

[APPROVED]



THE COURT OF APPEAL

CIVIL APPEAL No.: 2021/200

NEUTRAL CITATION NUMBER: [2024] IECA 135

BARNIVILLE P.

FAHERTY J.

NÍ RAIFEARTAIGH J.

BETWEEN/

MARTIN MCCAUGHEY

APPLICANT/RESPONDENT

AND

PETER MCCAUGHEY

RESPONDENT/APPELLANT

AND

IJM TIMBER ENGINEERING LIMITED

RESPONDENT IN THE HIGH COURT

AND

BY ORDER, MCCAUGHEY HOMES LIMITED

**JUDGMENT of Mr. Justice David Barniville, President of the High Court, delivered on
the 30th day of May, 2024**

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1. Introduction

1. This is my judgment in an appeal which has been brought by Peter McCaughey (the appellant, who was one of the respondents in the High Court, and who I will refer to in this judgment as “Peter”) from the judgment of the High Court (McDonald J.) delivered on 18th June, 2021 (*McCaughey v McCaughey & Ors* [2021] IEHC 412) and from the order made by the High Court on foot of that judgment on 2nd July, 2021, which decided all of the issues arising in the application to enforce a settlement agreement in favour of his brother, Martin McCaughey (the respondent, who was the applicant in the High Court, and who I will refer to as “Martin”).

2. As I explain in more detail later, Martin had brought proceedings under s. 212 of the Companies Act, 2014 (the “2014 Act”) alleging oppression against Peter and a company called IJM Timber Engineering Limited (“IJM”). Those proceedings were settled by a Settlement Agreement signed on 21st January, 2020 (the “Settlement Agreement”). The Settlement Agreement provided for the joinder as a party to the proceedings of another company, McCaughey Homes Limited (“MHL”) to give effect to the terms of the Settlement Agreement. An order was made by the High Court (McDonald J.) on 30th January, 2020, (a) joining MHL as a party to the proceedings, (b) cancelling the issue of a number of shares in IJM to Peter (as agreed in the Settlement Agreement), (c) striking out the proceedings with no order as to costs (and vacating all previous costs orders), and (d) giving liberty to re-enter the proceedings on notice “*solely for the purposes of enforcing*” the terms of the Settlement Agreement.

3. Issues arose between the parties as to the correct interpretation and scope of the Settlement Agreement and Martin brought an application to re-enter the proceedings for the purpose of giving effect to the Settlement Agreement and to obtain an order directing that the sale of IJM would proceed forthwith on a particular basis which, it was claimed, was required under the Settlement Agreement. Following objection by Peter as to the appropriateness of the re-entry application, McDonald J. delivered a ruling and made an order on 19th February, 2021, ordering the proceedings to be re-entered for the purpose of giving effect to the Settlement Agreement and giving procedural directions for the hearing of that application.

4. The application was ultimately heard by the judge on affidavit with written and oral submissions being made on behalf of Martin and Peter. Procedural and substantive issues were raised in the course of the application. Those issues were decided by the judge in favour of Martin. Peter appealed from the judgment and order made by the judge on Martin’s application.

5. For the reasons which I set out in detail in this judgment, I am satisfied that the judge was correct in deciding the procedural and substantive issues in Martin's favour and that Peter has failed to advance any basis on which this Court should interfere with the findings, conclusions and orders made by the judge. The judge delivered an extremely detailed judgment in which he set out the correct legal principles applicable to the procedural issue arising on the application (which was essentially whether the re-entry of the proceedings on foot of the terms of the Settlement Agreement was the appropriate way of resolving the disputed issues of interpretation of that agreement which had arisen between the parties) and to the substantive issue (which concerned the proper interpretation of the Settlement Agreement). The judge then carefully explained why, in his view, Martin was entitled to succeed on both of those issues. Peter did not contend that the judge had not correctly identified the applicable legal principles but did argue that the judge had failed properly to apply those principles to the facts. I disagree. I am satisfied that having identified the correct legal principles applicable to both aspects of the appeal, the judge then went on carefully to apply those principles in a correct and proper manner and his reasoning was, in my view, unimpeachable. I have not been persuaded by any of the arguments advanced on behalf of Peter as to why the judgment and order of the judge should be disturbed. In my view, therefore, Peter's appeal should be dismissed.

2. Factual Background

6. In a comprehensive judgment, McDonald J. set out the extensive background to the execution of the Settlement Agreement on 21st January, 2020. I gratefully adopt that background and the helpful agreed chronology provided by the parties at the hearing of the appeal. While the issues between the parties to the appeal are extremely contentious and while the factual background discloses a long history of contention and dispute between

members of the McCaughey family, it is possible to summarise the relevant factual background in what I hope are relatively non-contentious terms.

7. There are two McCaughey family companies which are relevant to the proceedings and to Martin's application. The first is IJM and the second is MHL. Both are private companies. IJM was previously controlled by Sean McCaughey Senior, Martin and Peter's father (who is not a party to these proceedings and who I will refer to as "Sean"). Between 1991 and 2018, Sean held 70% of the shares in IJM with Peter and Martin holding 20% and 10% respectively. A third McCaughey family company was McCaughey Developments Limited ("MDL"). The shareholding in MDL was held on a roughly similar basis to that in IJM with Sean holding the majority of shares, and Martin holding more shares than Peter.

8. IJM is involved in the manufacture of timber-frame housing-kits for sale in Ireland and the United Kingdom. MDL was engaged in property development. A receiver was appointed over MDL in December 2013. An agreement was subsequently reached between MDL and Danske Bank that a new company, MHL, would be incorporated and would purchase, from MDL, certain lands known as "Cois Ferraige". An agreement was executed between Sean, Martin and Peter in May 2016, under which the shareholding in MHL was to be apportioned in the same percentages as applied in MDL prior to the appointment of the receiver. IJM provided funding by way of loans to assist the purchase of Cois Ferraige from MDL. During the course of 2016, there were negotiations between Peter, Martin, and Sean regarding Sean's exit from IJM. An agreement with Sean was ultimately finalised in August 2016, under which Sean's shares were to be bought back by IJM, as well as his interests in other companies, including MHL. A further written agreement was entered into between Peter and Martin on 23rd August, 2016, concerning the ownership of the relevant companies, the responsibility for the day-to-day running of those companies, the need to enter into a

shareholders' agreement, the restructuring of the companies and the putting in place of a "*proper overarching and individual*" company board structure.

9. However, differences arose between Peter and Martin, on the one hand, and Sean, on the other, regarding Sean's exit from IJM. An Extraordinary General Meeting ("EGM") of IJM was convened on 4th December, 2017, at which several special resolutions and one ordinary resolution were proposed. The special resolutions included a resolution for the ratification of the agreement reached with Sean in August 2016, and the buyback by IJM of all of Sean's shares in that company for €1.4m. In the alternative, and failing ratification of that resolution, another special resolution was proposed approving the share buy-back by IJM of the shares held by Peter and Martin in that company. The ordinary resolution proposed (which was to be triggered in the event that the agreement of August 2016 was not ratified) approving an "*exit package*" for Peter. Two further ordinary resolutions were subsequently proposed at the meeting. Those two ordinary resolutions, Resolution 2A and Resolution 2B, are central to the issues which arose between Peter and Martin, and subsequently gave rise to the judgment under appeal. The various special resolutions proposed at the EGM were defeated. Resolutions 2A and 2B were deemed to be passed by the chairman of the meeting on the basis of support by Peter and Martin.

10. Resolution 2A was in the following terms:

"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."

11. Resolution 2B provided:

“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.”

12. In other words, under Resolution 2A, a payment based on not less than 5% of turnover for the period from 1st January, 2014, would be paid to Peter in the event of his exit from IJM (this has been referred to by the parties as the “exit payment”). Under Resolution 2B, Peter would receive a payment of €1.5m and be allotted an additional 500,000 ordinary shares in IJM, on Peter’s confirmation of his intention to remain with IJM (this has been described as the “loyalty payment”). One of the purposes behind Resolution 2B was to ensure that Sean would no longer hold a majority of shares in IJM.

13. Another resolution passed at the EGM provided for the appointment of Martin as a director of IJM, as he had previously resigned as a director in December 2013.

14. Relations between Peter and Martin, on the one hand, and Sean, on the other, further deteriorated after the EGM in December 2017. On 15th December, 2017, Sean commenced proceedings under s. 212 of the 2014 Act against (*inter alia*) IJM, Peter and Martin. IJM commenced proceedings against Sean in 2018, seeking to enforce the share buy-back agreement made in August 2016. Both those proceedings were settled on 25th October, 2018. A deed of settlement was executed by the parties. It recorded the agreement by IJM to buy back Sean’s shares. A mechanism had to be put in place to enable Sean’s shares in IJM to be bought back requiring the convening of an EGM of IJM. A resolution approving the buy-back of Sean’s shares by IJM was passed at either an adjourned EGM on 26th November, 2018, or 14th December, 2018 (it is not clear from the papers). IJM then purchased 699,999 IJM shares held by Sean. The change in shareholding was registered in the Companies Registration Office (the “CRO”) on 17th December, 2018.

15. On the same day, another form (Form B5) was filed in the CRO showing an allotment of an additional 500,000 IJM shares to Peter, on foot of Resolution 2B passed at the EGM on 4th December, 2017. The allotment of those additional shares to Peter triggered the commencement by Martin of proceedings under s. 212 of the 2014 Act, against Peter and IJM in March 2019. Martin claimed that, while the resolution had been passed at the EGM in December 2017, providing for the allotment of an additional 500,000 shares in IJM to Peter (Resolution 2B), it was passed in the context of Sean refusing to honour the share buyback agreement made in August 2016, and had been proposed as a temporary mechanism to allow Peter and himself to take control of IJM from Sean. He claimed that the allotment was no longer necessary in circumstances where the buyback from Sean had taken place. Martin claimed that this was a breach of the further agreement he had entered into with Peter in August 2016, and that the affairs of IJM were being conducted in a manner oppressive to him and in disregard of his interests as a member of the company. He contended that the most appropriate remedy would be for his shares in IJM to be purchased by Peter at a price to be fixed by the court, although he acknowledged that the remedy ultimately to be awarded was a matter for the court.

16. In his points of claim subsequently delivered in the s. 212 proceedings, in addition to challenging the allotment of the 500,000 shares to Peter, Martin alleged a further breach of his August 2016 agreement with Peter, in that the required shareholders' agreement had not been put in place and no overarching board structure had been established. He also contended that he was being excluded from any meaningful participation in IJM. Peter disputed these claims and delivered detailed points of defence. The relevant aspects of the points of claim and points of defence were summarised by the judge at paras. 24 and 25 of his judgment. Of note, Peter denied that Martin had voted in favour of Resolution 2B in December 2017 on the understanding that the issuing of the additional shares in IJM was a

temporary measure. On the contrary, Peter contended that it was, at all times, understood that he and Martin would assume separate ownership of IJM and MHL. Peter further contended that the agreement between himself and Martin of August 2016 had been superseded by the deed of settlement of 25th October, 2018.

17. As the judge noted at para. 26 of his judgment, the resolution to allot the additional 500,000 shares in IJM to Peter (under the second part of Resolution 2B) was “*very much a focus*” of Martin’s s. 212 proceedings and no issue was raised by him in relation to Resolution 2A (which provided for the exit payment to Peter) or to the first part of Resolution 2B (which provided for the loyalty payment of €1.5m to Peter). When it came to the dispute between the parties as to the interpretation and scope of the terms of the Settlement Agreement, Peter relied on the absence of a challenge in Martin’s s. 212 proceedings to Resolution 2A or to the first part of Resolution 2B in support of the interpretation of the Settlement Agreement for which he contended.

18. Martin’s s. 212 proceedings were listed for hearing before McDonald J. on 21st January, 2020, having been case-managed in the Commercial List. The judge was informed that day that the proceedings had been settled. He was asked to adjourn the proceedings until 30th January, 2020. On that date, he was asked to make various orders on consent to give effect to the terms of settlement reached between the parties. The following consent orders were made that day:

- (i) MHL was joined to the proceedings “*for the purpose of giving effect to the terms of settlement agreed between the parties and executed by the parties on 21st January, 2020*”;
- (ii) the issue of 500,000 shares in IJM to Peter in or about December 2018, pursuant to resolution passed at an Extraordinary General Meeting in or about December 2017, was cancelled and the €500,000 consideration for those

shares “*by way of bonus*” to Peter was ordered to be restored to the distributable reserves of IJM;

- (iii) the proceedings were ordered to be struck out with no order as to costs with all previous costs orders being vacated; and
- (iv) there was “*liberty for either party to apply on notice to re-enter the proceedings solely for the purposes of enforcing the terms of settlement executed by the parties on 21st January, 2020*”.

19. Various differences and disputes arose between the parties as to the scope and interpretation of, and as to the obligations of the parties under, the Settlement Agreement. Peter re-entered the proceedings in July 2020 under the liberty to re-enter provision in order to enforce a term of the settlement under which Martin agreed to pay the sum of €150,000 to Peter within 21 days of the date of the Settlement Agreement. Peter obtained summary judgment against Martin on that application.

20. Following correspondence between Martin’s solicitors and Peter’s solicitors, it was clear that there was dispute between the parties as to the proper interpretation and scope of the Settlement Agreement and, in particular, whether any claims or entitlements which Peter may have had under Resolutions 2A and 2 B were compromised by that agreement (as claimed by Martin) or whether they continued to subsist (as claimed by Peter).

21. Arising from that dispute, Martin issued a motion on 3rd February, 2021, seeking to re-enter the proceedings for the purpose of giving effect to the Settlement Agreement and an order directing that the sale of IJM proceed forthwith on the basis that Peter has no claim, right or entitlement against IJM arising out of, or pursuant to, Resolutions 2A and 2B. I will refer in more detail to the nature and content of Martin’s application and to Peter’s response to it later in this judgment.

22. At this point, I should outline the relevant terms of the Settlement Agreement to enable a better understanding of the rival contentions of the parties as to the interpretation and scope of the Settlement Agreement and, in particular, whether any claims or entitlements which Peter may have or have had under Resolutions 2A and 2B were compromised under that agreement or whether they continue to subsist.

4. Settlement Agreement

23. McDonald J. outlined very comprehensively the terms of the Settlement Agreement in his judgment (at paras. 40 – 60) and then set out his conclusions on the proper construction of the agreement (at paras. 61 – 88). I will turn later in the judgment to the judge’s conclusions on the correct construction of the agreement but focus here on what the terms of the agreement were.

24. The Settlement Agreement bears the heading of Martin’s s. 212 proceedings and identifies the parties to those proceedings as Martin, Peter and IJM. However, the last page of the agreement contains the signatures of those who signed the agreement under the words “*IN WITNESS WHEREOF the parties have hereunder set their hands this 21st day of January, 2020*”. The agreement was signed by Martin, Peter, IJM and MHL.

25. The Settlement Agreement contains two recitals. In Recital 1, Peter confirmed that there was “*no liability outstanding in respect of the 500,000 shares issued to him by IJM in December 2018 (‘the 500,000 Shares’)*”. In Recital 2, Peter acknowledged that there was a loan of €900,000 outstanding and due by him to IJM (which was defined as “the Loan”). The judge regarded those recitals as being “*of some importance*” for three reasons (para. 62). First, they appeared to be designed to provide information to Martin about aspects of the then-current position as between Peter and IJM in circumstances where Peter was the person who was then in *de facto* control of IJM. Second, he found it difficult to understand why

Peter would acknowledge that there was a loan of €900,000 which was 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 referred to in Resolution 2B, or (b) the exit payment referred to in Resolution 2A. Third, the judge felt that the recitals were significant as they purported to set out the situation not as between Peter or Martin or between Martin and IJM but between Peter and IJM (and in that respect being potentially inconsistent with Peter’s contention that he and IJM could not be construed as separate parties) (paras. 63 and 64).

26. Clause 1 of the Settlement Agreement was described by the judge as being of “*critical importance*” (para. 42) and of “*crucial importance*” (para. 65) for the purpose of the disputed issue of the proper construction of the agreement. Clause 1 provides:

“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.”

27. The proceedings referred to in Schedule 1 are two sets of summary proceedings commenced by Peter in 1999 against Martin and against MHL, respectively.

28. Clause 2 provides 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 terms ‘parties’ herein includes MHL.”

29. As noted earlier, MHL was ordered to be joined to the proceedings for the purpose of giving effect to the terms of settlement comprised in the Settlement Agreement by the order made on 30th January, 2020.

30. Clause 3 provides:

“The parties shall apply by consent to the court for an order cancelling the issue of the 500,000 shares and the share capital of IJM shall be reduced accordingly.”

31. Again, as noted earlier, the order made on 30th January, 2020, provided that the 500,000 IJM shares be cancelled and that the €500,000 consideration for those shares be restored to the distributable reserves of IJM. That order was made on consent.
32. Under Clause 4, Martin agreed to pay Peter the sum of €150,000, within 21 days of the date of the Settlement Agreement. Martin did not pay that sum and Peter re-entered the proceedings in July 2020 on foot of the order of 30th January, 2020, for the purpose of enforcing that provision of the Settlement Agreement. McDonald J. granted summary judgment to Peter on foot of that provision of the Settlement Agreement in July 2020.
33. Under Clause 5 of the Settlement Agreement the *“parties”* agreed that IJM and MHL *“including the assets of both companies, shall, as soon possible, be put up for sale at market value”*. This provision was described by the judge as being a *“crucial element”* of the Settlement Agreement, which he considered to be very relevant to the disputed issue of the proper interpretation of the Settlement Agreement.
34. Clauses 6 – 12 of the Settlement Agreement provided for the mechanism by which the sale referred to at Clause 5 would take place, with joint selling agents and joint solicitors being appointed for the purposes of the sale of IJM, MHL and certain lands identified in Schedule 2, as well as providing that the modes of sale of IJM and MHL would be a matter for the selling agents. Their decision on the mode of sale was stated to be *“final and binding upon the parties”*. Clause 13 provided for the assignment, for €1.00, to IJM of certain intellectual property rights by another company, MACA (R & D) Limited.
35. The judge described clauses 4 – 13 of the Settlement Agreement as being of *“some assistance in understanding the overall intentions of the parties”*. He agreed with Martin’s counsel that the intention was clearly to *“draw a line in the sand”* and to minimise the scope

for future disputes about the sales process which was to be a matter for the joint selling agents only (para. 72).

36. Clause 14 contains a number of warranties and was described by the judge as being “*of some relevance*” (para. 49). Clause 14 provides:

“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.”*

37. The term “*Companies*” was defined in Clause 5 as meaning IJM and MHL. There was a major disagreement between Martin and Peter as to the proper interpretation of Clause 14 and whether the reference to the “*parties*” therein was intended to refer just to Martin and Peter or also to refer to IJM and MHL.

38. Clause 15 provides that an accountant from BDO would compile an inventory of the assets of IJM and MHL within three days of the Settlement Agreement and that 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*”. The judge considered that the reference to “*ordinary course of business*” in Clause 15 was “*important*” as it “*plainly envisages that the business of the Companies was to continue pending their sale*” (para. 51). He explained that the Settlement Agreement did not appear to have been intended to prevent, for example,

“the payment of salaries on an ongoing basis and ordinary day to day debts” or *“to prevent the sale of items that would ordinarily be sold part of the business of the Companies”* (para. 51). However, he noted that a sale of property outside the ordinary course of business was precluded by the provisions of Clause 15.

39. Clauses 16 and 17 imposed certain obligations on Peter including that he had to procure that his pension would procure the sale of the lands referred to in Schedule 2 in conjunction with the sale of the Companies and that he would procure that Teresa McCaughey should cooperate in the sale of the Companies and agree to the distribution of the proceeds as set out in Clause 18 of the Settlement Agreement.

40. Clause 18 was also described as *“important”* by the judge as it provided for the manner in which the proceeds of sale of the Companies and the lands would be paid out. The judge found that the clear intention underlying Clause 18 was as provided for in Clause 18(d), namely that the proceeds of sale of the Companies would be divided in half with one half each being paid to Martin and Peter. He also felt that Clause 18(b) was *“revealing”* in that it expressly envisaged that, in the event that the purchase price for IJM was reduced in order to write off the loan of €900,000 outstanding and due by Peter to IJM (as referred to in Recital 2), the sum equivalent to one half of that reduction was required to be paid to Martin.

41. Under Clause 19, MHL was required to procure the payment to Peter 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 agreement, whichever was the earlier, and that that sum would be *“reckonable and the proceeds due to Martin McCaughey pursuant to Clause 18(d) above”*.

42. Clause 20 provides that Peter was required to pay Martin a specified sum from the proceeds of sale of the lands within a specified period.

43. Clause 21 provides:

“To best facilitate the sales of the Companies, Martin...agrees that these proceedings shall be struck out and all previous costs orders vacated and no further order as to costs with liberty to re-enter solely for the purpose of enforcing these settlement terms.”

44. The judge described this clause (and Clauses 22 and 23) as evidencing *“some measure of goodwill between the parties at the time the agreement was concluded in that both parties agreed to bear their own costs”* (para. 79). Clauses 22 and 23 also provided for the parties to bear their own costs in the circumstances envisaged in those provisions.

45. Clause 24 provides:

“No modification of any provision of this agreement shall be binding unless the same shall be evidenced in writing duly executed by or on behalf of each of the parties hereto.”

46. Clause 25 of the Settlement Agreement was described by the judge as of *“critical importance”* and was the subject of extensive debate between the parties as to its proper meaning and effect. It says:

“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 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.”

47. In my view, Clauses 1 and 25 of the Settlement Agreement, properly construed, are the most important provisions of the Settlement Agreement for the purposes of ascertaining both the scope of, and the matters compromised by, the Settlement Agreement. Both Clauses

1 and 25 refer to the full and final settlement by the parties of matters, claims and disputes between the parties and, as provided by Clause 25, claims which the parties may have against “*associated companies, partners or any companies within the control of any of the parties*”. The judge carefully analysed Clauses 1 and 25 in the context of the Settlement Agreement as a whole and also by reference to the relevant factual and legal context at the time it was concluded.

48. Clause 26 contains confidentiality provisions. It is relevant in the sense that “*the fact and terms of the Settlement Agreement and the registration in connection with it*” were stated to be “*confidential to the parties*”. If the term “*parties*” was to be interpreted as encompassing only Martin and Peter, then IJM and MHL would not be bound by the claim. That would seem anomalous. Clause 27 contains a confirmation that the parties entered into the Settlement Agreement with the benefit of “*prior independent legal advice from their solicitors as to their respective rights and obligations hereunder*”. Clause 28 seeks to disapply any *contra proferentem* rule of construction. Clause 29 provides that the Settlement Agreement and all of its provisions “*shall be binding upon the parties and their respective heirs, executors, administrators, successors and permitted assigns*”. Clause 30 is an “*entire agreement*” clause. Clause 31 seeks to provide for the severability from the agreement of any provision found to be void or unenforceable. Clause 32 provides that the Settlement Agreement may be executed by way of a number of different counterparts.

49. I have referred earlier to the signature provision of the Settlement Agreement where persons described as the “*parties*” signed the agreement, namely Martin, Peter, IJM and MHL.

50. As noted earlier, Clause 21 contained an agreement that the proceedings be struck out with previous costs orders vacated and no further order as to costs “*with liberty to re-enter solely for the purpose of enforcing*” the settlement terms. One of the orders made by the

judge on 30th January, 2020, was to strike out the proceedings on those terms, with liberty for either party to apply on notice to re-enter the proceedings “*solely for the purposes of enforcing the terms of settlement...*”.

5. Martin’s Application

51. While steps were being taken by the parties to implement the terms of settlement, various disputes and differences arose. I have mentioned one of those which led to Peter re-entering the proceedings for the purpose of enforcing the obligation on Martin (found in para. 4 of the Settlement Agreement) to pay him the sum of €150,000 within 21 days of the date of the agreement. Peter obtained summary judgment against Martin in that amount in July 2020.

52. A very significant dispute arose between the parties as to whether Resolutions 2A and 2B remained in force and continued to bind IJM. It was maintained, on behalf of Peter, that those two resolutions continued to remain in force and were not compromised by the Settlement Agreement and that Peter’s rights and entitlements under those resolutions had to be fully provided for in any sale of IJM. Martin disputed that contention. His position was that all claims or entitlements of Peter under Resolutions 2A and 2B were compromised by the Settlement Agreement.

53. Solicitors for Martin and Peter exchanged correspondence on this issue between October and December 2020. It was maintained on behalf of Peter that the resolutions conferred rights on Peter to which he was entitled and which were not compromised or released by the Settlement Agreement. It was further contended that, as Peter and IJM were the two respondents in the s. 212 proceedings, the Settlement Agreement did not cover claims as between them. Peter’s position was that, apart from one element of Resolution 2B, which was compromised by the Settlement Agreement (namely, the allotment of the 500,000 IJM

shares), Resolutions 2B and 2A remained in full force and effect. It was asserted, therefore, that as Peter remained with IJM following the EGM in December 2017, he was entitled to a payment of €1,500,000 from IJM and also that he was entitled to an exit payment immediately on leaving IJM under Resolution 2A. The judge noted (at para. 28 of his judgment) that no figure had been given to him as to the approximate value of the exit payment under Resolution 2A as of January 2020, but he commented that the accrued value as of that date “*must have been very substantial running to several million euro*”. Evidence was provided to the High Court that, as of 3rd March, 2021, BDO (on behalf of Peter) valued the benefit of Resolution 2A providing for the exit payment to Peter at “*about €8m*” and was likely to be higher when taking account of other business generated by IJM from January 2021 onwards.

54. There was clearly a dispute, therefore, as to whether the Settlement Agreement, as properly construed, compromised any claim or entitlement which Peter had under Resolutions 2A and 2B (over and above that part of Resolution 2B which was expressly addressed in Clause 3 of the Settlement Agreement).

55. Martin sought to re-enter the proceedings for the purpose of giving effect to the Settlement Agreement by way of notice of motion issued on 3rd February, 2021. He also sought an order directing that the sale of IJM would proceed forthwith on the basis that Peter had no claim, right or entitlement against IJM arising out of, or pursuant to, Resolutions 2A and 2B. Martin’s application was grounded on a relatively short affidavit which he swore on 21st December, 2020, which exhibited a copy of the Settlement Agreement and relevant correspondence. Peter swore a short replying affidavit on 10th February, 2021, in which he objected to Martin’s re-entry of the proceedings by motion and contended that his application was misconceived. He asserted that he was entitled to rely on his entitlements under Resolutions 2A and 2B and noted that, apart from the issue of the 500,000 IJM shares, which

Peter had agreed in the Settlement Agreement should be cancelled, the other matters provided for in Resolutions 2A and 2B were not challenged in Martin's s. 212 proceedings or addressed in the affidavits sworn in those proceedings and were never the subject of any claim made in the proceedings. Nor, Peter maintained, were they addressed in the Settlement Agreement. Peter asserted that the two resolutions represented part of his remuneration package in consideration of his "*pre-eminent and instrumental role in transforming IJM's fortunes*" through the recession and restoring it to strong financial growth by the end of 2017 and to provide "*recompense for sacrifices in relation to remuneration foregone during the recession*" (para. 7 of Peter's replying affidavit of 10th February, 2021).

6. High Court Ruling and Order of 19th February, 2021

56. The procedural objection raised by Peter to Martin's re-entry of the proceedings by motion with a view to giving effect to the Settlement Agreement and resolving the dispute as to whether Peter's claims or entitlement against IJM under Resolutions 2A and 2B were compromised by the Settlement Agreement was considered by the judge at a hearing on 19th February, 2021. A transcript of the hearing that day was provided to this Court as part of the appeal papers.

57. At the hearing on 19th February, 2021, Martin's counsel noted that a fundamental objection was being taken by Peter to Martin's use of the re-entry motion to resolve a dispute between the parties as to the proper interpretation of the agreement and Peter was contending that that would have to be done by way of separate proceedings. Reliance was placed by Martin on the judgment of McDonald J. in the High Court in *Solicitors Mutual Defence Fund Limited v. Costigan* [2020] IEHC 213 (the "*SMDF* case"). As it happens, the Court of Appeal had given judgment dismissing an appeal from McDonald J.'s judgment in the High Court a couple of weeks before the hearing in *Solicitors Mutual Defence Limited v. Costigan & Ors*

[2021] IECA 20. It was stressed on behalf of Martin that the re-entry motion was the appropriate way, procedurally speaking, to bring the matter before the court and that it was in everyone's interest that that be done as quickly as possible. The question as to whether oral evidence would be required could be left over to be determined by the trial judge. Peter's counsel disputed the appropriateness of the re-entry motion. While noting that Peter wanted "*finality*", it was contended that the disputed issue of interpretation should be dealt with by way of a construction summons (under O.3(7) and O.83 RSC) or, in the alternative, by way of separate proceedings for a rescission or rectification where there was no consensus between the parties as to what was compromised by the Settlement Agreement.

58. In his ruling delivered at the end of the hearing, the judge concluded that Martin was entitled to proceed by way of the re-entry motion to enforce the terms of settlement and that the disputed issues of interpretation could be resolved at the hearing of that motion. He held that if Peter and IJM felt that it was necessary to bring other proceedings, then that was a matter for them. In the order made by the court on 19th February, 2021, it was ordered that the proceedings be re-entered for the purpose of giving effect to the Settlement Agreement and the court made directions for the exchange of further affidavits and the delivery of written submissions.

59. Peter did not appeal from that decision and, as we shall see, the issue did not feature at all in the evidence, written submissions or oral submissions in the High Court. Peter did seek to argue on the appeal (in his notice of appeal, in his written submissions and in oral submissions made by his counsel at the hearing of the appeal) that the use of the re-entry motion was an inappropriate procedure for resolving the disputed issue of interpretation of the Settlement Agreement. The Court has to decide whether there is any merit to that ground of appeal. For reasons I explain later, I have concluded that there is no merit to it. Peter and IJM did issue plenary proceedings seeking rectification or rescission of the Settlement

Agreement. However, those proceedings were only issued on 20th December, 2021, long after McDonald J. delivered the judgment which is the subject of this appeal on 18th June, 2021, and many months after Peter had appealed from that judgment to the Court of Appeal.

7. Subsequent Exchanges of Affidavits

60. Following the judge's ruling and the order made on 19th February, 2021, to the effect that Martin could have the disputed issue of the proper interpretation of the Settlement Agreement determined on foot of the motion re-entering the proceedings, further affidavits were exchanged between Peter and Martin.

61. Having delivered a very brief affidavit in advance of the judge's ruling on 19th February, 2021, Peter delivered a more substantial affidavit on 12th March, 2021, in which he set out the reasons for his contention that his entitlements under Resolutions 2A and 2B were not compromised or released by the Settlement Agreement. In summary, he claimed that the exit and loyalty payments provided for in Resolutions 2A and 2B represented accrued rights as between himself and IJM which, similar to his salary entitlements, were not challenged by Martin in his s. 212 proceedings and were never in issue between Peter and IJM. Those entitlements were never identified in Martin's s. 212 proceedings as representing acts of oppression and there was no suggestion in Martin's s. 212 proceedings that that aspect of Peter's remuneration was being impugned, notwithstanding that Peter had challenged the issue of the 500,000 IJM shares under Resolution 2B in his proceedings. Martin disputed all of this in a replying affidavit sworn on 23rd March, 2021. He exhibited a copy of IJM's annual report and financial statements for the year ended 31st December, 2019, to that affidavit.

62. Further affidavits were exchanged between the parties, and in an affidavit sworn by Martin on 16th April, 2021, he exhibited IJM's annual report and financial statements for the

years ended 31st December, 2017 and 31st December, 2018. In his affidavit of 23rd March, 2021, Martin adverted to the fact that the audited accounts of IJM for 2019 made no provision for additional remuneration of Peter on foot of Resolutions 2A and 2B and contended that that provided further proof that his claims under those resolutions did not survive the Settlement Agreement (para. 12).

63. Those accounts and financial statements featured in the submissions before the judge in the High Court and were addressed by him in the course of his judgment. So too were valuations in respect of IJM prepared by BDO (dated November 2019) on behalf of Peter and by Crowe (dated 8th November, 2019), on behalf of Martin. Those valuations had been appended to witness statements prepared on behalf of Peter and Martin for the purposes of Martin's s. 212 proceedings. While not exhibited to the affidavits sworn in connection with the re-entered motion, they were provided to the judge in the course of the hearing with the agreement of both parties. The judge's consideration of the financial statements and valuations in the course of his judgment is the subject of criticism by Peter and forms part of his appeal to this Court. As I explain later, I do not accept that there is any basis for that criticism.

64. The parties exchanged written submissions in advance of the hearing in the High Court. It is not necessary to discuss the contents of those submissions in any way save to note that Peter did not assert in his submissions to the High Court that the use of the re-entry motion was inappropriate to resolve the disputed issue as to the proper interpretation or construction of the Settlement Agreement. That is clear, for example, from para. 1.02 of Peter's submissions where he set out the basis on which he was contending that Martin's application was "*misconceived*" (which did not include the procedural objection) and from paras. 2.01 and 2.02, where Peter identified the issues to be determined by the court, the "*overriding issue*" on the application being described as the "*proper construction of the*

Settlement Agreement and whether it affected the rights and entitlements conferred upon Peter by [IJM]”. The appropriateness of the re-entry procedure was not addressed in Martin’s submissions at all. That is presumably because, as far as the parties were concerned, the issue had been addressed and determined by the judge in his ruling and order of 19th February, 2021. The only point to make in relation to Martin’s submissions in the High Court is that he drew attention (at para. 61) to the fact that there was no reference to any debt of IJM on foot of Resolution 2A or Resolution 2B in IJM’s accounts and noted that the absence of any such reference or provision in the accounts was “*instructive*”.

8. The Judgment of McDonald J. in the High Court

65. In his very clear and comprehensive judgment, the judge commenced by referring back to the argument made on behalf of Peter on 19th February, 2021, that Martin’s re-entry of the proceedings on foot of the Settlement Agreement was procedurally misconceived and that it was not open to Martin, on the summary application to enforce the Settlement Agreement, to ask the court to construe that agreement. The judge referred to his *ex tempore* ruling that day in which he held that if Martin was correct in his interpretation of the Settlement Agreement, it was open to him to seek to have the agreement enforced, under the terms of the order made on 30th January, 2020, but that it would be a matter for the court to determine, on the hearing of his application, whether the Settlement Agreement had the effect for which Martin contended. The judge did note, however, that there were some aspects of the written submissions made on behalf of Martin which went beyond what was permissible on such a re-entry application and he held that it was not open to Martin to pursue those aspects in his application. He was, however, entitled to pursue the application to enforce the settlement.

66. The judge then helpfully set out the relevant legal principles applicable to (a) an application to enforce a settlement agreement, and (b) the interpretation of such an agreement. As regards (a), he held that there was no doubt but that Martin was entitled to apply to the court for an order enforcing the terms of settlement if he was in a position to prove that Peter was acting in breach of a term of the Settlement Agreement. He noted that that would be so where the words “*liberty to re-enter*” are contained in the order of the court even where there was no reference in the order to the underlying settlement agreement. That was clear from the decision of the Court of Appeal in the *SMDF* case. In that case, while the relevant settlement agreement provided that the parties would be entitled to re-enter the proceedings to enforce the terms of settlement, the order merely gave liberty to re-enter the proceedings but was silent as to the purpose of such a re-entry. An argument made by the defendants, in the *SMDF* case, to the effect that there was nothing in the order to permit an application to be made in the proceedings to enforce the terms of settlement was rejected by the High Court and, on appeal, by the Court of Appeal ([2021] IECA 20). McDonald J. noted that the relevant legal principles were set out by Binchy J. in the Court of Appeal (at paras. 52 to 56 of his judgment in that case). However, unlike the order at issue in the *SMDF* case, the order of 30th January, 2020, in this case did expressly give liberty to the parties to re-enter the proceedings for the purpose of enforcing the terms of settlement. Citing with approval what Binchy J. said at para. 55 of his judgment for this Court in the *SMDF* case, McDonald J. stated at para. 8:

“...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.”

67. The judge then set out the principles applicable to the interpretation of written agreements. He referred to the leading cases in the area including *Law Society of Ireland v. Motor Insurers Bureau of Ireland* [2017] IESC 31 (the “MIBI case”), and noted that there was no dispute between the parties as to the principles to be applied. The judge provided a summary of the relevant principles to which I will refer later and which are not disputed by the parties to this appeal. The judge observed that much of the evidence given on affidavit by Martin and Peter for the purposes of the application was inadmissible and amounted to evidence as to subjective intention or understanding. The judge noted that it was necessary to confine himself to “*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*”. He stated that it was clear from the case law and, in particular, from the judgments in the MIBI case, that “*appropriate attention should be given to both the context and terms of the agreement (read as a whole)*” and he went on to consider the relevant background to the Settlement Agreement before turning to the specific terms of the agreement. He noted that the terms of the agreement were “*of course, of central importance*” (para. 10).

68. The judge then set out the background to Martin’s application (and as I have summarised that background earlier, it is unnecessary for me to do so again here). The judge did note at para. 26, that only part of Resolution 2B was at issue in the s. 212 proceedings brought by Martin, namely the resolution to allot the additional 500,000 IJM shares to Peter and that no issue was raised in the proceedings by Martin in relation to Resolution 2A (which provided for the exit payment) or to the first part of Resolution 2B (which provided for the loyalty payment). The judge referred to the submission by Peter’s counsel that, given the nature of the claim made by Martin in the s. 212 proceedings, it was “*inherently unlikely that the settlement agreement... would extend to matters which were never questioned*” by

Martin, such as the resolutions in respect of the loyalty and exit payments to Peter. The judge considered that that was “*an important issue*” which he would consider in more detail later in his judgment.

69. The judge then referred to the various valuations of IJM which were provided to the court and noted that it was agreed by both sides that the valuations (prepared by BDO on behalf of Peter and by Crowe on behalf of Martin) could be placed before the court without the need to formally exhibit them to any affidavit.¹ He regarded it as an important part of the relevant factual matrix, against which the Settlement Agreement had to be construed, that the parties to the 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 the balance sheet.

70. The judge observed that, as of March 2021, BDO had valued the benefit of Resolutions 2A and 2B to Peter in the order of €9.5m and that, as of January 2020, the value of the exit payment provided for in Resolution 2A “*must have been very substantial running to several million euro*”. The judge drew attention to the fact that, in its valuation of November 2019, BDO did not mention any liability of IJM to Peter in the event that Resolutions 2A and 2B were acted upon. That fact was heavily relied upon by Martin’s counsel.

71. As part of his consideration of the relevant context, the judge noted that using an earnings valuation method, BDO valued IJM at €19.6m. Using a somewhat similar method of valuation to BDO, but with an adjusted EBITDA multiple, Crowe arrived at an equity value for IJM of €39,741,000 (€19,870,000 for a 50% interest). The judge noted that the valuations obtained by both parties showed that the value of IJM was significantly greater than its net asset value shown in the balance sheet.

¹ The judge noted (at para. 27) that Peter referred to the BDO valuation in his witness statement in the s. 212 proceedings. He stated the Martin did not refer to any valuation in his witness statement. However, a witness statement by Naoise Cosgrove of Crowe of 8th November, 2019 did append a copy of the Crowe valuation.

72. The judge then referred to IJM’s financial statements for 2017, 2018 and 2019, and noted that the 2019 financial statements were not available to the parties as of the date of the Settlement Agreement in January 2020. He accepted that, 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 of IJM shown in its last audited accounts prior to the date of the Settlement Agreement (para. 36). The judge observed that the IJM financial statements were “*nonetheless revealing*” in that they gave no indication that there were potential liabilities owed by IJM to Peter in respect of the exit and loyalty payments provided for in Resolutions 2A and 2B. The judge referred to the material parts of the 2018 financial statements to support his conclusion that no provision was made in them for any liability by IJM to Peter under Resolutions 2A and 2B and that there was nothing to support the suggestion that the loyalty payment (under Resolution 2B) had already been paid to Peter (as he had contended). The judge also analysed the IJM financial statements for 2017 and 2019 and reached similar conclusions (paras. 38 and 39).

73. The judge then set out, in some detail, the terms of the Settlement Agreement (which I have already identified earlier in this judgment) before turning to consider the meaning and effect of the Settlement Agreement.

74. In reaching his conclusions as to the proper meaning and effect of the Settlement Agreement, the judge followed the approach, prescribed by the caselaw, of putting himself in the position of a reasonable person with all of the background knowledge available to the parties at the time the agreement was concluded. Having cited the approach of O’Donnell J. in the *MIBI* case, McDonald J. set out his reasons for taking the view that the recitals to the Settlement Agreement were important. First, they provided information to Martin about what, at minimum, were aspects of the then-current position as between Peter, the person in *de facto* control of IJM, and IJM itself. In those recitals, Peter confirmed that there was no

liability outstanding in respect of the additional 500,000 IJM shares issued to him and that there was a loan of €900,000 outstanding and due by him to IJM. Second, the judge noted the point made by counsel for Martin, with which he agreed, that it was difficult to understand why Peter would acknowledge that there was such a loan outstanding and due by him to IJM if that liability was more than offset by amounts allegedly due by IJM to Peter in respect of the loyalty and exit payments under Resolutions 2A and 2B. Third, he held that the recitals were significant as they purported to set out the situation not as between Peter and Martin or as between Martin and IJM but between Peter and IJM. The judge thought that this was potentially significant in light of the argument made by Peter that reference to the “*parties*” in Clauses 1 and 25 of the Settlement Agreement should be read as referring only to Martin on one side and Peter and IJM on the other, and that Peter and IJM should not be treated as separate parties under the Settlement Agreement.

75. The judge reiterated that Clause 1 of the Settlement Agreement was “*of crucial importance*”, and observed that it was “*cast in very wide terms*”, which had to be read against the relevant factual backdrop, including the fact that Martin’s s. 212 proceedings were directed to the allotment of the additional 500,000 IJM shares to Peter and not to any other aspects of Resolutions 2A and 2B (as stressed by Peter). Nonetheless, he felt that the language that the parties chose to use in Clause 1, supported the view that the parties clearly intended to resolve more than the claims which were the subject of the proceedings or of the other proceedings referred to in Schedule 1. He drew attention to the fact that Clause 1 expressly stated that the Settlement Agreement was entered into, not only in full and final settlement of all of the matters the subject of the s. 212 proceedings and the subject of the other proceedings referred to in Schedule 1 but also “*any and all claims or disputes between the parties as of the date hereof*”.

76. The judge stated that, in light of the relevant legal principles (summarised at para. 9 of his judgment) it would be wrong to reach a definitive view as to the meaning and effect of Clause 1 in isolation from a consideration of the other terms of the agreement, construed against the relevant factual and legal background. However, he made a number of important observations relevant to the interpretation of that clause.

77. First, he felt that it was difficult to construe the term the “*parties*” in Clause 1 in the manner put forward by Peter’s solicitors in correspondence predating the application, namely that there were only two parties, Martin, on the one side, and Peter and IJM, on the other. Clause 1 had to be read in conjunction with Clause 2 and with the agreement as a whole. Clause 2 expressly envisaged that MHL would be joined as a “*party*” to the proceedings and that there was, therefore, no reason in principle to suggest that IJM could not also be a party to the agreement in its own right. Its status as a party was also reinforced by the fact that the signature page of the Settlement Agreement identified Martin, Peter, IJM and MHL as parties, each of whom signed the agreement in that capacity.

78. Second, the judge stated that the language used in Clause 1 strongly suggested that it was envisaged that the agreement would extend beyond the subject matter of the s. 212 proceedings. The reference to “*any and all claims or disputes between the parties*”, provided 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*” (para. 67(b)). He observed that courts do not lightly reach the conclusion that words used in an agreement are mere surplusage and that, therefore, *prima facie*, the inclusion of the aforementioned words was likely to have been intended to expand the effect of Clause 1 and to apply its terms not just to the matters the subject of the s. 212 proceedings and the proceedings referred to in Schedule 1 but to other claims and disputes between the parties.

79. Third, the judge held that the ordinary meaning of the word “*claims*” extended not only to “*claimed rights*” which have not yet been established but also to “*established or undischarged or unsatisfied rights*” (para. 67(c)). He referred to two Canadian cases, *Prudential Assurance Co. Limited v. Walwyn, Stodgell, Cochran, Murray Limited* [1985] 50 O.R. (2d) 609 (Ontario Court of Appeal) and *Weyerhaeuser Co. v. Ontario (Ministry of the Attorney General)* (2016) 60 BLR (5th) 237 (Ontario Court of Appeal) as to the proper legal meaning of the term “*claim*”, before stating that it was clear from those cases that the term “*claims*” (as used in Clause 1 of the Settlement Agreement) “*would embrace not only an alleged or claimed right but also a demand in respect of an established right or indisputable right*” (para. 67(c)). He felt that that would chime with the everyday experience of lawyers using that term and referred, in that context, to Courtney, *The Law of Companies*, 4th edn. (Dublin: Bloomsbury, 2016), where he refers to preferential debts as “*claims*” even though the 2014 Act treats them as debts (paras. 26.205 – 26.207). He held that, bearing in mind those considerations and subject to consideration of the balance of the Settlement Agreement and the factual context, there was nothing in the use of the word “*claims*” in Clause 1 which would exclude an “*undisputed but unsatisfied*” right of Peter to a loyalty payment or an exit payment due by IJM.

80. Fourth, the judge rejected the contention made by Peter that the court should apply the *noscitur a sociis* principle of interpretation in construing the words “*claims or disputes*”. He stated that it was clear from a plain construction of the words that the word “*claims*” was not used in the Settlement Agreement as a synonym of, but rather as an alternative to, the word “*disputes*”. He held that the words were used in a way which was intended to cover not only rights (which would fall within the ambit of “*claims*”) but also matters which were the subject of “*active dispute*” between any of the parties to the Settlement Agreement. He

could see no basis in the language used in the clause to suggest that the reference to “*disputes*” was intended to cut down the broad meaning of the word “*claims*”.

81. On the other hand, he did regard the “*narrow focus*” of the s. 212 proceedings as a “*very relevant consideration*”, in that those proceedings did not raise any issue in relation to the exit or loyalty payments for Peter under Resolutions 2A and 2B.

82. The judge agreed with Peter that Martin’s explanation as to why he did not challenge those parts of the two resolutions could not be taken into account as it amounted to subjective evidence which was not admissible as part of the process of interpreting the Settlement Agreement which had to be interpreted in an entirely objective way. The judge agreed with Martin that Clause 3 provided support for his contention that IJM was considered to be a party to the agreement as it would have to be a party to any application in respect of the cancellation of its shares or the reduction of its share capital which were required under Clause 3. However, he did not believe that he was entitled to have regard to the fact that the application for the consent order referred to in Clause 3 was actually made by counsel for Peter and IJM, as the conduct of a party to a contract subsequent to its conclusion is not admissible as an aid to the interpretation of that contract: *Re Wogan’s (Drogheda) Limited; Jenkins v. Hill Samuel (Ireland) Limited* [1993] 1 IR 157.

83. The judge did, however, state that there were aspects of the Settlement Agreement which suggested that the term the “*parties*” may have been intended to refer solely to Martin and Peter. He considered the arguments advanced by Peter and IJM to the effect that Clauses 5 and 14, by referring to MHL and IJM in the third person, demonstrated that the term the “*parties*” in Clauses 1 and 25 were intended to refer solely to Martin and Peter, and not to IJM or MHL, and that, if that were so, Clause 1 could not be said to settle any claim as between Peter and IJM but solely those as between Martin and Peter. The judge accepted

that the existence of these competing considerations made it all the more important to have regard to the other terms of the Settlement Agreement and the relevant factual context.

84. Referring to Clauses 4 to 13 of the Settlement Agreement, the judge felt that the intention of those provisions 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*” or, in the words of Martin’s counsel, to “*draw a line in the sand*” (para. 72).

85. While recognising that the agreement had to be read as a whole, the judge observed that, when so construed, there were a number of features which supported the conclusion that the term the “*parties*” in the Settlement Agreement, was generally intended to include IJM and MHL as well as Martin and Peter. They included (a) the signature page, (b) the fact that Clause 1 expressly provided that the proceedings between Peter and MHL fell within the ambit of that clause, (c) the “*very important*” fact that Clause 2 expressly identified MHL as a party to the agreement, (d) the fact that the confidentiality provision in Clause 26 would be “*rendered worthless*” if it did not extend to IJM and MHL, (e) the reference in Clause 25 to “*the parties hereto*” which suggested that that provision was intended to apply to all of those whose signatures appear on the signature page, and (f) the fact that Clause 25 refers to “*any associated companies, partners or any companies within the control of any of the parties*” which, the judge stated, suggested that the intention was that IJM and MHL fell within the ambit of the term the “*parties*” in the agreement. He stated that would be “*odd, to say the least, that [Clause 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*” (para. 74).

86. The judge referred to other aspects of the Settlement Agreement which supported that view, including the prohibition, in Clause 15, on the disposition of assets pending the sale

envisaged by the Settlement Agreement save in the ordinary course of business. He noted that the interpretation of the word “*parties*” in that clause to include IJM and MHL made “*good commercial sense*” given that such a prohibition should apply to the entities holding the assets in question.

87. He did observe, however, that there were other aspects of the Settlement Agreement (and in particular Clauses 5 and 14) where an interpretation of the term “*parties*” to include those two companies “*breaks down*”. That could be explained by the fact that parties to an agreement sometimes make “*linguistic mistakes*” (as recognised by Lord Hoffman in *Investors Compensation Scheme Limited v. West Bromwich Building Society* [1998] 1 WLR 896 (the “*Investors Compensation*” case). The judge also observed that it was not unusual to find some level of “*internal inconsistency*” in an agreement such as the one at issue here (para. 76). Before reaching any final conclusion on the proper interpretation to be given to the term the “*parties*” in the Settlement Agreement, the judge proceeded to review the balance of the agreement and to consider further provisions therein. With respect to Clause 18, he felt that that clause supported the suggestion that the underlying intention of the Settlement Agreement was to ensure that the proceeds of sale of the two companies would, save to the extent expressly agreed to the contrary, be divided equally between Martin and Peter, as envisaged in Clause 18(d).

88. Describing Clause 25 as being “*of critical importance*”, the judge considered the arguments advanced on behalf of Martin and Peter in support of their respective interpretations of that provision, and stated that the clause had to be read in conjunction with the terms of the agreement as a whole and construed against the relevant factual matrix, which included the known value of IJM and the confined nature of the claim made by Martin in the s. 212 proceedings.

89. Referring to the decision of the House of Lords in *Bank of Credit and Commerce International S.A. v. Ali* [2002] 1 A.C. 251 (“*BCCI*”), the judge made clear that the nature of a claim or dispute which is the subject of a settlement would sometimes require that a widely drawn general release of claims be construed more narrowly than the wide terms might suggest. He referred to certain observations made by Lord Nicholls in his opinion in *BCCI* to that effect.

90. The judge referred to a number of features of Clause 25 which supported the position for which Martin contended, namely, that all claims as between all of the parties (including those as between Peter and IJM) were compromised by the Settlement Agreement. He noted that the language was “*very broadly drawn*” and that the reference to the “*parties*” was properly to be construed as referring to the four signatories who signed the signature page as the “*parties*”. He felt that the language and express terms of Clause 25 strongly supported the position adopted by Martin, namely that the agreement was intended to compromise not only the claims between Martin and Peter but also the claims between Peter and IJM.

91. The judge concluded that a reasonable person standing in the shoes of the parties would understand the language used in Clause 25 to mean that the parties intended that the agreement would “*wipe the slate clean as between all the parties to it*”, and that there was nothing in the words used to suggest that Clause 25 was intended solely to address claims as between Martin and Peter or as between Martin and IJM. That conclusion was “*strongly reinforced*” by the concluding language of Clause 25 by the parties “*expressly agree that there are no other claims which **any** of the parties have against the other(s)...*”.² The judge felt that the use of the word “*any*” clearly suggested that the clause was concerned not with two parties (as the word “*either*” would have been more appropriate if that were the case) but was clearly concerned with compromising claims between more than two parties. That

² Emphasis added by McDonald J. when quoting Clause 25 at para. 86 of his judgment.

interpretation of the clause was also supported by the reference to “*associated companies, partners or any companies...*”.

92. The judge held that the words used in Clause 25 strongly indicated that the parties wished to ensure that there were no issues between any of them which might have adversely affected the process of realising and distributing the assets envisaged under the agreement. He stated that the language used in the latter part of Clause 25 provided further support for the view that the parties intended to “*wipe the slate clean*” and to ensure that there would be “*no unwelcome surprises*” along the way towards completion of the sale of the two companies and the distribution of the proceeds of sale (para. 86). He felt that such an intention was not surprising in the context of an agreement which was designed to bring a pre-existing and “*troubled*” relationship to an end. The judge concluded, therefore, that Clause 25 was sufficiently widely drawn to cover any claim which Peter might have against IJM under Resolutions 2A and 2B (para. 87).

93. Quite properly, the judge did not rest his conclusion there but went on to consider whether there was anything to suggest that the parties could reasonably be taken to have intended that the compromise contained in the Settlement Agreement should only apply to claims which were the subject of Martin’s s. 212 proceedings. He also went on to consider, as part of the relevant factual context, the “*sheer scale*” of Peter’s entitlements under the two resolutions. Having noted that it was necessary to consider a number of “*competing factors*” and that this was not a case in which all of the factors pointed in the one direction, the judge proceeded to place himself in the position of a reasonable person armed with all of the information available at the time the Settlement Agreement was concluded and objectively to weigh the competing factors to identify what the parties must have intended. Having done so, the judge concluded that the intention and effect of Clauses 1 and 25 of the Settlement Agreement was that Peter had released any claim which he may have had against IJM under

Resolutions 2A and 2B. He set out his reasons for that conclusion at paras. 89(a) – (f). In brief, those reasons were as follows:

94. First, there were the very wide terms of Clauses 1 and 25 and the fact that there were strong reasons to conclude that use of the wide language was intentional.

95. Second, reading the Settlement Agreement as a whole, and acknowledging that Clauses 1 and 25 could not be read in isolation, there were a number of other provisions of the Settlement Agreement which were consistent with the broad interpretation of Clauses 1 and 25. They included the fact that Martin, Peter, IJM and MHL signed the Settlement Agreement and were treated as separate parties to each other on the signature page. While it might not be possible to read the term the “*parties*” as used in Clauses 5 and 14 in the same way, this could have been down to “*internal inconsistencies*” in the agreement which, the judge noted, are “*not infrequently encountered*”. In contrast to Clause 14, the judge concluded that Clauses 1 and 25 contained no limitation in terms of the parties and Clause 25, in particular, strongly supported the view that the term “*parties*” was intended to include MHL and IJM. That interpretation was also supported by the recitals and by Peter’s acknowledgement of a loan due by him to IJM. He felt that it was “*odd*” that, if it were intended that Peter would assert his claim against IJM under Resolutions 2A and 2B, such an intention would not have been separately recorded in the recitals, particularly where a calculation of the amount of any exit payment would have to be carried out and that could only realistically be done by Peter as the person in *de facto* control of IJM. Similarly, Peter was the only person who could confirm whether the loyalty payment provided for Resolution 2B had been made. The judge felt that it was “*striking*” that this was not addressed in the recitals.

96. Third, given that the Settlement Agreement contained a number of express provisions specifying particular sums to be paid to Peter, had it been the intention that the exit or loyalty

payments would be made to Peter, it would be reasonable to expect that those payments would also be specifically identified in the agreement. He concluded that this was especially so in light of the sums of money involved and the consequential impact they would have on the distribution to be made to Martin and Peter under Clause 18(d).

97. Fourth, the judge felt that there were a number of factors which meant that it was not so unlikely that Peter would have agreed to give up the benefits apparently due to him under Resolutions 2A and 2B. They included the fact that the liabilities on foot of those resolutions were not recorded in IJM's financial statements which had been signed by Peter as director. The notes to the financial statements for 2017, and subsequent years, which addressed contingent liabilities of IJM, did not refer at all to IJM's exposure under the resolutions and, in particular, its exposure in respect of the exit payment under Resolution 2A. The judge found that "*striking*". He further found it to be "*telling*" that the BDO valuation report prepared on behalf of Peter made no adjustment to take account of the liabilities of IJM arising on foot of the resolutions, which he noted were not even mentioned by BDO in its report. The judge found that "*remarkable*" given that BDO did address in its report the implications for IJM were Peter to leave the company. No consideration was given by BDO in the report to the impact on IJM's value arising from its liabilities under the two resolutions.

98. Fifth, while noting that Martin did not challenge most of the aspects of Resolutions 2A and 2B in the s. 212 proceedings and that "*very substantial weight*" would have had to have been given to that consideration had the parties confined themselves in Clauses 1 and 25 to addressing the matters in dispute in the proceedings, the fact of the matter was that they had not done so. Instead, they used very wide language, which the judge felt was plainly designed expressly to extend the settlement to other matters. Unlike in the *BCCI* case, the parties to the Settlement Agreement knew, at the time of entering into the agreement on 21st January, 2020, of the circumstances giving rise to the potential liabilities of IJM to Peter

under the two resolutions. There was no basis to suggest, therefore, as there had been in *BCCI*, that the release of IJM's liability to Peter could not reasonably have been in the contemplation of the parties at the time of the Settlement Agreement. The judge concluded that the circumstances in this case supported the conclusion that the parties intended "*to wipe the slate clean and ensure that the relationship between them was brought to a clean end*" (para. 89(e)).

99. Sixth, the plain words of Clause 25 suggested that the parties wished to ensure that the Settlement Agreement would cover any claims that might arise between any of them, including any associated companies, partners or any companies within the control of any of them. Referring to the relevant factual context, the judge concluded that the fact that the Settlement Agreement was being entered into in the context of a "*troubled*" and "*intra-familial*" relationship, made it all the more important to ensure that the Settlement Agreement would "*wipe the slate clean in a way that avoided further dispute in the future*" (para. 89(e)).

100. For all those reasons, the judge concluded that the effect of Clauses 1 and 25 was to release the liability of IJM to Peter on foot of Resolutions 2A and 2B.

101. The judge, therefore, ordered that the Settlement Agreement be enforced on the basis that any payment claims which Peter may previously have had under the two resolutions had been settled and released by paras. 1 and 25 of the Settlement Agreement.

9. Peter's Appeal: Submissions in Support of and Against the Appeal

(1) Peter's Position on the Appeal

102. Peter appealed from the judgment of McDonald J. and from the order made on 2nd July, 2021, on foot of that judgment. While Peter's notice of appeal contained a number of grounds of appeal, it is clear from the notice of appeal and from the written and oral submissions advanced on his behalf, that Peter's appeal was directed to two essential issues,

namely, a procedural issue and a substantive issue. The procedural issue was centred on Peter's contention that it was inappropriate for Martin to utilise the procedure provided for in the order of 30th January, 2020, to apply on notice to re-enter the proceedings solely for the purpose of enforcing the terms set out in the Settlement Agreement as a means of resolving the dispute between the parties as to Peter's entitlement to rely on his rights under Resolutions 2A and 2B.

103. The substantive issue was directed to Peter's contention that the judge erred in his interpretation of the Settlement Agreement and in his conclusion that the effect of that agreement was to release IJM's liability for the exit payment under Resolution 2A and for the loyalty payment under the first part of Resolution 2B. As part of his appeal on the substantive issue, Peter contended that the judge erred in drawing conclusions adverse to his case from the absence of any reference to the two resolutions in the financial statements of IJM and in BDO's valuation report in the absence of expert accountancy evidence. The other aspect of his appeal on the substantive issue was his contention that the judge's interpretation of the Settlement Agreement did not represent the most coherent construction of the overall effect of that agreement in light of the relevant factual matrix and that the judge had, therefore, misapplied the applicable legal principles in construing the Settlement Agreement as compromising Peter's right to the exit and loyalty payments under the two resolutions.

(a) The Procedural Issue: Motion Re-entering Proceedings

104. Peter submitted that the "*threshold*" issue in the appeal is whether it was appropriate to use the re-entry provision in the order of 30th January, 2020, in order to resolve a dispute as to the proper construction of the Settlement Agreement. Peter maintained that the re-entry procedure was not appropriate and that that was particularly so where the matters alleged to have been compromised in the Settlement Agreement were not the subject of litigation between the parties and where, in Peter's submission, a compromise of his entitlements under

the two resolutions was never within the scope of their agreement. Peter accepted that a settlement agreement may provide for liberty to apply for the purpose of enforcing a settlement and acknowledged that such a jurisdiction was upheld and applied by the Court of Appeal in the *SMDF* case. He further accepted that he himself previously invoked that jurisdiction in circumstances which were analogous to those which applied in the *SMDF* case, where Martin had failed to make a payment to Peter which was expressly provided for in the Settlement Agreement.

105. Peter sought to contrast the matter at issue in this case with the issue the subject of the re-entry of the proceedings in the *SMDF* case. He contended that the court in the *SMDF* case had a much more limited function on the re-entry of the proceedings, the scope of which was clearly defined in the agreement at issue in that case. Noting that Binchy J. had stated in the *SMDF* case (at para. 55) that the court should assist the parties in enforcing the terms of settlement “*as long as no fundamental principle is offended, and as long as no prejudice is caused to either of the parties*”, Peter submitted that the re-entry of the proceedings with the view to resolving the disputed issue of construction of the Settlement Agreement in this case was inappropriate and did, in fact, prejudice him. The appropriate course to take, in circumstances where he was contending that there was no meeting of minds between the parties as to the effect of the compromise contained in the Settlement Agreement on Peter’s entitlements under the two resolutions, was, he maintained, for a construction summons to be issued or for separate plenary proceedings to be issued in respect of an alleged breach of contract. He noted that the judge had expressly contemplated (at the hearing on 19th February, 2021) the possibility that some other form of proceedings might be necessary to resolve the dispute between the parties as to the effect of the Settlement Agreement. Peter pointed out that he did, in fact, issue plenary proceedings on 20th December, 2021 (after the judgment and order were made by the judge and after Peter’s appeal was filed in the Court of

Appeal) in which he sought orders rectifying or amending the Settlement Agreement to reflect the fact that it did not, and was not, intended to affect Peter's entitlements under the two relevant resolutions or, in the alternative, rescission of the agreement.

106. Peter submitted that in light of the respective contentions of the parties, the resolution of the dispute between them was not a straightforward issue and involved having to deal with issues of construction of the agreement which might have required evidence or the bringing of further proceedings. In those circumstances, Peter submitted that the re-entry mechanism was not a "*judicial tool of procedural economy*" but rather risked causing the type of prejudice which Binchy J. contemplated in the *SMDF* case. That was particularly so, in Peter's submission, where he was contending that it was never his intention to agree to a particular construction of the Settlement Agreement (which, he noted, was first articulated ten months after the Settlement Agreement was signed by the parties) in respect of an issue which did not feature in Martin's s. 212 proceedings. Peter submitted that, in the circumstances, the use of the re-entry mechanism was unsuitable to resolve the disputed issues of construction that arose in this case. He submitted that this was not a case where the court was being asked to enforce an express term of the Settlement Agreement (as was the case when Peter used the re-entry procedure to obtain summary judgment against Martin) and that the use of the re-entry procedure caused actual prejudice to Peter. In those circumstances, Peter contended that the boundaries of the re-entry jurisdiction were exceeded in this case.

107. During the course of the hearing of the appeal, Peter's objection to the use of the re-entry procedure was maintained. It was submitted that the use of that procedure precluded Peter's ability to seek rectification or rescission of the Settlement Agreement in circumstances where he was contending that there was no consensus *ad idem* between the parties on the effect of the agreement on his entitlements under the two resolutions.

108. Peter sought to rely on cases such as *Condon v. Minister for Labour* [1981] I.R. 62 (“*Condon*”) and *Ryanair Limited v. Bravofly* [2016] IESC 53 (“*Bravofly*”) in responding to a point made on behalf of Martin that if Peter wished to maintain his objection to the use of the re-entry procedure, he ought to have appealed from the decision and order made by the judge on 19th February, 2021, permitting the proceedings to be re-entered for the purposes of giving effect to the Settlement Agreement. It was argued on behalf of Peter that the decision the judge made on 19th February, 2021, to permit the proceedings to be re-entered was “*at the level of principle*” and an “*interim decision*” in the course of the hearing, against which it would have been inappropriate for Peter to have appealed. While advancing the case that Peter was prejudiced by the procedure adopted, it was accepted on his behalf that there were no limits on the affidavit evidence which he could have adduced in response to the re-entry application. Nor was Peter deprived of the opportunity of seeking to cross examine Martin in the course of the application. No application for cross examination was, in fact, ever made to the judge. Nor, it has to be said, was Peter prevented from issuing such proceedings as he considered appropriate for the rectification or rescission of the Settlement Agreement prior to (or subsequent to) the hearing of Martin’s re-entry application. Nonetheless, it was submitted on behalf of Peter that he maintained his objection to the appropriateness of the procedure up to and including the hearing in the High Court, although he also ran an alternative argument, without prejudice to that objection, on the substantive issue concerning the proper construction of the Settlement Agreement.

(b) The Substantive Issue: Construction of the Settlement Agreement

109. In support of this part of his appeal, Peter relied on (a) the alleged misplaced reliance by the judge on accounting and financial evidence in construing the Settlement Agreement in the absence of any expert evidence, and (b) the alleged lack of coherency of the construction given to the Settlement Agreement by the judge when having regard to a number of matters.

Those matters included: (i) the alleged irreconcilability of the judge's interpretation of the Settlement Agreement as compromising Peter's entitlements under the two resolutions with the wider implications for Peter's remuneration entitlements; (ii) the significance of the fact that Martin decided not to challenge Peter's entitlements under the two resolutions (apart from the issue of the additional 500,000 shares to Peter) in his s. 212 proceedings; (iii) the alleged significance of the fact that there was never any dispute between Peter and IJM as to Peter's entitlements under the two resolutions; and (iv) the alleged excessive reliance placed by the judge on one of the recitals in the Settlement Agreement which referred to Peter's acknowledgment that there was a loan of €900,000 outstanding and due by him to IJM (Recital 2) without any consideration as to the historical rationale for that recital.

110. It was accepted by Peter that the judge had correctly identified the relevant legal principles governing the construction or interpretation of agreements although it was contended that the judge misapplied those principles (by means of a process which, Peter argued, restricted the evidence available to the court) in arriving at a construction of the Settlement Agreement as compromising Peter's entitlements under the two resolutions. In that respect, Peter submitted that the judge did not fully take into account the factual context in which those entitlements arose.

111. As part of his challenge to the judge's decision, Peter contended that the judge ought not to have attributed significance to, or relied on, the fact that IJM's financial statements and BDO's valuation did not make reference to Peter's entitlements under the two resolutions or their impact on the financial position of IJM, without the benefit of expert financial evidence. He asserted that the judge did place significant reliance on the financial statements and on BDO's valuation of November 2019, and referred, in that context, to what the judge stated at paras. 29, 32 and 38 of his judgment (he might also have added para. 89(d)). Peter accepted that the financial statements themselves were properly before the court (they were exhibited

by Martin to his affidavits of 25th March, 2021, and 16th April, 2021) and that it was agreed during the course of the hearing that the expert valuations obtained by Peter from BDO and by Martin from Crowe could also be considered by the judge. However, there was no expert financial evidence before the court as to how Peter's entitlements under the two resolutions ought properly to have been dealt with in the financial statements or in the valuation of BDO, in particular. Peter contended that the process adopted by the court precluded him from providing evidence from IJM's accountant to the effect that those entitlements had been considered and to explain why they had been omitted. Further, Peter disputed the court's entitlement to attribute significance to the omission of those entitlements from the financial statements or from BDO's valuation without expert accountancy evidence. It was contended that Peter was precluded from providing expert accountancy evidence as to why it would be normal to omit those types of entitlements from an EBITDA valuation. It must be said, however, that neither side sought to adduce any expert financial evidence at the hearing. There was no objection, at the hearing, to either side referring to the financial statements and there was agreement to the judge considering the BDO and Crowe valuation reports. During the course of the hearing in the High Court, Peter's counsel, in responding to submissions made by Martin's counsel in reliance on the financial statements, accepted that Peter's entitlements under the resolutions were not reflected in IJM's contingent liability in those financial statements and raised the issue as to whether they ought to have been. It was not suggested on behalf of Peter during the course of the appeal that he had sought an opportunity in the High Court to adduce any expert evidence to address the appropriateness of the lack of reference to those entitlements in the financial statements or reports. Clearly he did not.

112. Moving on from his point about the absence of expert financial evidence, Peter then contended that the judge's construction of the Settlement Agreement as releasing Peter's entitlements under the resolutions did not "*sit coherently with the overall effect of the*

settlement". He pointed out that the judge observed that not all of the factors weighed in favour of one side's proposed construction of the Settlement Agreement and referred to the possibility of internal inconsistencies. Peter acknowledged that certain linguistic inconsistencies did arise in the Settlement Agreement. However, he submitted that the judge ought to have adopted the "*working, though by no means irrebuttable, presumption of coherence*" to which O'Donnell J. referred in the *MIBI* case (at para. 6). Peter criticised the significance attached by the judge to the fact that the settlement was expressly extended beyond Martin's s. 212 proceedings, although he acknowledged that the adherence of MHL to the Settlement Agreement and the commitment given by the parties to a sale of IJM and MHL gave the agreement "*a wider scope*" than the s. 212 proceedings and the other two sets of proceedings referred to in Schedule 1 to the Settlement Agreement. He submitted that the Settlement Agreement represented an obvious response to the case presented by Martin, namely, that Peter and Martin should be equal owners of IJM and MHL and that it was logical that any settlement between them would address the shareholdings in both companies. However, he submitted that it did not follow that the settlement would release IJM from the obligations under the resolutions which had been approved by both Peter and Martin. The scope of the agreement was, Peter contended, based in the litigation and did not support the expansive construction of the term "*claims*" given by the judge.

113. Peter disputed the judge's construction of Clause 25 of the Settlement Agreement and contended that the judge had incorrectly construed the terms "*parties*" and "*claims*". He noted that the judge stated in relation to Clauses 5 and 14, that the term "*parties*" could not be given a "*unitary meaning*" and that its use (in those clauses) suggested a narrower meaning directed towards the "*human protagonists*" in the litigation. He contended that a "*unitary meaning*" of the term "*parties*" would not provide for a "*fully coherent construction*" of the term. He further contended that the term "*claim*" should not, in the case

of the agreement at issue, be interpreted as encompassing “*an undisputed but unsatisfied right*”, as the judge found, and that it should more appropriately be interpreted as referring to the “*claims and counterclaims ventilated between the litigating parties*”. Further, he submitted that there were never any disputes as between Peter and IJM or as between Peter and IJM, on the one hand, and Martin and MHL, on the other. Peter argued against a more expansive interpretation of the term “*claim*” and submitted that, if the judge’s interpretation were correct, Clause 25 would also operate to terminate immediately Peter and Martin’s remuneration entitlements including salaries and pension entitlements (although the judge noted, with reference to Clause 15, that the agreement did not appear to have been intended to prevent the payment of salaries on an ongoing basis as well as ordinary day-to-day debts (para. 51 of the judgment)). Peter contended that the judge’s construction of Clause 25 as providing for a compromise of his entitlements under the two resolutions was inconsistent with the acceptance by Peter and Martin that the Settlement Agreement did not affect the directors’ compensation entitlements and he argued that there was no intention to “*wipe the slate clean*” in relation to those entitlements. There was no reason why different considerations should apply to Peter’s remuneration package as provided for in the two resolutions. His contention was that the better construction of the agreement was that all aspects of the directors’ remuneration (including his entitlements under the resolutions) were unaffected by the Settlement Agreement.

114. Peter further relied on the fact that Martin never challenged Peter’s entitlements under the resolutions (apart from the issue of the additional 500,000 shares under Resolution 2B) and that the only reasonable inference from that was that Martin accepted the appropriateness of the payments provided for in the resolutions as representing reasonable compensation for Peter’s efforts to save IJM. Further, there was no dispute in any of the proceedings as between Peter and IJM and, therefore, no reason to compromise Peter’s entitlements as

against IJM. He submitted that the release of “*claims*” between the “*parties*” under the Settlement Agreement was confined to the dispute between himself and Martin and not otherwise.

115. Peter further disputed the appropriateness of the reliance placed by the judge on the recitals, and in particular, Recital 2 and contended that the reason for reciting the loan referred to in that recital was *sui generis* and did not assist in a wider construction of the agreement. Nor, he contended, was it appropriate to rely on the fact that the agreement referred to specified sums to be paid to Peter in interpreting the Settlement Agreement as compromising or releasing his entitlements under the resolution. Those other payments were provided for in the Settlement Agreement itself or corresponded to specific debts the subject of the proceedings referred to in Schedule 1 to that agreement. There was no reason to believe that Peter was agreeing to abandon his entitlements under the two resolutions.

116. In support of his submission that the judge gave an excessively broad construction to the provisions of Clauses 1 and 25 of the Settlement Agreement, Peter relied, at the hearing of the appeal, on certain passages from the decision of the House of Lords in *BCCI*. In particular, he referred to those passages in the opinions of Lord Hoffman (who dissented on the ultimate decision in the case) and of Lord Nicholls (who was in the majority) where it was stressed that the scope of the relevant dispute provided, what Lord Hoffman described as, a “*limiting background context*” to the document compromising the claim. It was submitted that the limiting factor here in terms of context was that there was, in fact, no dispute between Peter and IJM to be resolved or settled and that greater weight should have been attached to that fact by the judge when considering the relevant context against which to interpret the apparently wide terms used in Clauses 1 and 25 of the Settlement Agreement. Peter also relied on a passage from the judgment of O’Donnell J. in the Supreme Court in the *MIBI* case where he stated that it was necessary when considering the breadth of language used, also to

consider “*the intended field of application*” of the relevant provision which required a consideration of the scope of the provision as found in the entire agreement (para. 31). In his oral submissions at the hearing of the appeal, Peter’s counsel emphasised that, if the agreement meant what the judge said it meant, it was an integral part of his case that there was no consensus between the parties and if the agreement was properly to be construed on the basis that his entitlements under the two resolutions were compromised or released then the agreement would have to be rectified or rescinded.

(2) Martin’s Position on the Appeal

117. Martin urged the court to uphold the judgment and order of McDonald J. and, in particular, to endorse the procedural approach adopted by the judge in determining the disputed issue of construction of the Settlement Agreement and the decision of the judge on the construction of the agreement as operating to compromise or release Peter’s entitlements under the two resolutions.

(a) The Procedural Issue: Motion Re-entering Proceedings

118. In his written and oral submissions, Martin contended, first, that Peter’s appeal on this issue was out of time and outside the proper scope of this appeal in circumstances where the judge determined the issue and made an order on 19th February, 2021, allowing the proceedings to be re-entered which was not appealed by Peter. On the contrary, Peter fully engaged in the re-entered proceedings by delivering affidavits and written submissions in accordance with the directions made by the judge and fully participated in the hearing without raising any further challenge to the appropriateness of the procedure. At the hearing of the appeal, while not formally withdrawing the objection that Peter’s appeal on the procedural point was out of time, Martin’s counsel confirmed that he was not pressing that issue but was pressing the point that, following the determination of the judge on 19th February, 2021, Peter did not pursue his procedural objection and fully participated in the

process. Martin submitted that Peter should, therefore, be precluded from pursuing his procedural objection on this appeal.

119. Without prejudice to that submission, Martin disputed Peter's contention that the judge had exceeded his jurisdiction under the Settlement Agreement and under the order of 30th January, 2020, by resolving the disputed issue of the proper construction of the agreement on foot of the motion re-entering the proceedings. Martin submitted that the course of action pursued by the judge was consistent with the approach endorsed by the Court of Appeal in the *SMDF* case as otherwise Martin would have been denied "*the very remedy provided for in the Settlement Agreement*" and that that would amount to a "*highly unattractive proposition*" (as Binchy J. had stated at para. 53 of his judgment in the *SMDF* case). While acknowledging that Martin's application in this case was less straightforward than an application seeking to enforce a default judgment clause in a settlement agreement (as was the case in the *SMDF* case), he submitted that the provision in a Settlement Agreement for the proceedings to be re-entered for the purpose of enforcement necessarily envisaged that the court could resolve a dispute on two competing interpretations of the agreement. Martin rejected the contention that the judge went to the point of or beyond the "*outer limits of the jurisdiction*", and noted that Peter had not made clear where he was saying the precise limit of that jurisdiction lay.

120. Martin submitted that the re-entry procedure was an appropriate, effective and expeditious way of resolving the impasse between the parties on the enforcement of the Settlement Agreement. He referred to the considerable engagement by both sides at the hearing and the flexibility adopted in terms of the evidence accepted by the court when hearing the application. He disputed the contention that there was any prejudice to Peter in the way in which the disputed issues were resolved and noted that there was a full exchange of affidavits with no limit being placed on the documentary and affidavit evidence on which

the parties were permitted to rely. He referred also to the significant flexibility shown by the judge in accepting into evidence, at the express request of Peter's counsel, the Crowe valuation obtained by Martin and the BDO valuation obtained by Peter.

121. Martin pointed out that the evidence would have been the same if the disputed issue of construction had been the subject of a construction summons under O. 3(7) RSC and O. 83 RSC. He also observed that Peter could have sought to cross examine Martin on his affidavits or could have applied to have the matter heard on oral evidence. He could also have pursued his argument that the agreement should be rectified or rescinded in the course of the re-entered proceedings or could have commenced separate proceedings which could have been heard at the same time (Peter subsequently did commence such proceedings but only after the judge delivered his judgment and Peter's appeal was filed in the Court of Appeal). The judge had expressly left it open to Peter to commence such separate proceedings in the course of his ruling on 19th February, 2021.

122. Martin rejected the contention that Peter suffered any prejudice as a result of the procedure adopted, noting that Peter was free to adduce whatever evidence he wished in relation to the relevant background factual context or matrix within which the Settlement Agreement had to be considered and was not precluded from maintaining a claim for rectification or rescission either in the existing proceedings or by way of separate proceedings. It should be noted, however, that it was maintained by Martin at the hearing of the appeal that there could be no basis whatsoever for a claim for rectification or rescission in light of the applicable case law: *Leopardstown Club Limited v. Templeville Developments Limited* [2010] IEHC 152 and *Slattery v. Friends First Life Assurance Company Limited* [2013] IEHC 136 and [2015] IECA 149. Martin maintained that Peter had not addressed any of the essential elements to establish an entitlement under the case for rectification or rescission of the Settlement Agreement in any of the affidavits or indeed of any of the oral

submissions made in the High Court (or in this Court on appeal). The bottom line for Martin was that, not having pursued the point in the High Court, it was not open to Peter to do so in his appeal to this Court.

(b) The Substantive Issue: Construction of the Settlement Agreement

123. In his written and oral submissions, Martin urged the Court to endorse the judge's decision on the proper construction of the Settlement Agreement. He agreed with the summary of the relevant legal principles set out by the judge in his judgment and submitted that the judge had correctly applied those principles in interpreting the agreement with respect to the relevant context and factual matrix. He noted that the most significant aspect of the context was that relations between the shareholders of IJM had completely broken down and that it was necessary for Martin to bring the s. 212 proceedings. He submitted that the Settlement Agreement was intended to resolve all issues between the parties by providing for, amongst other things, the sale of IJM and MHL and the distribution of the proceeds of sale as between Peter and Martin in a just manner, as well as settling all claims between the parties, in order fully to disentangle their business interests from each other. While he accepted that the focus of the s. 212 proceedings was the issue of the additional 500,000 IJM shares pursuant to part of Resolution 2B, he submitted that the parties went much further than simply reversing that action in the Settlement Agreement and that the whole focus of that agreement was an exit for both Martin and Peter from the family businesses so that they could take value from the businesses and go their separate ways. It would, he contended, simply beggar belief that, having provided for a complete process by which he and Peter could exit the businesses, a pre-existing entitlement of Peter to a sum in excess of €8m under the two relevant resolutions would have been ringfenced and not encompassed by the Settlement Agreement. That would not have made business commonsense.

124. Further, Martin disagreed with Peter's contention that, on the judge's construction of the Settlement Agreement, Peter's salaries and other remuneration and pension entitlements would be affected or extinguished by the agreement. He noted that the judge had addressed that issue when considering Clause 15 of the Settlement Agreement (at para. 51 of his judgment). Martin agreed with the judge's conclusion that those entitlements, together with other payments required in the ordinary course of business, were expressly carved out, by Clause 15, from the application of Clauses 1 and 25.

125. With respect to Peter's point that Martin had not challenged those parts of the two resolutions which provided for the exit and loyalty payments, Martin pointed out that the judge had clearly taken that point on board and weighed it up in the course of his analysis of the entire factual context and the entirety of the agreement.

126. The judge had, Martin contended, appropriately contrasted this case with the *BCCI* case where the relevant claims which were found not to have been caught by the settlement were not known at the time the settlement was agreed. Here, Peter's entitlements under the resolutions were known and the judge correctly concluded that the parties had intended to "*wipe the slate clean*" in the particular circumstances of the Settlement Agreement's conclusion.

127. Martin fully supported the interpretation given by the judge to the provisions of Clauses 1 and 25 and, in particular, his interpretation of the terms "*claims*" and "*parties*" as they are used in those clauses and elsewhere in the Settlement Agreement. The judge had correctly rejected the suggestion that the principle of *noscitur a sociis* applied, and had correctly concluded that the phrase "*claims or disputes*" in Clause 1 had to be interpreted disjunctively and Martin agreed fully with the judge's interpretation of those clauses. The wording of Clause 25, he submitted, in referring to the agreement constituting "*full and final settlement of all outstanding matters between the parties...*" put the issue of the interpretation

of the term “*parties*” beyond any doubt. He also submitted that the judge correctly attached significance to the fact that Peter, Martin, IJM and MHL each signed the signature page of the Settlement Agreement and correctly found that his conclusion was further reinforced by the fact that Clause 2 provided for MHL to be joined as a party to the proceedings and that the term “*parties*” in the agreement was expressly stated to include MHL and also that IJM would have had to be a party to the consent order for the cancellation of the issue of the additional 500,000 IJM shares and the reduction of its share capital provided for in Clause 3.

128. Martin further argued that, while the judge felt that the term “*parties*” in Clause 5 was properly understood to refer to Martin and Peter, it was equally capable of being construed as covering the two companies, IJM and MHL, as it was their assets that were to be put up for sale under that provision. Similarly, Martin argued that the term the “*parties*” in Clause 14(a) and (b) was capable of being interpreted as applying to the two companies although he accepted that the term as used in Clause 14(c) and 14(d) applied to Martin and Peter. He further argued that an interpretation of the Settlement Agreement under which Peter would maintain his entitlement under the two resolutions would be completely inconsistent with Clause 14(b) under which the parties agreed not to do anything to damage the value of the two companies and to take reasonable steps to maximise the value of the sale assets. Clause 26 (the confidentiality provision) was also consistent with the wider interpretation of the term “*parties*” to include all of the signatories to the Settlement Agreement, as the judge found. Martin referred to various other aspects of Clause 25 which supported that interpretation, being those aspects referred to by the judge in his judgment.

129. Martin agreed with the way in which the judge treated the relevance of the €900,000 loan by IJM to Peter and the significance of Recital 2 in that respect. He submitted that the fact that the repayment of that loan, but not the payment of sums by IJM to Peter under the

two resolutions, was specifically dealt with in the Settlement Agreement was of significance and relevance in terms of the construction of the Settlement Agreement.

130. Martin strongly disagreed with Peter's point that the judge ought not to have attached significance, without expert financial evidence, to the absence of any reference to liabilities on the part of IJM to Peter on foot of the two resolutions in the IJM financial statements and in the BDO valuation report. He noted that the financial statements were exhibited to two of the affidavits which he swore for the purpose of the re-entered proceedings on 23rd March, 2021, and 16th April, 2021. Martin submitted that there was nothing to prevent Peter from obtaining an affidavit from an expert to address the issue at that stage. Although Peter had sworn an affidavit subsequent to that affidavit sworn by Martin, he did not address the issue at all in that affidavit. Martin further made the point that the BDO and Crowe valuations were appended to witness statements prepared for the purposes of the trial of Martin's s. 212 proceedings and that it was Peter's counsel who produced the Crowe valuation during the course of the hearing in the High Court following which the judge asked for a copy of the BDO valuation. It was agreed by the parties that the court could consider both valuations. At no stage was it suggested on behalf of Peter that expert evidence would be required in order for the court to consider the financial statements or valuations. Nor was there any complaint on behalf of Peter that he was prejudiced as a result of the consideration by the judge of the financial statements or valuations in the absence of expert evidence. Martin's written submissions in advance of the hearing in the High Court made clear that he was going to rely on the absence of any reference to the impact of the resolutions on IJM in IJM's financial statements and a similar point was made at the hearing in relation to the BDO valuation. Peter did not address the issue in his written submissions to the High Court and did not seek to adduce any expert evidence on the point either before or during the hearing. This point was described by Peter's counsel at the hearing of the appeal as a "*non-point*". It had never

been suggested at the hearing that the court could not consider the absence of a reference to, or provision for, any liabilities on foot of the resolutions without expert evidence. On the contrary, Martin submitted that Peter's counsel accepted that the court could look at the financial statements and in particular could consider the issue as to whether that was a relevant factor in terms of the factual matrix or context. Martin submitted that the absence of any reference to the impact of the resolutions in IJM's financial statements or in the valuations prepared reinforced the proper interpretation of the Settlement Agreement.

131. In response to Peter's contention that the judge's interpretation of the Settlement Agreement as encompassing Peter's entitlements under the two resolutions lacked coherency for the reasons advanced by Peter, Martin took a different view. He contended that the judge repeatedly stated that he was seeking to ascertain the overall effect of the Settlement Agreement and to view the provisions of the agreement in the context of the entirety of the agreement. Martin submitted that the judge's interpretation was coherent and was consistent with the purpose of the agreement as being to "*draw a line in the sand*" against the backdrop of a preexisting and troubled intra-familial relationship.

132. Finally, Martin agreed with the judge that this case was distinguishable from the *BCCI* case as the parties here were aware of the resolutions at the time the Settlement Agreement was entered into. Martin agreed with the judge's finding that the factual backdrop and context supported the conclusion that the parties intended "*to wipe the slate clean*", and he noted, as Lord Nicholls had stated in *BCCI*, wide and general releases are often entered into in such circumstances (per Lord Nicholls at para. 23).

10. Analysis and Decision on Appeal

(1) Scope of Review

133. The judge heard Martin's application to enforce the Settlement Agreement on foot of Martin's motion re-entering the proceedings. He heard the application on affidavit. There

was no oral evidence and neither side sought to cross examine the other. In those circumstances, it is well established from the case law that this Court is in as good a position as the trial judge was to determine the issues in dispute between the parties. However, the Court should be slow to interfere with the judge's decision in the absence of any error of principle although it can, of course, do so if it would be unjust to leave the decision of the High Court undisturbed. There was no debate between the parties in this appeal as to the appropriate standard of review which the court should adopt in respect of the judge's judgment. That has not, however, caused any problem in the determination of the appeal as I am satisfied, on any relevant standard of review, that the judge did not commit any error of principle in his judgment, that no injustice has been done to Peter as a result of the judgment, and that the judge was absolutely correct in his identification of the relevant principles and in his application of those principles to the facts. I have concluded, therefore, that the judge's decision should be upheld.

(2) The Procedural Issue: Appropriateness of Motion Re-entering Proceedings

134. I am satisfied that there is no basis for Peter's challenge to the judge's conclusion that it was open to Martin to seek to enforce the Settlement Agreement by bringing a motion to re-enter the proceedings on foot of the provisions of Clause 21 of the Settlement Agreement and the liberty to apply provision in the order of 30th January, 2020. I have set out earlier (at para. 43) the provisions of Clause 21 and the terms of the order made on 30th January, 2020. Clause 21 and that order both provided that the parties were to have liberty to apply on notice to re-enter the proceedings "*solely for the purposes of enforcing*" the terms of the Settlement Agreement. Peter himself availed of those provisions and re-entered the proceedings in July 2020 for the purposes of obtaining judgment against Martin in respect of a sum payable by Martin under the Settlement Agreement which was not paid by the due date. I accept that that did not prevent Peter from objecting to the use of the same procedure to enforce the

Settlement Agreement where Martin was seeking to have a disputed issue of interpretation of the agreement determined by the court. However, the judge gave a ruling rejecting that objection on 19th February, 2021, and ordered that the proceedings be re-entered for the purpose of giving effect to the Settlement Agreement. I am satisfied that the judge was correct in so ruling.

135. I am also satisfied that there is considerable merit to Martin’s contention that if Peter wished to challenge the appropriateness of the procedure adopted, he ought to have appealed against the judgment and order of 19th February, 2021, and that, since he did not do so, any attempt to raise the issue in his notice of appeal from the substantive judgment and order of the judge ought not to be permitted as being completely out of time. However, rather than basing my rejection of this part of Peter’s appeal on his failure to appeal in time, I am prepared to adopt the approach suggested by Martin’s counsel that the Court should consider Peter’s procedural objection on its merits and in light of what actually occurred in the proceedings. I should make clear, however, that I do not accept that in giving his decision and in making the order on 19th February, 2021, the judge was merely taking a decision “*in principle*” or making an “*interim decision*” which could not be the subject of appeal, as was argued on behalf of Peter. The judge was confirming the appropriateness of the procedure adopted by Martin in accordance with Clause 21 of the Settlement Agreement and with the order made by the court on 30th January, 2020.

136. The position is fundamentally different to that which existed in *Condon* and *Bravofly*, which Peter relied on at the hearing of the appeal. In *Condon*, the Supreme Court found that it was “*grossly irregular*” for the judge to have adjourned a trial, on the application of the defendants, to allow the defendants to appeal to that court in circumstances where the judge had allowed the defendants to amend their defence to raise a preliminary issue and then heard and decided that preliminary issue against the defendants. The preliminary point had never

been set down as an argument for the trial of a preliminary issue. The Supreme Court held that once the judge had decided the issue against the defendants, the proper course was to continue with the trial.

137. A similar approach was adopted by the Supreme Court in *Superwood Holdings plc v. Sun Alliance & London Insurance plc* [1999] IESC 15; [1999] 4 I.R. 531 (“*Superwood*”).

There the Supreme Court was satisfied that *Condon* provided “*ample authority for the proposition that appeals should not be made to this Court against orders or rulings made by a trial judge during the course of an action being tried by him or her.*” (per Hamilton C.J. at 538). A similar conclusion was reached by the Supreme Court in *Bravofly*. In that case, the trial judge ruled, during the course of the trial, that certain evidence which had not been included in Ryanair’s witness statements was inadmissible. Ryanair wished to appeal and, at its request, the judge deferred the further continuation of the trial until the appeal had been determined. Although the Supreme Court confirmed the correctness of the approach adopted in *Condon* and *Superwood*, it decided for “*special reasons*” to entertain the appeal, primarily on the basis that if it declined to do so and remitted the matter back to the High Court for the trial to continue, the entire litigation would likely be ongoing for several more years.

138. These cases are, however, completely different to the present case. The order made by the judge on 19th February, 2021, was not made during the course of the trial but was made well in advance of the trial. Orders of a procedural nature, such as orders made on foot of discovery applications or applications to compel replies to particulars or orders directing the trial of preliminary issues, and so on, are regularly the subject of appeal without any difficulty. It is when an attempt is made to appeal an order made during the course of a trial that the issue of principle decided in *Condon* and in the other cases referred to arises. This is not such a case. There was, in my view, no reason why, if Peter did genuinely wish to

challenge the appropriateness of the procedure adopted, he could not have appealed from the order made by the judge on 19th February, 2021, to this Court.

139. Rather than rejecting this ground of appeal on the basis of his failure to appeal from the order of 19th February, 2021, I have proceeded to consider whether there is any merit to the point raised by Peter as to the appropriateness of the procedure adopted. I do not believe there is. While the judge dealt with the point relatively briefly in his ruling on 19th February, 2021, he did identify and apply the most relevant decision on this point, namely, the decision of this Court in the *SMDF* case.

140. The judge set out, in detail, in his judgment of 18th June, 2021, the relevant legal principles applicable to an application to enforce a settlement agreement as identified by Binchy J. in his judgment for the Court in the *SMDF* case. Peter does not contend that the principles identified were not the correct principles but does suggest that the judge went beyond the permissible limits of the jurisdiction providing for the re-entry of proceedings for the purpose of enforcing a settlement. I do not agree.

141. While noting that the problem which arose in the *SMDF* case did not arise in this case given that the order of 30th January, 2020, contains an express provision for liberty to apply for the purpose of enforcing the settlement, the judge nonetheless, and correctly in my view, found that the principles outlined by Binchy J. were the appropriate principles to be applied when it was sought to re-enter proceedings for the purpose of enforcing a settlement. The key principle, for present purposes, is that outlined by Binchy J. at para. 55 of his judgment. Having noted that where there is any doubt as to the meaning or effect of the relevant order made by the court (which is not the case here), and having stated that any such doubt should be resolved so as to give effect to the terms of the settlement, Binchy J. stated: -

“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 court should aid the parties in enforcing the terms of settlement.”

142. I agree with the judge that in a case such as the present one, unless there is some significant countervailing issue, the courts should aid the parties in enforcing the terms of a settlement. I also agree that there is a clear public interest in promoting the settlement of proceedings and that that interest would be significantly undermined if the courts were not also in a position to ensure compliance with the terms of a settlement agreement.

143. I do not accept that any fundamental principle of the kind which Binchy J. had in mind in the *SMDF* case would be offended by the use of the re-entry procedure to resolve the disputed issue of interpretation in relation to the Settlement Agreement and to have that agreement enforced. Nor do I accept, contrary to the case made on Peter’s behalf, that he has been prejudiced, in any way, by the procedure adopted by Martin and endorsed by the judge in his ruling and order made on 19th February, 2021.

144. The judge made directions for the exchange of affidavits in respect of Martin’s application to enforce the Settlement Agreement. Had the interpretation issue been dealt with by way of a construction summons under O. 3(7) RSC and O. 83 RSC, as Peter contended it ought to have been, it would also have proceeded by way of affidavit evidence. It was also open to Peter to seek a plenary hearing if he so wished and it was open to both sides to seek to cross examine the other on their respective affidavits. No request to do so was made by Peter or by Martin. There is no reason to believe that if a plausible case for cross examination were made, the judge would have refused it. That being said, there may have been little basis for a plenary hearing or for cross examination in light of the objective nature of the test to be applied by the court in seeking to interpret the terms of the Settlement Agreement save, perhaps, for the purposes of determining a factual dispute that could conceivably have emerged as to the relevant factual matrix to be taken into account as part of

the interpretation exercise. In any event, neither side sought a plenary hearing or cross examination.

145. In advancing his procedural point on this appeal, Peter contended that he was precluded, by virtue of the procedure adopted by Martin and endorsed by the court, from making the case that, if the Settlement Agreement was to be construed in the manner contended for by Martin, the agreement would have to be rectified or amended or rescinded as not reflecting a *consensus ad idem* between the parties. I am not persuaded, however, that there is any basis for that contention. There was nothing to prevent Peter from making that case in response to Martin's application to enforce the Settlement Agreement. Nor was there anything to prevent Peter from making the case in fresh proceedings. The judge left that possibility open in his ruling on 19th February, 2021. He expressly confirmed that it was a matter for Peter and IJM to take their own course if they felt the interpretation advanced by Martin went beyond the terms of the Settlement Agreement and felt it necessary to take some other form of proceedings. Peter clearly chose not to do so at that stage and it is wrong to suggest that he (or, for that matter, IJM) was prevented from making that case by virtue of the procedure adopted by Martin and endorsed by the judge in the High Court. Indeed, and as noted earlier in this judgment, Peter and IJM did, in fact, issue separate proceedings seeking rectification, amendment and rescission of the Settlement Agreement in December 2021.

146. I do not agree, therefore, that Peter has been prejudiced, in any way, as a result of the procedure adopted which, was extremely flexible and enabled the judge to resolve, fairly and expeditiously, the disputed issues of interpretation between the parties so as to enforce the Settlement Agreement, consistent with the public interest, discussed earlier, in promoting the settlement of proceedings. That flexibility was vividly demonstrated by the willingness of the judge to depart from an overly formalistic approach and accept additional evidence tendered by the parties by agreement during the course of the hearing.

147. I found Peter's claims of prejudice to be somewhat hollow and unreal in light of how the application to enforce the settlement proceeded in the High Court. Once the judge had given his ruling, on 19th February, 2021, as to the appropriateness of the re-entry procedure, Peter made no mention of the issue in any of the subsequent affidavits which he swore for the purpose of Martin's application to enforce the Settlement Agreement.

148. Nor did Peter mention the point, at all, in his written submissions before the High Court: It is not mentioned as one of the issues arising in the case (paras. 2.1 and 2.2 of those submissions). Nor is it mentioned elsewhere in the submissions, including in the conclusion section (paras. 4.01 to 4.07). His written submissions did, however, deal fully with Peter's objections to the interpretation of the Settlement Agreement advanced by Martin, including Peter's argument that, if the agreement was to be so interpreted, it would point towards the absence of a *consensus ad idem* (para. 3.38). The procedural objection was not advanced at the hearing before the High Court and no claim of prejudice or of an inability to make his case by virtue of the procedure adopted by the court was made by Peter at that hearing. In summary, while Peter did initially object to the procedure adopted, he did not persist in that objection and only sought to revive the point when putting in his appeal to this Court. In my view, the judge correctly found that the objection was unfounded in his ruling on 19th February, 2021, and I note that both parties proceeded on the basis of the procedure endorsed by the judge in that ruling and that Peter made no objection as to the fairness or appropriateness of that procedure until after he lost on the substantive issue.

149. In conclusion, the judge correctly decided, in his ruling on 19th February, 2021, that the re-entry procedure was an appropriate one to adopt for the purposes of enforcing the Settlement Agreement, and that it was a procedure which enabled the advancement of the public interest in the promotion and enforcement of settlements. No claim of prejudice was advanced by Peter at the time. Nor has any prejudice been demonstrated by him on this

appeal. I have no hesitation, therefore, in dismissing that part of his appeal concerning the procedure adopted in the High Court.

(3) The Substantive Issue: Proper Construction of the Settlement Agreement

150. There were two parts to Peter’s appeal on substantive grounds. First, he complained that the judge ought not to have taken into account, in interpreting the Settlement Agreement and, in particular, in determining whether Peter’s entitlements under the two resolutions were compromised or released, the absence of any reference to those entitlements in either (i) IJM’s financial statements for 2017 and 2018, or (ii) the BDO valuation of November 2019, without expert financial or accounting evidence. Second, Peter contended that the judge misapplied the relevant principles in interpreting the Settlement Agreement, and, in particular, in interpreting the agreement as providing for the compromise or release of those entitlements. I will deal with those grounds in reverse order.

(a) Misapplication of Principle/Misinterpretation of the Settlement Agreement

151. In addressing this part of Peter’s appeal, the first and most obvious point to stress is that Peter agreed that the judge correctly identified and summarised the legal principles applicable to the interpretation of the Settlement Agreement. He did not suggest that the judge failed to identify or refer to any legal principle relevant to the interpretation of that agreement. Martin, too, agreed that the judge had correctly identified and summarised those principles.

152. I have already expressed my full agreement with the judge’s summary of those principles and gratefully adopt them as the relevant principles to be applied in interpreting a written agreement, such as the Settlement Agreement at issue in this case. Those principles, as identified and summarised by the judge (at para. 9 of the judgment), are as follows:

“(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 Requirement 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.’”

153. To add to that summary, and to expand briefly on the importance of context and of considering the agreement as a whole when carrying out the interpretation exercise, I would merely highlight a few passages from the (majority) judgment of O’Donnell J. in the *MIBI* case.

154. At para. 6 of his judgment, O’Donnell J. stated that the meaning of a term in an agreement must be “*determined from a consideration of the Agreement as a whole*” and “*not an interpretation in which some aspects win out over others*”. He continued:

“Rather it is a case of providing an interpretation of the Agreement as a whole, which not only relies on those features supportive of the interpretation, but also most

plausibly interprets the entire Agreement and in particular those provisions which appear to point to a contrary conclusion. Even if the majority of factors appeared to tend broadly to one side of the argument, that interpretation cannot be accepted if it is wholly and fundamentally irreconcilable with some essential features... It is important therefore to test any interpretation of a clause against the understanding of the agreement to be gleaned from what is said, and sometimes not said, elsewhere in the agreement.”

155. In explaining the importance of context, O’Donnell J. stated (at para. 12):

“It is not merely therefore a question of analysing the words used, but rather it is the function of the court to try and understand from all the available information, including the words used, what it is that the parties agreed, or what it is a reasonable person would consider they had agreed. In that regard, the Court must consider not just the words used, but also the specific context, the broader context, the background law, any prior agreements, the other terms of this Agreement, other provisions drafted at the same time and forming part of the same transaction, and what might be described as the logic, commercial or otherwise, of the agreement. All of these are features which point towards the interpretation of the agreement, and in complex cases, a court must consider all of the factors, and the weight to be attributed to each. The reasonable person who is the guide to the interpretation of the agreement is expected not merely to possess linguistic skills but must also have, or acquire, a sympathetic understanding of the commercial or practical context in which the agreement was meant to operate...”

156. In interpreting the Settlement Agreement in order to determine whether, as properly interpreted, the plaintiff’s entitlements to the exit and loyalty payments from IJM and under the two resolutions passed at the EGM in December 2017, the judge carefully, meticulously

and comprehensively applied those principles which he had summarised, and was clearly conscious of the direction given by O'Donnell J. in the passages from his judgment in the *MIBI* case which I have just quoted. The approach adopted by the judge was a textbook example of the correct application of those principles. The judge made clear, at many points throughout his judgment, that, even where he was satisfied that the words used in the critical provisions of the Settlement Agreement, such as Clauses 1 and 25, were broad enough to encompass a compromise or release of those entitlements, he did not rest his conclusion on the ordinary meaning of those words (such as the words "*parties*" and "*claims*") but went on scrupulously to consider the entirety of the agreement and how and whether an interpretation of those words in accordance with their ordinary meaning would sit with the other terms of the agreement and also whether such an interpretation was consistent with the relevant context or factual matrix in which the agreement was made.

157. The judge carefully identified those elements of the relevant context or factual matrix which might not, in themselves, have provided support for the interpretation of the critical clauses of the agreement suggested by the ordinary meaning of the terms used. One example of this is the fact that the judge considered it to be very relevant that Martin had not challenged the relevant parts of the two resolutions passed at the EGM in December 2017 in his s. 212 proceedings. Another is the judge's acceptance that, on one view at least, some of the clauses in the agreement might not have allowed for the same meaning to be given to the term "*parties*" (such as Clauses 5 and 14) as in other clauses (such as Clauses 1 and 25).

158. At each stage, the judge clearly explained, in the most transparent way, the process by which he reached his ultimate conclusion on the proper interpretation of the Settlement Agreement by reference to the ordinary meaning of the terms used in the two most critical provisions of the agreement (Clauses 1 and 25) and in other provisions of the agreement, as well as the context and factual matrix in which the agreement was made. I am satisfied that

the judge did precisely what was required of him by the legal principles set out in the case law which he identified and that he was assiduous in his application of those principles.

159. Having carefully considered the judgment in light of all of the complaints made by Peter, I can find no error in the judge's interpretation of the Settlement Agreement or in the process by which he came to the conclusion that Peter's entitlements under the two relevant resolutions were compromised or released by virtue of Clauses 1 and 25 of the Settlement Agreement.

160. As the judge correctly noted at various points throughout this judgment, Clauses 1 and 25 of the Settlement Agreement are of "*critical importance*" to the issue as to whether Peter's entitlements under the resolutions were compromised or released. I completely agree with the approach taken by the judge to the interpretation of those clauses and with his conclusion as to their correct interpretation. I agree with the judge's interpretation of the term "*parties*" in those clauses as referring to Martin, Peter, IJM and MHL, for the same reasons outlined by the judge.

161. Clause 1 contains a comprehensive agreement by those parties on a "*full and final settlement*" of all matters the subject of the s. 212 proceedings and the subject of the two other proceedings brought by Peter against Martin and MHL respectively. The clause did not stop there as it made clear that it also contained an agreement by those parties for the "*full and final settlement*" of "*any and all claims or disputes between the parties as of the date hereof*". MHL clearly agreed to be party to the Settlement Agreement (under Clause 2), and, in doing so, agreed to be bound by the terms of the agreement and all parties to the agreement expressly confirmed that the term "*parties*" included MHL. Clause 3 necessarily involved IJM being a party to the agreement as it imposed an obligation on the parties to apply for a consent order cancelling the issue of the 500,000 IJM shares and for the consequent reduction

of IJM's share capital. There is nothing incongruous about IJM being a party to the agreement in circumstances where it was to be the subject of that consent order.

162. Returning to the reference to the full and final settlement of "*any and all claims or disputes between the parties*" as of the date of the Settlement Agreement, I agree with the judge that it is clear that the parties did intend to settle more than the matters the subject of the s. 212 proceedings and the other proceedings referred to in Schedule 1.

163. I also agree with his conclusion that the term "*claims or disputes*" is used disjunctively with those words being alternatives rather than synonyms of the other. The judge reached that conclusion, not only on a plain construction of those words, but also having considered the relevant context. In my view, the judge correctly rejected Peter's submission that the principle *noscitur a sociis* applied. I agree with the judge's interpretation of the "*claims*" as encompassing an undisputed but unsatisfied right of Peter to the exit and loyalty payment provided for in the resolutions. In his written submissions on the appeal, Peter acknowledged that the word "*claim*" could bear that meaning in an appropriate context, albeit that he suggested that the Settlement Agreement at issue here did not provide such a context. I do not agree. I am satisfied that the judge was fully entitled to reach the conclusion he did as to the meaning of the word "*claim*" or "*claims*" and his conclusion was supported by the plain meaning of the word when used in Clause 1 and in other provisions of the Settlement Agreement (including, most significantly Clause 25) and by reference to the Canadian case law to which the judge referred at para. 67(c) of the judgment. I agree with his conclusion that the words "*claims or disputes*" in Clause 1 were intended to cover not only rights but also matters which were the subject of active dispute between any of the parties to the agreement.

164. Finally, insofar as the meaning of the term "*parties*" is concerned, the fact that each of Martin, Peter, IJM and MHL signed the Settlement Agreement as "*parties*" under the

introductory words *“IN WITNESS WHEREOF the parties have hereunder set their hands...”* provides powerful and convincing support for the judge’s conclusion that all four signatories were parties to the Settlement Agreement.

165. I am also in full agreement with the judge’s interpretation of the other clause of *“critical importance”*, namely, Clause 25. That clause copper-fastened the comprehensive nature of the settlement between the parties and contained the agreement of those parties that they had *“no further claims whatsoever against each other”*, a phrase clearly wide enough to cover a compromise or release of Peter’s entitlements under the resolutions. Clause 25 did not, however, stop there. It went on to provide that performance of the Settlement Agreement would constitute *“full and final settlement of all outstanding matters between the parties hereto as of the date hereof”*. Again, extremely wide and expansive terms were used in the clause. The references to *“the parties hereto”* and to the *“date hereof”* were correctly interpreted by the judge as being clearly intended to refer to those who signed the Settlement Agreement as parties on that date. As if that were not enough, Clause 25 went on to record that the parties expressly agreed that there were *“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”*. Having correctly interpreted the term *“claims”* as including an undisputed but unsatisfied right or entitlement of Peter to the payments provided under the resolutions, the judge then attached significance to the fact that the parties used the phrase *“any of the parties”* and not *“either of the parties”*. He rightly attached significance to the use of *“any”* rather than *“either”* which would have been more appropriate if Clause 25 was intended only to refer to Peter and Martin and not also to IJM and MHL. The comprehensive nature of the clause and its clear and unambiguous application to all four signatories of the agreement is further strengthened by the use of the phrase *“any associated companies...”*. That must clearly have been intended to be a reference to companies which

were “*associated*” with one or both of the two companies which signed the Settlement Agreement, namely, IJM and MHL.

166. The judge was entitled to draw support from the dicta of the Law Lords, Lord Nicholls, in particular, in the decision of the House of Lords in the *BCCI* case. I agree with his conclusion that Lord Nicholls’ observations (at para. 23 of his opinion) are apposite here. Lord Nicholls stated:

“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.”

167. Having considered, in great detail, the context in which the Settlement Agreement was entered into, namely, the intention of bringing a pre-existing, troubled, intra-familial relationship to an end, the judge was entitled to draw the conclusion that the Settlement Agreement was of the type referred to by Lord Nicholls in that quotation. The judge was also correct in distinguishing the facts of the *BCCI* case from the present case, as involving a claim which neither party could realistically have foreseen at the time of entering the agreement, which led the court to find that the parties could not have intended for the releases provided for in the relevant agreement to apply to those claims. The judge rightly concluded that that was not the case here as Peter and Martin were well aware, at the time of entering the agreement, of the resolutions passed at the EGM in December 2017, and it could not be said that Peter’s claims on foot of those resolutions could not have been contemplated by the parties at the time of the Settlement Agreement.

168. As I have explained earlier, the judge did not rest his conclusion as to the proper interpretation and scope of the Settlement Agreement solely on the ordinary words used in the critical clauses, Clause 1 and 25, but, as he was required to do, looked at the agreement as a whole and carefully considered the relevant context and factual matrix, including those

clauses and those parts of the context which might appear to point to a contrary conclusion. He was very careful to outline throughout his judgment those provisions of the agreement and those parts of the context relied on by Peter as suggesting that a more limited and restricted interpretation should be given to the agreement. The examples set out below are merely illustrative in that respect.

169. In considering whether the word “*parties*” should be given a more limited meaning, as applying only to Martin and Peter, the judge considered that some support for the more limited meaning could be derived from Clauses 5 and 14 but, nonetheless, concluded that the failure by the parties to be more careful in those clauses could be attributed to the sort of “*internal inconsistencies*” which are “*not infrequently encountered*” in agreements such as this or the sort of “*linguistic mistake*” to which Lord Hoffman referred in the *Investors Compensation* case. While I am not so sure that Clause 5 or paras. (a) and (b) of Clause 14 could not properly be interpreted as including IJM and MHL, even if those provisions could not properly be so construed, the judge’s conclusion that internal inconsistencies can often arise in Settlement Agreements is plainly correct. I agree with his conclusion that the looser language in Clauses 5 and 14 does not trump the wide and expansive language in Clause 1 and 25, when the entire agreement is considered and where the context within which it was entered into is carefully factored into the analysis. In that regard, the judge rightly considered that other provisions in the Settlement Agreement such as Clauses 4 to 13, 16, 17, 18, 21 and 23 were all consistent with the intention of bringing lengthy disputes and differences to an end and “*drawing a line in the sand*”.

170. The judge fully took on board Peter’s point that it was necessary, as part of the context, to consider the confined nature of Martin’s s. 212 proceedings when considering whether the Settlement Agreement could be interpreted as compromising or releasing other claims which were not the subject of those proceedings. The judge adverted to that point on

numerous occasions throughout the judgment and addressed the point squarely at para. 89(e). He made the simple and incisive point that this consideration would have had “*very substantial weight*” if the parties to the Settlement Agreement had limited Clauses 1 and 25 of the Settlement Agreement to refer to the settlement of all matters in dispute in those proceedings. However, they did not do so but used the very broad and expansive language in Clauses 1 and 25 to which I have referred earlier. I agree with that analysis.

171. Having adopted the correct approach in interpreting the Settlement Agreement, the judge then asked and, in my view, correctly answered the question as to whether a reasonable person in the position of the parties would conclude that the Settlement Agreement was intended to prevent Peter from pursuing his apparent entitlements to the exit and loyalty payments under the resolutions when the validity of those resolutions had not been questioned by Martin in his s. 212 proceedings. The judge’s conclusion that a reasonable person would have so concluded is convincingly reasoned at paras. 89(c) and (d) of his judgment. I agree with his conclusion.

172. As regards Peter’s contention that the interpretation of the Settlement Agreement as including a compromise or release of Peter’s entitlements under the two resolutions lacks coherency in light of the fact that the salary and other remuneration entitlements of the directors were not affected by the Settlement Agreement, I believe this is answered by the judge in his analysis of Clause 15 of the Settlement Agreement. It will be recalled that that in Clause 15, the parties agreed that there would be no disposition of the assets of IJM and MHL pending the sale of those assets envisaged by the agreement “*save in the ordinary course of business*”. The judge concluded that the reference to “*the ordinary course of business*” plainly envisaged that the business of those companies was to continue pending their sale and that the clause did not appear to have been intended to prevent the payment of salaries on an ongoing basis and ordinary day-to-day debts. In other words, the agreement as construed by

the judge, far from lacking coherency, made provision for such payments. Clauses 1 and 25 made provision for the settlement of claims or disputes in very wide terms. Those clauses were correctly construed by the judge as extending to Peter's entitlements under the two resolutions. I do not believe that the judge's interpretation of those two clauses would apply to the payment of salaries or other remuneration in circumstances where such payments were found to be clearly intended to be covered and carved out by the saver contained in Clause 15 permitting payments to be made "*in the ordinary course of business*" of the two companies.

173. Finally, I reject Peter's contention that the judge placed inappropriate reliance on Recital 2 of the Settlement Agreement. Peter maintained that the reason for reciting the loan due by him to IJM in that recital was *sui generis* and did not assist in the construction of the agreement. However, I agree with the reasons provided by the judge for concluding that the recitals (including Recital 2) were important (see paras. 62 to 64 of the judgment). I also agree with what the judge stated at para. 89(b) that it is difficult to understand why Peter would acknowledge, in Recital 2, that there was a loan of €900,000 due to IJM if it were intended that he would assert a claim against IJM for a much larger amount under the two resolutions. I also agree with the judge's conclusion that, had it been the intention of the parties that Peter could maintain such a claim notwithstanding the wide terms of the Settlement Agreement, it is very difficult to see why such an intention was not separately recorded in the recitals. I see no basis, therefore, for criticising the judge's reliance on Recital 2 in reaching his conclusions as to the proper interpretation of the Settlement Agreement.

174. In conclusion, therefore, I am satisfied that the judge correctly identified and applied the correct legal principles in interpreting the Settlement Agreement, and reject Peter's submissions to the contrary. I completely agree with the judge's interpretation of the Settlement Agreement.

(b) Reliance on IJM's Financial Statements and BDO Valuation without Expert Evidence

175. I am satisfied that there is no basis for Peter's complaint that the judge ought not to have considered as significant, in his interpretation of the Settlement Agreement, the fact that neither IJM's financial statements for 2017 and 2018 nor the BDO valuation of IJM obtained by Peter made any reference to Peter's entitlement to the exit and loyalty payments under the two resolutions, without the benefit of expert financial advice.

176. The judge did consider that it was significant that the IJM financial statements for 2017 and 2018 did not refer to Peter's entitlements under the resolutions (he did not take into account a similar omission from IJM's financial statements for 2019 as they were not available at the time of the conclusion of the Settlement Agreement). The judge described it as "*striking*" that the contingent liabilities (which would include Peter's entitlements under those resolutions) were not noted in those financial statements. He also regarded it as "*telling*" that the BDO valuation report made no reference to, or adjustment for, the liabilities which would arise on foot of those resolutions. The judge explained why he felt those omissions were relevant as forming part of the context and relevant factual matrix against which he had to determine the proper interpretation of the Settlement Agreement and in reinforcing what he had concluded was the proper interpretation of the Settlement Agreement as providing for a compromise or release of those entitlements.

177. As I noted earlier, Martin had exhibited the IJM financial statements for 2017, 2018 and 2019, to the various affidavits which he swore in support of his application. He averred, at para. 12 of his affidavit of 23rd March, 2021, that the 2019 financial statements made no provision for any additional remuneration to Peter on foot of the resolutions. Peter did not address that issue in the subsequent affidavit he swore on 13th April, 2021. Martin also relied on the absence of any reference to any debt of IJM on foot of those resolutions in IJM's

accounts at para. 61 of his written submissions in the High Court. Peter did not address that issue in his submissions.

178. Martin's counsel referred to the accounts at the hearing before the High Court and drew attention to the absence of any reference in the accounts to any liability of IJM to Peter on foot of those resolutions (see High Court transcript of 21st April, 2021, pp. 23 – 37).

Peter's counsel referred to the accounts in his reply (commencing on p. 87 of the transcript). He did so primarily to demonstrate that it was not correct to rely on the net asset value of IJM and sought, in that context, to refer to the Crowe valuation which had been obtained by Martin for the purpose of the s. 212 proceedings (dated 8th November, 2019) and which noted that a net asset value approach was not appropriate in the circumstances. The judge then indicated that it would be helpful to receive the valuation of IJM which Peter had obtained, namely the BDO valuation. It was agreed that both valuations would be provided to the court. The judge was prepared to allow the parties to exhibit those reports in a further affidavit but the parties agreed that the reports could go into evidence without the need for any affidavit (High Court transcript p. 122). There was no qualification on the terms in which the judge was provided with the two valuation reports. Peter did not suggest that the judge should not rely on anything said in those reports without expert evidence. He did not object to the judge considering those reports.

179. Peter's counsel also addressed the IJM financial statements in his reply. He said:

“Mr. MacCann [Martin's counsel] has opened the accounts. It is not in the contingent liabilities. The question is, whether should it ought it to be. That's in FRS21, whether or not there is a real or present prospect of payment. But it is what it is. There is no reference to the 1.5 in it and that's a fact that the court takes into account or not takes into account in the context of what is now being urged by [Martin] as to

why it should be disallowed or why we in some way compromise that claim.” (High Court transcript, pp. 95 – 96)

180. It was not suggested on behalf of Peter that the judge could not consider the IJM’s accounts without expert financial or accounting evidence. On the contrary, the financial statements which had been exhibited to Martin’s affidavits were the subject of argument before the High Court, and it is clear from the submission made by Peter’s counsel that Peter was content for the judge to draw whatever conclusion he felt appropriate from what was and was not referred to in the accounts. Peter had every opportunity to object to Martin’s reliance on the accounts and the absence of any reference to Peter’s entitlements under the resolutions in those accounts. He could have done so by way of replying affidavit or in written submissions or when replying at the hearing in the High Court but he did not. Instead, he produced the Crowe valuation report and sought to make submissions on it and to respond to the submissions made on behalf of Martin in relation to the accounts. There is, in my view, no basis for Peter’s complaint that the judge attached significance to the omission of any reference to his entitlements under the resolutions in the IJM accounts or in the BDO valuation (which the judge was provided with at his request) without the benefit of expert financial advice. I am satisfied that the judge made no error of judgment and no injustice was caused to Peter in the judge’s consideration of those matters when considering the context within which the Settlement Agreement was reached and to reinforce what he regarded as the proper interpretation of the Settlement Agreement. I would, therefore, also dismiss this aspect of Peter’s appeal.

11. Conclusions

181. In conclusion, I would dismiss Peter’s appeal in its entirety. I agree with the trial judge’s conclusions both as to the procedural approach he adopted in determining Martin’s application to enforce the Settlement Agreement and as to the substantive issue of the proper

interpretation of the Settlement Agreement. I am satisfied that the judge correctly interpreted the Settlement Agreement as including a compromise or release of the entitlements Peter had to the payments provided for in Resolutions 2A and 2B passed at the EGM of IJM in December 2017. In my view, there is no error of principle in the judge's determination of Martin's application and no injustice has been caused to Peter as a result of that determination. I would, therefore, dismiss Peter's appeal in its entirety.

12. Provisional View on Costs

182. As Peter, the appellant in this appeal, has been entirely unsuccessful in his appeal, and as Martin, as the respondent to the appeal, has been entirely successful, it is my provisional view that, having regard to the provisions of s. 168 and s. 169 of the Legal Services Regulation Act 2015, and O. 99 of RSC, Martin should be entitled to his costs of the appeal as against Peter. If Peter wishes to dispute this provisional view on costs or to seek any other order, he should so indicate in writing to the registrar within seven days from the electronic delivery of this judgment and the court will list the matter for a short hearing at 9.45 am on 14th June, 2024, to make final orders. In default of any such application, the costs order will be made in accordance with my provisional view.

183. Faherty J. and Ní Raifeartaigh J. have confirmed their agreement to this judgment and to the orders I have proposed.