

**THE HIGH COURT
COMMERCIAL**

[2021] IEHC 412
[2019 No. 80 COS.]

BETWEEN

MARTIN MCCAUGHEY

APPLICANT

AND

**PETER MCCAUGHEY, IJM TIMBER ENGINEERING LIMITED AND BY ORDER MCCAUGHEY
HOMES LIMITED**

RESPONDENTS

JUDGMENT of Mr. Justice Denis McDonald delivered on 18th June, 2021

The application before the court

1. By the application before the court, the applicant seeks an order enforcing the terms of a settlement agreement entered into between the parties on 21st January, 2020. An order is also sought directing the sale of IJM Timber Engineering Ltd ("*IJM*") to proceed on the basis that Mr. Peter McCaughey, the first named respondent, has no claim, right or entitlement against IJM, arising out of or pursuant to certain resolutions that were passed at an extraordinary general meeting of the shareholders of IJM on 4th December, 2017. In this context, the applicant makes the case that, by the terms of the settlement agreement, any such claim on the part of Mr. Peter McCaughey on foot of the resolutions in question was extinguished. In particular, the applicant relies on para. 1 of the settlement agreement under which (*inter alia*) the parties to the settlement agreement agreed that it was in full and final settlement not only of the matters in issue in these proceedings (together with two additional sets of proceedings identified in the schedule to the settlement agreement) but also "*any and all claims or disputes between the parties as of the date hereof*". The applicant also relies on clause 25 (addressed in further detail below) by which the parties to the agreement agreed that they would have "*no further claims whatsoever against each other and... that there are no other claims which any of the parties have against the other(s) or against any associated companies...*". Essentially, the applicant submits that, by virtue of these provisions of the settlement agreement, any claim or entitlement which Mr. Peter McCaughey may formerly have had under the resolutions in question was released.
2. The settlement agreement was executed in the context of these proceedings which were brought by the applicant under s. 212 of the Companies Act, 2014 ("the 2014 Act") in relation to the way in which IJM was being run. As described in more detail below, the applicant alleged that the affairs of IJM were being carried on by Mr. Peter McCaughey in a manner oppressive to him and in disregard of his interests. Mr. Peter McCaughey is a brother of the applicant. Those proceedings were listed for trial before me on Tuesday, 21st January, 2020. On that occasion, I was informed by counsel for the parties that the proceedings had been settled and I was asked to adjourn the proceedings until 30th January, 2020. When the matter subsequently came back before me on the latter date, I was asked to make a number of orders including an order that the parties should be at liberty to re-enter the proceedings "*solely for the purposes of enforcing the terms of*

settlement executed by the parties on the 21st day of January, 2020". An order to that effect was duly made.

3. On the basis of the terms of the settlement agreement, the applicant contends that Mr. Peter McCaughey is not entitled to rely on the terms of the following ordinary resolutions which were passed at the extraordinary general meeting of IJM on 4th December, 2017:-

"2. Ordinary Resolutions Notified on or before 24th Nov 17

- A. *Approval that immediately upon his exit from the company, for whatever reason, Peter McCaughey will receive a payment of not less than 5% of turnover generated from 1st Jan 2014 to date and projected forward to include all existing orders and customer commitments. This payment may be made by way of cash, assets, shares, etc, or any combination thereof, at his discretion.*
- B. *On confirmation from Peter McCaughey that his intention is to remain with the company. He will receive payment of €1,500,000... and given 500,000... ordinary shares. The authorised share capital of the Company will be increased to 1,500,000... shares to accommodate this."*

4. In response, Mr. Peter McCaughey argues that the application is misconceived and that there is nothing in the terms of the settlement agreement (when construed against the relevant factual background) to support the suggestion made by the applicant that the entitlements which Mr. Peter McCaughey has under those resolutions were in any way settled or compromised under the terms of the settlement agreement of January, 2020. The issue was fully argued before me on 21st April, 2021. For completeness, it should be noted that, when the application to enforce the settlement was first listed before me on 19th February, 2021, it was also argued on behalf of Mr. Peter McCaughey that the application was procedurally misconceived and that it was not open to the applicant, on a summary application to enforce a settlement agreement, to ask the court to construe the agreement. It was submitted that the appropriate course was for the applicant to issue a construction summons. In an *ex tempore* ruling on that day, I held that, if the applicant is correct in his interpretation of the settlement agreement, it was open to him, under the terms of the order made on 30th January, 2020 to seek to have the settlement agreement enforced but that it would be a matter for the court to determine, on the hearing of the application, whether the settlement agreement has the effect contended for. In that ruling, I observed that it frequently happens on an application of this kind that there will be debate between the parties as to the precise meaning or ambit of the settlement agreement sought to be enforced. It also has to be said that, on the present application, the same materials are available to the court as would be put before the court on a construction summons under O. 3 (7) of the Superior Court Rules.
5. That said, it is important to observe that there are aspects of the written submissions delivered on behalf of the applicant which seem to me to go beyond what is permissible on an application of this kind. In paras. 53 to 62 of the submissions, an argument is made

as to the legal effect of the resolutions described in para. 3 above and a case is made that, even if the court finds that Mr. Peter McCaughey's claims on foot of the resolutions were not compromised by the settlement agreement, Mr. Peter McCaughey is nonetheless not entitled to pursue the claims. In my view, that plainly goes beyond the scope of what is permissible under the Order of 30th January, 2020 and, accordingly, it is not open to the applicant to pursue it on this application.

6. In due course, it will be necessary to consider the respective contentions of the parties as to the meaning and effect of the settlement agreement. Before doing so, it seems to me to be essential to identify the relevant legal principles that govern (a) an application to enforce a settlement agreement and (b) the interpretation of an agreement of this kind.

The applicable principles

7. In light of the terms of the order in this case, I believe that there is no doubt but that the applicant has an entitlement to apply to the court for an order enforcing the terms of the settlement if he is in a position to prove that Mr. Peter McCaughey is acting in breach of a term of the settlement agreement. This would be so even in cases where the words "*liberty to re-enter*" are contained in the relevant order but where, at the same time, there is no reference made in the order to the underlying settlement agreement. This is clear from the decision of the Court of Appeal in *Solicitors Mutual Defence Fund Ltd v. Costigan* [2021] IECA 20. In that case, the parties had entered into a settlement agreement which expressly provided that they should be entitled to re-enter the proceedings for the purposes of enforcing the terms of settlement. However, the only order which the court had been asked to make in that case, following the settlement of the proceedings, was to give liberty to re-enter the proceedings. The order was silent as to the purpose of any such re-entry. When the plaintiff subsequently brought an application, by motion on notice, seeking to re-enter the proceedings, the defendants argued that there was no entitlement to do so. The defendants submitted that there was nothing on the face of the order to permit an application to be made, in the same proceedings, to enforce the terms of the settlement. This argument was rejected by the Court of Appeal. In the judgment of the court delivered by Binchy J., he set out the applicable principles as follows:-

"52. *Firstly, I think it would be quite wrong to hold that the words "liberty to re-enter" are otiose on the basis that what precedes them extinguishes the proceedings altogether. It is quite clear from the terms of the Order that the court did not have that intention. If that had been the court's intention, the order made by it would not have made express provision for liberty to re-enter.*

53. *Secondly, such an interpretation would not just be contrary to the intentions of the parties, as clearly expressed in the Settlement Agreement, it would also deny the respondent the very remedy provided for in the Settlement Agreement in the event of a default by the appellants in honouring the financial commitments undertaken by them to the respondent in the Settlement Agreement. I consider this a highly unattractive proposition, not least in circumstances where there was evidence before the Court that strongly suggested that the settlement was structured as it*

was in order to preserve confidentiality, which would have been of significantly more concern to the appellants than to the respondent.

54. *Thirdly, while it may well be the case that the phrase "liberty to re-enter" is normally used for the purpose of enabling the original claim to be re-entered and litigated to a conclusion, that does not preclude the re-entry of the proceedings for some other purpose, such as the making of agreed orders as provided for in terms of settlement, as in this case. Moreover, if it is the case that the proceedings can be re-entered, there is no impediment in principle to the court making orders provided for in the Settlement Agreement.*
55. *Insofar as there is any doubt as to the meaning or effect of the Order, it is my view that this doubt should be resolved in such manner as to give effect to the express terms of settlement entered into between the parties... The courts should not, without very good reason, obstruct the implementation of lawfully concluded settlements. On the contrary, as long as no fundamental principle is offended, and as long as no prejudice is caused to either of the parties, the courts should aid the parties in enforcing the terms of settlement.*
56. *Accordingly, where a court makes an order striking out proceedings, but with liberty to re-enter, and that order was clearly made pursuant to written terms of settlement entered into between the parties, which terms of settlement state in clear and unambiguous terms what is to happen upon the re-entry of the proceedings, the order striking out the proceedings must be interpreted as being subject to the condition that the proceedings may be re-entered for the purposes expressed in the terms of settlement, notwithstanding that the terms of settlement themselves are not referred to in the order of the court..."*
8. In this case, in contrast to the position in the *Solicitors Mutual* case, the order made on 30th January, 2020 expressly gives liberty to re-enter the proceedings for the purposes of enforcing the terms of settlement. Thus, the perceived difficulty that existed in the *Solicitors Mutual* case does not exist here. Nonetheless, the observations of Binchy J. are relevant here and should be borne in mind. As is clear from para. 55 of his judgment, the courts, in cases of this kind, in the absence of some significant countervailing issue, should aid the parties in enforcing the terms of settlement. There is clearly a public interest in promoting the settlement of proceedings. That public interest would be significantly undermined if the courts did not also ensure that the terms of such settlement agreements are honoured.
9. In addition, in light of the significant dispute which exists in this case in relation to the meaning of the settlement agreement, it is necessary, also, to bear in mind the principles which are applicable to the interpretation of written agreements. For this purpose, I was referred to a large number of authorities including *Analog Devices BV v. Zurich Insurance Company* [2005] 1 I.R. 274, *Law Society of Ireland v. Motor Insurer's Bureau of Ireland* [2017] IESC 31 ("the MIBI case"), *Jackie Greene Construction Ltd v. Irish Bank Resolution Corporation* [2019] IESC 2, *Hyper Trust v. FBD Insurance* [2021] IEHC 78

(“the FBD case”), *FCA v. Arch Insurance* [2020] EWHC 2448, *FCA v. Arch Insurance* [2021] UKSC 1, [2021] 2 WLR 123 and *Brushfield Ltd. t/a The Clarence Hotel v. Arachas Insurance Brokers* [2021] IEHC 263. Ultimately, there was no dispute between the parties as to the principles to be applied. While it may be necessary to review the authorities in more detail at a later point in this judgment, I believe it is sufficient, at this point, to identify the following principles which are relevant in interpreting a written agreement of this kind:-

- (a) The interpretation of a written contract is an entirely objective exercise. For that reason, the law excludes from consideration the previous negotiations of the parties, their subjective intention in entering into the agreement and also their subjective understanding of the terms agreed;
- (b) The court is required to interpret the written contract by reference to the meaning which it would convey to a reasonable person having all of the background knowledge which would have been reasonably available to the parties at the time the contract was put in place;
- (c) The agreement must be read as a whole. It is wrong to consider any of its terms in isolation;
- (d) In construing the agreement, the court looks not solely at the words used in the contract but also the relevant context (both factual and legal) at the time the contract was concluded. However, the conduct of the parties subsequent to the conclusion of the contract is not admissible as an aid to its interpretation (see *Re Wogans of Drogheda Ltd.* [1993] 1 I.R. 157);
- (e) A distinction is to be made between the meaning which a contractual document would convey to a reasonable person and the meaning of the individual words used in the document. As explained by Lord Hoffmann in *Investors Compensation Scheme v. West Bromwich Building Society* [1998] 1 WLR 896 at p. 912, in a passage expressly endorsed by the Supreme Court in *Analog Devices*, the meaning of individual words is a matter of dictionaries and grammar. But the task of the court is to understand what the parties intended those words to mean in the specific context of their contract. That may not necessarily coincide with their dictionary definition. As noted above, in order to determine the meaning of words used in a contract, it is necessary to consider the contract as whole and, as outlined at (d) above, it is also necessary to consider the relevant factual and legal context;
- (f) While a court will not readily accept that the parties have made linguistic mistakes in the language in which they have chosen to express themselves, there may nonetheless be occasions where it is clear from the context that something has gone wrong with the language and, in such cases, if the intention of the parties is clear, the court can ignore the mistake and construe the contract in accordance with the true intention of the parties; and

- (g) As O'Donnell J. made clear in the *MIBI* case, in interpreting the meaning of a contract, it is wrong to focus purely on the terms of the contract in dispute. He emphasised the principle that, as noted at (c) above, a contract must be read as a whole and, furthermore, he observed that it is wrong to approach its interpretation solely through the prism of the dispute before the court. At para. 14 of his judgment in that case, O'Donnell J. cautioned:-

"It is necessary therefore to see the agreement and the background context, as the parties saw them at the time the agreement was made, rather than to approach it through the lens of the dispute which has arisen sometimes much later."

10. Having regard to these principles, it is clear that much of the evidence given on affidavit both by the applicant and by Mr. Peter McCaughey in relation to the present application is simply inadmissible. The affidavits on both sides are replete with evidence as to subjective intention or understanding. For the purposes of this judgment, I must confine myself to a consideration of the terms of the agreement read against the backdrop of the s. 212 proceedings and any other relevant elements of the factual or legal context against which the settlement agreement was put in place. For this purpose, it is clear from the judgments of the various members of the Supreme Court in the *MIBI* case that appropriate attention should be given to both the context and the terms of the agreement (read as a whole). While I do not believe that it makes much difference whether one commences with a consideration of the terms of the agreement or with the relevant context, I propose, in this judgment, to first consider some of the relevant background following which I will address the specific terms of the settlement agreement. I should make clear that I take this course purely for convenience. I do not intend to suggest that the context is in any way more important than the terms of the settlement agreement itself. The terms of the agreement are, of course, of central importance.

Background

11. IJM is a private company. It was previously controlled by Mr. Sean McCaughey ("Mr. McCaughey Snr") who is the father of both the applicant and Mr. Peter McCaughey. Between 1991 and 2018, Mr. McCaughey Snr held the majority of the shares. He held 70% of the shares in IJM, Mr. Peter McCaughey held 20% and the applicant held 10%.
12. On 3rd December, 2008, Mr. McCaughey Snr, the applicant and Mr. Peter McCaughey entered into an agreement to the effect that (other than in the case of day-to-day management issues) decisions in relation to IJM would be made by the shareholders by way of consensus, or, if no consensus could be reached, by a simple majority.
13. IJM was not the only company controlled by members of the McCaughey family. There was also another company called McCaughey Developments Ltd ("MDL"). The shareholding in MDL substantially mirrored the position in IJM. According to the applicant, Mr. McCaughey Snr held 70%, the applicant 20% and Mr. Peter McCaughey 10%. However, Mr. Peter McCaughey suggests that the shareholding was slightly different with Mr. McCaughey Snr holding 62%, the applicant holding 25% and Mr. Peter McCaughey

holding 13%. MDL was engaged in property development. In contrast, IJM was and remains involved in the manufacture of timber framed housing kits for sale in Ireland and in the United Kingdom.

14. In 2013, a receiver was appointed to MDL by Danske Bank. It was subsequently agreed between MDL and Danske Bank that a new company, namely McCaughey Homes Ltd ("MHL") would purchase the lands known as "Cois Farrige" from MDL. An agreement was executed by each of Mr. McCaughey Snr, the applicant and Mr. Peter McCaughey in May, 2016 which records the following in relation to MHL:-

"[MHL] will initially be set up with shares being held by Martin McCaughey – 99 shares and Andrew McCaughey – 1 share. Before the end of the first period of trading the shareholding will be redistributed to reflect the same % ownership that pertained to [MDL] prior to Danske Bank appointing a receiver.

The funding of [MHL] will be done by way of various loans:

- 1. c€600,000 from Martin McCaughey*
- 2. c€300,000 from IJM...*
- 3. c€400,000 debit to IJM transferred from [MDL].*

This is to enable it to purchase "Cois Farrige" from [MDL].

It is agreed that repayment of these loans will take precedent (sic) over all else and in particular no. 2 must be repaid within is (sic) calendar year."

For completeness, it should be noted that the reference to Andrew McCaughey in that agreement is a reference to a son of the applicant.

15. During the course of 2016, negotiations took place between Mr. McCaughey Snr, the applicant and Mr. Peter McCaughey with a view to Mr. McCaughey Snr exiting from IJM. Those negotiations were largely handled by Mr. Peter McCaughey on behalf of both himself and the applicant. According to the applicant, the negotiations were concluded in May, 2016 with an agreement that the shares of Mr. McCaughey Snr would be bought back by IJM. Although the applicant says that the negotiations were concluded in May, 2016, it appears that the agreement with Mr. McCaughey Snr was not finalised until August, 2016. Following the agreement with Mr. McCaughey Snr, a written agreement was entered into between Mr. Peter McCaughey and the applicant. While there is a dispute between the parties as to the basis upon which this agreement was entered into, the terms of the agreement (which is dated 23rd August, 2016) are as follows:-

"We confirm that further to agreement by Sean McCaughey on 22nd August, 2016 to accept a share buyback by IJM... of his entire shareholding, including his interest in any other related companies including [MHL] for the sum of One million, four hundred thousand euros.

Following Sean McCaughey's agreement Peter and Martin McCaughey met at 8.00pm on 22nd August, 2016 in the Windsor Restaurant, Dundalk and the following was agreed as a framework for moving forward:

- 1. We will arrange shareholding in these companies on a 50/50 basis.*
 - 2. Peter McCaughey will be responsible for the day to day running of IJM...*
 - 3. Martin McCaughey will be responsible for the day to day running of [MHL].*
 - 4. Both will use their best endeavours to grow profitable businesses.*
 - 5. A shareholders' agreement will be professionally structured to provide for dispute resolution, succession planning including probable separation of ownership in advance of the next generation's involvement, etc.*
 - 6. Restructuring of the companies will be carried out with professional advice to maximise protection for the companies and provide for the most tax efficient exit by the parties.*
 - 7. A proper overarching and individual company board structure which should include both parties along with both executive and non-executive members. These boards will meet on a regular basis, as agreed by the parties."*
16. Subsequently, by letter dated 3rd September, 2016, Mr. McCaughey Snr waived his entitlement to shares in MHL pursuant to the agreement of August, 2016. However, a dispute arose in relation to IJM. Both the applicant and Mr. Peter McCaughey characterised this dispute as an attempt by Mr. McCaughey Snr to renege on the agreement providing for his exit from IJM. In an attempt to overcome this difficulty, an extraordinary general meeting ("EGM") of IJM was convened for Monday, 4th December, 2017 pursuant to a notice issued by Mr. Peter McCaughey on 10th November, 2017. That notice contained an agenda proposing a number of special resolutions and one ordinary resolution. The special resolutions proposed included one ratifying the agreement reached with Mr. McCaughey Snr in August, 2016 that IJM should buy back all of his shareholding in the company for €1.4 million. In the alternative, failing ratification of that resolution, a further special resolution was proposed approving the share buyback by IJM of the shareholding held by Mr. Peter McCaughey and the applicant. In addition, the agenda included an ordinary resolution (to be triggered in the event that there was no ratification of the agreement of August, 2016) approving an "Exit Package for Peter McCaughey". Subsequently, two further ordinary resolutions were proposed, namely those quoted in para. 3 above.
17. According to the minutes of the meeting which subsequently took place on 4th December, 2017, the EGM was attended by Mr. Peter McCaughey, the applicant and a solicitor representing Mr. McCaughey Snr. The meeting was chaired by Gregory McKenna who is a director of IJM. The minutes record that the following resolutions were addressed at the meeting:-

- (a) The first resolution to be addressed (referred to as special resolution 1A) proposed the ratification of the agreement reached with Mr. McCaughey Snr in August, 2016 that IJM should buy back his shareholding in the company. According to the minutes, this resolution was put to the meeting. An objection was made by the solicitor representing Mr. McCaughey Snr. The chairman, having noted that there was no consensus, deemed this resolution to have been defeated.
- (b) The second resolution considered (referred to as resolution 1B) was the special resolution approving the share buyback by IJM of the shares held by Mr. Peter McCaughey and the applicant. Again, objection was made to this resolution by the solicitor acting on behalf of Mr. McCaughey Snr. The minutes record that the chairperson, having noted that there was no consensus, deemed this resolution to have been defeated.
- (c) The next resolution considered at the meeting was ordinary resolution 2A (quoted in para. 3 above) which proposed that a payment based on 5% of turnover in the period since 1st January 2014 would be paid to Mr. Peter McCaughey in the event of his exit from IJM. According to the minutes, the solicitor representing Mr. McCaughey Snr objected to this resolution. However, Mr. Peter McCaughey asked the chairman to put it to a vote. Both the applicant and Mr. Peter McCaughey are recorded as having voted in favour of this resolution while the solicitor representing Mr. McCaughey Snr voted against. He also made objection to a vote being carried on the basis that he represented a 70% shareholder. However, according to the minutes, a copy of the shareholders' agreement of 3rd December, 2008 (i.e. the agreement described in para. 12 above) was passed to the solicitor concerned by the applicant and it was suggested (as recorded in the minutes) that "*all that is required is a simple majority of shareholders*". On that basis, the resolution was deemed to be passed by the chairman by two votes to one;
- (d) The next resolution considered was ordinary resolution 2B (which is again quoted in para. 3 above) which proposed that, on confirmation from Mr. Peter McCaughey of his intention to remain with IJM, he would receive a payment of €1.5 million and be allotted an additional 500,000 ordinary shares. The resolution also proposed that, for this purpose, the authorised share capital of the company would be increased to 1.5 million shares. According to the minutes, this resolution was put to the meeting and was carried on the basis of votes from both Mr. Peter McCaughey and the applicant. The solicitor representing Mr. McCaughey Snr voted against the resolution.
- (e) There were also resolutions passed dealing with the appointment of the applicant as a director of IJM which the minutes record as having been passed by virtue of the votes cast by Mr. Peter McCaughey and the applicant.

The proceedings involving Mr. McCaughey Snr

18. It appears to be clear that, at minimum, one of the purposes behind resolution 2B was to ensure that Mr. McCaughey Snr would no longer hold a majority of shares in IJM.

Regrettably, it appears that relations between Mr. McCaughey Snr and his sons did not improve after the meeting. Mr. McCaughey Snr commenced proceedings under s. 212 of the 2014 Act against IJM, Mr. Peter McCaughey, the applicant, and Mr. McKenna alleging oppression. Proceedings were also launched by IJM against Mr. McCaughey Snr (Record No. 2018/1451P) seeking to enforce the buyback agreement.

19. Both sets of proceedings between Mr. McCaughey Snr and IJM were ultimately settled on 25th October, 2018. A formal deed of settlement was entered into on that date. For the purposes of this judgment, a copy of the Deed of Settlement was made available to me by agreement of the parties to these proceedings. There were seven parties to the Deed of Settlement, namely Mr. McCaughey Snr, IJM, Mr. Peter McCaughey, the applicant, Mr. McKenna, MHL and MDL. The Deed of Settlement records the agreement of IJM to buy back the shares of Mr. McCaughey Snr. It also records an agreement by Mr. McCaughey Snr to purchase shares held by MHL in another company, namely Derryhale Hotel Company Ltd. The Deed provided for a completion date of 30th November, 2018. Paragraph 8.8 provided that the Deed should "*supersede, cancel and replace any and all previous agreements made between any of the parties hereto relative to its subject matter*". In addition, para. 6.1 dealt with the settlement of the proceedings involving Mr. McCaughey Snr in the following manner:-

"6.1. Completion of all of the matters provided for in this Deed, the Buyback Agreement and the DHL Share Sale Agreement shall be in full and final settlement of the Proceedings and each Group Party (and each member of it) hereby releases and forever discharges the other Group Party (and each member of it) and each of its and their properties and assets... from all and/or any actions, claims, rights, demands and set-offs, whether in this jurisdiction or any other, whether or not currently known to such party, and whether in law or equity, that it, its parent, subsidiaries, assigns, transferees, representatives, principals, agents, officers and directors or any of them ever had may have or hereafter can, and such Group Party (and each member of it) shall or may have against the other Group Party (and each member of it) or any other of its parent, subsidiaries, assigns, transferees, representatives, principals, agents, officers or directors arising out of or connected with the matters referred to in this Deed..."

For this purpose, the Deed defined a Group Party as Mr. McCaughey Snr, Derryhale Hotel Company Ltd, Mr. Peter McCaughey, the applicant, Mr. McKenna, IJM, MH and MDL and each member of IJM, MHL and MDL.

20. Having regard to the terms of the Deed of Settlement, it then became necessary to give effect to the agreement under which the shares held by Mr. McCaughey Snr in IJM would be bought back. An EGM of IJM was convened for 19th November, 2018 but the applicant did not attend. As a consequence, the meeting was inquorate and the meeting had to be adjourned to 26th November, 2018. On that occasion, the applicant did attend. Mr. Peter McCaughey acted as chairperson of the meeting. Mr. McKenna also attended. According to the minutes of the meeting, Mr. Peter McCaughey outlined that the purpose of the

meeting was to conclude the Deed of Settlement dated 25th October, 2018 which required that all of the shares held by Mr. McCaughey Snr should be bought back by IJM. The minutes also record that the applicant voted against the resolution but that Mr. Peter McCaughey, in his capacity as chairperson, disallowed this vote on the basis that it was inconsistent with the Deed of Settlement signed on 25th October, 2018. On that basis, Mr. Peter McCaughey declared the resolution to have passed. As a consequence, IJM duly purchased 699,999 shares held by Mr. McCaughey Snr. The change in shareholding was duly registered in the Companies Registration Office on 17th December, 2018. However, on the same day, a Form B5 was also filed in the Companies Registration Office evidencing the allotment of an additional 500,000 shares to Mr. Peter McCaughey. This was on foot of resolution 2B which had been passed at the EGM on 4th December, 2017.

The focus of the s. 212 claim made by the applicant

21. The allotment of the additional 500,000 shares in favour of Mr. Peter McCaughey appears to have been the issue which triggered these s. 212 proceedings which were commenced by an originating notice of motion issued in March, 2019. In his affidavit sworn on 5th March, 2019 in support of that motion, the applicant claimed that the allotment of 500,000 shares to Mr. Peter McCaughey was in contravention of the 2016 agreement. He also contended that the resolution approving the allotment which had been passed on 4th December, 2017 had been a temporary mechanism to engineer a change of control of IJM. At paras. 42 to 44 of this affidavit, the applicant stated:-

"42. *I attended an EGM on the 14th December 2018 at which the buyback of Sean's shares was approved. IJM duly purchased Sean's 699,999 shares later that day...*

43. *However, to my dismay, without my knowledge IJM issued the additional 500,000 shares to Peter the same day... While we had obviously passed a resolution to that effect a year previously, such resolution had been passed in the context of Sean refusing to honour the 2016 Buyback Agreement and had been the proposed temporary mechanism to allow Peter and I to take control of the company from him. It was not necessary in circumstances where the buyback had now happened. In reliance on the Share Ownership Agreement, and the dealings I had had with Peter over the course of the previous few weeks, I had understood that, rather than getting new shares, Peter would be transferring shares to me. Further I ought to point out that the shares that were issued to Peter were issued at par value i.e. 1.25 euro per share which was a substantial discount on what was paid to my late father i.e. approximately 6.85 euro per share.*

44. *I discovered the issuing of the shares to Peter on or about the 17th December 2018 from a review of the CRO returns..."*

22. On this basis, the applicant contended, in para. 45 of his affidavit, that the affairs of IJM were being conducted in a manner oppressive to him and in total disregard of his interests as a member of IJM. He also alleged that the relationship of mutual trust and confidence that existed between Mr. Peter McCaughey and himself had completely broken

down "as evidenced by his reneging on the Share Ownership Agreement and his being issued new shares in total violation of that agreement...".

23. In para. 47 of that affidavit, the applicant stated that, given the "complete breakdown of trust", he did not wish to have any further business dealings with his brother and considered that the most appropriate remedy would be for his shares to be purchased by Mr. Peter McCaughey at a price to be fixed by the court. That said, the applicant acknowledged in the same affidavit, that the remedy to be awarded was a matter for the discretion of the court and that he would abide by whatever order that might ultimately be made by the court.
24. Subsequently, points of claim were delivered on behalf of the applicant. In the points of claim, the applicant expanded his oppression claim somewhat. In addition to his challenge to the allotment of 500,000 shares to Peter McCaughey, it was also alleged in para. 21 of the points of claim that, in "further breach" of the share ownership agreement, no shareholders' agreement had been put in place; nor was an overarching board structure set up with regular meetings. It was alleged that, on the contrary, strategic decisions were made in the absence of the applicant and that he was refused information that he requested. Furthermore, in para. 23 of the points of claim, it was alleged that the relationship of mutual trust and confidence between the brothers had completely broken down and that the applicant had:-

"...effectively been excluded from any meaningful participation in IJM. In the circumstances, it is appropriate for the court to exercise its discretion to grant relief under section 212... to bring about a fair resolution of the dispute and redress the injustice caused to Martin by the said actions on the part of IJM."

25. Points of defence were delivered on behalf of Mr. Peter McCaughey and IJM on 9th July, 2019. There are a number of features of the points of defence that should be noted:-
- (a) In a preliminary plea, contained in the opening paragraph of the points of defence, attention was drawn to MHL and it was stated that Mr. Peter McCaughey maintained that the applicant was "frustrating the exercise of [Mr. Peter McCaughey's] rights" as a shareholder in that company and that he expressly reserved the right to issue appropriate proceedings "to vindicate his rights in respect of that Company and to apply, if appropriate, for the determination of those issues alongside the issues in these proceedings";
- (b) In para. 12, it was denied that the applicant voted in favour of the resolution of 4th December, 2017 on the understanding that the issuing of extra shares was a temporary measure. On the contrary, it was alleged that, in fact, the applicant and Mr. Peter McCaughey:-

"...at all times understood that they would each, respectively, assume separate ownership of IJM and MHL. Otherwise, there would have been no

reason to issue extra shares to Peter solely at this EGM, and instead the share issue would have been 300,000 to Martin and 200,000 to Peter”;

- (c) In response to a plea made by the applicant in para. 17 of the points of claim to the effect that the applicant had entered into the settlement of 25th October, 2018 on the understanding that Mr. Peter McCaughey would honour the terms of the share ownership agreement, Mr. Peter McCaughey, in para. 15 of the points of defence, expressly claimed that the settlement of the proceedings was entered into in accordance with the Deed of Settlement and not otherwise and that the Deed of Settlement expressly provided (at para. 8.8) that it superseded, cancelled and replaced all previous agreements made between the parties relative to its subject matter;
 - (d) It was also alleged that the applicant had sought to undermine the implementation of the settlement of the dispute with Mr. McCaughey Snr by failing to attend the EGM on 18th November, 2019 which he had previously covenanted to support. It was also contended that, in lieu of performing his obligations under the Deed of Settlement, the applicant made exorbitant and unreasonable demands of Mr. Peter McCaughey as to how much he would pay him for performing what he had already covenanted to do.
 - (e) In para. 7 of the points of defence, it was expressly pleaded that, subsequent to the negotiation of the 2016 buyback agreement with Mr. McCaughey Snr, the parties met on 22nd August, 2016 and agreed that, following the buyout from Sean, they would separate their interests to better accommodate family succession and that each would take over and wholly own the respective businesses with which they had been primarily involved, namely IJM and MHL.
 - (f) It was denied that the applicant had effectively been excluded from meaningful participation in IJM. It was pleaded that the applicant was entitled to participate as a member *“in accordance with his shareholding”*;
 - (g) Notwithstanding that Mr. Peter McCaughey denied that any valid grounds had been made out for relief under s. 212 of the 2014 Act, it was stated in para. 19 of the points of defence that he was agreeable to purchasing the applicant’s *“100,000 shares in IJM and to same being valued as were Sean’s shares for the buyout, with minority interest rules applied”*; and
 - (h) In addition, it was alleged that, by reason of the applicant’s conduct in *“attempting to undermine the prior Settlement concerning IJM”* and in refusing to discharge personal debts to Mr. Peter McCaughey *“as leverage in his claims against IJM”*, the court should exercise its discretion to decline relief.
26. One of the features of the s. 212 proceedings brought by the applicant (which has been strongly emphasised for the purposes of the present application by counsel for Mr. Peter McCaughey) is that the resolution to allot shares was very much a focus of those

proceedings. No issue was raised by the applicant in relation to resolution 2A (providing for the exit payment to Mr. Peter McCaughey) or to the first part of resolution 2B (providing for the loyalty payment of €1.5 million to Mr. Peter McCaughey). It was submitted by counsel for Mr. Peter McCaughey that, given the nature of the claim made by the applicant in these proceedings, it is inherently unlikely that the settlement agreement of January, 2020 would extend to matters which were never questioned by the applicant such as the resolutions in respect of the loyalty and exit payments. This is an important issue which is considered in more detail below. Before doing so, it is necessary to identify a number of other important features of the relevant factual background to the settlement agreement including the valuations of IJM available to the parties and including also the information in relation to IJM which was apparent from its financial statements.

The IJM valuations

27. As noted previously, the s. 212 proceedings were listed for hearing in January, 2020. In advance of that date, witness statements were exchanged. In his witness statement, Mr. Peter McCaughey referred to a valuation of IJM carried out on his behalf by BDO. The applicant did not refer to any valuation in his witness statement. However, it became clear at the hearing of the present application in April, 2021 that the applicant had also obtained a valuation of IJM (described as a “*desktop valuation*”) in November, 2019. For the purposes of the present application, both sides agreed that the valuations could be placed before the court without the need to be formally exhibited to any affidavit.
28. Before considering the terms of the respective valuations of IJM, it is important to note that, as of 3rd March, 2021, BDO had valued the benefit of resolution 2A providing for the exit payment to Mr. Peter McCaughey at “*about €8m*” which excluded any amounts due on foot of sales or customer commitments from January, 2021 onwards. This is confirmed in an email from Ms. Laura Daly of BDO. Thus, the total value of resolutions 2A and 2B to Mr. Peter McCaughey is currently of the order of €9.5 million. While no figure has been provided to the court as to the approximate value of the exit payment the subject of resolution 2A to Mr. Peter McCaughey as of January, 2020, the accrued value as of that date must have been very substantial running to several million euro.
29. Insofar as the BDO report is concerned, it is striking that, notwithstanding the substantial liability of IJM to Mr. Peter McCaughey (in the event that resolutions 2A and 2B were to be acted upon), that liability is not mentioned anywhere in the BDO valuation of November, 2019 which Mr. Peter McCaughey attached to his witness statement for the purposes of the s. 212 proceedings. As counsel for the applicant has emphasised, the BDO valuation contains no adjustment for IJM’s liability under either of the resolutions.
30. Using an earnings valuation method, BDO placed a value of €19.6 million on IJM. In the executive summary on p. 7 of the BDO report, a number of adjustments are set out that would require to be made in arriving at an earnings basis of valuation (including a deduction for debt). No adjustment is made in the executive summary in respect of the very substantial liability which the company would have to Mr. Peter McCaughey in the

event that the resolutions were to be acted upon in respect of the loyalty payment or the exit payment.

31. It is also significant that, at p. 15 of the BDO report, where BDO deal, in more detail, with the adjustments that must be made in order to arrive at a figure for maintainable earnings, there is provision made for bad and doubtful debts, directors' pension costs and legal and professional fees but no reference is made to any liability which IJM might have to Mr. Peter McCaughey on foot of either of the resolutions passed at the meeting of 4th December, 2017. This stands in marked contrast to the position taken by Mr. Peter McCaughey following the settlement agreement of January, 2020. As outlined in more detail below, one of the matters that was raised on behalf of Mr. Peter McCaughey in the context of the proposed sale of IJM pursuant to the settlement agreement was a requirement that the liability on foot of the December 2017 resolutions should be fully provided for in any sale of IJM. In an email dated 3rd November, 2020 from the solicitor for Mr. Peter McCaughey to BDO, it was suggested to BDO that the effect of the resolutions "*needs to be factored in*" and that, because the resolutions were purportedly not compromised by the settlement agreement, they remain binding "*as a matter of law... on the directors of IJM **who must ensure that these are fully provided for in any sale of IJM***" (emphasis added).
32. On p. 18 of the BDO report, it is explained that the application of a multiple to maintainable EBITDA (earnings before interest, taxes, depreciation and amortization) results in an enterprise valuation which, by definition, does not take excess cash, non-operating assets or long-term debt into consideration. On the same page, it is explained that, in order to calculate the value of the equity, it is necessary to adjust the enterprise valuation for these items. Adjustments are made for excess cash and the value of investments. A deduction is also made for debt in the sum of €488,000. That figure clearly does not extend to the purported liabilities to Mr. Peter McCaughey on foot of resolutions 2A and 2B which, as of November, 2019, far exceeded the sum of €488,000. By way of comparison, BDO, at pp. 21-23, set out a valuation based on net assets. Again, in considering the adjustments to be made in respect of the liabilities of IJM, no provision was made in respect of any liability to Mr. Peter McCaughey on foot of either of the resolutions.
33. Counsel for the applicant also drew attention to what was stated on p. 17 of the BDO report where it was explained that an adjustment would have to be made to the multiple used for the purposes of the earnings valuation in the event that Mr. Peter McCaughey were to leave. On p. 17, it is stated that, due to IJM's reliance upon "*key customers with a lack of long term contracts*", BDO have discounted the multiples by "*20% to reflect the likely decrease in sales if Peter McCaughey were to leave*". Counsel suggested that it was remarkable, in those circumstances, that no reference was made to any purported liability of IJM in respect of the exit payment which, having regard to the BDO estimate of its value in 2021, would have a similarly stark impact on the value of IJM.

34. As noted above, the applicant also secured a valuation of IJM prior to his s. 212 proceedings being listed for hearing in January, 2020. He obtained a valuation from Crowe Ireland. While that valuation was not put in evidence in the s. 212 proceedings, it is clear from its report that Crowe adopted a somewhat similar method of valuation to that recommended by BDO. However, Crowe proposed an adjusted EBITDA multiple of 7.4. On their basis, they arrived at an equity value for IJM of €39,741,000 or €19,870,000 for a 50% interest. In the same report, Crowe indicated that a net assets approach was not considered appropriate:-

"as it does not take into account the effectiveness with which a business uses its internally generated goodwill and intangible assets to drive profits. As such it is rarely used for the purpose of valuing trading companies."

35. It is, therefore, an important part of the relevant factual matrix, against which the settlement agreement of January, 2020 is to be construed, that both parties to that agreement had valuations available to them which showed that the value of IJM was significantly in excess of the net asset value as shown in its balance sheet (considered below).

The IJM financial statements for 2017, 2018 and 2019

36. In light of the BDO and Crowe valuations, it would be wrong to assess the commercial effect of the settlement agreement by reference to the net asset value shown in the last audited accounts of IJM prior to the date of the settlement agreement. The most up to date audited accounts for IJM which were available in January 2020 were those for the financial year, 1st January, 2018 to 31st December, 2018, which were signed by Mr. Peter McCaughey and Mr. McKenna on 10th October, 2019. The balance sheet for IJM for that financial year showed a net asset value of €5,736,917. This is significantly less than the value shown in the balance sheet for the following year which disclosed a net asset value, as of 31st December, 2019, of €8,400,210. However, those financial statements were not signed until September, 2020 and, thus, were not available at the time of the settlement agreement.
37. At one point during the course of the hearing of the present application, counsel for the applicant argued, on the basis of the net asset value shown in the 2019 balance sheet, that it cannot have been intended by the parties that IJM would have any liability to Mr. Peter McCaughey on foot of the December, 2017 resolution. On the basis of the net asset value, he submitted that there would be insufficient funds to meet the liability on foot of the resolutions and, thus, there would be nothing remaining, after discharge of those liabilities, to fund the payments to be made under the settlement agreement in favour of the applicant and Mr. Peter McCaughey. In light of the Crowe and BDO valuations, that argument is misplaced.
38. That said, the financial statements are nonetheless revealing in that they give no indication that there are potential liabilities owed by IJM to Mr. Peter McCaughey in respect of the exit payment or in respect of the loyalty payment. While it has been suggested by Mr. Peter McCaughey that the loyalty payment has already been made to

him, there is nothing in the 2018 financial statements to support this contention. In this context, note 1.12 to the financial statements indicates that the cost of short-term employee benefits is recognised as a liability and an expense. Notes 4 and 5 show the average number of employees for both 2017 and 2018. Note 5 shows the remuneration paid as between 2018 and 2017. While there is an increase from €3,489,261 paid in wages and salaries for the 2017 year to €4,429,586 for the 2018 year, the difference between those sums is less than €1.5 million and, therefore, would not account for the payment of the amount alleged to have been paid to Mr. Peter McCaughey in respect of the loyalty payment. Note 6 deals with the remuneration paid to directors and connected parties. The amounts shown fall well below the figure of €1.5 million and, therefore, would not account for the loyalty payment either. Note 17 deals with creditors "*amounts falling due within one year*". There is nothing here to suggest that any provision has been made either in respect of the potential liability of IJM to Mr. Peter McCaughey in respect of either the exit payment or the loyalty payment. Nor is there anything to support the suggestion that the loyalty payment has already been made to Mr. Peter McCaughey. Similarly, there is nothing in note 18 dealing with creditors "*amounts falling due after more than one year*" which shows any provision in respect of either the loyalty payment or the exit payment. Furthermore, note 21 which addresses provisions for liabilities, makes no mention of any liability to Mr. Peter McCaughey. The only matters that are addressed are liabilities that may arise under guarantees and warranties.

39. In so far as the financial statements for IJM for 2017 and 2019 are concerned, there is nothing in the financial statements for either of those years which records a payment to Mr. Peter McCaughey in respect of the loyalty payment of €1.5 million. Nor is there anything which identifies that IJM has a potential liability to Mr. Peter McCaughey in respect of the exit payment. Note 21 to the 2017 accounts shows provision for a potential liability on the part of IJM in respect of guarantees and warranties and also a small amount in respect of deferred tax liabilities. Similarly, note 20 to the financial statements of IJM for 2019 shows potential liabilities in respect of guarantees and warranties. There is no exposure recorded in favour of Mr. Peter McCaughey in respect of either the exit payment or the loyalty payment.

The settlement agreement

40. Having outlined the factual context, it is now necessary to turn to the terms of the settlement agreement. It should be noted that the settlement agreement is signed by each of the applicant, Mr. Peter McCaughey, IJM and MHL. The signature page of the settlement agreement identifies each of them as parties. Although MHL was not a party to the s. 212 proceedings (notwithstanding the preliminary plea made in the points of defence on behalf of Peter McCaughey summarised in para. 25(a) above), para. 2 of the settlement agreement records that MHL "*shall be joined as a party to the proceedings for the purposes of giving effect to these terms of Settlement and hereby enters into this Settlement Agreement and agrees to be bound by its terms and the term "parties" herein includes MHL*".

41. The settlement agreement commences with two recitals. Recital 1 contains a confirmation by Mr. Peter McCaughey that "*there is no liability outstanding in respect of the 500,000 shares issued to him by IJM IN DECEMBER 2018...*". Recital 2 contains an acknowledgement by Mr. Peter McCaughey that there is a loan of €900,000 outstanding and due by him to IJM. This is referred to in the settlement agreement as "*the Loan*".
42. Paragraph 1 of the agreement is of critical importance for present purposes. It provides as follows:-
 - "1. *These proceedings are hereby settled on the following terms and the parties acknowledge that this Settlement Agreement is entered into in full and final settlement of all matters the subject of these proceedings and the subject of the proceedings referred to in Schedule 1 and any and all claims or disputes between the parties as of the date hereof.*"
43. It will be necessary, in due course, to consider the language of para. 1 of the settlement agreement in greater detail. At this point, it is sufficient to note that the proceedings identified in Schedule 1 include summary summons proceedings brought by Mr. Peter McCaughey against the applicant (High Court Record No. 2019/128S) and similar proceedings brought by Mr. Peter McCaughey against MHL (High Court Record No. 2019/129S).
44. Paragraph 3 of the settlement agreement records an agreement by the parties to apply to the court by consent for an order cancelling the issue of the additional 500,000 shares allotted to Mr. Peter McCaughey. Such an order was duly made as part of the order of 30th January, 2020.
45. Paragraph 4 of the settlement agreement required the applicant to pay to Mr. Peter McCaughey a sum of €150,000 within 21 days of the date of the agreement. While not relevant to the interpretation of the agreement, it should be noted that the sum of €150,000 was not paid within that period. This resulted in an application to me in July, 2020 to enforce this element of the settlement agreement in favour of Mr. Peter McCaughey in respect of that sum. For reasons which I outlined in an *ex tempore* judgment delivered on the same day, I indicated that I had no alternative but to grant judgment to Mr. Peter McCaughey on foot of this aspect of the settlement agreement.
46. Under para. 5 of the settlement agreement, the parties agreed that IJM and MHL should be put up for sale at market value. This is obviously a crucial element of the settlement agreement. It plainly envisages that there would be no ongoing business relationship between the applicant and Mr. Peter McCaughey and that they would bring that about by arranging for the sale of the companies in which they both held an interest. For this purpose, para. 6 of the settlement agreement provided that Crowe and BDO should be appointed joint selling agents for the purposes of the sale of IJM. A similar provision was made in respect of the sale of MHL and also the sale of certain lands (described in more detail below). Paragraph 8 provided that BDO should be appointed to provide tax advice in relation to the sale of the companies. Paragraph 9 provided that the solicitors acting for

the applicant and Mr. Peter McCaughey respectively should be appointed as joint solicitors in respect of the sale of the companies and of the lands.

47. Paragraphs 10 and 11 dealt with some points of detail which are not immediately relevant. Paragraph 12 addressed the mode of sale of the companies and provided that the mode of sale should be a matter for the selling agents taking account of the tax advice and certain other matters which are specified in para. 12. The decision of the joint selling agents in relation to the mode of sale was stated to be final and binding upon the parties.
48. Paragraph 13 required the applicant to procure that a company called MACA (R&D) Ltd (of which he is the 100% shareholder) should assign for €1 the benefit of its registered patents and intellectual property to IJM within one month of the date of the agreement and that thereafter the applicant should transfer his shareholding in that company to Mr. Peter McCaughey for €1.
49. Paragraph 14 of the settlement agreement is of some relevance for present purposes. Paragraph 14 provides as follows:-

"14. The parties warrant that –

- (a) they have not done anything since the institution of these proceedings to damage the value of the Companies,*
- (b) pending the sale of the Companies, they shall not do anything to damage the value of the Companies and shall take such reasonable steps to maximise the value of the sale assets,*
- (c) they are the beneficial owners of the shares in the Companies as registered, other than as disclosed in the proceedings, and*
- (d) they shall not pledge or otherwise deal with their shares in the Companies pending the sale of the Companies."*

50. It was submitted by counsel for the applicant that the reference to "*the parties*" in para. 14 can only have been intended to refer to the applicant and Mr. Peter McCaughey and not to the other parties to the settlement agreement. Counsel submitted that the warranties were plainly intended to be given by the applicant and Mr. Peter McCaughey and that the warranties would not make sense if they were interpreted in any other way. According to counsel for the applicant, the reference to the "*the Companies*" in the warranties clearly indicated that IJM and MHL were the subject of the warranties but were not themselves giving warranties. On the other side, counsel for Mr. Peter McCaughey argued that this clause shows that a narrow meaning should be given to the term "*the parties*" and counsel submitted that, for consistency, the same meaning should be given to that term wherever it appears in the agreement. He argued accordingly that the references to "*the parties*" were not intended to extend to IJM or MHL. If this submission

is correct, it would have significant consequences for the proper interpretation and effect of clauses 1 and 25 of the settlement agreement.

51. Under para. 15 of the settlement agreement, a BDO accountant was to compile an inventory of the assets of the Companies within three days of the agreement. By the same clause, the parties agreed that there would be no disposition of assets pending the sales envisaged by the agreement save in the ordinary course of business. For that purpose, the current land holdings of MHL were detailed in Schedule 3 to the settlement agreement. The reference to the ordinary course of business is important because it plainly envisages that the business of the Companies was to continue pending their sale. Thus, the agreement would not appear to have been intended to prevent, for example, the payment of salaries on an ongoing basis and ordinary day to day debts. Likewise, it was not intended to prevent the sale of items that would ordinarily be sold part of the business of the Companies. On the other hand, a sale of property outside the normal course of business was prohibited.
52. Paragraph 16 of the settlement agreement provided that Mr. Peter McCaughey "*shall procure that his pension will procure the sale of the lands described in Schedule II ("the land") in conjunction with the sale of the Companies*" (bold in original).
53. Under para. 17, Mr. Peter McCaughey agreed to procure that Teresa McCaughey, the holder of one share in IJM, shall cooperate in the sale of the companies and agree to the distribution of the proceeds in the manner set out in para. 18 of the agreement.
54. Paragraph 18 of the settlement agreement is important. It addresses the manner in which the proceeds of sale of the companies and of the lands should be paid. It provides as follows: -

"18. Subject to clause 19, the proceeds of the sale of the Companies and the Lands shall be paid out as follows:

- (a) The fees of the selling agents, tax advisors and Joint Solicitors appointed pursuant to paragraphs 6 to 8 shall be discharged,*
- (b) In the event of the purchase price of IJM being reduced to write off the Loan, a sum equivalent to one half of the liability reduction on foot of the Loan (net of tax liabilities, if any) shall be paid to Martin McCaughey,*
- (c) The proceeds of sale attributable to the Lands shall be paid into Peter McCaughey's pension and in the event the lands are sold together with other property, the pro rata proportion on an acreage basis shall be paid to Peter McCaughey's pension, and*
- (d) The balance of the proceeds shall be divided in half, one half shall be paid to Peter McCaughey and one half paid to Martin McCaughey."*

55. Under para. 19, MHL is required to procure the payment to Mr. Peter McCaughey of the sum of €573,000 out of the proceeds of the first sale of an MHL asset pursuant to the settlement agreement or within six months of the date of the settlement agreement, whichever is the earlier, *"which sum will be reckonable and the proceeds due to Martin McCaughey pursuant to clause 18(d) above"*.
56. Under para. 20, Mr. Peter McCaughey is to pay to the applicant a sum equivalent to 50% of the net proceeds of sale from the Lands, less the sum of €100,000 within 7 days after he receives payment in accordance with clause 18(c).
57. Paragraph 21 provides that the applicant agreed that the proceedings should be struck out with all previous costs order vacated and no further order as to costs but with liberty to re-enter solely for the purposes of enforcing the settlement terms.
58. Paragraph 22 provided that, within seven days of payment of the sums described in para. 16 of the settlement agreement, Mr. Peter McCaughey is to discontinue the proceedings referred to in Schedule 1 on the basis that all previous costs orders would be vacated and there would be no further order as to costs. Furthermore, under para. 23, each of the parties agreed to bear their own costs of the proceedings and the proceedings referred to in Schedule 1.
59. Paragraph 24 is not of immediate relevance. It simply provides that there can be no modification of the agreement unless executed in writing by all of the parties. Paragraph 25 is important and, as explained further below, there was extensive debate as to its meaning and effect. Paragraph 25 provides as follows:-
- "25. Apart from performance of the obligations contained herein to each other, the parties hereby agree that they have no further claims whatsoever against each other and that the performance of the terms of this Settlement Agreement will constitute full and final settlement of all outstanding matters between the parties hereto as of the date hereof and the parties expressly agree that there are no other claims which any of the parties have against the other(s) or against any associated companies, partners or any companies within the control of any of the parties."*
60. Paragraph 26 deals with the confidentiality to be accorded to the settlement agreement. In para. 27, the parties confirmed that they have entered into the settlement agreement with the benefit of prior independent legal advice. Paragraph 28 provides that, if any ambiguity or question of interpretation arises, the settlement agreement is to be construed as if drafted jointly by the parties. Paragraph 29 makes clear that the settlement agreement is to be binding upon the parties and their successors. The only remaining relevant provision of the agreement is para. 30 which is an *"entire agreement"* clause. It also makes clear that the agreement supersedes any prior statements, representations, agreements or understandings.

The meaning and effect of the settlement agreement

61. It is now necessary to seek to construe the meaning and effect of the settlement agreement in light of its terms, when interpreted against the factual matters described in paras. 11 to 39 above and in light of the arguments made on behalf of the parties. For convenience, I propose to consider the arguments of the parties in the context of my consideration of the terms of the agreement construed against the relevant factual and legal backdrop described above. As noted in para. 9 (b) above, the approach which the court must take in interpreting the agreement is to put itself in the position of a reasonable person with all of the background knowledge available to the parties at the time the settlement agreement was concluded.
62. In my view, the recitals to the settlement agreement (described in para. 41 above) are of some importance. In this context, counsel for the applicant drew attention to the approach taken in the *MIBI* case by O'Donnell J. in relation to the recitals to the MIBI agreement. In that case, the respondent had sought to argue that no reliance could be placed on the terms of the preamble to the MIBI agreement. This was rejected by O'Donnell J. who said, at para. 34, that:-
- "34. I cannot accept this argument. I rather question whether this Victorian certainty is applicable here at least to exclude the question in limine. The judgment cited [Young v. Smith (1865) L.R. 1 Eq.180] expresses the common sense view that the parties will pay particular attention to the operative provisions of a contract, which are likely to be more specific than any generalisation in the preamble or recitals. Where there is a clear conflict between such general descriptive provisions and specific operative provisions, then effect will normally be given to the operative provisions applying that presumption. But the question here is whether there is such an inconsistency or rather whether the two can be read consistently which is what one would normally expect. Put more simply still, the question for the Court is perhaps why would the parties describe this Agreement in inadequate and misleadingly narrow terms, if indeed the Agreement has the broad and generous sweep for which the [respondent] contends..."*
63. In the present case, it seems to me that the recitals are important for a number of reasons. In the first place, they appear designed to provide information to the applicant about what, at minimum, are aspects of the then current position as between Mr. Peter McCaughey and IJM. As the person who was then in *de facto* control of IJM, Mr. Peter McCaughey was confirming that there was no liability outstanding in respect of the 500,000 shares and he was also acknowledging that there was a loan of €900,000 outstanding and due by him to IJM. Typically, confirmations of this kind are sought where one party to a contract is in doubt about, or is unaware of, the position on the ground and, in order to address that concern, the other party provides a confirmation of the position with the intention that such confirmation can then be relied upon for the purposes of entry into the agreement.
64. Secondly, as counsel for the applicant highlighted, it is difficult to understand why Mr. Peter McCaughey would acknowledge that there is a loan of €900,000 outstanding and

due by him to IJM if that liability was more than offset by amounts due by IJM to him in respect of (a) the loyalty payment (if not already paid) or (b) the amount which would fall due to him on foot of the exit payment. Thirdly, the recitals are significant because they purport to set out the situation not between the applicant and Mr. Peter McCaughey or between the applicant and IJM, but between Mr. Peter McCaughey and IJM. This is a potentially significant point to bear in mind given the argument made on behalf of Mr. Peter McCaughey (as outlined further below) that the reference to "*the parties*" in para. 1 of the settlement agreement should be read as a reference to the applicant on one side and Mr. Peter McCaughey and IJM, on the other and that, for the purposes of understanding the meaning and legal effect of para. 1, Mr. Peter McCaughey and IJM should not be construed as separate parties.

65. As noted previously, para. 1 of the settlement agreement (quoted in para. 42 above) is of crucial importance. On its face, it is cast in very wide terms. However, counsel for Mr. Peter McCaughey and IJM stressed that its terms must be read against the relevant factual backdrop and, in particular, must be read in light of the undisputed fact that these s. 212 proceedings were not concerned with any aspect of the December, 2017 resolutions other than the resolution in relation to the allotment of 500,000 shares in IJM to Mr. Peter McCaughey. I entirely agree that this important fact must be kept in mind. Nonetheless, the language which the parties chose to use in para. 1 of the settlement agreement, supports the view that the parties plainly intended to resolve more than the claims which were the subject of these proceedings or, indeed, the subject of the proceedings referred to in Schedule 1 to the agreement. Paragraph 1 expressly states that the parties acknowledge that the agreement is entered into, not just in full and final settlement of the matters the subject of these proceedings or the subject of the proceedings referred to in Schedule 1 but also "*any and all claims or disputes between the parties as of the date hereof*". Counsel for the applicant submitted that the addition of those words clearly signified that the parties intended to go beyond the subject of these proceedings or the proceedings between Mr. Peter McCaughey and MHL and to extend the terms of settlement to any other claims or disputes between the parties as of January, 2020. In this context, counsel stressed that, as the signature page of the settlement agreement makes clear, each of the applicant, Mr. Peter McCaughey, IJM and MHL were identified as parties to the settlement agreement. Each of them expressly signed the agreement in that capacity. Thus, counsel argued that the reference to "*all claims or disputes between the parties*" includes not only claims or disputes between the applicant and Mr. Peter McCaughey but also any claims or disputes that existed, as of the date of the agreement, between Mr. Peter McCaughey and IJM. These submissions were strongly resisted by counsel for the respondent. Counsel submitted that, in circumstances where the December, 2017 resolutions in respect of the exit and loyalty payments were not challenged in these proceedings, there was in fact no "*claim*" or "*dispute*" in relation to those payments. On the contrary, counsel submitted that Mr. Peter McCaughey had an undisputed contractual right to the payments which had never been challenged either by IJM or by the applicant. Counsel suggested that such an enforceable contractual right could not plausibly be considered to be a "*claim*". He also submitted that, in light of the *noscitur a sociis* principle (which has been applied, for example, by O'Donnell J. in *ICDL*

GCC Foundation v. European Computer Driving Licence Foundation [2012] 3 I.R. 327 at p. 379), the word “*claim*” should be construed in a similar way to “*disputes*” and, therefore, should not be extended to an undisputed right which counsel suggested existed in Mr. Peter McCaughey’s favour on foot of the December, 2017 resolution.

66. In considering the meaning of para. 1, I must also bear in mind the argument made in the correspondence which predated the present application in which it was argued that Mr. Peter McCaughey and IJM were not separate parties. As set out in a letter from Mr. Peter McCaughey’s solicitors of 12th November, 2020, an argument was made that there were only two parties to these proceedings, namely the applicant, on one side, and Mr. Peter McCaughey and IJM as the respondents, on the other side.
67. In light of the applicable principles (summarised in para. 9 above), it would be wrong to reach any definitive view in relation to the meaning and effect of clause 1 in isolation from a consideration of the balance of the agreement, construed against the relevant factual and legal background. However, a number of observations can be made at this point: -
- (a) In the first place, it is difficult to see that the reference to “*the parties*” could be construed in the manner suggested in Mr. Peter McCaughey’s solicitor’s letter of November, 2020. Paragraph 1 must be read in conjunction with para. 2 and with the agreement as a whole. Paragraph 2 expressly envisages that MHL would be joined as a party to the proceedings. Clause 2 therefore recognises that MHL was regarded, on its own, as a party. If MHL is a party, there is no reason in principle to suggest that IJM (which was already a party to the proceedings) could not also be a party. Its status as a party is reinforced by a consideration of the signature page of the agreement which clearly identifies that each of the applicant, Mr. Peter McCaughey, IJM and MHL were all parties. In circumstances where all signed as parties in that way, it is difficult to see how the reference to the parties could be read in the manner suggested by Mr. Peter McCaughey’s solicitors;
- (b) Secondly, the language used in para. 1 strongly suggests that it was envisaged that the settlement would extend beyond the subject matter of the proceedings. The language expressly extends not only to the present proceedings and the proceedings involving MHL but also “*any and all claims or disputes between the parties*”. The addition of those words seems to me to provide a strong indicator that the settlement agreement was intended to wipe the slate clean between the parties and to ensure that the agreement captured all issues. In this context, the reason why a contract is required to be read as a whole is to ensure that appropriate effect is given to all parts of it. While there are cases where a court can properly conclude that a particular word or phrase is no more than surplusage, courts do not lightly reach that conclusion. Thus, the starting proposition is that the words used were intended to have meaning and effect. It follows in this case that, *prima facie*, the addition of the words “*and any and all claims or disputes between the parties at the date hereof*” was intended to expand the effect of para. 1 and to apply it not just to

the matters the subject of the s.212 claim and the proceedings described in the Schedule but to other claims and disputes between the parties.

- (c) Thirdly, the ordinary meaning of the word “*claims*” seems to me to extend not only to claimed rights which have not yet been established but also to established or undischarged or unsatisfied rights. The relevant principle was described in the following terms by Grange J.A. in the Ontario Court of Appeal in *Prudential Assurance Co Ltd v. Walwyn, Stodgell, Cochran, Murray Ltd* (1985) 50 OR (2d) 609 at pp. 612-613 where he said:-

“There do not appear to be Canadian cases of definition but American jurisprudence is replete with them. Corpus Juris Secundum, vol 14, p 115... defines “claim” as: “...embracing every species of legal demand, not necessarily limited to money demand; and, particularly when used in connection with property, “claim” has been used to signify a demand and nothing more. The term has been specifically defined as meaning a demand of a right, or of an alleged or supposed right: a calling on another for something due or supposed to be due; an active assertion of right and the demand for its recognition; an assertion, demand or challenge, of something as a right...”

In that case, the Ontario Court of Appeal, held that the word “*claim*” extended to the costs of complying with a direction given by the city of Toronto to a landlord which the city was entitled to impose by statute. A similar view was taken more recently by Hailey J. in *Weyerhaeuser Co. v. Ontario (Ministry of the Attorney General)* (2016) 60 BLR (5th) 237 at p.249 in relation to a remediation order issued by the Ontario Ministry of the Environment under its statutory powers. It is clear from the very broad definition given by Grange J.A. that “*claims*” would embrace not only an alleged or claimed right but also a demand in respect of an established right or indisputable right. That view chimes with the everyday experience of lawyers where the word “*claims*” is frequently used in that way. A useful example will be found in *Courtney’s “The Law of Companies”*, 4th ed., 2016 at paras. 26.205 to 26.207 where the very experienced author refers to debts given preferential status under s. 621(2) of the Companies Act 2014 as “*claims*” even though the statute treats them as debts. For example, para. 26.206 opens with the words: “*The claims of preferential creditors ...*”. Bearing these considerations in mind and subject to a consideration of the balance of the settlement agreement and the factual context, I can see nothing in the use of the word “*claims*” in para. 1 of the settlement agreement which would exclude an undisputed but unsatisfied right of Mr. Peter McCaughey to a loyalty payment or an exit payment due by IJM.

- (d) In this context, I do not believe that the *noscitur a sociis* principle has any application to the phrase “*claims or disputes*”. It seems to me that, on a plain construction of those words, “*claims*” is not used as a synonym of “*disputes*” but as an alternative. It seems to me that the words are used in a way which was

intended to cover not only rights (which, for the reasons discussed at (c) above, would clearly fall within the ambit of claims) but also matters which were the subject of active dispute between any of the parties to the agreement. I can see no basis in the language used to suggest that the reference to "*disputes*" was intended to cut down the broad meaning of the word "*claims*".

68. On the other hand, I must also bear in mind the fact that no issue was raised in the s. 212 proceedings by the applicant in relation to the resolutions providing for the exit or loyalty payments to Mr. Peter McCaughey. As discussed further below, the circumstances in which a release of claims is given may suggest that the release should be interpreted as applying only to a specific category of claim. The narrow focus of the s. 212 proceedings is therefore a very relevant consideration. While the applicant has sought on affidavit to explain why he did not challenge those aspects of the resolutions, I do not believe that I can have regard to subjective evidence of that kind which is, in any event, strongly contested by Mr. Peter McCaughey. As explained in para. 9 above, I must approach the interpretation of the agreement in an entirely objective way and evidence as to the subjective intention of the parties is not admissible for that purpose.
69. Counsel for the applicant also placed some emphasis on the provisions of para. 3 of the settlement agreement under which, as noted in para. 44 above, the parties agreed to apply, by consent, for an order cancelling the issue of 500,000 shares and reducing the capital of IJM accordingly. Counsel for the applicant suggested that this reaffirms the proposition that IJM was itself considered to be a party to the agreement. As he stressed, IJM would have to be a party to any application in respect of the cancellation of its shares or the reduction of its share capital. Thus, for example, s. 85 of the Companies Act, 2014 ("*the 2014 Act*") expressly envisages that the applicant for such an order would be the company itself. While the parties, in making the relevant application to the court in these proceedings, did not follow the procedure set out in s. 85 of the 2014 Act, it seems to me that there is some force in the applicant's suggestion that IJM would, of necessity, have to be a party to any such application. It might be noted the application that was subsequently made to me for such an order was moved by counsel for Mr. Peter McCaughey and IJM. However, I do not believe that I am entitled to have regard to what happened on that occasion. As explained by the Supreme Court in *Re Wogans of Drogheda Ltd.*, the conduct of a party to a contract subsequent to its conclusion is not admissible as an aid to its interpretation.
70. On the other hand, there are aspects of the settlement agreement which suggests that the reference to "*the parties*" was intended to refer solely to the applicant and Mr. Peter McCaughey. This is particularly so in the context of para. 14 (considered below). However, it also arguably arises in the context of para. 5 under which "*the parties*" agreed that IJM and MHL should be put up for sale at market value. The language used in para. 5 suggests that IJM and MHL were being spoken of in the third person and were not themselves agreeing that they should be sold. This is reinforced by a consideration of para. 14 where, again, the companies are referred to in the third person and warranties are provided, for example, to the effect "*they are beneficial owners of the shares in the*

Companies..." and that "they shall not pledge or otherwise deal with their shares in the *Companies...*". The reference to "they" in that context can only refer to the human persons holding shares in IJM and MHL respectively. Counsel for Mr. Peter McCaughey and IJM forcefully argued that this demonstrates very clearly that the references to "the parties" in paras. 1 and 25 are intended to refer solely to the human parties, namely the applicant and Mr. Peter McCaughey and not to IJM or MHL respectively. If para. 1 is read in that way, there could not be said to be any settlement of any claim as between Mr. Peter McCaughey and IJM. The reference to "and any and all claims or disputes between the parties..." would be read solely with reference to claims or disputes between the applicant and Mr. Peter McCaughey.

71. The existence of these competing considerations makes it all the more important to have regard to the other terms of the agreement and the relevant aspects of the factual context (considered below).
72. Paragraphs 4 to 13 of the agreement are of some assistance in understanding the overall intentions of the parties. Those paras. suggest that the applicant and Mr. Peter McCaughey were concerned to put an appropriate procedure in place which would ensure that both IJM and MHL would be put on the market in a professional and tax efficient way with the benefit of appropriate expert advice and without interference from either of them. Having regard to the backdrop of the s. 212 proceedings and the allegations that were made in the points of claim and points of defence respectively in those proceedings, the intention was clearly to put an end to the disputes between the brothers and to ensure that the companies in which they both had an interest would be disposed of so that they could pursue their future independently of each other. As counsel for the applicant submitted, the intention clearly was to "draw a line in the sand". Paragraph 12 appears to have been intended to minimise the scope for future disputes about the sales process by ensuring that neither side could interfere in the sales process which would be a matter for the joint selling agents, namely Crowe and BDO. Having regard to the previous very unhappy history of intra familial disputes, it made good business sense to include provisions of this kind in the agreement.
73. There was controversy in the hearing as to the effect of para. 14 (quoted in para. 49 above). As noted previously, counsel for the applicant acknowledged that, in the specific context of para. 14, the reference to "The parties" could only refer to the applicant, on one side, and Peter McCaughey, on the other. Having commenced with the words "The parties warrant that", para. 14 contains warranties in relation to the companies which, as noted in para. 70 above can only have been given by the human persons holding the shares in those companies, namely the applicant and Mr. Peter McCaughey respectively. Counsel for Mr. Peter McCaughey and IJM has submitted that references elsewhere in the agreement to "the parties", and, in particular, the references to that term in paras. 1 and 24, must, if the agreement is to be read consistently and as a whole, have been intended to likewise refer to the applicant and Mr. Peter McCaughey. He highlighted that all of the authorities stress the need to consider the agreement as a whole.

74. I entirely agree that the agreement must be read as a whole. However, when read as a whole there are a number of features which support the conclusion that the references therein to "*the parties*" were generally intended to include IJM and MHL. These include (a) the signature page, (b) the fact that para. 1 specifically envisages that the proceedings between Mr. Peter McCaughey and MHL fell within the ambit of that paragraph, (c) the very important fact that para. 2 expressly states that "*the term 'parties' herein includes MHL*", (d) the confidentiality requirement imposed by para. 26 on the parties which would be rendered worthless if it did not extend to the companies, (e) the reference in para. 25 to "*the parties hereto*" which suggests that it is intended to apply to all of the parties who adhered to the agreement by their signature and (f) the express terms of para. 25 to the effect that the parties agree that there are no other claims which any of them may have against the others (i.e. the other parties) or "*against any associated companies, partners or any companies within the control of any of the parties*". That language suggests that the intention was that the companies fell within the ambit of "*the parties*". It would be odd, to say the least, that para. 25 would have gone to so much trouble to capture claims against such a broad range of entities if it did not also extend to claims against IJM and MHL or either of them.
75. There are other aspects of the agreement which support this view. Thus, for example, the reference to the "*parties*" in para. 15 would appear to be more consistent with an intention to include not only the human parties to the agreement but also all of the signatories to the agreement. Under para. 15, "*the parties agree that there will be no disposition of assets pending the sales envisaged by this agreement save in the ordinary course of business*". While that language is not definitive, it makes good commercial sense that the reference to "*the parties*" in para. 15 should be understood as extending not just to the human parties but also the companies, namely MHL and IJM. They are the entities which held the assets and if the intention was to ensure that there should be no disposition of assets, it would make commercial sense to ensure that MHL and IJM were bound by the obligations imposed by para. 15.
76. Nevertheless, I must also bear in mind that, notwithstanding the existence of these factors supporting the applicant's case as to the meaning of the term "*the parties*", there are other aspects of the agreement (principally paras. 5 and 14) where such an interpretation breaks down. Yet, these two paras. might be explained on the basis recognised by Lord Hoffmann in the *Investor Compensation* case, that parties to a contract do sometimes make linguistic mistakes. Accordingly, I must bear in mind the possibility that the parties in this case may simply have failed to ensure that the terms used in the settlement agreement were internally consistent. That is a problem which besets a wide range of legal documents. It is not unusual to find some level of internal inconsistency in an agreement of this kind.
77. Before reaching any final conclusion on the interpretation to be given to the term "*the parties*", it is necessary to review the balance of the agreement. Paragraphs 16 and 17 (summarised in paras. 52 and 53 above) seem to me to evidence the concern of the parties to ensure that effect can be given to the agreement without any unnecessary

obstacles. Thus, Mr. Peter McCaughey agreed to procure that the lands identified in Schedule 2 to the agreement should be sold in conjunction with the sale of the companies' lands and he also agreed to procure that his wife (who held one share in IJM) would cooperate in the sale of the companies and the distribution of the proceeds in the manner described in para. 18 of the agreement.

78. Paragraph 18 (quoted in para. 54 above) is important for present purposes. It deals with the way in which the proceeds of sale of the companies and the lands would be applied. Subject to the specific matters outlined in sub-paras. (a) to (c), the clear intention underlying clause 18 is, as provided for in sub-para. (d), that the proceeds of sale of the companies would be divided in half, with one half being paid to the applicant and the other to Mr. Peter McCaughey. Paragraph 18(b) is also revealing in that it specifically envisages that, in the event that the purchase price for IJM was reduced in order to write off the loan of €900,000 outstanding by Peter McCaughey to IJM, the sum equivalent to one half of the reduction would be paid to the applicant. This supports the suggestion that the underlying intention of the agreement was to ensure that the proceeds would, subject to the extent expressly provided to the contrary in other provisions of the agreement, be divided equally between the applicant and Mr. Peter McCaughey as envisaged by para. 18 (d). The parties clearly contemplated that the loan (described in recital 2 to the agreement) might have an impact on the value of IJM and they agreed that, in that event, this mechanism should be put in place to ensure that the applicant was not prejudiced.
79. Paragraphs 19 and 20 address specific payments to be made to Mr. Peter McCaughey and the applicant respectively. Paragraphs 21 to 23 evidence some measure of goodwill between the parties at the time the agreement was concluded in that both parties agreed to bear their own costs. Paragraph 24 (which provides that modification of the agreement is to be binding unless evidenced in writing and signed by each of the parties) suggests that the parties were concerned to ensure that the agreement would be final and could not be the subject of claims that it had subsequently been varied as a consequence of something said during a conversation that might happen to take place between any of the parties to it.
80. Paragraph 25 of the agreement is of critical importance. According to counsel for the applicant, the wording of para. 25 is very clear. He argued that, as between the four parties who signed the agreement, para. 25 makes very clear that all claims between any of them have been compromised together with any claims that any of the parties might have against any associated companies, partners or companies within their respective control. Counsel submitted that the plain intention of this paragraph was to effect a full and final compromise of anything that had accrued and had not been paid at the time the agreement was executed. Counsel submitted that the agreement was plainly intended to bring the relationship between the brothers to an end and to do so in a way that eliminated, in so far as possible, the scope for future disputes. In contrast, as previously noted, counsel for Mr. Peter McCaughey argued that the reference to "*the parties*" must be read in conjunction with the way in which the same words are used in para. 14 of the

agreement. He also urged that it would make no commercial sense for Peter McCaughey to give up the very valuable claims which he had on foot of the resolutions passed in December, 2017 providing for the exit and loyalty payments. Particular emphasis was also placed on the important background fact that the resolutions in respect of the loyalty and exit payments had not been questioned by the applicant in his s. 212 claim. Counsel for Mr. Peter McCaughey stressed that, in addition, para. 25 should be read in light of the fact that, as appears from the respective valuations of IJM, both parties were aware that IJM was a valuable company and that, even allowing for discharge of its liability to Mr. Peter McCaughey under the resolutions, there would still be a substantial balance to be distributed to both the applicant and Mr. Peter McCaughey in accordance with para. 18. It was, therefore, wrong to concentrate (as counsel for the applicant had initially done) on the book value of IJM as shown in the company balance sheet for 2019 which, if read on its own, might suggest that, after discharge of the liabilities under the resolutions, there would be nothing to be paid to the applicant.

81. In reply, counsel for the applicant conceded that it was overly simplistic to refer solely to the book value of IJM. However, he submitted that, even taking the BDO valuation of the company at €19.2 million, the amount to be paid to Mr. Peter McCaughey on foot of the exit payment would represent close to 50% of that sum and would therefore substantially reduce the payments envisaged by para. 18 of the settlement agreement. Counsel for the applicant also highlighted the fact that the BDO report contained no reference to any liability to Peter McCaughey in respect of either of the two December, 2017 resolutions. Equally, there was nothing in the financial statements of IJM which provided for any contingent liability to Mr. Peter McCaughey on foot of the resolution providing for the exit payment. Nor was there anything in the financial statements to suggest that the loyalty payment had been either made or provided for.

82. Paragraph 25 must, of course, be read in conjunction with the terms of the agreement as a whole. It must also be construed against the relevant factual matrix which includes, of course, matters such as the known value of IJM and also the confined nature of the claim made by the applicant in the s. 212 proceedings. The latter is undoubtedly a significant consideration in the context of an agreement that was entered into against the backdrop of legal proceedings. The nature of the dispute, the subject of a settlement, will sometimes require that a widely drawn general release of claims should be construed more narrowly than its wide terms might, at first sight, suggest. This is illustrated by the views of the majority in the House of Lords decision in *Bank of Credit and Commerce International SA v. Ali* [2002] 1 AC 251. The relevant principle is encapsulated in the following observation by Lord Nicholls at p. 266:-

"28. ...However widely drawn the language, the circumstances in which the release was given may suggest, and frequently they do suggest, that the parties intended, or, more precisely, the parties are reasonably to be taken to have intended, that the release should apply only to claims, known or unknown, relating to a particular subject matter. The court has to consider, therefore, what was the type of claims at which the release was directed. For instance, depending on the circumstances, a

mutual general release on a settlement of final partnership accounts might properly be interpreted as confined to claims arising in connection with the partnership business. It could not reasonably be taken to preclude a claim if it later came to light that encroaching tree roots from one partner's property had undermined the foundations of his neighbouring partner's house. Echoing judicial language used in the past, that would be regarded as outside the 'contemplation' of the parties at the time the release was entered into, not because it was an unknown claim, but because it related to a subject matter which was not 'under consideration'.

29. *This approach, which is an orthodox application of the ordinary principles of interpretation, is now well established. Over the years different judges have used different language when referring to what is now commonly described as the context ... in which a contract was made. But ... the constant theme is that the scope of general words of a release depends upon the context furnished by the surrounding circumstances in which the release was given. The generality of the wording has no greater reach than this context indicates."*

83. A countervailing consideration was also identified by Lord Nicholls in the same case at p. 264. There, Lord Nicholls said:-

"22. *This appeal raises a question of interpretation of a general release. By a general release I mean an agreement containing widely drawn general words releasing all claims one party may have against the other. The release given by Mr Naeem was of this character. Mr Naeem accepted a payment from BCCI 'in full and final settlement of all or any claims... of whatsoever nature that exist or may exist'.*

23. *The circumstances in which this general release was given are typical. General releases are often entered into when parties are settling a dispute which has arisen between them, or when a relationship between them, such as employment or partnership, has come to an end. **They want to wipe the slate clean...**" (emphasis added).*

84. The *Bank of Credit and Commerce* case was concerned with a release that was given, in consideration of a redundancy payment, of claims that employees of the bank might have "of whatsoever nature that exist or may exist" against the bank. A question subsequently arose as to whether the general release that was given by the employees was sufficient to extinguish a claim they had against the bank in respect of reputational damage. At the time the release was given, none of the employees was aware that the bank in question had been involved in corrupt and dishonest business practices. Those practices only became public several years later. In circumstances where they found that their employment prospects were seriously damaged by that scandal, the employees sued the bank for "stigma" damages. The liquidator of the bank argued that these claims were released under the terms of the general release which expressly covered not only existing claims but those which might exist in the future. The House of Lords rejected the liquidator's position. Instead, it was held by a majority that, when the terms of the release were construed objectively in the context of the circumstances in which the

release had been entered into, neither party could realistically have supposed, at that time, that a claim for damages in respect of disadvantage on the labour market was a possibility. Accordingly, it was held that the parties could not have intended the releases to apply to such claims.

85. On the face of it, the terms of para. 25 of the settlement agreement are wide enough to cover any claims which any of the parties might have against any of the others. The language is very broadly drawn. If, as suggested in para. 74 above, the reference to "*the parties*" is properly construed as referring to each of the four signatories who signed the agreement on p. 5 as "*the parties*", the language of para. 25 strongly supports the view that the settlement agreement was intended to resolve not only the claims as between the applicant and Mr. Peter McCaughey but also the claims between Mr. Peter McCaughey and IJM. This seems to me to follow from the confirmation given in plain and unambiguous terms that "*Apart from the performance of the obligations contained herein to each other, the parties hereby agree that they have no further claims whatsoever against each other*" and that the performance of the terms of the settlement agreement would constitute "*full and final settlement of all outstanding matters between the parties hereto as of the date hereof...*". As noted in para. 74 above, the ordinary and natural meaning of the phrase "*the parties hereto*" would be understood as referring to the parties who have signed the agreement namely the four signatories on page 5. Similarly, the opening words of clause 25 plainly envisage that the obligations arising under the settlement agreement are the only obligations that remain in force as between the parties. The parties acknowledge that they have no "*further claims*" (i.e. no claims apart from those that now arise under the settlement agreement). In my view, a reasonable person standing in the shoes of the parties would understand this language to signal that the parties intended that the settlement agreement would wipe the slate clean as between all the parties to it. There is nothing in the language to suggest that the clause is intended to solely address claims which arose between the applicant and Mr. Peter McCaughey or as between the applicant and IJM.
86. This is strongly reinforced by the concluding language of para. 25 by which the parties "*expressly agree that there are no other claims which **any** of the parties have against the other(s) or against any associated companies, partners or any companies within the control of any of the parties*" (emphasis added). The use of the word "*any*" clearly suggests that this paragraph of the settlement agreement was concerned not with two parties (in which case the word "*either*" would be appropriate) but was concerned, instead, with resolving claims between more than two parties. The wide language used does not suggest that it was intended to be confined to claims between the applicant or MHL, on the one side, and Mr. Peter McCaughey or IJM, on the other. The language to the effect that "*the parties expressly agree*" that there are "*no **other** claims*" (emphasis added) which "*any*" of them have against "*the other (s) any associated companies, partners or any companies within the control of any of the parties*" reads like a straightforward but comprehensive confirmation to that effect. It strongly indicates that the parties wished to ensure that there were no issues between any of the parties that might affect the outcome of the process of the realisation and distribution of assets

envisaged by the agreement as a whole and which is intended to be carefully managed in accordance with the provisions of, for example, paras. 6 to 14 of the agreement. The parties went further still and made clear that not only was the release to extend to claims which any of the parties had against the others but also any claims which they had against associated companies, partners or any companies within the control of any of them. This language which they chose to use in the latter part of para. 25 provides further support for the view that they intended to wipe the slate clean and to ensure that there would be no unwelcome surprises along the way towards completion of the sales of the companies and the distribution of the proceeds. Such an intention is unsurprising in the context of an agreement which, as previously noted, is designed to bring a pre-existing (and in this case also a troubled) relationship to an end. A widely drawn clause makes sense in that context. These considerations support a conclusion that the agreement here falls into a similar category to that described in para. 23 of the opinion of Lord Nicholls in the *Bank of Credit and Commerce* case (quoted in para. 83 above).

87. For the reasons outlined in paras. 85 to 86 above, not only is para. 25 sufficiently widely drawn to cover any claim which Mr. Peter McCaughey might have on foot of the December 2017 resolutions but, in addition, there is a strong basis to take the view that the parties intended that para. 25 was intentionally cast in broad terms. The question which arises is whether there is anything in the terms of the agreement as a whole or in the relevant factual context which would support the view that, notwithstanding its wide terms, the parties nonetheless intended that para. 25 should be more narrowly construed. To paraphrase Lord Nicholls in the *Bank of Credit and Commerce* case, is there anything to suggest that the parties should reasonably be taken to have intended that the settlement should apply only to claims relating, for example, to the subject matter of the s. 212 proceedings? It is in this context, that the narrow ambit of the s. 212 claim made by the applicant is important. Equally, as highlighted by his counsel, the sheer scale of Mr. Peter McCaughey's entitlements under the December 2017 resolutions is another relevant element of the context. Would a reasonable person in the position of the parties conclude that the settlement agreement was intended to bar Mr. Peter McCaughey from pursuing his apparent entitlements to payments of several million euro on foot of those resolutions when their validity had not been questioned by the applicant in his s.212 claim? That is an issue that I consider further in para. 89 below.
88. For completeness, it should be noted that there is nothing in paras. 26 to 32 of the agreement which throws any further light on the intention of the parties. However, as noted previously, p. 5 of the agreement is relevant insofar as it identifies that each of "the parties" have signed the agreement. This is followed by a signature on behalf of each of the applicant, Mr. Peter McCaughey, IJM and MHL. As outlined above, counsel for the applicant maintained that this makes "*manifestly clear*" that it was intended that both MHL and IJM should be treated as parties and that, accordingly, the reference to "the parties" in clauses 2 and 25 should be construed in the same way.

Conclusion

89. For the reasons discussed in paras. 61 to 88 above, there are a number of competing factors which require to be considered in assessing what the parties are reasonably to be taken to have intended by the settlement agreement. This is not a case where all of the factors weigh in favour of one side alone. Placing myself in the position of a reasonable person armed with all of the knowledge available to the parties at the time the settlement was concluded, it is therefore necessary to objectively weigh the competing factors and to attempt to identify what the parties must have intended. Approaching the issue in that way, I have come to the conclusion that the intention and effect of paras. 1 and 25 of the agreement is that Mr. Peter McCaughey has released any claim he may have had against IJM under resolutions 2A and 2B. I have reached that conclusion for the following reasons:

- (a) In the first place, the language of paras. 1 and 25 is plainly sufficiently wide to cover such a release. I reiterate in this context the observations made by me at para. 67 in so far as para. 1 of the settlement agreement is concerned and those made by me at paras. 85 to 87 in so far as para. 25 is concerned. Not only is the language sufficiently wide but there are, as explained in para. 86, strong reasons to take the view that this wide language was intentional;
- (b) I am very conscious that paras. 1 and 25 cannot be read in isolation from the agreement as a whole. However, there are a number of other provisions of the settlement agreement which are consistent with an interpretation of paras. 1 and 25 in the manner outlined at (a) above. In the first place, for the reasons outlined in paras. 74 and 75 above, the references in the agreement to "*the parties*" would naturally be read, with the exception of paras. 5 and 14, as designating each of the parties who adhered to the agreement by their respective signatures. IJM is plainly treated as a separate party to Mr. Peter McCaughey on the signature page. I appreciate that, in the case of para. 14, the reference to the "the parties" cannot be read in the same way and that it can be argued that this applies equally to para. 5. However, internal inconsistencies of this kind are not infrequently encountered. Moreover, while the text of para. 14 strongly suggests that the reference in that paragraph to "*the parties*" should be construed as solely signifying the applicant and Mr. Peter McCaughey, the language of either para. 1 or para. 25 contains no such suggestion. On the contrary, the language of para. 25 (in particular) strongly supports the view that the references therein to "*the parties*" or "*the parties hereto*" were intended to include both MHL and IJM. Secondly, for the reasons advanced in paras. 63 and 64 above, the recitals to the agreement support the view that it was intended that, under the settlement agreement, Mr. Peter McCaughey should give up any claim he might have on foot of the resolutions. In this context, it is difficult to understand why Mr. Peter McCaughey would acknowledge in the recitals that there was a loan of €900,000 due by him to IJM if it was intended that he would assert his claim against IJM for a much larger sum under the resolutions. Moreover, had it been the intention to maintain such a claim it is odd that such intention would not be separately recorded in the recitals. In this context, I appreciate that it might be said that there was no need to do so in

circumstances where the applicant, having participated in the December 2017 EGM, was fully aware of the resolutions in favour of both the loyalty and exit payments. However, that overlooks the fact that the exit payment required a calculation to be made by reference to the turnover of IJM which could only realistically be made by Mr. Peter McCaughey (as the person in *de facto* control of IJM). If the making of that payment was within the contemplation of the parties, one would expect that some attempt would have been made to spell out its extent in terms of euro and cents in the settlement agreement. Secondly, for the same reason, Mr. Peter McCaughey was the only person who could confirm whether the loyalty payment had been made. Accordingly, had the parties truly intended that these payments would be made notwithstanding the provisions of paras. 1 and 25 of the settlement agreement, it is striking that there is no recital or other provision quantifying the payments to be made. This is particularly so given the size of these liabilities relative to the overall value of IJM.

- (c) Furthermore, it is of some significance that the parties took care to spell out in a number of express provisions in the agreement the specific sums that are to be paid to Mr. Peter McCaughey or the specified proportion of amounts realised that are to be paid to him. Had it been the intention that he should also be paid the loyalty or exit payments, it would be reasonable to expect that those payments would also be specifically identified in the text. This is especially so given the sheer scale of the payments to be made and the consequential impact they would have on the distribution to be made to the applicant and Mr. Peter McCaughey under para. 18 (d).
- (d) The scale of those payments is relevant for another reason namely that pressed by counsel for Mr. Peter McCaughey. Why would Mr. Peter McCaughey agree to give up the very substantial benefits which were apparently due to him under the December 2017 resolutions? Can it reasonably be concluded that the settlement agreement was intended to go that far especially when the payment element of the resolutions was not under attack in the s.212 claim made by the applicant? At first sight, it may appear very difficult to credit that Mr. Peter McCaughey can reasonably be thought to have had such an intention. However, there are a number of factors that render this scenario significantly less unlikely than might, at first blush, appear. In the first place, the liabilities on foot of the resolutions are not recorded in the financial statements of IJM which Mr. Peter McCaughey himself signed as director. It is true that the exit payment is in the nature of a contingent liability arising on his exiting IJM. However, the notes to the financial statements for 2017 and subsequent years addressed contingent liabilities such as IJM's potential exposure under guarantees and warranties. It is striking that those contingent liabilities (which were on a significantly more modest scale than the exit payment) should be noted in the financial statements, while the far higher exposure in respect of the exit payment was not noted at all. Secondly, the terms of the BDO report commissioned by Mr. Peter McCaughey are telling. Notwithstanding the adjustments made by BDO for other debts in adjusting their valuation of IJM, no

adjustment whatever was made by them in relation to the liabilities on foot of the resolutions (which are not even mentioned by them in their report). This is all the more remarkable given that BDO, on p. 17 of their report, addressed the implications for IJM in the event that Mr. Peter McCaughey were to leave. To take account of the impact of that factor on IJM's client base, they reduced their proposed multiple by 20%. Yet, no consideration was given to the impact on IJM's value arising from its liability on foot of the December 2017 resolutions. Thirdly, as noted at (b) and (c) above, there is no reference to the liabilities in the recitals to the agreement or anywhere else in the agreement.

- (e) I have not lost sight of the narrow focus of the s.212 claim made by the applicant in these proceedings and the fact that he did not challenge the making of the payments. That consideration would have very substantial weight if parties had confined themselves in the language which they used in paras. 1 and 25 to the matters in dispute in these proceedings. They did not so confine themselves and instead used language which, as outlined in paras. 67 and 85 to 87 above, plainly seems designed to expressly extend the settlement to other matters. In making that observation, I acknowledge that, as Lord Nicholls made clear in the *Bank of Credit and Commerce* case, the circumstances in which a release of claims is entered into may suggest that widely drawn language of the kind used in paras. 2 and 25 was intended to be construed more narrowly. However, in contrast to the position in that case, the parties here knew in January 2020 of the circumstances giving rise to the potential liabilities of IJM to Mr. Peter McCaughey. Each of IJM, the applicant and Mr. Peter McCaughey were clearly aware of the passing of the December 2017 resolution. In the *Bank of Credit and Commerce* case, the employees, at the time of execution of the relevant releases, were wholly unaware of the corrupt practices that subsequently came to light. It was in those circumstances that the House of Lords held that the stigma damages claim could not reasonably have been in the contemplation of the parties at the time the releases were signed. In circumstances where the parties here were aware of the December 2017 resolutions, there is no similar basis to suggest that the release of IJM's liability to Mr. Peter McCaughey could not reasonably have been in the contemplation of the parties. As outlined in para. 86 above, the circumstances here support a conclusion that the parties intended to wipe the slate clean and ensure that the relationship between them was brought to a clean end. For that purpose, as the plain words of para. 25 suggest, they wanted to ensure that the settlement would capture any claims that might arise between any one of them and any of the others – and not just any of the others but also any associated companies, partners or any companies within any of their control. As Lord Nicholls suggested in the *Bank of Credit and Commerce* case, such a general release is typical in the case of the termination of a business relationship. The termination of such a relationship is at the heart of the settlement agreement here. Moreover, the troubled relationship here was an intra-familial one which made it all the more important to ensure that the settlement would wipe the slate clean in a way that avoided further dispute in

the future. As noted previously, the provisions of paras. 7 to 12 of the settlement agreement appear designed to assist in achieving that end.

- (f) In all of these circumstances, I have come to the conclusion that the effect of paras. 1 and 25 is to release the liability of IJM to Mr. Peter McCaughey on foot of the December 2017 resolutions.

The order to be made.

90. I will accordingly order that the settlement agreement should be enforced on the basis that any payment claims which Mr. Peter McCaughey may previously have had under the December 2017 resolutions have been settled and released by virtue of paras. 1 and 25 of the agreement.

Costs

91. In circumstances where the applicant has succeeded in his application to enforce the settlement agreement, my provisional view is that he should be entitled to his costs of that application to be adjudicated by the Legal Costs adjudicator, in default of agreement, such costs to include the costs of the written submissions and of all attendances before the court on this application but subject to a stay on the order for costs in the event of an appeal by the respondents within the time limited for that purpose, such stay to continue until the determination of the appeal. If either side wishes to canvass for a different order for costs, the registrar should be so informed by email (setting out the nature of the order sought and the grounds relied upon) not later than 14 days after the electronic delivery of this judgment, in which event I will give further directions for the resolution of this issue. The parties should, however, be aware that there may well be additional costs consequences should it be necessary to hold a further hearing (whether written or oral) in relation to costs.