evidence in the light of the acceptance by the plaintiff that Diane O'Rourke, at the time she began cohabiting with the plaintiff, was estranged from her parents for a considerable period of time. This Court accepts that in all these circumstances the fact that the house was purchased in trust was completely understandable. This Court accepts the evidence of Diane O'Rourke that she understood that she would have been given a licence to occupy the property on the terms set out in correspondence from Paraic Madigan solicitor of Matheson Ormsby Prentice solicitors as referred to

in para. 6 of this judgment. It was a property which was to be purchased in a tax efficient manner. This Court accepts the evidence of Ms. Natasha McKenna Solicitor and the documentary proof thereof dated 31st August, 2004 that she had written to Diane O'Rourke explaining the situation that there was to be a discretionary settlement and explaining the full implications of that if Dermot or Perle O'Rourke had ever become bankrupt, that the property might be repossessed and she would not have any claim to it and that for all [intents] and purposes she would not have a claim to the property and the situation might occur where Dermot and Perle O'Rourke might never [transfer] the property to her and that any monies spent on the house would be for the benefit of her parents and she would have no claim to same. The letter was summarised setting out that the property was theirs to reside in, was not theirs to own and that any money they expended they would not recoup. (Day 23, p. 101).

106. This Court notes the evidence of Ms. McKenna that she did not provide legal advice to Brendan O'Rourke and does not accept the contention that Diane O'Rourke concealed the reality of this from her husband. At that time, the husband had a long history of involvement in property transactions and in running a business and business affairs and this Court does simply not accept that he was not aware of the import of him having signed documents which occurred. Mr. Kelly accountant stressed that he was an accountant to the business affairs and accounts of the plaintiff.”

49. At para. 115 she noted that there was no completed gift of Furness Hall to Brendan O'Rourke or indeed to Diane O'Rourke. Neither had paid Capital Acquisitions Tax (CAT) on the property. Noting that the legal title to Furness Hall was at all material times held in the name of the second and third defendants, the trial judge stated:

“...The evidence of Diane O'Rourke and of her father is accepted in relation to the manner in which the trust was set up which was a place for the married couple to live in and nothing further was promised. Diane O'Rourke's behaviour at all times in relation to the property is consistent with her belief which this Court accepts, that she had a license to live there. The manner in which she returned the keys to the fourth named defendant is consistent with that belief in all the circumstances. The plaintiff's contention is inconsistent and is simply not believable that he thought the property could be gifted to him and a mortgage taken out on it without documentation being signed by him and without the requisite tax obligations being complied with, had he actually received such a gift.”

50. The trial judge also accepted (at para. 120) that by virtue of the agreement entered into between the second and third defendants and Diane O'Rourke, the latter was granted a personal licence to reside in Furness Hall. She found that the interest which the second and third defendants retained in the property “was the equity of redemption i.e. a right to a reconveyance of Furness Hall into their names (or into the names of their successor or nominees) on discharge of the sums secured by the Deed of Mortgage.” She further accepted the contention of the Bank that there was neither promise nor assurance nor reliance nor detriment suffered on the part of the plaintiff. She opined “[u]nfortunately for the plaintiff his evidence is unreliable, and in some instances as set out herein is fabricated and no equity could favour his claim.” (at para. 122).

51. Brendan O'Rourke's reliance on the wedding speech made by Dermot O'Rourke was addressed in the following terms:

“123. Unfortunately for the plaintiff despite his plea at para. 8 of the Equity Civil Bill and despite an affidavit having been sworn by him at paras. 2 and 5 of that affidavit of 20th November, 2013 he attempts to prove that the second named defendant led

him to believe that Furness Hall was purchased by Dermot O'Rourke for both Brendan O'Rourke and Diane O'Rourke as a wedding gift. The particular passage relied upon from the speech, of Dermot O'Rourke at the said wedding, the transcript of which is agreed and admitted as an agreed note make it clear that it is an attempt to make Brendan O'Rourke out to be the purchaser of the property where he clearly had not purchased same but he knew that himself. As well as the fact that it alludes to First Active and the fact that the property was acquired with the assistance of First Active which cannot be ignored”.

52. Central to her conclusion that there could have been no promise or representation on the part of Dermot O'Rourke that Furness Hall was or would be gifted to Brendan O'Rourke was the latter's belated acknowledgment that he executed three documents relevant to the conveyancing of Furness Hall in September 2004 namely:

(a) the family home declaration signed by him and Diane O'Rourke dated 16 September 2004;

(b) his consent to Diane O'Rourke's Deed of Confirmation incorporating confirmation of having taken independent legal advice dated 16 September 2004; and

(c) a further undated confirmation of his having obtained independent legal advice.

53. On Day 3 of the trial, Brendan O'Rourke admitted to having signed these documents. However, by Day 6, he had changed his evidence and denied all the signatures. On Day 10, he changed his evidence again and admitted that he had signed the documentation in question. However, he continued to dispute the location and timing of his signatures, a matter that features in the within appeal and to which I shall return in due course.

54. In the course of the trial, Brendan O'Rourke had made complaint regarding the absence of any independent legal advice at the time of the execution of the documents. As is apparent from the contents of para. 106 of the judgment, the trial judge did not find any merit in this argument, noting that given the plaintiff's long history of involvement in property transaction and in running a business he could not have been unaware of the import of the documents he had signed. She rejected his evidence that he could have been unaware of the existence of the DORDT, or the basis of Diane O'Rourke's entitlement to reside in Furness Hall. She stated:

“125. This Court accepts and finds that the plaintiff had to have known what the documents referred to because he was of full-mind and was a fully mature adult at the time and that he is bound by what he signs even if he does not read the documents. This Court therefore finds that the plaintiff signed documents plainly referring to the existence of the trust, the existence of a licence, and the fact that First Active were involved which he knew anyway from the wedding speech in relation to the purchase of Furness Hall. The plaintiff despite the fact that the two solicitors involved were questioned as to their credibility, the reality of the situation is that documents were executed and the plaintiff admitted that he had signed them although he continued to dispute location and time.

126. This Court takes into account in coming to this conclusion the fact that the plaintiff has been in business since the 1990s and that he had bought and in some cases sold a number of houses prior to his wedding and was therefore involved beforehand in the execution of deeds of title, mortgages, loan agreements, statutory declarations and the court therefore rejects his claim to be ignorant about signing documents around conveyancing transactions. The court notes and gives some

weight to the fact that the plaintiff did not call Mr. Michael O'Neill his then solicitor in respect of the aforementioned transactions.

127. This Court draws the inference that Brendan O'Rourke knew full well that he was not in receipt of any gift in relation to Furness Hall and that that is the only explanation for the lack of a CAT return and his lack of candour about his tax affairs gives him no shelter from the said inference. His affidavit of 7th May, 2013 in the possession proceedings which was open in the course of his cross-examination shows that he was well aware of the tax consequences of property transactions.”

55. The trial judge also found inconsistencies in the plaintiff's evidence. Brendan O'Rourke had testified that in 2007 he discussed the prospect of selling Furness Hall with the first defendant who explained to him that it could not be sold because of tax reasons involving her father. The trial judge concluded that if Brendan O'Rourke had believed in 2007 that he was the co-recipient of a gift of Furness Hall from Dermot O'Rourke he would not have let the matter drop.

56. She noted that the pre-litigation letters sent to the second and third defendants on 6 July 2012 and 3 August 2012 had made no reference to any gift of Furness Hall by Dermot O'Rourke. In evidence, Brendan O'Rourke admitted that he did not instruct his solicitors at the time that he was part owner of Furness Hall but simply considered himself entitled to a beneficial interest on the basis that he had expended monies on the property.

57. The trial judge also drew inference supporting her conclusion that no representation or promise had been made by Dermot O'Rourke, from the fact that although the plaintiff claimed to have come to know about borrowings on the property in 2007, it was only three years later that he claimed an interest in the property. She stated:

“This Court is entitled to infer and so infers that the reason for the expenditure by both the plaintiff and his wife on the property such as it was, was for their immediate enjoyment that such improvements brought to the property as well as the hope that in the future Dermot O’Rourke might repay the mortgage loan and might gift the property to them as an unencumbered asset. They both enjoyed these improvements for a few years and the plaintiff for many years thereafter, living rent free in occupation for thirteen years of the property where he has excluded all other persons despite his alleged interest extending to just 50% of the property.” (at para. 132)

58. She also addressed the plaintiff’s claim to have spent approximately €1.8m on Furness Hall. Some days into the trial, the second and third defendants conceded an approximate value of €250,000 in respect of the works carried out by Brendan O’Rourke, albeit not conceding that the said works were in reliance of any representation made. Brendan O’Rourke did not accept the concessionary figure of €250,000. His quantity surveyor, Mr. O’Kane, valued the works at €1.6m.

59. At para. 111, the trial judge found that “both the plaintiff and Mr. O’Kane QS produced documents without any or any appropriate level of evidentiary proof in relation to what they say was expended by the plaintiff on the property. Estimates without proof are simply of no use.”

60. She considered the evidence of other witnesses in respect of the plaintiff’s claimed expenditure on Furness Hall, together with certain documentation produced by or on behalf of the plaintiff. During the trial, it transpired that receipts tendered from “Brennan’s Hardware” were not issued by that company, to which an agent of Brennan’s Hardware testified. Documents were also tendered which showed a payment to Brennan’s Hardware, which an agent of the said company testified was not a genuine invoice and was on an

obsolete letterhead. Moreover, Mr. Anthony Ryan, a witness for the plaintiff, conceded that he had forged the signature of a purported supplier, Eugene Spratt, on an invoice generated by or on behalf of the plaintiff.

61. At para. 117, the trial judge found that it was clear from Mr. Ryan's evidence that Brendan O'Rourke was complicit in this forgery. Mr. Eugene Spratt had provided a statement signed by him refuting that he had carried out works attributed to him and confirmed that he had not signed the document presented as his signature by the plaintiff. He gave evidence also to that effect in the course of the trial.

62. The consequences of these matters were addressed at para. 133:

“Unfortunately for the plaintiff the fabrication of evidence, the creation with an out-of-date stamp which Mr. Alfred Brennan, Brennans Hardware testified did not accord with a document emanating from that company, and the further admitted forgery by a Mr. Anthony Ryan, of Eugene Spratt's signature on an alleged vouching document created by the plaintiff but presented as if it were Eugene Spratt's own, amount to concocted documents, forged signatures, representation of expenditure, all of which must deprive the plaintiff of any indulgence of this Court.”

63. Applying the reasoning of Hardiman J. in *Shelly-Morris v. Bus Átha Cliath* [2003] 1 IR 232, the trial judge opined, at para. 137:

“[I]t is certainly not in order for the court to engage in speculation or guess work in an attempt to rescue a fraudulent claim such as this. The plaintiff's falsehoods have left it in a sorry state. The plaintiff is simply not a credible witness nor are many of the witnesses called on his behalf and this case stands dismissed for the reasons set out above herein. The plaintiff is not able to sustain the case he brought, the court must reject false evidence, and considering the clean hands maxim such court

prevents an equity upon which the claim depends, from arising at all. This case notes the findings of Hardiman J. in *Shelly-Morris v. Bus Átha Cliath* ...and the principles contained therein.”

64. The trial judge’s ultimate conclusions on the representations issue were expressed in the following terms:

“138. The plaintiff has failed to establish that there was any representation made to him to lead him to believe that Furness Hall, Naas in the County of Kildare was or would become the property of the plaintiff and his wife Diane O'Rourke. Diane O'Rourke clearly accepted that all she had was a licence. The evidence of Natasha McKenna was quite clear that it was Mr. Rory Egan solicitor who actually introduced her to Dermot O'Rourke as her client in relation to the transaction and it was quite clear from her evidence that Dermot O'Rourke had not decided at the commencement of this process how the property would actually be held. His wish was to buy a property in a tax efficient manner where his daughter would be given a licence to occupy the property on an annual basis and provided that she occupied the property for three years the property *could* be appointed out to her in three years free from CAT. It is quite from the evidence that there was no question of any beneficial interest being given to either Diane O'Rourke or to the plaintiff at that stage, whatever might have occurred had matters worked out well going forward. There is absolutely no guarantee in existence or given that such an eventuality might come to pass and the total power in relation to the trust rested with the second and third named defendants.

139. ... This Court simply does not accept the evidence of the plaintiff that he never met Natasha McKenna solicitor and that he never met Vanessa Byrne solicitor. Both solicitors explained in detail to the court their own involvement in

these transactions and further when they were asked to do so each individually were able to point out and identify the plaintiff as Brendan O'Rourke, in the body of the court and both confirmed that they had met him prior to the court date. Unfortunately for the plaintiff he has asserted in this case a case which he could not prove and the onus of proof is on the plaintiff. He had a solicitor of his own Michael O'Neill whom he did not chose to call to give evidence and he also had the assistance of Mr. Kelly accountant. There is a contradiction between the evidence of the plaintiff and the said Mr. Kelly where the plaintiff tried to say that for an eleven-month period that accountant was not available to him although this appears to be disputed by Mr. Kelly who said that he looked after the businesses and business affairs of the plaintiff.

140. It is simply not credible that Brendan O'Rourke was under any illusion but that the property in which he was residing with his wife who had a licence in same was held by a trust. Despite various changes in his evidence he finally confirmed that he accepted his own signatures although his evidence waivered on this point for some time prior to him actually accepting the signatures on the various documents were signed by him.

...

142. The reality of this case is that the plaintiff has failed to show this Court that there were any representations made to him and if he undertook substantial works on the premises it was not on foot of any alleged representation as clearly the legal position was well established. Looking at all of the evidence and his capacity as a business man with property dealings in the past, it is inconceivable and simply not credible that the plaintiff was not fully aware of the circumstances in which he was moving into the said property and residing there on foot of his wife's licence in

same. It is only if the plaintiff had managed to establish positively such representations that the court would then have to deal with the issue of beneficial interest. The plaintiff however insisted in elongating this trial despite being asked on many occasions to stick to what was relevant. The court also notes that the second and third named defendants had absolutely nothing to benefit from defending this case and yet have made themselves available over a long period of time to ensure that the case was fully defended. This Court dismisses the plaintiff's claim on the grounds set out in this judgment, having fully accepted the submissions of the second, third and fourth named defendants, this Court therefore dismisses the plaintiff's claim.”

The appeal

65. The notice of appeal lists some twenty grounds of appeal. At the commencement of the appeal hearing, the plaintiff clarified that the grounds being relied on were grounds 1,2,5,6,7,8 and 13-22, as follows:

“1. The trial judge erred in fact and in law in holding that the motivation behind the establishment of the Trust was some apparent disapproval on the part of the Trustees, Dermot O’Rourke and Perle O’Rourke, of the relationship between Diane O’Rourke and the Appellant/Plaintiff. The trial judge erred in fact and in law in accepting ‘... the evidence in full of Dermot O’Rourke particularly with reference to his evidence that he had concerns about the marriage between his daughter Diane and the plaintiff...’ ...Further, the trial judge accepted the evidence in full [of Dermot O’Rourke] without hearing any evidence from Perle O’Rourke or from Paraic Madigan;

2. The trial judge erred in fact and in law in failing to have any or any sufficient regard to the evidence in support of the contention that it was intended at the time of

establishment of the Trust that the property known as Furness Hall... would be transferred into the ownership of Diane O'Rourke after three years;

...

5. The trial judge erred in fact and in law in that she accepted and placed undue weight on the evidence of ... Dermot O'Rourke. Further the trial judge erred in fact and in law in adopting an indirect approach to weighing or balancing the veracity of the evidence of Dermot O'Rourke given the issues that arose in the context of credibility. In particular, the trial judge:

- a. Failed to have any or any sufficient regard to the fact that Dermot O'Rourke had previously been convicted of the offence of false accounting;
- b. Failed to have any or any sufficient regard to the fact that Dermot O'Rourke confirmed that:
 - a) That Dermot O'Rourke and Perle O'Rourke had removed moneys from the [DORDT];
 - b) That in June 2007 Dermot O'Rourke extracted €1m from the Trust and transferred the funds to his own personal bank account;
 - c) That Dermot O'Rourke and Perle O'Rourke refinanced a loan on the Furness Hall property and received the proceeds of that refinancing;
- c. Failed to have any or any sufficient regard to the evidence of Dermot O'Rourke by letter signed by both himself and Perle O'Rourke as Trustees and on the suggestion of members of Ulster Bank's lending team, that they Dermot and Perle O'Rourke as Trustees of [the DORTD] had spent €2m on refurbishing the Furness Hall property. It was established in evidence that this statement was a false statement and Dermot O'Rourke testified that this false statement was made at the suggestion of the Ulster Bank's lending team for the

purpose of persuading the Ulster Bank's credit committee to approve the refinancing loan. Furthermore, Ulster Bank did not at any time seek to contradict this evidence;

- d. Failed to have any or any sufficient regard to the fact that Dermot O'Rourke and Perle O'Rourke executed a family home declaration wherein they declared, incorrectly, that the property was his family home;
 - e. Failed to have any or any sufficient regard to the fact that Dermot O'Rourke produced no evidence to support the claim that funds extracted from the Trust were used to purchase high quality blood stock in Kentucky;
 - f. Failed to have any or any sufficient regard to the contradictions and inconsistencies in Dermot O'Rourke's testimony, in particular to the fact that Dermot O'Rourke recalled that the funds may be have been used for alternative investment purposes, also recalled that the funds may have been used for a war chest for future deals;
 - g. Failed to have any or any sufficient regard to the fact that Dermot O'Rourke committed to producing the Trust accounts and failed to do so;
 - h. In the teeth of the above accepted on the basis of Mr. O'Rourke's bare concession and in the absence of documentary evidence that the deficit in the DORDT was €200,000.
6. The trial judge erred in fact and in law in failing to give any or any adequate or appropriate weight to the evidential matter set out at (5) above in the particular context of the Court's assessment of the respective credibility of the witnesses;
7. The trial judge erred in fact and in law in failing to give any or any adequate or appropriate weight to the evidential matters set out at (5) above in the particular context of Dermot O'Rourke's capacity as one of the Trustees of the Trust;

8. The trial judge erred in fact and in law in failing to exercise or to invoke its jurisdiction to supervise the administration of trusts generally. Specifically, the trial judge erred in failing to inquire as to the nature of the breaches of trust and breaches of fiduciary duty and in failing to order and direct the Trustees to provide a full account of their Trusteeship to the Court.

...

Costs Application

13. The trial judge erred in fact and in law in ordering the Plaintiff/Appellant to make interim payments in the amounts of €255, 040 and €138,735 respectively, both payments to be made on or before the 6th January 2019;

14. The trial judge erred in fact and in law in failing to attribute any or any sufficient weight to the fact that the Fourth Named Defendant... played an extremely limited role in the trial of the action ... the trial judge erred in failing to attribute any sufficient weight to the contention that it was open to the Fourth Named Defendant... to deliver submissions at the conclusion of the trial;

15. The trial judge erred in fact and in law in failing to exercise its discretion to depart from the rule that provides that costs follow the event;

16. The trial judge erred in fact and in law in the proper application of High Court practice direction HC 71;

17. The trial judge erred in fact and in law in failing to attribute any or any sufficient weight to the fact that the Second and Third Named Defendants... did not call a quantity surveyor and did not cause or allow the parties' respective quantity surveyors to meet;

18. The trial judge erred in fact and in law in holding that it was not possible in the within case to allow costs for a portion only of the overall trial and the Court thereby

erred in the exercise of its discretion by awarding the Defendants the entirety of the costs associated with the trial;

19. The trial judge erred in fact and in law and the trial judge erred in the exercise of its discretion, in holding that the sums ultimately ordered to be paid out on interim basis were in fact reasonable amounts;

20. The trial judge erred in fact and in law in refusing to place a stay on the Order directing the payment out of the said sums.”

Discussion

66. Counsel for the plaintiff distilled the appeal of the substantive judgment in the Equity Proceedings into three principal arguments. The first is that there was a significant and reviewable error on the part of the trial judge in failing to engage with or weigh key aspects of the evidence concerning the representations said by Brendan O’Rourke to have been made to him by Dermot O’Rourke prior to his marriage to Diane O’Rourke (“the representations issue”).

67. Secondly, he says that there was a significant and reviewable error by reason of the trial judge’s failure to weigh the evidence of Dermot O’Rourke in the context of the latter’s credibility in circumstances where the trial judge embarked on such a weighing exercise in the context of the plaintiff’s credibility. It is contended that Dermot O’Rourke’s credibility was a highly relevant factor both in relation to the representations issue and his personal use of a trust asset – Furness Hall – this being the very asset that Brendan O’Rourke contends was promised to him at least to the extent of 50% ownership. It is also argued that even if the actions of Dermot O’Rourke in relation to the trust are found to be outside the confines of the plaintiff’s pleaded case, the supervisory function of the High Court in trust matters ought to have been deployed by the trial judge when assessing the credibility of the second defendant’s evidence on the representations issue. Allied to this second argument is

the matter of the Bank having assisted Dermot O'Rourke in a breach of the trust (albeit counsel says this relates more properly to the plaintiff's appeal in the Bank Proceedings)

68. Thirdly, it is said that there was a direct conflict in evidence between the relevant parties as to what occurred at the end of August/beginning September 2004 in relation to the signing of documents. It was Brendan O'Rourke's evidence that he signed certain documents at the office of Dermot O'Rourke at Leinster Mills, County Kildare in the presence of Clodagh Gill, personal assistant to Dermot O'Rourke. This was contested by the second and third defendants and their evidence was that the documents in question were signed by Brendan O'Rourke in the presence of solicitors at a location other than Leinster Mills and that Ms. Gill was not present on the day. The plaintiff submits that the trial judge failed to properly take account of this conflict, particularly in the context of the plaintiff's contention that he had no independent legal advice when signing the documents.

The appellate function

69. Before turning to the appeal grounds, it is apposite to refer role of the Court in an appeal such as the present.

70. As between the parties, there was no dispute as to the legal test for an appellate court to interfere with findings of fact made by a trial judge. In *Leopardstown Club Ltd v. Templeville Developments Ltd.* [2017] 3 IR 707, Denham CJ considered the well-established principles identified in *Hay v. O'Grady* 1 IR 210 and which delineated the role of an appellate court in reviewing the findings of fact made by a trial court. She stated, at para. 82:

The principles identified by the Hay v. O'Grady jurisprudence include the following:-

- *An appellate court does not proceed by way of a full re-hearing of the case;*
- *An appellate court is bound by the findings of fact of a trial judge which are supported by credible evidence;*

- *In general, an appellate court proceeds on the findings of fact of a trial judge;*
- *The fact that there is contrary evidence does not alter the position;*
- *An appellate court should be slow to substitute its own inferences of fact where such depends upon oral evidence, and a different inference has been drawn by the trial judge;*
- *The fact that there is some evidence before the trial judge which may lead to a different conclusion does not alter the fundamental principle;*
- *A finding of the credibility, or not, of a witness is a primary finding of fact.”*

With reference to the decision of the Supreme Court in *McCaughey v Irish Bank*

Resolution Corporation Ltd [2013] IESC 17 she went on to state, at para 88:

“...an appellate court should not interfere with a primary finding of fact by a trial court which has heard oral evidence, unless it is so clearly against the weight of the evidence as to be unjust”.

71. In *Doyle v. Banville* [2012] IESC 25, [2018] 1 I.R. 505, Clarke J., noting McCarthy J.’s emphasis in *Hay v. O’Grady* on the importance of a clear statement of the trial judge’s findings of fact, opined that *“any party to any litigation is entitled to a sufficient ruling or judgment so as to enable that party to know why the party concerned won or lost”*. He went on to state:

“To that end, it is important that the judgment engages with the key elements of the case made by both sides and explains why one or other side is preferred...the judgment must analyse the case made for the competing version of [the] facts and come to a reasoned conclusion as to why one version of those facts is to be preferred. The obligation of the trial judge, as identified by McCarthy J. in Hay v. O’Grady, to set out conclusions of fact in clear terms needs to be seen against that background.”

72. Clarke CJ. returned to this theme in *Morrissey v. HSE* [2020] IESC 6, again emphasising that the obligation on a trial judge to provide a clear statement of the primary findings of fact, the inferences to be drawn therefrom and the conclusion that follows is premised on there having been an appropriate engagement on the part of a trial judge with the arguments of the parties. Citing the holding of the Supreme Court in *Doyle v. Banville* to that effect, he went on to state:

“7.4.... In my judgment in [Doyle v. Banville], a distinction was drawn between circumstances in which there may have been a significant and material error in the way in which the trial judge reached a conclusion as to the facts, in respect of which an appellate court can and should intervene, and a case where the trial judge was simply called on to prefer one piece of evidence to another and does so for a stated and credible reason. In the latter case, it is not the function of the appellate court to revisit the trial judge's findings.

7.5 This obligation on the trial judge to engage with and adequately address the competing arguments of the parties on the facts was restated by this Court in Wright v. AIB Finance & Leasing and ors [2013] IESC 55 and Ulster Bank v. Healy [2015] IESC 106. Importantly, in Leopardstown Club Ltd. v. Templeville Developments Ltd [2017] IESC 50, [2017] 3 I.R. 707, MacMenamin J. set out in clear terms the approach to be taken by an appellate court when reviewing the engagement of the trial judge with the arguments of the parties to litigation, at paras. 109-111:-

‘109. Save where there is a clear non-engagement with essential parts of the evidence, therefore, an appeal court may not reverse the decision of a trial judge, by adverting to other evidence capable of being portrayed as inconsistent with the trial judge's primary findings of fact.

110. “Non-engagement” with evidence must mean that there was something truly glaring, which the trial judge simply did not deal with or advert to, and where what was omitted went to the very core, or the essential validity, of his findings. There is, therefore, a high threshold. In effect, an appeal court must conclude that the judge's conclusion is so flawed, to the extent that it is not properly “reasoned” at all. This would arise only in circumstances where findings of primary fact could not “in all reason” be held to be supported by the evidence (see Henchy J. in *V. C. v. J.M. and G.M.* [1987] I.R. 510, at p. 523, quoting his earlier judgment in *Northern Bank Finance v. Charlton* [1979] I.R. 149). “Non-engagement” will not, therefore, be established by a process of identifying other parts of the evidence which might support a conclusion other than that of the trial judge, when there are primary facts, such as here. Each of the principles in *Hay v. O'Grady* [1992] 1 I.R. 210 is to be applied.

111. The task faced by the judges of our appeal courts is already too onerous. But the task would be made yet more onerous were appeals to be reduced to a piece-by-piece analysis of the evidence, in an effort to show, on appeal, that the trial judge might have laid more emphasis on, or attached more weight to, the evidence of one witness, or a number of witnesses, or one document, or a number of documents, rather than others on which he or she relied.’ (emphasis included in original)’”

73. The above cited jurisprudence represents a useful summary of the boundaries of this Court’s role. As stated by Collins J. states in *McDonald v. Conroy* [2020] IECA 239, with reference to the established jurisprudence, “[t]he judge’s task was to have regard to the evidence, to identify the issues that required to be resolved, to make findings on those

issues and to explain the basis for those findings sufficiently, within the parameters set out in the case law...” He also opined that “*it is essential to keep the proper boundaries of this Court’s role in mind*” and “*not to overstep the Court’s appellate function by substituting the Court as fact-finder*”

74. Essentially, the plaintiff’s argument on appeal is that the trial judge failed to engage either with pertinent evidence relating to the representations the plaintiff says were made by Dermot O’Rourke or the credibility deficits said by the plaintiff to attach to Dermot O’Rourke’s testimony. He maintains that her failure to do so constitutes the type of error which, as envisaged by Clarke J. in *Doyle v. Banville* at paras. 2.4 and 2.5, warrant interference by an appellate court. This is because, as maintained by the plaintiff, the trial judge failed to engage with or analyse the broad case made by on or on behalf of the plaintiff. It is said that, accordingly, there are significant errors in the way the trial judge reached her conclusions as to facts.

75. I turn now to the specific grounds advanced by the plaintiff.

Alleged failure on the part of the trial judge to engage with key evidence (Grounds1-2)

76. The plaintiff asserts that there was a significant and thus a reviewable error on the part of the trial judge in failing to engage with and weigh key evidence that was supportive of his case. Counsel argues that nowhere in the judgment is the substance of the representations made by Dermot O’Rourke as claimed by Brendan O’Rourke dealt with. While it is accepted that at paras. 53 and 90 of the judgment the trial judge refers to the representations, the plaintiff says that there was no consideration by the trial judge of the evidence which Brendan O’Rourke gave in this regard or of the manner in which Dermot O’Rourke responded to questioning on the issue in the course of the trial.

77. Counsel describes the noting, at para. 47 of the judgment, of the defendants’ submission that the plaintiff had agreed under cross-examination that Dermot O’Rourke

had never offered to buy him a house mortgage-free as a “minimalist” approach by the trial judge to the case being made by the plaintiff. Counsel also takes issue with her observation, at para. 90, that no representations were asserted by Brendan O’Rourke to have been made by Perle O’Rourke “although the plaintiff does allege representations made by the second defendant”. He submits that the trial judge appears to be making a technical point that because it is not claimed that Perle O’Rourke made representations to Brendan O’Rourke, he cannot thus rely on the representations said to have been made by Dermot O’Rourke. The plaintiff’s position is that the legal authorities upon which the trial judge appears to have relied do not detract from the plaintiff’s essential argument, namely that the DORDT was concealed from him.

78. The plaintiff contends that the trial judge fell into error when she failed to have regard to evidence that supported the claim that the property was to be transferred to the ownership of Diane O’Rourke after three years. He also submits that the trust mechanism was motivated solely by tax considerations (as shown by contemporaneous documentation) and not, as said by Dermot O’Rourke in oral evidence, out of concerns he had about the marriage of Diane O’Rourke and the plaintiff.

79. Turning therefore to the evidence given by both the plaintiff and Dermot O’Rourke on the representations issue.

80. On Day 2 of the trial, the plaintiff testified to a conversation he said he had with Dermot O’Rourke some months prior to the wedding, in the course of which Dermot O’Rourke evinced his intention to buy a house for Brendan O’Rourke and Diane O’Rourke.

“ ... we were just sitting there and Dermot said: ‘Look, I want to buy you a house.’ I will never forget these words, he said: ‘I would rather my daughter live on an estate than in one.’ I probably laughed, do you know, I probably took it in good

jest, I probably thought about it slightly. He said: ‘Look, I’m going to find somewhere for you to live.’ I said, well I didn’t say anything, ok, right. That was fine. About a month later he asked us to go and view, and he came with us, a house out in Brannockstown,”

81. The plaintiff went on to testify that in the context of the Brannockstown property (which Brendan O’Rourke, Diane O’Rourke, Dermot O’Rourke and Perle O’Rourke had all viewed and which had a guide price of €2.5m/€3m) he had later gone back to Dermot O’Rourke and advised him that if he, Brendan O’Rourke, sold everything, he could still only afford €1.2m to which Dermot O’Rourke had replied “Brendan, this is mere bagatelle to me”. According to the plaintiff, the conversation had taken place in Dermot O’Rourke’s home.

82. He explained that weeks later, he was again called to Dermot O’Rourke’s home after an advertisement had appeared in the papers for the sale by auction of a house in Kill for €3m. On that occasion Dermot O’Rourke had stated that he was going to try and buy the house using words “I’m going to try and buy it for you”. Brendan O’Rourke and Diane O’Rourke duly went to view the house. He further testified that Dermot O’Rourke attended the auction where it transpired that he was the under-bidder, the house ultimately selling for €5.2m.

83. The plaintiff explained that sometime later, he and Diane O’Rourke were apprised by Dermot O’Rourke that Furness Hall was coming up for sale. The plaintiff and Diane O’Rourke duly viewed the property on a number of occasions including on one occasion in the company of the plaintiff’s sister and parents. Brendan O’Rourke testified: “Every time Diane said it ‘Dad is buying this for us as a wedding present.’ Dermot confirmed it, you know, ‘that’s your wedding present and that’s it’”.

84. He testified that at no stage when Furness Hall was being viewed was there any mention of a trust, either by Diane O'Rourke or Dermot O'Rourke. Rather, "it was openly said it was our wedding present". He stated: "I was just told I was getting a house, 'that's your wedding present' and that's it... I knew the price it was 3.6". He further testified: "[Dermot O'Rourke said] 'I've only one daughter' and he said it in a joking way now and he said, 'it might be cheap, you'll have the burden afterwards' it was like in a joking in a friendly way..."

85. The plaintiff described discussions he had in the Summer of 2004 with Diane O'Rourke. She had told him that her father was buying the house for the couple as their wedding present: "There was no mention of who the solicitors were. There was no mention of banks. There was no mention of anybody. It was a present. [She said] 'Dad was buying us this present for our wedding'. Dermot O'Rourke confirmed that too". As was the case with Diane O'Rourke, Dermot O'Rourke had not mentioned solicitors or banks.

86. In the course of the plaintiff's evidence-in-chief, a transcript of the wedding speech referenced in the pleadings was provided by his solicitors. The following passage contains the words of Dermot O'Rourke at the wedding, pleaded by Brendan O'Rourke as evidence of the promise or assurance of the gift of Furness Hall to him:

"[Brendan O'Rourke] has done extremely well in his own right. He just succeeded in selling a property of his own private house for a substantial amount of money. Paddy Jordan says that if I mention his name, he will give you a rebate but ah no, no, things have gone very well and they have bought a beautiful new property and we wish them every happiness in it. I was going to thank John Hunt for putting a roof over their head but he's not a joiner now, he's just involved with the First

Active and he said if I mentioned First Active, he would definitely give them a reduction in the interest rate. So I don't know where we are going with that."

The plaintiff testified that he understood those words to mean that he was in receipt of a gift of the house.

87. Dermot O'Rourke gave evidence on Days 19 and 20 of the trial. When questioned as to his intention in relation to Diane O'Rourke's living arrangements once she got married, he responded as follows:

"I had always intended... and this is quite important... I had always intended that I would buy a property for her to live in...and after a period of years – the quantum of years is undetermined – I would then be in a position to determine whether in fact I should give the property to her. But in the interim time, until I knew that the marriage was going to last - which I wasn't certain about – there would have been no question of giving any beneficial ownership to anybody. ... So at that stage I had determined that I wanted to buy a nice house, that my wife and I would put in trust, and over a period of time, in years to come we would be in a position to determine how we might either dispose of it, give it to my daughter, or whatever."

88. Dermot O'Rourke was also questioned about the representations which it is alleged he made to Brendan O'Rourke:

Q. ... Now, I am going to take you to the transcript of Brendan O'Rourke's evidence in relation to his testimony as to what he claims that you said to him on a series of occasions prior to his wedding in relation to this property. But before I do this I want to ask you did you have any discussions with Brendan O'Rourke in relation to the acquisition of this property?

A. Never mentioned the idea, the concept of a property in relation to him at any time until I signed for the purchase of Furness Hall.

Q. Yes.

A. That was the only time I ever spoke to Brendan O'Rourke prior to buying Furness Hall...

Q. How do you know? How do you recall at this remove that you had no such conversation with him [prior to signing for Furness Hall]?

A. Because I had so limited contact with him. I did say previously that for the preceding 12 months, before they moved into Furness Hall, I had a total of about 60 minutes' conversation in 12 months with him. There was never a question of discussing with him. It had nothing to do with him. And I always saw it that it was nothing to do with him."

89. Questioned about the conversation he had with Brendan O'Rourke after he signed for Furness Hall, Dermot O'Rourke stated:

"A. ...I phoned my daughter and said: 'if the two of you want to come up to the house, I want to tell you about a house that I have committed to buying.'

Q. Yes.

A. So they came up and I just simply said: 'I'm thrilled. You guys can have the right of residence in it and I hope that it will be useful and satisfactory and pleasant for you', and all that. What I said at the same meeting – it was only 5/7 minutes – but now that I had signed for it I was going to off and organise the funding for it.

Q. Yes. Did you tell them anything more in relation to how you intended to hold the property?

A. Well I just simply said it was a trust because – I had said to you previously that my daughter was the beneficiary of the family trust since the year 2002 so the concept of a trust wasn't unique. I mean, I heard the plaintiff's evidence when I was

here saying he didn't understand the concept of a trust. But, yeah, I did explain that to him.”

90. Later, in response to the question whether he had ever informed Brendan O'Rourke that Furness Hall was a wedding present, Dermot O'Rourke replied: “Never, because it was never was because I never intended it to be. It never – the question never arose. It is a bare faced untruth predicated upon his opening thing ‘I’m going to say that this was promised to me as a wedding present’. The thing is farcical.”

91. Counsel for the plaintiff contends that the responses of Dermot O'Rourke as cited above (in particular his responses to the evidence adduced by the plaintiff) were not analysed or weighed by the trial judge as they ought to have been. His complaint is that the trial judge did not take account of Dermot O'Rourke's failure to adequately address in his responses as to whether or not he made the representations attributed to him by Brendan O'Rourke in his evidence.

92. In the first instance, I find no basis for contention that the trial judge did not engage with the evidence Brendan O'Rourke gave in respect of the representations he alleged were made to him. It is apparent from the outset of the judgment that the trial judge understood the case being made by the plaintiff (see para. 2). Albeit that his testimony concerning the representations upon which he relied is not recited verbatim in the judgment, it is patently clear that the trial judge was entirely cognisant of the plaintiff's evidence as to what had been said to him by Dermot O'Rourke. She expressly states, at para. 12: “[t]he plaintiff makes many references to various alleged statements made by the second named defendant and by Diane O'Rourke to the effect that the property was given to them as a gift by Dermot O'Rourke and to both Diane and Brendan O'Rourke. This is heavily disputed throughout the evidence”. In my view, para. 12 can only be taken as a reference to the evidence led by the plaintiff in respect of what he alleged was said to him by Dermot

O'Rourke and Diane O'Rourke. Again, at para. 46, the trial judge records that that "the plaintiff referred to meetings where a representation was made that the property or some property was being gifted to him and Diane O'Rourke..." In the same para. 46, she specifically refers to "the evidence of the second defendant and Diane O'Rourke...of a single transaction [meeting] with the plaintiff after the contract was signed at which the second defendant explained that he was purchasing the property in trust and their evidence was that it was indicated that a property was being bought for the married couple to live in but nothing further was promised".

93. At para. 115, she refers to Dermot O'Rourke's evidence to the effect that the plaintiff and Diane O'Rourke were getting "a place for the married couple to live in and nothing further was promised", which, I am satisfied, correctly summarises the thrust of the evidence given by Dermot O'Rourke on Days 19 and 20 of the trial. The recitals at paras. 12, 46 and 115 demonstrate the trial judge's engagement with the testimony given by the plaintiff and Dermot O'Rourke in relation to the alleged representations and correctly represent the case advanced by each side. Accordingly, contrary to the plaintiff's submission, there was nothing "asymmetrical" in the way the trial judge reached the conclusion she did at para. 142 in respect of the representations issue. Her conclusion was reached after a consideration of the relevant evidence including that of the plaintiff, Diane O'Rourke and Dermot O'Rourke.

94. I am satisfied that there was an ample basis for the trial judge to accept Dermot O'Rourke's evidence that no representations of the kind described by the plaintiff were made to the plaintiff and that at the relevant time Dermot O'Rourke's intention was to benefit *Diane O'Rourke* in the future. The first and second defendants' evidence apart, there was extraneous independent evidence which the trial judge properly took account of in making her findings. Contrary to the arguments which the plaintiff seeks to advance, the

contemporaneous documentation in fact shows that the intention at all relevant times was to *potentially* benefit Diane O'Rourke. This is evidenced by Dermot O'Rourke's solicitor's email correspondence with the Bank on 13 July 2004 in respect of the purchase of Furness Hall by trustees of the discretionary settlement then being proposed to be established by Dermot O'Rourke. The email clearly states that the property was to be acquired by the trustees and taken in their names with the trustees then permitting "Diane [O'Rourke] to occupy the residence on an annual basis" (in a tax efficient manner) and that "after Diane has occupied the property for three years, the Trustees can then appoint the property to her absolutely".

95. Email correspondence of the same date to Dermot O'Rourke from his solicitor refers *inter alia* to Diane O'Rourke to be given "a licence to occupy the property on an annual basis" and that "the property could be appointed out to her in three years free of ...[CAT]". There is no reference in either piece of correspondence to Brendan O'Rourke. All in all, the trial judge had an ample basis upon which to reject the plaintiff's case on the representations issue and conclude, as she did at para. 142, that it was "inconceivable and simply not credible that the plaintiff was not fully aware of the circumstances in which he was moving into [Furness Hall]" in 2004.

96. It is suggested by the plaintiff in his written submissions that the trial judge concluded that Dermot O'Rourke's primary motivation for the trust structure was his misgivings about Brendan O'Rourke and that the trial judge erred in so concluding in the face of contemporaneous documentary evidence that showed that the use of the trust structure was motivated solely by tax reasons. In this regard, counsel for the plaintiff relies on the email correspondence from Mr. Madigan to First Active of 13 July 2004 and to his email to Dermot O'Rourke of the same date as well as the internal First Active

memorandum of 14 July 2014 and a further email from Mr. Madigan to Dermot O'Rourke of 17 July 2004.

97. Undoubtedly, the trial judge accepted, at paras. 104-105, that Dermot O'Rourke had concerns about the likely duration of the marriage. She found that there was a possibility of a transfer of the property in the future but that until Dermot O'Rourke was sure that the marriage would last there was no question of him giving ownership of the property to anybody. She found Dermot O'Rourke's evidence regarding his concerns to be credible in light of the acceptance by Brendan O'Rourke that at the time she began cohabitating with him, Diane O'Rourke was estranged from her parents for a considerable period of time. Dermot O'Rourke gave evidence of that estrangement on Day 19 (pp 24-26) and further testified to his intention to buy a property for Diane O'Rourke to live in and that, after a period of years (undetermined) he would be in a position to determine whether in fact he should give the property to her – that was dependent on whether her marriage to Brendan O'Rourke would last. Dermot O'Rourke's evidence was that in the interim, "there would be no question of giving beneficial ownership to anybody".

98. Notwithstanding the submissions of the plaintiff, I do not consider that para. 105 of the judgment can be read as a finding that the primary motivation for the trust structure was Dermot O'Rourke's concerns about the marriage of his daughter to the plaintiff. While para. 105 records Dermot O'Rourke's concerns about the marriage it also records that the property "was to be purchased in a tax efficient manner".

99. The plaintiff also complains that the trial judge did not engage to any extent with the fact that the contemporaneous documentation supported the contention that the use of the trust structure was motivated solely by tax considerations or with the submission that the first mention of the establishment of the trust structure because of Dermot O'Rourke's apparent concerns about the marriage was during the trial of the action. This alleged

lacuna on the part of the trial judge is said by the plaintiff to amount to a failure on the part of the trial judge to engage with a significant and key element of the case.

100. Firstly, I cannot agree with the argument that the *motivation* behind the establishment of the trust was a key element of the case. The motivation for the establishment of the trust (be that tax considerations or concerns about the likely duration of the marriage of Brendan and Diane O'Rourke) cannot on any reading of the claim advanced by the plaintiff be regarded as a key element of his case. Whether one looks at the case as pleaded (i.e. that Furness Hall was gifted to the plaintiff and Diane O'Rourke at their wedding) or the claim ultimately advanced in evidence by the plaintiff, namely that the house was promised to them in a series of conversations he and Diane O'Rourke had with Dermot O'Rourke prior to the marriage, the central premise of the plaintiff claim was not based the existence of a trust or the motivation for its establishment. In point of fact, the plaintiff denied any knowledge of the existence of the trust. Accordingly, and I agree with the Bank's submissions in this regard, Dermot O'Rourke's intention or motivation in establishing the trust did not bear on whether or not a promise or representation was made to Brendan O'Rourke that he was to receive a share of Furness Hall or whether he relied on those representations to his detriment-the two central issues which arose for determination based on the claim advanced by the plaintiff.

101. Secondly, even if the motivation for the establishment of the trust could be considered a key element of the case, as set out above, the trial judge clearly engaged with the evidence given in respect of the establishment of the trust and, moreover, she had a credible basis for accepting that as well as tax considerations, Dermot O'Rourke's concerns about the marriage informed his decision to establish a trust structure, given the accepted estrangement of Diane O'Rourke from her parents for a number of years prior to the marriage.

102. Insofar as the plaintiff's submissions to this Court appear to suggest that the promise made by Dermot O'Rourke was to establish a discretionary trust to hold Furness Hall until 2007 but at the same time Dermot O'Rourke committed the property to the plaintiff and Diane O'Rourke in 2004 *via* representations, again, that was a case never pleaded or advanced by the plaintiff. In any event, such a case could never conceivably have been advanced given that for Diane O'Rourke to benefit from the tax efficiency created by the DORDT, it was necessary that no interest vested in her and that the trustees retained their discretion to appoint. As pointed out in the Bank's submissions, the premise suggested by the plaintiff would have been a fraud on the Revenue.

103. As acknowledged by his counsel at the appeal hearing, the central element of the plaintiff case is that representations were made by Dermot O'Rourke that the plaintiff and Diane O'Rourke would become the owners of Furness Hall and that based on those representations Brendan O'Rourke incurred expenditure. As is evident from the judgment (para. 104), in determining whether any or any alleged representations were made to the plaintiff that led him to believe that Furness Hall was or would become the property of him and Diane O'Rourke, the trial judge accepted "in full the evidence of Dermot O'Rourke" which disputed the plaintiff's claim. The plaintiff challenges that finding by contending, *inter alia*, that the rationale for the trial judge's preferment of Dermot O'Rourke's evidence over that of Brendan O'Rourke is not evident from the judgment.

104. I find no substance in the plaintiff's argument. There was no lack of reasoning in the judgment as to why the trial judge preferred the evidence of Dermot O'Rourke over that of the plaintiff. The rationale for her findings in respect of the knowledge the plaintiff was found to have about the legal and beneficial ownership of Furness Hall is apparent, *inter alia*, from her consideration of the documents he signed in September 2004. These documents made clear that Furness Hall was subject to a trust and borrowings from First

Active which were secured by a mortgage. This documentary evidence more than corroborated Dermot O'Rourke's personal testimony as to the nature of his discussion with the plaintiff after he signed the contract for Furness Hall.

105. Moreover, the plaintiff signed documents which clearly referred to a trust and secured borrowings and which recoded that Diane O'Rourke was taking up residence of Furness Hall as a licensee of Dermot and Perle O'Rourke. All of this belied any reasonable probability of representations of the kind testified to by the plaintiff having been made by Dermot O'Rourke either prior to at or indeed subsequent to his marriage to Diane O'Rourke. I am satisfied that the findings of the trial judge on these and indeed other matters could have left the plaintiff in no doubt as to why his evidence was not preferred over that of Dermot O'Rourke. The requirement, per para. 7.7 of *Morrissey*, for a trial judge "*to set out the reasons why central or important aspects of the case of one or other party on the facts were not accepted*" has been met in this case, in my view.

106. It is also patently obvious from the judgment that the trial judge's rejection of the plaintiff's case did not rest solely with her acceptance in full of the evidence of Dermot O'Rourke or indeed the documentary evidence that supported Dermot O'Rourke's denial of the alleged representations. She also had regard to the fact that the very wedding speech upon which the plaintiff placed reliance referred to the property having been purchased with borrowings from First Active and the plaintiff's own admission in evidence that he was not getting a house mortgage-free both of which were inconsistent with the notion that Dermot O'Rourke could have given him a fifty percent interest in the property.

107. Moreover, there were other actions on the part of the plaintiff that impelled the trial judge to make the findings she did and reject his claim, not least his acquiescence when told by Diane O'Rourke in 2007 that he could not sell the property for tax reasons relating to her father and his conflicting evidence as to his knowledge of the DORDT, as referred to

at para. 135 of the High Court judgment. More fundamentally, there was the plaintiff's fabrication of evidence in order to advance his claim, a matter to which I shall return.

108. Ground 2 of the notice of appeal asserts that the trial judge failed to have regard to the documentary evidence that established that it was intended at the time of the establishment of the DORDT that Furness Hall would be transferred to the ownership of Diane O'Rourke after three years.

109. The plaintiff asserts that the trial judge did not engage with the evidence given by Diane O'Rourke on Day 17 of the trial (pp 51-54, with reference to a property at Brannockstown) to the effect that her understanding was that Dermot O'Rourke was purchasing a property "with the intent that it was going to be mine, obviously, at some stage" and "it was obviously going to be mine and whoever I was married to..." and "my conclusion was my father's intent was to purchase a property for myself and Brendan to reside in or to live in" and that "the intention was the property was... for myself and Brendan...".

110. The plaintiff contends that the evidence of Diane O'Rourke showed her acceptance that the intention was that whatever property was purchased it was going to be hers and her husband's in due course. Accordingly, it is submitted that the findings made by the trial judge at para. 115 of the judgment were arrived at in the absence of any analysis of the evidence of Diane O'Rourke in this regard.

111. I do not find any merit in this submission. The trial judge clearly engaged with this evidence, as para. 115 of the judgment denotes. To my mind, the trial judge had a clear basis to conclude as she effectively did that the overall thrust of Diane O'Rourke's evidence mirrored that of her father the second defendant. To my mind, the plaintiff's parsing of the language used by the first defendant amounts to no more than a "*rummaging*

in the undergrowth” (to adopt Clarke CJ’s language in *Doyle v. Banville*) in an attempt to say that the trial judge was in error in her conclusions on the representations issue.

112. In any event, as far as this issue is concerned, I find merit in the Bank’s submission that even if it was the case that Diane O’Rourke had believed at the time she and the plaintiff met with her father after he signed the contract for Furness Hall, that Dermot O’Rourke’s intention was to transfer a house to her and to Brendan O’Rourke, by September 2004 that was clearly not the case as both Diane O’Rourke and Brendan O’Rourke signed documentation acknowledging that their occupation of Furness Hall was on foot of a licence then being given to Diane O’Rourke to occupy the house, and they were aware when signing that documentation that the property was owned by a trust and funded by borrowings. Moreover, pursuant to a letter written on 31 August 2004 to Diane O’Rourke by Ms. Natasha McKenna of Mason Hayes and Curran the solicitors acting for Dermot O’Rourke in the conveyance, Diane O’Rourke knew that the house was being bought in trust, that she would not own it, that her occupation would be on foot of a licence and that any monies she invested in it would not be recouped.

113. I should also add that there is some force in the Bank’s argument that it is implicit from grounds 1 and 2 and that Brendan O’Rourke appears to accept that he knew of the trust at the relevant time and was aware of the import of the documents he signed in September 2004 and, more importantly, knew that the occupation of Furness Hall by Diane O’Rourke and himself was on the basis of a licence and accordingly that he had not established that any representations had been made to *him*. It logically follows that the manner in which grounds 1 and 2 of the appeal are formulated substantially undermines the arguments sought to be advanced by the plaintiff at the hearing of the within appeal.

The Clodagh Gill issue

114. After a series of denials during the trial, the plaintiff ultimately accepted that he had signed the family home declaration and the Consent to the Deed of Confirmation. It was his case that the documents were signed by him at the offices of Dermot O'Rourke at Leinster Mills. Central to his case, as recorded at para. 15 of the judgment, was his assertion that he signed the documents in the absence of independent legal advice. In his appeal submissions the plaintiff makes much of the fact that the defendants chose not to call Clodagh Gill as a witness the person who, he asserts, in whose presence he signed the documentation in question. He says that Clodagh Gill was present in court throughout the trial and could well have given evidence as to her presence or absence on the date in question, but she was not called as a witness by the defendants. The complaint is that the trial judge failed to have any proper regard to the plaintiff's submissions on this issue.

115. The Bank asserts that there is no merit in Brendan O'Rourke's complaint that the defendants chose not to call Clodagh Gill as a witness in the case. Counsel submits that this factor has no bearing on the case and that the salient factor is that Brendan O'Rourke accepted that he had signed the documents in question. It is submitted that where they were signed is not relevant.

116. The case advanced by the defendants at trial was that each of the documents was signed by the plaintiff in the presence, variously, of Ms. McKenna and Ms. Vanessa Byrne of Mason Hayes and Curran. The Consent to the Deed of Confirmation states that the plaintiff signed that document on 16 September 2004 in the presence of Ms. Byrne. The plaintiff claims that while the document says as much, Ms. Byrne was not present when he signed it.

117. The family home declaration signed by Brendan and Diane O'Rourke on 16 September 2004 records that it was declared in the presence of Ms. McKenna. The plaintiff

denied that he met Ms. McKenna or that he signed the document in her presence. Again, his evidence was that it was signed at Leinster Mills in the presence of Ms. Gill.

118. Ms. McKenna testified that she witnessed the signing of the family home declaration by both the plaintiff and Diane O'Rourke and that it was done in the offices of Mason Hayes and Curran. She testified that she recognised the plaintiff in court. When asked if she could identify him she did so. This was also the case with Ms. Byrne. The trial judge noted that both solicitors when asked were able individually to point out and identify the plaintiff and confirm that they had met him previously.

119. While it is the case that on 31 August 2004, Ms. McKenna had sent documents including the family home declaration to be sworn by Brendan and Diane O'Rourke to Ms. Gill, ultimately, the trial judge accepted the evidence tendered by Ms. McKenna that the requisite documentation was sworn by Brendan O'Rourke and Diane O'Rourke on 16 September 2004 the date of closing of the sale of Furness Hall at the offices of Mason Hayes and Curran, following which Ms. McKenna brought the couple to Mr. O'Loughlin, Solicitor and Commissioner for Oaths.

120. As noted by the trial judge at para. 124, the salient issue as far as the documents relevant to the conveyance of Furness Hall was concerned was the plaintiff's ultimate admission that he was the signatory on three important documents, the family home declaration dated 16 September 2004, the Consent to the Deed of Confirmation dated 16 September 2004 and an undated acknowledgment that he received independent legal advice. She rejected the plaintiff's contention that he was unaware of the import of the documents, noting that at the relevant time he was a mature adult of full mind who himself had business interests and who had dealings with property transactions of his own. Accordingly, the plaintiff was bound by the contents of the documents (which referred to both the existence of a trust and that Diane O'Rourke's residence in Furness Hall was on

foot of a licence) even if he professed not to have read the documents. She stated: “the reality of the situation is that documents were executed and the plaintiff admitted that he had signed them although he continued to dispute location and time” (at para. 125).

121. Now, the plaintiff seeks to impugn the trial judge’s findings by reason of the alleged failure of the trial judge to take account of the fact that the defendants chose not to call Ms. Gill as a witness in circumstances where she was present in court each day of the trial. To my mind, even if it could be said that the trial judge failed to adequately take account of the plaintiff’s argument in this regard (although I note the trial judge does record more than once that the plaintiff was disputing the timing and the location of his signatures), such finding could not assist the plaintiff in circumstances where he does not dispute that he signed the documents in question. It seems to me that notwithstanding the plaintiff’s insistence on the Clodagh Gill issue as an important factor, the reality of the matter is that it has not been established by the plaintiff that any failure of the trial judge in this regard “*went to the very core, or the essential validity*” of her findings, as per MacMenamin J. in *Leopardstown*.

122. In all the circumstances and for the reasons outlined above I find no basis for the argument that the trial judge failed to engage with key evidence or submissions in the case. A perusal of both the transcripts and the judgment shows that the trial judge engaged in an analysis of all relevant and material issues. Moreover, the rationale for the trial judge’s preferment of Dermot O’Rourke’s evidence is clear from the judgement and thus the plaintiff cannot be in any doubt why he lost the claim he advanced.

123. It must also be said that this argument misunderstands the scope and purpose of those authorities that suggest a power to determine issues against a party when they could have, but failed to, call evidence to rebut a claim made by their opponent. The principle was explained by O’Donnell J. in *Whelan v. AIB* [2014] IESC 4, as follows:

*“The drawing of an inference in this context, as indeed in any other, is an exercise in logic: when one party asserts a given set of affairs, which the identified witnesses available to the other party could be expected to rebut if untrue, then, if the second party does not call those witnesses to give evidence, the court may draw the inference in support of the case made by the first party, that those witnesses were not called to give such evidence because they would not in fact rebut the case made by the first party. Each case therefore, involves a consideration of the specific inference which the court is invited to draw. The position is well put in two authorities relied on by the bank in this regard. In *McQueen v. Great Western Railway Company* (1874 - 75) L.R. 10 Q.B. 569 Cockburn L.J. said:*

‘If a prima facie case is made out, capable of being displaced, and if the party against whom it is established might by calling particular witnesses and producing particular evidence displace that prima facie case, and he omits to adduce that evidence, then the inference fairly arises, as a matter of inference for the jury and not as a matter of legal presumption, that the absence of that evidence is to be accounted for by the fact that even if it were adduced it would not disprove the prima facie case. But that always presupposes that a prima facie case has been established; and unless we can see our way clearly to the conclusion that a prima facie has been established, the omission to call witnesses who might have been called on the part of the defendants amounts to nothing.’ (para. 574)”

124. Here, however, there was no need for the defendants to call Ms. Gill because the issue on which her evidence was relevant was the issue not of where the documents were signed but of whether they were signed by the plaintiff and of whether he understood them.

Given the other evidence that was adduced calling her would have avoided only an inference as to irrelevant facts-where documents were executed and who was there.

125. The plaintiff has not met the requisite threshold for the intervention of this Court in respect of grounds 1 and 2.

The alleged failure of the trial judge to properly assess Dermot O'Rourke's credibility (Grounds 5-7)

126. On Day 19 of the trial, Dermot O'Rourke was questioned by his counsel about the 2008 loan facility. With regard to the letter he wrote to the Bank on 22 November 2007 wherein reference was made to the trustees having spent €2m on refurbishing Furness Hall, he acknowledged that the trustees had not spent such sums on the property and that that reference, which was at the proposal of the Bank personnel with whom he was then dealing, was "simply a question of finding terminology so that these lending people could go to their credit committee...". He stated that the Bank personnel knew when he wrote the letter that no money had been spent by the trustees on Furness Hall.

127. On Day 20, under cross-examination by counsel for the plaintiff about the submission of his counsel on Day 3 of the trial that Dermot O'Rourke "took no funds from this trust at all", and when questioned as to whether he had taken money from the DORDT, Dermot O'Rourke testified as follows: "[t]here was toing and froing. We put money in and we took money out. Yeah, there's no one disputing that." He duly confirmed that €1m had been extracted from the trust in 2007.

128. In response to further cross-examination, he acknowledged that the €1m that was contributed to the settled funds in 2006 had reduced the mortgage balance. He further acknowledged that following his extraction on 11 May 2007 of the €1m from the relevant account the mortgage balance had reverted to what it was prior to the settlement of funds in 2006. He confirmed that he requested that the €1m be paid out but was unsure whether

that request was in his personal capacity or on behalf of the trustees but acknowledged it went into his personal account. He did not know what happened to the money.

129. Dermot O'Rourke was also questioned about the circumstances in which he came to write to the Bank in November 2007 advising that Furness Hall was by then worth €7m/€7.5m on the open market and that the trustees had spent €2m on the refurbishment of the property. He confirmed that the contents of the letter of 22 November 2007 were at the behest of personnel in the Bank with whom he dealt. When he went to borrow the funds, it had been suggested that "from an in house point of view" the Bank needed "an excuse of some description" in order to provide the funds. He stated:

"... [W]e agreed on the formula that the Bank wanted the request to be couched in".

The formula of words was intended to be for the Bank's Finance Committee. Dermot O'Rourke agreed that his statement in the letter that he had spent €2m on the property was "incorrect" but that this had been "by agreement with the recipient".

130. He said that he assumed that the purpose of the borrowing in 2008 was "for alternative investment purposes" although he did not recall at that juncture what the funds had been used for but was happy to accept what the documentation said that the equity release of €1.3m was being sought for "further property investment" albeit he acknowledged later Bank documentation also referred to the purpose as having been for "home improvement".

131. Ultimately, he stated that he could not recall what the equity release monies were spent on and that it may have been the case that he was lining up a "war chest" for deals in the future. While denying he used the trust as his own "piggy bank", he accepted that the €1.3m did not go to the trust but rather to his own personal account. He could not be sure where the money ultimately ended up save that he stated he had been told that it was

“invested in high quality bloodstock in Kentucky” all of which had been lost in the market downturn.

132. At the hearing of the appeal, counsel for the plaintiff confirmed that his cross-examination of Dermot O’Rourke in relation to the administration of the DORDT was for the purpose of impugning his credibility as a witness. He stated however that he had also cross-examined the witness on the basis that had the plaintiff been made aware of the existence of the trust, he would not have expended money on the refurbishment of Furness Hall.

133. Counsel prefaced his submissions by reminding the Court that at all stages the trial judge was aware that Dermot O’Rourke’s credibility was being put in issue by the plaintiff, in this regard pointing to his submission on Day 3 of the trial that the actions of Dermot O’Rourke in taking money out of the trust was “highly relevant” to the representations the plaintiff claimed had been made by Dermot O’Rourke. Counsel’s argument is that it was not open to the trial judge to make the finding at para. 138 of the judgment that the plaintiff had failed to establish that any representations were made that could have led him to believe that Furness Hall was or would become his property and that of Diane O’Rourke-in circumstances where she failed to properly weigh the evidence given by Dermot O’Rourke in relation to the operation of the DORDT. It is submitted that insofar as the trial judge accepted, at para. 104, “the evidence in full of Dermot O’Rourke”, this Court will struggle to find anywhere else in the judgment any reasoned or rational analysis of the *credibility* of Dermot O’Rourke.

134. The fundamental point advanced by the plaintiff is that what is said at para. 105 of the judgment was not a balanced way of reaching a conclusion on the issue of Dermot O’Rourke’s credibility. His argument is that there was external evidence in the case impacting on Dermot O’Rourke’s credibility which was not considered. It is argued that in

those circumstances, the high threshold for interference by this Court, as referred to by MacMenamin J. in *Leopardstown* and by Clarke CJ in *Morrissey*, has been met in circumstances where the trial judge here “*has significantly failed*” to adequately address the reasons as to why “*central or important*” aspects of the plaintiff’s case were not accepted.

135. I cannot agree with this submission. It is clear from the judgment that from the outset the trial judge was cognisant of the factors said by the plaintiff to adversely affect Dermot O’Rourke’s credibility. Para. 24 of her judgment records that his credibility was being called into question by the fact that he had previously been convicted of a fraud offence, his false declaration that Furness Hall was his family home at the time of the application for the 2008 refinancing, by reason of his involvement in what the plaintiff described as a conspiracy with the Bank’s lending officials to persuade the Bank’s credit committee to approve a further lending on the basis of an alleged expenditure of €2m on Furness Hall and the use to which the 2008 equity release monies were put.

136. The trial judge addressed the credibility of Dermot O’Rourke at para. 112 of the judgment. She noted that the first piece of evidence he gave was that he had had a prior difficulty (in fact a historical conviction in the District Court for false accounting) and that he had been “appropriately sanctioned in relation to a financial matter in the past” in respect of which he had been “totally upfront”. The plaintiff complains that this issue was not properly dealt with by the trial judge and that Dermot O’Rourke’s prior financial difficulties and the sanction imposed on him ought properly to have been factored into the trial judge’s assessment of his credibility *vis-à-vis* the representations issue.

137. As is also clear from para. 112, the trial judge accepted that part of the 2008 equity release borrowings went into the personal account of Dermot O’Rourke on 13 February 2008. She also accepted Dermot O’Rourke’s evidence of a trust deficit of €200,000

(which was acknowledged on Day 2 of the hearing). Counsel for the plaintiff describes this concession as a *nil ad rehm* since no trust documents were ever produced to the trial court to the effect that the deficit was limited to €200,000.

138. The plaintiff's principal argument is that the trial judge's assessment and ultimate preferment of Dermot O'Rourke's evidence on the representations issue over that given by the plaintiff is seriously flawed because she failed to take account of the events of 2007/2008 concerning the trust and the refinancing of the original borrowings.

139. His written submissions list the evidence which was adduced in the court below and which it is alleged was not taken account of by the trial judge in her preferment of Dermot O'Rourke's evidence over that of the plaintiff:

- (a) Dermot O'Rourke's admission that he and the third defendant had personally taken funds from the DORDT;
- (b) Dermot O'Rourke's contribution of €1m to the DORDT by way of settled property in 2006;
- (c) Dermot O'Rourke's extraction of €1m from the DORDT in June 2007 and his claim that he did not know what happened to these funds after they were lodged to his own bank account;
- (d) Dermot O'Rourke's false claim in the course of the refinancing application in 2007/8 that he and Perle O'Rourke *qua* trustees had spent €2m on the refurbishment of Furness Hall;
- (e) The claim that that false claim had facilitated the refinancing of the existing loan on the property and the balance of the funds obtained in 2008 after the discharge of the 2004 loan had not been spent on the property.

140. The plaintiff says that the trial judge was required to engage in a substantial analysis of the credibility of Dermot O'Rourke in light of the evidence he gave in relation to the

foregoing matters. It is argued that the breaches of the trust committed by Dermot O'Rourke should have had an impact on his credibility on the representations issue. Counsel described Dermot O'Rourke's credibility as a key factor and, thus, his actions *vis-à-vis* the trust monies and the second loan facility were not divisible from the representations issue. It is submitted that the rationale for the trial judge's preferment of Dermot O'Rourke's evidence over that of the plaintiff against the backdrop of the former's actions as a trustee is not evident from the judgment and that the trial judge did not explain why she chose to ignore the evidence of Dermot O'Rourke's breach of the trust, his involvement in making false declarations and his false statement to the Bank's credit committee.

141. The Bank argues that the plaintiff's emphasis on the actions of Dermot O'Rourke in relation to the DORDT is entirely misguided and, moreover, completely irrelevant to the claim advanced in the within proceedings, a position that was made clear to the trial judge when she was informed that the Bank did not intend to engage with the plaintiff's allegations regarding the 2007/2008 borrowings. It is submitted that even if Dermot O'Rourke made certain concessions in evidence regarding the administration of the trust, that did not make him a non-credible witness in relation to the representations issue. Counsel further points to the fact there were no findings made by the trial judge against the Bank.

142. Undoubtedly, counsel for the plaintiff puts great emphasis on the trial judge's alleged failure to take account of the factors which were identified in the court below as going to Dermot O'Rourke's credibility. The question that arises, to my mind, however, is the relevance of the factors which the plaintiff highlights to the issue in dispute as between the plaintiff and the defendants. As acknowledged by his counsel in response to questions from the Court, the critical aspect of the appeal was the trial judge's alleged failure to engage

with the evidence regarding Dermot O'Rourke's representations that the plaintiff would get ownership of Furness Hall. Asked by the Court what, in those circumstances, was the purpose of the plaintiff's reliance on Dermot O'Rourke's dealings regarding the trust, counsel reiterated that, fundamentally, his reliance on the alleged breaches of the trust was to impugn the credibility of Dermot O'Rourke *vis-à-vis* the representations issue. Counsel emphasised Dermot O'Rourke's concession that there has been a breach of the trust. That, counsel says, should have been considered by the trial judge and weighed in the context of her assessment of the credibility factors that affected both sides.

143. As is by now well-rehearsed in this judgment (and in the judgment of the court below), the plaintiff's representations claim related to discussions he allegedly had with Dermot O'Rourke and Diane O'Rourke in 2004 following which, and based on the representations made by Dermot O'Rourke, he expended monies on Furness Hall between 2005 – 2006. It will be recalled that what the plaintiff initially pleaded was that he had been gifted a share in Furness Hall at the wedding of himself and Diane O'Rourke in August 2004. At the hearing of the action, the claim settled into a contention that Dermot O'Rourke had represented to the plaintiff on a number of occasions prior to the wedding that Furness Hall would be gifted to Diane O'Rourke and the plaintiff. Thus, at its heart (albeit formulated late in the day) the claim advanced was of a representation or promise made by Dermot O'Rourke to the plaintiff on a date or dates prior to the wedding of the plaintiff and Diane O'Rourke (or at the latest prior to the completion of the purchase of Furness Hall) that Furness Hall was or would become their property and that based on that promise the plaintiff expended monies on the property.

144. As can be seen from her judgment, the trial judge found Dermot O'Rourke to be a fully credible witness insofar as he denied that any representations were made to the plaintiff. She did so by taking account, *inter alia*, of his testimony as to the state of his

relationship with the first defendant up to the time of the latter's marriage and, perhaps more importantly, of contemporaneous documentation (including that signed by the plaintiff) that on any reading was entirely at variance with the plaintiff's claim that he had either been gifted or promised ownership of Furness Hall. For the reasons already set out earlier in this judgment, this Court has rejected the plaintiff's appeal grounds 1 and 2, namely that in reaching the conclusions she did, the trial judge failed to consider key evidence relevant to the alleged representations.

145. Pursuant to grounds 5-7, the plaintiff seeks to impugn the trial judge's findings on the representations issue by reason of her failure, when assessing Dermot O'Rourke's credibility, to take account of concessions he made in evidence in relation to matters which both predate (the District Court conviction) and post-date (events regarding the trust over the period 2006-2008) the representations issue.

146. Counsel for the Bank, while acknowledging that it was uncontroverted that the equity release funds obtained in 2008 were not used for trust purposes, described the cross-examination of Dermot O'Rourke on the DORDT as relating to collateral issues only and submitted that the plaintiff's complaints were of a type that should not trouble an appellate court. In making this submission counsel relied on *Harrison v. Gordon* [1838] 2 LEW CC 156. He further contended that, as per *Morrissey*, only the principal and relevant matters as arise in evidence have to be decided on and, thus, there was no obligation on the part of the trial judge to decide on every collateral issue that arose in the case. The Bank's submission is that even if Dermot O'Rourke's concessions with regard to the trust are found not to have been properly assessed by the trial judge, it cannot be said that a conclusion to that effect would compensate for the gaps or deficits in the case made by the plaintiff on the representations issue. According to counsel for the Bank, the plaintiff's argument is misconceived: it does not follow that even if Dermot O'Rourke ought not to

have been found to be a credible witness, that Brendan O'Rourke should succeed in his claim.

147. I accept the Bank's argument that the matters upon which the plaintiff seeks to rely are matters of an entirely collateral nature. These factors are, in my judgement, totally unrelated to the question of whether representations were made by Dermot O'Rourke to the plaintiff. Fundamentally, neither the concessions Dermot O'Rourke's made regarding the operation or administration of the DORDT nor the independent evidence that was adduced regarding the 2008 loan refinancing contradict the evidence Dermot O'Rourke gave (and which was supported by contemporaneous independent evidence and documentation) regarding his intentions when purchasing Furness Hall, and which was found by the trial judge to belie the plaintiff's claim that he had been led to believe that he would become the joint owner of the property. Accordingly, Dermot O'Rourke's poor conduct *vis a vis* the operation of the DORDT trust and/or the 2007/2008 refinancing of the 2004 facility cannot be said have any bearing on the claim that was at the heart of the Equity Proceedings.

148. It may be that it would have been preferable had the trial judge set out in detail as to why Dermot O'Rourke's credibility on the representations issue was not affected by the admissions he made regarding the obtaining of the 2008 loan facility and the use to which the equity release funds were put. However, in my view, at the end of the day, the matters in respect of which it is said the trial judge should have pronounced cannot be considered, in the words of McMenamin J. in *Leopardstown*, "*to go to the very core, or the essential validity*" of her findings on the representation issue.

149. The matters in respect of which the plaintiff makes complaint did not bear either materially or temporally on the issue in respect of which the trial judge was required to make on her primary findings of fact. The same cannot be said of the factors which the trial

judge found bore on the credibility of the plaintiff. His inconsistencies in his evidence in respect of the claims he sought to advance, his about-turns in respect of certain matters and his fraudulent conduct went to the heart of the issues the trial judge had to determine and in respect of which she made the findings she did. As has already been found by this Court, those findings are entirely supported by contemporaneous documentary evidence that contradicted the plaintiff's claim that he was given or promised ownership of Furness Hall in 2004.

150. For the reasons set out, grounds 5-7 must fail.

***The alleged failure of the trial judge to deploy the High Court's supervisory function
(Ground 8)***

151. At ground 8, the plaintiff asserts that the trial judge erred in fact and in law in failing to invoke the jurisdiction of the High Court to supervise the administration of trusts generally. It is said that this failure was in the face of the clear and uncontroverted evidence put before the High Court of breach of fiduciary duty on the part of Dermot O'Rourke in relation to the DORDT as well as uncontroverted evidence that a party (the Bank) had engaged in the dishonest assistance in respect of a breach of trust. It is argued that the Court's overriding inherent jurisdiction in this regard is established in *Chaine-Nickson v. The Bank of Ireland* [1976] 1 IR 393, *Schmidt v. Rosewood Trust Ltd.* [2003] 2 A.C. 709 and *O'Mahony v. McNamara* [2005] IEHC 118, [2005] 1 IR 519. Reliance is also placed on Biehler, *Equity and the Law of Trusts in Ireland*, 6th Ed at pp. 471 and 488.

152. The plaintiff contends that even if this Court finds that the trial judge was not required to engage in such inquiry given the nature of the plaintiff's *pleaded* case, she ought still to have engaged with these issues as they were "manifestly relevant to the issue of the credibility of key witnesses in the trial". It is argued that that as a beneficiary of a discretionary trust, the plaintiff had rights in a court of equity. Beneficiaries to a trust are to

be treated fairly, reasonably and properly by trustees, which is an objective standard.

Reliance is placed on Lewin on Trusts 20th Ed. (para. 1.061).

153. It is said that the trial judge erred in law in failing to intervene when faced with “the most cogent evidence of serious breach of trust”. In this regard, counsel points to the plaintiff’s invitation to the trial judge on Day 23 of the trial to specifically enquire into the unjust enrichment of Dermot O’Rourke particularly in circumstances where he could not recall what became of the €1m extracted from the DORDT in 2007 and his belief that some of the equity release funds obtained in 2008 had been spent on bloodstock in Kentucky. Counsel asserts that at the very least the trial judge had an obligation to conduct a basic inquiry into those matters given the nature of the evidence put before her and the nature of the issues in dispute. In aid of his submissions he relies on the *dictum* of Carroll J. in *O’Mahony v. McNamara*:

“The law relating to a beneficiary’s right to information is dealt with in a recent case, Schmidt v. Rosewood Trust Limited..., in which it was held that it was fundamental to the law of trusts that the court has jurisdiction to supervise and if appropriate intervene in the administration of a trust...”

154. As the Bank in its submissions correctly observes, the claims now being advanced by the plaintiff, *qua* alleged beneficiary of the DORDT, are totally at odds with either his pleaded case (a gift of Furness Hall at the wedding) or indeed the case as actually advanced at trial (a promise prior to the marriage of Brendan O’Rourke and Diane O’Rourke that Furness Hall was or would become their property as a result of which the plaintiff acted to his detriment) both of which were asserted independently of the existence of any trust. At all relevant times, the case the plaintiff advanced was asserted as a right in priority to the DORDT whose existence the plaintiff claimed remained unknown to him at the time of the purchase and only became known to him in the Discovery process (an assertion I should

say that was not accepted by the trial judge for the reasons she set out and whose finding in that regard has been upheld by this Court). It was never pleaded that the plaintiff required any remedies pursuant to any supervisory jurisdiction of the High Court in trust matters.

155. In my view, the plaintiff's argument falls to be rejected absent any material connection between the actions of the DORDT trustees to the actual claim advanced by the plaintiff in this case (and which I do not find for the reasons already set out above). The very fact that the High Court may possess the powers of supervision and intervention in trust matters cannot, of itself, be sufficient for the invoking of such jurisdiction.

156. Secondly, as already observed, the plaintiff never made a claim *qua* beneficiary or potential beneficiary of the DORDT and in fact advanced a claim to be entitled to an interest in Furness Hall which, irrespective of whether one considers the claim as pleaded (gift) or the case as made (propriety estoppel), was on a basis which was entirely independent of any trust. Thus, any complaint regarding the administration of the trust is of no relevance. As observed by the Bank in its submissions, from start to finish, the plaintiff claimed to be a part owner of Furness Hall by reason of an entitlement based on the doctrine of propriety estoppel and on it was on that premise that he asserted his claim, and occupied Furness Hall to the exclusion of the trustees and Diane O'Rourke (a potential beneficiary of the trust) and indeed the Bank, until delivery of the substantive judgment. He did not then maintain that his occupation was *qua* a beneficiary of the DORDT. In my view, the plaintiff cannot at this juncture recast his claim by attaching himself to the coat tails of the DORDT, or any supervisory jurisdiction the High Court may have in respect of the administration of trusts, to now impugn the judgment of the trial judge by asserting that she failed, of her own motion, to intervene in the administration of the DORDT.

157. More fundamentally, even if it could be said that the plaintiff's claim in these proceedings was premised on the existence of the DORDT, his argument is doomed. As

the Settlement of July 2004 provides, the class of potential beneficiaries under the trust was limited to Diane O'Rourke and any "spouse, children, widow or widower of Diane O'Rourke". The plaintiff was not a potential beneficiary other than in his capacity as a spouse of Diane O'Rourke. As a consequence of the outcome of the other proceedings as between himself and Diane O'Rourke, and the Orders made in those proceedings on 20 January 2017, at the time of the hearing of the Equity Proceedings the plaintiff (being no longer the spouse of Diane O'Rourke) did not fall into the category of beneficiaries capable of benefiting under the DORDT. As the rights asserted by Brendan O'Rourke did not exist, he did not therefore have *locus standi* to assert alleged breaches of the trust such that the High Court might have considered invoking the supervisory jurisdiction contended for.

158. For the reasons just set out, the plaintiff cannot succeed pursuant to ground 8.

Did the equity upon which the plaintiff's claim depends ever arise in this case?

159. It will be recalled that at para.137 of her judgment, the trial judge opined that "[t]he plaintiff's falsehoods have left [his claim] in a sorry state". This referred to the undisputed fact, as found by the trial judge, that the plaintiff had engaged in and was complicit in the submission of fraudulent evidence and documents in order to further his claim, all of which the trial judge found "must deprive the plaintiff of any indulgence of this Court" (at para. 133) Thus, it is readily apparent from the judgment that even if the plaintiff had established his alleged representation as a matter of fact, that could not have assisted him in any event given his fraudulent conduct in and about the prosecution of his claim.

160. At para. 62 of her judgment, the trial judge noted the Bank's reliance on *Gonthier v. Orange Contract Scaffolding Ltd.* [2003] EWCA Civ 873 in aid of its submission that the "clean hands" maxim is not confined to the rejecting of false evidence but rather that the impugned conduct prevents the equity upon which the claim depends from arising at all.

161. The issue in contention in *Gonthier* was not unlike the present case. There the defendants (OCS) sought to resist an action for the possession of property occupied by them on the basis of an estoppel. They claimed that they were entitled to the repayment of monies they had allegedly expended on the property to the knowledge of the plaintiff. To this end they relied on documents which they alleged evidenced that expenditure. Three of the items of expenditure were duly found by the county court to be forged (the companies which allegedly sent the bills testifying that they had never done so). OCS had also produced an invoice which was found to record a payment greater than the cash payment that had actually been paid to the supplier. The county court rejected the contention that the clean hands principle meant that the claim should be refused in its entirety and instead, having found that some of the expenditure had been incurred, awarded reduced compensation to OCS accordingly.

162. On appeal, Lindsay J. took a different view noting that in their claim for an equity in their favour which depended on expenditure, OCS “*had very substantially exaggerated that expenditure*” and had done so in ways that “*were not only inaccurate but misleading, which, at points, had the appearance of an intended fraud on the Customs and Excise...and at other points, had depended on documents as to which there was evidence ...that they had been fabricated.*” He went on to state:

“... there cannot be any principle by which the fabrication of documents produced to the Court as part of a party's case may be excused or treated as other than serious on the ground that the fabrication was done in order to portray ‘in broad terms’ what the party believed to be the truth or what was the truth. A party unable to find any documentary support for the truth it wishes to assert can expect a very serious view to be taken of its conduct if, in order to suggest or support that truth, it fabricates documents. Still less can such conduct be excused where the documents

do not portray but exaggerate the truth and where their falsity is hidden from view until the very course of the hearing.”

163. He opined that the question was not whether refusing relief would impose a disproportionate penalty on OCS stating:

“With respect, those were not appropriate questions; the question, as Parker L.J. emphasised in Willis supra at page 63 e-f, was not whether an equity had been lost by reason of bad conduct but whether, by reason of bad conduct, the equity had ever arisen. –

43 - In the circumstances I would hold that the Learned Recorder misdirected himself in law on the question of "clean hands" for the reasons I have given. If (as to which I am far from sure) Mr Recorder Thom was able to regard the matter as simply one of the exercise of a discretion, I would hold that, in the light of his misdirection, this Court is free to look afresh at "clean hands". For my part I would hold, especially in the light of Willis supra, that Mr Horrigan's hands were hopelessly muddied; his conduct on OCS's part was in my judgment such as to deny equitable relief to the Respondent. I would allow the appeal on this ground alone ...”

164. In the earlier case of *Willis v. Willis* [1986] 1 EGLR 62, cited by Lindsay J. in *Gonthier*, Parker J. expressed the view that when a party seeks the aid of the court to obtain its assistance *via* the principles of equity so as to override another’s legal rights, he or she must come to court with clean hands. He stated, at para. 63:

“When a party comes to the Court and seeks to obtain from it equitable relief, it is accepted, as I have said, that he must come with clean hands. I accept also, as was submitted on behalf of the appellants, that not every item of misconduct can possibly be sufficient to deprive a party who seeks equity from

being granted the relief he seeks. Some misconduct may be trivial. But when a party acts as these parties have done – and Joanna Willis must be regarded as having been concerned in this, albeit indirectly, in as much as the document was put forward on behalf of both the appellants – it seems to be impossible for this Court to do [anything] other than to take the most serious view of it and to decline to grant equitable relief even if, to which I say nothing because it does not arise on the view I take of this case, they would otherwise have been so entitled.”

165. In his judgment for this Court in *Egan v. Heatley* [2020] IECA 354, Murray J. was satisfied that the decisions in *Willis* and *Gonthier* represent the law in this jurisdiction. Noting that these decisions (and quoting from *Fiona Trust v. Privolov* [2008] EWHC 1748 (Comm)) “*are examples of cases in which the court regards attempts to mislead as presenting good grounds for refusing equitable relief*” (and not only where the purpose is to create false but where it is to bolster the truth with fabricated evidence), Murray J. went on to hold, at para. 96:

“ It follows from the authorities I have addressed in the earlier part of this judgment that, subject to the exception for falsehoods that are trivial or inconsequential, the production before a court exercising an equitable jurisdiction of documentary evidence which is manufactured for the purposes of obtaining relief within that jurisdiction, or of testimony which is material and knowingly false will, of itself, debar the plaintiff from obtaining the relief claimed. The decisions in Willis and Gonthier, which I am satisfied represent the law in this jurisdiction, make it clear that this is so irrespective of whether the plaintiffs themselves falsified the documents, that it is so whether or not the plaintiffs believed that they had incurred the expenses purported to be evidenced by that documentation and that it

is so irrespective of the fact that some of the damages claimed by the plaintiffs could be established independently of the false material.”

166. Having regard to the jurisprudence just cited and bearing in mind the nature of the plaintiff’s actions here, it follows that even if the representations alleged by him were established, the plaintiff would in any event be precluded from invoking the equity by virtue of his being complicit in the forgery of Mr. Spratt’s signature and his involvement in procuring the invoice forged by Anthony Ryan. Indeed, at para. 137, the trial judge, albeit going on to find at para. 138 that the plaintiff had failed to establish that any representations were made to him that led him to believe that Furness Hall was or would become his property, specifically states that the clean hands maxim “[prevented] an equity upon which the claim depends, from arising at all.”

167. While not disputing that the fraudulent conduct of which the plaintiff was guilty would ordinarily operate, on the principle set out in *Gonthier*, to prevent the equity upon which the plaintiff’s claim depended from arising at all, in oral submissions to the Court counsel for the plaintiff nevertheless suggested that the trial judge’s conclusion at para. 133 that the plaintiff could never succeed in his claim by reason of his conduct was vitiated by mistakes the trial judge herself made in arriving at that conclusion.

168. It is the case that para. 55 of the judgment of the High Court as first delivered referred to the fact that the second and third defendants were relying on false evidence said to have been adduced by the plaintiff. Para. 55 records the following:

- “(a) receipts... tendered from A&B Fencing Works which an agent of A&B Fencing Works testified were not issued by that company;
- (b) documents were tendered to show a payment to a supplier, Phillips Construction Ltd, which an agent of the said company testified was not a genuine invoice and was on an obsolete letterhead;

- (c) Oral evidence was given by the plaintiff that he paid the sum of €9,693.75 to Shepherd Construction Limited which the plaintiff accepted in cross examination was an exaggerated figure.
- (d) a witness for the plaintiff (Anthony Ryan) conceded that he had forged the signature of a purported supplier Eugene Spratt on an invoice generated by the plaintiff in 2014 and it is clear from Mr. Ryan's evidence that the plaintiff was complicit in this forgery (transcript day 21, pp. 13ff). It is clear from the evidence tendered that the number of invoices advanced by way of vouching of expenditure or of like provenance to that tender relating to Eugene Spratt."

169. At paras. 115-116 of the judgment as first delivered, the trial judge accepted that receipts had been tendered in the manner described at (a) and (b) above and she found that the plaintiff had exaggerated a payment he had made to the entity described at subparagraph (c) above.

170. It is, however, common case that only item (d) was material to the case that was before the trial judge. The items at (a)–(c) related to the factual matrix in *Gonthier* which had been opened to the trial judge.

171. In my view, while the trial judge's attribution to the plaintiff of the factual matrix that was relevant in the *Gonthier* case is unfortunate, that mistake cannot operate to preclude the application of the *Gonthier* principle, as approved in *Egan v. Heatley*, to the facts of the present case. This is because it cannot be gainsaid that the plaintiff was found by the trial judge as a matter of fact to have engaged in or to be complicit in fraudulent conduct in relation to the provision of receipts from Brennan's Hardware and the procuring of the forged signature of Mr. Eugene Spratt on an invoice, all of which was discussed both in the judgment as first delivered and in the iteration of the judgment that duly followed

once the matter was brought to the attention of the trial judge and which is under appeal here.

172. For all of the reasons set out above, I would dismiss the plaintiff's appeal of the substantive judgment in the Equity Proceedings.

173. I should add at this stage that before reaching the conclusions I have in respect of the substantive appeal in the Equity Proceedings (and which are dispositive of the appeal), I took full account of the arguments the plaintiff advanced in the procedural appeals, lest anything raised in those appeals could be said to impact upon my decision to uphold of the substantive judgment in the Equity Proceedings. However, nothing in those appeals impacted upon the conclusions I have arrived at in the substantive appeal. The procedural appeals are considered later in this judgment.

Costs (Grounds 13-20)

174. Consequent on the delivery of judgment in the Equity Proceedings the trial judge held a costs hearing on 21 November 2018. Both counsel for the second and third defendants and counsel for the Bank sought costs against the plaintiff on the basis that he had failed on all issues. Both also requested that the trial judge exercise her discretion pursuant to Order 99 r. 5 RSC (since amended in the recast Order 99 as substituted by S.I. No. 584/2019-Rules of the Superior Courts (Costs) 2019) and High Court Practice Direction 71 ("HC71") and direct that the plaintiff make an interim payment in respect of costs.

175. In his submissions to the trial judge, counsel for the plaintiff contended that only a proportion of their costs be awarded to the second and third defendants. He urged that the principles set out in *Veolia Water UK plc v. Fingal County Council (No.2)* [2007] 2 IR 81 should apply in the exercise of the judge's discretion. It was argued that the second and third defendants had elongated the trial by putting to witnesses certain matters their

quantity surveyor, Mr. Lewis, would give in evidence, yet they did not call Mr. Lewis. Counsel for the plaintiff also relied on the fact that the second and third defendants had resisted the plaintiff's suggestion (and the urging of the court) that both sides' quantity surveyors would meet. It was submitted that had such a meeting taken place the court would have been in a much better position to ascertain what work had been done on the property. The complaint was also made that counsel for the second and third defendants had spent three days cross-examining the plaintiff with regard to vouchers which counsel for the plaintiff said could have been foreshortened if the quantity surveyors had met. It was also said that the second and third defendants had taken no responsibility for having advised the trial court (in conjunction with the plaintiff) that the trial would take four days.

176. Counsel also resisted the second and third defendants' application for a payment on account in respect of costs on the bases that they had not furnished a bill of costs, that counsel had instructions to appeal the substantive judgment and because there would be no appreciable delay (of the type envisaged when the Practice Direction was given) in the taxation of the costs award.

177. Counsel for the second and third defendants refuted the argument that there should be a *Veolia* type costs order, stating that there was no merit in the argument that the second and third defendants had wasted the court's time and reminding the trial judge of the findings she had made at para. 142 of the substantive judgment. It was further argued that contrary to the plaintiff's submission, the second and third defendants were entitled to put the plaintiff on proof of claimed expenditure and that his claim regarding the two quantity surveyors not meeting was groundless as the case was not concerned with a building contract. It was accepted that some days into the trial, the defendants had made a concession regarding an expenditure of 250,000 by the plaintiff on the property. Counsel rejected the notion that the second and third defendants had wasted the court's time in

cross-examining the plaintiff's quantity surveyor stating that his entire evidence had taken no more than half a day. She described as illogical the suggestion advanced by the plaintiff that the defendants' failure to call certain witnesses could impact on costs. While it was acknowledged that the plaintiff had been cross-examined over a period of three days, counsel made no apology for that and submitted that her approach was borne out by the findings in the substantive judgment. She observed that counsel for the plaintiff had spent four days opening the case and that despite the second and third defendants' protestations (and the court's inquiries), counsel for the plaintiff had persisted in the course of his opening in referring to documents that had come into being after the date (2004) of the relevant events and moreover had persisted in canvassing those documents with the plaintiff in his evidence-in-chief.

178. The plaintiff's position in the court below in respect of the Bank's application for costs was that no order should be made in respect of the costs of the Bank. It was submitted that this was the appropriate order because the Bank was "neutral" in relation to the reliefs sought in the Equity Proceeding. The plaintiff also relied on the fact that the Bank called no witnesses. The plaintiff's submissions were disputed by counsel for the Bank on the basis that had the plaintiff established his claimed half interest in Furness Hall, that would have adversely affected or potentially adversely affected the Bank.

Consequently, the Bank was a relevant and necessary party to the proceedings and indeed had been joined by the plaintiff as a party. Counsel also urged the trial judge to view the Bank's restraint in not calling witnesses positively and submitted that the absence of Bank witnesses was in fact a reflection of the weakness of the plaintiff's case.

The costs judgment

179. By way of written judgment of 23 November 2018, the trial judge determined that both the second and third defendants and the Bank were entitled to their costs. After noting

the parties' written and oral submissions, she concluded that "the reality of this case is that the plaintiff did not prove one item of the case which he mounted". She stated that the case had been taken "against the second and third defendants who had absolutely nothing to gain and everything to lose in defending the matter in terms of their exposure to costs in particular". She considered that the Bank "was a necessary party to the proceedings and while they were restrained in their interventions, such interventions as they made in this case in terms of cross-examination were highly relevant and on point". By contrast, she found the plaintiff's case "one based on considerable fabrication with a number of witnesses and the plaintiff found to lack credibility" finding that "[t]here was absolutely no basis for pursuing this case to the extent to which it was pursued given the realities of the case." She considered that the court "has to take a global view on the costs issue" and that "the discretion has to be exercised by the person who has heard all the evidence and measured same". She stated:

"It is not possible where the plaintiff in this case lost the case comprehensively for him to then argue about whether costs might be awarded for a particular portion or portions thereof."

180. The trial judge then turned to the second and third defendants' and the Bank's applications for a reasonable sum of costs on account. She was satisfied to exercise the court's wide jurisdiction to make the payments noting that it was not the fault of the Bank that the case had been prolonged and that it was the plaintiff who prolonged it and that the second and third defendants had met a case where there was no possible benefit to them in doing so and where they had employed a solicitor, junior counsel and senior counsel. She stated that she would not put any of the defendants to the expense of preparing a bill of costs; rather they were to provide "a list of costs in broad terms, that is in somewhat

broader terms than in the tables already submitted” following which she would direct the amounts to be paid on account.

181. This information was duly delivered by the defendants. In a ruling given on 5 December 2018, the trial judge reiterated the entitlement of the second and third defendants and the Bank to their costs and duly directed the plaintiff to make specified payments on account. Pursuant to the Order of 5 December 2018, the second and third defendants and the Bank were awarded their costs including that the plaintiff make an interim payment €255,040 on or before 6 January 2019 in respect of the second and third defendants’ costs and a payment of €138,735 to the Bank on or before 6 January 2019.

The appeal

182. The plaintiff appeals both the costs awards and the order for payment on account.

The Court’s function in relation to an appeal of a costs order

183. There is no dispute between the parties as to how an appellate court should deal with an appeal of a costs order. As per the established jurisprudence (*Spencer v. Kinsella* [1999] IESC 16, *MD v. ND* [2015] IESC 66, *WYYP v. PC* [2013] IESC 12) and most recently *O v. Minister for Justice* [2021] IECA 293 (at para. 30), an appellate court will be very reluctant to interfere with the discretion exercised by the High Court in awarding costs. However, the case law also establishes that in an appropriate case the Court will interfere with the High Court order for costs. In *Sony Music Entertainment v. UPC Communications* [2017] IECA 96, Finlay-Geoghegan J. writing for this Court described the jurisdiction of the appellate court in respect of orders in respect of costs made by a trial judge:

“This Court is exercising an appellate jurisdiction in what is a discretionary order of the High Court. In accordance with Ord. 99, r. 1(1) the costs of and incidental to every proceeding in the High Court is in the discretion of that Court. As is clear from the case law reviewed by the judgment of Irvine J. in this Court in Collins v.

Minister for Justice Equality & Law Reform [2015] IECA 27 (with which the other members of the Court concurred) whilst great deference will normally be granted to the views of the trial judge, this Court in accordance with its appellate jurisdiction under Article 34.4.1 retains jurisdiction to exercise its discretion in a different manner in an appropriate case. McMenamin J. in Lismore Builders (in receivership) v. Bank of Ireland Finance Limited [2013] IESC 6 put it this way:

'4. ... Although great deference will normally be granted to the views of a trial judge, this Court retains the jurisdiction of exercising its discretion in a different manner in an appropriate case. This is especially so, of course, in the event there are errors detectable in the approach adopted in the High Court. The interests of justice are fundamental. This is clear from the judgment of Geoghegan J. in Desmond v. MGN [2009] 1 I.R. 737, where he states at pp. 742-743:-

'The expression "discretionary order" can cover a huge variety of orders, some of them involving substantive rights and others being merely procedural in nature including mundane day to day procedural orders, such as orders for adjournments etc. I think that in reality over the years since In bonis Morelli; Vella v. Morelli this court has exercised common sense in relation to that issue. The court would be very slow indeed to interfere with the High Court Judge's management of his or her list, but in a case such as this particular case where much more substantial issues are at stake the court, while having respect for the view of the High Court Judge, must seriously consider whether in all the circumstances and in the interests of justice it should re-exercise the discretion in a different direction.'

Finlay-Geoghegan J. went on to conclude her analysis of the role of the appellate court in the following terms:

“...While there is for the reasons stated more fully in Collins no a priori requirement that an appellant should establish an error in principle for this Court to interfere, I nevertheless consider we should, in relation to costs orders, be very slow to interfere unless there are errors detectable in the approach of the High Court or, even without such errors, an appellant satisfies this Court in the particular circumstances of the case that the interests of justice require that it should interfere in the High Court order for costs.” (Emphasis added)

184. The plaintiff’s appeal of the costs order in favour of the second and third defendants is premised on what is said was their unsatisfactory conduct in the course of the trial by reason of their failure to call named individuals (including Mr. Lewis their quantity surveyor) as witnesses in circumstances where it had been put to Brendan O’Rourke in cross-examination what these individuals would say in evidence.

185. Counsel points to the fact that the plaintiff had agitated prior to the trial for a meeting between the parties’ experts in order to limit the dispute as to the nature of the work carried out by the plaintiff but the defendants resisted this. It is submitted that it was not until, by accident, the second and third defendants’ solicitor handed in a report of their quantity surveyor (which had not been disclosed to the plaintiff) acknowledging that some €250,000 - €300,000 had been spent on Furness Hall by Brendan O’Rourke that the defendants some number of days into the trial conceded that these sums had been spent by Brendan O’Rourke on the property. The plaintiff contends that this should have had a costs implication in his favour. Reliance is placed on the decision in *BUPA Ireland v. The Health Insurance Authority and Others* [2013] IEHC 177.

186. The second and third defendants submit that there was no error on the part of the trial judge in the exercise of her discretion to award costs to them costs as the successful parties in the action. They point to the fact that the plaintiff's complaint is not that the second and third defendants added to the complexity of the litigation or materially added to the duration of the trial, but rather that they failed to call witnesses to whom reference had been made in the course of cross -examination. The second and third defendants do not dispute that they did not call the witnesses to whom the plaintiff refers in his submissions. They say that they were not obliged to do so.

187. I accept the submissions of the second and third defendants. No adverse inference was drawn by the trial judge in respect of their failure to call witnesses. Moreover, the absence of such inference is not complained of by the plaintiff. I also accept that there was no obligation on the second and third defendants to agree to a meeting between the parties' quantity surveyors. They were entitled to require the plaintiff to prove his case which in the event he wholly failed to do, as the trial judge herself noted and, indeed, in her judgment of 23 November 2018, she specifically refers to the plaintiff's fabrication of evidence. It is also noteworthy that no criticism was levelled by the trial judge at the defendants conduct in the course of the trial the trial. On the contrary, at para. 142 of her substantive judgment she noted that although they had nothing to benefit from the trial they had made themselves available over a long period of time to ensure the case was fully defended, a theme to which she returned in her 23 November 2018 judgment. She was also of the view that it was the plaintiff who had "insisted in elongating the trial".

188. I am satisfied that the trial judge gave a reasoned judgment as to why the plaintiff's argument that the second and third defendants should not be awarded their full costs was rejected.

189. In relation to the costs award in favour of the Bank, the plaintiff's complaint is that the Bank did not call any witnesses during the entire trial and that there was very little engagement by counsel for the Bank on Days 5,6, 7, 8, 9, 11, 16, 19 and 21. The plaintiff's written submissions refer to the fact that this was not of itself surprising given that the issues in the court below were, on foot of the Bank's own contention, limited to whether representations were made and if so was there reliance thereon by the plaintiff, as indeed identified by the trial judge as the issues arising. Accordingly, it is argued that the Bank's presence in no way added to the argument in the court below, or to the factual basis relevant to the issues in dispute in the Equity Proceedings. It is submitted that while the Bank had an interest in the outcome of the Equity Proceedings, it did not and could not add in any material way to the issues in dispute. Accordingly, in light of the truly limited role played by the Bank, any argument that it should be entitled to recover its costs for attending at the trial is not capable of being reconciled with the principles outlined by Clarke J. in *Kalix Fund Ltd. v. HSBC Institutional Trust Services (Ire) Ltd.* [2010] 2 IR 581, where he stated at p.84:

"...it should be noted that parties whose interests may be affected by a particular decision will, in most cases, be entitled to be heard before any decision is made which is binding on that party, and which is material to the interests of the party concerned. It does not, however, follow that a party who has nothing to add to the argument or factual basis relevant to the issue concerned would be entitled to the costs of being present while the issue was, in substance, being tried between other parties. Even in relatively straightforward litigation it is, as I have pointed out, the case that the first case to run of a series may well determine either as a matter of law or as a matter of practicality issues likely to arise in subsequent cases. It does not follow that each of the parties to the subsequent cases are entitled to be heard

in the case first to be run. Even if a series of cases are run together it does not follow that a party who has nothing to add to the issue but who may, in some way, be said to be affected by the issue can be entitled to expect to be paid its costs of attendance unless it has something material to add to the process.”

190. The Bank’s position is that contrary to the plaintiff’s now claim that the Bank’s presence was unnecessary at trial given the issues to be decided, the plaintiff’s *modus operandi* in the course of the trial was not to stay within the confines of the representations issue but rather, at every turn, he sought to establish elements of his case for priority as against the Bank and to undermine the Bank’s security notwithstanding that these were matters for the Bank Proceedings. This required the Bank having to intervene on Days 17 and 20 in order to restrain counsel for the plaintiff putting extraneous matters to the second defendant.

191. The Bank also points to the fact that the plaintiff never suggested in the course of the trial that no reliefs would be sought against the Bank or that no attacks would be made against the Bank’s security. Nor was it suggested that the Bank’s presence was unnecessary. Yet now, the plaintiff is asking the Court to determine that the Bank’s presence was unnecessary.

192. I do not consider that the plaintiff has established any error on the part of the trial judge in awarding the Bank its costs. I also consider that the plaintiff’s reliance on *Kalix* is misconceived in circumstances where what was in contemplation in *Kalix* was a large number of cases coming to trial at the same time, in other words, a merged trial bringing together multiple sets of proceedings with different plaintiffs. I accept the Bank’s submission that the pronouncement of Clarke J. in *Kalix* as set out above was made in that contemplated context, namely that a plaintiff in a merged trial would not necessarily be entitled to their costs of attending that part of the trial where issues peculiar to another

plaintiff's case were being tried. In my view, *Kalix* is not an apt comparator with the present case.

193. Here, the Bank was a named defendant. As the Bank contends, it was said never said at trial that its presence was unnecessary or that the plaintiff was not pursuing relief against the Bank. It is also the case that Brendan O'Rourke's standing to challenge the Bank's security for its lending to the second and third defendants, and which was a fully pleaded issue in the Bank Proceedings, fell to be determined in the Equity Proceedings. This was a matter in which the Bank had an interest and thus an entitlement to participate to protect that interest. As the substantive judgment shows, the Bank's submissions on the legal issues were adopted to a considerable degree by the trial judge.

194. The Bank in its submissions makes the reasonable point that parties embarking on a trial cannot know the full extent to which their visible participation will be required. I accept its submission that given the way the plaintiff advanced his case, and his attempts to bring into play the efficacy of the Bank's security over the lending for Furness Hall (despite this being a matter for the Bank Proceedings), the extent of the Bank's participation in the Equity Proceedings was justified. Aside from the fact that- quintessentially-the trial judge is in a far better position to appraise the extent to which as the trial developed the participation of a party was ultimately justified, it is my view that the plaintiff cannot at this late stage rely on the fact that the issues to be determined in the Equity Proceedings were limited as a basis upon which to argue that there should be no order for costs in favour of the Bank when the reality is that the plaintiff's actual advancement of his case in the Equity Proceedings went well beyond the two issues that were required to be determined. I am also of the view there can be no criticism of the restraint showed by the Bank in not calling witnesses. In her ruling on 5 December 2018, the trial judge stated that that "there was absolutely no basis for not giving [the Bank] their

full costs” and that it had been “put to the expense of this very difficult and prolonged hearing”. I consider that there was a more than reasonable basis for the conclusion arrived at by the trial judge.

195. In all the circumstances, there was no error on the part of the trial judge in awarding the second and third defendants and the Bank their costs, and certainly there is no basis to find that the justice of the case require this Court to interfere with the trial judge’s orders in this regard.

The interim costs payments

196. The plaintiff’s submissions acknowledge that the trial judge enjoyed a wide jurisdiction in the context of directing the payment out of costs pursuant Order 99, r.5 RSC (as it then stood) and High Court Practice Direction 71. He nevertheless contended that the trial judge erred when she directed payment out of the sums concerned in the absence of a short form bill of costs or invoices generated by the second and third defendants and the Bank. It is said that that there was no evidence before the trial judge of the reasonableness of the sums directed to be paid out. In aid of his argument the plaintiff cited *Heeney v. Deputy International* [2017] IEHC 355 as an example of a case where the court had a bill of costs before deciding to make a payment out under HC71 and where it was clear in *Heeney* that there had been engagement between the parties’ respective costs accountants before any order for payment out was made. Reliance was also placed on *Kacper Anteck v. MIBI & Ors* [2017] IEHC 355 and *CED Construction Limited v. First Ireland Risk Management* [2017] IEHC 603 as examples of cases where a bill of costs had been delivered or where legal costs accountants had attempted to reach a resolution in relation to costs.

197. The Bank (whose submissions on the principles to be applied by the trial judge were adopted by the second and third defendants) asserts that there is no merit to the plaintiff’s complaint about the interim costs payments in circumstances where the trial judge had

evidence that the fees actually paid out by the Bank were some three times the amount ordered by the trial judge to be paid out and where the work the subject of the costs Order included 23 days of trial, preparation of two Discovery affidavits, preparation of submissions and the costs of multiple motions, involving the Bank's solicitor and junior counsel and senior counsel. I note that while the second and third defendants were represented only by their solicitor in the appeal, they too had full legal representation including junior counsel and senior counsel in the court below over the course of the 23-day trial.

198. Order 99, r.5 as it then was provided as follows:

“5. (1) subject to sub-rule (4A) of rule 1, costs may be dealt with by the Court at any stage of the proceedings or after the conclusion of the proceedings; and an Order for the payment of costs may require the costs to be paid forthwith, notwithstanding that the proceedings have not been concluded.

(2) In awarding costs, the Court may direct-

(a) that a sum in gross be paid in lieu of taxed costs, or

(b) that a specified proportion of the taxed costs be paid, or

© that the taxed costs from or up to a specified stage of the proceedings be paid.

(3) At any stage of the proceedings. The Court may require the parties to produce to the Court and exchange with one another an estimate of the costs respectively incurred by them, for such period as the Court may direct, and particularised in such manner as the Court may direct.”

199. I am satisfied that there is nothing in the above rule that requires the provision of a bill of costs, or input from legal costs accountants, before the trial judge could exercise the jurisdiction she undoubtedly had to direct payment out. The fact that such material may

have been produced in the cases cited by the plaintiff does not mean that the trial judge erred in this case. As the transcript for 5 December 2018 (Day 25) shows, the trial judge had regard to the information which was furnished to her following her request that further details be provided in respect of the payment out applications. As she had set out in her 23 November 2018 judgment, she did not want a bill of costs but rather “a list of costs in broad terms” or, as she put it on 5 December 2018, “an idea of the costs”. She found the Bank’s request for €138, 735 “completely reasonable”. She also acceded to the second and third defendants’ request for €255,040 representing one third of their costs (with full outlays). In my view, there is nothing in the plaintiff’s submissions which suggest that the sums directed to be paid out were not reasonable in the circumstances of this case. Insofar as his focus is on the fact that there was no bill of costs or input from legal costs accountants, neither was a pre-condition in order for the trial judge’s exercise of the wide discretion she undoubtedly had. While the trial judge was not at large in relation to the exercise of her discretion, in my view, the plaintiff has not demonstrated that the sums directed to be paid out were unreasonably arrived at given the duration of the trial and the level of representation which both the second and third defendants and the Bank had throughout the trial. I also take into consideration that the Order of 5 December 2018 specifically notes the undertaking given by the respective solicitors that in the event of taxation certifying a smaller sum, any overpayment will be repaid.

200. For the reasons set out, I would dismiss the appeal of the costs Orders.

The Procedural Appeals

The dismissal of the plaintiff’s claim against the first defendant and the striking out of his reply to the first, second and third defendants’ defence

201. On 28 October 2016, the plaintiff was granted liberty to deliver, on or before 14 November 2016, a reply to the defence delivered on behalf of the first, second and third

defendants and a reply to the Bank's defence. The liberty granted to the plaintiff was subject to "... the entitlement of the Defendants to challenge the content therein".

202. A reply and defence to the first, second and third defendants' defence and counterclaim was delivered on 14 November 2016.

203. By notice of motion 15 February 2017, the first, second and third defendants sought, *inter alia*, an order pursuant to O.19, r.16 RSC striking out the reply and, pursuant to the inherent jurisdiction of the court, an order striking out the plaintiff's claim as against the first defendant as "... being an abuse of process as conferring no tangible benefit or gain on the Plaintiff where the First Named Defendant is neither a proper or necessary party thereto".

204. The motion was grounded on the affidavit of Mary Hayes, solicitor for the first, second and third defendants sworn 14 February 2017. A replying affidavit was delivered by the plaintiff's solicitor, Ms. Orlaith Byrne, on 6 March 2017. The first defendant delivered an affidavit in support of the motion, sworn 23 March 2017, and further affidavits were sworn by the plaintiff's solicitor and the plaintiff, respectively, on 29 March 2017. The motion came on for hearing on 3 April 2017.

205. In short, the first second and third defendants' argument was that the reply purported to plead matters outside those raised in the defence and counterclaim and expanded and raised new grounds of claim not originally pleaded. As regards the relief sought in respect of the first defendant, it was argued that the proceedings against her were an abuse of process as even if the plaintiff were to succeed in his claim, the first defendant had neither legal nor equitable interest in the property the subject matter of the proceedings. Furthermore, no substantive relief was sought against her as acknowledged at para. 23 of the plaintiff's reply.

206. In her judgment delivered on 12 May 2017, O’Hanlon J. did not consider it “to be reasonable to continue to include the first named defendant as a party to the proceedings”. She found that “no possible benefit can accrue to the plaintiff by continuing to hold the first named defendant as a party to these proceedings.” She opined that insofar as the involvement of the first defendant was considered to be necessary “the reality of the situation is that a subpoena can be issued [against her] to cause her to be present as a witness if the plaintiff so desires”.

207. Accordingly, by Order of 24 May 2017, the High Court struck out the plaintiff’s proceedings as against the first defendant. The plaintiff’s reply to the first, second and third defendants’ defence and counterclaim was also struck out pursuant to that Order.

The appeal

208. The plaintiff contends that the High Court erred in striking out the entirety of his claim against Diane O’Rourke. He asserts that the first defendant was a proper party to the proceedings and in this regard points to paras. 1 – 6 of the Equity Civil Bill wherein it was pleaded, *inter alia*, that the plaintiff had been led to believe that Furness Hall belonged to him and the first defendant and that based on those representations he had undertaken substantial works in respect of the property. He further points to paras. 1 and 6 of the Equity Civil Bill where, respectively, the plaintiff sought a declaration of a legal and beneficial interest in the property and an order for directions as to the validity of two mortgages affecting that property.

209. Counsel contends that the manner in which the first defendant engaged with the plaintiff’s pleadings is important and points out that the first defendant only sought to be let out of the proceedings at a late stage. He asserts that it was not clear from the information and evidence before the High Court that the plaintiff’s claim against the first defendant was frivolous, vexatious, bound to fail and/or an abuse of process. He says that

it is of significance that in the defence, the first defendant engaged with a number of relevant pleas in the Equity Civil Bill. He points to para. 8 of the defence where it was expressly pleaded that the first defendant advised the plaintiff of the second mortgage in or about 2007. Moreover, she denied that the plaintiff did not consent under the 1976 Act to the said mortgage and expressly denied the content of para. 15 of the Equity Civil Bill (again concerning the plaintiff's consent to the mortgages). Moreover, the first defendant joined in the counterclaim against the plaintiff.

210. Counsel says that there was ample evidence before the High Court, by way of affidavit evidence from the plaintiff in response to the first, second and third defendants' motion, which, if accepted at trial, might arguably have led to the plaintiff succeeding against the first defendant and securing substantial relief against her. It is in those circumstances that the plaintiff's claim against the first defendant should not have been struck out. The plaintiff's complaint is that, leaving aside the employment of the reply as a means of expanding his case against the first defendant, the High Court judge failed to have any or any adequate regard to the contents of the detailed affidavit evidence which contained clear and concise details and particulars of the plaintiff's claims against the first defendant and which contained a succinct account of the facts upon which the plaintiff would rely at trial.

211. It is submitted that in striking out the plaintiff's case against the first defendant, the trial judge exercised her discretion in an overly burdensome and oppressive way and in disregard of the evidence before the court. This was particularly so in circumstances where counsel for the plaintiff had indicated to the trial judge at the hearing of the motion that the plaintiff was likely to bring an application for leave to deliver an amended statement of claim. The argument made on appeal is that in the instant case there was no "clear case" within the established jurisprudence on the inherent jurisdiction of the court to

dismiss proceedings (*Barry v. Buckley* [1981] IR 308, *Keohane v. Hynes* [2014] IESC 66) that merited the striking out of the plaintiff's case against the first defendant.

212. The position of the second and third defendants is that there is no merit in the plaintiff's appeal given that the proceedings against the first defendant were in name only and given that no substantive relief was sought against her as a defendant. They say that the High Court judge was correct in law in removing the first defendant and in determining that it was an incontrovertible fact that the first defendant had no interest, legal or beneficial, in Furness Hall and had only a mere expectation of ownership in the future as a potential beneficiary of a discretionary trust (which never came to fruition). Moreover, as the High Court judge observed, the first defendant could be (and was) called as a witness to the proceedings.

213. I accept the submissions of the first, second and third defendants. Diane O'Rourke had no benefit to bring to Brendan O'Rourke's claim. She did not own the property in issue in the proceedings being a mere licensee. Moreover, the issue before the High Court was not the trust or indeed her status as a potential beneficiary of the DORDT but rather an asserted claim by the plaintiff of a beneficial interest in the property in question based on alleged representations said to have been made by the second defendant. The removal of the first defendant from the proceedings did not prejudice the case the plaintiff sought to advance in this regard.

214. It is also important to bear in mind that the trial judge here had effectively case managed the progress of these proceedings for a considerable period prior to 12 May 2017. The Order of 12 May 2017 was effectively case management as well as being an interlocutory Order. As put by Clarke J. in *Dowling v. Minister for Finance & Ors* [2012] IESC 32:

“...it would be necessary for this Court to be satisfied that the relevant measures under appeal created a substantial risk of significant procedural unfairness coupled with the likelihood that no remedial action could be put in place either by the trial judge or this Court on appeal which would have the effect of significantly remedying any alleged unfairness which might be demonstrated to have occurred”
(at para. 3.2)

At para. 3.4, he opined that it is the trial judge who will be *“in a much better position to determine with some precision as to whether real prejudice has occurred”*.

215. In the event, as we have seen, the first defendant gave full evidence in the High Court and was cross-examined by counsel for the plaintiff, as indeed the trial judge envisaged would happen. It cannot therefore be said that the plaintiff was prejudiced by her removal as a defendant.

216. The plaintiff also appeals the order striking out his reply to the first, second and third defendants’ defence and counterclaim. In the first instance, he complains that the judgment of 12 May 2017 does not give any reasons as to why the reply was struck out.

217. He says that the High Court erred in striking out those elements of the reply that were in accordance with the relevant rules, namely where the plaintiff sought to meet and to engage with a number of positive pleas contained in the first, second and third defendants’ defence, not least in para. 8 thereof where it was denied that the plaintiff only became aware of the mortgages at the commencement of the proceedings and where in support of this plea the defence refers to the plaintiff having executed a Consent to the Deed of Confirmation in September 2004. As this issue was raised in the defence, the plaintiff says he was entitled to engage with this issue in the reply and that he did so at para. 6 thereof. Similarly, he engaged with the positive plea at para. 8 of the defence to the effect that the first defendant advised the plaintiff of the second mortgage in 2007.

218. It is submitted that while the reply may have pleaded matters outside of those pleaded in the defence, and purported to advance upon and raise new grounds of claim not advanced in the Equity Civil Bill (and which were more properly for an application to amend), the reply, at least in part, simply joined issue with the matters pleaded in the defence, which is permissible under the RSC.

219. The first, second and third defendants contend that the High Court was correct to strike out the plaintiff's reply as it purported to amend the proceedings in a manner not permitted by the RSC (see Order 19, r.16), including a new claim for damages that was not sought in the Equity Civil Bill.

220. I am satisfied that the appeal on this ground should be dismissed. While the judgment delivered on 12 May 2017 may not have expressly stated why the application to strike out the reply was being acceded to, and while it may have been open to the trial judge to retain those portions of the reply that simply joined issue with the first, second and third defendants' defence and counterclaim, at the end of the day, the plaintiff has not pointed to any prejudice or unfairness caused to him by the Order of 24 May 2017. In essence, the plaintiff had a full opportunity to present his case at the trial of the Equity Proceedings. I note that while in his substantive appeal he took issue with the findings made by the trial judge, none of his appeal grounds were based on any alleged unfairness in how he was permitted to advance his pleaded claim. The absence of his reply did not inhibit him from advancing his claim.

The refusal of leave to the plaintiff to bring an application to amend his pleadings

221. As already referred to, on 3 April 2017 at the hearing of the application to strike out the plaintiff's reply to the first, second and third defendants' defence and counterclaim, the High Court was made aware that if the reply was struck out it was likely that the plaintiff would seek leave to bring a motion to amend his pleadings. To that end, counsel for the

plaintiff indicated that if he was permitted to amend his pleadings he would be prepared to work within a court-directed timetable to ensure that the necessary pleadings would be exchanged in advance of the trial of the Equity Proceedings then scheduled to commence on 24 May 2017.

222. In the event, on 24 May 2017, the first day of the trial of the Equity Proceedings, counsel indicated to the trial judge that the plaintiff wished to bring an application to amend his pleadings to ensure that his claim for damages for misrepresentation would be fully heard and determined. In that regard he requested that the trial judge hear his application as soon as possible. By that time, an amended statement of claim had already been prepared and by then circulated to the first, second and third defendants but in respect of which their consent to the Amended Statement of Claim was not forthcoming. It had not, apparently, been circulated to the Bank.

223. At that juncture, the position being adopted by counsel for the first, second and third defendants was that she would meet the application to amend the proceedings the following day if necessary, in the event that the court decided to grant the plaintiff leave to make such an application.

224. Counsel for the plaintiff advised the trial judge that he wished to bring an application to amend and thus asked for leave to bring the necessary motion the next day. The trial judge refused the application for leave stating that it was not the appropriate time to be considering any further pleadings and that that opportunity had long gone in circumstances where the trial of the action had commenced. Thereafter, counsel for the plaintiff commenced his opening of the case.

225. The issue of amending the pleadings was again, however, canvassed on 25 May 2017. Counsel for the plaintiff was asked by the trial judge why it was necessary to bring such an application. He advised the trial judge that the court only had an Equity Civil Bill

and should have a statement of claim, to which objection was taken by counsel for the second and third defendants on the basis that there was no necessity to have a statement of claim as the case was fully pleaded in the Equity Civil Bill. In a later exchange, counsel for the plaintiff sought to impress upon the trial judge that the necessity for bringing the application to amend stemmed from the fact that there was no claim for damages in the Equity Civil Bill and indicated that he had a motion to hand seeking to amend the pleadings. In the event, as reflected in the Order of the High Court of 24 May 2017, the plaintiff did not obtain leave of the court to bring his motion and the trial of the action duly continued.

The appeal

226. The plaintiff's complaint is that it was impermissible and wrong for the trial judge to have refused him leave to apply to amend his pleadings and that she should have permitted him to issue such an application and then considered it on the merits. Reliance is placed on the decision of the Supreme Court in *Wildgust and Carrickowen Ltd. v. Bank of Ireland and Norwich Union* [2000] IESC 10 where at para. 47 of her judgment McGuinness J. states that "*it is not impermissible for pleadings to be amended during the course of a trial*", in that regard noting the provisions of O.28, r.1 RSC which provide that:

"The Court may, at any stage of the proceedings, allow either party to alter or amend his endorsement or pleadings in such manner and on such terms as may be just, and also such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

227. It is thus asserted that the plaintiff should at least have been afforded the opportunity to bring a motion returnable before the trial judge in circumstances where proposed amended statement of claim primarily aimed to do two things:

- a) To amend the prayer to include “damages for misrepresentation”, “interest pursuant to statute” and an order for directions and enquiry into the investment of funds raised by the 2008 mortgage; and
- b) To give further detailed particulars of misrepresentation in addition to those set out in the Equity Civil Bill.

228. Counsel submits that the trial judge’s refusal to grant the plaintiff liberty to bring the motion to amend both abridged the plaintiff’s constitutional right to litigate and shut him out from making the case he wanted to make. It is contended that given the nature of the pleadings in the Equity Civil Bill, it was open to the trial judge, upon considering the merits of the application to amend, to only permit certain amendments, for instance those the court considered necessary to complete a fully pleaded claim for damages for misrepresentation. The trial judge could then have dealt with any issue or complaint by the defendants of delay on the part of the plaintiff in seeking to amend by way of a costs order.

229. Both the second and third defendants and the Bank dispute that any unfairness was caused to the plaintiff by the trial judge’s refusal to grant leave to amend. In its submissions, the Bank contends that there was ample justification for the ruling of the trial judge, not only in what she specifically found, but also in the underlying factual background. They assert that the refusal was wholly merited on three grounds. Firstly, to permit any amendment would cause enormous prejudice to the defendants by rendering the trial date a nullity and delaying the already long-running proceedings even further. Secondly, amendments of the kind proposed by the plaintiff would unnecessarily cause prejudice to the Bank in having to deal with the same case in two separate actions. Thirdly, and primarily, the nature of the amendments affecting the Bank were such as to reveal the plaintiff’s application for leave to amend to be a collateral challenge to the Order of the High Court of 17 November 2016 (affirmed by the Court of Appeal 23 March 2017)

refusing to link the Bank Proceedings and the Equity Proceedings. It is submitted that these considerations justified both the trial judge's refusal to grant leave to bring the application to amend and would have also justified a refusal of any such application on its merits.

230. I am satisfied that the plaintiff's appeal against the refusal of leave must fail. Firstly, as the trial judge observed, the proposed amendments were put forward extremely late in the day, indeed some five years post the institution of the Equity Proceedings. There was ample opportunity for the plaintiff to seek to amend his pleadings at a much earlier stage, but he chose not to do so. Secondly, as observed by counsel for the Bank, and as the High Court transcripts and the substantive judgment in the Equity Proceedings show, the substance of the amendments at paras. 10A – 10M and paras. 14A – 14I of the proposed amended statement of claim were in fact adverted to at the trial of the Equity proceedings by or on behalf of the plaintiff without any objection being taken by the defendants on pleading points. Thus, it cannot be said, as far as the representations issue and the alleged works undertaken by the plaintiff is concerned, that the plaintiff suffered any prejudice in presenting his case as a result of the trial judge's refusal to give leave to amend his pleadings by the insertion of paras. 10A – 10M and paras. 14A – 14I. In effect, the just approach contemplated in O.28, r.1 RSC and *Wildgust* was achieved by the fact that no pleading point was taken by the defendants to the plaintiff having adverted to these matters in the course of the trial.

231. The amendments at para. 12, paras. 15A – 15F and paras. 17A – 17B of the proposed amended statement of claim largely concerned the Bank and the actual or constructive knowledge the plaintiff claimed the Bank had of his alleged beneficial interest in Furness Hall. I accept the Bank's submission that these proposed amendments all related to matters raised by the plaintiff in his defence to the Bank Proceedings. Thus, even if this

Court considered that the trial judge should at least have allowed the amendment application to be brought, there was no reasonable prospect that the plaintiff would have been permitted to amend his pleadings by the addition of paras. 12, 15A – 15F and 17A – 17B. All these matters were fully at play in the Bank Proceedings. In my view, on the merits of any application to amend, the trial judge would have had to refuse the proposed amendments at paras. 12, 15A – 15F and 17A – 17B since they constituted a duplication of the issues in contention in the Bank Proceedings in circumstances where it had already been ordained that the Equity Proceedings would be heard and determined prior to the Bank Proceedings. As by now well-rehearsed, the plaintiff's application to have the Equity Proceedings linked with the Bank Proceedings was refused by the High Court a ruling which was upheld by this Court on 29 March 2017.

232. In its submission in the instant appeal, the Bank described the plaintiff's complaint in relation to the trial judge's refusal to grant him leave to amend as an attempt to smuggle into the Equity Proceedings issues more properly to be decided in the Bank Proceedings. I am constrained to agree with this submission.

233. For the reasons set out above, the appeal of the trial judge's refusal to grant the plaintiff leave to bring an application to amend his pleadings is dismissed.

The striking out of the plaintiff's reply to the Bank's defence

234. The plaintiff's reply to the Bank's defence was filed on 14 November 2016.

235. On 18 November 2016 the Bank's solicitors wrote the plaintiff stating, *inter alia*, that the Bank would be objecting to the reply at the hearing of the action. They wrote again on 21 February 2017 in connection with the first, second and third defendant's motion dated 15 February 2017 stating that the Bank did not intend issuing a separate motion seeking to have the plaintiff's reply to their defence struck out but rather that they would be objecting at the trial to the admission of any evidence or the making of any legal submissions in

support of the plaintiff's reply to the Bank's defence and counterclaim. The plaintiff's solicitors were again reminded of this in a letter of 16 March 2017 to the effect that at the opening of the hearing of the Equity Proceedings the Bank would be objecting "to the entire of that Reply".

236. Following the commencement of the trial of the Equity Proceedings on 24 May 2017, counsel for the Bank duly indicated to the trial judge that he wished to move an application to strike out the plaintiff's reply to the Bank's defence. At that juncture, counsel for the plaintiff indicated that he wished to proceed with his opening statement. Later that day, the Bank repeated its request to move an application to strike out the plaintiff's reply. The plaintiff's position, albeit acknowledging that prior to the commencement of the trial the Bank had indicated an intention to make such an application at the trial, was that it was nevertheless incumbent on the Bank to do so by way of motion and affidavit. The trial judge duly directed that the Bank make its application by way of motion.

237. The motion dated 24 May 2017 that was opened to the court on 25 May 2017 sought to strike out the plaintiff's reply "or so much thereof (*in particular Paragraphs (7) and (8)*)" pursuant to Order 19, r.27 RSC and /or the inherent jurisdiction of the court. The Bank advanced two grounds namely, (a) an assertion that the reply was an abuse of process; and (b) that the plaintiff was seeking to introduce new matters in the reply that ought more properly to be in the Equity Civil Bill.

238. According to the affidavit of Mr. Brendan Moriarty, the Bank's solicitor, which grounded the motion, "the troubling content of the Reply [was] contained in paragraphs (7) and (8) thereof". Those paragraphs contained (a) the plaintiff's challenge to the priority of the Bank's mortgages by reference to allegations of actual or constructive notice of his alleged beneficial interest and (b) his attempt to look behind the mortgages by alleging that

the loans secured by those mortgages were repaid and/or not properly secured by those mortgages. Mr. Moriarty averred that the matters raised at paras. 7 and 8 were fundamentally matters at issue in the Bank Proceedings and that the Bank at all times accepted the reality that its priority and all issues associated therewith were to be properly dealt with in the Bank Proceedings. He went on to state:

“[T]he Reply represents an attempt to undercut three of the said decisions of the High Court and the Court of Appeal by, in effect, consolidating [the Bank Proceedings] with these Equity Proceedings. As such I am advised and believe it is vexatious and an abuse of process and is calculated to, and/or will, have the effect of delaying and prolonging the trial of these Equity Proceedings.”

He described the reply as “a departure seeking as it does to raise new arguments and introduce new causes of action for the first time, well after the proceedings were set down for trial and indeed [were introduced] a matter of days before the trial was due to begin (*in November 2016*) ...”

239. In her replying affidavit, Ms. Byrne, the plaintiff’s solicitor, averred that the reply joined issue with the Bank’s defence generally and “individually joins issue with a number of matters expressly pleaded by [the Bank].” She stated, with regard to paras. 7 and 8 of the reply:

“14. I say that the Plaintiff pleaded in his Equity Civil Bill that the Fourth Defendant knew, or ought to have known, that the Plaintiff had a beneficial interest in the Furness Hall property. The Fourth Defendant pleaded in its Defence that it denied that it had any actual or constructive notice of any beneficial interest of the Plaintiff in the Furness Hall property. Accordingly this issue is already joined between the Parties in the Equity Civil Bill and Defence. Paragraph 7 of the Reply simply deals with that issue by way of reply, setting out the extent of the

knowledge of the Fourth Defendant and its predecessor First Active plc and their senior staff.

15. In relation to paragraph 8 of the Reply specifically, I say that the Plaintiff pleaded in his equity civil bill that the Fourth Defendant wrongfully sought to interfere with the Plaintiff's peaceful enjoyment of the relevant property and expressly sought injunctions restraining the Fourth Defendant in that regard as well as directions in relation to the mortgages dated 16th September 2004 and 12th February 2008. The Fourth Defendant then pleaded in its Defence that it is entitled to possession of the Furness Hall property as mortgagee under the terms of the mortgages. Paragraph 8 of the Reply deals with the question of the Fourth Defendant's assertion of a right to possession by way of reply.

16. I say that the Fourth Defendant makes the novel argument that the foregoing issue of whether the Fourth Defendant is entitled to possession of the property in question should not be dealt with in these proceedings because they also arise in the "Ulster Bank Proceedings" issued by the Fourth Defendant against the Plaintiff.

17. I say that the possession issue clearly arises in these proceedings. The Plaintiff seeks the relevant injunctions against the Fourth Defendant and directions in relation to the validity of the mortgages in his Equity Civil Bill and the Fourth Defendant expressly pleads its right to possession on foot of the mortgages in its Defence. It could not be any clearer that the issue of possession arises in these proceedings on foot of *inter alia* the Fourth Defendant's express plea at paragraph 4 of its Defence that it, at all material times, was and is entitled to possession of the property under the terms of the mortgages."

240. In her *ex tempore* judgment delivered on 25 May 2017, the trial judge set out her rationale for striking out the reply on the basis that the "purported reply... was late" and

“... completely unnecessary”. She opined that having looked at the pleadings in the Equity Proceedings it was quite possible for the plaintiff to run his case and try and prove a beneficial interest by issuing subpoenas whenever he saw fit. She noted that “the possession case is the third module”. She went on to state:

“The Plaintiff has clearly said that the Fourth – Named – Defendant knew or ought to have known certain items. It is for the Plaintiff now to take the stand and to prove these matters to the court.”

241. In the trial judge’s view, having looked at previous orders the court had made, and in circumstances where the Equity Civil Bill was dated 10 August 2012 and the pleadings closed on 20 June 2013, it could not be said that striking out the reply would be unfair to the plaintiff. She stated:

“If the Plaintiff were concerned to have a pre-trial further case management or a pre-trial further hearing the onus there was on the Plaintiff, he got the letters from the Bank in a timely manner and he got more than one letter. He could have come into Court before now to complain, put the matter in for mention, had a full case management argument on this for half a day, the case managements date has now long passed...

We are now at the equity aspect of the case where the Plaintiff tries or is yet to try in evidence to show how he says he had a legal and/or beneficial interest in the property. To my mind this is yet another attempt to muddy the waters in this case...

Issues of possession and the Bank’s case must remain with the third module.”

She was of the view that any other approach “would elongate the equity part of this case to [an] enormous degree”. She further noted that the Court of Appeal had previously rejected the plaintiff’s attempt to link the Equity Proceedings and the Bank Proceedings. She accordingly granted relief pursuant to Order 19, r.27 striking out the reply.

The appeal

242. In his appeal submissions, counsel for the plaintiff asserts that the trial judge did not consider the merits of each paragraph of the reply but rather had simply struck it out in its entirety which was, he says, an impermissible approach given that paras. 2,3,4,5 and 6 of the reply constituted answers to the Bank's denials. It is submitted that there could be no credible suggestion that those pleas met the standard of being unnecessary or scandalous as required by O.19, r.27 RSC, which was the basis upon which the trial judge made her Order. Counsel argues that what was set out in the reply were merely further details as permitted under O.19, r. 16 RSC and, as such, the details were not inconsistent with the Equity Civil Bill.

243. He contends that insofar as there may have been overlap of the issues in the Equity Proceedings and the Bank Proceedings, any such overlap was necessary because of the overlapping facts and issues in both sets of proceedings which relate to the same property, the same mortgages and the same factual context. The duplication of proceedings arose solely as a consequence of the Bank issuing the Bank Proceedings after the Equity Proceedings had already been issued. He points to the fact that the Bank sought reliefs including an interlocutory injunction restraining the plaintiff from being on the Furness Hall property and a declaration that its title is unaffected by the claims advanced in the Equity Proceedings. In the Equity Proceedings the plaintiff sought injunctive relief restraining the Bank from interfering with the property at Furness Hall and an order for directions in relation to the validity of two mortgages asserted by the Bank to be in respect Furness Hall. Accordingly, in light of the overlapping issues the plaintiff had sought to link both sets of proceedings so that the issues relating to Furness Hall could be dealt with by a single judge in a single hearing. Counsel acknowledged that that application was refused by the High Court and that the refusal was upheld to the Court of Appeal. It is submitted,

however, that in those very circumstances, and where the Equity Proceedings came on for hearing first, the issues adverted to in the reply ought properly to have been dealt with in the Equity Proceedings.

244. While it is conceded the contents of para. 8 of the reply ought more properly to have been the subject of an application to seek to amend the proceedings, the plaintiff's position nevertheless remains that the contents of the reply as a whole did not merit the striking out of the reply in its entirety. Counsel reiterates that the reply could not be construed as being unnecessary or scandalous or that it would have prejudiced or delayed the fair trial of the Equity Proceedings. He submits that there was no reasonable basis for the trial judge's order.

245. I am not persuaded by the plaintiff's arguments. I accept the Bank's submission that the real purpose of the reply was to contaminate the Equity Proceedings with issues which are more properly for the Bank Proceedings. The reply was delivered against a background where the matters pleaded therein have already been pleaded in the Bank Proceedings and where the plaintiff had previously failed in his attempt to link the Equity Proceedings and the Bank Proceedings. As argued by the Bank in the court below, the plaintiff's entitlement to challenge the contractual dealings between the second and third defendants and the Bank was entirely predicated on his being able to establish a beneficial interest in Furness Hall. In the absence of establishing an interest in the property he would have no *locus standi* to complain about the dealings between the second and third defendants and the Bank. Clearly, the trial judge was entitled to take account of this argument in coming to her decision to strike out the plaintiff's reply and to reiterate that matters more properly the subject of the Bank Proceedings must be dealt with in those proceedings.

246. Again, I would observe that insofar as it is argued that the trial judge struck out those parts of the reply which joined issue with the matters pleaded by the Bank, the plaintiff has

not pointed to any prejudice he suffered during the currency of the trial as a result of the action taken by the trial judge. Furthermore, I note that during the hearing of the Bank's motion, counsel for the plaintiff, in response to observations made by the trial judge, conceded that anything he intended saying about the Bank at the trial of Equity Proceeding was sufficiently pleaded in the Equity Civil Bill and that the plaintiff would give evidence of what he alleged the Bank knew or ought to have known (as transpired to be the case). It cannot be said, therefore, that the plaintiff was caused, in the words of Clarke J. in *Dowling*, "irremediable prejudice" by the decision of the trial judge, which was effectively an exercise by her of case management.

247. In all of the circumstances, I would dismiss the plaintiff's appeal of the Order of 25 May 2017.

The grant of injunctive relief in the Bank Proceeding

248. It will be recalled that the Bank Proceedings issued on 7 September 2012. By notice of motion dated 21 February 2013 returnable to 11 March 2013, the Bank sought certain interlocutory reliefs against Brendan O'Rourke and Mountainview to include injunctive relief. In this context, a number of affidavits were exchanged including the grounding affidavit of Ms. Naomi Williams sworn 20 February 2013 and affidavits sworn by Brendan O'Rourke on 7 May and 8 May 2013.

249. The Bank delivered its statement of claim on 29 May 2013 and Brendan O'Rourke's defence was delivered on 27 June 2013. On or about 25 July 2013, directions were made regarding the exchange of pleadings, the exchange of requests for discovery and other interlocutory matters. Following further interlocutory orders, the Bank Proceedings were set down for hearing in December 2016.

250. As previously referred to, the High Court directed that the Equity Proceedings would be tried in advance of the Bank Proceedings, in the course of which the question of

priorities as between any interest of Brendan O'Rourke might be found to have in Furness Hall and the Bank's mortgages would be resolved.

251. Following the delivery of the substantive judgment in the Equity Proceedings on 25 October 2018, counsel for the Bank applied for and was granted liberty to re-enter the original notice of motion in the Bank Proceedings where the Bank sought injunctive relief. As of October 2018, Brendan O'Rourke continued to occupy Furness Hall. The motion was made returnable for 15 November 2018.

252. For the purposes of that motion, Mr. Brendan Moriarty of the Bank swore an affidavit on 2 November 2018. He asserted that as Brendan O'Rourke has been found to have no legal or beneficial interest in Furness Hall, "it follows that he has no standing, and is not entitled, to impugn or to seek to challenge [the Bank's] title as legal Mortgagee over the property, as that would amount to an impermissible attempt by him to plead a *jus tertii*". Mr. Moriarty alluded to the fact that Dermot O'Rourke and Perle O'Rourke, the registered owners of the property and the mortgagors, had, together with Diane O'Rourke, attempted to surrender possession to the Bank as mortgagee in July 2012 but that Brendan O'Rourke had intervened and refused to leave the property and had changed the locks and thereafter enjoyed sole and exclusive possession and use of the property including housing his employees there and storing plant and machinery connected with his business. He stated that in circumstances where Brendan O'Rourke "has conclusively been found to have no legal or beneficial interest" in Furness Hall "and thus has no standing to challenge [the Bank's] title as legal Mortgagee there over, or its entitlement to possession" and where Mountainview had never challenged the Bank's title as legal mortgagee or sought to assert or to set out any title of its own against that of the Bank and was merely seeking a monetary judgment, the Bank should be granted injunctive relief for immediate possession of Furness Hall (at paras. 13-16).

253. Brendan O'Rourke swore a replying affidavit on 14 November 2018 therein averring that he had delivered a full defence to the Bank Proceedings. He averred that the validity of the two mortgages on Furness Hall remains to be determined in the Bank Proceedings. He further claimed that the 2004 mortgage had been fully repaid by the loan underlying the second mortgage created in 2008 and that, accordingly, the 2004 mortgage, having been fully redeemed and discharged, was of no legal effect. His position in respect of the 2008 mortgage was that the loan underlying that mortgage had been made to Dermot O'Rourke in his personal capacity and that Dermot O'Rourke did not have the capacity to execute the 2008 mortgage as security over the trust property in respect of his personal borrowings. He maintained that First Active (the Bank's predecessor) was on full notice of the DORDT as a result of the 2004 mortgage and must therefore have known that the later 2008 mortgage would be invalid and unenforceable. He went on the aver, at para 11:

“...The loan of €4.22m underlying the Second Mortgage was ostensibly for the purpose of redeeming the First Mortgage (€2.92m) and to provide €1.3m for ‘*home improvements*’. First Active plc’s staff knew that this money would not be used for home improvements but it was nevertheless given to Dermot O’Rourke.

I believe that evidence given in the Trial of the Second Module assists in the above assertions. Furthermore, it will be necessary arising from such evidence to amend the “Bank proceedings” ...”

254. Brendan O'Rourke's position was that the foregoing issues were substantial and constituted *bona fide* defences to the Bank Proceedings. He averred that he lived in the property and that no damages could ever compensate him for the grave prejudice he would suffer if he was required to vacate his family home and hand it to the Bank pending the outcome of the Bank Proceedings. He stated that no prejudice could accrue to the Bank if it were denied possession of the property pending the determination of those proceedings.

Accordingly, he contended that the balance of convenience rested with the *status quo* being maintained. He further adverted to what he described as the six-year delay in the Bank's application for an interlocutory injunction.

255. As explained to the trial judge when the application for interlocutory relief came on for hearing on 21 November 2018, the Bank's principal argument for the grant of injunctive relief was that Brendan O'Rourke had been found to have no interest in Furness Hall which, it was submitted, was the only basis upon which he could resist an application for injunctive relief. Accordingly, having failed to establish any interest in Furness Hall, any challenge sought to be made by Brendan O'Rourke to the validity of the mortgages was a *jus tertii* in the absence of Dermot O'Rourke and Perle O'Rourke having consented to Brendan O'Rourke's possession of Furness Hall and in circumstances where both Dermot O'Rourke and Perle O'Rourke had consented to the Bank having possession of the property. It was also argued that the second named defendant, Mountainview, had no basis upon which to assert a right to remain in possession of the property given that their claim in the Bank Proceedings was a purely monetary one.

256. As the High Court transcript discloses, Brendan O'Rourke opposed the application on the basis that the High Court was being asked by the Bank to invoke its equitable jurisdiction to grant an interlocutory injunction in the teeth of the evidence given by Dermot O'Rourke in the Equity Proceedings as to the actions of both himself, as trustee of the DORDT, and the agents of the Bank, actions which, counsel contended, had deprived Brendan O'Rourke and all the beneficiaries of the DORDT from ever having the possibility of an appointment. Counsel relied on Dermot O'Rourke's admission in evidence that he had not spent €2m on the renovation of Furness Hall, despite having asserted as much to the Bank's agents, at the Bank's instigation, in order to obtain the 2008 loan facility and mortgage.

257. The trial judge delivered her ruling on 5 December 2018. She duly noted the Bank's argument that as Brendan O'Rourke had been found to have no interest in Furness Hall he had no standing to make the argument he sought to make in resisting the application for injunctive relief. She noted Brendan O'Rourke's submission that an injunction should not be granted until the validity of the mortgages had been probed and particularly in circumstances where the unchallenged evidence in the Equity Proceedings was that the Bank executed the 2008 mortgage pursuant to an alleged collusion between Dermot O'Rourke (the mortgagor/trustee) and the Bank's agents such that as a consequence the Bank should be debarred from pursuing interlocutory relief. She further noted his argument that the delay in bringing an application for injunctive relief mitigated against the grant of such relief.

258. After addressing the arguments advanced by Mountainview (which do not concern us here), the trial judge turned to the question of Brendan O'Rourke's *locus standi*. She opined that a person, for example a licensee, against whom possession is sought may successfully resist a claim for possession by providing a licence agreement. However, only the licensee and not some third party relying on the licence would have the standing to do so. "If a person derives a right that is particular to them, then only they can enforce it". In the instant case, the question that fell for determination was whether Brendan O'Rourke's purported challenge to the mortgage agreements afforded him a status whereby he had the requisite standing to resist the Bank's application for interlocutory relief. She stated:

"It is well established that those who are party to Mortgage Agreements can challenge them. This is the idea of privity of contract. Those who derive rights from a contract are party to it and provide consideration may enforce its terms or rights associated with it. However, neither of the Defendants are party to the Mortgage Agreement. Therefore, under the rules of privity they cannot enforce the

Mortgage Agreement and neither can they challenge it. Their entitlement falls under the rules of *jus tertii* and would not be enforceable this way.”

259. Insofar as Brendan O’Rourke and Mountainview were contending that they had some form of agreement with the Bank and/or a right that estopped the Bank from taking possession, the trial judge opined that there was no authority that supported such a contention stating “neither counsel for [Brendan O’Rourke] nor counsel for [Mountainview] has referred me to any precedent that would even hint at the existence of such a right.”

260. She found no substance in the argument that the Bank had delayed in seeking injunctive relief, finding that its decision to await the outcome of the Equity Proceedings before seeking possession was reasonable. Nor had any detriment been suffered by either Brendan O’Rourke or Mountainview as the delay had allowed them to continue to remain in the property rent free and thus preventing the Bank from seeking possession. As far as the balance of convenience was concerned, the trial judge saw no effect of any balance on the legal position of the parties as neither Brendan O’Rourke nor Mountainview had any interest in the property. She concluded:

“They have established no standing to challenge the Mortgages, and [the Bank] is entitled to seek possession under the Mortgage Agreements which *prima facie* allow [the Bank] to do so. The position is clear enough that any alleged convenience does not offset the legal rights enjoyed by [the Bank]”.

She also took account of the fact that neither Brendan O’Rourke nor Mountainview had advanced any substantive argument as to why damages would be an appropriate remedy for the Bank. Accordingly, by Order of 5 December 2018, with effect from 6 January 2019 and pending the trial of the action, Brendan O’Rourke and Mountainview were restrained from remaining in or entering onto Furness Hall.

The appeal

261. The proposition advanced on behalf of Brendan O'Rourke in the appeal is that the Bank engaged in conduct that ought to have had the effect of depriving it of an entitlement to interlocutory injunctive relief. His fundamental point is that the Bank did not come to court with clean hands, a principle which is engaged on any occasion where a moving party seeks equitable and discretionary relief such as an interlocutory injunction.

262. Counsel asserts that the fact of this conduct was established in evidence during the trial of the Equity Proceedings. He contends that the trial judge in the exercise of her discretion erred in fact and in law by failing to attach the appropriate or any weight to the evidence of the Bank's conduct. He asserts that what was established in evidence (*via* Dermot O'Rourke's concessions) was that a statement made in letter sent by Dermot O'Rourke and Perle O'Rourke to the Bank to the effect that the trustees of the DORDT had carried out refurbishment works to Furness Hall to the value of €2m was a false statement. It is submitted that Dermot O'Rourke's unequivocal acknowledgment in evidence that his statement was false and that it was made at the instigation of the Bank's lending team for the purpose of persuading the Bank's credit committee to approve a refinancing loan ought to have impelled the trial judge to refuse the Bank injunctive relief. Moreover, the Bank did not call evidence to counter Dermot O'Rourke's assertions. In the circumstances, the 2008 loan was procured under false pretences and, moreover, the Bank paid out the funds of the 2008 refinancing to Dermot O'Rourke directly. All of this, it is submitted, constitutes an affront to equity.

263. Counsel thus contends that the trial judge erred in fact and in law in granting the injunction in the face of uncontroverted evidence of the action of the Bank's lending team in (a) facilitating the drawing down of funds on a false pretence; and (b) facilitating the securing of a loan over Furness Hall, also based on a false pretence. This conduct, it is

submitted, cannot be discounted by reason of being too remote from the issues in dispute in both the Equity Proceedings and the Bank Proceedings. The arrangement of the 2008 refinancing had the direct and inevitable effect of loading the property with additional debt in the form of the 2008 mortgage. Moreover, Dermot O'Rourke did not produce the trust accounts at any stage during the trial of the Equity Proceedings despite having committed to do so. The Bank was relying on a mortgage which came into being as a result of a false statement by Dermot O'Rourke and with the dishonest assistance of the Bank. That is sufficient to have the effect of depriving the Bank of an entitlement to interlocutory injunctive relief. The impugned conduct of the Bank was material, from an objective prospective, to the very issue that the trial judge was being asked to adjudicate on. If the 2008 mortgage is tainted by the Bank's conduct, then the Bank's application for an injunction in its capacity as mortgagee must also be tainted by that very same conduct.

264. Counsel also makes the case that while the Bank seeks injunctive relief for possession based on either the 2004 mortgage or the 2008 mortgage, the fact of the matter is that as far as the 2004 mortgage is concerned, same was vacated in 2008 as the 2004 borrowings were paid off by the later refinancing. Moreover, it is contended that the finding of the trial judge, at para. 121 of her judgment in the Equity Proceedings, that the 2004 loan facility was replaced by the February 2008 loan facility and described as "a renewal of the then existing facility" is incorrect. What in fact occurred was that a portion of the monies borrowed in February 2008 were used to discharge the 2004 loan and mortgage, as indeed recorded in the Bank's internal documentation and evidenced by the fact that a vacate fee was charged. Yet, the trial judge erroneously proceeded on the basis that the 2008 loan "replaced" the earlier borrowings. It is also argued that in any event the Bank cannot move on foot of the 2004 mortgage in circumstances where Dermot O'Rourke, in removing €1m from the account in June 2007, put that mortgage in peril.

Brendan O'Rourke's primary position is that the Bank can only have contemplated proceeding for injunctive relief on foot of the 2008 loan facility. That being the case, the Bank's reliance on the 2008 mortgage is doomed to fail given the way in which the 2008 mortgage was created.

265. For all of the above reasons, Brendan O'Rourke submits that the Bank is not entitled to equitable relief and thus must advance its position in the trial of the Bank Proceedings and meet the contention there that by reason of its engagement in rendering assistance to Dermot O'Rourke in relation to a breach of the DORDT its claim to be entitled to realise its security cannot be enforced on grounds of public policy. He further submits that even if Brendan O'Rourke is found to have no standing to challenge the Bank's application for interlocutory relief, the trial judge, in the exercise of the court's equitable jurisdiction, was nonetheless required to weigh the behaviour and the conduct of the respective parties in the determination of the application. It is submitted that the *Gonthier* principle must apply to the Bank's injunction case in view of its conduct. This is central to Brendan O'Rourke's appeal of the grant of interlocutory injunctive relief in the Bank Proceedings.

266. The central tenet of the Bank's argument is that the outcome of the Equity Proceedings renders it unnecessary to determine the fundamental issue raised in the Bank Proceedings, namely whether the equitable interest of Brendan O'Rourke had priority over the Bank's mortgages. This is in circumstances where it has been found that Brendan O'Rourke has no legal or equitable interest in Furness Hall and, accordingly, there is nothing to assert in priority. The Bank's position, simply put, is, firstly, that Brendan O'Rourke's repeated attempts in the Equity Proceedings to involve the Bank in allegations of wrongdoing were completely irrelevant to the two primary issues to be determined in those proceedings. Secondly, insofar as he now seeks to appeal against the grant of injunctive relief in the Bank Proceedings by relying on evidence given by Dermot

O'Rourke in the Equity Proceedings that the Bank was complicit in certain misconduct with Dermot O'Rourke in relation to the DORDT, he does not have the requisite *locus standi* to advance that case.

267. As I have recorded elsewhere in this judgment, Dermot O'Rourke gave evidence on Days 19 and 20 of the trial of the Equity Proceedings to the effect that certain officials of the Bank were aware that the loan application in respect of the 2008 refinancing wrongly attributed refurbishment works on Furness Hall to the tune of €2m to Dermot O'Rourke when in fact he had not carried out such works. The Bank did not engage with those contentions in the Equity Proceedings on the basis that it was not relevant to the issues to be decided in those proceedings. Moreover, in her judgment in the Equity Proceedings, the trial judge made no findings in relation to the evidence suggesting that the Bank was complicit in the wrongdoing alleged and decided the case by reference to the principles based on the doctrine of proprietary estoppel. Given the logical order in which the trial judge determined that the litigation would be conducted, and for the reasons set out earlier in this judgment, the alleged misconduct of the Bank could never have been relevant to the issues to be determined in the Equity Proceedings.

268. The question now is whether the misconduct (if it be misconduct) now being relied on by Brendan O'Rourke ought to have been adjudged by the trial judge as conduct that offends against the "clean hands" maxim, thus preventing the equity upon which the Bank relied in seeking injunctive relief from ever arising, as contended for by Brendan O'Rourke in this appeal.

269. A consideration of that issue is however predicated on whether Brendan O'Rourke has the necessary standing to advance that argument. In the Equity Proceedings the High Court found that he has no equitable or legal interest in Furness Hall, a finding which this Court has upheld for the reasons set out earlier in this judgment.

270. In truth, as matters stand, Brendan O'Rourke's status *vis-à-vis* Furness Hall is akin to that of a trespasser in circumstances where no consent to his being on the property is forthcoming from Dermot O'Rourke and Perle O'Rourke as the mortgagors and holders of the equity of redemption, and where those individuals have accepted that the Bank is entitled to possession. I have not been alerted by counsel for Brendan O'Rourke to any principle of law or equity that allows a stranger to come on to the land of another and – when told by the landowner to leave – to refuse to do so on account of some wrongdoing between the landowner and the landowner's predecessor in title or some other third party. I accept the Bank's submission that in the absence of having any title to assert, or any legal authority supportive of his position, the proposition put forward by Brendan O'Rourke that the trial judge was obliged to take account of alleged wrongdoing by the Bank *vis a vis* the 2008 mortgage in deciding whether or not to grant the interlocutory relief against him is not well-founded. I accept that the position might well have been different if the claim asserted by Brendan O'Rourke had been made by someone with an interest in the property. But Brendan O'Rourke is not such a person. A defendant with no substantive defence cannot call upon the court to decline to vindicate a property right by reference to its discretion in relation to the grant or refusal of equitable remedies.

271. Furthermore, in my view, if the Bank were to be found guilty of wrongdoing *vis-à-vis* the 2008 mortgage, it nevertheless advances a claim in respect of the 2004 lending and security of which some €1.9m is *prima facie* untainted by allegations of misconduct. In those circumstances and given that Dermot O'Rourke and Perle O'Rourke *qua* mortgagors have consented to possession of Furness Hall by the Bank, *prima facie*, the Bank will be able to realise its security to the extent of €1.9m on foot of the 2004 security. Accordingly, the balance of convenience lies in favour of the granting of interlocutory relief to the Bank. I accept that counsel for Brendan O'Rourke sought to impugn the Bank's entitlement to

rely on the 2004 mortgage by arguing that the 2004 indebtedness and the 2004 mortgage has been replaced by the 2008 lending and mortgage. However, while that may well be something to be adjudicated on at the trial of the action, in my view, the argument is not sufficient to tip the balance of convenience in favour of not granting injunctive relief particularly given Brendan O'Rourke's lack of standing to advance any argument as to the fate of Furness Hall.

272. For the avoidance of doubt, I am also satisfied that there is no basis to overturn the trial judge's assessment that the Bank had not delayed in seeking equitable relief or her finding that damages would not be an appropriate remedy for the Bank.

273. In all the circumstances, I would dismiss the appeal.

Summary

274. The four appeals brought by Brendan O'Rourke in the Equity Proceedings and his appeal of the interlocutory Order granted in the Bank Proceedings are dismissed.

Costs

275. As Brendan O'Rourke has not succeeded on any ground in any of the four appeals in respect of the Equity Proceedings, it follows, in my preliminary view, that the second and third defendants and the Bank are entitled their costs. Similarly, as Brendan O'Rourke has not prevailed in his appeal of the interlocutory Order in the Bank Proceedings, my preliminary view is that the Bank should be awarded its costs. If, however, any party wishes to seek some different costs order to those proposed they should so indicate to the Court of Appeal Office within twenty one days of the receipt of the electronic delivery of this judgment, and a costs hearing will be scheduled, but any party seeking such a hearing will run the risk that if they are unsuccessful they may incur further costs. If no indication is received within the twenty-one-day period, the orders of the Court, including the proposed costs orders, will be drawn and perfected.

276. As this judgment is being delivered electronically, Murray J. and Pilkington J. have indicated their agreement therewith and the orders I have proposed.