THE HIGH COURT

[2023] IEHC 729

[2018/2537 P]

BETWEEN

JAMES OSBORNE

PLAINTIFF

AND

KEN TYRELL

DEFENDANT

[2015/1856 S]

BETWEEN

KBC BANK IRELAND PLC

PLAINTIFF

AND

JAMES OSBORNE

DEFENDANT

Judgment of Mr. Justice Brian O'Moore delivered on the 20th day of December 2023.

1. On the 5th of May 2021 an interim judgment was delivered in respect of Mr. Osborne's motion. That motion sought two reliefs, namely that he be released from an Isaac Wunder type undertaking given to McGovern J on the 17th of April 2018 or, alternately, that he be permitted to institute proceedings seeking declaratory and other reliefs against KBC Bank Ireland PLC

('KBC'). The current judgment should be read in conjunction with the interim ruling which is arranged under the following headings;

i. Events after the Interim Judgment.
ii. Findings on the Evidence.
iii. Decision on Release from the Undertaking.
iv. Decision on any Variation of the Undertaking

I. EVENTS AFTER THE INTERIM JUDGMENT

2. The Interim Judgment gave Mr. Osborne an opportunity to provide evidence that "he never, either formally or informally, directly or indirectly, agreed that these undertakings, or any of them, or any version of them, be given to the High Court." In response, Mr. Osborne swore two affidavits, at least initially. The first did not, in fact, state in terms that he had never agreed that the undertakings were to be given to McGovern J. This affidavit did, however, contain some important averments including;

(a)The evidence that "at no time prior to during or after the break on the 17th of April 2018 was the word undertakings ever mentioned or explained to me"; paragraph 2.
(b)The averment that he first became aware of "the severity of these legal undertakings" was when they were explained by Ms. Sallar, his counsel since 2019, in 2020.
(c) The description of what happened during the 15 minute interval, during which Mr. Osborne says that he discussed with his counsel one of the two sets of proceedings listed that day in the High Court, but not the other (in which the Isaac Wunder order was being sought by KBC).

(d)The averment that the undertakings were given by his counsel without any instruction or discussion, and the statement that Mr. Osborne had not interrupted the proceedings (and the giving of the undertakings) because "it was my understanding that when represented it would be inappropriate to do so"; paragraph 15. Later in the same paragraph a somewhat different reason for not interrupting is given, namely that Mr. Osborne was out of his depth.

3. This affidavit was sworn on the 25th of May 2021. A further affidavit was sworn by Mr. Osborne on the 18th of June 2021. Before considering the contents of this second affidavit, it is important to note what happened at a remote hearing on the 4th of June 2021. At that time, and prompted by correspondence from Matheson (solicitors for KBC and the receiver, Mr. Tyrrell), there was an appearance by Gabriel Reynolds BL who, as noted in the Interim Judgment, gave the contested undertakings to McGovern J. It was plain from this appearance, which was most unusual, that Mr. Reynolds was unhappy with the account given by Mr. Osborne. After the hearing of the 4th of June, Mr. Reynolds assumed the role of witness and provided an affidavit to Matheson, to which I will shortly refer.

4. Mr. Osborne's affidavit of the 18th of June 2021 inevitably referred to the appearance of Mr. Reynolds. He exhibited a letter from Mr. Reynolds to Bajwa Solicitors (acting for Mr. Osborne) dated the 18th of January 2021. The existence of this letter had never previously been revealed to the Court by Mr. Osborne or his lawyers, notwithstanding Mr. Osborne's 25th of May affidavit and notwithstanding correspondence postdating the Interim Judgment. While Mr. Osborne, on the 18th of June, exhibited the letter from Mr. Reynolds he did not mention that his solicitor (with Mr. Osborne's knowledge) had written to Mr. Reynolds asking him to change (in important ways) the account contained in the Reynolds letter of the 18th of January 2021, nor did he mention that Mr. Reynolds had refused to do so.

5. Mr. Osborne's affidavit relied, as he and his lawyers had in the past, on the contention that Mr. Reynolds was not instructed by Mr. Jacob and that "there is sufficient precedent in this Jurisdiction and in the Court of Appeal pertaining to uninstructed counsel in contentious litigation." In addition, and prompted by comments made at the hearing on the 4th of June 2021, Mr. Osborne unequivocally swore "for the avoidance of doubt, [he] did not directly or indirectly, formally or informally, give instructions or directions to [counsel] to give the undertakings on [his] behalf in relation to the Isaac Wunder Order proceedings." This is not, of course the form of words set out at paragraph 24 of the Interim Judgment, which referred to Mr. Osborne "agreeing" to the offering of the undertakings. The Interim Judgment sets out the equivocation inherent in the use of the word "instructions" in this context; the same might be said of the phrase "directions". It is difficult to understand why the precise phraseology in the relevant part of the Interim Judgment was not used in any of the three affidavits sworn by Mr. Osborne between the delivery of that decision and the oral hearing which occurred on the 22nd and 23rd of July 2021. In any event, it is the case that, notwithstanding the terms of the Interim Judgment and the opportunity thereby provided to him, Mr. Osborne has not sworn unequivocally on affidavit that he did not agree to the giving of the undertakings by Mr. Reynolds on the 18th of April 2018.

6. On the 8th of July 2021, Mr. Reynolds swore an affidavit in which he stated that on the 9th of April, the 18th of April and the 31st of May 2018 he appeared instructed by Jacob and Twomey on behalf of Mr. Osborne before the High Court in both the proceedings taken by Mr. Osborne against Mr. Tyrrell (the 2018 action) and the proceedings taken by KBC against Mr. Osborne (the 2015 action). The Isaac Wunder order was sought by KBC in the 2015 action.

7. Mr. Reynolds swore that he was attended by a Town Agent on each occasion. He says that he was briefed to draft a Statement of Claim in the 2018 proceedings, and importantly to draft a replying affidavit to the Isaac Wunder motion in the 2015 action, between the 9th and the 13th of April 2018. He also gave evidence that he discussed the Isaac Wunder motion, including its potential consequences, with Mr. Jacob and Mr. Osborne.

8. As to the events of the 17th of April 2018, Mr. Reynolds swore that he gave advices to Mr. Osborne which the latter accepted (except in respect of certain matters before the Court of Appeal at the time). Mr. Reynolds went on;

> "I also say that on foot of my advices he instructed me, inter alia, that he would undertake not to begin any fresh proceedings against the Bank. I further say that on foot of those instructions, I spoke to Counsel for the Bank and the Receiver and conveyed my instructions. I say that the totality of the discussions between Counsel were with a view to seeking to advance al outstanding matters between Mr. Osborne, the Bank, and the Receiver, save for matters then before the Court of Appeal."

9. Mr. Reynolds then referred to one of the Court of Appeal matters, mentioned in the last paragraph. In the KBC Grounds of Opposition to an appeal by Mr. Osborne, the following is stated;

> "On 17th of April 2018, KBC applied to the High Court for an Isaac Wunder order against [Mr. Osborne], and [he] ultimately agreed to provide an undertaking to refrain from commencing proceedings, issuing motions and bringing appeals against KBC and related parties."

10. Subsequently, Mr. Osborne in his evidence characterised Mr. Reynolds' reference to this document as an attempt by counsel to justify his position retrospectively. It is no such thing. In referring to the Grounds of Opposition, and referring to the fact that these were (on the 10th of August 2018) sent to Mr. Reynolds and Mr. Osborne by Mr. Jacob by email without any comment on the reference to the giving of the undertakings, Mr. Reynolds is providing material which undermines the assertion that Mr. Osborne did not know of, or did not understand, what had happened to the Isaac Wunder motion. It is also of some interest, though by no means essential to the view I have ultimately formed, that Mr. Jacob (who presumably read the document, either prior to or after he sent it to counsel and his client by email) at no time appears to have queried with Mr. Reynolds how and why these undertakings were given; nor does Mr. Osborne, at least until 2020.

11. To continue with Mr. Reynolds' affidavit, he exhibits his letter to Bajwa but adds a communication from Bajwa asking him to change his account. These solicitors (and Mr. Osborne, who is stated to be present at the time the email is sent) asked Mr. Reynolds to;

1. Remove his account of how the Isaac Wunder motion was to be addressed. This involved the deletion of an entire paragraph of the letter, which read;

> "I had noticed that the Motion seeking the *Isaac Wunder Order* was brought not upon the instructions of Ken Tyrell but by the instructions of the KBC Bank, and for the convenience of the Court and as I has been briefed to appear in the matter of the examination of Mr. Osborne in the KBC Bank matter, I dealt with the said second

Motion, which I successfully opposed, McGovern J. refused to grant the Isaac Wunder Order, as Mr. Osborne had undertaken to dis-continue matter against Ken Tyrrell, which matter as I write above, Mc Govern J. struck out, and that Mr. Osborne had undertaken to lift the *lis-pendens.* Mr. Osborne was present in Court on the 17th of April and agreed to give the said undertakings."

2. Remove a clause in the penultimate paragraph of the letter, stating that Mr. Osborne was "undertaking not to seek by new proceedings to go behind the Order of Barrett J in [the 2015 action] ..." This completely changes the thrust of the paragraph, on the fundamental issue in the current application.

12. The request that Mr. Reynolds change his account in critical ways was made by Bajwa Solicitors, after consulting with counsel and with Mr. Osborne's apparent assent. The reason given is not that Mr. Osborne (or his lawyers) did not agree with the accuracy of the contents of Mr. Reynolds' original version. Instead, it is stated in the email enclosing the propose revised letter that;

"...may we respectfully suggest some paragraphs be deleted in order for the letter to be reduced to the net points you have already suggested."

13. Another reason given for the revisions to the letter was that the name of the firm, and of the solicitor concerned, were incorrect; this is irrelevant. However, the main reason given for

the changes to the letter is entirely disingenuous, to put it kindly. The letter was not being amended so that it was confined to relevant points; it was being changed to accord with Mr. Osborne's case, in a less that forthright way.

14. The lack of candour in the email to Mr. Reynolds is underscored by the contents of the final affidavit of Mr. Osborne, sworn on the 12th of July 2021. In it, he swore that the reason for the suggested amendments (apart from the issue of the name of Mr. Bajwa's firm) was "as Mr. Reynolds account was different from my own..." This is not what was said to Mr. Reynolds. On Mr. Osborne's own evidence. therefore, an attempt was made to persuade Mr. Reynolds, on a false premise, to change his account so that Mr. Osborne's interests could be advanced by using the amended (and materially incomplete) Reynolds letter. As it is not clear to me who initiated this manoeuvre, no further comment will be made at this time.

15. In his final affidavit, Mr. Osborne returns to the theme that Mr. Jacob's firm had not entered an appearance in the 2015 action as of April 2018. He rebuts Mr. Reynolds' evidence that the latter was instructed to prepare a replying affidavit in the Isaac Wunder motion, and says that a letter sent by Mr. Jacob to Matheson of the 11th of April 2018 (upon which Mr. Reynolds relied) was written solely in respect of the 2018 action. On its face, this is so; I will return to this in the context of the cross examination of Mr. Reynolds.

16. Mr. Osborne then repeats evidence already given about a letter sent by Matheson asking if Mr. Jacob was coming on record for Mr. Osborne in the 2015 action, and the reply of Mr. Jacob on the 13th of April that he had no instructions to do so. He exhibits this exchange of correspondence. In this motion alone, this exchange is described and/or exhibited in;

1. The Osborne affidavit of the 27th of July 2020, grounding the application;

2. Mr. Jacob's affidavit supporting the motion;

3. Mr. Osborne's affidavit of the 30th of November 2020;

4. Mr. Osborne's affidavit of the 2nd of December 2020;

5. Mr. Osborne's affidavit of the 25th of May 2021;

17. It may be thought surprising that Mr. Osborne saw the need to exhibit this correspondence, let alone describe it one further time in his affidavit of the 12th of July 2021.However, the purpose of doing so was to lead, yet again, to the proposition (in the final paragraph of his final affidavit) that;

> "I say there is clear evidence from the letters and records that Mr. Reynolds had no standing to act in the summary proceedings and the Isaac Wunder matter on the 17th of April 2018 in which he had also sought costs which would assumedly be on behalf of a solicitor who clearly made his position clear by the letter Exhibit J.O.3."

The affidavit evidence concludes, therefore, on the topic of lack of standing, the very issue which is identified in the Interim Judgment as carrying a high degree of ambiguity.

18. Despite the repetition of his earlier evidence, Mr. Osborne in his final affidavit did not deal directly with certain of the averments of Mr. Reynolds. In particular, and most extraordinarily,

Mr. Osborne does not deny in this affidavit the account given by Mr. Reynolds and summarised at paragraph 10 of this judgment. Mr. Reynolds' narrative, to the effect that Mr. Jacob and Mr. Osborne had sight of a KBC pleading in August 2018 which stated in the plainest terms that the disputed undertakings had been given to the High Court, is of central importance. It has never, as will be seen, been contradicted by Mr. Jacob.

19. The exchange of affidavits having been completed, there was a hearing on the 21st and 22nd of July 2021 at which both Mr. Reynolds and Mr. Osborne were present. I heard applications from Ms. Sallar (counsel for Mr. Osborne) and Mr. Lavelle (counsel for KBC and, in the 2018 action, for Mr. Tyrrell) for leave to cross examine. Leave was given for the cross examination of Mr. Reynolds and Mr. Osborne. Leave was refused for the cross examination of two solicitors from Matheson; Ms. Julie Murphy O'Connor (who had not even sworn an affidavit in the current motion) and Mr. Dylan Gannon. The application to cross examine the solicitors took some time, and the reasons why cross examination was refused are set out in transcript. The starkest of these was the fact that there was no relevant factual dispute between Mr. Osborne and the solicitors.

20. While Mr. Reynolds was cross examined first, for a full day, it is appropriate to consider now the evidence of Mr. Osborne as it is he who bears the onus of proof in the motion.

21. At the outset, and despite the fact that this was cross examination on his eight affidavits, Mr. Osborne and his counsel were given the opportunity to put in evidence any matters which had been put to Mr. Reynolds the previous day and which was not already in the affidavits. Counsel did not avail of this offer.

22. During his cross examination, Mr. Osborne confirmed that he had been in court on the 16th of March 2018, when counsel for KBC told McGovern J of the intention to seek the Isaac Wunder order, that McGovern J had twice on that occasion explained clearly to Mr. Osborne what this involved, that there was no doubt on Mr. Osborne's part as to what such an order meant, and that he understood that he was to file any replying affidavit by the 12th of April in preparation for a hearing on the 17th of April. He also agreed that he got the motion papers on the 23rd of March 2018, that he understood the affidavit and that the points made in it were clear though he did not agree with some of them.

23. On representation before the hearing, Mr. Osborne said;

> "I didn't actually have a solicitor on record at the time. I tried to get Mr. Patrick McCarthy and he was away in Australia so unfortunately he was [not] available. It was after that that I contacted Mr. Robin Jacob, who did come in later and said he would try and get this stuff together as quickly as possible. He - he felt it was too short a time span for him to do it."

24. Mr. Osborne was asked about his failure to file any affidavit in opposition to the Isaac Wunder motion, either himself or through solicitors, by the 12th of April 2018 or at all. He began a very lengthy and irrelevant answer by referring to the events of the 17th of April. Asked the question again, Mr. Osborne again evaded it, referring instead to an appearance before Barrett J in 2015 and a subsequent negotiation with Pepper. A third time the question was asked why no affidavit was filed in advance of the 17th of April 2018. The reply was;

> "Because Mr. Reynolds had assured me, before he gave any of these undertakings in court - and he gave the undertakings, not me. Before he gave any of these undertakings, he

assured me that things were going very well, negotiations were going, everything was smooth and we were moving along. And what I was hearing was great progress was being made. It came to the 15 minutes, which - Judge McGovern generously allowed us to go out and have a discussion about it..."

25. This account clearly is not a genuine attempt to answer or even engage with a simple but important question. Asked a fourth time, Mr. Osborne referred again to his effort to engage Mr. McCarthy, the short timeframe, and the other pressures which he claimed were being placed on him by KBC or Mr. Tyrrell. Asked if he was trying to get a solicitor to prepare an affidavit "in advance of the 17th" and if that was or included Jacob and Twomey, he then said;

"I hadn't - I haven't even got to Jacob and ... Twomey at that stage."

26. That was inconsistent with his previous evidence. However, Mr. Osborne then reverted to the position he had adopted earlier, which was that he had "tried to get Mr. Jacob and counsel to prepare an affidavit in opposition to the Isaac Wunder...order application." He then elaborated on this account, to the effect that he had discussed with Mr. Jacob the preparation of an affidavit in opposition to the Isaac Wunder motion, that the solicitor needed time to read the papers and he wasn't going to "do an affidavit until he'd read the papers." It follows that Mr. Jacob was agreeable to preparing a replying affidavit when he had read the papers. This is consistent with the next piece of evidence from Mr. Osborne, which was that prior to the 17th of April 2018 he had a "few meetings" with Mr. Jacob and one meeting with Mr. Reynolds as well as phone contact with counsel "about the proceedings generally".

27. Mr. Osborne went on to accept that, between the 16th of March and the 17th of April, he discussed the situation with KBC and the receiver generally "and the different strands of the litigation" with Mr. Jacob and, through him, had the input of Mr. Reynolds. He also volunteered that Mr. Reynolds "had offered to prepare - to do some work on - the KBC proceedings on the basis that when Mr. Jacob would come on record, that he would be instructing Mr. Reynolds." As we will see, this account is consistent with Mr. Reynolds' evidence of the previous day that he had been preparing a replying affidavit on the Isaac Wunder motion until he informed Mr. Jacobs (on the 13th of April 2018) that it was not going to be ready in time. This work was done notwithstanding the fact that Mr. Jacobs had not entered an appearance in the 2015 action at the time. For Mr. Reynolds to have begun to draft a replying affidavit he must have had the motion papers; again, this is consistent with this portion of Mr. Osborne's testimony.

28. At odds with what he had just said, Mr. Osborne then went on to deny that he had ever discussed the Isaac Wunder motion with Mr. Reynolds prior to the 17th of April, and that the only advice he received from Mr. Reynolds about that motion was after the 24th of May 2018 (when Mr. Jacob came on record in the 2015 action). Bizarrely, Mr. Osborne's evidence was that Mr. Reynolds' advice (through Mr. Jacob) some time after May the 24th was that there was no Isaac Wunder order, and Mr. Osborne should oppose the making of one. This was clearly an indefensible position for him to adopt, so Mr. Osborne moved away from it. He eventually conceded that after Mr. Jacob came on record in the 2018 action, the solicitor "channelling Mr. Reynolds" advised him about the undesirability of an Isaac Wunder order being made.

29. This was all new. At no stage, over his extensive and repetitive affidavit evidence, had Mr. Osborne revealed that prior to the 17th of April he had provided the papers to Mr. Jacob, discussed the different strands of the litigation with him and Mr. Reynolds, been advised by

them about the Isaac Wunder motion, and was in receipt of an offer from Mr. Reynolds to do some work on the 2015 action even before Mr. Jacob came on record. These facts were suppressed by Mr. Osborne as they, individually and collectively, significantly undermined his contention that Mr. Jacob and Mr. Reynolds had nothing to do with the 2015 action until May 2018.

30. The next area explored in cross examination was the extent to which Mr. Osborne understood what an undertaking involved. Mr. Osborne initially denied that he had ever previously given an undertaking to a court. It transpired that an undertaking had been given by him, through a solicitor in January 2016 and that Mr. Osborne had set out the terms of this undertaking in one of his affidavits. Mr. Osborne accepted, as he had to, that this event had occurred, which makes his denial of giving an undertaking somewhat dubious. Mr. Osborne had also said that he did not understand "the legal consequences of an undertaking". However, he then agreed that he understood an undertaking to be a promise but that he did not appreciate the legal consequences of the promise. A short while later, Mr. Osborne stated that he had been advised in January 2016 by the solicitor through whom he gave an undertaking that "if I interfered with the receiver, that I would be attached and committed." Notwithstanding this appreciation, Mr. Osborne's evidence was that he did not relate these consequences to any breach of the undertaking given in January 2016 or that given in April 2018.

31. I find this evidence quite incredible. Mr. Osborne knew in 2016 that he was promising to the court that he would not interfere with a receiver, and his then solicitor explained to him that if he did so he would be subject to attachment and committal. He clearly understood in January 2016 what an undertaking involved. He must have understood the same in April 2018, even without the advice of Mr. Reynolds.

32. The evidence given by Mr. Osborne in the course of the exchanges about his understanding of an undertaking is quite unedifying. At one point in time, presumably to support the mysterious nature of an undertaking, Mr. Osborne suggests that his earlier solicitor "probably didn't maybe fully understand [the word 'undertaking'] himself." There is absolutely no reason to believe that this is accurate or truthful. Mr. Osborne continued that;

> "But in any event, he didn't explain it to me either."

Within minutes, Mr. Osborne had described what his solicitor told him in January 2016; this constituted an adequate summary of what an undertaking involves.

33. Finally, on this topic, Mr. Osborne at one point sought to distance himself from the giving of the January 2016 undertaking by suggesting that it was his former solicitor who had used the term and not him. This was not a realistic or forthright approach to take, particularly as Mr. Osborne accepted that (at the time of his evidence) he understood the nature of an undertaking which is, necessarily, offered not by the lawyer personally but on behalf of a litigant.

34. Mr. Osborne was then asked about the build up to the 17th of April and, in particular, how he intended to deal with the Isaac Wunder motion on the day given that he had not filed any affidavit in compliance with the court's directions. This was a straightforward and important question. The response was singularly evasive. I will set it out in full.

> “Q. So your response was you wanted to oppose it. And how did you envisage that you would oppose it on April 17th? Explain that to me?

A. Well, on the basis that –

Q. Because we've agreed – agreed that you hadn't filed an affidavit?

A. Okay, can I explain?

Q. Yes?

A. Just one question at a time, please.

Q. Okay?

A. So, okay. How was I going to oppose it? Well, first of all my understanding is that it would – and I think the judge actually explained it to me as well that there'd be a notice of motion and that there'd be an application made for an Isaac Wunder order.

Q. Yes, we've been through the service of that, yes, and I think you've agreed that you got that on the 23rd of March?

A. So – yes. So what – what I said on that particular day was I would definitely be opposing it. And how – you're asking me how was I going to oppose it. I would be opposing it on the basis that I never got discovery of my documents in 2015. I never seen the original mortgage, which we requested, and we had two separate visits to Matheson's offices, pre-arranged. We gave them a list of documents that we wanted to inspect. We brought a qualified document inspector with us. I think it was 24 documents that we were supposed to get sight of, original documents. We did not get sight of any of those original documents. The original mortgage was not provided. It was missing – the copy that was produced on that day was missing the signature page, page 33, and I was told it was an original

Q. Yes?

A. So the – there was two solicitors in the office watching us doing what we were doing. One of the solicitors went off and came back with a photocopy of page 33 and put it in with the mortgages.

Q. Right?

A. And that's what I was told was an original mortgage. So that was one basis I was going to oppose it.

Q. Okay, so the question --?

A. Can I not, please – let me – just let me finish.

JUDGE: No, no, let Mr Osborne finish.

A. Yes. That was one basis that I was going to appeal it on. The other one was that there were two contracts. Two contracts. JP18048 was the 2004 contract, EMK15951 was the 2003 contract. Neither of those contracts were made available to us when we went in for inspection. Those are the facility letters. And I explained that to Judge Max Barrett and that was another reason why he told me to go back and tell the judges in the Court of Appeal to ring him. There's one very important point here, and, you know – when I was taking out that mortgage, we were very specific about what was happening on the 10th of the 12th in particular when that mortgage was being put together by my solicitor. I was asked to come into the office and signed a particular map in the mortgage, which I did on 10/12/2002. I signed that map. On the 17th of February 2003 there were concerns about the map. In fact, there'd been a couple of different issues raised about it by your own solicitor, Mr O'Sullivan, who subsequently I think became a partner in your company, in –

Q. Let's – yes?

A. Sorry. So on the 17th of February 2003, I was told to go to my architect's office and to have him prepare a map, outline exactly how much was charged, in relation to the map that she had given me and emailed to him. So I went to his office. He drew up that map. He coloured it in. He marked out what was charged. He showed me exactly what the situation was with relation to the properties that I was retaining. I went back to my solicitors office on the 17th of February 2003. I handed her in the map. She was quite happy that everything was in order. She rang O'Sullivan Barnicle and the money – everything

was agreed by the – by KBC's executives and the money arrived in my solicitor's office the very next morning. That facility letter, ENK15951, was amended in 2002 on the 17th of February, that same day – sorry, 2003, 17th of February 2003. That facility letter was amended that same day.

Q. Okay --?

A. And that amendment meant that instead of us getting 2.5 million we were only drawing down 1.6 million, which just about got us out the door because we were under serious pressure to try and – we were nearly halfway through the whole project at Gorey Business Park.

Q. Okay, so those are your grounds of opposition to --?

A. So – no, that's – so the money was paid over and the next situation that arose is in 2004 –

A. Okay, Judge. The – most important thing as far as I was concerned, Judge, is that there was an insurance policy taken out which indemnified KBC Bank if there was any negligence on our part because we wrote to the – we wrote to the bank before we drew down that second two – 2.5 million. We wrote to the bank and we informed them that we had issues with fire certs and we – we were concerned about is. The bank did not come back to us, but what we did have in place and we put in place – it cost us an extra €1,100 per year – we upped our insurance policy to indemnify the bank if there was any negligence on our part while we were building that factory.

Q. MR LAVELLE: Yes --?

A. And one final thing, and I – I don't want to – take two minutes on this one. We had a loan with AIB Bank. The units that were charged the receiver also exercised his – his

powers over those. Those units could not possibly have been charged to KBC, could not possibly, because we didn't pay hat mortgage off AIB until 2006.

So that's – that's – sorry, Judge, for being –

Q. Okay, so --?

Q. JUDGE: So that was the plan you had to deal with the Isaac Wunder order application of the 17th of April? You were going to deploy all that information to the Court; is that right?

A. I was, Judge, yes.

JUDGE: Very good."

35. This is not an answer to the question. However, perhaps happy to have got all this off his chest, Mr. Osborne was more forthcoming when the question was repeated. He said that the intention was that the Isaac Wunder motion would be dealt with by Mr. Jacob, instructing Mr. Reynolds, and the "plan was that Mr. Jacob and Mr. Reynolds would oppose the Isaac Wunder order application on the 17th..." Mr. Jacob would handle all this, information was being relayed back to Mr. Jacob "at all times", and Mr. Osborne was happy for the legal team to deal with the Isaac Wunder motion as he was incapable of doing so himself.

36. This account has the virtue of clarity, though it suggests that Mr. Osborne's affidavit evidence on this topic was utterly untruthful. However, it was contradicted some time later when Mr. Osborne reverted to the proposition that he was to represent himself on the 17th of April. In giving this latest version of the preparations for that hearing, Mr. Osborne said the following;

a) He was there to deal with the Isaac Wunder motion himself;

b) His intention was to look for an adjournment, but he never did.

c) He would have sought the adjournment on the basis that he "had instructed a solicitor but the solicitor wasn't prepared to deal with it at that stage."

37. Leaving aside the fact that this account is fundamentally at odds with his earlier evidence, this version includes the significant statement that Mr. Osborne had, as of the 17th of April 2018, instructed a solicitor (who must have been Mr. Jacob) in the Isaac Wunder motion. The fact that Mr. Jacob could not deal with the matter until he had read into the papers does not dilute the fact that Mr. Osborne was prepared to tell the High Court (presumably truthfully) that solicitors were instructed in the motion, whether or not they had come on record.

38. The final element of this version is this;

d) He did not apply for an adjournment of the motion because McGovern J stated that he would not make an order there and then, but that the Isaac Wunder application would be dealt with at a later stage.

39. In proffering this last piece of evidence, Mr. Osborne had to explain how he could have come to this view given that, (1) before McGovern J stated that he was not going to make an Isaac Wunder order the undertakings had been given by Mr. Reynolds and (2) the reason given

by the judge for not making the order was that the undertakings had been provided. Mr. Osborne's evidence on this point was;

"I honestly did not know the significance of "undertaken"'

40. I do not accept this last element as remotely honest evidence, for the reasons already set out. In addition, Mr. Osborne was vague as to when he thought the Isaac Wunder motion was to be dealt with after the hearing of the 17th of April. When asked if he had enquired later as to when the motion would re emerge, Mr. Osborne said;
"I honestly didn't, Judge, because I thought we had an arrangement in place that was going to be successful. That's – that's genuinely what my mind-set was at that point in time."

41. Given that the nature of an Isaac Wunder order had been explained to him in advance of the 17th of April, given that he was concerned enough about it to have sought two firms of solicitors to represent him on the motion, given that he had also sought the services of counsel in respect of the motion, and given that he was determined (he says) to resist the motion, it is not believable that Mr. Osborne (who describes himself as a businessman) would not have at any time over the following two years inquired as to what was happening to an Isaac Wunder motion which (he says) he understood simply to have been adjourned on the 17th of April. It is far more likely that he understood that, as McGovern J said, no order was being made on the motion because of the undertakings given by Mr. Osborne's counsel. This would explain why Mr. Osborne never subsequently asked anyone what had happened to the motion over the following two years. It would also explain the complete lack of reaction on the part of Mr. Osborne, Mr. Jacob and Mr. Reynolds to the contents of the KBC Grounds of Opposition before the Court of Appeal, available to all three men in August 2018.

42. It is also important to note that this account as to why Mr. Osborne did not stand up and look for an adjournment of the Isaac Wunder motion differs from his earlier accounts.

43. In response to a question as to why, if he was representing himself on the motion, he did not make this known to the court Mr. Osborne swore that he did not do so as the registrar did not ask him to speak and nobody asked him a direct question. Again, this lacks credibility as Mr. Osborne had previously represented himself and the experience of doing so was not new to him. In addition, Mr. Reynolds had told the court that he appeared for Mr. Osborne without suggesting that he only appeared in one of the two cases listed that day. This would have made it all the more important that Mr. Osborne make it clear that he was representing himself on the important Isaac Wunder motion. From observing Mr. Osborne give his evidence over the best part of a day, he does not lack in confidence. There is no reason to believe that he was any different in 2018.

44. On the key issue of his agreement to giving the undertakings, Mr. Osborne's evidence was to this effect. He did not discuss the Isaac Wunder motion with Mr. Reynolds on the morning at any time before they went into court. When Mr. Reynolds said to McGovern J that Mr. Osborne "will discontinue any proceedings which he might have against the Receiver and he will undertake through his solicitor not to bring any more proceedings in this particular series of proceedings..." Mr. Osborne's evidence was that he understand this to mean that he would only act in this way if "settlement is arrived at and everybody's happy..." This defies belief. The idea that counsel would inform the court that proceedings would end, and no further proceedings would occur, if there was a settlement and everyone was happy is surreal. That he

would do so in the context of addressing an Isaac Wunder motion without any prior discussion with a client, present in court and representing himself in the motion is incredible.

45. Mr. Osborne then says that, during the subsequent 15 minute break, the Isaac Wunder motion was never discussed. This is also difficult to accept; at the very least, given that he says he was dealing with it himself, one would have expected Mr. Osborne to ask Mr. Reynolds (1) what exactly he meant in saying what he did when the motion had been dealt with earlier and (2) was the motion going to be dealt with after the break, and if so when, so that he would know when to apply for an adjournment.

46. After the adjournment, Mr. Reynolds told McGovern J that;

"My Lord, I am instructed that Mr. Osborne will discontinue all proceedings against the Receiver in this matter…And, moreover, Mr. Osborne's solicitor has requested that I give an undertaking to the Court that there will be no more proceedings against the KBC and against the Receiver in this particular sequence of events."

While, at the hearing before me, much was made of the fact that Mr. Jacob was at an event in Donegal on the 17th of April, and could not therefore have given Mr. Reynolds these instructions on that day, it is more striking and much more significant that Mr. Osborne failed to give any evidence that he tried to intervene at the time or that he subsequently queried Mr. Reynolds' clear statement that he had instructions to give the undertaking. This failure is consistent with Mr. Osborne having authorised the undertakings.

47. Mr. Osborne gave three reasons why he did not interject;

1) The meaning of an undertaking had not been explained to him by Mr. Reynolds. However, for the reasons already outlined, Mr. Osborne understood the meaning of an undertaking to the High Court, and its consequences.

2) The Isaac Wunder order was not going to be made. However, it was after the undertakings were given that McGovern J said he would not make an order. There was ample opportunity for Mr. Osborne to make his position clear. In addition, McGovern J was plain that the order was not being made only because the undertakings were being given. This brings one back to the question (which I have already decided) of Mr. Osborne's knowledge of the meaning of an undertaking.

3) Discussions between the parties were "moving forward". There was nothing conditional about the undertakings offered, which were teased out by the court over some time.

Mr. Osborne's reasons for not interjecting do not stand up to scrutiny.

48. After court, Mr. Osborne says that he did not discuss with Mr. Reynolds the Isaac Wunder motion or the undertakings given. He did not ask what was the adjourned date of the motion. Mr. Reynolds, according to Mr. Osborne, just said that great progress had been made, that the examination of Mr. Osborne in aid of execution would be got out of the way, and that "things will be sorted and that will be the end of you and court proceedings."

49. On the 27th of April 2018, counsel instructed by Mr. Jacob's firm withdrew one of Mr. Osborne's appeals before the Court of Appeal. Mr. Osborne confirmed that this was consistent with the advice given by Mr. Reynolds to him (and Mr. Osborne's acceptance of this advice)

to the effect that he should try to do a deal with KBC, forget about the appeals, starting vexatious proceedings and litigation generally. Notably, Mr. Osborne also stated that he had no problem with counsel acting on the instructions of a firm that had not entered an appearance in the proceedings before the Court of Appeal.

50. Mr. Osborne was asked about other events after the 17th of April 2018. When it was put to him that he had continued to instruct Mr. Reynolds for 3 years after that date, without raising any issue about the undertakings, the reply was that Mr. Osborne "actually didn't know the significance of these undertakings until..." February 2020. When the asked if he was at all times aware of the undertakings but did not know of their significance, Mr. Osborne replied;

> "I never even thought about it because we were in an entirely different mind-set."

I take from the substance of the reply, and its evasive nature, that Mr. Osborne was quite aware of the undertakings given in his presence to McGovern J.

51. On the plea in the KBC Grounds of Opposition of August 2018, Mr. Osborne was asked about the evidence to Mr. Reynolds to the effect that there had been a meeting with Mr. Jacob at his office in September 2018 attended by Mr. Osborne and Mr. Reynolds, at which this document was discussed. He denied that such a discussion took place.

52. On the Bajwa amendments to the Reynolds letter of January 2021, Mr. Osborne gave evidence that he could see no difference between what actually happened in court of the 17th of April and this section of the Reynolds letter (part of which Mr. Bajwa wanted excised);

"I say that my understanding of what Mr. Osborne was undertaking to do was to discontinue the matter against Ken Tyrrell and he was undertaking to lift the lis pendens and to allow the conveyance and also undertaking not to seek by new proceedings to go behind the Order of Barrett J in the 2015 proceedings."

53. This acceptance by Mr. Osborne that this is what happened in court on the relevant day is important. It clarifies what was intended by Mr. Osborne, and what was said to the court. Mr. Osborne then sought to pull away from this acceptance by saying that part of the undertaking was provided "on the basis that we were settling our claim with the bank" - though the undertaking is nowhere stated to be conditional in this or any way - and by saying that he did not "give any undertakings as I understood it on the day", which flies in the face of the transcript of the hearing.

54. Mr. Osborne attempted to justify the changes proposed by Mr. Bajwa by saying that this was an attempt to "narrow the issues". For reasons given earlier, it was no such thing.

55. In re examination, Mr. Osborne stated that Mr. Jacob had been at a family event in Donegal on the 17th of April 2018, that Mr. Jacob had spoken neither to Mr. Osborne or Mr. Reynolds during the 15 minute interval, and that Mr. Reynolds was in error in stating to McGovern J that a particular court appearance was the first time that Mr. Osborne was legally represented. There was then evidence to the effect that an affidavit in the lis pendens motion was "suppressed from the Court" on the 17th of April. This allegation was not developed subsequently in any meaningful way.

56. Mr. Osborne was finally asked about his instructions to Mr. Reynolds on the 17th of April; he said that he gave no such instructions "on that day". It is unnecessary to describe certain of the other lines of re examination, just as I have only set out the more relevant lines of cross examination. I should, however, state my strong disapproval of a question put about a statement made by counsel for KBC to McGovern J on the day in question. After the 15 minute break, counsel informed the court that there had been a "good measure of progress". This formed the basis for a leading question by Ms. Salar to the effect that "this deal" was "a sham" between the two counsel appearing on the day. There is no basis whatsoever for this suggestion which Mr. Osborne, to his credit, refused to endorse. Unless questions as loaded as these are grounded on some evidential basis, they have no place in properly conducted litigation.

57. The evidence of Mr. Osborne was evasive, inconsistent and in important respects untruthful. The same cannot be said of the evidence of Mr. Reynolds, which can therefore be summarised more speedily.

58. Mr. Reynolds gave evidence that, on the 29th of March 2018, he met with Mr. Osborne and that the 2015 action was “fully discussed” at that stage. The meeting was also attended by Mr. Geoffrey Nwadike, a barrister colleague of Mr. Reynolds who had introduced the latter to Mr. Osborne’s affairs. At that meeting, Mr. Osborne asked Mr. Reynolds if the latter would represent him in court. Mr. Reynolds agreed that he would do so if Mr. Nwadike would step down and hand over the brief. None of this evidence was challenged in cross examination. Mr. Reynolds also gave evidence that he was still instructed by Mr. Osborne in certain commercial matters. In those proceedings, Mr. Reynolds was at the time of his evidence instructed by Eamonn Bennett, solicitor, and lead by two senior counsel. This is surprising, given that Mr. Osborne maintains that his current predicament arises directly from the giving of undertakings without instructions by Mr. Reynolds. Again, this evidence was not challenged.

59. Mr. Reynolds was asked if he was aware that a solicitor had to be on record in High Court proceedings in order for counsel to be instructed. He replied that he had never asked a solicitor whether or not they were on record before attending meetings with them. When asked about the proposition that he had told Mr. Osborne that there was no Isaac Wunder order in place, he referred to the correspondence with Mr. Bajwa of January 2021 to which reference has already been made. He also mentioned possibly having seen a copy of the 17th April transcript at a meeting with Mr. Bennett in 2020; he was in any event sure that he had seen the transcript prior to having a telephone conversation with Mr. Bajwa sometime between July 2020 and the correspondence of mid January 2021. Mr. Reynolds described the version of his own letter (as sent back to him by Mr. Bajwa) as a "doctored" one, and that he had told Mr. Bajwa in a conversation shortly after this version was sent to him that he "was not prepared to allow that this letter would be submitted" as his evidence. This was not contested in cross examination.

60. Mr. Reynolds also referred to the consideration in about October 2018 of the KBC pleading in the Court of Appeal, which described concisely and accurately the undertakings given to McGovern J. This happened at a meeting with Mr. Osborne and Mr. Jacob at the offices of Jacob & Twomey in Enniscorthy. While the KBS Notice was discussed, the undertakings described in the document were not raised either by Mr. Osborne or Mr. Jacob at the meeting. This appeared to be accepted as accurate by Mr. Osborne's counsel – in any event, and very significantly, this account was not challenged.

61. Mr. Reynolds was asked a series of questions about the presence, or absence, of a town agent in court on the 17th of April.; in his affidavit, Mr. Reynolds had said that no solicitor or legal clerk from Jacob & Twomey was present in court at any time, but that town agents (Rochford Brady) were present on the 17th of April. It was then put to him that "there was no town agent and no one has attended you on the 17th of April…" Mr. Reynolds maintained that

he was attended by town agents on that day. When asked for the evidential basis for the assertion that town agents were not in attendance on the 17th of April 2018, counsel gave three alternate answers;

(a) "Judge, it's the DARSs everywhere. He was not attended."

(b) "Mr. Osborne could confirm that as well."

(c) "Judge, on the 17th of April there was no attenders" – when asked if this evidence was in any of the many affidavits of Mr. Osborne.

62. Leaving aside replies (a) and (c), and despite being afforded an opportunity to do so, Mr. Osborne did not give any evidence on this topic (which spills over four pages of transcript). I therefore accept Mr. Reynolds' testimony on this point.

63. Mr. Reynolds was then challenged on his evidence that he was instructed to prepare a replying affidavit to the Isaac Wunder motion. In a letter of the 11th of April 2021, Mr. Jacob had written to Matheson that;

"Please note that a Statement of Claim and a replying Affidavit is currently being prepared by our Counsel in the matter, Gabriel Reynolds BL."

Mr. Reynolds had stated, in his affidavit, that the affidavit referred to in this letter is the replying affidavit to the Isaac Wunder motion. This does not appear to be the case. The letter is headed by reference to the 2018 action, the Statement of Claim mentioned in it was to be delivered in those proceedings, and the reference to both the Statement of Claim and the replying affidavit being prepared by counsel "in that matter" suggests that Mr. Reynolds is mistaken in his evidence about the reference in the letter from Mr. Jacob.

64. However, this error on the part of Mr. Reynolds does not mean that he was not instructed to prepare an affidavit to deal with the Isaac Wunder application. The day after the cross examination of Mr. Reynolds, as we have seen Mr. Osborne accepted

(for the first time) that Mr. Reynolds and Mr. Jacob had been entrusted with looking after the Isaac Wunder motion as Mr. Osborne could not do so. In addition, the cross examination of Mr. Reynolds on this topic was deeply flawed. It was put to him that the Order of the 9th of April 2018 stipulated dates for the delivery of a Statement of Claim and a replying affidavit (both in the 2018 action) but that no such directions were given in respect of a replying affidavit in the Isaac Wunder application. Counsel was asked to clarify her exact question, in this exchange;

> "MS SALLAR: So we've established initially that there is no directions from McGovern J in relation to the Isaac Wunder Order, we're putting that aside.
>
> JUDGE: Well, that's what I was going to ask about, Ms Sallar, is that what you're putting to the witness?
>
> MS SALLAR: I would put it to him after I've finished this, Judge, with the—
>
> JUDGE: No, no, no, no, no, the proposition you've just enunciated, there were no directions from McGovern J in relation to the Isaac Wunder Order.
>
> MS SALLAR: Yes.
>
> JUDGE: Is that the proposition you are putting to the witness?
>
> Q. MS SALLAR: Yes, it's in the orders. Did you see anything, any directions in relation to the Isaac Wunder Order?
>
> A. On what date, Ms Sallar?
>
> Q. Of the 9th of April on the order?
>
> A. No, I was only sent – I was only sent in on the 9th, so …
>
> Q. The entire point of paragraph 8 of your averment is in relation to the date on the 9th of April and that's why I am questioning you –

JUDGE: Now, let's just be clear, Ms Sallar, are you putting to the witness that there was no direction in respect of a delivery of an affidavit by Mr Osborne at all made on any date or are you confining your question to this date?

MS SALLAR: It is. Was there any directions from McGovern J in relation to the Isaac Wunder Order to put in an affidavit?

JUDGE: On any date.

Q. MS SALLAR: On any date, yes?

A. With me present in court or –

Q. On the 9th of April order, as you have read?

A. Well that with me present in court, no, I don't believe that there was.

Q. There were no directions then, you agree with me?

A. Mr –

Q. Then why do you believe in your averment in paragraph 8 that Isaac Wunder Order in the affidavit was in relation to the Isaac Wunder Order and not in relation to the lis pendens proceedings?

A. Because simply, Ms Sallar, they were my instructions.

Q. From whom?

A. From Mr Jacob?"

65. It was accepted by Mr. Osborne the following day that he had given Mr. Jacob the information relevant to the Isaac Wunder motion. Mr. Reynolds' evidence that he was told by Mr. Jacob to prepare an affidavit in response to the motion is credible, and I accept it. That is particularly so given the evidence of Mr. Osborne that Mr. Reynolds

was working on the 2015 action even before Mr. Jacob entered an appearance in that case.

66. I will now set out why the questioning of Mr. Reynolds on this topic was flawed. The proposition put to him was that there was never, on any date, any direction as to when a replying affidavit on the Isaac Wunder motion was to be delivered. This proposition was simply untrue. Such a direction was, as I have set out, made on the 16th of March 2016. If counsel intended to confine her questions to the hearing of the 9th of April 2018, it was important to make it clear that this was so, not to use phrases such as "on any date". The witness should in due course have been informed that such directions had in fact been given at an earlier time, in order to avoid misleading Mr. Reynolds. None of this was done.

67. Mr. Reynolds went on to give evidence that, as of the 13th of April 2018, he told Mr. Jacob that he had not finished work on the draft affidavit (which he had begun) and that an adjournment would have to be sought on the 17th of April in order to have enough time to complete the draft; the 13th of April was, of course, the day after the deadline for delivery of the replying affidavit (in the 2015 action) fixed by McGovern J on the 16th of March 2016.

68. Asked about the instructions given to him, Mr. Reynolds said;

"And also, Ms. Sallar, you must be aware with this that outside the door of the court, without formal instructions of your solicitor, counsel on the other side might well put a proposition to you, which you would put to your client, your client would agree and there it is. You have instructions but they're not formally written out by the solicitor and given to you."

69. This account by Mr. Reynolds has a ring of familiarity, and a ring of truth, about it. Mr. Reynolds then accepted that he did not phone Mr. Jacob on the day, but at some stage communicated to him what happened. He maintained that he was instructed, both on the 17th of April and thereafter, in respect of a number of matters even if Mr. Jacob had not come on record in all of them; this again was consistent with Mr. Osborne's subsequent evidence. Mr. Reynolds said that he had continued to communicate with counsel for KBC and Mr. Tyrrell into May 2018, and that there was "an embryonic settlement" in place before Mr. Jacob came on record in the 2015 action on the 24th of May 2018. In light of this evidence, which again it was not suggested was incorrect in any detail, Mr. Reynolds was asked "a very important question", as follows;

"Well, have you been in trouble then before, Mr. Reynolds?"

70. This question was in the context of Bar Council rules and its Code of Conduct. Without describing the episode in detail, it appears that there was some confusion about the representation of an individual before Reynolds J. Contrary to the suggestions put by counsel, there was no rebuke delivered to Mr. Reynolds, there was no order made against him, and there was no breach of the Bar Council Code of Conduct made out against him. There was no evidence of a complaint against Mr. Reynolds to any professional body. The line of questioning was groundless.

71. Mr. Reynolds was then examined by reference to the DAR transcript for the key day. He said that the instructions on the day arose from discussions with Mr. Jacob and Mr. Osborne "over a number of days" Mr. Reynolds was then accused by counsel of having misled McGovern J by suggesting that Mr. Osborne had represented himself in advancing a reckless lending claim, when he was in fact represented by counsel. However, Mr. Reynolds explained that he had not seen the relevant pleadings at the time (by which I take it he may not have been aware that they were signed by counsel)

and that in any event he was trying to divert McGovern J's displeasure at the concept of a reckless lending claim by playing on the judge's approval (at an earlier hearing) of Mr. Osborne having secured legal representation in the matters before him. Whatever one thinks of the wisdom of this approach, it does not involve lack of candour on the part of Mr. Reynolds as alleged by the cross examiner.

72. Asked about the advices given by him to Mr. Osborne on the 17th of April, Mr. Reynolds gave evidence that these were (a) that Mr. Osborne would lose the lis pendens motion in the 2018 proceedings, (b) that the lis pendens should therefore "really be dispensed with", and (c) that "more than likely, considering what had taken place over the previous number of years, it was likely that he was going to be found a vexatious litigant and as a result we should try and see what we might be able to do in respect of a settlement with the KBC." He went on to say that "following on from that, very quickly, is that having had those instructions, those undertakings were given and true to the word, I began counsel to counsel discussions in that, re settlement, which were successful."

73. It was put to Mr. Reynolds that the undertakings offered were worse than a court order. Asked why this was so, counsel answered;

"Judges are generally quite reluctant to give an Isaac Wunder order unless there are serious grounds. An undertaking is volunteered as a private contract that can even by-pass constitutional advice."

74. This analysis ignores the fact that Mr. Reynolds had come to the view that an order was likely to be made. It was never put to him that this view was misplaced or incorrect. Even if an Isaac Wunder order is not often granted, there are occasions when such an order is justified. Once the order is made, it is of identical effect to an undertaking. An order can, of course, be appealed and an undertaking can not; however, an undertaking

is only more disadvantageous on this ground if such an appeal has some prospect of success. Again, the opinion formed by Mr. Reynolds that an order would more likely than not be granted (either in this court or on appeal) meant that (unless the opinion was wrong) an undertaking was no worse than an order. In fact, even on this ground the undertaking can be more advantageous, as an unsuccessful appeal against an order is likely to carry significant consequences in terms of costs.

75. Not surprisingly, therefore, Mr. Reynolds confined himself (on his evidence) to explaining the nature of an undertaking, and explaining "fully what was going to happen in the Court."

76. Mr. Reynolds had already given evidence that, after the 17th of April, he attended a meeting with Mr. Osborne and Mr. Jacob to discuss the KBC notice in the Court of Appeal. At this point in his cross examination, when pressed on his instructions, he gave evidence that Mr. Osborne, through Mr. Jacob, consulted George Brady S.C. in respect of "tis particular matter", also after the 17th of April. At a meeting with Mr. Brady, attended by Mr. Reynolds, the undertakings were mentioned but Mr. Osborne never said "Look, I never gave any undertakings". It is difficult to place much weight on this meeting, not least because of the vague way in which it was described, but it is instructive that this account was not explored (let alone challenged) by Mr. Osborne's counsel in cross examination, nor was it contested in Mr. Osborne's evidence the following day. The account is also consistent with the fact that the undertakings were set out in the 2018 KBC Notice before the Court of Appeal, but this went unremarked by Mr. Jacob and Mr. Osborne.

77. This reference, in the KBC Notice, gave rise to the final line of factual cross examination of Mr. Reynolds. It was put to him that he was misleading the court by referring to a document (of August 2018) which postdated the events of April 2018. It

is trite to observe that a subsequent document can shed light on earlier events; in referring to the later document, Mr. Reynolds was neither confusing matters nor misleading the court. Mr. Reynolds stated;

"Mr. Jacob and Mr. Osborne knew exactly what had transpired in the Court on that particular day if you read the grounds of opposition which were served upon him in that particular matter, where he was attempting to brief me on that, and as you can clearly see, without any doubts, states…that those undertakings were given. And, at that meeting, and subsequent to it, nobody has ever said to me 'Those undertakings were improperly given' or 'The advice you gave me was wrong.' Mr. Jacob never said any such thing to me and Mr. Jacob continued to instruct me in this particular matter and also in other matters."

78. In response, it was put to Mr. Reynolds that neither Mr. Osborne nor Mr. Jacob knew of the undertakings until the 27th of February 2020 when the relevant transcript was sent by Matheson. How this could be the case, given the contents of the KBC pleading, was not addressed in the examination of Mr. Reynolds or anywhere in the written or oral evidence of Mr. Osborne.

79. Before setting out my findings on the evidence, I will consider the affidavit of Mr. Jacobs. At paragraph 4, he sets out the purpose of the affidavit;

"I wish to provide full clarity for the court in circumstances whereby my former client is now adversely affected under circumstances which are not of his own volition."

While I am conscious that Mr. Jacobs is not represented before this Court, did not swear another affidavit in response to the affidavit of Mr. Reynolds, and was not cross examined, it must nonetheless be noted that Mr. Jacobs' affidavit omitted any mention of, among other things, the following;

(a) The fact that Mr. Osborne had asked Mr. Jacobs to represent him in the Isaac Wunder motion;

(b) The fact that the plan was that Mr. Jacob and Mr. Reynolds would look after the motion on the 17th of April;

(c) The fact that Mr. Osborne had provided the relevant papers in the Isaac Wunder motion to Mr. Jacobs;

(d) Mr. Reynolds' role in the preparation of a replying affidavit on the motion;

(e) The KBC Respondent's Notice of August 2018, its transmission to Mr. Reynolds and Mr. Osborne, and the subsequent meeting.

It is also notable that Mr. Jacobs' evidence is shot through with references to "standing" and "instructions" which, for the reasons given in the Interim Judgment, can give rise to ambiguity. In any event, having carefully considered the affidavit of Mr. Jacobs, nothing in it creates the sort of clear clash with the evidence of Mr. Reynolds which prevents me from making the findings of fact which will now be set out.

II. FINDINGS ON THE EVIDENCE.

80. I find as follows;

(a) Mr. Osborne attended at the hearing before McGovern J on the 16th of March 2018. He knew from that hearing that an Isaac Wunder type application was to be brought against him, was aware of the return date for that motion, the date by which he was to file any affidavits in response, and the significance of the motion. He decided to oppose the application.

(b) Mr. Osborne subsequently tried to get Mr. McCarthy to act for him in the motion.

(c) When he did not secure the services of Mr. McCarthy, Mr. Osborne approached Mr. Jacobs who agreed to act for him but wanted to have time to consider the papers. Mr.

Jacobs was provided with documents, by Mr. Osborne, in respect of the Isaac Wunder motion.

(d) There were discussions involving Mr. Jacobs, Mr. Osborne and Mr. Reynolds in the period before the 17th of April 2018. The three men were not all involved in each discussion. The contacts were not confined to the 2018 action, but on at least one occasion included consideration of the 2015 action and the Isaac Wunder motion.

(e) Mr. Reynolds took on the task of preparing a replying affidavit to the motion. However, on the 13th of April he informed Mr. Jacobs that it would not be ready in time.

(f) Mr. Osborne's plan was that Mr. Jacobs or Mr. Reynolds would deal with the motion on the 17th of April.

(g) In the days before the 17th of April, Mr. Reynolds discussed with Mr. Jacobs how matters (including the Isaac Wunder motion) would be handled.

(h) Mr. Reynolds discussed with Mr. Osborne the matters which were before the Court on the 17th of April, and gave the advices set out at paragraph of this judgment.

(i) Mr. Osborne agreed to follow the advice of Mr. Reynolds, and agreed that undertakings would be provided in the terms actually given to McGovern J.

(j) Mr. Osborne attended Court while the undertakings were given by Mr. Reynolds on his behalf, and fully understood the nature, meaning and consequences of the undertakings.

(k) Mr. Osborne never subsequently enquired about what had happened to the motion, as he was aware that it had been resolved by the undertakings given, with his agreement, to McGovern J by Mr. Reynolds.

(l) The KBC Respondent's Notice of August 2018 was seen by Mr. Jacobs, Mr. Osborne and Mr. Reynolds. It was discussed by the three men at a meeting some time after it was served. Mr. Osborne did not query the relevant part of the Notice. He had known since the 17th of April 2018 that the undertakings had been provided on his behalf.

(m) I also accept the evidence of Mr. Reynolds relating to the meeting which took place in the proceedings involving George Brady S.C. but, for the reasons outlined in the judgment, place little significance on that episode.

(n) I also accept the evidence of Mr. Reynolds that there were town agents present in Court on the relevant dates, but find that this is of no real importance.

(o) Given the findings that I have made about the events of the 17th of April, I reject the evidence of Mr. Osborne that the first he knew of the undertakings was at any later date.

(p) Mr. Jacobs did not enter an appearance in the 2015 proceedings until after the 17th of April, and did not have any contact with Mr. Reynolds on that day. However, Mr. Jacobs was consulted about the 2015 proceedings by Mr. Osborne before the 17th of April and was involved in preparations for dealing with the Isaac Wunder motion on that date

(q) My findings on the interactions between Mr. Reynolds and Mr. Bajwa in January 2021 are set out earlier in this judgment. Equally, certain other findings of fact will be apparent from my narrative on the evidence.

III DECISION ON RELEASE FROM UNDERTAKING

81. The primary basis on which Mr. Osborne sought to be released from his undertakings was they were given without his consent. I have found unequivocally that this is wrong, and therefore Mr. Osborne is not entitled for this reason to have the undertakings set aside.

82. A further basis for this relief is that Mr. Reynolds was not appearing with a solicitor on record in the 2015 action. As a result, it is extrapolated, the undertakings should be set aside. This is to misunderstand the effect of the rule prohibiting counsel from appearing

before the Court without an instructing solicitor. If counsel attempts to appear in such circumstances, they can be prevented from doing so. However, no authority was opened to me suggesting that anything done by counsel in such circumstances is legally void. This would allow an unscrupulous litigant to have representations made to the Court by an uninstructed counsel, safe in the knowledge that they were of no legal effect and could not bind him or her. Given that it is not for the Court or, indeed, for opposing solicitors to police whether or not counsel is instructed by a solicitor who has entered an appearance, such abuse could easily occur if it were the case that any commitment or undertaking given by uninstructed counsel is without any legal effect whatsoever. In the absence of authority, and for the reasons of principle which I have just described, I do not accept that Mr. Osborne can be freed from his undertakings simply because they were given in proceedings in respect of which Mr. Jacobs had yet to enter an appearance.

83. For the sake of completeness, I should describe a further submission made by Ms. Sallar. It is that, as Mr. Osborne had appeals pending before the Court of Appeal at the time, McGovern J had no jurisdiction to 'sanction' the undertakings; see page 71 of the original hearing. This proposition is without either authority or rational justification, and I do not accept it.

IV DECISION ON ANY VARIATION OF THE UNDERTAKINGS

84. Mr. Osborne seeks to be permitted to issue proceedings against KBC, J.C. Hogan & Company (as agents of KBC), Mr. Tyrell, and Sean Doyle (to whom lands were sold by Mr. Tyrell as receiver appointed by KBC over certain assets of Mr. Osborne). While

a draft Plenary Summons was produced by Mr. Osborne, no draft Statement of Claim was provided despite the request of Matheson.

85. In deciding whether to allow any such proceedings to be brought, I follow the principles set out in Kenny v Trinity College Dublin [2008] IEHC 320 and Daire v The Wise Finance Company [2018] IECA 126.

86. The intended proceedings agitate four main issues. I will deal with each separately.

87. Firstly, the question of the particularisation of KBC's claim in the 2015 proceedings is raised. Those proceedings, it will be remembered, were summary proceedings in which KBC recovered judgment against Mr. Osborne by order of Barrett J. He now claims that the particulars provided in that action fell short of the requirements established in Bank of Ireland v O'Malley. This is something that could and should have been raised in defence of the summary proceedings. Those proceedings have been finally determined by the High Court. It is, of course, the case that Henderson v Henderson (1843) 3 Hare 100 sets out principles rather than establishes an unwavering rule; see Hardiman J in A.A. v Medical Council [2003] 4 I.R. 302. However, applying these principles as elaborated upon in the judgment of Hardiman J, I refuse permission to Mr. Osborne to issue proceedings in respect of this first issue.

88. The second matter in the proposed proceedings relates to an alleged breach by KBC of a condition precedent in a 2002 facility letter by which it loaned money to Mr. Osborne. The condition precedent in issue involves the obtaining of a fire safety certificate in respect of premises which secured KBC's loan to Mr. Osborne. A strikingly similar case was brought by Mr. Osborne in 2016. Indeed, that action was initiated on the day that Barrett J gave judgment in the summary action. The claim relating to the non-existence of a fire safety certificate was dismissed by McGovern J on the 28th of April 2018, on the grounds that it disclosed no reasonable cause of action, was frivolous and

vexatious, constituted a collateral attack on the judgment of Barrett J, was statute barred, and offended against the principles set out in Henderson v Henderson. McGovern J's judgment bears the neutral citation [2016] IEHC 220. The proposed claim offends against all of these principles, and I see no reason to allow it to be made.

89. The third issue in the intended action is an argument based on the map attached to a mortgage entered into by Mr. Osborne. As is the case in respect of all matters which Mr. Osborne wants to advance in these proceedings, it is accepted by his counsel that this could have been raised in earlier proceedings. At page 102 of the transcript of the original hearing, there is this exchange;

"MR. JUSTICE O'MOORE; Well, Ms. Sallar, as I understand it, all of the matters that you may want to litigate in the fresh proceedings are matters which could have been litigated in the other proceedings; is that correct?

MS. SALLAR; That's correct, Judge."

90. The property involved in this third issue was sold to Mr. Doyle by Mr. Tyrell in 2018. Mr. Tyrell was then discharged as receiver. The mortgage, to which the disputed map was attached, was executed by Mr. Osborne in 2003. This issue could (and should) have been agitated in earlier proceedings. Allowing it to be the subject of new proceedings would facilitate the very sort of "vexatious and oppressive litigation" warned against by Lord Bingham in Gairy v Attorney General of Grenada [2002] 1 A.C. 167, as cited with approval by Hardiman J in A.A. I will therefore not allow proceedings to be issued on this ground.

91. The final basis for the new proceedings is that Mr. Tyrell was appointed by deed describing him as "Receiver" and nor "Receiver and Manager". As this is an issue which could have been raised in earlier proceedings, as the failure to raise it at that time

is unexplained (as is the case with a number of the grounds of the proposed action) and as litigating this point as of the date of the motion would be vexatious and oppressive, I refuse leave to advance this issue on Henderson v Henderson grounds alone. However, I also find that this fourth ground is bound to fail. The asserted defect in Mr. Tyrell's deed of appointment was, as submitted by Mr. Lavelle, rejected by Allen J in McCarthy v Langan [2019] IEHC 651. It has also, since the hearing, been found not to be a good point in my judgment in Kearney v Bank of Scotland [2022] IEHC 605 and, more importantly, in the judgment of Murray J in Fennell v Corrigan [2021] IECA 248. This last proposed ground for the new proceedings which Mr. Osborne wishes to launch will therefore not be permitted to be litigated. It is bound to fail, and is contrary to the proper application of the Henderson v Henderson principles.

92. I will therefore dismiss the motion in its entirety, as indicated in my Decision circulated to the parties some time ago.