THE HIGH COURT

COMMERCIAL

[2024] IEHC 674
Record No. 2016/5037P

BETWEEN

VICTORIA HALL MANAGEMENT LIMITED

PALM TREE LIMITED

GREY WILLOW LIMITED

ALBERT PROJECT MANAGEMENT LIMITED

O'FLYNN CAPITAL PARTNERS

O'FLYNN CONSTRUCTION (CORK)

PLAINTIFFS

- AND -

PATRICK COX

ROCKFORD ADVISORS LIMITED

LIAM FOLEY

FOLEY PROJECT MANAGEMENT LIMITED

EOGHAN KEARNEY

CARROWMORE PROPERTY LIMITED

CARROWMORE PROPERTY GARDINER LIMITED

CARROWMORE PROPERTY GLOUCESTER LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Michael Quinn delivered on the 26th day of November 2024

Table of Contents

PART ONE: INTRODUCTION

1. The defendants developed a student accommodation scheme at Gardiner Street, Dublin. By the time the scheme had been completed in 2017 they earned profits after tax of €11.33m. The opportunity for the development came to the first named defendant, Patrick Cox on 28 February 2014, when he met with an architect, Mr. John Fleming, who had information about the Gardiner Street site and its suitability for student accommodation which he shared with Mr. Cox. At that time Mr. Cox was employed in the O'Flynn Group of companies, of which the sixth named Plaintiff was one. He was also providing services to non-group companies, including the first named plaintiff, Victoria Hall Management Limited ("VHML"), and others. He had come to know Mr. Fleming during his time working for the O'Flynn Group. The plaintiffs claim that at the time when he learned of and took the

Gardiner Street opportunity, Mr. Cox held a senior and trusted position in them and that he was under a duty to disclose to them such an opportunity and not to divert it and the profits earned to himself and others.

2. The plaintiffs claim also that in breach of contract and breach of duty the first named defendant appropriated and used confidential documents and information of the plaintiffs which he shared with his co-defendants, and which was used in progressing the Gardiner Street project and for their other purposes.

3. The core of the contractual claim is that Mr. Cox was an employee whose duties included a duty of fidelity. Mr. Cox's direct employer was Tiger Developments Limited, a company in the O'Flynn Group, and which is not a plaintiff. There is a dispute as to whether Mr. Cox performed functions for the plaintiffs pursuant to that employment contract or in a different capacity. The plaintiffs make an alternative claim that if and in so far as the relationship between them and Mr. Cox is characterised as a "consulting or other arrangement" he owed fiduciary duties "arising from his senior and trusted role".

4. The claims against the third named defendant Mr. Foley and the fifth named defendant, Mr. Kearney relate principally to the use of confidential documents taken from the plaintiffs by Mr. Cox and shared with them. It is alleged that they knew or ought to have known that Mr. Cox was acting in breach of duties owed to the plaintiffs. Although Mr. Foley and Mr. Kearney had previously been employees of the sixth named plaintiff, O'Flynn Construction (Cork), they were no longer employed by that company, or any of the plaintiffs, in any capacity when the Gardiner Street project was first mooted.

5. The second and fourth named defendant are companies owned by the first and third named defendant respectively.

6. The remaining corporate defendants, the sixth, seventh and eighth defendants are the companies in which Mr. Cox, Mr. Foley and Mr. Kearney are directors and shareholders and which were used as their vehicle to develop Gardiner Street.

7. The plaintiffs seek declarations that the defendants acted in breach of contract and/or breach of duty by failing to disclose the profitable Gardiner Street project and by diverting profits earned therefrom.

8. The plaintiffs claim declarations that the profits of Gardiner Street are held in trust for them and orders directing the defendants to account to them for those profits.

9. The plaintiffs claim also a declaration that they are the owners of documents which they allege were wrongfully taken from them.

10. Damages are sought for breach of contract, breach of duty, breach of confidentiality, breach of trust, breach of fiduciary duty, conspiracy, inducement of breach of contract, intentional interference with the plaintiffs' contractual and commercial relations and/or interference with the plaintiffs' economic and commercial interests.

11. The defendants plead the following.

12. Firstly, each of the defendants denies that it owed to the plaintiffs any of the contractual or other duties relied on by the plaintiffs. Mr. Cox pleads that he was employed in the O'Flynn Group, of which the first to fifth plaintiffs were never members. He says that his relationship with these plaintiffs was never more than that of a consultant, for which he was paid 'consultancy' or 'advisory' fees only, and that he did not owe to the plaintiffs any of the duties pleaded by them.

13. Secondly, that before pursuing the Gardiner Street project Mr. Cox had obtained the consent of his then employer, Tiger Developments Limited, to undertake commercial property development in Dublin on his own account. Mr. Cox claims that this consent was given orally in discussions between him and the managing director of Tiger Developments Limited, Mr. John Nesbitt and that the consent was confirmed in a letter dated 14 July 2014, signed by Mr. Nesbitt.

14. Thirdly, the defendants admit that documents were taken by Mr. Cox and circulated among them. They claim that with certain exceptions the documents were not confidential or

proprietorial and say that these documents were not used or required by them to undertake the Gardiner Street development.

15. Fourthly, the defendants claim that it has not been proved that any of the plaintiffs would have had the capacity to develop the Gardiner Street scheme or would have developed it.

16. Fifthly, the defendants plead that in the manner of their dealings with the National Asset Management Agency ("NAMA") the plaintiffs acted in breach of the NAMA Act 2009 and otherwise acted unlawfully and are therefore not entitled to any relief. They plead that the plaintiffs are estopped from claiming relief, that it would be contrary to public policy to grant relief and that the court should exercise its discretion to refuse relief in the light of the conduct of the plaintiffs. Only one of the plaintiffs, namely the sixth named plaintiff was ever a NAMA obligor, being a member of the original O'Flynn Group of companies, about which more detail is provided later in this judgment.

17. This defence, referred to by the parties as 'the NAMA Defence', is grounded on an allegation that the first four named plaintiffs were party to and benefited from a transaction in 2012 whereby two sites, one in Birmingham and one in Coventry, England, held by an O'Flynn Group company indebted to NAMA, Victoria Hall Limited ("VHL", which is not to be confused with VHML), which is not a party to these proceedings, were sold at an undervalue, thereby depriving NAMA and the Irish taxpayer of the true value of these assets. It is said that those plaintiffs, or persons having control or ownership thereof, failed to disclose to NAMA the financial benefits and profits which flowed from the sale transaction to their shareholders who were themselves directors and shareholders of NAMA indebted entities in the O'Flynn Group.

18. It is alleged that, in an act of theft, the plaintiffs caused VHL to bear planning fees and other costs to the benefit of the plaintiffs and their shareholders and that all of this was concealed from NAMA.

19. Fraud was not pleaded, and the defendants never applied for leave to amend the Defence to add a plea of fraud.

20. In written legal submissions delivered before the trial the allegation of unlawful conduct and of concealment was elevated to an allegation that the transaction relating to Birmingham and Coventry was fraudulent.

21. In "Supplemental Replies to Particulars" delivered on 3 March 2021, long after the trial of this action had commenced and during the course of a long interruption in the trial, the defendants alleged that the plaintiffs had acted "in fraud of NAMA".

22. The plaintiffs deny these allegations. They say also that there is no immediate and necessary connection between the matters alleged in the "NAMA defence" such as would warrant refusal of the reliefs claimed.

23. Sixthly, the defendants submit that in the manner in which the plaintiffs have presented their case they sought to mislead the court about the circumstances in which the plaintiffs were established, the relationship between the plaintiffs and the O'Flynn Group and other important facts and have in their presentation relied on fabricated and false evidence.

24. The plaintiffs say that the allegations of illegality and fraud are improper, scandalous, frivolous, vexatious and an abuse of process and that the court should mark its disapproval by awarding them aggravated damages.

This Judgment

25. For the reasons stated in this judgment I have concluded the following:

1. The first named defendant, Mr. Cox, was a fiduciary of the plaintiffs.
2. Mr. Cox acted in breach of his fiduciary duties when, without the consent or approval of the plaintiffs, he concealed from the plaintiffs the opportunity to develop the Gardiner Street scheme and diverted its profits to himself and his co-defendants.

3. In taking documents and information of the plaintiffs without their consent, retaining them for a year after his resignation from the O'Flynn Group, returning them when called on to do so after the plaintiffs learned of the taking, and sharing of documents and information with his co-defendants, Mr. Cox acted in breach of his fiduciary duties.
4. No cause of action has been made out against the third to eighth named defendants.
5. The sale of sites at Birmingham and Coventry by Victoria Hall Limited, which is not a plaintiff, is not closely or necessarily connected to the events which ground the plaintiffs claims against the defendants.
6. The plaintiffs did not act illegally or fraudulently in the transaction for the sale of sites at Birmingham and Coventry, or otherwise.
7. The plaintiffs did not mislead the court or give false or fabricated evidence, and I reject the allegation that they acted dishonestly in the presentation of their case.
8. The court will declare that the first and second named defendants have at all times held the profits of the Gardiner Street scheme on trust for the plaintiffs and will order that those defendants account to and pay the said profits to the plaintiffs together with interest.
9. Insofar as the first or second named defendants are not entitled to or have not received profits of the Gardiner Street scheme the remedy will be an order against them for damages for breach of fiduciary duty equivalent to the full profits of the scheme.
10. I am not persuaded that the conduct of the defendants warrants an award of aggravated damages.

26. The introduction above is of necessity an oversimplification. Very few facts or propositions of law are admitted or agreed. To understand the issues which the court needed to determine it is necessary to outline the history of the O'Flynn Group of companies and

events which occurred after its loans were acquired by NAMA in April 2010, which includes the establishment and operation of the plaintiffs themselves.

27. I then consider the following:

a. The establishment and operation of the plaintiffs.

b. The relationships between the plaintiffs and the O'Flynn Group.

c. The relationship between the plaintiffs and the defendants.

d. The role and actions of the defendants, including the Gardiner Street project.

e. The claim by the defendants that the plaintiffs were aware of Mr. Cox's intention to pursue a commercial property in Dublin and approved of him doing so, thereby releasing him from any duty to disclose Gardiner Street and any duty not to divert it for his own benefit or for the benefit of others.

f. The Birmingham and Coventry transaction, including the question of whether it relates to or is connected to the plaintiff's claims against the defendants.

g. The defendants' claims that the plaintiffs have presented fabricated evidence at the trial.

28. Before examining the issues, I shall describe in more detail the case as pleaded.

PART TWO: THE PLEADED CASE

Statement of claim

29. In the statement of claim the plaintiffs allege that Mr. Cox, Mr. Foley and Mr. Kearney were all former employees of *"the plaintiffs and/or other entities within the O'Flynn Group of companies"*. The plaintiffs allege the following:-

> *"(a) Mr. Cox actively competed with them, concealed and diverted significant investment opportunities for his own benefit and the benefit of the other defendants, and appropriated and/or failed to return and used a substantial*

amount of confidential documentation relating to the business of the O'Flynn Group.

(b) Mr. Foley and Mr. Kearney appropriated and/or failed to return confidential documentation relating to the business of the O'Flynn Group".

30. In Replies to Particulars requesting the identity of companies in the O'Flynn Group the plaintiffs furnished the overview page of a structure chart. The only plaintiff referenced in that chart is the sixth named plaintiff. None of the other plaintiffs were members of the Group. It was stated in the Replies that they were companies associated with the Group.

31. It is alleged that the actions, omissions and knowledge of Mr. Cox, Mr. Kearney and Mr. Foley are attributable to Carrowmore Property Limited (*"Carrowmore"*).

32. It is pleaded that between 2010 and 2015:-

"Companies within the O'Flynn Group were not in a position to take up opportunities in the U.K. and Irish property markets because of investment and salary restrictions imposed by NAMA. To pursue such opportunities and to retain certain employees, the directors of the O'Flynn Group sought other opportunities for the relevant employees, including Mr. Cox, and established companies that it was envisaged would work in co-operation with the companies in the O'Flynn Group in the future.

To this end between 2010 and 2014 O'Flynn Capital Partners Limited, VHML, APML, Palm Tree Limited and Grey Willow Limited were established with a view to taking up investment opportunities available in the market".

33. The statement of claim recites Mr. Cox's employment contract and pleads that the following were express and/or in the alternative implied terms of that contract *"and/or the following duties were owed by Mr. Cox to the plaintiffs and each of them".*

34. The terms and duties pleaded are as follows:-

(a) That pursuant to clause 2.2 Mr. Cox owed a duty to find *"new leads"* for discussion and eventual approval, to bring investors to the O'Flynn Group and to

execute deals on behalf of the Group and to perform other ad hoc duties associated with the role of Investment Director.

(b) That Mr. Cox agreed to be flexible in his position and to undertake other work or duties assigned to him by Tiger Developments for it or any associated companies (emphasis added).

(c) That pursuant to clause 16 of the contract Mr. Cox was prohibited from engaging in *"other interests"* during working hours and that outside working hours he was prohibited from engaging in any business or employment without the prior written consent of Tiger Developments.

(d) That pursuant to clause 15 of the contract Mr. Cox owed duties of confidentiality to the entire O'Flynn Group which duties it is alleged persisted after the termination of Mr. Cox's employment and breaches of which it is alleged were actionable *"by the Group"* (emphasis added).

(e) That Mr. Cox was obliged on termination of his employment to return all documents, papers, notes of any description or other property belonging to "the company" which may be in his possession or control, and which relate to the affairs of "the company" and that he must not retain copies of such documentation.

(f) That pursuant to clause 14 Mr. Cox was subject to restrictive covenants for three months after termination of the contract. In particular that he agreed not to solicit or canvas the custom of any client or deal with any client or any other person with whom he had business contact during his employment.

(g) That Mr. Cox *"owed and continues to owe a fiduciary duty and/or duty of loyalty and confidentiality to the O'Flynn Group and to the plaintiffs individually".* (Emphasis added).

35. At para. 20 the plaintiffs plead as follows:-

"While the Cox Contract of Employment was formally concluded by Tiger Developments, Mr. Cox's role was primarily connected to the Victoria Hall division of the O'Flynn Group's business and, in later years to the Plaintiffs. Mr. Cox was described as a 'Partner' of O'Flynn Capital Partners Limited and a 'Director (Investment)' of VHML. Further in and around 2014 Mr. Cox was specifically tasked with sourcing investment opportunities, particularly student accommodation opportunities, in Dublin to be developed by O'Flynn Capital Partners, in association with O'Flynn Construction (Cork) and managed by VHML. Between 2012 and 2015 payments totalling approximately £810,475.58 were made by the Plaintiffs to Mr. Cox, either directly or through his nominated company Rockford".

36. In para. 21 the plaintiffs plead:-

"The Cox Contract of Employment expressly envisaged that Mr. Cox would provide services <u>to associated companies</u> (emphasis added), *other than Tiger Developments (as he did) as follows:-*

(a) Mr. Cox reported to the Managing Director for the U.K. arm of the O'Flynn Group.

(b) Mr. Cox's duties (clause 2.2) included:-

(i) Bringing investors to the Group and executing deals on behalf of the Group.

(ii) Finding new leads and bringing these to the Board for discussion.

(iii) Following through and converting leads on Board approval.

(c) Clause 2.3 required Mr. Cox to be 'flexible in your position and… prepared to undertake such other work as may be assigned to them (sic) *by the Company from time to time. You may also be transferred either on a temporary or permanent basis to other duties and to other positions within the company <u>or for any associated or subsidiary companies</u>'"* (emphasis added).

37. It is pleaded at para. 22 that the express and implied duties owed by Mr. Cox pursuant to the Cox Contract of Employment *"were owed to the plaintiffs and each of them".*

38. Para. 23 pleads as follows:-

> *"Further and/or in the alternative, if and insofar as the relationship between the plaintiffs and Mr. Cox is characterised as a consultancy or other arrangement, the said duties were express and/or implied terms of the agreement between Mr Cox and the plaintiffs and Mr. Cox owed the said duties to the plaintiffs arising from his senior and trusted role with the O'Flynn Group, his agreement to provide services to the plaintiffs and/or the payments made by the plaintiffs.*

39. Para. 23 A pleads that on 15 May 2017 Tiger Developments Limited, then known as Carbon Developments Limited assigned to the plaintiffs all of its right, benefit, interest and title to and in the Cox Contract of Employment *"together with all of the benefit of the obligations owing to Tiger Developments under the Cox Contract of Employment and all the rights and remedies and claims and demands in respect of any breach of such of obligations".* This is referred to as 'the Carbon Assignment'.

40. Mr. Cox resigned from his employment on 27 April 2015. Paragraph 24 pleads that it had been agreed that he would serve out "a three month notice period with and was paid by VHML and APML, control of Tiger Developments having been transferred to Carbon on that date".

41. Para. 25 pleads as follows:-

> *"Mr. Cox has acted in breach of contract and/or breach of duty by failing to disclose certain commercial opportunities to Plaintiffs and/or diverting certain commercial opportunities to the benefit of the Defendants or some of them and/or by appropriating and/or retaining certain documentation".*

42. Particulars are then given of the *"Gardiner Street project".* It is pleaded that Mr. Cox and Carrowmore were at the commencement of the proceedings (8 June 2016) involved in a

"€60 million, five hundred bed project on Gardiner Street in Dublin to provide housing for students from Trinity College Dublin and DIT Bolton Street" (the "Gardiner Street Project"). It is pleaded that Mr. Cox was *"actively but secretly pursuing the Gardiner Street project, contrary to the interests of the plaintiffs during the course of his employment, in breach of contract and in breach of duty".*

43. It is pleaded that Mr. Cox was aware of and actively pursued the Gardiner Street project long before his resignation and without bringing the opportunity to the attention of the plaintiffs. It is pleaded also that Mr. Cox was made aware of another student accommodation scheme in Smithfield, Dublin from at least in or about December 2013 but failed to bring that opportunity to the attention of the plaintiffs.

44. Reference is made to approaches to other investors and clients of the group.

45. It is pleaded that in breach of duties of confidentiality and his obligations to return documents on termination of his contract of employment Mr. Cox *"took and retained a vast amount of confidential materials and intellectual property of the O'Flynn Group and of the plaintiffs".*

46. Para. 25 A describes a letter dated 14 July 2014 which was signed by Mr. John Nesbitt on 8 August 2014:-

> *"The July 2014 Letter acknowledged and approved that Mr. Cox in his own right or through Rockford or any other associated companies could engage in real estate or real estate related activities in Dublin, Ireland specifically including but not limited to acquisition of land, development of land, sale of land, acquisition of residential or commercial investment properties, the redevelopment of residential or commercial investment properties and/or the sale of residential or commercial investment properties. It was further acknowledged and agreed with Mr. Cox that should any single project related investment exceed expenditure of greater than €500,000 by Mr.*

Cox, Rockford or any other associated companies, that Mr. Cox would inform Tiger Developments and seek approval, such approval not to be unreasonably withheld."

47. The plaintiffs deny that this letter had the effect of approving the pursuit by Mr. Cox of the Gardiner Street Project.

48. Paragraph 25B recites the circumstances in which the plaintiffs say this letter was signed and plead that Mr. Cox misrepresented the purpose of the letter and concealed the fact that he was already advancing a specific opportunity in Dublin, namely the Gardiner Street project.

49. Finally, the plaintiffs plead that even if the letter had the effect contended for by Mr. Cox, expenditure in respect of the Gardiner Street project exceeded €500,000 and therefore the consent does not apply to the project.

50. The claims against Mr. Foley and Mr. Kearney focus on receiving and retaining documents which the plaintiffs claim were confidential, and on conspiracy. Neither of them were still in the employment of any company in the O'Flynn Group or any of the plaintiffs at the time when the Gardiner Street development first came to their attention.

51. In para. 37 it is pleaded that the defendants *"unlawfully combined and conspired to injure the plaintiffs (or some of them) by unlawful means, namely by the unlawful acts of Mr. Cox, Mr. Kearney and Mr. Foley. The said unlawful acts were done by the persons or person on behalf of itself and of themselves and its/or their co-conspirators in furtherance of the said conspiracy".*

52. In para. 38 it is alleged that Carrowmore or its servants or agents *"well knowing the contractual and other obligations of Mr. Cox, Mr. Kearney and Mr. Foley to the plaintiffs or any of them, wrongfully induced and procured the various breaches of contract and other obligations pleaded and without justification unlawfully interfered with the contractual and other entitlements of the plaintiffs. The loss and damage claimed comprises:-*

(a) Loss of commercial opportunities

(b) Loss of valuable, proprietary intellectual property

(c) Loss of reputation and/or goodwill and/or damage to the conduct of their business".

Amended defence delivered 21 March 2019

53. The amended defence commences with certain *"preliminary objections"*. The first objection is that the claims are "frivolous and/or vexatious and/or an abuse of the process of the courts and/or unnecessary and are bound to fail and should be struck out or dismissed". No application for strike out or dismissal was made before the trial.

54. It is objected that the pleas in relation to ownership and control of the plaintiffs and each of them *"lack clarity"*. The defendants do not admit any of the pleas regarding ownership and control of the plaintiffs.

55. There follows in para. 4 the so called *"NAMA defence"*. Paragraph 4(ii) is the core of this defence, but it is appropriate to quote paragraph 4 in full.

"4.(i). It is noted that the plaintiffs plead, inter alia, that:-

(a) In January 2010 the corporate loans of the O'Flynn Group were acquired and transferred to National Asset Loan Management Limited ('NALM'), a wholly owned subsidiary of the National Asset Management Agency ('NAMA');

(b) On or about 24 April 2015, a commercial agreement was reached between Carbon Finance Limited ('Carbon') and the O'Flynn Group whereby

(i) Ownership and control of certain entities (including Tiger Developments) and assets formally within the O'Flynn Group were transferred to Carbon; and

(ii) Ownership and control of other entities and assets were retained by the O'Flynn Group and/or transferred to Michael O'Flynn and John O'Flynn.

(c) Companies within the O'Flynn Group were not in a position to avail of or pursue opportunities in the Irish property market and/or the United Kingdom property market between 2010 and 2015 because of investment and salary restrictions imposed by NAMA and, in particular;

(i) Companies within the O'Flynn Group could not dispose of assets or acquire assets without the consent of NAMA;

(ii) NAMA required the directors of the O'Flynn Group to impose salary restrictions across the entire group;

(iii) It was not possible for companies within the O'Flynn Group to invest in opportunities that were arising particularly in the United Kingdom and Ireland; and

(d) Notwithstanding such restrictions, companies within the O'Flynn Group and/or the directors of the O'Flynn Group – including Mr. John Nesbitt, Mr. Michael O'Flynn and Mr. John O'Flynn – took steps to pursue such opportunities and established the first, second, third, fourth and fifth plaintiffs to that end.

4.(ii). In the premises and/or insofar as any of the claims herein relate to any acts, omissions and/or decisions which were prohibited by NAMA and/or any relevant legislative provisions and/or which were not disclosed to NAMA in accordance with statutory obligations in that regard and/or in respect of which the consent of NAMA was not obtained and/or such acts, omissions and/or decisions were not in accordance

with restrictions imposed by NAMA and/or the provisions of any relevant legislative provisions:-

(a) The plaintiffs are not entitled to the reliefs claimed or any relief; and/or

(b) The plaintiffs are estopped from claiming such reliefs; and/or

(c) It would be contrary to public policy to grant the reliefs claimed or any reliefs to the plaintiffs or any of them against the defendants or any of them; and/or

(d) In the exercise of its discretion the court should refuse to grant the reliefs claimed or any relief.

4.(iii). The defendants reserve the right to provide further particulars in connection with, inter alia the matters aforesaid following discovery, including discovery of documents which evidence:-

(a) The ownership and/or control of the Plaintiffs in each of them;

(b) The financial benefits to each of the directors of the O'Flynn Group and related parties – including each of the persons who own and/or control each of the Plaintiffs (including John Nesbitt, Michael O'Flynn and John O'Flynn) – of the establishment of the plaintiffs for the purposes aforesaid including, in particular, the period when the O'Flynn Group was subject to the restrictions consequent upon its loans having been acquired by and transferred to NALM;

(c) The opportunities pursued and sought to be pursued by the directors of the O'Flynn Group – including each of the persons who own and/or control each of the Plaintiffs (including John Nesbitt, Michael O'Flynn and John O'Flynn) – by the establishment of the plaintiffs during the said period; and

(d) The totality of the information disclosed to NAMA by the O'Flynn Group and/or the directors of O'Flynn Group including each of the persons who own

and/or control each of the Plaintiffs (including John Nesbit, Michael O'Flynn and John O'Flynn) – in connection with inter alia the said loans.

4.(iv). The defendants will rely upon inter alia the provisions of the National Asset Management Agency Act, 2009, as amended."

56. Although not stated in this paragraph, the transaction said to be illegal was a sale by VHL, not being a plaintiff, of sites in Birmingham and Coventry at what the defendants say was an undervalue, as part of a scheme directed by Mr. Nesbitt, a director and fiduciary of VHL, and from which companies owned by him profited.

57. Apart from a general denial of this paragraph, in the Reply the plaintiffs object that no acts, omissions or decisions of entities and individuals within the O'Flynn Group are specified and that the legislative provisions relied on are not specified. It is pleaded that these allegations are inappropriate, scandalous, frivolous, vexatious and an abuse of process.

58. The defendants plead the following:-

(a) That none of the plaintiffs was a party to the contract of employment between the first defendant and Tiger Developments.

(b) That the assignment by Tiger Developments Limited, having changed its name to Carbon Developments Limited, of the Cox Contract of Employment to the plaintiffs is invalid and ineffective.

(c) That the Cox Contract of Employment was a personal right of Tiger Developments which cannot be transferred to a third party without the consent of Mr. Cox.

(d) That the purported assignment is an assignment of a bare right to litigate and is void on public policy grounds.

(e) That none of the first, second, third, fourth or fifth plaintiffs was ever a party to a contract of employment with Mr. Foley or Mr. Kearney.

59. The defendants deny the plaintiffs description of the business of each of the plaintiffs.

60. Mr. Cox denies that he was under any duty to disclose commercial opportunities to the plaintiff or to direct commercial benefits to the plaintiffs or to refrain from pursuing commercial opportunities to his own benefit or the benefit of any defendants. He pleads that the defendants were lawfully entitled to pursue the student accommodation project at Gardiner Street, Dublin.

61. Mr. Cox denies that he concealed or diverted any investment opportunity for his own benefit or for the benefit of the other defendants.

62. Mr. Cox denies that his contract of employment required him to provide services to companies other than Tiger Developments. He denies that consultancy services which he provided to companies other than Tiger Developments were provided pursuant to or by reference to his contract of employment.

63. Mr. Cox pleads that on various dates between 2010 and 2015 he provided consultancy services to the first, second, third and fourth plaintiffs on the basis of which he received "consultancy" fees and "discretionary performance related bonuses". He says that the performance of these services and the payments made were not made pursuant to an employer and employee relationship.

64. Mr. Cox admits that on various dates he transmitted certain documents of the O'Flynn Group and of the first plaintiff VHML to his personal Gmail address for information purposes. He denies that these were commercially sensitive or confidential documents. He pleads that due to the fact that the offices from which he worked did not have shared IT systems and the fact that he travelled frequently between London and Dublin it was necessary for him to have hardcopy documents in his possession with the result that he had certain hardcopy documents in his possession at the time of and after the termination of his employment.

65. Mr. Cox denies that he or any of the defendants used for their own benefit any of the material taken.

66. Mr. Cox denied that he was ever a partner of O'Flynn Capital Partners, notwithstanding that description ascribed to him from time to time.

67. Mr. Cox denies that he was tasked with sourcing investment opportunities or student accommodation opportunities in Dublin.

68. Mr. Cox pleads that he was instructed to resign without notice and with immediate effect from his employment with Tiger Developments Limited and that he did so on 27 April 2015.

69. Mr. Cox claims that insofar as any approval to pursue the Gardiner Street or any other project was required, Mr. Nesbitt gave such approval orally on a number of occasions. He relies on the letter dated 14 July 2014 and denies the allegation that it was procured by misrepresentation or concealment of its true purpose.

70. The defendants deny the allegations of conspiracy, inducement or procurement of and inducement or procurement of breaches of contract.

71. The defendants plead that losses claimed are remote and constitute wholly or partly pure economic loss which is not recoverable.

72. The defendants deny that the documents which the plaintiffs allege they appropriated were either owned by the plaintiffs or were confidential, or that they used them in the Gardiner Street Project, with one exception.

The Reply

73. Firstly, the plaintiffs object to the NAMA Defence. They deny the allegation regarding the Birmingham and Coventry transaction. They plead that the matters alleged, even if proved, are not grounds to refuse the reliefs claimed. They plead that the allegations made are inappropriate, scandalous, frivolous, vexatious and an abuse of process.

74. Secondly, the plaintiffs clarify that they do not allege that the plaintiffs were parties to the Cox Contract of Employment with Tiger Developments. They plead that Mr. Cox assumed and owed duties to the plaintiffs pursuant to that contract of employment *"given that the first to firth named plaintiffs are associated companies and that the sixth named plaintiff is a member of the O'Flynn Group of companies"*. They rely also on the Carbon Assignment.

75. Thirdly, it is pleaded that to the extent that Mr. Cox's relationship with the plaintiffs is found not be governed by the Cox Contract of Employment, the terms of the relationship and the duties pleaded in the statement of claim are express or implied, whether the relationship is "characterised as a consultancy or other arrangement".

76. The plaintiffs deny that Mr. Cox was instructed to resign on 27 April 2015.

77. The plaintiffs admit that Mr. Nesbitt signed the letter of 14 July 2014 but deny that it has the effect relied on by the defendants, or that any approval was given to Mr. Cox to pursue Gardiner Street.

PART THREE: ISSUES TO BE DETERMINED[1]

78. The following issues, many of which overlap, require to be determined:

(1) What was the legal character of the relationship between each of the plaintiffs and the defendants at dates relevant to the events giving rise to the proceedings?

(2) What legal duties flowed from that relationship?

(3) What rights and obligations flow from the Cox Contract of Employment?[2]

(4) By whom are those obligations and duties enforceable?

(5) Is the Carbon Assignment valid? If so, is it enforceable by the plaintiffs?

---

[1] The parties did not present any agreed chronology of events or description of the issues to be determined. This may be due to the absence of agreement on almost any facts.

[2] One of the very few undisputed facts is that from 1 January 2010 to 27 April 2015 Mr. Cox was an employee of Tiger Developments pursuant to the contract of employment dated 24 March 2010. Even the effective date of termination of that employment relationship is disputed, having regard to the plaintiffs' reliance on a three-month notice provision in that contract.

(6) Were Mr. Cox's duties modified or varied by any agreement or conduct whether in oral discussions, by the letter of 14 July 2014 or otherwise?

(7) Did Mr. Cox breach any duty owed to or enforceable by any of the plaintiffs by his actions and/or omissions in relation to:-

a. The Gardiner Street transaction.

b. The taking of documents alleged to be confidential.

c. Any other actions or omissions.

(8) What were the status and duties of Mr. Foley to the plaintiffs and did he act in breach thereof or otherwise act unlawfully?

(9) What were the status and duties of Mr. Kearney to the plaintiffs and did he act in breach thereof or otherwise act unlawfully?

(10) Are the allegations in the NAMA defence proved? If so, should the court refuse the reliefs sought on the grounds of illegality, estoppel, public policy or otherwise.

(11) Have the plaintiffs presented and relied on false or fabricated evidence and misled the court?

(12) Depending on the court's conclusions in relation to the above questions what remedies should be granted to any of the plaintiffs and against which defendants? Claims are made for declarations (i) that the defendants acted in breach of contract and/or breach of duty (ii) that the profits of Gardiner Street are held in trust for the plaintiffs. An order is sought directing the defendants to account to the plaintiffs for the proceeds.

(13) Are the plaintiffs entitled to damages for breach of contract, breach of duty, breach of trust, breach of fiduciary duty, conspiracy, inducement of breach of contract, intentional interference with the plaintiffs contractual and commercial

relations and/or interference with the plaintiffs economic and commercial interests?

PART FOUR: THE O'FLYNN GROUP

79. The O'Flynn Group started business in 1978. The business was commenced by Michael O'Flynn and his brother John O'Flynn. The first company in the group was O'Flynn Construction Company, which later became O'Flynn Construction (Cork), the sixth named plaintiff.

80. Initially the business was engaged only in the construction of houses, and its first project was a development of two houses built in 1978.

81. The business grew, focusing in the early years on residential development in the southern region of Munster. Over time the business expanded outside Munster and development extended beyond residential developments to include office development, industrial units, a town centre and shopping centre, and student accommodation facilities.

82. In 1994 the first student accommodation development was built and was known as Deans Hall, Crosses Green, Cork. The second student development project was built in 2004 namely Deans Hall, Bishopstown, Cork. Those student accommodation complexes in Cork are still operated by a company owned by Michael O'Flynn and John O'Flynn.

83. As and when sites were acquired and projects undertaken, new companies were established specific to those sites and projects. The shareholders in those companies were usually Michael O'Flynn and John O'Flynn and in the early years no formal group structure was put in place.

Colebridge International Limited

84. In 2006 a restructuring was implemented with the benefit of professional advice. Most of the companies were brought within a structure in which the ultimate holding company was Colebridge International Limited, a company incorporated in the British Virgin Islands. I

refer to this group variously as the Group, the O'Flynn Group or the Colebridge Group. Michael O'Flynn and John O'Flynn each held forty six percent of Colebridge. Patrick Kelliher and John Nesbitt each held four percent.

85. In 2011, Mr. Nesbitt transferred his four percent shareholding to Michael O'Flynn. Michael O'Flynn, John O'Flynn and Patrick Kelliher retained their shareholding until 28 April 2015, when Colebridge was acquired by the Blackstone Group through a subsidiary Carbon Finance.

86. When the Colebridge Group was established in 2006, a number of divisions were formed. Under O'Flynn Construction Holdings were most of the companies which undertook traditional residential and commercial development in Ireland. That division included O'Flynn Construction Company, now O'Flynn Construction (Cork), which is the only company in the original Group which is a plaintiff in these proceedings.

87. A division under Tiger Developments Limited was principally engaged in commercial property development and investment.

88. A division under Victoria Hall Limited ("VHL") was engaged in student accommodation principally in the U.K., Germany and Spain.

89. A division under Shelbourne Senior Living developed and provided accommodation for senior citizens.

90. Victoria Hall Limited was an important company in the group. It was first established in 1996 and its founding shareholders and directors were Michael O'Flynn and John Nesbitt. It grew a successful business developing and operating student accommodation, offering more than ten thousand beds in the U.K. and elsewhere.

91. By 2010, when the first named defendant Mr. Cox became an employee, the Group comprised over one hundred companies across nine jurisdictions. The evidence of the plaintiffs is that in the O'Flynn Group, before and after 2006, although there were numerous companies which were specific to discrete assets and projects, the companies in the Group

operated “in harmony” and resources were shared within the Group. Some persons were employed to work only on particular assets or projects and therefore for a single entity only. At managerial and senior executive level employees worked regularly “across the Group”. Functions such as finance, human resources and information technology were resourced not through a central service providing company in the Group, but by persons whose contracts of employment were with individual named companies in the Group and who were expected to and did work across different parts of the Group as and when required.

92. Examples of this were the Group Finance Director, Margaret O’Neill. She joined the group on 13 July 2006 as Financial Controller of Tiger Developments Limited. In 2015 she was appointed Group Financial Controller. Her employment contract was with O’Flynn Construction Company, now the sixth plaintiff. She gave evidence that she always performed her functions by reference to tasks or projects in hand across the Group without distinguishing the particular entities for which she was performing her duties. She never limited her work to any one company or to the entity which was named as the employer on her employment contract. She believed this also was the practice for other employees providing such services.

93. Orla Kelleher is the Information Technology Manager of the group. Her employer is also O’Flynn Construction Company. She gave evidence that although that entity was her employer, she carried out her function across all companies in the Group as and when required.

94. The position of Michael Kelleher, the Group Operations Director, is different because he was a director of a number of companies in the Group. He joined in 1982 and is also a now a shareholder of O’Flynn Capital Partners, a company which was incorporated in 2014 and was never one of the original group companies. He gave evidence that he always worked across the Group without confining the performance of his duties to individual entities.

95. On joining the Group, Mr. Cox signed an employment contract with Tiger Developments Limited. That contract provides that he would be required to be flexible and to perform functions from time to time for other 'Group' companies, which he did. I examine his contract and circumstances of his recruitment in more detail later.

NAMA

96. Arising from the banking crisis in Ireland, the Oireachtas passed the National Asset Management Agency Act, 2009 and NAMA was established in 2009. Its mandate was to acquire from Irish banks loans principally related to property development and realise those loans in the interests of the national exchequer which had guaranteed the obligations of the banks. Loans were acquired compulsorily pursuant to the Act together with attendant asset security and guarantees.

97. At the start of 2010 the O'Flynn Group was among the property development companies in the State most heavily indebted to Irish banks. Of its total banking indebtedness of €1.8 billion, approximately ninety percent was owed to Irish banks, including Allied Irish Banks, Bank of Ireland and Anglo Irish Bank Corporation, which later became the Irish Bank Resolution Corporation ("IBRC").

98. In April 2010 NAMA acquired the Group's loans from the Irish banks.

99. NAMA's first action after acquisition of loans was to request and obtain from debtors a Business Plan to demonstrate how each debtor intended to repay its bank debt.

100. On 30 April 2010 the O'Flynn Group submitted its Business Plan to NAMA. It described each asset and project of the Group and the Group's plans to maximise returns for NAMA. Some assets were completed projects generating revenues. Others were projects at varying stages of planning or development. In respect of those assets, the plan required the continuance of existing bank facilities and where appropriate the extension of development

finance to fund completion. In certain instances, this would have required NAMA, as successor to the original lenders, to extend new funds.

101. The Business Plan envisaged the Group continuing to hold the fully developed income producing assets, the revenues from which would support, inter alia, the servicing of debt and the funding of ongoing developments.

102. The Business Plan was prepared with the assistance of professional advisors and comprised approximately two thousand five hundred pages including appendices detailing all of the assets, how they were funded, and their status.

103. Evidence was given by Mr. O'Flynn that he believed that if the O'Flynn Group were permitted to pursue its development plans and retain income producing assets in the meantime it could ultimately repay its bank debt.

104. NAMA retained external professional advisors FTI Consulting to examine the Plan. FTI spent time over a period of weeks at the group headquarters in Cork and meetings were held at the highest level with FTI Consulting and with NAMA itself.

105. On 24 May 2010 NAMA rejected the Business Plan. In its letter of that date it stated that the plan "in its current format is unacceptable". The letter stated that NAMA required a greater degree of debt reduction through an asset disposal programme over the period of the plan, namely three to five years. It called on the Group to urgently review its asset disposal programme and to provide a ranking of properties for sale in line with "NAMA requirements".

106. Mr. Michael O'Flynn and Mr. Nesbitt gave evidence about the engagement with NAMA around this time. They explained how disappointed they were at the rejection of the Business Plan. Mr. O'Flynn said that the plan relied on the fact that the economy in the U.K. was stronger than in Ireland. He had hoped to hold income producing assets and continue the development of assets which required funding. By contrast NAMA required that asset

disposals be expedited, particularly in the U.K. where it believed that higher prices could be secured in the shorter term.

107. The Group met with NAMA in an effort to persuade them to change their mind and to provide the funding support necessary to complete development of suitable assets. Mr. O'Flynn's evidence was that he believed that NAMA did not understand his business model and that if the Group was prohibited from continuing development it had in his view no hope of repaying its debt. He described the NAMA approach as a 'liquidation model'.

108. NAMA did not change its mind. The O'Flynn Group did not challenge NAMA in this decision. It accepted that NAMA was the body conferred with statutory powers in relation to the treatment of the loans and security and recognised that it had no alternative but to comply with the requirements of that body.

109. According to Mr. O'Flynn's evidence this turn of events had the following consequences. Firstly, no additional funding was available to spend on assets which still required planning or investment. Secondly, limited funding would be provided for the completion of certain projects, depending on the stage of development already reached by them. Thirdly, NAMA started to exert control over the expenditure of the Group, leading to salary and headcount reductions, limits on the payments of bonuses and a range of strictures on expenditure. There were some differences in the application of these strictures. Certain entities would require continuous day-to-day funding support, but others were cash flow positive and had the required revenues to meet continuing expenses, subject ultimately to accounting to NAMA.

110. A memorandum of understanding was entered into between the O'Flynn Group and NAMA, the essence of which was that the group prioritise asset disposals. It is not contradicted that, although disagreeing on the policy adopted by NAMA, the Group complied with the memorandum of understanding.

The investor process

111. In the immediate aftermath of the rejection of the Business Plan the O'Flynn Group engaged with NAMA about an alternative to the 'liquidation model' as Mr. O'Flynn described it. The Group sought to find investors or providers of capital to fund or support it in settling or restructuring of the debt. It engaged the international investment banking firm of NM Rothschild, to seek out investors in the international markets. Messrs Rothschild prepared a detailed presentation on the process and were put in contact with NAMA directly. The evidence of the plaintiffs is that some progress was made, and that NAMA were willing, at least initially, to engage in this process for a limited period. NAMA appointed one of its most senior loan portfolio executives, Mr. Graham Emmett as its contact point for this process.

112. In early October 2011 NAMA informed the Group that it had decided not to pursue this process any further. The retainer of NM Rothschild was terminated, and the Group had to progress in earnest the disposal programme identified by NAMA when it rejected the Business Plan. NAMA required that the Group immediately rank assets in order of priority for disposal and progress disposals.

Restructuring Agreement

113. Before their transfer to NAMA, the Group's loans were held across a number of banks, each holding its own security over assets it funded. On 28 February 2013, a Restructuring Agreement was executed between the O'Flynn Group and NAMA. The purpose of this agreement was to put the loans and security on a consolidated footing, including the execution of cross guarantees and collateral security and the taking of charges on rental accounts. This agreement provided also for regular reporting by quarterly accounts and budgets and the appointment of rent monitors.

114. The precise extent of the controls and limitations which these arrangements imposed on the Group as regards expenditure and overheads is itself a matter of controversy. In the context of the allegations which underpin the NAMA defence, this issue takes on a particular importance. The plaintiffs say that Victoria Hall Limited was profitable and cashflow strong throughout these years, which meant that although it had to ultimately report to NAMA on its transactions, receipts and payments, it did not require NAMA approval of each and every item of expenditure as was required for companies which did not have positive cashflow.

Sale of loans

115. Having completed the Restructuring Agreement, NAMA decided in 2013 to offer the Group's loans for sale. The plaintiffs say, and it has not been contradicted, that NAMA has acknowledged that the Group co-operated in the loan sale process, engaging constructively with interested parties and professionals undertaking due diligence on the loans.

116. In early 2014 the international investment firm Blackstone emerged as the highest bidder for the loans. On 16 May 2014 Blackstone completed the loan acquisition through a special purpose company Carbon Finance Limited, which acquired the Group's loans and supporting security.

Actions of Carbon

117. The Group engaged with Carbon seeking to agree a long term settlement or restructuring of the debt. No resolution was achieved, and on 29 July 2014 Carbon appointed receivers over the shares in Colebridge, and other assets thereby taking control of that company and of the O'Flynn Group.

118. On the same day 29 July 2014 Carbon presented a petition under the Companies (Amendment) Act, 1990 for the appointment of an examiner to O'Flynn Construction Company and other companies in the Group and the court appointed an interim examiner.

119. The Group immediately commenced proceedings to challenge the receiverships and the examinership appointments. It sought declarations to set aside payment demands which had been served by Carbon and the appointment of the receivers. It moved also to dismiss the petition for examinership. These applications, and applications for certain injunctions, were heard by the court on 5 August 2014.

120. In a judgment delivered on 13 August 2014 the court (Irvine J.) discharged the receivers and the interim examiner and dismissed the petition for examinership. This decision was based principally on findings that the demands which preceded the receivership appointments were defective, and that Carbon had breached the statutory duty to exercise the utmost good faith in the disclosures required in the examinership petition.

The Carbon Settlement

121. Following the judgment of Irvine J., the O'Flynn Group of course remained indebted to Carbon. The dispute between the parties and the litigation continued. The parties re-entered active negotiations with a view to seeking a long-term resolution. This time an agreement was reached and in January 2015 a Framework Agreement, described as Phase 1 of the Carbon Settlement, was negotiated and signed. The agreement was that Carbon would acquire the Group by taking a transfer of all the shares in Colebridge International Limited. A limited number of companies and assets were "carved out" and retained by the original O'Flynn Group shareholders. Ownership of those entities was transferred out of Colebridge to Michael O'Flynn and John O'Flynn. Those companies included O'Flynn Construction Company, which is now the sixth named plaintiff. With those exceptions, this transaction ended the ownership and control of the original O'Flynn Group by Michael O'Flynn and John O'Flynn.

122. Carbon retained within Colebridge important entities such as Victoria Hall Limited and Tiger Developments Limited.

123. Since Carbon was acquiring the shareholding in the parent company Colebridge, the status of employees of companies within the Group would, as a matter of general law, be unchanged. The majority of employees in the Group remained in its employment, now under the ownership of Carbon. However, it was agreed between the Group and Carbon that six named senior management persons would not remain in the Group. These included Mr. Nesbitt, Mr. Cox and others. Instead, Mr. Nesbitt agreed to procure resignations of those persons and that they would be offered employment on the same terms and conditions in a company outside the Group owned and controlled by Mr. Nesbitt, Victoria Hall Management Limited (VHML), the first named plaintiff. Five of those persons, not including Mr. Cox, resigned and took up employment in VHML. Mr. Cox resigned but did not take up employment in VHML.

124. Carbon had now acquired a business providing in excess of five thousand five hundred student accommodation bedrooms in the U.K. and elsewhere and the operational staff. It needed experienced senior management for the business, and it contracted VHML to provide the management services for its Victoria Hall business, which owned the student accommodation facilities. An Operating Agreement was executed on 15 September 2015.

125. The final phase of the Carbon Settlement was concluded on 28 October 2015. By that time, Mr. O'Flynn and his brother and others had raised the money to complete the purchase of O'Flynn Construction (Cork) and other assets from Carbon. That purchase and the final settlement with Carbon was duly implemented on 28 October 2015 with new external borrowings.

The parallel structure

126. This is where the controversy starts. The defendants say that the plaintiffs have come to court with a false description of the origins and activities of what all the parties refer to as the parallel structure.

127. When NAMA acquired the O'Flynn Group loans in 2010 and rejected the Group's business plan this had the effect that the Group was precluded from pursuing and undertaking new property development projects, particularly where doing so necessitated acquisition of property, or new funding for planning and construction. Mr. O'Flynn and Mr. Nesbitt considered this to be the end of the property development business as they had built it. They were determined to continue in business and decided on the operation of a parallel structure to pursue new opportunities of which the Group could no longer avail. The principal company in that structure was VHML.

128. When first incorporated the shareholding in VHML reflected that of Colebridge, namely the brothers Michael and John O'Flynn, John Nesbitt and Patrick Kelleher. In December 2011 Mr. Nesbitt became the sole shareholder of VHML.

129. VHML undertook a number of projects in England commencing with one at Wembley in 2010. Other companies were established under the control and ownership of Mr. Nesbitt for particular projects including the second named plaintiff Palm Tree Limited, the third named plaintiff Grey Willow Limited and the fourth named plaintiff Albert Project Management Limited. I refer to these together as the "VHML parallel companies".

130. In March 2014 the O'Flynn brothers established the fifth named plaintiff O'Flynn Capital Partners, principally to progress opportunities in Ireland no longer available to the O'Flynn Group.

131. From the outset of the establishment of the parallel structure a number of senior management still employed in the O'Flynn Group, including the first defendant Mr. Cox were from time to time requested to and provided services to the new companies. They were renumerated for these services not through the payroll of the O'Flynn Group, but by invoicing the new entities directly. The invoices typically described their services as *"consulting"* or *"advisory"*.

132. In the plaintiffs' narrative, which is disputed by the defendants, a sharing agreement was put in place whereby VHML paid an annual fee to VHL for services and facilities it provided, including human resources, and for a licence to use the trademark *"Victoria Hall"*.

133. A central dispute in this case concerns the characterisation of the legal basis upon which Mr. Cox provided services to the parallel structure and I shall return to that subject in more detail.

The Sharing Agreement

134. In his evidence in chief Mr. O'Flynn said that he and Mr. Nesbitt agreed that certain staff members of the O'Flynn Group who were dissatisfied with their salary levels would be permitted to undertake activities for VHML as well as for the O'Flynn Group companies and would be paid additional income from "that structure". Mr. O'Flynn said that a formal agreement was put in place between VHL and VHML which operated to the satisfaction of all. He said that NAMA were aware of the arrangement.

135. Mr. O'Flynn said that Group employees were familiar with the concept of working "across" companies within the Group. Working for the parallel structure was therefore no more than an extension of this practice to include now working for entities outside the O'Flynn Group, with the difference that they were remunerated by the parallel companies as consultants and invoiced and were paid accordingly. Mr. O'Flynn said that this enabled the O'Flynn Group to retain those employees and therefore the capabilities it required to return to development projects in the future should that ever become possible. In the meantime, it enabled VHML to avail of a skilled team to pursue projects which could not at the time be undertaken by the O'Flynn Group.

136. Mr. O'Flynn and Mr. Nesbitt each referred to a copy of a document entitled "Agreement Relating to Provision of Services" between VHML and VHL. The document produced in court had a date of 15 October, 2012 inserted in handwriting at the front. The recitals to this agreement state that the parties had agreed to cooperate for the mutual benefit

of each other. Recital 1 stated "they see this as an opportunity to continue to develop the mark "Victoria Hall" and to maintain strong presence and to continue to build strong and effective business relationships whilst providing the opportunity for VHML to grow its activities".

137. Recital 2 acknowledges that VHL has "an existing infrastructure to support such cooperation". Recital 3 acknowledged that VHML "has the contacts and business relationships and is well placed to continue to promote VHL's interests".

138. The Services Agreement is stated to be for a ten year period commencing 15 October, 2012 and the annual fee provided for thereunder was sterling £50,000.

139. Schedules 1 and 2 to the agreement describes the services each entity would provide to the other. VHL would provide to VHML:

"*support in the following areas:*

1. Office facilities at 9 Clifford Street, London, including support staff as required for VHML central office function.

2. Specialist operational and management advice.

(a) design and specification.

(b) Accommodation management.

i.Staff appointments.

ii.Staff training and development.

iii.Safety and welfare.

iv.Compliance with VHL procedure manuals.

(c) Marketing, letting and administration.

3. All relevant processes, systems and front of house as is required for VHML to successfully operate the "Victoria Hall" student accommodation franchise.

4. Operational standby services, if required, who could be appointed in respect of individual properties".

140. Mr. O'Flynn's evidence was that any work done by Mr. Cox for VHML was done pursuant to this "sharing agreement". If that were intended to mean that the service could be provided within the annual fee provided for in the agreement of £50,000, it does not explain why Mr. Cox was also paid additional consultancy or advisory fees by VHML. Later in this judgment I analyse and reject the proposition that Mr. Cox provided services to VHML pursuant to his contract with Tiger.

141. The version produced in evidence was signed by Mr. Nesbitt on behalf of VHML but not executed by VHL.

142. The plaintiffs also gave evidence of the existence of a trademark licence agreement of the same date conferring on VHML the right to use the brand "Victoria Hall" for sterling £25,000 per anum.

143. A number of issues arise in relation to this "sharing agreement". Firstly Mr. Nesbitt said in his evidence that the agreement was disclosed to NAMA. No documentary evidence to support this was adduced. He said that in the course of various high level meetings the agreement was "shown" to NAMA. He was asked in cross examination what this meant. "Were copies handed over? Were the agreements read out or "waved" in front of NAMA officials?" No clear answer was given to these questions and Mr. Nesbitt was unable to give any direct evidence to demonstrate that the document was presented to NAMA.

144. Evidence was given at the trial by the Chief Legal Officer of NAMA Mr. Alan Stewart, under subpoena by the defendants. He said that he could not locate any of these agreements on the file at NAMA. He could not speculate as to whether they were "shown across the table to NAMA at a meeting" or whether NAMA asked for copies of the agreements if indeed they had been mentioned in meetings.

145. Mr. Nesbitt cited the references in the application to NAMA for consent to sell the Birmingham and Coventry sites to the possibility of a NewCo with the right to use the brand Victoria Hall having a management role with a purchaser. It emerged in Mr. Stewart's

evidence that when he said that NAMA was aware of the possibility of such a joint venture role for a NewCo, this was a reference only to the possibility of a management or operational agreement relating of those assets for a consideration of 5% of the rental income, not a reference to a wider sharing agreement between VHL and another entity not named in those communications. These communications were exchanged between November 2011 and February 2012 and could not have been references to a services agreement said by the plaintiff to be signed in October 2012 or to the trademark licence agreement.

146. The next difficulty in relation to the provenance of this document is that during the due diligence for the sale of the O'Flynn Group loans in April 2014 questions were raised about the relationship between VHL and VHML. One of the advisors to a bidder had asked the following question.

"Q. 159. Is there a management agreement B/T VHL and VHM. Are there any other management costs that are incurred by VHL than that outlined in the overheads costs?"

147. On 10 April, 2014 the Group Finance Director of the O'Flynn Group Mr. Brendan Lenehan prepared the draft of a reply to this question in the following terms:

"*Answer – No. [there is a cooperation agreement <u>being drafted currently</u> to formalise interaction between the two. VHM currently pays an annual contribution of circa £25k to VHL for services] As discussed in the presentation, VHL (sic) also benefits from a number of group functions and the services of group directors for which it is not cross charged. Other than this no further management costs that are incurred by VHL than what is outlined in the overhead costs."* (Emphasis added).

148. A further question was asked, in the due diligence, Q. *654 "Are there any operating agreements in respect of the student accommodation properties or otherwise in the group (for example the hotels)?* The draft reply was *"No".* In respect of the second of these questions an operating agreement was executed later in 2015 when VHML and VHL (by that time in the ownership of Carbon) for student accommodation facilities in the UK and elsewhere.

149. Mr. Lenihan submitted his draft reply to Mr. Nesbitt who replied "will it not be better to say that the £25k sterling per anum is for the "brand licence". Mr. Lenihan then asked Mr. Nesbitt if he was "happy to provide the copy of the licence if asked?". To this question Mr. Nesbitt replies "yes, I think we should be – it was disclosed to NAMA".

150. When Mr. Lenihan on 10 April, 2014 proposed the answer to the question of whether there was management agreement between VHL and VHML as follows "no – there is a cooperation agreement being currently drafted to formally interaction between the two", Mr. Nesbitt did not reply stating that this was an incorrect answer. It was put to Mr. Nesbitt in his cross-examination that if the plaintiffs were seriously asserting the existence of a sharing agreement and relying on a document put in evidence by him and by Mr. O'Flynn as dated 12 October, 2012, eighteen months earlier, Mr. Nesbitt ought to have said to Mr. Lenihan something along the following lines: "what are you talking about with the answer no. We have the Services Agreement of 12 October, 2012".

151. Mr. Nesbitt said that Mr. Lenihan was mistaken in his draft reply. He referred to another error in that the annual contribution of £25k mentioned was for the trademark licence whereas the annual contribution for services was £50,000 and that this illustrated Mr. Lenihan being incorrect in more than one respect. He said that Mr. Lenihan was simply incorrect to say that there was an agreement "being drafted currently."

152. None of these answers explain why Mr. Nesbitt did not at the time point out to Mr. Lenihan that he was simply wrong to state that there was no such agreement already in place.

153. After Carbon had acquired the loans from NAMA and when negotiations were active in 2015 leading to the Carbon settlement Mr. Nesbitt sent to EY (Ernst & Young) who were at the time advising the O'Flynn Group the following information:

"VHML agreements

Please find attached the following

(a)services agreement (signed)

(b) licence agreement (signed)."

154. The attachments to this email were signed but undated.

155. No explanation was proffered as to how in the context of the formal processes of the NAMA loan sale in 2014 and the later Carbon settlement with O'Flynn Group in 2015, no copy had been produced of the version of the Services Agreement which Mr. Flynn and Mr. Nesbitt had put into evidence at the trial on the basis that it was dated 15 October, 2012.

156. When this is taken together with Mr. Lenihan's statement on 10 April, 2014 that there was no such agreement and it was "being drafted currently" the only conclusion which can be made is that in the version put into evidence at the trial by Mr. O'Flynn and Mr. Nesbitt purporting to bear a date of 15 October, 2012 that date was inserted later.

157. Mr. Lenihan's email of 10 April 2014 is at least consistent with the existence of an established practice of VHML paying annual fees to VHL for services and for the use of the trademark Victoria Hall. Mr. Nesbitt's email shows that the two agreements were put in place and executed, albeit undated.

158. None of the defendants were in a position to give direct evidence of the complete state of the disclosures and discussions made by the O'Flynn Group to NAMA. They were not therefore capable of gainsaying the evidence given by the plaintiffs that NAMA was aware of the sharing agreement even if a copy of the document relied on was not formally submitted to NAMA.

159. The defendants submit that the presentation to the court of a document bearing the date 15 October 2012 as part of the evidence of Mr. O'Flynn and Mr. Nesbitt was one of the 'lies' in their evidence. There are undoubtedly inconsistencies and contradictions in the accounts given about this document but it is clear that such agreements were made, albeit that there is doubt about the date of execution. I am not persuaded that the plaintiffs perpetrated a lie or fabricated evidence for the court.

PART FIVE: PATRICK COX

160. Before the emergence of the banking crisis in 2008 and 2009 the O'Flynn Group had ambitions to expand its business in central and eastern Europe. It retained for this purpose the consulting services of a Mr. Pat Cox, father of the first defendant Patrick Cox. He, together with Patrick Cox Jnr., formed a company which provided consulting services to the Group in the years 2007, 2008 and 2009. Through this arrangement Patrick Cox came to be known to John Nesbitt and other senior executives in the Group. Arising from this the Group recruited Patrick Cox to join as a fulltime employee effective 1 January 2010.

161. The contract of employment for Mr. Cox was signed on 20 March 2010 with Tiger Developments Limited. That was the entity selected as the most appropriate for administration of payroll and tax, having regard to the fact that Mr. Cox would generally be required to attend at work three days a week in London and on two days a week in Dublin. The contract provided that Mr. Cox would serve Tiger Developments and the Group as a whole with the title *"Investment Director"*. It was common practice in the Group that senior management responsible for such functions as finance, HR and IT worked across the Group as a whole. Mr. Cox's annual salary under the contract was €75,000.

162. From 1 January 2010 to the date of his resignation on 27 April 2015 Mr. Cox was an employee under the Tiger contract.

163. During this time, at the request of Mr. Nesbitt, he worked on a number of projects for VHML. He invoiced VHML and other entities in the parallel structure for these services, variously described as consulting or advisory services.

164. Mr. Cox resigned on 27 April 2015. On 17 June 2015 an agreement was signed between Mr. Cox and Mr. Nesbitt recording that Mr. Cox would work "on a consultancy basis" with VHML and Albert Project Management Limited until 30 July 2015. He would be paid for each of the months of May, June and July €6,250 by VHML and £5,000 by Albert Project Management Limited. He committed that for August 2015 he would be available on

an "ad hoc basis" with no fee charged and thereafter could be contacted on phone. The agreement stipulated that none of these arrangements precluded or restricted him from working on his own business activities *"during the above months"*. The monthly payments were a continuance by Albert Project Management Limited of monthly payments which Mr. Cox had been receiving from that entity since October 2013.

165. Between January 2012 and July 2015 Mr. Cox received payments from companies in the parallel structure (VHML, Grey Willow, Albert Project Management Limited and Palm Tree Limited) totalling £810,475.58. Of these £600,000 was paid to Rockford Advisors Limited a company owned and controlled by Mr. Cox. He continued to receive the salary of €75,000 paid by Tiger from 1 January 2010 to 30 April 2015.

PART SIX: GARDINER STREET

166. Mr. Cox claims that Mr. Nesbitt gave him approval to pursue for his own account a property development opportunity in Dublin. I examine that claim in more detail later. Mr. Cox does not claim that he disclosed any detail of the location or nature of the project, or how he came to find it.

John Fleming

167. On 28 February, 2014 Mr. Cox met by arrangement in Dublin with an architect Mr. John Fleming who he had come to know during his time in the O'Flynn Group. Mr. Fleming had been engaged from time to time by the O'Flynn Group.

168. Mr. Cox told Mr. Fleming that he was seeking development opportunities in Dublin to pursue for himself. Mr. Fleming told Mr. Cox about a site at Gardiner Street, Dublin 1 which had been sold the year before to a foreign purchaser. Mr. Fleming knew about the site because he had made a feasibility study on it for the sales agent Lisney some years earlier, and had provided that study to the ultimate purchaser. The purchaser was a Mr. Peter Mullins, who lived in Singapore. Mr. Fleming gave Mr. Cox the contact details of Mr. Mullins.

169. Mr. Cox asked Mr. Fleming to prepare a sketch layout and feasibility study for a 400 bed student accommodation scheme at the site which Mr. Fleming provided. Later he instructed Mr. Fleming to conduct a feasibility study for a 450 bed scheme at the site.

Peter Mullins

170. Mr. Cox initiated contact with Mr. Mullins and his first approach was rejected. In May 2014 he renewed the approach. This time he gained traction. Outline terms were agreed between Mr. Cox and Mr. Mullins for the grant of an option to Mr. Cox to acquire the site for €6m. Solicitors were instructed by each of them to work on an option agreement and other documents. Progress was made on the preparation of documents in June and July 2014. On 14 July, 2014 Mr. Mullins' solicitors Martin Maloney sent to Mr. Cox's solicitors Matheson a draft of the relevant option agreements which they way they were "hopefully close to final versions".

171. 18 July, 2014 Mr. Cox signed the option agreement and Mr. Mullins signed it on 8 August, 2014. The acquisition of the site by Mr. Cox was completed, as part of the defendants' arrangements with investors, on 4 March 2016.

Dublin City Council and Others

172. On 21 July, 2014 Mr. Cox and Mr. Fleming agreed that Mr. Fleming would approach Dublin City Council to request a preplanning meeting about the site.

173. On 25 August, 2014 Mr. Cox attended the preplanning meeting at Dublin City Council.

174. In July, 2014 Mr. Cox started to engage with potential partners for the scheme. He opened contact with a Mr. Timothy, who was later employed by Trinity College Dublin, providing information as to the suitability of the site for student accommodation.

175. In August, 2014 Mr. Cox opened contact with representatives of Global Student Accommodation ("GSA"), the world's largest investor in and provider of student accommodation. He invited them to inspect the site with him on 2 September, 2014.

176. He liaised with Mr. Fleming and Mr. Nolan of Mr. Flemings office to have them available to join the meeting.

177. Mr. Nesbitt and Mr. O 'Flynn each gave evidence that they had a long-standing relationship with GSA and they regard Mr. Cox as having acted in breach of his contract of employment to make such direct contact with GSA for his own benefit.

178. On 30 October, 2014, a planning application was lodged for the project, in the name of Mullins Investments Limited. Mr. Cox had assured Mr. Mullins that all planning costs incurred and engagement with planners would be borne and managed by his company Rockford Advisors Limited and its planning consultants. The application was for permission to demolish all existing structures on site and the construction of a seven storey student residence complex with ancillary accommodation and a café and restaurant. On 26th May, 2015 the City Council issued Notification of Decision to Grant Permission.

179. In October 2014 Mr. Cox learned of a site at Gloucester Place, Dublin 1, which was owned by Dublin City Council and which adjoined the Gardiner Street site. On 11 October, 2014 he approached the City Council about the possibility of acquiring it, for what became Phase 2 of the Gardiner Street Scheme. On 15 October, 2014 he submitted initial plans to demonstrate how the site could be used. On 23 February, 2017 the City Council agreed the sale of the Gloucester Street site to Mr. Cox on terms that it would be developed for student accommodation, and it granted a building licence pending final completion of the transaction.

180. On 03 November 2014, Mr. Cox emailed representatives of Dublin City Council following up his previous discussions with them in relation to the Phase 2 site. He inquired whether they required any further information in respect of his plans for that site.

181. Through the remainder of 2014 and 2015 Mr. Cox continued to engage with GSA and with Trinity College Dublin, whilst progressing the planning applications for the two phases with the assistance of Mr. Fleming and other professionals.

182. In January 2015, Mr. Cox was actively engaged with Trinity College Dublin in relation to Gardiner Street and again with GSA. Later in this judgment I describe an event which occurred on 13 January 2015, the O'Flynn Capital Partner Strategy Day and the evidence of communication between Mr. Cox and Trinity College in relation to the project both on the day of the strategy meeting and the days before and after it. Mr. Cox did not mention Gardiner Street at that meeting.

183. In August, 2014 Mr. Cox approached the fifth named defendant Mr. Eoghan Kearney. Mr. Kearney is a chartered accountant. He was an employee of O'Flynn Construction Cork from September 2006 until he resigned on 13 July, 2011.[3] Mr. Cox requested him to assist in appraisals of the Gardiner Street site and approaches to potential investors. Mr. Kearney was at that time busy having taken up employment in Google at the time but he agreed to assist Mr. Cox where possible.

184. In December 2014 Mr. Cox approached the third named defendant Mr. Liam Foley. Mr. Foley is a chartered surveyor and had been an employee of O'Flynn Construction Cork from November 1999 until his resignation in March 2013.[4] He was by this time in business on his own account in London. He agreed to assist Mr. Cox with general advice about Gardiner Street.

185. Mr. Cox maintained contact thereafter with Mr. Foley and Mr. Kearney. When he resigned on 27 April, 2015 he opened discussions with the two of them together about working on Gardiner Street. They met on 8 May, 2015 to progress this and agreed that together they would develop the project.

186. Mr. Cox, Mr. Foley and Mr. Kearney formed a number of companies for the project, which are defendants in these proceedings.

---

[3] In May 2013 Mr. Kearney was engaged by Mr. Nesbitt to prepare a report on "viability of Dublin residential market". This was a one off assignment and he was requested to invoice VHML for this task.

[4] After his resignation Mr. Foley was retained by VHML as a consultant part time until the end of 2013, working on the construction aspects of the Birmingham and Coventry schemes.

187. Carrowmore Properties Limited was used for day to day operations and was owned in equal shares by the three. All three were directors. Mr. Cox was Managing Director, Mr. Foley was Construction Director and Mr. Kearney was Finance Director.

188. Carrowmore Properties Gardiner Limited was owned as to 80% by Mr. Cox and 10% each by Mr. Foley and Mr. Kearney, in each case through companies owned and controlled by them. It ultimately became party to a Profit Share Agreement with GSA for Phase 1.

189. Carrowmore Property Gloucester Limited was owned equally between the three and was the entity which entered a Profit Share Agreement with GSA for Phase 2.

The scheme with GSA

190. On 2 December, 2015 GSA made a "forward funding" proposal for the project, placing on it a "Gross Development Value" of €62,350,000.[5] The price would be paid in stages with separate payments for the land, payments against a build contract sum and a "bullet payment" at practical completion. Under the proposal the value attributed to the land was €12.5 million and for the build contract was €30.9 million.

191. The purchaser was to be a newly formed partnership funded by GSA.

192. On 4 March, 2016 Mr. Cox executed a series of agreements whereby he exercised the option to acquire the Gardiner Street site from Mr. Mullins for €6 million and sold it into the GSA structure for €12.5 million.

193. At the same time Carrowmore Properties Gardiner Limited signed a Profit Share Agreement with GSA, pursuant to which it ultimately earned €4.47 million on the project.

[5] The parties described to the court that there were two typical models for funding student development schemes. The first was by traditional debt and equity. In this method the developer would acquire the property to be developed, borrowing from external lenders and otherwise sourcing equity funds, constructing the scheme, sometimes operating it for a period, and later selling it. In some cases, it is not sold, and the developer continues to own and operate it. The second was by 'forward funding'. By this model an investor participates at the outset in the funding of the project, usually in tandem with external borrowing, and profit share agreements are entered into whereby the developer/ promoter is remunerated for its role in the planning and operation of the scheme. The Gardiner Street scheme adopted the 'forward funding' model.

194. On 9 March, 2016, a public announcement was made that Carrowmore Property would be responsible for the construction and delivery of the Gardiner Street student accommodation scheme.

195. On 2 February, 2017, a Construction Delivery Agreement was entered into by Carrowmore Properties Limited and GSA, providing for payment in phases of a total amount of €300,000.

196. On Day 32 of the trial the court was informed that the parties experts were agreed that, if one applied the forward funding structure as the defendants did, the total profits earned by Mr. Cox, Carrowmore Properties Limited and Carrowmore Properties Gardiner Limited were €10,782,000 before tax and other adjustments.

197. Corresponding agreements were made later in relation to Phase 2. The experts agreed that for Phase 2, again applying the forward funding structure, the profits earned by Carrowmore Properties Limited and Carrowmore Property Gloucester Limited, before tax and other adjustments were €2.17 million.

198. The experts also agreed that when adjustments were made to the above amounts for taxation and for land acquisition costs the combined net profits earned over the two phases was €11.33m.

PART SEVEN: THE PLAINTIFFS

199. The term "parallel structure" is used by the parties to refer to the first five plaintiffs. The first four plaintiffs ("the VHML companies") are said by the plaintiffs to have been owned and controlled, at least at times relevant to the actions of the defendants which gave rise to these proceedings, by Mr. Nesbitt based in England.

200. The fifth named plaintiff, O'Flynn Capital Partners, incorporated in 2014 was owned and controlled by Michael and John O'Flynn as to 40% each and Michael Kelleher and Patrick Kelliher each holding 10%. It is described as the 'Irish' part of the parallel structure.

201. The sixth plaintiff, O'Flynn Construction (Cork), is the only plaintiff which was originally in the O'Flynn Group. It continues to undertake the traditional business of construction of residential and commercial properties in Ireland. After the Carbon Settlement, it came to be owned beneficially as to fifty percent each by Michael O'Flynn and John O'Flynn. Later John Nesbitt and Michael Kelleher each acquired 5%, with Michael O'Flynn reducing to 51% and John O'Flynn to 39%.

202. The plaintiffs' description of the foundation of the parallel structure and its relationship to the O'Flynn Group was described by the defendants as "the Foundation Lie". The defendants say that a correct understanding of the origins and operations of these companies is fundamental to assessing their relationship with Mr. Cox which is an essential platform of the plaintiffs' case and secondly that a full understanding of their relationship with NAMA is essential to understanding the NAMA Defence. They submit that the plaintiffs have provided a narrative on those matters which is so misleading that the court should mark its disapproval of the plaintiffs' conduct by refusing the reliefs claimed.

203. The plaintiffs say that when NAMA rejected the O'Flynn Group Business Plan in 2010, Mr. O'Flynn and Mr. Nesbitt formulated their own new plan. Mr. O'Flynn would focus on the business of the original Group, dealing with NAMA and trying to rescue as much of the value in the Group as could be saved. Mr. Nesbitt would lead a new structure independent of the Group and which would pursue business opportunities no longer open to the Group by reason of the constraints NAMA imposed on its activities. Mr. Nesbitt would take ownership and control of the new business, in a parallel structure in which VHML became the principal company and would cede to Mr. O'Flynn his shareholding in Colebridge.

204. The plaintiffs said also that the new "parallel" structure would not compete with O'Flynn Group companies. They said that certain of the employees in O'Flynn Group including Mr. Cox, were afforded the opportunity to supplement their NAMA restricted incomes by working for and earning payments from the new entities. They refer to the cost

sharing agreement entered into between VHL and VHML and a licence agreement for the use of the name "Victoria Hall". They say that these arrangements were all disclosed to NAMA.

205. According to the plaintiffs, it was agreed between Mr. O'Flynn and Mr. Nesbitt that they would "go their separate ways" as far as concerned ownership in the short term, but they may at some time in the future agree terms of a new structure together. In Replies to Particulars this was described as Mr. O'Flynn having a "future right of control" of VHML. This was later recharacterized as an "understanding" between two businessmen who were friends and trusted each other. They feared that in the short term, any entity in which Mr. O'Flynn was a shareholder or director would be hampered in its ability to secure and conduct future business and credit by reason of the widely known fact of the O'Flynn Group being "in NAMA". Mr. O'Flynn said that the expectation of the two men was that when those matters were behind them, the understanding could be implemented. Mr. O'Flynn and Mr. Nesbitt both gave evidence at the trial that this understanding and trust had been honoured, such that they both now hold interests in the parallel structure.

206. The defendants say that in truth the parallel structure was established to enable the plaintiffs and Mr. Nesbitt and Mr. O'Flynn to pursue commercial property development with the objective of diverting profits away from the O'Flynn Group companies which were indebted to NAMA. This particular point carries limited weight because neither Mr. Nesbitt or the new companies were ever obligors to NAMA, either directly or indirectly. It is the next contention which carries more weight. That is that the plan was pursued and implemented in part by utilising O'Flynn Group assets and personnel without proper reimbursement and at cost to O'Flynn Group and ultimately at cost to NAMA, all without the knowledge or consent of NAMA. The defendants say that when NAMA interrogated the O'Flynn Group on matters relating to payroll, bonuses and other expenditure, the plaintiffs misled NAMA by concealing the extent to which Mr. Cox and others worked on projects for the parallel structure while

paid their salary by Tiger Developments Limited, Victoria Hall Limited and other O'Flynn Group companies.

VHML

207. VHML was incorporated in Ireland on 13 January 2010. The initial shareholding mirrored that of Colebridge, namely forty nine percent held by Michael O'Flynn, forty three percent by John O'Flynn and four percent each by John Nesbitt and Pat Kelliher.

208. On 13 July 2010 all of the shares in VHML were acquired by Palm Tree Limited, which at that time was owned in the same percentages between Michael O'Flynn, John O'Flynn, John Nesbitt and Patrick Kelliher.

209. In December 2011 Mr. Nesbitt acquired from the O'Flynns and Mr. Kelliher, all of their shareholdings in Palm Tree Limited, thereby becoming the only shareholder.

210. VHML was never a company in the O'Flynn Group. As regards ownership its closest connection was that until 12 July 2010, it was directly owned by the same shareholders, Michael O'Flynn, John O'Flynn, John Nesbitt and Patrick Kelliher. Those persons retained ownership when the shares in VHML were acquired by Palm Tree Limited on 13 July 2010. It was only in December 2011 when Mr. Nesbitt acquired the entire shareholding in Palm Tree Limited, that the ultimate beneficial shareholding link was severed from Michael O'Flynn, John O'Flynn and Patrick Kelliher.

211. The first controversy relates to the origin of VHML. Mr. O'Flynn in his witness statement and evidence in chief stated that after NAMA rejected the Business Plan on 24 May 2010 and decided that it would not sanction future investment or development by companies in the O'Flynn Group, Mr. Nesbitt suggested to him that he could form another company outside of the O'Flynn Group which would not have any liabilities to NAMA, would be under no restrictions on its own activities and which could work in co-operation or association with the O'Flynn Group. He said that they were searching for a solution which

would allow the O'Flynn Group to work within the parameters set by NAMA and yet enable them to exploit new opportunities independently of the O'Flynn Group and independent of the restrictions of NAMA and this solution was the formation of VHML and the parallel structure. Mr. Nesbitt said that this was "how VHML began" and described it as "my new company".

212. Mr. O'Flynn put it thus:-

> *"Someone was going to take up the development opportunities which the O'Flynn Group could not pursue and we agreed that formation by John Nesbitt of a new company could protect the business of VHL from being picked up by unfriendly competitors and could keep the business in friendly hands while companies in the O'Flynn Group could not develop. Victoria Hall Management Limited ("VHML") was the <u>new</u> company <u>incorporated</u> for that purpose* (emphasis added). *There was no prohibition on my involvement in VHML but John Nesbitt and I agreed that there would be less banking complications if the shareholders were different because, unfortunately there was a stigma associated with those whose loans who had been acquired by NAMA. John Nesbitt and I had an understanding that if matters changed and if the O'Flynn Group could attract an investor and recommence trading that we would each, at that point, acquire shares in the structure controlled by the other. We could not work out the details as we had no idea how things would work out, but we trusted each other that we would be reasonable with each other when the time came. In the meantime we worked out a means by which resources could be shared.*
>
> *By agreement between John Nesbitt and I certain staff members of the O'Flynn Group who were dissatisfied with their salaries were permitted to undertake activities for VHML as well as O'Flynn Group companies and they were paid additional income from that new structure. This operated to the mutual benefit for everyone. A formal agreement was put in place between VHL and VHML and operated to the satisfaction*

of all. NAMA were aware of the arrangement. [This is a reference to a so-called "Sharing Agreement" or a "Services Agreement" which, when pressed, the plaintiffs were unable to prove].

It has always been the case in our businesses that new employees were directly employed by a selected company, but everyone was expected to work across the group and associated companies. While the new structure was not part of the formal O'Flynn Group the practise of working across companies which were not in a formal group was not new to our staff as this is how it had always been before the group was formally established in 2006.

The new arrangement was explained to employees and it worked for everyone. The employees got the benefit of the additional income they were looking for. VHL and the O'Flynn Group got to keep those employees and the capability to go back to development if that was required. VHML got the benefit of a skilled team to undertake development that could not be undertaken by companies in the O'Flynn Group".

213. It is one thing for employees to be expected to work for and to customarily work for different companies across a group, and this was the evidence given in relation to senior management in the O'Flynn Group. It is quite a different thing to then require such persons to work for entities outside the group in which they were employed, unless their employment contracts so provided, which was not the case here, or they consented to do so. In this case there is evidence of senior management, including Mr. Cox, agreeing to provide services to VHML and other entities outside the Group of which his employer was a member, but not as a term or condition of their O'Flynn Group employment contracts.

214. Mr. O'Flynn referred to the existence of the agreements between VHL and VHML. One was for shared services which provided for a payment by VHML to VHL of €50,000 per

annum. The second was for the licensing of intellectual property by VHL to VHML in return for a payment of €25,000 per annum.

215. The first difficulty with Mr. O'Flynn's description of VHML and identified by the plaintiffs is that insofar as he stated that VHML was the new company incorporated to pursue developments which the O'Flynn Group could not pursue after the rejection of the Business Plan by NAMA, this was incorrect because VHML had been incorporated on 13 January 2010, many months before that rejection.

216. When this important fact was pointed out to Mr. O'Flynn in his cross examination he said that VHML had been a dormant company which only came to be activated after the NAMA rejection of the Business Plan. This is also incorrect because evidence was later adduced that before that rejection of the Business Plan VHML had undertaken on its own account a project at Wembley, London in March 2010. Mr. Cox and Mr. Foley had worked on that project and VHML earned fees from it in excess of stg £800,000

217. The next difficulty with Mr. O'Flynn's description is that it was not until December 2011 that the entire shareholding in Palm Tree Limited (the then parent company of VHML) was acquired by Mr. Nesbitt. Therefore throughout 2010 and for most of 2011 Michael O'Flynn, John O'Flynn and Patrick Kelliher retained their interest in VHML, through their continued shareholding in Palm Tree Limited.

218. In his direct evidence Mr. O'Flynn expanded by saying that the establishment and purpose of the new structure was disclosed to NAMA. He said the following:-

> *"We decided that we would form a new structure and John Nesbitt would be the person, we had an understanding, it was absolutely an understanding that John Nesbitt would take that on and that he would – and that I would concentrate on the Irish. So he gave up his shares in the Irish group and I had no ownership of that English group so that VHML was a separate structure that didn't have any baggage attached to it, for want of a better way of putting it, and that enabled us to do new*

business in the U.K. without being restricted (emphasis added). *We weren't formally restricted, it was just the way the market perceived it".*

219. This evidence ignores the fact that Mr. O'Flynn, along with his brother John O'Flynn held controlling shareholder interests in VHML through Palm Tree Limited until December 2011.

220. Mr. O'Flynn continued:-

"There is no question of us competing with our own structure anywhere, Ireland or England. That was never an issue and there is no question of us not telling NAMA about this. We would hardly call it Victoria Hall if we were somehow trying to set up a company that was been kept away from anybody so we set up the structure to take advantage".

221. When asked whether he had revealed this new structure to NAMA and to whom at NAMA this was disclosed Mr. O'Flynn stated the following:-

"Frank Dowling would have been the main person at the time we – they knew we were setting up this structure. It was going to be complimentary to the business we were already in so there was no downside once – once NAMA weren't being asked for money, and once NAMA, it wasn't costing NAMA, they had no issue, whatsoever, and we would have explained that having this structure meant that anybody looking at a possible purchase of the Victoria Hall business would be much more interested in it if it had a development arm, than it would be if it hadn't a development arm.

Not only did we discuss it, we had an agreement that I acted on behalf of VHL and John acted on behalf – and we discussed and we brought this to NAMA's attention".

222. Mr. O'Flynn admitted that his initial description of VHML as a company incorporated to take advantage of development opportunities after the rejection of the Business Plan and that it was from the outset in the sole ownership of Mr. Nesbitt was incorrect. He sought to minimise this by stating that under the agreement between him and Mr. Nesbitt VHML

simply became active after the rejection of the Business Plan. That proposition was undermined by reference to the 2010 Wembley project.

223. As regards ownership of the "parallel company" which became VHML, Mr. O'Flynn said the following:-

> *"The understanding was quite simple. John was getting out of Ireland and we were leaving all future in all England that would be coming VHL's way* (sic) *but NAMA had no interest in to be taken on by John* (sic). *And the agreement we came to – we had an understanding that when this storm blows over and we didn't know what was going to happen, that we would still work together in both jurisdictions. That was our agreement, understanding. It was never a formal agreement because you couldn't document it. We didn't know what was going to be left. We didn't know what was going to happen and we'll come on to other issues that happened subsequently. But we had an understanding and that understanding has carried through and has been finalised. Exactly what we set out to do. It took some debate between us, as you will imagine, but that understanding has come all the way home".*

224. As to ownership of VHML Mr. O'Flynn was cross examined by Mr. Gardiner S.C. on behalf of the defendants who put the question as follows:-

> *"Q. Now John Nesbitt and you, you say had an understanding, tell us about that negotiation. I mean Mr. Nesbitt is giving up phenomenal consideration his four percent shareholding in Colebridge and is becoming the one hundred percent shareholder in Victoria Hall Management Limited, it that right?*
>
> *A. Yes, that it is correct.*
>
> *Q. And he is the sole beneficial owner of the one hundred percent shareholding in VHML, is that right?*
>
> *A. That is correct.*
>
> *Q. And also the sole legal owner of the shareholding in VHML?*

A. That is correct.

Q. You have no beneficial or legal interest in that company, is that right?

A. No. At that time I came to an understanding. We were in a very uncertain place, that John would continue the U.K. side without any restrictions on him on the basis that when the entire situation played out – we had no idea how it would play out – that we would agree a structure in both Ireland and England, Judge, which we since have done exactly as our understanding at the time. We had a long-term relationship, business and became quite friendly over many years, that we trusted each other and that we would come to an amicable arrangement. And to that understanding, I am pleased to tell the court, has come home.

Q. Ok. Well at that time I am going to ask you about that so, hold that thought for a moment, Mr. O'Flynn, at that time the understanding was that Mr. Nesbitt would be the legal and beneficial owner of VHML and you would have no rights to acquire any shareholding in that company in the future, is that right?

A. No, no. I would have a future, I had an understanding of acquiring a future shareholding in that structure.

Q. That is why I used the word "right". You would have no right to a future shareholding in that structure.

A. Well my understanding was I would. That we had agreed that I would have a right in time, once we saw how everything played out. So there was no question that John Nesbitt understood and I understood it very clearly, that he had right to get back involved in the Irish structure and I had a right to get involved in the English structure. But it was only understanding because how else could we possibly do it?

Q. Well you see, Mr. O'Flynn, I think you know the difference between an understanding and a right. Do you know the difference?

A. I certainly do and I have, and I am carefully using the word "understanding".

Q. So, you did not have a right to acquire any shareholding in VHML in the future, is that correct?

A. Well, then the word possibly should have been stronger than understanding, because definitely we had agreed that once everything played out I would become a shareholder in time and he would become a shareholder. But that was subject to how everything played out. So we couldn't actually do anything more. Judge when people trust each other there is a lot of business done on trust. I had an understanding and trusted the person I had the understanding with and both him and I have proved to be correct.

Q. You see, did you or did you not have an agreement that you would acquire a shareholding in VHML in the future?

A. I didn't have an agreement at that time, no, I only had an understanding.

Q. Right. So you did not have any right to acquire control of or indeed any part of VHML in the future?

A. I think, Judge, I have answered the court, the question. I had an understanding that I could acquire a position and he had an understanding that he could acquire a position. That's what we had and that's what happened".

225. This line of questioning persisted with Mr. O'Flynn restating that the arrangement between him, and Mr. Nesbitt made in 2010 was an understanding based entirely on trust, and therefore not a binding legal agreement.

226. The evidence then turned to the question of how this understanding was implemented in the context of events after the acquisition of the O'Flynn Group by Carbon. Mr. Gardiner asked Mr. O'Flynn to expand then on what was described as the "new structure" concluded at that time. Mr. O'Flynn described it as follows:-

"Well it started once we came to an agreement with Carbon but then once we implemented a new lender into that structure who was, which turned out to Avenue.

So Mr. Nesbitt would have been very involved in helping all that, the process at the time. So Mr. Nesbitt is now a shareholder in the Irish companies and in the O'Flynn Capital Partner structure, and myself and my brother are shareholders in VHML and in the U.K. structure".

John Nesbitt evidence about VHML

227. The witness statement adopted by Mr. Nesbitt corresponded or, as counsel for the defendants put it, *"mirrored"* that of Mr. O'Flynn's witness statement, opening with the description that VHML was a new company established after NAMA had rejected the O'Flynn Group business plan.

228. Before Mr. Nesbitt gave his evidence on this subject on Day 10, evidence had been given by the O'Flynn Group Finance Director, Margaret O'Neill, detailing the shareholding and changes of shareholders in the plaintiff companies, including the fact that VHML had been incorporated on 13 January 2010 having as its shareholders Michael O'Flynn (49%), John O'Flynn (43%), John Nesbitt (4%) and Pat Kelliher (4%) and that it was not until late in 2011 that the O'Flynns and Mr. Kelliher diverted themselves of their shareholding in favour of Mr. Nesbitt.

229. Mr. Nesbitt corrected his witness statement and acknowledged that VHML had been incorporated before the rejection of the business plan. He said, as had Mr. O'Flynn by this stage, that following the rejection of the NAMA business plan, VHML was then used as the vehicle to enable him to pursue student accommodation development opportunities outside of the restrictions which applied to companies in the O'Flynn Group.

230. Mr. Nesbitt was cross-examined by Mr. Dowling SC on behalf of the defendants regarding the understanding relating to ownership of VHML.

231. Referring to the assertion that Mr. O'Flynn had a future right to acquire control of those entities, Mr. Dowling questioned Mr. Nesbitt as follows:-

"Q. Now will you agree with me that its now common case, I think, that Michael O'Flynn did not have a future right to acquire control over the affairs of the first, second, third and fourth named plaintiffs?

A. I recall your colleague and Mr. O'Flynn debating this point at length and I don't – I think it's a matter of legal argument and I don't know if I can add to it.

Q. Well sorry – and this, I think, Mr. Cush will be able – sorry, just to say Judge it's the plaintiff's pleaded case that he [Mr. O'Flynn] had a future right to control. So when I say it's common case that's what their pleaded case is exactly what went on is not clear. But Mr. Nesbitt you understand the meaning of a right, that somebody has a right to do something?

A. I recall much discussion with your colleague and Mr. O'Flynn about this.

Q. I'm not asking about your recollection of Mr. O'Flynn's answers, I'm asking you about your own understanding of the term "right". Did Michael O'Flynn, on your evidence, have a right, an enforceable right to acquire control over the affairs of the first, second, third and fourth named plaintiffs?

A. We had an understanding.

Q. Yes. So an understanding and I don't want to take, sorry if you wouldn't mind, to say what Mr. O'Flynn said, but would you not agree with me that an understanding is not the same as a right?

A. I think that might, well, I think that might be a legal argument.

Q. Well, I have to suggest to you that its not a legal argument, Mr. Nesbitt. The interpretation of a contract is a matter of law, but whether or not there was a binding agreement is a matter of fact."

232. As with Mr. O'Flynn, the questions and answers continued in this vein with Mr. Nesbitt, on each occasion, indicating that there existed between himself and Mr. O'Flynn an understanding. He was unable to point to the existence of any binding agreement whereby Mr. O'Flynn had a future right to acquire control over VHML and other plaintiffs. He continued:-

"We had an understanding between each other that I would go one way and he would go the other way. And as we didn't know how the world was going to work out, we had an understanding that one day things might come back together if everything fell together in the right way."

233. In his original witness statement as adopted and in evidence given on day 10 Mr. Nesbitt expanded on the rationale for the establishment of a "parallel" structure as follows:-

"I did not want to complicate matters for the new structure and Michael and I agreed that the new structure would have a better chance of raising funds if Michael was (sic) *involved as a shareholder or director initially. Our understanding was that, assuming the original O'Flynn Group could get out of NAMA Michael O'Flynn and I would work out an arrangement where I would acquire some shares in that structure and Michael could acquire shares in the new company. There was no contract, just an understanding between two people who trusted each other the terms on which it would ultimately happen would have to be worked out at the relevant time depending on what happened in the intervening period. We were also careful to ensure no conflict of interest. If the original O'Flynn Group was in a position to pursue an opportunity the new structure would not pursue it.*

While companies in the original O'Flynn Group including VHL generally purchased and developed its own sites, my new company, VHML identified a market for investors who had money to invest but who did not have the skills to avail of the profits which could be made from development and who could benefit from partnering with a company which had those skills. One of the benefits of my new company pursuing those opportunities was that Michael could trust that, if and when the original O'Flynn Group got back to normal trading, I would not compete directly with it and, in the meantime its business of student accommodation development was protected to some extent from unfriendly rival groups. So that's how VHML began." (Emphasis added).

234. With the exception of the sixth named plaintiff, O'Flynn Construction (Cork) the O'Flynn Group did not "go back to normal trading", at least not under its original ownership, but continued trading after it was acquired by Carbon. (Emphasis added).

235. Mr. Nesbitt continued:-

"VHML also solved another problem for the original O'Flynn Group. Some of the U.K. based employees, including Patrick Cox had made it clear that they were not at all happy with the salary restrictions imposed by NAMA. We were able to offer them roles in VHML which allowed them to continue their roles in O'Flynn Group and facilitated VHML to provide them with additional renumeration and bonuses, thereby retaining them for the benefit of the original O'Flynn Group in the long-term. O'Flynn Group's strategy was to try and attract investment with a view to exiting NAMA and, for that purpose, it needed a strong platform including good assets and a skilled and experienced team. It was important therefore that the new structure did not in any way undermine or detract from the original O'Flynn Group".

236. The defendants dispute the proposition that VHML was intended to provide continuing support with a view to a successful future for O'Flynn Group companies indebted

to NAMA. The defendants submit that the entire narrative surrounding the establishment and purpose of VHML insofar as it related to support of the original O'Flynn Group companies, is misleading as there was no evidence they submit, that the strategy was based on a real expectation that O'Flynn Group could "exit NAMA".

237. Throughout the evidence of Mr. O'Flynn, less clearly stated by Mr. Nesbitt, there is a stated aspiration that the original O'Flynn Group group could "exit NAMA". That aspiration was clearly 'dealt a blow' when NAMA rejected the Business Plan and a further 'blow' when NAMA terminated the investor or "Rothschild" process in October 2011. This emerges from Mr. O'Flynn's evidence that when NAMA rejected the Business Plan and refused to fund future development this meant that the Group was destined for liquidation, absent any other long-term solution.

238. On day 10 Mr. Nesbitt expanded on this description of the difference between the original business of VHL and the business of VHML as follows:-

> *"Judge, there is a different business here. VHL set out up in 1996 and opened its first scheme in Manchester in 1997. It bought sites, it developed sites, it operated sites all for its own. We were fortunate enough to be able to put some equity in and to match debt along side it and we built a business with about five thousand five hundred beds over that period of time with equity and debt. VHML did not have the benefit at the time of equity and therefore we had to go off and do a different business plan and that business plan was recognising that the purpose built student accommodation world had moved on through the late 1990's and early 2000 and it was now recognised as a small sector within the investment property world, that as an alternative, they liked to call it, that purpose built student accommodation would be part of not only private equity but also funds and therefore we recognised that they wanted to put their money to work in this particular sector and we had the skills in order to deliver these beds to them. So it was very much focusing on working with external money and not as in*

1996 where we were with Victoria Hall. So different business proposition in the fact that we were working with third party equity".

239. Mr. Nesbitt continued:

240. *"So this was the time when NAMA decreed that all those people who worked for businesses that had NAMA debt they had to take a pay cut or restrict their top salaries to €100,000 and, as I mentioned to you, in the U.K., the U.K. wasn't quiet, and particularly London where we were based as in Tiger Developments and Victoria Hall, had not suffered quite the same extent and salaries were continuing to rise – at a slower rate but were continuing to rise – and people didn't like, obviously, taking a ten percent pay cut but also didn't recognise it. Therefore, if we set up businesses outside the Colebridge group that were free to go and work with third party equity we could create monies with which we could supplement people's income and we did that with Simon Fox who was the Development Director for Tiger Developments, well Tiger Developments no longer was going to do any developments so what would we get him to do? So we allowed him to stay. We have talked about Liam Foley who was running out of things to do in Ireland. He came over to the U.K. We were able to keep people working. It was tough times. You know it is easy when you sit in 2020. It is different now. But back then it was tough and keeping people working and keeping people employed was important. And Michael had set up this business a long time ago, and even Victoria Hall, where we were from 1996, you know we were will into it and we had responsibility to people who had been loyal to us and you will see later on, Judge, that a number of those people transferred and are still working with us."*

<u>Ownership and control of VHML</u>

241. In the amended statement of claim delivered 18 July 2016, it is pleaded at para. 11 as follows:-

"Mr. Cox, Mr. Foley and Mr. Kearney are all former employees of the plaintiffs and/or other entities within the O'Flynn Group of companies (the 'O'Flynn Group')."

The statement continues at para. 16 as follows:-

> *"Between 2010 and 2015 companies within the O'Flynn Group were not in a position to take up opportunities in the UK and Irish property markets because of investment and salary restrictions imposed by NAMA. To pursue such opportunities and to retain certain employees, the directors of the O'Flynn Group sought other opportunities for the relevant employees, including Mr. Cox, and established companies in which it was envisaged would work in cooperation with the companies in the O'Flynn Group in the future.*

Paragraph 17:-

> *"To this end, between 2010 and 2014, O'Flynn Capital Partners Limited, VHML, APML, Palm Tree Limited and Grey Willow Limited were established, with a view to taking up investment opportunities available in the market."*

242. In the plaintiffs' replies dated 12 September 2016 to the defendants' first Notice for Particulars, it is stated, at para. 4(b), that the O'Flynn Group comprises the companies identified in the Schedule to those replies. The schedule is a structure chart showing all companies in the Colebridge Group. The only plaintiff appearing in that Schedule is the sixth named plaintiff. The replies continue: *"at all material times each of the first to fifth named plaintiffs were companies <u>associated with</u> the O'Flynn Group of companies"*.

243. In response to further particulars sought, replies were delivered on 21 November 2016 in which the plaintiffs gave particulars regarding the ownership of VHML and of the second, third and fourth named plaintiffs as follows:-

> *"The first, second, third and fourth named plaintiffs are owned and controlled by John Nesbitt. In the case of the first, second and third plaintiffs, Mr. Nesbitt's interest is held indirectly through nominee companies Elian nominees (JY) Limited and Naile nominees (JY) Limited. Michael O'Flynn has control of the first, second, third and*

fourth named plaintiffs insofar as he has a future right to acquire control over the affairs of the first, second, third and fourth named plaintiffs at a future date."

244. It is clear from the evidence given by each of Mr. O'Flynn and Mr. Nesbitt that whatever their belief as to the nature of their understanding regarding future ownership and control of VHML, there was not in place any legally binding or enforceable agreement whereby Mr. O'Flynn would, at a date in the future, acquire control of VHML.

245. The defendants submit that the characterisation of this *"understanding"* between Mr. O'Flynn and Mr. Nesbitt regarding the establishment of VHML and its ownership arrangements was part of what they call the 'Foundation Lie'. They submit that there is a fundamental inconsistency between the proposition that the parallel structure was established to operate outside of the NAMA restrictions which applied to the O'Flynn Group, and without Mr. O'Flynn as an owner or promoter, and the assertion that all the companies in the parallel structure were "associated" to the O'Flynn Group.

246. The evidence does not support the assertion of the existence of a right, meaning an enforceable legal right, in Mr. O'Flynn to acquire ownership of VHML in the future.

247. It is not disputed that, ultimately, the "understanding" between Mr. O'Flynn and Mr. Nesbitt was honoured at a later time. But this is an entirely different matter from the description of an enforceable binding legal arrangement between Mr. Nesbitt and Mr. O'Flynn made at the time when VHML was established.

The conference call of 22 April 2014

248. Another inconsistency emerged later on the question of who controlled VHML, Grey Willow Limited and Albert Project Management Limited. Mr Cox gave evidence that Mr. Nesbitt had promised him shares in these entities or some of them. Mr. Cox does not assert the existence of a binding and enforceable agreement to issue or transfer shares to him. He says that Mr. Nesbitt reneged on the commitment.

249. Mr. Cox refers to a particular conversation which he says occurred on 22 April 2014 in which both John Nesbitt and Michael O'Flynn participated. This is a *"note to self"* dated 2 May 2014 headed *"note re call Tuesday 22nd April 11:30a.m."*.

250. The contents of this call were the subject of disputed evidence given by each of Mr. Cox, Mr. O'Flynn and Mr. Nesbit. The note reads as follows:-

> *"I had a call with Michael and John at 11:30a.m. to discuss shares in VHML, VHM U.K.L, Albert project management and palm tree being vested in my name with a right to crystalize ownership at any time.*
>
> *I explained that there was a commitment of shareholding made to me, quite some time ago by Michael O'Flynn and consistently by John Nesbitt the controlling shareholder (plus wife in name only it would appear), I discussed this with John 3/4 weeks ago and he agreed wholly that I should be granted a shareholding. I believe circa 15% to 20%, but me and John did not cover levels.*
>
> *Michael initially said that he thought this was all covered off by the bonus they paid me, which he signed off on and although he was fully aware of this, he reiterated to John that he would deny knowledge of the bonus if it ever arose or he was questioned about it (mostly I suppose to do with other staff dissatisfaction of the level of it compared with their own).*
>
> *I asked John to confirm on the call that there was a commitment of shareholding made to me, which he did. There then ensued a fifteen-minute discussion between JN and MOF where they disagreed and can be summed as follows. MOF did not commit but acknowledged they (sic) was an intention but seemed to think that this fell away for some reason after Liam Foley's departure from the group. He said he realised John was left in an awkward position but that he would not sign off on it and asked me and John to understand the reasoning (mainly to do with creating a situation where other employees would not have the same and therefore it would not be fair).*

He said he would remain open minded but not make a commitment. MOF demonstrated his control of these entities yet again on these calls".

251. Mr. Cox said that one of the striking features of this note is the final sentence. He said that in circumstances where the plaintiffs assert that VHML was owned and operated and controlled independently of the O'Flynn Group, it was contradictory for Mr. O'Flynn to be *"calling the shots"* in relation to the question of who would or would not become a shareholder in VHML and other parallel companies. Mr. Cox said that apart from a question of whether a commitment had been reneged upon it was particularly significant that Mr. O'Flynn should demonstrate in this call his authority in relation to the shareholding in the "VHML" companies.

252. Mr. Cox said that he had not previously engaged directly with Mr. O'Flynn in relation to shareholding (although the note implies in the second paragraph that he did) and that this was the only direct engagement he had with Mr. O'Flynn on the subject of shares.

253. Mr. O'Flynn first said that he was never party to such a conversation. Under cross-examination he agreed that he did participate in the call but that the note was an inaccurate record of the conversation. He confirmed that Mr. Nesbitt had in the past discussed with him the question of shareholding for Mr. Cox. However, in Mr. O'Flynn's view Mr. Cox was never *"on the radar for shares"*. He was not of such seniority as to be within the contemplation of any of the companies for shareholding.

254. Under cross examination by Mr. Gardiner for the defendants Mr. O'Flynn referred again to the understanding which he had with Mr. Nesbitt regarding future ownership of the companies, and he added that he had an understanding with Mr. Nesbitt that no shares were to be issued to Mr. Cox. Mr. O'Flynn stated that he never made a commitment to issue shares to Mr. Cox.

255. Mr. Nesbitt acknowledged that he had discussed previously the concept of shares being given to Mr. Cox but said that no amount or price was ever agreed. He said that on this

conference call "Mr. O'Flynn represented us". This was a curious phrase to use if the shares were at the time owned only by Mr. Nesbitt.

256. Under cross examination, Mr. O'Flynn initially stated that he did not recall discussing shares with Mr. Nesbitt, however, he later stated that *"Mr. Nesbitt discussed it with me and I was completely and utterly against it because Mr. Cox was not on my radar for shares".*

257. The reference by Mr. Cox to a promised shareholding and a *"right to crystalise ownership at any time"* would typically be associated with a senior employee or executive. Yet, Mr Cox's position is that he was an employee only in the O'Flynn Group, and it is noteworthy that his assertion that he was promised shares relates to the parallel structure, in which he says he was never more than a consultant, and in the case of O'Flynn Capital Partners a very occasional consultant and 'note taker' for no remuneration.

258. Although the parties differ about the content of this conference call, Mr. Nesbitt and Mr. O'Flynn admit (Mr. O'Flynn first having denied) that it occurred. Most importantly, Mr. O'Flynn's statements in his evidence that "Mr. Cox was not on my radar for shares" and that he was "utterly against" Mr. Cox receiving shares reveals a level of influence, if not control, by Mr. O'Flynn in the parallel structure. Whilst such 'control' is asserted in Replies to Particulars, it is, at first pass, contradictory to the 'foundation' proposition that the parallel structure was based on Mr. O'Flynn and Mr. Nesbitt going their separate ways. But in circumstances where at a minimum Mr. O'Flynn held an understanding of a future interest in the VHML companies, and where the understanding was later met in each other's businesses, there is in fact nothing surprising in the fact that Mr. O'Flynn retained a measure of influence over the identity of any new shareholders.

Early activities of VHML

259. Mr. Cox cited two developments undertaken by VHML in 2010 and 2011. Firstly, he described the development of a site at Wembley in London for a 'client' Westbrook Partners.

This site had been sold by Victoria Hall Limited to Westbrook Partners and VMHL then provided development management services followed by operational services to the ultimate purchaser Clovis Prop. Co. VHML earned fees in respect of the development management services and the operational services. Mr. Cox said that these were fees which could have been earned by Victoria Hall Limited without the necessity to raise new investment of the type which NAMA would not have sanctioned.

260. The Wembley project was contracted for in early to middle 2010 and concluded in September 2011.

261. Mr. Cox referred also to a project at Dashwood, London, in which the counter party of VHML was Rockspring Investment Managers. This transaction was first incepted in early to mid-2011 and closed in quarter four 2011 on the basis of a purchase price for the asset of sterling £34 million. VHML earned an acquisition fee of £340,000 and annual fees thereafter for the operational management of the asset. It also had the potential to earn a profit share after the exit of the investor depending on the rate of return achieved. Mr. Cox's evidence is that in the third quarter of 2011 Mr. Nesbitt agreed with him that on completion of that transaction VHML would pay him a fee. He was ultimately paid a fee of £40,000, out of the acquisition fee of £340,000 earned by VHML.

262. Mr. Cox's evidence in relation to both Wembley and Dashwood is that these were consultancy and operational services provided by VHML. His view, which he accepted was only his own personal view, was that there is no reason why VHL itself could not have undertaken these projects and earned the fees. He cited these as examples which contradict the narrative of the plaintiffs that VHML was not competing with VHL or other O'Flynn Group companies and was established only to avail of opportunities which were not available to O'Flynn Group companies. However, Mr. Cox was unable to take that point any further, and whether or how the O'Flynn Group would pursue those opportunities is a matter of

speculation. He did not know whether Mr. Nesbitt ever spoke to NAMA about those opportunities or whether NAMA had refused to permit the O'Flynn Group to pursue them.

263. Mr. Cox gave evidence also in relation to a transaction concerning a property in Southwark in London, referred to as Paris Gardens.

264. When VHML became aware that this property was being sold by receivers in late 2010/early 2011 VHML approached a company called McLaren Property, who it believed would have the capital available to invest in the acquisition and development of the Paris Gardens site. VHML earned fees through three separate elements of this transaction namely a development management fee, an operational management fee and a "promote structure" or profit share. This transaction concluded in early 2015. Although the transaction had been structured by VHML the profit earned was taken in its parent company Palm Tree Limited. Mr. Nesbitt arranged for a payment of a fee of sterling £100,000 to Mr. Cox's company Rockford Advisors on 30 March 2015. Mr. Cox did not say this was profit which VHL could have earned. Instead, he cited this as an example of VHML utilising and benefitting from a VHL resource, namely himself, without the knowledge of NAMA.

265. The defendants make the case that in truth the first four plaintiffs were established for the sole purpose of diverting opportunities to companies outside the O'Flynn Group such that those entities could earn profits which would not flow back to the O'Flynn Group for NAMA debt reduction.

266. The description provided by the plaintiffs is that these new entities were never indebted to NAMA and accordingly were entitled to earn profits independently of the O'Flynn Group structure, not themselves being subject to any obligations to NAMA.

267. The essence of the defendants' complaint in this regard is that there was not full disclosure to NAMA of these opportunities being taken by entities for the benefit of persons, principally Mr. Nesbit, who continued to hold office and owe fiduciary duties to companies in the O'Flynn Group.

268. Mr. Cox confirmed that although from time to time he met or encountered NAMA officials, he had no direct dealings with NAMA in relation to fundamental or "high level" matters. He could not therefore say whether VHL or the O'Flynn Group was otherwise in a position to pursue those opportunities. Nor could he say whether the O'Flynn Group had sought NAMA's agreement to do so, although it was not contended by the plaintiffs that they had put those three projects to NAMA as ones which the O'Flynn Group could pursue.

269. Similarly, Mr. Cox was unable to give evidence to affirm or contradict the proposition that NAMA would not finance or permit fundraising by companies which were NAMA debtors. He was aware generally of this policy on the part of NAMA but said that he had no specific knowledge or engagement with NAMA in relation to the O'Flynn Group itself.

270. Finally, but importantly, VHML had a central role in the transactions relating to sites at Birmingham and Coventry which are the subject of the NAMA defence.

Evidence of Mr. Alan Stewart of NAMA re VHML

271. The court was not informed whether any of the parties invited any of the NAMA personnel with direct knowledge of the O'Flynn Group to give evidence. In the event, no such persons were called at the trial by any party.

272. Evidence was given under subpoena, issued by the defendants, by one representative of NAMA. The representative nominated by the Chief Executive Officer of NAMA was Mr. Alan Stewart, Chief Legal Officer of NAMA.

273. Mr. Stewart confirmed that he had no involvement in any of the matters which are the subject of these proceedings. With one exception (a Mr. Phelan who was not called or subpoenaed), the persons who had a direct involvement in the matters were by the time of the trial no longer in the employment of NAMA, namely the Chief Case Manager, the relevant Team Leader and the Case Manager for the O'Flynn Group. (That of itself does not explain why they were not called by either party to give evidence even under subpoena). Mr Stewart

was therefore giving his evidence based on a review of the documents and files of NAMA relevant to the O'Flynn connections.

274. Mr. Stewart was questioned by Mr. Dowling for the defendants as to the extent of NAMA's knowledge of the plaintiffs, starting with VHML. Mr Dowling put the matter to Mr. Stewart as follows:-

> *"Q. And the first four plaintiffs, it you like are the U.K. parallel structure, that was said to operate outside the Colebridge group and then the fifth plaintiff is the Irish parallel company that was set up to operate outside the Colebridge group. I know there is a dispute about whether it was – but that's, I think an agreed fact. And what was said by Mr. O'Flynn was that NAMA was told, from the very start, that this parallel structure had been set up. So literally just after the business plan and so on was rejected, that a parallel structure was set up and that's what was, I think that case may – it could still be run, it's not clear what case they are making anymore."*

275. Reference was made to correspondence exchanged between the plaintiff's solicitors Messrs. BHK and NAMA before the trial commenced. BHK wrote to NAMA on 21 November 2019, in advance of the opening of the trial, drawing to the attention of NAMA the allegations which were made in the defence.

276. In Mr. Stewart's reply dated 13 December 2019 he stated the following:-

> *"Again, I cannot speak to the views, considerations and hopes of the VHL and O'Flynn Group directors at the time. I can confirm that:-*
>
> *(a) NAMA was made aware of the establishment of 'New Co.'. a separate entity outside the O'Flynn Group; and*
>
> *(b) Neither Victoria Hall Management Limited ('VHML') nor John Nesbitt were NAMA debtors."*

277. Mr. Stewart continued *"NAMA was made aware that VHL or an associated company would provide an 'Operational Management Agreement' via a Development Management Agreement."*

278. Mr. Stewart confirmed in evidence that his responses as quoted above were based on documents provided in March 2012 in the very specific context of the request by VHL for approval of the sale of properties at Birmingham and Coventry. Therefore, the reference identified by Mr. Stewart in his letter quoted above was specific to the proposed Birmingham and Coventry transaction, not to a general agreement between VHL and VHML, such as a costs sharing agreement.

279. Mr. Stewart confirmed that the only reference to another entity was the reference to "New Co." in the specific context of the proposed sale of the Birmingham and Coventry sites. Mr. Stewart confirmed that there was no other information on the files which he could locate concerning other companies in the *"parallel structure"* being the second, third and fourth named plaintiffs.

280. As regards NAMA's knowledge of employees of companies in the Colebridge group working for companies outside the group Mr. Dowling questioned Mr. Stewart as follows:-

> *"Q. Then there is this issue about whether or not NAMA knew that employees in the Colebridge group were working for the parallel structure. And I take it again there is no documentary – if there is nothing about the parallel structure, there is no documentary evidence that NAMA knew about that either, isn't that correct?*
>
> *A. Well, what's correct is that there was an awareness that the employees were working on some other projects, say for other secured lenders – because there were other secured lenders to the group. So, I think there was an awareness that they weren't exclusively working on the NAMA secured assets only. But as regards anything explicit that they were working for this parallel structure, as you keep*

referring to it, VHML, there is nothing that I can see about that, other than the email I mentioned that copies the person in VHML, but it is only a copy.

Q. Yeah and there is no evidence that that was picked up at the time as evidence that somebody was working for a different company than VHL?

A. Nothing to that effect no.

Summary of VHML

281. Mr. O'Flynn gave evidence that when NAMA took over the loans, he had hoped that he could persuade NAMA to permit the O'Flynn Group to continue to develop assets in accordance with their own existing business plan, a plan which he believed would ultimately yield repayment of debt. When NAMA rejected the Business Plan this had the following consequences. Firstly, that the O'Flynn Group had to co-operate in the disposal programme required by NAMA. NAMA was then in control of the debt and all security held so it could dictate the pace of disposals and had decided that it would not fund new development or investment projects.

282. Secondly, since no new development would be permitted and there was no prospect of the O'Flynn Group companies being in a position to avail of any new opportunities to acquire and develop assets Mr. O'Flynn believed that this would result in a permanent loss of the experience and skills which had been developed over the lifetime of the group.

283. Mr. O'Flynn and Mr. Nesbitt then decided that a new company should be formed which would go forward with any new development opportunities. This would be a company outside the O'Flynn Group and therefore not an obligor of NAMA.

284. The agreement as described by both Mr. O'Flynn and Mr. Nesbitt was that they would go their separate ways as outlined above but that they had an *"understanding"* that a point in time in the future they would come together again. Mr. O'Flynn would in the future become a shareholder in VHML and Mr. Nesbitt would again have a shareholding in the O'Flynn

Group, or whatever 'O'Flynn' structure would succeed it if it did not survive NAMA. This was not a legally binding agreement and was always an understanding between two men who trusted each other.

285. The evidence given by Mr. O'Flynn and Mr. Nesbitt was that long after the events which gave rise to these proceedings, such a mutual exchange conferring shareholding and swapping of shares did in fact take place and that the understanding came to pass.

286. The nature of the *"understanding"* was described by the defendants as "*shrouded in mystery".* That criticism is borne out of the confusing replies to particulars as to ownership and control and the absence of evidence of a binding agreement between Mr. Nesbitt and Mr. O'Flynn. Nonetheless the plaintiffs have said that it was only an understanding between two men who had worked together over a long period of time and trusted each other, and that evidence has not been contradicted.

287. The defendants attach importance to the change of evidence regarding the establishment of VHML, both by Mr. O'Flynn and Mr. Nesbitt in the witness box. In their evidence in chief, they described VHML as having been established after the rejection of the business plan. They then had to correct this in their evidence by acknowledging that VHML had been incorporated on 13 January 2020, many months before the rejection of the business plan by NAMA. They therefore altered their description of the origins of VHML to say that in truth it was dormant and therefore a suitable company to lead future projects and investments outside the O'Flynn Group of companies. This description was then undermined by the evidence that VHML had undertaken projects, notably Wembley, before the rejection of the Business Plan.

288. These contradictions are invoked by the defendants in support of their characterisation of the plaintiffs' description as the 'Foundation Lie'. They submit that this *"foundational lie"* came to be revealed only during the course of the trial and goes to the credibility of the plaintiffs' descriptions of the relationships between the plaintiffs and the defendants.

289. It is an unsatisfactory feature of the evidence that each of Mr. O'Flynn and Mr. Nesbitt in their evidence in chief described VHML as having been incorporated after, and in response to the rejection of the Business Plan, and that this misstatement was corrected by them only after it was pointed out that it could not be correct. This does not mean that they lied to or set out to mislead the court. From the outset of the case, the court was informed that the business undertaken by each of them was, as described, the 'parallel' business of pursuing development opportunities no longer open to companies in the O'Flynn Group. That central feature of the raison d'etre and activities of those companies was never concealed or differently characterised in the evidence.

290. I am satisfied that in the manner which the plaintiffs gave their evidence in chief their description was honest. They did not come to court intending to mislead the court on such a fundamental matter.

Palm Tree Limited

291. Palm Tree Limited was incorporated in Jersey on 27 January 2010. It became the sole shareholder in VHML on 13 July 2010. Its initial shareholders were Michael O'Flynn forty nine percent, John O'Flynn forty three percent, Pat Kelliher four percent and John Nesbitt four percent. In December 2011 Mr. Nesbitt acquired the shareholding of the O'Flynn brothers and of Mr. Kelliher thereby becoming the sole shareholder.

292. In 2013 Mr. Nesbitt transferred his shares to his wife Francesca Nesbitt. In 2014 these shares were transferred to Crest Bridge Corporate Nominees and in 2015 were transferred as to fifty percent each to Naile Nominees (Jersey) Limited and Elian Nominees (Jersey) Limited, each of which was owned by Mr. Nesbitt. In substance, it became "Mr. Nesbitt's company" in December 2011 and he retained control and ownership.

293. Palm Tree Limited became the parent company of VHML on 13 July 2010. It was the vehicle through which a payment of £100,000 was made to Mr. Cox on 30 March, 2015 for

his work on the Paris Gardens project. Very little evidence was proffered by any of the parties as to the other activities of Palm Tree Limited save for its capacity as the shareholder in VHML and therefore a "John Nesbitt" company.

Grey Willow Limited

294. This is another "John Nesbitt" company. It was incorporated in Jersey on 7 February, 2012. The initial shareholding was held entirely by Mr. Nesbitt's wife Francesca Nesbitt. In 2015 the shares were transferred to Naile Nominees (Jersey) Limited and Elian Nominees (Jersey) Limited, each owned by Mr. Nesbitt.

295. The principal activity of Grey Willow Limited relevant to these proceedings is that it was a participant in the scheme for the acquisition and development of the sites of Victoria Hall Limited at Birmingham and Coventry.

296. Two significant payments were made by Grey Willow Limited to Mr. Cox. The first was £60,000 on 17 January, 2013, described as "Bonus 2012" in respect of his contribution to the Birmingham and Coventry project.

297. On 7 January, 2015 Grey Willow Limited made a payment of £150,000 to Rockford Advisors, a company owned and controlled by Mr. Cox. This was described as the balance of an "Agreed Bonus" relating to the Birmingham and Coventry transaction. The Initial Bonus of £350,000 in respect of that transaction had been paid on 20 May, 2014 to Rockford Advisors by Francesca Nesbitt, wife of Mr. Nesbitt.

Albert Project Management Limited

298. This company was incorporated in England on 20 February, 2012. From its inception one share was held each by Mr. Nesbitt and Mr. Richard Parker.

299. As its name implies, this company was engaged in the business of project management, principally in the UK. Under the ownership of Mr. Nesbitt, it had an active role in relation to the construction delivery on the Birmingham and Coventry projects.

300. Albert Project Management Limited made monthly payments to Mr. Cox between October 2013 and July 2014, totalling £87,000.

301. On 3 September, 2019 the entire shareholding was transferred to a new company Tiger Developments Limited (not the original Tiger Developments Limited which was Mr. Cox's employer). This was a newly established company in which each of Michael O'Flynn, John Nesbitt and John O'Flynn held 33%.

302. I refer to VHML, Palm Tree Limited, Grey Willow Limited and Albert Project Management Limited as the "VHML Group".

O'Flynn Capital Partners

303. This company was incorporated on 24 February, 2014.

304. The initial shareholding was held by Michael O'Flynn 40%, John O'Flynn 40%, Michael Kelleher 10% and Pat Kelliher 10%.

305. On 21 September, 2018 Mr. Nesbitt acquired the 10% shareholding of Mr. Pat Kelliher.

306. O'Flynn Capital Partners is said by the plaintiffs to have been established for the purpose of pursuing property development and construction in Ireland. It was incorporated at a time when the NAMA loan sale process was at an advanced stage.

307. The plaintiffs say that O'Flynn Capital Partners was to fulfil in Ireland much the same purpose as the VHML Group, namely to pursue investment and development opportunities which were no longer available to O'Flynn Group. An important difference was that its shareholders were the O'Flynn Brothers and Mr. Michael Kelleher. Mr. Nesbitt did not become a shareholder until much later i.e. 21 September, 2018.

308. O'Flynn Capital Partners had no role in relation to the Birmingham and Coventry transaction.

O'Flynn Construction (Cork)

309. This company was incorporated in Ireland on 21 July, 1998. It was originally known as O'Flynn Construction Company and it is the only plaintiff which was a member of the original O'Flynn Group. It is essentially the platform for Irish residential development.

310. Being in the original O'Flynn Group, the shares in the company were, from 2006 to 2015 held by Colebridge International Limited. After the acquisition of the shareholding in Colebridge by Carbon the shares in O'Flynn Construction Cork were acquired by Michael O'Flynn 50% and John O'Flynn 50% in a transaction completed on 28 October, 2015.

311. Thereafter the beneficial shareholding, held through a new trading entity O'Flynn Construction Company come to be held as to 51% by Michael O'Flynn, 39% by John O'Flynn and 5% each by John Nesbitt and Michael Kelleher.

312. O'Flynn Construction (Cork) had no role in the Birmingham and Coventry transaction.

PART EIGHT: THE RECRUITMENT AND APPOINTMENT OF MR. COX

313. The claim against Mr. Cox is grounded on contract, and in the alternative, breach of duty including fiduciary duty. To examine those claims it is necessary to consider the contract entered into between Mr. Cox and Tiger Developments on 24 March 2010 and the events leading up to its execution.

314. The employer named in the contract is Tiger Developments, which is not a plaintiff.

315. The defendants plead that none of the plaintiffs was a party to the Contract and therefore there is no privity of contract between any of the plaintiffs and Mr. Cox. In response, the plaintiffs rely on a Deed of Assignment dated 15 May, 2017 whereby "Tiger Developments, now known as Carbon Developments Limited, assigned to the plaintiffs all of its rights, benefit, interest and title to and in the Cox Contract of Employment, together with all the benefit of the obligations owing to Tiger Developments under the Cox Contract of

Employment and all the rights and remedies and claims and demands in respect of any breach of such obligations."

316. Later I examine the validity and enforceability of the assignment Carbon Assignment and I conclude that it is not enforceable by the plaintiffs. It is nonetheless relevant to consider the context of Mr. Cox's employment and the terms of the contract since the plaintiffs place heavy reliance on it in a number of respects to demonstrate Mr. Cox's knowledge of his obligations to the Group, of which the sixth plaintiff is a member. This background also informs the court in determining Mr. Cox's knowledge of both the Group and of the plaintiffs.

317. Mr. Cox in his evidence refers to his role as a consultant to the Group from 2007 to the end of 2009. He then described the circumstances in which he was employed:

> *"During that period I had various dealings with Michael O'Flynn, Brendan Lenihan and to a lesser extent John Nesbitt. In 2009 I dealt with John Nesbitt in relation to a UK transaction. While it is not addressed in detail in Mr. Nesbitt's witness statement, I believe that my work on that transaction provided much of the impetus for the decision to hire me directly as an employee.*
>
> *Arising out of the property crash, it was common knowledge that O'Flynn Group loans would be acquired by NAMA. This would lead to inevitable scrutiny in relation to costs including consultancy costs. In addition it was most unlikely that NAMA would give permission for any or any speculative acquisition or development in central or eastern Europe. At that point – in early 2010 – O'Flynn Group had a range of investments and developments in the UK through three entities, (Victoria Hall Limited (an Isle of Man company), Tiger and Shelbourne Senior Living). Mr. Nesbitt was responsible for all of those investments and developments and I understood he felt that I would be useful to the UK business. It was against that backdrop that I was employed by Tiger."*

318. It is clear from Mr. Cox's own description and from other instances (including a potential project with Trinity College referred to below) that Mr. Cox never regarded his function as confined to activities of Tiger Developments Limited.

319. Mr. Nesbitt's evidence is that he believed that the skills exhibited by Mr. Cox were such that he could provide value across the group of O'Flynn companies in much the same manner as had been provided in the course of the consultancy since 2007. Mr. Nesbitt said that it was agreed that, as with other senior management in the Group, Mr. Cox would be required to work across different companies in the Group, but one company would have to be selected as his employer for payroll and taxation purposes. Mr. Nesbitt gave evidence that although his own salary was paid by Tiger Developments, he was expected to work for whatever company in the Group he could usefully assist with. (In fact, that element of Mr. Nesbitt's description is erroneous in that his own remuneration was paid through his consulting company Altavera which paid his salary and in turn recharged the O'Flynn Group). He references also the fact that salaries of other senior persons in the group such as those of Michael O'Flynn, John O'Flynn, Michael Kelliher, Patrick O'Flynn, Gary O'Halloran, Tom O'Driscoll and Margaret O'Neill were at that time being paid by O'Flynn Construction Cork despite the fact that they performed functions "across the Group as a whole".

320. Mr. O'Flynn gave evidence that before and after the incorporation of Colebridge Limited and the establishment of a formal structure all of the companies concerned "worked in harmony and resources were shared". He said *"anyone employed to act for one company could be asked to undertake work for any of the other companies. Everyone understood this and it worked perfectly smoothly. Indeed, the O'Flynn Group' as it is known is back now again operating through a number of associated structures which do not constitute a group structure in the strictest sense as that term is defined in the Companies Acts."*

321. Illustrative of Mr. Cox's role in respect of entities other than Tiger Developments from the very outset was his role in relation to a submission which had been made on behalf of Victoria Hall Limited ("VHL") for the provision of student accommodation for Trinity College Dublin.

322. On 18 December, 2009 the Director of Buildings at Trinity College Mr. Langan wrote to Mr. Patrick Cox at "Victoria Hall Limited" informing him that the Victoria Hall prequalification submissions had been rejected following a tender submissions process and giving reasons.

323. Mr. Cox circulated Mr. Langan's letter within the O'Flynn Group, including Michael O'Flynn, and participated in an exchange of emails regarding the reasons for the rejection, stating that he would arrange a debriefing with Trinity College *"with a view to understanding how they assess this point and would keep Mr. O'Flynn informed"*.

324. Mr. Cox's email within the Group dated 14 January, 2010 is signed by him "Patrick Cox, O'Flynn Construction Company".

325. Many individual emails and notes were put in evidence by all parties during the course of the trial as evidence supporting their descriptions of the roles and functions of Mr. Cox and others. Such selected individual emails and notes, frequently generated casually and in very particular contexts, have the potential to be unrepresentative and misleading. Nonetheless, in circumstances where there is such a conflict in the manner in which the parties describe their roles and status, it is informative to have regard to contemporaneous communications of this nature.

326. Mr. Cox in his evidence said that the use of the term "O'Flynn Construction Company" under his signature in the email of 14 January 2010 was no more than the use of a "template email" which he said was no different than standard format or even a disclaimer type format.

327. This communication, however, illustrates that Mr. Cox was participating in the business of Group companies other than Tiger Developments, on this occasion using the signature of O'Flynn Construction Company in the context of a project for which VHL had made a submission. It also reveals his role in the student accommodation sector. He circulated the outcome and participated in discussions about it with the most senior executives in the O'Flynn Group including Mr. Michael O'Flynn, Mr. Nesbitt, Mr. Brendan Lenihan and others, and committed to following up for a debriefing with Trinity College.

328. After Mr. Cox had joined the Group on a full-time basis, and when it came to determining which entity within the Group would be his named employer for the purpose of a formal contract the HR manager of the Group Laura Nolan was instructed to address the formalities. She emailed Mr. Lenihan, then Finance Manager in the Group and Mr. Nesbitt as follows:

> *"Hi Brendan,*
>
> *John and I have discussed various titles and duties for Patrick Cox and propose the following:*
>
> *Title: Strategic Investment Director*
>
> *Duties:*
>
> - *Participate with the raising of capital;*
> - *Represent the company with potential investors;*
> - *Develop networks and target markets;*
> - *Develop investor relationships with both active and target investors;*
> - *Bring investors to the Group and execute deals on behalf of the Group;*
> - *Find new leads and bring these to the Board for discussion;*
> - *Follow through and convert leads on Board approval.*
>
> *We will need to also agree the following for the contract:*

- *Whether this position will be subject to a probationary period;*
- *Start date;*
- *Who Patrick will report to;*
- *Place of employment (subject to travel);*
- *Salary (and looking into benchmarks);*
- *Bonus/incentive;*
- *Whether he will receive a company credit card;*
- *Notice period;*
- *Restriction after termination clauses?*
- *Which company Patrick will be paid by and associated tax implications;*
- *Which company Patrick will be employed by and whether he will be governed by UK or Irish legislation."*

329. On 24 February, 2010 Mr. Lenihan emailed Mr. Kevin Kenny at EY to obtain tax advice on the issue as follows:

"Kevin

- *We have a consultant working for us at present (Patrick Cox) who is providing services to Tiger and Victoria Hall.*
- *The consultancy arrangement is now over and we would like to employ him directly effective immediately, and I would like to tease out some of the tax implications in relation to this proposal.*
- *He lives in Dublin.*
- *His title will be Strategic Investment Director O'Flynn Group UK. At the moment he is very focussed on looking at equity and debt partners for Vic…*(sic).*"*

330. On 26 February, 2010 Mr. Kenny of EY gave advice in relation to the appropriate tax treatment of Mr. Cox having regard to the provisions of Ireland-UK double tax treaties. Mr.

Kenny identified the conditions in which an exemption would be available to a rule requiring that renumeration derived from UK activities be taxed also in the UK. He continued:

> *"However, Article 15 para. 2 contains an exception to this rule, where all the following three conditions are met:*
>
> 1. *The employee is not present in the UK for a period exceeding 183 days in the fiscal year concerned and*
> 2. *The remuneration is paid by or on behalf of an employer who is not a resident of the UK and*
> 3. *The remuneration is not borne by a PE or a fixed base which the employer has in the UK.*
>
> *Conditions 2 and 3 will be satisfied if Pat's salary is paid out of Tiger Developments (as a cost of head office and not the UK branch)."*

331. Mr. Kenny advised that the decisive question would be the number of days which it was intended Mr. Cox would spend in the UK.

332. Arising from this advice it was concluded that the HR manager should prepare Mr. Cox's contract "in the name of Tiger Developments who is already registered as an employer in Ireland".

333. It has not been suggested by any of the parties that there was anything improper in relation to the manner in which tax was to be administered. On the contrary it is accepted that appropriate advice was taken to ensure compliance with tax laws and treaties. The result was the selection of Tiger Developments as the appropriate employer having regard to the intended activity and location of Mr. Cox.

334. A number of other emails are of assistance in understanding the perspective of both parties in the context of identifying Mr. Cox's employer. On 10 February, 2010 Mr. Cox

emailed an intended counterparty Maxcap Partners by way of introduction to Victoria Hall. In this email he provided his own biography as follows.

> *"Patrick Cox*
>
> *Patrick Cox is the Corporate Finance Director of the O'Flynn Group, with responsibility for identifying new development investment opportunities for the O'Flynn Group* (emphasis added), *structuring joint ventures agreements and arranging bank finance for new ventures. He joined the O'Flynn Group following a number of years with Anglo Irish Bank where he worked in corporate treasury, specifically involved in cash and currency management for key corporate and institutional clients followed by a period in corporate lending specifically focussed on providing funding to Irish property investment and development transactions".*

335. On 3 March 2010, Mr. Cox gave an instruction in relation to the content of his intended business card stating that it should read as follows:-

> *"Name: Patrick Cox*
>
> *Title: Investment Director*
>
> *Address: O'Flynn Group, 9 Clifford Street, London, W1S 2FT*
>
> *Telephone: (given)*
>
> *Mobile: (given)*
>
> *Fax: (given)*
>
> *Email: pc@tigerdevelopments.com*
>
> *www.oflynngroup.com"*

336. It is clear therefore that before the contract itself was signed, all of the parties contemplated that Mr. Cox's role would be that of an "Investment Director" or, as he put it in his email to MaxCap Partners, *"Corporate Finance Director of the O'Flynn Group"*, and therefore having responsibilities across the Group as a whole.

337. As a matter of basic contract law, the parties could of course have agreed at the time of signing the contract that Mr. Cox's duties and responsibilities would be confined to particular named entities within the group such as Tiger Developments Limited. That is not what the contract states, and there is no evidence to suggest any agreement to so limit his duties or responsibilities.

The Contract of Employment

338. The contract is in the form of a letter signed by Mr. Cox and Mr. Nesbitt on 26 March 2010. It is stated to be a contract dated 24 March 2010. Its relevant provisions are as follows:-

"Date 24 March 2010

Dear Patrick

I refer to our recent discussions. It gives me great pleasure to offer you the position of Investment Director with Tiger Developments. This offer letter outlines the terms and conditions ('terms and conditions') of your employment and shall be referred to in this document and in the Employee Handbook as your contract of employment ('contract of employment').

('You') Patrick Cox will be employed by Tiger Developments, whose registered offices are at Beckett House, Barrack Square, Ballincollig, County Cork, Ireland ('the company').

1. *COMMENCEMENT OF EMPLOYMENT*

   1.1 Your employment will commence on 1st January 2010.

2. *JOB TITLE AND DUTIES*

   2.1 You will report to John Nesbitt or such other person as may be authorised by the company and notified to you. You also have dotted line reporting

responsibilities to Brendan Lenihan and Tony Barry, to keep them appraised of your work and seek their input periodically."

339. Mr. Nesbitt was at the time a shareholder in Colebridge Limited and was Managing Director of Tiger Developments, Victoria Hall Limited and Shelbourne Senior Living, these being the companies conducting the Group's principal activities in the UK. Mr. Lenihan was the Finance Director of the O'Flynn Group itself. Mr. Barry was, according to his own evidence, the *"O'Flynn Group European and Finance Director in Victoria Hall Limited and Tiger"*, and a director of a number of companies in the Group.

340. *"2.2 Your job title is Investment Director and your duties include, but are not limited to:*

- *Participating with the raising of capital.*
- *Representing the company with potential investors.*
- *Developing networks in target markets.*
- *Developing investor relationships with both active and target investors.*
- *Brining investors to the Group and executing deals on behalf of the Group.*
- *Finding new leads and bringing these to the Board for discussion.*
- *Following through and converting leads and Board approval.* (Emphasis added).
- *Other ad hoc duties associated with the role of Investment Director."*

341. The contract contains no definition of the term *"Group"* or the term *"board"*. It is not disputed that the term Group means the O'Flynn Group, being Colebridge International Limited and its subsidiaries.

342. *"2.3 You are expected to be flexible in your position and must be prepared to undertake such other work as may be assigned to them (sic) by the company from time to time. You may also be transferred either on a temporary or permanent basis to other duties and to other positions within the Company or for any associated or subsidiary companies* (emphasis added).

3. PLACE OF WORK

3.1 Your place of work will be the company office at Killorglan House, 41-43 Shelbourne Road, Ballsbridge, Dublin 4, Ireland but you will also be required to carry out work in the UK office at 9 Clifford Street, London, W1S 2FT. You shall also be required to call to prospective or existing clients or visit such other locations or sites as may be necessary for the performance of your duties from time to time. The company reserves the right, at its reasonable discretion to change your place of work to any other place where it now conducts or where at some future date, it may conduct its business or part of its business in the course of your employment."

343. Clause 4 governs hours of work and clause 5 governs remuneration and benefits. Clause 5 provides for the payment of a basic gross salary of €75,000 per annum.

344. Clauses 6 to 12 govern such matters as retirement age (65 years), pension, holidays, sickness, smoking policy, searches and data protection.

345. Clause 13 governs termination:-

"13.1 This agreement may be terminated by either party giving the other party not less than three months' notice of termination in writing or such longer notice as may be required under the Minimum Notice Act 1973.

13.2 The company reserves the right to make payment in lieu of notice.

13.3 During any period of notice of termination of employment whether given by you or by the company, the company shall not be under any obligation to assign any duties to you or provide you with any work and shall be able to

exclude you from its premises provided that this shall not affect your entitlement to receive salary and other contractual benefits.

13.4 Upon termination of your employment for whatever reason you are required to return all documents, papers, notes of any description, or other property belonging to the company, which may be in your possession or under your control which relate in any way to the affairs of the company, and you must not retain copies of any such documentation."

346. Clause 13.5 provides for termination with immediate effect and without notice in case of gross misconduct, criminal offences, bankruptcy and the like.

347. Clause 14 Restriction after Termination:-

"14.1 You acknowledge that you are being appointed to a senior position and you agree to comply with the restrictions of this clause for the purpose of protecting the legitimate business interests of the company and the group companies.

14.2 You agree that you shall not in connection with any business or activity which is or is about to be competitive with the restricted business [a phrase not defined in the contract] *at any time within the period of three months following termination without the prior written consent of the company (either directly or indirectly, alone or jointly with others, or on your own behalf or on behalf of any third party):*

- *Solicit or canvas the custom of any client.*
- *Deal (in any capacity whether as employee, consultant, agent, supplier, director or otherwise) with any client or any other person with whom you have had business contact during your employment.*

- *Solicit, induce or attempt to persuade any team member to leave employment or engagement in the restricted business and/or to accept employment or engagement by you or any person, firm or company.*

...

14.4 You have given the undertakings contained under this heading to the Company as trustee for itself and for each O'Flynn Group company and shall at the request and cost of the company, enter into direct undertakings with any Group company which correspond to the undertakings contained under this heading. The rights of the company contained under this heading may be transferred to its successors and assigns."

348. Clause 15, Confidentiality:-

"15.1 You will understand that the company's business is of such a nature as to require discretion on your part and confidence in relation to your work and in relation to matters which you may come into contact during the course of your work.

15.2 You must at all times keep confidential and not disclose to any other person or make use of any trade secrets or confidential information of the company or of the O'Flynn Group (together 'the Group'). Trade secrets and confidential information include for example, all knowledge about the business activities, organisation, operations and finances of the Group, and information relating to suppliers, clients of the Group. This duty of confidentiality lasts even after you leave employment.

15.3 You shall not during your employment make or compile, otherwise than for the benefit of the Group, any notes, memoranda, drawings or other images (however recorded) relating to the business or affairs of the Group.

15.4 Any breach of this condition, during the period of employment or at any time thereafter shall be actionable by the Group and the Group shall reserve the right to take such action as necessary for such loses as may be incurred owing to the breach hereof against you (the disclosure of such confidential information) and also the recipient of such information which shall be deemed to be aware of the confidentiality of such information."

349. Clause 16, "Other interests":-

"16.1 You must devote the whole of your time, attention and abilities during normal working hours (and any overtime which you may be required to work) to your duties for the company. You may not, under any circumstances, whether directly or indirectly, undertake any other duties of whatever kind, during your hours of work for the company.

16.2 You may not without the prior written consent of the company (which will not be unreasonably withheld) engage, whether directly or indirectly, in any business or employment outside your hours of work for the company."

350. Clause 20 contains a standard entire agreement provision-

"20.1 This contract of employment constitutes the entire agreement and understanding between the parties in respect of the matters dealt within it and supersedes any previous agreement between the parties relating to such matters".

<u>Who can invoke the Cox Contract of Employment?</u>

351. The plaintiffs submit that pursuant to the contract Mr. Cox owed to all of them, including the first five plaintiffs which were never in the O'Flynn Group, the duties identified in the contract. They cite broad principles for construing a contract identified in *Brushfield Limited (trading as the Clarence Hotel) v The Arachas* 2021 IEHC 263, *Rohan Construction v Insurance Corporation of Ireland* [1986] 1 ILRM 419 and [1988] IRLM 373, *Analog*

Devices v Zurich Insurance Company [2005] 1 IR 274, *ICDL GCC Foundation v European Computer Driving Licence Foundation* [2012] 3 IR 3267, *Emo Oil Limited v Sun Alliance and London Insurance Plc* [2009] IESC 2 and *Law Society of Ireland v Motor Insurers Bureau of Ireland* [2017] IESC 31 and *Goudriaan v Jenda Corporate Holdings Limited* [2019] IEHC 332. They submit that these cases are authority for the proposition that the court must examine what a reasonable person, having knowledge of the relevant background, would have understood the terms *"Group"* and *"associated companies"* to mean and rely on this proposition to establish that the contract itself conferred on Mr. Cox duties to the plaintiffs, not being Group companies.

352. The plaintiffs cite clause 2.3 which provides that Mr. Cox may be transferred to other duties and other positions *"within the company or for any associated or subsidiary companies"*. They submit that the term *"associated"* must have a different meaning to the term "subsidiary" and therefore is not limited to companies within the Colebridge Group.

353. Clause 2.2 provides that the duties of Mr. Cox include, "but are not limited to", the different tasks listed which include *"bringing investors to the Group and executing deals on behalf of the Group"* and references to finding leads and bringing these to the Board for discussion.

354. Having regard to the manner in which Mr. Cox was recruited and the fact that even by the time he signed this contract he was clearly engaged in tasks on behalf of entities other than Tiger, there can be no doubt that the term *"Group"* referred to in clause 2.2 of the contract refers to the Colebridge Group as a whole. It was not seriously contended at the trial that this was not the case.

355. Similarly, it was not disputed that the term *"board"* cited in clause 2.2 means the boards of companies in the O'Flynn Group.

356. The plaintiffs invoke clause 2.3 to extend the contractual obligations to companies outside the Colebridge Group namely the first five plaintiffs, on the basis that they are "associated companies".

357. Clause 2.3 provides as follows:-

> *"You may also be transferred either on a temporary or permanent basis to other duties and to other positions within the company or for any associated or subsidiary companies".*

358. This is the only reference in the contract to *"associated"* companies. None of the provisions of s. 14, concerning restriction after termination, clause 15, concerning confidentiality or clause 16, concerning other interests, contain any reference to "associated companies".

359. The plaintiffs submit that reference to the definition in the Oxford English dictionary of "associated" as meaning *"connected with an organisation"* is an example of the use of the term "associated company".

360. The plaintiffs rely on Mr. Cox's later conduct in performing services for them to show that the word *"associated"* must in its ordinary and natural meaning encompass companies, even outside the Group, with a connection or association with Tiger *"and/or the persons then controlling Tiger"*.

The first four plaintiffs

361. In support of the submission that the first five plaintiffs were "associated" companies of the Group, reliance is placed on evidence of activities of Group companies, notably VHL, coinciding with and interfacing with the parallel VHML Group as it evolved. Reference is made to such matters as office sharing at the London location and the existence of a single computer server for the London office, used by group and non-group companies. Reference is made to staff members of the Colebridge Group undertaking activities for the plaintiff

companies as well as Colebridge Group companies and that they were paid additional income for doing so. Finally, reliance is placed on marketing and other materials used for external use in which the names VHL and VHML are associated and occasionally are used interchangeably.

362. The existence of a services agreement and a brand licence agreement between VHL and VHML are relied on to demonstrate *"the close working relationship between VHL and VHML"*.

363. Finally, the plaintiffs rely on the fact that for certain work which Mr. Cox undertook for a number of the plaintiffs, no separate fee was paid, which they say is demonstrative of a *"de facto association between the companies"*.

364. The defendants submit that most of this evidence cited relates to events which took place after the signing of the contract. They submit, correctly, that evidence of such activity and interconnection is not admissible as an aid to interpretation of the contract.

365. I consider in more detail later the evidence regarding the extent to which Mr. Cox preformed services for companies outside the Group and the implications of that evidence in these proceedings. However, the evidence of the manner in which the parties conducted themselves after the signing of this contract cannot be invoked as an aid to the construction of the contract itself. The events before signing are relevant, namely the recruitment of Mr. Cox and the manner in which it was determined that one entity Tiger Development would be his employer for administrative, payroll and tax purposes, but not the many events which took place over several years thereafter.

366. The case made by the plaintiffs is that arising from the rejection by NAMA of the O'Flynn Group Business Plan it was necessary to utilise the plaintiff companies as vehicles, independent of and freed of the limitations applying to the Group, through which new investment and development opportunities could be availed of. I accept the defendants' submission that the plaintiffs cannot rely on this assertion of independence and disassociation

on the one hand and at the same time persist in the submission that the plaintiff companies are, for the purpose of clause 2.3 of the contract *"associated"* companies.

367. In replies to particulars delivered on 21 September 2016 the plaintiffs stated that pursuant to the Tiger contract Mr. Cox *"agreed to and did provide services and owed duties to companies within the O'Flynn Group and associated companies"*. It continues *"at all material times each of the first to fifth named plaintiffs were companies associated with the O'Flynn Group of companies"*. Particulars were sought of the meaning of the phrase *"associated companies"* and the plaintiffs delivered further replies stating the following:-

> *"The phrase 'associated companies' appearing in the Cox Contract of Employment referred to other companies within the O'Flynn Group of companies, and to any other company under the control of the same person or persons as the O'Flynn Group companies. For the avoidance of doubt, each of the plaintiffs is an associated company, within the meaning the Cox Contract of Employment"*.

368. When further particulars again were sought the plaintiffs said the following:-

> *"The first, second, third and fourth named plaintiffs are owned and controlled by John Nesbitt.*
>
> *In the case of the first, second and third named plaintiffs, Mr. Nesbitt's interest is held indirectly through nominee companies, Elian Nominees (JY) Limited and Naile Nominees (JY) Limited.*
>
> *Michael O'Flynn has control of the first, second, third and fourth named plaintiffs insofar as he has the future right to acquire control over the affairs of the first, second, third and fourth named plaintiffs at a future date"*. (Emphasis added).

369. At the date on which the contract was signed VHML was owned by the same shareholders as the Colebridge Group, namely Michael O'Flynn and John O'Flynn with minority shareholding held by Mr. Nesbitt and Mr. Kelliher. However, the plaintiffs persisted in the assertion at the trial that VHML, while not incorporated for the purpose of operating

the *"parallel"* structure, was the entity used to operate independently of the Group and therefore free of the constraints of NAMA. They acknowledged in evidence that Mr. O'Flynn did not enjoy a *"right"* to acquire a controlling interest.

370. The assertion that Mr. O'Flynn had a future *"right to acquire control"* of VHML having been abandoned in the evidence, the plaintiffs described an *"understanding"* between them as men who trusted each other. Therefore, the assertion of a right in Mr. O'Flynn to acquire such control, which in the particulars quoted, is a basis for the assertion that the VHML companies are "associated" companies for the purpose of the contract, is unsustainable, and I conclude that none of the first four plaintiffs were associated companies of Tiger or the Group as envisaged by Clause 2.3.

The fifth named plaintiff

371. O'Flynn Capital Partners was incorporated on 24 February 2014, almost four years after the signing of the Cox Contract. The ultimate shareholders were Michael O'Flynn (40%), John O'Flynn (40%), Michael Kelleher (10%) and Patrick Kelleher (10%). The dominant shareholding of the O'Flynns mirrored the shareholding in the Colebridge Group, save that in Colebridge Mr. Nesbitt held a 4% shareholding. O'Flynn Capital Partners is clearly not a 'Group' company. The question is whether it is an 'associated' company for the purpose of the contract.

372. The plaintiffs submit that in the ordinary way a trading group of the scale of the O'Flynn Group would evolve and expand, and that the parties must have understood that companies within the Group would *"come and go"*. New companies would continue to be established from time to time within the Group.

373. They submit that it would be an artificial construction if the identity of "associated", or "subsidiary" companies was "frozen" as at the date of signing the contract. Mr. Cox joined a Group which already had over 100 subsidiaries and if the contract were limited in its effect

to companies in existence as of his commencement date the efficacy of the clauses protecting "associated" companies would be undermined. The term Group, they say, should be understood to recognise that new entities could be incorporated or dissolved in the future, and fall within the definition of the term 'Group' and that O'Flynn Capital Partners is such an entity. There is some force in this argument, but it does not prevail for O'Flynn Capital Partners, for the following reasons.

374. Firstly, although O'Flynn Capital Partners had common shareholders with the Group, it was formed four years after the contract and, even if it was "associated" by common ownership for a limited period of fourteen months (being the period from February 2014 to April 2015 when Carbon acquired ownership of the Group), there is no evidence that its formation was in the contemplation of the contracting parties in March 2010.

375. Secondly, the purpose of O'Flynn Capital Partners was entirely different to that of the companies in the Colebridge Group. It was said by the plaintiffs themselves to have been formed for the purpose of pursing projects and opportunities outside the Colebridge Group and untrammelled by the constraints of the debt and security overhanging Colebridge.

376. Thirdly, it would be a wholly unreasonable construction of the Cox Contract to find that, when entering into the contract on 24 March 2010, Mr. Cox was agreeing to assume obligations and duties under that contract to an entity which would be formed four years later outside the Colebridge Group and for the purpose of pursuing opportunities and objectives independently of that Group. No evidence was proffered to support such a contention. I therefore conclude that the term "associated" company in the contract does not include O'Flynn Capital Partners.

The sixth named plaintiff

377. O'Flynn Construction (Cork) was an O'Flynn Group company when the contract was signed and was, until 2015, an "associated company". It is therefore open to the contracting party, Tiger Developments, now Carbon Developments, to invoke the contract for its benefit,

which it has not done. As a 'group company' it was clearly an intended beneficiary of the restrictive provision in Clause 14 and the confidentiality provision in Clause 16. It still faces two obstacles in seeking to invoke the contract. Firstly, it is not a party to the contract and the objection that it lacks privity of contract with Mr. Cox is valid. Secondly, no evidence was adduced that O'Flynn Construction (Cork) had any history of developing student accommodation schemes or was party to the plans and ambitions of the first five plaintiffs to pursue and develop such projects.

378. Clause 14 is the clause which restricts Mr. Cox from competing with the company (Tiger) and the Group at any time within the period of three months following termination without the prior written consent of the company.

379. This clause is stated (14.4) to be for the benefit of the company, namely Tiger Developments, "as trustee for itself and for each O'Flynn Group company". No reference is made to "associated companies". It is accepted that none of the first five plaintiffs are in the Colebridge Group and accordingly, taking clause 14 on its own, there can be no basis upon which they could invoke that clause.

380. Clause 15.4 concerning confidentiality states that any breach of this condition "shall be actionable by the Group" and refers nowhere to "associated companies".

381. Clause 16 relates to the obligation to devote whole time attention "to your duties for the company". No part of Clause 16 refers to the Group or "associated companies".

382. Although only the word "company" and not "Group" is used in Clause 16, the duties described in Clause 2 clearly extend to group activities and group obligations. But only the contracting party Tiger can enforce that clause, absent a valid and enforceable assignment of the contract.

383. When account is taken of the circumstances in which Mr. Cox was recruited and appointed, the reasons why Tiger was selected as the named employer in his contract, and his interaction with the Group over a period of three years before he took up the full time

position and before he signed the contract, a proper construction of the contract is that it imposed duties which are not limited as a matter of contract to Tiger Developments, but extend only to companies in the Colebridge Group.

384. Clause 14.4 provides that "the rights of the company contained under this heading (namely the restriction after termination) may be transferred to its successors and assigns."

385. Unless the Carbon Assignment was valid Tiger Developments is the only party with standing to enforce any of the provisions of this contract.

386. The contractual position of Mr. Foley and Mr. Kearney is different. They were employees of O'Flynn Construction (Cork), having resigned long before the events giving rise to the plaintiffs' claims. The only aspects of their contracts relevant to the plaintiffs' claims against them are the provision that the "duty of confidentiality lasts even after you leave employment" and the obligation on termination of employment to "return all documents, paper, notes of any description or other property belonging to the company in your possession or under your control, which relate in any way to the affairs of the Company and you must not retain copies of any such documents". These terms are clearly relevant to the plaintiffs' claims arising from the taking by Mr. Cox of documents which he then shared with Mr. Foley and Mr. Kearney.

The Carbon Assignment – 15 May 2017.

387. The defendants contest the validity and lawfulness of the assignment. At least three different versions of this document were put in evidence. An unsigned version was annexed to the witness statement of Mr Nesbitt. In his evidence on Day 3 Mr O'Flynn referred to a signed copy, which appeared in the Core Book of Documents for the trial. A different, partly executed version was put in evidence by Mr. Robert Dix, a director of Carbon.

388. The Deed is stated to be dated 15 May 2017. The assignor is Carbon Developments Limited (formerly called Tiger Developments).[6] The assignees are the six plaintiffs.

389. The Deed recites the background as follows:

> *"(a) The Assignor and Patrick Cox of 15 Rockford Park, Blackrock, County Dublin entered into a contract of employment dated 24 March 2010 (the Contract) a copy of which is annexed to this Deed.* (No copy of the employment contract was in fact annexed to the Deed).
>
> *(b) The Assignor was, prior to 24 April 2015, indirectly owned and controlled by Michael O'Flynn and John O'Flynn.*
>
> *(c) On 24 April 2015 (the 'date of sale'), pursuant to various commercial agreements and contracts, the ownership and control of the Assignor was transferred (indirectly) to Carbon Holdings 1 SARL*. (This is a reference to the transaction whereby Carbon acquired the shareholding in Colebridge Limited).
>
> *(d) On 27 April 2017, Patrick Cox gave notice of resignation under the Contract (by email), a copy of which is annexed to this Deed. Patrick Cox has not subsequently provided employment services directly to the Assignor, either pursuant to the Contract or otherwise.*
>
> *(e) The Assignees and the Assignor have entered into an agreement (the Agreement) in relation to the matters herein contained under which agreement the Assignees have, inter alia, confirmed to the Assignor that, both prior to and after the date of sale, Patrick Cox provided services to them <u>including under and pursuant to the contract</u> (emphasis added) and that the Assignees had relied on the Contract in respect of the services. The Assignees have requested that the Assignor transfer and assign all of its*

[6] Tiger Developments remained in the Colebridge Group after the Group was acquired by Carbon International Finance (Blackstone). Its name was later changed to Carbon Developments.

rights, title, benefit and interest in and under the Contract to the Assignees, and the Assignor has agreed to do so in accordance with the terms of this Deed."

390. The key operative provision of the agreement is in Clause 2 headed "Assignment":

"Pursuant to the Agreement and with effect from the date of this Deed, the Assignor, to the fullest extent permissible by law, hereby absolutely transfers and assigns to the Assignees, free from all incumbrances, all of its rights, benefit, interest and title to and in the Contract together with all the benefit of the obligations owing to the Assignor under the Contract and all the rights and remedies and claims and demands in respect of any breach of such obligations. Each assignee accepts the assignment of such rights, benefit interest and title to and in the Contract."

391. The execution pages provided for execution under seal in the case of the Assignor and in the case of Victoria Hall Management Limited, O'Flynn Capital Partners and O'Flynn Construction (Cork) and for execution "as a deed" by the Jersey registered companies Palm Tree Limited and Grey Willow Limited and the English incorporated company Albert Project Management Limited.

392. Eighteen months later, by letter dated 14 November 2018 the plaintiff's solicitors, Messrs BHK, gave Notice of Assignment to Mr Cox in the following terms: -

"On behalf of the assignees we hereby give notice that on 15 May 2017 Carbon Developments Limited absolutely transferred and assigned all its rights, benefit, interest and title to and in the contract to the assignees, together with all the benefit of the obligations owing to Carbon Developments Limited under the contract and all the rights and remedies and claims and demands in respect of any breach of such obligations".

Execution and delivery of the Assignment

393. The version of the assignment contained in the Core Book of documents presented to the court at trial showed signatures of relevant directors of each of the companies which is a party, including in the case of Carbon Developments Limited the signature of Mr Robert Dix, Director and of Diana Hoffmann, "Director/Secretary". None of the execution pages in that version showed any evidence of company seals having been affixed.

394. A copy corresponding to the version in the Core Book was handed in to court at the third day of the trial in the course of evidence being given by Mr O'Flynn. It was said by the plaintiffs that the version shown to the court was an original and that a copy was contained in the Core Book.

395. At the outset of the trial the court was informed that, with certain exceptions, the parties had agreed that documents discovered by the parties or appended to the adapted witness statements would be admitted into evidence without the requirement for formal proof (the so-called Bula/ Fyffes model). The court was informed that the Carbon Assignment was one of the exceptions to this agreement and Mr. Gardiner, on behalf of the defendants, informed the court that the defendants required that this document be formally proved. The version verified by Mr. O'Flynn on Day 3 was not an original.

396. Counsel for the plaintiffs indicated that if formal proof of the Assignment was required, evidence would be adduced in due course, including ultimately evidence by Mr Dix one of the directors of Carbon who had signed it.

397. On Day 14 of the trial the plaintiffs' counsel informed the court that there was a difficulty in relation to the evidence go be given regarding the Deed of Assignment. The document which it was intended would be proved by calling Mr Dix was a version of the assignment on which the seal of Carbon Developments did not appear. At that point it had become clear that the trial would be adjourning for an extended period of time. Counsel for the plaintiffs said that the interval before resumption of the trial would be used to establish

the whereabouts of the duly executed assignment and that Mr Dix would give evidence when the trial resumed.

398. Ultimately no original of the executed assignment could be located.

Evidence of Mr. Robert Dix

399. On Day 19 of the trial, Mr Dix was called to give evidence in relation to the execution of the assignment. Mr Dix was a member of the Board of Directors of Carbon Developments which held a meeting on 15 May 2017. The meeting was attended by himself and, remotely, by two other directors of Carbon, namely Mr Rhys Owens and Ms Diana Hoffmann. Mr Dix said that the purpose of the meeting was to consider a proposal to assign the Cox Contract of Employment from Carbon to the plaintiffs. A draft of the deed of assignment was tabled at the meeting.

400. The minutes of the meeting put into evidence by Mr Dix recite the following: -

"8. Consideration of the Deed of Assignment.

8.1 By way of background, it was explained to the meeting that Michael O'Flynn (MOF) is involved in a dispute with an ex-employee of the company, Patrick Cox, who resigned from the company on 27 April 2015.

8.2 Mr Cox provided services to MOF's group of companies both during and after the time in which the MOF group owned the company.

8.3 MOF and his group allege that Mr Cox has breached various confidentiality and other obligations owed to them during the course of his setting up a new business which competes with MOF's business, and that these breaches have caused them loss.

8.4 The purpose of the Deed of Assignment is to assign any and all rights the company has in the contract of employment entered into by the company and Mr Cox

on 24 March 2010 to the entities claiming damages against Mr Cox in order to assist such entities with their claims". (Emphasis added).

401. The minute continued by reciting the following resolutions: -

"After due and careful consideration it was unanimously resolved that -

9.1 In the good faith opinion of all the directors, it was for the commercial benefit and in the best interests of the company to approve the entry into by the company of the Deed of Assignment, and the Deed of Assignment be and is hereby approved;

9.2 the Deed of Assignment in substantially the form of the draft circulated prior to the meeting be executed by the company by any one director; and

9.3 any one Director be and is hereby authorised to do all such acts and things and agree and execute on behalf of the Company such of the Deed of Assignment (and any other documents) as such Director in his absolute discretion considers necessary or desirable in connection with the signing of the Deed of Assignment (including, where relevant, any two directors or a director and the secretary under seal), in each case with such amendments deletions or variations as any director in their absolute discretion deems necessary or appropriate."

402. A draft of the Deed of Assignment was tabled at the meeting.

403. Mr Dix stated that on the evening of 15 May he received from Carbon's English solicitors Kirkland & Ellis International LLP a copy of the Deed of Assignment. He signed the Deed in his capacity as a director of Carbon and returned to Kirkland a scanned copy bearing his signature. This was done by Mr Dix immediately after midnight and therefore early on 16 May 2017.

404. Subsequently a Mr Alexander Van der Gaag of Kirkland confirmed receipt of the signature page from Mr. Dix.

405. Mr. Dix understood that his co-director Ms. Hoffman was also sent a scanned copy of the deed bearing his email signature which she then signed in her capacity as a director of Carbon and that a scanned copy of the deed was returned by her to Kirkland on the morning of 16 May. The defendants objected to this evidence as hearsay.

406. Mr. Dix said that he understood that the company seal of Carbon was subsequently applied to a copy of the deed bearing his signature and Ms. Hoffman's signature by the company's corporate services provider, Sanne, on behalf of Carbon. Mr. Dix referred to a letter of 9 October 2020 from a Mr. Kinsella of Sanne confirming that Sanne had on 16 May 2017 received a copy of the Deed of Assignment signed by Ms. Hoffman and by Mr. Dix and that Sanne had then affixed the company seal to that copy of that deed on Carbon's behalf and returned it Kirkland & Ellis. Again, the defendants objected to this as hearsay evidence.

407. Annexed to Mr. Dix's witness statement as adopted is a copy of the Deed of Assignment on which he states that there appears the seal of Carbon and the signatures of himself and Ms. Hoffman. The copy annexed to the statement contains an execution page for Carbon which states that it is *"given under the common seal of Carbon Developments Limited and delivered as a Deed"*. It is signed by Robert Dix as director and by Dianna Hoffman as director. There appears on this photocopy an impression of the seal of Carbon Developments.

408. Mr. Dix stated that he was aware that despite extensive searches the version of the deed bearing the original seal of Carbon cannot be found and he believes that the copy attached to his witness statement is the best available copy.

409. Mr. Dix was questioned as to the reasons why the directors of Carbon considered that the execution of the assignment was in the best interests of Carbon and gave the following evidence:-

> *"We entered into agreements two years earlier to do the overall transaction and as part of that there was an agreement of co-operation between the parties and there*

were a myriad of things to be sorted afterwards and we agreed co-operate with one another to do so, to sort these things out. And this was part of that.

The intention was that Carbon was to assign the benefits of this contract to the assignee".

410. Mr. Dix believed that searches for the original sealed Deed of Assignment were conducted by Sanne, and by Carbon, through Blackstone in both London and Luxembourg and at Kirkland & Ellis, Carbon's Solicitors.

Evidence of Patricia O'Brien

411. The plaintiff's solicitor, Patricia O'Brien gave evidence in relation to the Deed of Assignment on day 33 of the trial.

412. Ms. O'Brien explained the context of the request for the assignment. A mediation had been arranged between the parties to be held on 16 May 2017. The terms of the assignment were agreed on 15 May 2017 between Ms. O'Brien's firm, BHK Solicitors and Carbon's Solicitors, Kirkland & Ellis. Ms. O'Brien stated that on the morning of 16 May 2017 she received by email from Kirkland the Deed of Assignment signed and stated to be *"given under the common seal of Carbon and delivered as a Deed"*. The covering email from Messrs. Kirkland stated as follows:-

"Patricia, please see attached both documents signed on behalf of Carbon Developments. Please note that these documents and Carbon Developments signatures are not released and are strictly held to our order.

Please can you circulate fully signed versions as soon as possible. We will confirm release of our signatures upon review of both fully signed documents".

413. Ms. O'Brien attached to her witness statements as adopted and put into evidence what she calls the "counterpart Deed of Assignment" executed by Carbon attached to that email

and which she stated constituted an original *"albeit in electronic form"*. This is described by Ms. O'Brien as the *"Carbon counterpart"* which had been delivered to her in escrow.

414. In the copy attached to Ms. O'Brien's witness statement and put into evidence by her the execution by Carbon shows the signature of Mr. Dix as director and of Dianna Hoffman as *"director/secretary"* but contains no impression of a seal.

415. Ms. O'Brien confirmed in her evidence that it was this page which was interleaved with signature pages of the assignees to produce the signed version referred to by Mr. O'Flynn in his evidence on day 3. Ms. O'Brien stated that this was the version on which she relied at the time.

416. Because a number of the assignees were based in Jersey and one in the U.K. Ms. O'Brien was concerned that she would not be in a position to secure executed versions back to Kirkland in sufficient time on the morning of 16 May. She therefore telephoned Mr. Michael Steele, a partner in Kirkland & Eillis. She explained to Mr. Steele the need to have the assignment released on that day and the challenges of having the assignment executed by the assignees in sufficient time. She undertook to Mr. Steele to furnish him with the assignment executed by the assignees. On that basis Mr. Steele confirmed release of the escrow condition. Ms. O'Brien characterises that conversation as *"completed delivery of the Carbon counterpart to the plaintiffs"*.

417. Ms. O'Brien said that it had been her intention to follow up with Kirkland to obtain a *"wet ink"* version of the Carbon counterpart. In the meantime, she treated the Carbon counterpart as an effective deed by virtue of the release of the escrow condition in her conversation with Mr. Steele.

418. Ms. O'Brien said that although she had intended to follow up on the wet ink versions of the assignment in due course, she did not believe this was actually necessary because of the *"virtual completion"*. Nonetheless, she confirmed that the follow up in relation to the wet ink version was overlooked entirely.

419. Long afterwards, on 19 December 2018, BHK sent a copy of the Deed of Assignment to Kirkland & Ellis and to their Dublin Solicitors, Arthur Cox.

420. Ms. O'Brien gave evidence that it was acceptable practise in accordance with guidelines published by a Joint Working Group of the Law Society (England and Wales) Company Law Committee and the City of London Law Society Company Law and Financial Law Committees and consistent with guidance provided by the Law Society of Ireland, to effect *"virtual execution"* as a recognised and legitimate way for parties to execute and deliver agreements and deeds. She said that this was a means by which she had previously completed transactions and agreements between her clients the O'Flynn companies and Carbon.

421. Ms. O'Brien's said that while completion can be achieved on a virtual basis, there will be certain circumstances in which wet ink versions of documents are still required, for example for registration of title, and this is not such a case.

422. In cross examination, Ms. O'Brien conceded that even on the copy of the Deed relied on at the trial the seal of Carbon was affixed to the assignment after it has been signed by Mr. Dix and by Ms. Hoffman and returned by Kirkland & Ellis to Ms. O'Brien on the morning of 16 May 2017.

423. Ms. O'Brien insisted that the document which she received from Kirkland and Ellis on the morning of 16 May 2017 is the original of the assignment, albeit a *"virtual document"*. She emphasised that the reason why the follow-up in relation to a wet ink version came to be overlooked was that she regarded the assignment as having been delivered when she received it virtually on the morning of 16 May 2017.

424. There was no direct evidence that the seal of Carbon was affixed to the version of the assignment on which the plaintiffs relied at the hearing. Whilst Mr. Dix exhibited to his witness statement a version which contained the impression of the seal, he was unable to give any direct evidence as to the source of that copy. He was careful in his evidence to say only

that the signatures were the signatures of himself and Ms. Hoffman and that the impression of the seal appearing on the copy was of the seal of Carbon Developments Limited. He was, however, unable to give any direct evidence as to the affixing of the seal, or when that occurred.

425. No witness was called to attest that the seal of Carbon was duly affixed in accordance with the constitution of Carbon Developments.

426. Mr. Dix states in his evidence that *"I understand that the company seal of Carbon was subsequently applied to a copy of the deed bearing mine and Ms. Hoffman's signatures by Sanne, Carbon's corporate services provider, on Carbon's behalf"*. He then exhibited a letter from Sanne dated 9 October 2020 confirming that it had received a copy of the deed of assignment and that it had affixed the seal of Carbon to that copy deed of assignment.

427. The letter dated 9 October 202 does not state when exactly the seal was affixed. Mr. Dix again was careful to say in his evidence, understandably, only that the seal of Carbon was *"subsequently applied to a copy of the deed"*. No direct evidence is given as to when the seal was applied or the provenance of the version which is both signed and sealed and which is referred to by Mr. Dix in his evidence.

Supreme Court of Judicature Act (Ireland) 1877

428. The plaintiffs rely on s. 28(6) of the Supreme Court of Judicature Act (Ireland) 1877 which provides as follows:-

> *"Any absolute assignment, by writing under the hand of the assignor* (emphasis added) *(not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and transfer the legal right to such*

debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor."

429. Although the assignment is described as a Deed of Assignment and purports to be a deed as such, it is clear from s. 28(6) above that an assignment can be made *"under the hand of the assignor"* provided notice is given to the counterparty. No rule of law or requirement was cited by the defendants which requires that for a chose in action or debt to be validly assigned, it must be under seal.

430. The requirements for such validity were considered in *O'Rourke v. Considine* [2011] IEHC 191 where Finlay Geoghegan J. summarised the four conditions which must be complied with for s. 28(6) as follows:-

"(a) The assignment was of a debt or other legal chose in action.

(b) The assignment was absolute and was not by way of charge only.

(c) It was in writing under the hand of the assignor.

(d) Express notice in writing thereof was given to the debtors."

431. The meaning of the phrase *"by writing under its hand"* was considered by Cregan J. in *McCleary v. McPhillips* [2015] IEHC 591, where he identified three constituent elements:-

"These are (i) that the appointment of the receiver is 'by writing'; (ii) that it is 'under its hand' and (iii) the use of the pronoun 'its' means that it must be the signature of a person duly authorised by the Bank to sign such documents, under hand, on behalf of the Bank."

432. *McCleary v. McPhillips* related to the appointment of a receiver and whether the requirements of a debenture that the appointment be made "under the hand of the bank" had been complied with. Nonetheless, these principles are relevant to an application of the requirement to execute the assignment *"under the hand of the assignor"* identified in s. 28(6).

433. As to whether these requirements were complied with, the evidence demonstrates the following:

(a) 15 May, 2017 the board of Carbon held a meeting at which the proposal to assign the Cox Contract of Employment to the plaintiffs was considered and was approved unanimously. The board approved assignment of the contract and execution of a deed and any other documents necessary to affect the assignment.

(b) The clear intention of Carbon was to assign the benefits of the contract to the plaintiffs.

(c) Two of the directors namely Robert Dix and Diana Hoffman signed the deed in their capacities as directors and each returned a scanned copy to Kirkland and Ellis.

(d) On 16 May, 2017 BHK Solicitors received from Kirkland and Ellis an email attaching a copy of the deed of assignment signed by Mr. Dix and Ms. Hoffman stated to be signed "on behalf of Carbon Developments". The covering email from Messrs. Kirkland stipulated that the document was not to be released and was to be held pending the circulation by BHK of fully signed versions on behalf of the assignees.

(e) On the morning of 16 May, 2017 Ms. O'Brien spoke with Mr. Steel a partner in Kirkland and Ellis. She undertook to furnish him with the assignment duly executed by the assignees and on the basis of that undertaking Mr. Steel confirmed release of the escrow condition, thereupon effecting delivery of the assignment to the plaintiffs.

(f) Carbon's agent Sanne confirmed by letter dated 9 October, 2020 that it had affixed the company seal to the deed of assignment and returned a scanned copy of that deed to Kirkland and Ellis. No direct evidence is given as to when the seal was affixed to the assignment.

(g) No original or "wet ink" version has been produced and the evidence is that searches for the original were conducted by Carbon by Sanne and by Kirkland and Ellis unsuccessfully.

434. There is no statutory or other requirement for the assignment to be executed under seal. The requirements of s.28(6) of the Supreme Court of Judicature (Ireland) Act 1877 that the assignment be executed under the hand of the assignor has been satisfied by the direct evidence of due authorisation by the board of Carbon and signature of two directors. The confirmation of release of the escrow to Ms. O'Brian by Mr. Steele is evidence of delivery of the assignment. I therefore find that the Deed was duly executed and delivered.

435. The requirement to give notice to the counterparty Mr. Cox was complied with formally when notice of the assignment was given on 14 November, 2018. The timing of the delivery of that notice is relevant to the discussion which follows below regarding the enforceability of the assignment.

Origins of the assignment

436. On 8 June, 2016, the plenary summons issued.

437. On 18 July, 2016, the Statement of Claim was delivered. The plaintiffs pleaded reliance on the Cox Contract of Employment. Alternative pleas are made as to the nature of the relationship between the plaintiffs and Mr. Cox, but the claim in contract is rooted in the Cox Contract.

438. On 10 October, 2016, the defence was delivered. In para. 5 it makes the fundamental objection that none of the plaintiffs were party to the Cox Contract and therefore that they had no privity of contract with the first named defendant.

439. The assignment was executed on 15 May 2017 and delivered on 16 May 2017.

440. On 14 November, 2018 notice was given to Mr. Cox of the assignment.

441. On 7 February, 2019, pursuant to an order of the court made on 6 February, 2019, an amended statement of claim was delivered which pleaded the assignment for the first time.

442. The minutes of the meeting of Carbon Developments, formerly Tiger Developments Limited, held on 15 May, 2017 which authorised the grant of the assignment record that it is in the best interests of Carbon Developments to execute the assignment. The evidence of Mr.

Dix is that the assignment arose from a request by the assignees. He also gave evidence that the grant of the assignment was consistent with cooperation obligations in the Carbon Settlement of 2015. The minutes of the meeting of 15 May, 2017 recite the dispute between "MOF and his group of companies" and Mr. Cox. For these reasons it was appropriate for the minutes to record the board of Carbon being satisfied that it was in the commercial interests of Carbon to grant the assignment. Nonetheless, there is no doubt having regard to the chronology and the minutes, that the sole purpose of the request by the plaintiffs for the assignment was not to avail of the services of Mr. Cox pursuant to the contract, but to meet the objection in para. 5 of the defence that the plaintiffs had no privity of contract with Mr. Cox.

443. The relationship of employer and employee terminated when Mr. Cox resigned on 27 April, 2015 and the plaintiffs do not in these proceedings seek to require Mr. Cox to perform any of the service obligations provided for in the contract. The assignment was procured only to enable the plaintiffs pursue the cause of action which it now pleads without the legal obstacle of the absence of privity of contract.

444. In the amended defence the defendants plead that the assignment did not validly or effectively assign the contract of employment and the plaintiffs are put on proof thereof. In para. 33B the defendants plead as follows:

> *"Without prejudice to the generality of the foregoing denial the defendants plead as follows:*
>
> *(a) The Cox Contract of Employment was a personal right of Carbon Developments Limited and cannot be transferred to a third party without the consent of the first defendant. The first defendant did not consent to the purported assignment.*
>
> *(b) The purported assignment of the Cox Contract of Employment is in breach of the first defendant's fundamental right to choose his employer and not to work for an employer whom he has not freely chosen.*

(c) As of the date of the purported assignment the Cox Contract of Employment had been terminated and there were no subsisting rights or entitlements under the Cox Contract of Employment capable of assignment.

(d) The termination of the Cox Contract of Employment did not render it capable of assignment when it had heretofore been unassignable.

(e) The purported assignment is an assignment of a bare right to litigate and is void on public policy grounds.

(f) Carbon Developments Limited, the purported assignor, on the plaintiff's own case did not suffer any loss and would not have been a party to any of the purported developments that would have been undertaken by the plaintiffs."

445. The first and most fundamental objection made by the defendants is that it is a rule of employment law that contracts of personal service cannot be assigned without consent. They submit that the fact that the contract had been terminated long before the assignment does not support or avail the plaintiffs. If the contract could not have been assigned in the first place, then it is no more capable of assignment after than before termination.

446. The defendants cite the judgment of the House of Lords in *Nokes v Doncaster Amalgamated Collieries* [1940] AC 1014 where the Lord Chancellor said:

"A fundamental principle of our common law – the principle, namely, that a free citizen, in the exercise of his freedom is entitled to chose the employer whom he promises to serve so that the right to his services cannot be transferred from one employer to another without his assent".

447. This principle was endorsed by the Court of Justice of the EU in *Katsikas v. Konstantinidis* Case C132/91. There the court was considering questions concerning Council Directive 77/187EEC on the safeguarding of employee's rights in the event of transfers of undertakings. The court held that the Directive cannot be interpreted as obliging an employee to continue his employment relationship with a transferee as "*such an obligation would*

jeopardise the fundamental rights of the employee, who must be free to choose his employer and cannot be obliged to work for an employer whom he has not freely chosen".

448. The plaintiffs submit that on the facts of this case those principles have no application. They submit that no attempt is made in these proceedings to compel the first defendant Mr. Cox to provide personal services to any of the assignees. Therefore, the policy underlying the Nokes principles is not violated in circumstances where the contract of employment has long since terminated and the assignment will be relied on only for the purposes of maintaining the cause of action against Mr. Cox for breaches of the contract.

449. The plaintiffs rely on a passage from Guest on the Law of Assignments (3rd ed., Sweet and Maxwell 2018) where the following is stated:

> *"4-33 Employment contracts. The wages and salary of an employee can normally be assigned by him and (subject to the rules relating to maintenance and champerty) rights of action for breach of a contract of employment are also assignable. But at common law the right to receive the services of an employee under a contract of employment is a personal right and cannot be assigned without his consent. Thus, where two companies are merged under an order of the court, the employer's rights under the contract cannot be transferred to the new company without the employee's consent. 'No contract of service can be transferred from an employer to another without the servant's consent: and this consent is not to be raised by operation of law but only by the real consent in fact of the man, expressed or implied".*

450. In support of the proposition that "rights of action for breach of a contract of employment are also assignable" Guest cites two judgments *Beckham v. Drake, Knight and Surgey* [1841] 151 ER 1283 and *Bailey v. Thurston & Co. Limited* [1903] 1 KB 137.

451. Both of these cases relate to the survival of claims in the event of a bankruptcy of the employee. They address questions as to whether claims for wrongful dismissal against an employer may be maintained either by the bankrupt former employee in person or by his

assignees. Thus, the phrase in Guest underlined above which suggests that the right of action for a breach of a contract of employment are also assignable derives from cases in which dismissed employees have been the plaintiffs in claims against their former employers. No question arose in those cases arose of assignment to third parties of surviving claims against an employee.

Clause 2.3 as consent to assignment

452. The plaintiffs invoke Clause 2.3 of the contract to submit that Mr. Cox consented to an assignment.

453. The second sentence of Clause 2.3 provides as follows:

> *"You may also be transferred either on a temporary or permanent basis to other duties and to other positions within the company or for any associated or subsidiary companies".*

454. I have already determined that "associated or subsidiary companies" extends in the context of the contract to companies in the Colebridge Group only. The sixth plaintiff, O'Flynn Construction (Cork), is a company in the Group, and therefore falls within the words of Clause 2.3. However, I do not accept that such a clause could be relied on as a meaningful and informed consent, of the character referred to by Guest, on the part of Mr. Cox to an assignment to O'Flynn Construction (Cork) seven years after the contract was signed and two years after it had been terminated.

455. O'Flynn Capital Partners did not exist when the contract was signed. For the finite period from its incorporation on 24 February 2014 (two years after the contract) to 25 April, 2015, being the date of the Carbon Settlement (two and a half years before the Assignment), it was owned by the same persons as the Colebridge Group. That connection ended on 25 April 2015, two years before the Assignment. O'Flynn Capital Partners was therefore not associated to Tiger either at the time of the contract or the time of the Assignment. I reject the reliance placed on Clause 2.3 as a consent to the Carbon Assignment.

Assignment of a bare right to litigate

456. The defendants submit that the assignment, if properly executed and delivered, is an assignment of a bare right to litigate and is void on public policy grounds.

457. The plaintiffs submit that the assignees had a legitimate commercial interest in taking the assignment because Mr. Cox was already providing services to them. Recital E of the Assignment, states as follows:-

> *"The assignees and the assignor have entered into an agreement (the agreement) in relation to the matters herein contained under which agreement the assignees have, inter alia, confirmed to the assignor that both prior to and after the date of sale, Patrick Cox provided services to them including under and pursuant to the contract and that the assignees had relied on the contract in respect of these services."*

458. The law relating assignments of a bare right of action was considered extensively by O'Donnell J. as he then was in the Supreme Court in *Re SPV Osus Limited v. HSBC Institutional Trust Services (Ireland) Limited & ors* [2018] IESC 44.

459. O'Donnell J. examined the case law of a number of jurisdictions and previous Irish case considering also the law of maintenance and champerty, namely *Fraser v. Buckle* [1994] 1 IR 1, *O'Keeffe v. Scales* [1998] 1 IR 290, *Thema International Fund v. HSBC Institutional Trust Services (Ireland)* [2011] IEHC 357 and [2011] 3 IR 654, *Greenclean Waste Management Limited v. Leahy* [2014] IEHC 314, and *Persona Digital Telephony Limited v. Minister for Public Enterprise* [2017] IESC 27.

460. O'Donnell J. stated the following:-

> *"I propose to apply the test adopted by the House of Lords in Trendtex: that is, that an assignment of the right to litigate is unenforceable unless the assignee had a genuine commercial interest in the assignment…*

Assignments of a right to litigate are void as savouring of champerty or maintenance (which perhaps means that they offend the same public policy which underpins the prohibition of maintenance and champerty and the avoidance of contracts which constitute maintenance or champerty) unless they are justified by a genuine [commercial] interest. Since public policy underpins this area, the attitude of the courts has changed over the years towards a much greater tolerance of agreements, arrangements, and assignments of a right to litigate which might hitherto have been considered to involve maintenance or champerty or as savouring of champerty…

…I consider that an out-and-out assignment of a bare right to litigate which has no redeeming feature, is, if anything, more obnoxious to underlying public policy than champerty and maintenance respectively…"

461. O'Donnell J. considered what he described as the *"contours of public policy underpinning the principle of invalidity of assignment of bare rights to litigate"* and whether that policy still remains valid or should be modified in some way. He recognised that, of course, debts have always been regarded as assignable, and continues *"Other assignments ancillary to bona fide transactions, particularly in relation to property, have also been regarded as legitimate"*.

462. Finally, O'Donnell J. stated the following:-

"…the common law remains hostile to the assignment of causes of action generally and is supportive only of certain limited and permissible assignments. The question which arises here is whether this claim can be fitted within the existing case law, or within some plausible and permissible extension thereof."

463. Earlier in this judgment, I have analysed the terms of the Cox Contract. It permitted the named employer, Tiger Developments, to direct Mr. Cox to perform functions not only for itself but for other companies within the Colebridge Group. None of the first to fifth named

plaintiffs were ever in the Colebridge Group. The sixth named plaintiff was a member of the Colebridge Group until 25 April 2015 but there is no evidence advanced of any tasks or services performed by Mr. Cox for it.

464. Therefore, the Cox Contract itself did not confer on those plaintiffs a commercial interest in the contract the subject of the assignment. The next question is whether, apart from the terms of the Cox Contract, the plaintiffs, two years after Mr. Cox's resignation, had a genuine commercial interest in the subject matter of the assignment.

465. There is extensive evidence, analysed later in this judgment, of Mr. Cox providing services to VHML and other plaintiffs. Where the contract did not in its terms oblige Mr. Cox to serve the non-Group plaintiffs, the question then is whether, as the plaintiffs contend, he was, either by express agreement or impliedly acting for those entities pursuant to the contract, as the Recital to the Assignment purports to record.

466. The plaintiffs advanced a proposition in their opening submissions that *"It was at all times agreed and understood that the work was being carried out for these entities* (namely VHML, Grey Willow, Albert Project Management and Palm Tree), *save insofar as concerns payment terms, on the basis that the same duties were owed by Mr. Cox as were owed under the terms of his employment contract"*.

467. The defendants submit that, if this was in fact the case, then the contract would be tainted by illegality because payments made by those plaintiffs were made gross and not subject to the tax deductions as would apply were he an employee. It was submitted that if those companies were being utilised as a channel to supplement the income of Group employees this would render the contract a fraud on Revenue and therefore be unenforceable on grounds of illegality.

468. Only the first four plaintiffs made payments to Mr. Cox. No party has contended that the arrangements, including payment arrangements, between Mr. Cox and the plaintiffs were a fraud on Revenue. No party has suggested that Mr. Cox and/or Rockford Advisors Limited

did not, at all times, duly and properly account for tax on the payments made to him by the plaintiffs.

469. In replies to particulars, the plaintiffs confirm that no contract was entered into with them, stating that "*it is not asserted that Mr. Cox entered into another agreement with VHML governing the relationship"*.

470. At the time of the assignment, made two years after Mr. Cox's resignation, he was clearly no longer providing any services to any of the plaintiffs. Therefore, any commercial interest which might be said to derive from the services he provided was historic. The plaintiffs' interest was entirely in this litigation.

Conclusion regarding enforceability of the Assignment

471. The Assignment was executed (a) seven years after the Contract was signed, (b) two years after Mr. Cox's resignation, (c) one year after the plaintiffs discovered the events which have given rise to the claim made in these proceedings, and (d) after having made the claims in 2016, they were confronted with a defence which pleads the fundamental, not merely technical (as the plaintiffs have suggested), defence that they have no privity of contract with Mr. Cox. The entire purpose of the assignment was to meet the pleaded defence in these proceedings. Against that background, even the historic connection associated with the consultancy services and payments made by the plaintiffs cannot be characterised as evidence of a genuine commercial interest, independent of this litigation, in the assignment of the contract.

472. The assignment is of a bare right to litigate and does not meet any of the exceptions considered in *SPV Osus*. It is therefore unenforceable.

PART NINE: WAS MR. COX A FIDUCIARY OF THE PLAINTIFFS?

473. The alternative plea in Paragraph 23 of the Statement of Claim is that Mr. Cox owed a fiduciary duty and/ or duty of loyalty and confidentiality to the plaintiffs "arising from his

senior and trusted role within the O'Flynn Group, his agreement to provide services to the plaintiffs and the payments made by the plaintiffs".

474. This plea requires an examination of the evidence of the relationship between Mr. Cox and the plaintiffs.

475. Before turning to the detail of that evidence, it is important to record that each of the parties approached this fundamental question as a binary question: was Mr. Cox an employee of or a consultant to the plaintiffs? The plaintiffs assert that Mr. Cox owed duties of fidelity and loyalty pursuant to the contract of employment. They plead in the alternative that, *"insofar as the relationship is characterised as a consultancy or other arrangement Mr. Cox owed the said duties to the Plaintiffs arising from his senior and trusted role with the O'Flynn Group, his agreement to provide services to the Plaintiffs and/or the payments made by the Plaintiffs"*.

476. Mr. Cox submits that, insofar as services were provided to the plaintiffs, this was in a consultancy capacity. He submits that the duties and obligations of a consultant are confined to the performance of individual tasks for which a consultant is retained and that such a person attracts none of the duties or obligations of fidelity and loyalty which would be associated with an employment relationship.

477. The question is not such a binary question. The difference between an employee and a consultant is, of course, important. But the ascription of the label "employee" and "consultant" does not conclusively determine the entire legal character of the relationship or all of the duties which flow from it. All of the facts and incidents of the relationship must be examined to determine its legal character. The use of words such as "consultancy" and "advisory", which appear in Mr. Cox's invoices to the plaintiffs are informative, but they are only one aspect of the facts.

478. Limited duties apply to a consultant in the common sense of an independent consultant who provides services to a variety of clients and who does not act exclusively or

under a particular form of retainer for a client. Such a consultant may in certain circumstances be sued by a client in contract or negligence arising from defective advice or services or failures relating to the particular consultancy for which he is engaged. There is no evidence that Mr. Cox acted in any capacity for reward for parties other than the O'Flynn Group and the plaintiffs.

479. In the Australian case of *Oliver Hume South East Queenland PTY Limited v Investa Residential Group PTY Limited* [2017] FCAFC 141, Greenwood J. said that the *"categories of fiduciary are not closed"*. Therefore, the mere fact that a person is an employee, or a consultant would not of itself determine whether fiduciary duties were owed. Greenwood J. referred to the *"calculus of factual information"* to be examined.

480. In the three years prior to his employment when Mr. Cox was providing services as a consultant to the Group, this function was not limited to any one company in the Group. The very earliest instances of his involvement and role, spanning the consultancy period up to 31 December 2009 and into early 2010 related to Victoria Hall Limited, and not Tiger. Therefore, from the very outset, it has never been suggested that Mr. Cox's duties or functions were limited to the named employer Tiger Developments. Clearly, he provided services not only to other Group companies, but also to the plaintiffs in the evolving parallel structure. The question is one of determining what status he acquired or assumed, when doing so.

481. There is evidence that, in the performance of his functions, Mr. Cox characterised himself, both internally and externally, as Investment Director of the O'Flynn Group and at the same time listed his functions as including functions performed for the first named plaintiff, Victoria Hall Management Limited.

482. In considering Mr. Cox's role, it is relevant to have regard also to his assertions that (a) student accommodation in Dublin was not a sector targeted by the plaintiffs (b) student accommodation was not within his sphere of responsibility; and (c) that the finding of new

opportunities was not his responsibility. As I consider the evidence each of these questions arise.

Evidence of Michael O'Flynn regarding the role of Mr. Cox.

483. Mr. O'Flynn described the activity of the Group and of the plaintiffs in relation to student accommodation. He referred initially to the two schemes in Cork developed in 1994 and in 2004, although the companies operating those assets were established before the incorporation of the Colebridge Group and were not included within that structure. The Group's student development schemes were was developed and operated by Victoria Hall Limited at locations in the UK, Germany and Spain. Later, in Ireland, O'Flynn Capital Partners developed a student accommodation project at the Point Campus in Dublin, albeit after Mr. Cox's resignation. On that project O'Flynn Capital Partners acted as promoters and development managers and VHML acted as the operating management company. It is said to be the biggest student development in Dublin with 966 student beds. It was funded with the Blackrock Group. Nonetheless he remained in the employment of the Group, and at the same time worked with the plaintiffs and received from them lump sum payments, totalling £810,475.58.

484. Mr. O'Flynn states that Mr. Cox was intimately involved in the student accommodation aspect of the Group's business. He cites examples of efforts made by the O'Flynn Group to pursue student accommodation developments in the Dublin area and of Mr. Cox's involvement in those efforts. The examples he cites include extensive references not only to Group companies but also to VHML and others. I shall return to the detail of those instances below.

485. Mr. O'Flynn said that it has always been the case in the O'Flynn Group that new employees had to be directly employed by a selected company, but that everyone was expected to work *"across the group and associated companies"*. He said that while the new

parallel structure was not part of the O'Flynn Group the practice of working across companies, including entities outside the formal group, continued as the parallel structure evolved, and was not new to staff, including Mr. Cox.

486. Mr. O'Flynn said that from 2010 onwards it was in the interests of employees to work across all the entities, including the plaintiffs and that they benefited from additional income earned, as in the case of Mr. Cox.

487. Mr. O'Flynn said that O'Flynn Capital Partners was established in February 2014 for the purpose of doing in Ireland what VHML was already doing, namely to pursue opportunities for commercial property development having regard to the constraints imposed on the companies in the O'Flynn Group. Mr. O'Flynn treated Mr. Cox as part of that overall team and as a person who would work across O'Flynn Group entities and in the new structure.

488. Mr. O'Flynn referred to the submission made by Victoria Hall Limited for provision of student accommodation for Trinity College which led to the letter of rejection on 18 December, 2009 received from Trinity College. It is clear from the emails exchanged in relation to that project that it was a VHL project in respect of which Mr. Cox had a direct involvement. It is also clear from internal emails exchanged in January 2010 following the rejection of the submission that Mr. Cox had been engaged in relation to that project and therefore was aware of the interest of the Group in student accommodation in Dublin. In an email of 4 January 2010 to Mr. O'Flynn commenting on the rejection letter he observes that:

> *"we carried out two tests at morning and evening in peak travel times and calculated the Luas and walk commute to and from Trinity College at between 27 and 29 minutes. Just inside the 30 minute maximum commute time. Myself and Mylo will have a debriefing with Trinity College with a view to understanding how they assessed this point. We will keep you informed."*

489. This was not the statement of a person who did not have any responsibility for pursuing student accommodation opportunities.

Evidence of John Nesbitt

490. Mr. Nesbitt's evidence is that he had a discussion with Mr. Cox after NAMA took over the loans in which he asked Mr. Cox what it would take to ensure that he stayed "with us". Mr. Nesbitt said it was agreed that if Mr. Cox continued to work with the plaintiffs, VHML, through its BVI parent company Palm Tree Limited, would pay Rockford Advisors Limited, the company owned by Mr. Cox and make very significant six figure lump sum payments to that company. Mr. Cox denies that this was the nature of the discussion. In fact Mr. Cox remained in the employment of the Group and continued to provide services to the plaintiffs and receive from them significant lump sum payments.

491. Mr. Nesbitt gave details of the payments made and says that between 2012 and 2015 the "new structure" facilitated payments by the first four plaintiff companies to Mr. Cox totalling approximately stg £810,475.58, in addition to his salary from Tiger Developments. Mr. Nesbitt says that the effect of the payments was to make Mr. Cox "the highest paid employee across the original group and the new structure".

492. Mr. Nesbitt says that Mr. Cox was asked to and willingly undertook tasks for VHML from 2011 onwards. He said that in the day to day operations there was no distinction between the roles performed by Mr. Cox for the original O'Flynn Group and for the plaintiffs. The office in London was shared between the Group and the parallel companies. He and Mr. Cox worked "side by side" as they had done before and continuously switched working between Group companies and VHML without discussion on every occasion as to whether the activity or project was Group business. Mr. Nesbitt says that it was "simply assumed that he would owe the same duties to all companies for which he worked as he had always done". (Emphasis added).

493. Mr. Nesbitt said that in addition to looking for investment opportunities Mr. Cox was active in the management and operation of a number of the student accommodation businesses. He worked two days per week in Dublin and three in London, all of which suited his tax and family arrangements. Mr. Nesbitt said that Mr. Cox had responsibility among his wide range of functions for looking at investment opportunities in Dublin as much as elsewhere. Instances of this evidence are considered below.

494. Mr. Nesbitt said that the VHML business plan was successful and that Grey Willow Limited, Palm Tree Limited and Albert Project Management Limited were incorporated for specific project purposes as and when the plan was rolled out.

495. Mr. Nesbitt and Mr. O'Flynn each referred to the establishment in 2014 of O'Flynn Capital Partners which was intended to pursue in Ireland the same model of taking up opportunities which required planning and investment which the O'Flynn Group was no longer free to pursue.

Evidence of Patrick Cox

496. Mr. Cox does not dispute that much of his time in the Group related to the student accommodation business of VHL. He agrees that he provided services to the first and fourth named plaintiffs. He says that he did so on an "ad hoc consultancy basis" for which he was paid fees. Mr. Cox says that while working for Tiger and VHL within the O'Flynn Group he provided services to the parallel, or "non-NAMA" entities, meaning the VHML Group, both directly and through Rockford Advisors Limited and that these services were invoiced for separately and were provided on the express basis that the non-NAMA entities were not O'Flynn Group entities.

497. Mr. Cox goes further and says that insofar as he provided services to those entities it was on the explicit basis that this was not pursuant to his contract of employment with Tiger. He emphasises that the *"raison d'etre"* of the non-NAMA plaintiffs was that they were not "in NAMA" and could earn profits for which they would not be accountable to NAMA.

498. Mr. Cox says that he did no work for O'Flynn Capital Partners and that he had a "minor and tangential involvement" in its business. He was never paid any fees or remuneration by O'Flynn Capital Partners. Mr. Cox says that he never had any role to identify student accommodation opportunities in Dublin. Apart from the question of payments, the plaintiff's dispute this description of Mr. Cox's status viz O'Flynn Capital Partners. I shall return to the evidence in relation to O'Flynn Capital Partners later.

499. Mr. Cox says that he had no dealings whatsoever with O'Flynn Construction (Cork). No evidence of Mr. Cox performing any functions or services for O'Flynn Construction Cork was adduced in the case.

500. Later I refer to Mr. Cox's evidence on individual events and documents cited by the plaintiffs.

Other witnesses

501. The Group Finance Director Margaret O'Neill gave evidence that Mr. Cox attended board meetings, management meetings and conference calls for both O'Flynn Capital Partners and VHML. He was never an appointed director of any of these entities, but Ms. O'Neill says that he participated in such meetings.

502. Mr. John Donohoe, the Property and Development Director, said that in his experience Mr. Cox was predominantly linked to the UK student development business but that he was also involved in acquisition calls and other calls concerning new development in Dublin and in meeting potential capital partners, not limited to the UK.

503. The group operations director Michael Kelleher said that his understanding was that Mr. Cox would work not only for the entire Colebridge Group but also for Victoria Hall Management Limited and O'Flynn Capital Partners and that Mr. Cox was in fact pursuing potential opportunities for those entities. Mr. Kelleher said that he participated in conversations with Mr. Cox in relation to such potential opportunities.

504. Mr. Tony Barry had been "European and Finance Director" in Victoria Hall Limited from 2006 to 2014. He said that to his knowledge Mr. Cox was never involved in property transactions in Ireland. He believed that Mr. Cox's function was outside Ireland particularly related to property in the UK where he would spend more than half of his week. Under cross examination Mr. Barry agreed that he would not have made this observation in his evidence in chief had he previously seen documents which were put to him under cross examination illustrating the activities of Mr. Cox.

505. Fintan Tierney was a chartered surveyor who joined O'Flynn Capital Partners in February 2014 and left in June 2015. His evidence was that Mr. Cox had no real role in relation to O'Flynn Capital Partners. He was told by Michael O'Flynn that Mr. Cox was appointed a *"partner"* in O'Flynn Capital Partners only in the context that Mr. Flynn wished to demonstrate substance in O'Flynn Capital Partners when it was formed in February 2014. He said that Mr. Cox had no active role in the OFCP business although he shared investor names from time to time with Mr. Cox and Mr. Nesbitt.

506. Mr. Tierney says that he recalls Mr. Cox and Mr. Ledbetter joining bi-weekly OFCP calls when there was meaningful input which they could provide and that from time to time Mr. Cox issued the action list after the calls.

507. Mr. Tierney said that Mr. Cox was not designated as a person intended to follow up on potential funders or other opportunities as regards O'Flynn Capital Partners. He believed it was his (Mr. Tierney's) role to identify development opportunities in Dublin for O'Flynn Capital Partners and that he would have had a great concern about his own position if he had known that was the role also of Mr. Cox.

508. Mr. O'Flynn contradicts this version of events and said that Mr. Tierney had no role in relation to pursuing student accommodation for O'Flynn Capital Partners or other entities, and that this was part of Mr. Cox's role.

Further evidence of Mr. Cox's role

509. I now turn to the detailed evidence given of Mr. Cox's role. Before doing so it is appropriate to restate that caution is required when attaching importance to what may be isolated items of evidence, notably emails which were adduced. In the course of the trial numerous references were made to individual emails, telephone conversations or other communications as evidence of the function, role, responsibilities and duties of Mr. Cox. Predictably each of the parties has selected individual emails, letters and other communications to support their case. It is difficult to discern the extent to which the individual emails and other materials which have been extracted from the record are truly representative of the overall position. They are nonetheless of assistance for the court in the task of determining which account of the relationship to prefer.

510. The parties adopt totally opposing descriptions of Mr. Cox's role from the very outset of his appointment. Each persisted with the submission that the evidence demonstrated that he was either an employee or a consultant to the plaintiffs, a binary distinction which is not conclusive in determining the legal character of his position and duties.

511. Mr. Cox's role as a full-time employee of Tiger ran from 1 January 2010 to 27 April 2015 and spans different levels of activity at different times within the O'Flynn Group and the plaintiff companies.

512. Many of the instances cited by Mr. O'Flynn relate to functions within the Colebridge Group and O'Flynn Capital Partners. Mr. Nesbitt on the other hand focused largely on instances concerning VHML and the other plaintiffs. There is significant overlap between the two and in many instances, documents describe VHL and VHML interchangeably. This illustrates the extent of the overlap in functions performed not only by Mr. Cox but by others during the period between the acquisition of the loans by NAMA in March 2010 and 27 April 2015 when Mr. Cox resigned.

513. In October 2010 Mr. Cox was in contact with London based property company Quatari following meeting a Mr. Wallace of that firm the previous week. He introduced himself to Mr. Wallace as follows:

> *"John, I wanted to drop you a quick email following the Financial Times property conference last Wednesday. We sat next to each other during the first presentation, but did not get the opportunity to chat.*
>
> *I work with a large Irish owned property group, the O'Flynn Group. The group operates a number of businesses in Ireland, the UK and mainland Europe. The group's activities cover property investment and development, construction, provision of student accommodation and luxury senior living. The group currently has assets in excess of €2 billion in a number of subsidiaries including Victoria Hall student accommodation, Tiger Developments, Shelbourne Senior Living and O'Flynn Construction.*
>
> *As an Irish group with borrowings from Irish financial institutions, the group is now part of the National Asset Management Agency (NAMA) process. Myself and my MD would welcome meeting with you to discuss the NAMA process and investigate if there are reasons to have further discussions regarding opportunities we could work on together.*
>
> *The following link will bring you to our website: www.oflynngroup.com.*

514. *Please revert with some suitable dates which are amenable to meeting up."*

515. In January and February 2012, Mr. Cox was copied on a series of emails concerning approaches to be made to UCD regarding the provision of student accommodation. Mr. Cox confirmed under cross examination that he was aware that Mr. O'Flynn was interested in pursuing student accommodation opportunities in Dublin. He said however, that he believed that the only role identified for him was to engage with investors. Later emails show that his role was not so limited.

516. On 15 March 2012 Mr. Cox met with representatives of DIT, Grangegorman. On the following day he circulated an email to Mr. Nesbitt and Mr. O'Flynn and others reporting on the meeting with his perception of the DIT plans for the Grangegorman campus. He concluded by stating *"they have asked whether they can stay in touch with me to identify potential tender parties, which I said I would be happy to advise on. This is a slower burner and possibly does not hold too much value for us at this point in time. I will keep you all appraised of further interactions. Please feel free to revert if you have anything to add or suggestions regarding this matter"*.

517. Mr. Cox under cross examination insisted that the Grangegorman project never became a live project, and he was simply being asked about its viability. The Grangegorman example is evidence of Mr. Cox's willingness to take a lead role in relation to a student accommodation opportunity in Dublin and reporting to Mr. Nesbitt and Mr. O'Flynn thereon. He met with DIT, reported on this meeting and committed to keeping Mr. Nesbitt and Mr. O'Flynn "appraised of further actions".

518. In May 2012 Mr. Cox met with potential partners about a project which would be a Joint Venture between a developer and Dublin City Council for student accommodation. On 23 May 2012 he reported on this meeting to Mr. Nesbitt and Mr. O'Flynn stating *"the plan is in the first place to investigate the above (without having to go through a public selection process), if this was possible we would approach Trinity College on a subject to planning deal"*.

519. Mr. Cox attached links to a previously proposed project for the same site and concluded by stating *"I have left Tom to do the running on this until such time as it may become a viable option"*. This is cited as an instance of Mr. Cox's knowledge of and role in relation to the investigation of potential student development opportunities in Dublin.

520. By this time, Mr. Cox had been heavily engaged in the Birmingham and Coventry project, which was a VHML scheme, described in Part Twenty.

521. In June 2012 DTZ prepared a document entitled *"Assessment of Dublin Student Accommodation Market – for the information of Victoria Hall"*. There was a dispute in the trial as to whether this report had been commissioned particularly for Victoria Hall or any O'Flynn Group entity.

522. This document takes on a further significance according to the plaintiffs, when on 24 September 2014 Ms. Sarah Jones of DTZ emailed it to Mr. Cox at *"pc@tigerdevelopments.com"* stating *"the attached is for your eyes only, confidential"*.

523. In June, July and August 2012 Mr. O'Flynn engaged with representatives of the Smurfit Group in relation to land considered suitable for student accommodation at a site near UCD. He conducted negotiations with the owners with a view to entering an option agreement on those lands and to obtaining planning permission. Mr. O'Flynn says that it was hoped that this would form part of a larger proposed student accommodation scheme. Mr. Cox was brought into the process and on 25 March 2013 reported by way of update to Mr. O'Flynn, Mr. Nesbitt and Mr. Foley on *"our interactions with UCD"*. In doing so Mr. Cox identified potential issues relating to the timing and phasing of the project, questions concerning rights of way and access routes. He concluded *"while we intend to continue our interactions with UCD, it is likely that this will be a slow process"*. Mr. Cox signed that email *"regards Patrick, O'Flynn Group"*.

524. In September 2012 Mr. Cox was approached about a potential student accommodation opportunity at a site called *"The Tenters Site, Blackpitts, Dublin 8"*. The approach came from an agent and on 28 September 2012 Mr. Cox circulated this to Mr. Nesbitt and Mr. O'Flynn as follows:-

> *"John/Michael the below has come through to me through an agent I have been speaking to. I would be interested in your thoughts? Per some comments you made Michael when we last met, I bring to your attention that this site is owned by BAM as I understand"*.

525. The plaintiffs attach importance to this exchange as evidence of Mr. Cox holding himself out and being known in the market to be a person dealing with new opportunities including student accommodation and reporting to both Mr. Nesbitt and Mr. O'Flynn in that capacity. It is such evidence. When Mr. Cox invited Mr. O'Flynn and Mr. Nesbitt for their 'thoughts', he was undoubtedly taking the opportunity to demonstrate to them that he was known in the market for student accommodation schemes.

526. Mr. Cox was questioned as to why, if he believed it appropriate for him to bring to the attention of Mr. Nesbitt and Mr. O'Flynn such opportunities as they arose, he did not do the same in relation to the Gardiner Street opportunity when it first came to his attention in February 2014. He said that this was an entirely different matter. Firstly, he did not believe he had any obligation to do so and secondly the Blackpitts reference was not in truth a substantial opportunity but merely an approach from an agent on a random basis. This does not explain why he did not report the Gardiner Street opportunity.

527. Mr. O'Flynn referred to a diary entry of Mr. Cox setting up a meeting with Mr. Mylo Carey of Kingston Construction in respect of student accommodation on 1 October 2012. This was followed by an email on 22 October 2012 from Mr. Carey to Mr. Cox, copied to Mr. Kelleher and Mr. Nesbitt concerning a potential opportunity at a site opposite the Mosque in Clonskeagh known as the former Friarsland site. The email refers to an adjoining redundant petrol station and Mr. Carey observes that if the two sites are combined site values *"will possibly legislate against student accommodation"*.

528. On 22 October 2012 Mr. Cox circulated to Michael Kelleher and John Nesbitt a development appraisal for a site at Mill Street in Dublin and provides his own commentary on its merits. Mr. Cox said that he had been advised by Bruce Shaw as advisors to Trinity College that the site was still one of three being considered by Trinity College for their tender programme which began some years earlier. He concludes *"I will speak to BAM, but my gut instinct is that they will want to see where the Trinity procurement goes before engaging. I*

also assume that the 1 million land value and 31k per bed build cost (given this is their core function) will not be too appetising".

529. Mr. Carey replied the next day with some comments and suggesting that Mr. Cox *"keep us in the loop re progress and let us know regarding the view on the Ormond site"*.

530. On 5 December 2013 Mr. O'Flynn was approached by a Mr. Maxime Laroussi, director and co-founder of an entity called *"Urban Agency"*. Mr. Larousi stated that he had completed a viability study for a student accommodation project on sites in Smithfield commissioned by his client Linders of Smithfield. Mr. Laroussi said that Linders were interested in meeting student accommodation providers and requested a meeting. Mr. Nesbitt nominated Mr. Cox to meet with this party and a meeting was set up between Mr. Cox and the potential partners later that week. Mr. Cox kept in touch with Linders Brothers.

531. Mr. O'Flynn said that this shows the direct involvement Mr. Cox had in such projects in Dublin and that in fact he never heard anything further from Mr. Cox in relation to that particular site.

532. In February 2014 Mr. Cox was in communication again with the Linders discussing their potential Smithfield opportunity for a student accommodation scheme. Patrick Linders asked Mr. Cox for his thoughts on approaches to a student accommodation scheme in Smithfield. Mr. Cox replied on 25 February 2014 stating, *"I have been keeping in contact with Maxime and spending some time meeting the current parties transacting in the Dublin student accommodation space"*. Mr. Cox then provided what he described as his *"high level views"* commenting on the market for student accommodation in Dublin and providing his own view as to the suitability of the Smithfield location and courses of action which Mr. Linders should pursue in terms obtaining planning consent and timing.

533. Discussions were also held between Mr. Cox and the Urban Agency about the willingness of Dublin City Council to consider a scheme for the *"fruit and veg. parking site"*.

534. Around this time, in January 2014, Mr. Cox was also in contact with the Urban Agency about the feasibility of a site for student accommodation at the junction of New Bride Street and Kevin Street.

535. Mr. O'Flynn said in his evidence that he had no knowledge of most of these opportunities, although elsewhere it appears that he had a role in introducing Mr. Laroussi of the Urban Agency to Mr. Cox. Mr. O'Flynn complained that none of the opportunities mentioned above were brought back to him or any of his colleagues to progress as opportunities and he noted that these matters all appeared to be live at around the same time that Mr. Cox was first pursuing the Gardiner Street opportunity. That complaint holds no force in relation to the Linders Brothers example, of which Mr. O'Flynn was clearly aware, although the substance of the complaint is that having been introduced to the Smithfield opportunity Mr. Cox never reverted with an outcome. The other examples were not contradicted, save that Mr. Cox gave evidence that these items were no more than enquiries some of which were not serious, and some of which were no more than communication circulating in the market which would not confer any particular advantage on any of the plaintiffs.

536. Mr O'Flynn cited examples which he said demonstrated that throughout the period to which these proceedings relate it was widely known, both within the Group and externally that the O'Flynn Group, the VHML Group and O'Flynn Capital Partners had a continuing interest in developing student accommodation projects.

537. On 29 January 2014, a Mr Goddard, a director of Davy contacted Mr O'Flynn about a potential project in Limerick stating:-

> *"Further to our call this morning kindly find the outline of what I have mind in Limerick. In order to progress this we need an underwrite on rents from LIT/Mary I. They have indicated that they are prepared to do this. However, we will need confirmation of this in advance of proceeding. They [sic] key to this is what are the*

costs of developing 500 beds. The section 50 relief no longer applies. Could you possibly have a look at this. I have looked at them underwriting up to a figure for 39 weeks. We/the operator will then be responsible for the summer. We can obviously resist this. Lets discuss when you have a minute."

538. Mr O'Flynn immediately shared this email with Mr Nesbitt who in turn circulated it to Mr Cox and others suggesting that Mr O'Flynn, Mr Nesbitt and Mr. Cox would have a call together on the subject. Mr Cox confirmed that he was available to participate in such a call.

539. O'Flynn Capital Partners was incorporated on 24 February 2014.

540. On 02 April 2014, Messrs GVA Donal O'Buachalla, circulated to a number of agents information that they had been retained by a third level institution to acquire a site or existing building suitable for student accommodation. An associate in Savills, Mr Guerin submitted this to Mr Kelleher who in turn forwarded it to Mr O'Flynn and Mr Cox. In response Mr Cox acknowledged receipt and stated *"Thanks for this I did speak with Lisa in GVA and will stay close to the process. It is likely to end up as some form of public process in time".* (Emphasis added).

541. Mr O'Flynn's evidence was that this related to a potential requirement by UCD for student accommodation.

542. On 08 April 2014, Mr Cox circulated his notes of a *"OFCP conference call meeting Tuesday 08 April 10.00am"*. In this email he noted fifteen projects and invited participants to contribute. The email was circulated to Fintan Tierney, Catherine Ennis, Brian Donohue and Michael O'Flynn. At the conclusion Mr Cox stated; *"Separate diary invite to be circulated with the proposed conference call times for fortnightly catchup, if the time does not suit as we get closer to each call date, please circulate a proposed alternative time if you are not available".*

543. One of the sites mentioned under number fifteen is the *"Mongey Plunkett site"* and Mr Cox noted that Mr Tierney wished to consider whether it could be suitable for student accommodation. The action point noted by Mr Cox is *"FT to gather information"*.

544. This was the first of a series of such emails from Mr. Cox. They identify matters discussed and action points and formed the agenda for further meetings. Mr Cox claims that he was no more than a notetaker at these meetings. Nonetheless, he took responsibility for the circulation and convening of the meetings, as the closing sentence indicates where he states; *"Separate diary invite to be circulated with proposed conference call times for fortnightly catchup, if the time does not suit as we get closer to each call date, please circulate a proposed alternative time if you are not available."*

545. On 16 April 2014, Mr Cox circulated an email to Mr Michael Kelleher, Simon Ledbetter, John Nesbitt and Michael O'Flynn headed; *"Catalyst Capital";*

> *"Michael, as you will know we had a positive meeting with Catalyst Capital yesterday and <u>there is a potential opportunity to bring the OFCP skillset to the table</u> from a development perspective.* (Emphasis added).
>
> *You indicated that you had put together some information prior to your initial involvement in the meeting, Simon would like to go back to Catalyst with some information to backup (provide hardcopy) the verbal overview Michael gave at the meeting demonstrating our development track record/capability in Ireland.*
>
> *Would it be possible to send through a short document demonstrating that track record, if someone else has compiled the original information or will put it together let me know and I can get in touch with them.*
>
> *Regards Patrick".*

546. On 06 June 2014, Mr Cox circulated to Catherine Ennis, Fintan Tierney, Brian Donohue, Michael O'Flynn and Brendan Lenihan the *"OFCP call notes Tuesday 3rd June 2014"*.

547. Under the heading "opportunity notes" eighteen separate potential projects or opportunities are listed.

548. The status of each project or opportunity is briefly described in some cases, and in almost every case the note is followed with a bullet concerning action to be taken. None of these "action points" are ascribed to Mr Cox. They are ascribed variously to Catherine Ennis, Fintan Tierney, Michael O'Flynn.

549. Mr Cox has submitted that this is evidence of the fact that he had no role in O'Flynn Capital Partners at this time let alone any particular role in relation to student accommodation projects.

550. Mr O'Flynn on the other hand said that he considered that this showed Mr Cox taking responsibility for the circulation of the action points, and not merely as a notetaker. He said that it was his belief that the absence of any action points for Mr Cox meant that Mr Cox was not doing his job in relation to these matters. Mr O'Flynn ascribes this to the fact that, unknown to all concerned at the time, Mr Cox was more interested in advancing his own project at Gardiner Street.

551. In June 2014 Mr Shane O'Flynn, son of Michael O'Flynn and who was at that time an associate director at DTZ enquired of Mr. Cox as to how he would rate Heuston South Quarter as a location for student accommodation. Mr O'Flynn Junior said that he personally thought it was too far out despite being near the Luas, but he still wished to raise the question.

552. Mr Cox replied:-

> *"Shane, sorry for the slow response I am on leave this week. I agree fully with your assessment of the location and would add that in a very undersupplied market as exists now it could seem appealing, but it is likely to become very secondary location wise as the market develops. There is a scheme in for planning on Church Street, that property behind Cleary's being sold by Savills is noted for student, these are better*

more central locations with many similar potentially sites available from the Council or privates over the next few years.

Happy to discuss further.

Patrick".

553. The plaintiffs cite this email as yet another instance of Mr Cox exhibiting interest and advising in relation to student accommodation in Dublin and discussing with Mr O'Flynn Junior possible suitable locations for student accommodation, all at a time when he was actively pursuing the Gardiner Street opportunity without reference to anyone in the Group.

554. On 11 June 2014 Mr. Cox wrote an email to himself which is relevant to his claim, examined later that he had obtained consent to the Gardiner Street project. In it he stated the following:

"Even though I carry out most of my work for entities outside this Group I am technically employed by it and therefore act on transactions which provide no financial payback in any way to the Group (and I earn the bulk of my annual wages over the last number of years from non-group related entitles with the full knowledge of the Group) (entities including VHML, VHM(UK)L, Palm Tree Limited, Grey Willow Limited, Albert Project Management.". (Emphasis added).

555. On 26 June 2014, a partner at Philip Lee Solicitors drew to the attention of Michael O'Flynn and Michael Kelleher the fact that NUI Galway had published on E-Tenders an invitation to tender for a student accommodation project at NUI Galway. Michael O'Flynn acknowledged the email stating; *"Thank you for forwarding your email. I am not sure what level of interest we may have but I have forwarded same to our student accommodation section".* It was then circulated by Mr O'Flynn to Mr Cox cc'd to John Nesbitt, Michael Kelleher and Michael O'Flynn. Mr Cox replied to all on 26 June 2014 stating as follows:-

"Thank you for forwarding this through. I met with NUIG about a year and a half ago when they were planning this process to discuss how we could be involved. I believe

the current tender is more for professional advisers to assist the University in their procurement programme rather than actual project finance or delivery. I will follow up with someone close to this process". (Emphasis added).

556. This email is evidence of Mr Cox recognising that he had a function in relation to student accommodation matters for the business in Ireland and committing to following up on the process. Mr O'Flynn went so far to say that he regarded this is as evidence that Mr Cox was the *"Student accommodation man in OFCP"*.

557. Mr Cox did not agree with this and said that all he was doing was commenting on a referral. This ignores his own statement that he would "follow up".

558. On 30 June 2014, Mr Cox circulated to Mr Tierney, Mr O'Flynn and Mr Nesbitt a *"rough investor list which myself and John put together in advance of our call at 3.30pm today"*. He said that this list together with a list previously circulated by Fintan Tierney could generate names worth discussing on the call.

559. The list contained the names of 76 potential investors including well-known international firms such as Blackrock, Blackstone, Avenue Capital, Davidson Kempner, Goldman Sachs, Invest Tech, Lloyds Bank, Macquarie Capital, RBS Bank, Starwood Capital. On the version of the list circulated by Mr Cox he placed his initials opposite forty two institutions.

560. On 27 June 2014 Mr Tierney circulated to Mr O'Flynn, Mr Nesbitt and Mr Cox a list of *"target partners"* stating; *"I suggest that we focus on a few target partners for OFCP, and spend time getting to know their exact requirements and a deep understanding between us that they will perform when the time to move on an opportunity arises".* (Emphasis added).

561. On 10 July 2014, Mr Cox circulated notes headed *"OFCP call Tuesday 01 July"*. Thirteen *"opportunity notes"* are made and this is another instance in which that Mr Cox is not described as the person responsible for any subsequent action point, a fact on which Mr

Cox relies in submitting that he did not have responsibility for executing any of these matters in O'Flynn Capital Partners.

562. On 15 July, 2014 Catherine Ennis forwarded to Mr. Cox a "Stage 1 Report for Cherrywood lands" stating that the information was based "on our own diligence and is subject to verification when it is brought to the market. Any queries please let me know.".

563. Mr. O'Flynn's evidence was that this was a very large opportunity for the development of lands at Cherrywood in Dublin. Mr. Cox replied stating that "we will review and revert with any questions we have."

564. On 18 July, 2014 Mr. Brian Donohoe circulated to Mr. Tierney and Mr. John Donohoe a reference to an E tender published opportunity concerning the provision of campus residences for Dublin City University. Mr. Tierney forwarded this to Mr. Cox and the two Donohoe's stating "Patrick, this is your expertise – will you have a look please and see if there is anything for OFCP/Victoria Hall?".

565. Mr. Cox replied stating "I have already read the RFI, this is a first phase inquiry with the second to likely follow. I believe that we are not likely to be interested in this but will wait and see how they actually intend to procure."

566. In his evidence Mr. Tierney expressed the opinion that O'Flynn Capital Partners was not in the business of student accommodation and that he had referred this to Mr. Cox in the context of possibly being pursued by "Victoria Hall". That does not explain why Mr. Tierney referred to "OFCP/ Victoria Hall".

567. Mr. Cox said that he did not believe this item was of any significance because it was nothing more than a reference to a public procurement announcement which the company was not interested in pursuing. When asked by counsel for the plaintiffs whether Mr. Tierney and others would have referred this to Mr. Cox as his area of expertise, if they had known that he was at the time pursuing Gardiner Street privately, Mr. Cox simply repeated that it was not his role in relation to OFCP.

568. On 18 July, 2014 Mr. Cox circulated to John Nesbitt, Fintan Tierney and Michael O'Flynn an email headed "Investors for Ireland" in which he stated:

> *"See below list of investors which has been drawn from our larger list, many of these are London based investors. It is envisaged that we will set up a few days of meetings in London the week commencing the 18th of August and the week commencing the 25th August when FT returns from holidays. The list is not exhaustive and can be continuously added to and taken from (likely that many of the below list will not have an interest in Ireland). I have put the initials of the organising contacts beside each company name. I am going to ask Sara to assist in coordinating the meetings to ensure we do not overlap diaries.*
>
> *In advance of mid-August we will meet the advisors detailed below to continue to build contact with credible Irish focused investors."*

There follows a table identifying 39 named investors and details of the "organiser" are identified. In twelve cases Mr. Cox is identified as one of the organisers, jointly with others including John Nesbitt, and in certain cases Fintan Tierney. (The only plaintiff entity for which Mr. Tierney worked was O'Flynn Capital Partners).

569. The email also includes an "advisor table" comprising entities such as Macquarie, Storm Harbour, UBS, CBRE Investment Managers and others. In four of these cases Mr. Cox identified himself as the "organiser", in two of the cases jointly with Mr. Nesbitt.

570. On 20 March, 2015 Mr. Tom Brown of LeBruin emailed Mr. O'Flynn referencing a "student housing development". Mr. Brown was one of the external contributors at the O'Flynn Capital Partners Strategy Day held on 13 January 2015 and said he was submitting this information to Mr. O'Flynn in the light of his potential interest in student accommodation projects. This particular opportunity related to Church Street, Dublin 7. In reply Mr. O'Flynn confirmed to Mr. Brown his interest in Dublin student accommodation but indicated that he was instead "keen to create our own development" meaning that a finished

forward funding scheme such as this was not of immediate interest. Mr. O'Flynn attached significance to this exchange as evidence that it was clear to Mr. Brown as an external participant in the strategy meeting that OFCP was interested in pursuing student development opportunities in Dublin.

Curriculum Vitae, business cards and marketing material

571. Mr. Cox's own cv was put in evidence by Mr. Nesbitt as evidence of the group wide role which he held. It refers to Patrick Cox and contained the following descriptions: "O'Flynn Group 2007-present".

> *The O'Flynn Group is one of the largest Irish private property investment development companies, with a European portfolio of assets of circa €2 billion. The group comprises a number of key subsidiaries including O'Flynn Construction, Tiger Developments, Victoria Hall Student Accommodation and Shelbourne Senior Living. Joined the group in the role of strategic consultant and subsequently took on the position of Investment Director. The role primarily involves the identification, development and implementation of investment opportunities on behalf of the Group and the implementation of operational management efficiencies in respect of group subsidiaries.*

Investment Director

1. Manage and develop key group investor and banking relationships, facilitating the raising of senior/mez debt and external equity for inhouse or joint venture transactions.

2. Provide strategic operating and investment guidance for the group board of directors in respect of a £250 million operating group subsidiary. Implement an investment and operating strategies within group subsidiaries.

3. Manage and oversee operational subsidiaries cost budget analysis and ongoing budget rationalisation.

4. Oversee the management of existing and implementation of new processes and controls and key group subsidiary.

5. Recruitment of key staff members for group operating subsidiary.

6. Analyse and evaluate the commercial viability of various investments outside the group's core business.

Strategic consultant

1. Examine and evaluate growth and expansion options for group subsidiary companies in mainland and eastern Europe.

2. Developed extensive relationships with investors, principles and advisors throughout Europe.

3. Analysed and appraised investment/development opportunities and strategic partnerships."

572. The form of the business card approved by Mr. Cox describes him as Patrick Cox, Investment Director – Victoria Hall Management Limited, having its address at 9 Clifford Street, London. (Emphasis added).

573. On 18 November, 2014 Mr. Cox submitted to John Nesbitt the text of his bio to be included in a presentation being prepared for a forthcoming student conference organised by Property Week. It read as follows:

> *"Patrick Cox has been involved in the student accommodation sector for the past seven years and oversees the operation and strategy of Victoria Hall student accommodation. Patrick jointly established and currently oversees Victoria Hall Management Limited which manages all third party investor joint ventures in the student sector."* (Emphasis added).

"A note of thanks"

574. Three months after his resignation, when Mr. Cox was leaving employment and severing all connections with the Group and with the plaintiffs he issued an email on 30 July,

2015 headed "A note of thanks". The email was addressed to headoffice@oflynn..... office@o'flynnconstruction.ie, Londonoffice@o'flynnconstruction.ie, JohnRipley@victoriahall.com, KateSmallshaw@victoriahall.com, AndyAttewell@victoriahall.com, and J.Donohoe@ofcp.ie. He thanked all of his colleagues and stated that he had enjoyed working "with the O'Flynn Group over the past eight years". He said that he looked forward to future contact and concluded as follows:

> *"I have worked closest with Victoria Hall and its wider businesses over the last number of years and know the student accommodation market intimately; I can safely say that Victoria Hall is the best student operator in the UK with staff who demonstrate real commitment and care to their work. This business will flourish over the next few years and I look forward to seeing Victoria Hall crystalising its place as the institutional operational and development partner of choice in the student sector. More recently I have also worked with OFCP and have seen a new fledgling business take strong steps forward, securing good residential development projects in Dublin and Cork in a very competitive non normalised development space in Ireland."*

The Carrowmore website

575. The plaintiffs refer also to an extract from the website of Carrowmore when it was first set up and in particular the biography of Mr. Cox its Managing Director. Mr. Cox is described as follows:

> *"Patrick is responsible for overseeing the overall growth of the business and structuring and managing Carrowmore's joint venture partnerships. He most recently worked as Investment Director of the O'Flynn Group, Victoria Hall Student Accomodation and Victoria Hall Management Limited and is a partner in O'Flynn Capital Partners."*
>
> *"He has partnered with private equity institutional capital structuring over £500 million of investment and development transactions over the past five years. He has*

successfully established and implemented joint venture strategies with various investors including Blackrock, La Salle Investment Managers, Westbrook Partners, Coral Fund, McLaren Property, Apache Capital and Eric White."

576. The plaintiffs rely on this as evidence that Mr. Cox on his own description held the position of Investment Director for not only Group entities but also for Victoria Hall Management Limited and O'Flynn Capital Partners. For example, the Coral Fund cited in his CV was not an entity with which the O'Flynn Group ever engaged. It was the counterparty for VHML and Grey Willow Limited in the Birmingham and Coventry transactions.

577. Mr. Cox said that this was no more than a promotional biography and that it did not amount to a verification or admission by him of the roles to which the plaintiffs attach importance. The plaintiffs had requested that he correct these references to his role. The key point, however, is that he had chosen to ascribe these titles and roles to himself. In doing so he reveals that he had no hesitation holding himself out as Investment Director of VHML and a partner in O'Flynn Capital Partners.

578. Mr. Cox was based in London three days a week and two days in Dublin. Mr. Nesbitt said that Mr. Cox worked closely with him both in relation to the seeking out of investment opportunities and the operation of the student accommodation business. There are no instances of Mr. Cox saying 'that is not part of my job to pursue'.

579. Mr. Nesbitt cited other documents in which Mr. Cox was described variously as having the role of Investment Director in VHML. He referred to a document used for promotional purposes as "Victoria Hall Management Limited – a specialist student accommodation provider" in which the structure chart of VHML shows Mr. Cox as Investment Director.

580. Promotional material for O'Flynn Capital Partners used for a presentation of the 7th October, 2014 to York Capital Management contains a biography of Patrick Cox described as

a "partner" and states "Patrick Cox is responsible for the prudent financial structuring of acquisitions for O'Flynn Capital Partners".

581. In an extract from what was referred to as the "Paul Street Bank Pack", Mr. Cox is described as the Investment Director of "Victoria Hall". Similarly, he is so described in the bank pack for "Paris Gardens" which includes a structure chart for VHML showing him as Investment Director.

582. Mr. Cox stated in his evidence that he was not the author of a number of these documents. Secondly, he said that in any case they are merely promotional material created for presentations to external parties. No evidence was given by Mr. Cox that he ever demurred from these descriptions of his roles in VHML and O'Flynn Capital Partners as Investment Director and Partner respectively.

Role of Mr. Cox in O'Flynn Capital Partners (OFCP)

583. OFCP was incorporated on 24 February 2014. Mr. O'Flynn gave evidence that from the time of its inception, both it and VHML were seeking out investment and development opportunities in the Dublin market. At that time the O'Flynn Group loans were in the course of being transferred from NAMA to Carbon, and the future of the O'Flynn Group was uncertain. Mr. O'Flynn says that in that context Mr. Cox was asked to continue to support the seeking out of opportunities for both VHML and OFCP.

584. Despite its name O'Flynn Capital Partners is not a partnership. It is an unlimited company whose shareholders were Michael O'Flynn 40%, John O'Flynn 40%, Michael Kelleher 10% and Patrick Kelliher 10%. (On 21 September 2018, John Nesbitt acquired the shares of Patrick Kelliher).

585. Mr. O'Flynn and Mr. Nesbitt say that Mr. Cox agreed to and undertook a role in O'Flynn Capital Partners corresponding to the roles which he had previously performed in the O'Flynn Group and was already performing for VHML. Mr. Cox denies this.

586. An internal email between Mr. O'Flynn and Brendan Lenihan concerning Mr. Cox's role in O'Flynn Capital Partners stated that Mr. Cox *"would be working with Fintan (Tierney) on connecting/structuring capital with opportunities. He will also assist with meeting with banks and receivers"*.

587. Mr. Cox says that he was never instructed or appointed or considered that he had a role to identify student accommodation opportunities in Dublin and he did not believe that this was his role. He never received any fees or renumeration from OFCP.

588. Mr. Cox says that he provided advice from time to time in relation to what potential funding partners may be interested in Ireland. He joined some calls of OFCP and assisted on some documents in relation to this. Some of the calls he joined from London but says that he had no role in identifying opportunities in OFCP.

589. Mr. Cox said that although he was initially named as a partner in OFCP he was later demoted without consultation to be a member of its *"management team"*. He stated his view that Mr. O'Flynn was simply keen to create a "façade" that OFCP was a company of substance with significant staff and experience and to that end appointed named persons, including him, to positions which were not real in substance. The plaintiffs disagree with this description. Among the matters on which they rely is a series of emails which record conference calls held regularly from the early days after the inception of OFCP identifying opportunities and action points, all of which were issued by email by Mr. Cox.

590. The defendants object to the reliance on these documents. They did not object to the documents being put into evidence at the hearing, but they submitted that as these had not been included in discovery in the category of documents said to evidence Mr. Cox's role in any of the plaintiffs, they cannot be relied on for that purpose. They submitted that since these documents had been omitted from that category, this meant that the plaintiffs did not regard them as such evidence and cannot rely on them.

591. References were made to a history of contentious discovery applications and voluminous discovery made by each party. The detail of these earlier disputes was not opened to this court at the trial. Of course, the parties are required by the Rules of the Superior Courts to make their discovery in accordance with categories agreed or ordered to be made. However, in circumstances where these documents were put into evidence at the trial against a background of extensive discovery and disputes relating to discovery, which were not opened to the court at trial, I am not willing to disregard these emails, the provenance of which was not disputed, on the ground that they had not been discovered under one category relating to Mr. Cox's role.

592. The first recorded such communication is an email from Mr. Cox dated 11 March 2014 to Michael O'Flynn, Fintan Tierney and Brian Donoghue entitled *"OFCP follow up note"*.

593. In this email Mr. Cox stated the following:-

> *"A quick note following up on this morning's call. Please feel free to add to the below information and circulate to all.*
>
> *I think it would be useful to schedule a fortnightly catch up call/meeting to keep on top of active projects (there may of course be specific calls on particular projects in between)."*

594. There are then listed nine *"property related notes/actions"*. These identify assets and opportunities at nine different locations. In almost all cases the action points are ascribed to persons other that Mr. Cox although he is referenced in a number of places in relation to the task of meeting and pursuing potential funders. This email is not the writing of a person who does not regard himself as holding a position of seniority and responsibility in OFCP.

595. A series of such emails all entitled *"OFCP conference call meeting"* were issued by Mr. Cox on 8 April 2014, 22 April 2014, 6 May 2014, 26 May 2014, although no later such notes were put into evidence. In each case Mr. Cox circulates the notes to Mr. Tierney, Mr.

O'Flynn, Mr. Donohue and others. The listed projects describe a range of projects with only one reference in each case to a potential student accommodation, the so called Mongey Plunkett site.

596. In his covering email of 6 May 2014 Mr. Cox stated:-

> *"Other notes*
>
> *Opportunities not under consideration: Delgany site, Oxmontown Green*
>
> *PC and JN to work with FT to put together a list of London based capital providers who should be met with a view to them potentially becoming partners.*
>
> *Lastly for your interest please see the below link to the 'regency' website. This is the development company that Centre Bridge will be working on with the 67 acre development in Hollystown.*
>
> *As always please feel free to revert to all either adding to or amending any of the information above".*

597. Mr. Cox said that the fact that very few of the action points referenced him was indictive of the fact that his role was limited.

598. Mr. Cox said that he was at these meetings no more than a *"notetaker"*. The plaintiffs say that Mr. Cox was clearly taking initiatives by the circulation of these notes. No evidence has been advanced by any party, including Mr. Cox himself, that he was asked to prepare such notes merely in his capacity as a "notetaker".

599. Over the course of his four years and four months employed by Tiger, and performing services for the plaintiffs, Mr. Cox held himself out as a senior person holding a strategic and representative position, using variously the designation Investment Director or Partner. When O'Flynn Capital Partners was incorporated he embraced the opportunity to work for it as much as for the existing VHML structure, himself using the title 'Partner'. I am not persuaded that he was ever in the position of a mere 'note taker' at any of these meetings or conference calls or regarded himself only as a notetaker. His practice of circulating the most

senior persons, including Michael O'Flynn, with minutes and action points on the full range of development opportunities, and the advisory and other comments contained in his various emails, all undermine the proposition that he was only a taker of notes.

The O'Flynn Capital Partners Strategy Day – 13 January 2015

600. On 13 January 2015 there was held at an off-site location in a hotel in Dublin an event described as the *"O'Flynn Capital Partners Strategy Day"*.

601. Mr. Nesbitt in his evidence describes this as a day organised *"for the benefit of the new O'Flynn Group and associated companies including the plaintiffs"*. All documents and notes referable to the strategy day describe it as the *"OFCP Strategy Day"*.

602. Mr. O'Flynn's evidence was that the purpose of the strategy day was to motivate staff and focus on opportunities which could be availed of through O'Flynn Capital Partners.

603. The meeting was arranged against the background that at the end of 2014 and start of 2015 progress was being made with Carbon towards a settlement, which ultimately involved Carbon taking ownership of the O'Flynn Group. There was therefore an increased focus on finding and pursing meaningful opportunities in the market for OFCP and other non Group entities.

604. Mr. Cox was directly involved in the preparations for the meeting. On 15 December 2015 he emailed Mr. O'Flynn headed "OFCP Strategy Day Tuesday 13th of January". He said that he had spoken to John Nesbitt and Fintan Tierney at a high level regarding the proposed day and about organising external professional and expert speakers for a market focussed session.

605. The events around the strategy meeting take on importance in the context of the plaintiffs' allegation of concealment by Mr. Cox of his activities at Gardiner Street. This is described in detail later. Shortly after the strategy day Michelle O'Flynn was in contact with Mr. Cox regarding the structure of the regular calls and notes and agendas. Mr. Cox provided

to Ms. O'Flynn a copy of one of the early sets of notes dated 11 March 2014 stating as follows:-

> *"This is an old set of minutes (but reflective of the typical minutes).*
>
> *The calls had been scheduled fortnightly on Tuesdays at 10a.m. I think we discussed before, but this process needs to ideally be changed or discarded depending on how the business is going to move forward"*.

606. Ms. O'Flynn acknowledged this and indicated that she would discuss it with Michael O'Flynn, as well as the other points raised at the strategy day. This in turn led to an email by Mr. O'Flynn of 23 February 2015 announcing a new structure of a Management Committee and an Investment Committee.

Resignation of Patrick Cox

607. Mr. O'Flynn and Mr. Nesbitt said that when the outline of the Carbon settlement was emerging in early 2015, they held consultations with staff members including Mr. Cox. They say that they explained that because the company which was their *"technical employer"*, which in the case of Mr. Cox was Tiger Developments, would, being subsidiaries of Colebridge, be transferring to the control of Blackstone they would be offered continued employment by VHML on the same terms and conditions which they previously enjoyed with the relevant Colebridge company.

608. Mr. O'Flynn says that he informed staff of his belief that if they opted to stay with companies moving to Blackstone there would be uncertainty for them as regards long-term employment because Blackstone were likely to have their own complement of senior staff.

609. Mr. O'Flynn said that he did not put pressure on anyone to resign and 'transfer' to VHML. He instanced the case of one person, since deceased, who elected to stay in the Group transferring to Blackstone. Mr. O'Flynn had assured that person that if he wished to stay in the O'Flynn Group under the Carbon ownership, he could do so and that if later he

changed his mind, he would be welcome to 'come back', meaning transfer to VHML. The person concerned died shortly afterwards.

610. The evidence given by Mr. Nesbitt and Mr. O'Flynn was that they encouraged each of these persons to transfer to VHML.

611. Mr. Nesbitt says that all of the others agreed to transfer, and he believed that Mr. Cox was intending also to transfer. Mr. Cox's evidence is that he never agreed to this.

612. Mr. Nesbitt said that VHML had started the process of preparing new contracts of employment.

613. As the date for completion of the Carbon settlement approached at the end of April 2014 it was necessary, to obtain resignations from those who were agreeing to join VHML.

614. Mr. Nesbitt said that he understood at the time that a draft of a contract with VHML had been given to the relevant persons including Mr. Cox. He said that when Mr. Cox told him that he had never received such a contract he apologised, explaining that so much had been happening in the lead up to the Carbon transaction that this was an oversight and he agreed to arrange to send a draft contract to Mr. Cox. Mr. Nesbitt says that he confirmed to Mr. Cox that it would be on substantially the same terms as his existing contract with Tiger.

615. The Carbon transaction was completed at 4:30a.m. on the morning of Saturday 25 April 2015.

616. Mr. Nesbitt acknowledged that a certain pressure surrounded the request for resignation letters over the weekend of the completion, but this was the context of the imminent completion of the transaction, which came to fruition very rapidly in the end.

617. On the morning after completion, namely Saturday 25 April 2015 a conference call was convened with John Nesbitt, Michael O'Flynn, John Ripley, Kate Smallshaw, Andy Attewell and Mr. Cox. Mr. O'Flynn informed the call participants that the Carbon deal had been completed in the early hours of that morning.

618. Mr. Cox disagrees fundamentally with this description of the events leading to his resignation.

619. He said that the first request made to him to resign to facilitate the implementation of the Carbon settlement was made within a few days of its implementation. He says he was asked to resign and that he did so. He says that although his contract provided for a three-month written notice, he never received such notice nor did he receive pay in lieu of notice.

620. Mr. Cox's perspective on this was that when Blackstone acquired the business of Victoria Hall as part of the Colebridge Group this created a difficulty for Mr. Nesbitt in that he would lose staff unless they resigned and transferred to VHML. As he put it *"if the staff moved with Victoria Hall to Blackstone then he would lose the core operational staff for his shadow non NAMA business"*.

621. The evidence given by Mr. O'Flynn and Mr. Nesbitt is that the requests for resignations from Tiger and other Colebridge entities and their subsequent recruitment under contracts with VHML was nothing sinister. Although encouraged by Mr. O'Flynn and Mr. Nesbitt, it was a voluntary migration of certain senior management to VHML, in agreement with Carbon, and was in the interests of the persons concerned, including Mr. Cox.

622. Mr. Cox put into evidence an email dated 5 May 2015 which is another *"note to self"* headed *"Note Tuesday 5th of May re resignation"*.

623. The parties have different views in relation to the authenticity of the contents of this and other such emails. However, it is not alleged by the plaintiffs that this email was created on any date other than the date which appears on it namely on 5 May 2015. It is informative and reads as follows:-

> *"Background*
>
> *It is worth noting that myself, John and Michael had a brief discussion in the London office about a month and a half ago during which they suggested that they would like me to move with them to VHML. During this conversation they suggested that I would*

be 'TUPE'd' across and that they would inform me further – at the time I simply responded that I looked forward to getting the details. At that meeting Michael told me that others, John R., Kate S. and Andy A. would all be moving also. When I questioned whether any of them may stay with the new Blackstone entities, Michael said that anyone who didn't move would be fired. I told Michael that it would be unreasonable to say such a thing to loyal employees who had concerns over their jobs, Michael retorted that he may not say it that way, but he was going to be matter of fact about it. John R. informed me that he was indeed threatened with dismissal if he did not move, even if such dismissal was unfounded.

Timeline

Received a call from John Nesbitt on Friday 24th of April at circa 2:30p.m.;

On the call John asked me whether I had a contract with Tiger Developments, which I indicated I had. He asked me what my pay was and what my top up fee was. I told him the contracted salary level and the monthly invoice level which I had charged to 'Albert Project Management'. John then said that he would need me to resign soon and that he wanted to move me to VHML and thus why he wanted to know the details. I asked how soon 'soon' was and he said this weekend. I suggested that it would have been pertinent to give me some notice if he and Michael wanted me to resign. He said that he had hoped to have more time but their plates were full over the last number of weeks. I couldn't believe what I was hearing and how unprofessionally they were dealing with such a sensitive situation. I thought the request to resign over the weekend was wholly unreasonable.

John said he would speak to John R. and get me a draft contract over, I said I would have to review the terms and that I would like an external adviser to review the terms also as of the date of drafting this note, I have not received any draft terms. John and Michael's expectation was for me to be forcefully pushed to resign from my

contractual position in Tiger Development to a position with no contract with a new entity they wanted me to work for. John said he would honour the payment terms on the table currently and I could consider whether to be an employee or to be paid into my own company.

John asked me to join a con call the next morning at 9:30a.m. on Saturday 25th of April with Michael, John R., Kate S., and Andy A. I said I would join.

The call commenced at 9:30a.m. with small talk, Michael joined the called twelve minutes late and gave us a very brief overview of the deal closing at 4:30a.m. the night before with Blackstone and that the parties were now on good terms. John then took control of the call and effectively asked all [end of extract put in evidence]*"*

624. On the morning of Monday 27 April 2015 at 7:40a.m. Mr. Cox emailed Mr. Nesbitt his resignation in the following terms:-

"John as requested, please accept this email as my resignation from tiger development (sic) Patrick".

625. Mr. O' Flynn gave evidence that when Mr. Nesbitt reported to him that Mr. Cox had given his resignation and was not transferring to VHML he was surprised. He said that they had been through an intensive period of activity in trying to resolve matters with Carbon, including spending many continuous days in the offices of Eversheds Solicitors working on that transaction and he had assumed that Mr. Cox would take the opportunity to transfer across to VHML.

626. From the evidence given by the witnesses that the following can be said:-

(a) On a date in March 2015, John Nesbitt and Michael O'Flynn spoke with Mr. Cox about the plan under which he would be invited to transfer to VHML.

(b) In the course of that conversation Mr. Cox said he awaited receipt of the detail of this transfer.

(c) No draft of a new contract was ever presented to Mr. Cox.

(d) In the days leading up to the completion of the Carbon settlement Mr. Nesbitt set about obtaining the resignations required to comply with the intended agreement with Carbon.

(e) On the afternoon of 24 April 2015 Mr. Nesbitt called Mr. Cox and asked him questions about his existing contract with Tiger Developments. Mr. Nesbitt said that he would *"need Mr. Cox to resign over the course of the weekend as part of the completion of the Carbon settlement"*.

(f) On the morning of Saturday 25 April 2015 on a conference call Mr. Nesbitt and Mr. O'Flynn announced to the relevant personnel that the Carbon transaction had been completed. Arrangements were made to obtain the resignations of the relevant persons.

(g) Mr. Cox resigned on 27 April 2015.

(h) In the case of Mr. Cox this was not a "technical" resignation, because he did not take up a position as an employee of VHML. Instead he left the employment of the Group entirely.

627. Very little in the case turns on whether Mr. Cox resigned because he was "forced" to do so, or whether he resigned for other reasons. Mr. O'Flynn expressed the view that, although he Mr. O'Flynn did not know about Gardiner Street at the time, Mr. Cox would have found it more difficult to maintain his concealment of Gardiner Street if he had signed a new contract with VHML, and that at this time the Gardiner Street plans were progressing at pace. Either way, Mr. Cox could not have been lawfully compelled to resign from Tiger merely because of the change of shareholder. He made the decision to resign and not to take up an employed position in VHML.

Mr. Cox's "leaving arrangements"

628. Mr. Nesbitt's evidence is that he was surprised and shocked that Mr. Cox's resignation was not a technical one, because he believed that Mr. Cox had intended to transfer to VMHL. There then followed discussions between Mr. Cox and Mr. Nesbitt regarding his arrangements for leaving. This culminated in the signing of a letter which although dated 17 June 2015 is stated to have been signed on 22 June 2015 in the following terms:-

> *"Proposed leaving arrangements*
>
> *Consultancy role: June//July*
>
> *I will work on a consultancy basis with Victoria Hall Management Limited and Albert Project Management Limited until July 30th 2015. I will be paid €6,250 from Victoria Hall Management Limited and £5,000 by Albert Project Management Limited in June and July respectively in the last working week of each month.*
>
> *At the end of July I will transfer my mobile phone numbers and mobile billing into my own name and I will give John Nesbitt the debit card provided to me by Victoria Hall Management Limited.*
>
> *August*
>
> *I will be on holiday with my family for the month of August in the south of Ireland and will have ad hoc availability, subject to availability I will be accessible on the phone and will endeavour to make myself available for an ad hoc in person meeting should it be requested. Any travel and disbursement costs expended by me will be reimbursed by Victoria Hall Management Limited. No fee will be charged by me for any engagement during this month.*
>
> *September*
>
> *In the event that any group company should wish to make contact with me, I will be accessible on the phone and will endeavour to make myself available for an ad hoc in person meeting shouldn't be requested.*

In the months thereafter I can be contacted by phone.

None of the above precludes or restricts my in any way from working on my own business activities during the above months".

629. The document was signed on 22 June 2015 by each of John Nesbitt and Patrick Cox.

630. VHML made payments of €6,250 to Mr. Cox in respect of each of the months of May, June and July 2015 on 26th May 2015, 25th June 2015 and 30th July 2015.

631. Albert Project Management Limited made payments of £5,000 in respect of each of the months of May, June and July on 26th May 2015, 19th June 2015 and 27th July 2015. These were a continuation of what were described as *"top up payments"* made by APML and which had commenced as far back as September 2013. They were originally being paid at a rate of £2,500 per month, later increased to £3,500 per month and increased to €5,000 per month from January 2015 onwards.

632. On 30 July 2015 Mr. Cox sent the email headed *"a note of thanks"* to head office at oflynnconstruction.ie and others and which I have quoted earlier.

633. In that email Mr. Cox stated as follows:-

"I have worked closest with Victoria Hall and its wider businesses over the last number of years and I know the student accommodation market intimately; I can safely say that Victoria Hall is the best student operator in the U.K. with staff who demonstrate real commitment and care to their work. This business will flourish over the next few years and I look forward to seeing Victoria Hall crystallising its place as the institutional operational and development partner of choice in the student sector. More recently I have also worked with OFCP and have seen a few fledgling business make strong steps forward".

634. In cross examination Mr. Cox stated that when he was referring to Victoria Hall in this paragraph, he was referring to VHML and VHML U.K.

Emails to Frank Dowling at NAMA

635. From time to time after acquisition of the loans, NAMA sought clarification on such matters as overhead levels including payroll costs and related matters.

636. On 29 November 2011 Mr. Frank Dowling, portfolio manager at NAMA asked for clarification of the employment arrangements for Patrick Cox and Simon Leadbetter.

637. On 15 December 2011 Mr. O'Flynn replied to various questions and stated the following in relation to Messrs Cox and Leadbetter:-

> *"Simon Leadbetter is a consultant and Patrick is an employee. (You will see in a number of property companies that these structures are used interchangeably and as we look ahead to what will likely be a dwindling portfolio it is likely that we will need to utilise the consultancy route on a more frequent basis then we have to date). We consider that both are a vital part in achieving best value for disposals and other initiatives to realise value from the Group's assets given that there will likely be financial structuring and research inherent in significant transactions to realise cash from UK assets".*

638. In December 2012 further queries were raised by NAMA in relation to Mr. Leadbetter and Mr. Cox. On 19 December 2012 Brendan Lenihan, Group Finance Director of the O'Flynn Group replied and stated the following in relation to Mr. Cox:-

> *"Patrick Cox has a background in banking and accountancy and specialises in research, programme management and funding for group companies, including Victoria Hall Limited and Tiger Developments. This is a very important function as it is support for our front line asset manager. Patrick has deep knowledge in particular specialist markets, including student accommodation and this is extremely important for us in an increasingly competitive environment. As a compliment to this he has been very active in recent times in constructing and advancing revenue optimisation and cost efficiencies, business management systems, online marketing strategies*

across the group and advancing with green initiative to reduce the very significant energy consumption across the group. Therefore, his role in the group critically includes researching and programme managing important operational initiatives in the U.K. businesses/portfolio in particular. There have been a number of key initiatives that Patrick has established and planned and continues to implement to ensure revenue optimisation and cost efficiencies".

639. Mr. Lenihan then identified four particular further functions which included a reference to the I.T. function of the Group, facilities management and the operation of Victoria Hall and of Tiger Developments.

640. The defendants quote these emails in support of an allegation that when disclosure was made to NAMA in relation to the role of Mr. Cox it conveyed the impression that he was dedicating his whole time and attention to the affairs of companies in the O'Flynn Group and made no reference whatsoever to his role, and therefore time spent, in the VHML Group.

641. Before the reply was issued to Mr. Dowling Mr. Cox was invited to prepare the draft and the piece quoted above is based largely on the draft submitted by Mr. Cox. The email drafted by Mr. Cox differed somewhat in conveying a wider role for Mr. Cox, which was later revised by Mr. Nesbitt. The piece drafted by Mr. Cox states the following:-

"Patrick Cox's key role in the group is overseeing and managing key operational matters in Victoria Hall, his role is commensurate with that of <u>a chief operating officer</u> (this was a description removed later by Mr. Nesbitt). *The student accommodation sector has become significantly more competitive over the last number of years and the business model requires constant refinement in order to maintain and exceed market pace. There have been a number of key initiatives that Patrick established and planned and continues to implement to ensure revenue optimisation and cost efficiencies.*

642. Mr. Cox's own draft referred also to his role in implementing best practice facilities within the Victoria Hall Group and the success of the Victoria Hall student halls operation and references to his functions in Tiger Developments.

643. It was also submitted by Mr. Cox that the impression conveyed by all of these emails was that Mr. Cox was dedicating his whole time and attention to companies in the O'Flynn Group which were indebted to NAMA, again without reference to his activities for companies outside the Group. That is correct, and it is consistent with the evidence of Mr. Stewart, when he said that NAMA knew that the O'Flynn Group had other business to occupy it but believed that the other activities were dealing with other bank conditions of the Group, not working outside the Group. But if NAMA had elected to exercise total control over not only assets but also the day to day activities of management, it could have done so by appointing statutory receivers.

Analysis of the status of Mr. Cox

644. I have already examined the Cox contract and found that it obliged Mr. Cox to perform services for Tiger Developments and companies in the O'Flynn Group only. His stated tasks included finding new leads and bringing these to the board for discussion and converting leads on board approval. Although this is a provision of his contract with Tiger, which is not a plaintiff, the contract is relevant in that it demonstrates that his proposition that his function as Investment Director, even in the O'Flynn Group, never extended to finding new "leads" or new "opportunities" is incorrect.

645. The sixth named plaintiff was a member of the Colebridge Group until 25 April 2015, or later when the Carbon Settlement was finally implemented. But in respect of the sixth plaintiff the following must be said. Firstly, no evidence has been advanced that Mr. Cox ever worked directly for it or provided services to it in any capacity.

646. Secondly, the only entity with which Mr. Cox had privity of contract was Tiger and Tiger is the party entitled to invoke and enforce the contract on behalf of O'Flynn Group companies, which it has not done.

647. As regards the VHML Group the essence of Mr. Nesbitt's evidence is as follows.

648. Firstly, that from 2011 at the latest Mr. Cox was asked to and willingly undertook tasks for VHML and other entities in the parallel group.

649. Secondly, Mr. Cox did so without ascribing any stated distinction between the performance of those tasks and his work for O'Flynn Group companies. It is not said by him that there was ever any discussion about new or different terms and conditions, save that Mr. Cox says that he was told that when working for the VHML Group this was work unconnected to the O'Flynn Group.

650. Mr. Nesbitt cites the fact that Mr. Cox performed tasks for VHML companies for which he was paid a total of stg £810,475.00. Payments were made by VHML, Grey Willow, Palm Tree and Albert Project Management Limited. They were described variously as *"advisory fee", "consultancy payments", "bonus"* and in certain cases *"top up payments".*

651. Mr. Nesbitt instances numerous documents such as curriculum vitae, biographies, emails internal and external, business cards and other documents which describe Mr. Cox as Investment Director initially of O'Fynn Group and elsewhere of both VHL and VHML. A biography which Mr. Cox himself prepared in preparation for his attendance at a student conference in November 2014 states that Mr. Cox *"jointly established and currently oversees Victoria Hall Management Limited"*.

652. Mr. Nesbitt cites a number of Mr. Cox's *"notes to self"*. In particular the note of 11 June 2014 states that *"I carry out most of my work for entities outside the group. I am technically employed and therefore act on transactions which provide no financial payback in any way to the group (and I earn the bulk of my annual <u>wages</u> over the last number of years*

from non-group related entities) with the full knowledge of the group (entities including VHML, VHM U.K.L, Palm Tree Limited, Grey Willow Limited and Albert Project Management)". (Emphasis added)

653. Obviously Mr. Cox was not earning 'wages' from the VHML companies. But his own use of the phrase illustrates that he regarded himself by that time as serving the parallel structure predominantly.

654. Reliance is placed also on so called *"farewell email"* dated 30 July 2015 in which Mr. Cox refers to his role across all the relevant entities including VHML.

655. Reference is made also to internal and external presentations both by Victoria Hall Management Limited and of O'Flynn Capital Partners which describe Mr. Cox as Investment Director.

656. The alternative plea made in para. 23 of the statement of claim and expanded on in submissions by the plaintiffs is that insofar as the relationship is characterised as a consultancy or other arrangement the duties of Mr. Cox, including those pleaded in para. 19 of the statement of claim which include such matters as duties to find new leads, and the prohibition of engaging in *"other interests during working hours"* such duties arose from *"his senior and trusted role within the O'Flynn Group, his agreement to provide services to the plaintiffs and/or the payments made by the plaintiffs".*

657. Mr. Cox says that there is a dichotomy between his role as an employee of Tiger and the services he provided to VHML Group and others which he says were provided as consultancy services. He submits that everything he did for the plaintiff entities was on the express basis that they were not connected to the O'Flynn Group and that it therefore could not be said that he was working for the plaintiffs as an employee, whether pursuant to the original contract of employment with Tiger or otherwise.

658. The evidence and submissions by each side focus on the distinction between a relationship between employer and employee on the one hand and the relationship of a consultant and client on the other hand. A number of issues arise from this.

659. Firstly, Mr. Cox's relationship with the O'Flynn Group commenced in 2007 and continued from the consultancy period when he was working with his father through to the period as a fulltime employee of Tiger which terminated on 27 April 2015 when he resigned. The latter overlaps with his relationship with the parallel structure which commenced in 2010 and continued until 31 July 2015. However labelled, those overlapping and evolving relationships spanned a period of seven and a half years. With the O'Flynn Group it evolved from consultant to employee. The relationship with VHML evolved in its own right from 2010 onwards and was clearly, in its day-to-day functioning an extension of his role which he willingly, and to his profit, undertook. The concepts of loyalty and confidentiality which featured in the Tiger contract were not alien to his role for the parallel companies. Mr. Cox did not at any point suddenly become a "free agent" of the type a truly independent consultant would be.

660. There is no evidence that, after signing the Tiger contract, in the day to day living of the relationship between the parties they turned their attention to such questions as the legal character of their relationship and the precise scope of the legal rights and obligations flowing from it. Mr. Cox became a full-time employee in O'Flynn Group from 1 January 2010, yet his contract was only signed on 24 March 2010. It is not unusual that such a contract would be signed after the commencement date. But the signing of that contract was clearly well down the priorities of the parties. It was an administrative event in the lead up to which the principal focus was on which entity in the O'Flynn Group would be selected as the most appropriate employer for payroll and taxation purposes.

661. Mr. Cox himself in a note to self-dated 11 June 2014 commented *"in my employment contract it says that I only work on company projects, something I had issue with at the time*

but as and when one is signing contracts you can agree flexibility". The evidence is that at no point in the course of the *"living"* of the relationship and as when individual projects and tasks were pursued by or assigned to Mr. Cox, whether by O'Flynn Group entities or by plaintiff entities, did the parties gave any consideration to the legal framework governing such work or the legal consequences in terms of rights, obligations and duties.

662. It is understandable that the parties in their evidence and submissions now seek to ascribe to the relationship as it evolved the legal construct which the supports their respective cases. The task for this Court is to assess the evidence and determine the legal character of the relationship and its consequences in terms of rights, obligations and duties.

663. Labels are not definitive and all encompassing. In the contract Mr. Cox is described in numerous places as "Investment Director", but he was not appointed a member of any board of directors. Similarly, Mr. Cox has been described variously, including by himself, as a partner in OFCP, but in fact that was not a partnership in the legal sense.

664. The term "consultant" can have different meanings. Its most commonly understood meaning is a person who is engaged, not as an employee, to provide defined services, advisory or otherwise, whether on a one-off basis or as a recurring obligation to deliver the agreed services and he will be paid a fee for doing so. Such a role attracts no rights, obligations or duties beyond the delivery of the defined services and the payment of fees. A breach of contract or duty in the performance or non-performance of services could give rise to a cause of action in certain circumstances. Such a consultant is generally not constrained from serving other clients at the same time and the scope of his other activities is his own business. That is a 'pure consultant'.

665. A consultant may agree retainer terms which restrict other activities or contain commitments in relation to availability, all in exchange for agreed fees.

666. Finally, the term consultant is frequently used to designate ranking or status of persons who are in fact required to devote their whole time and attention to the "client".

667. Mr. Cox claims to be in the first of these categories, a 'pure consultant'. He says that he was to the VHML Group never any more than a 'pure' consultant and that he was paid consultancy or advisory fees for individual projects or in some cases what were described as "bonuses" or "top ups". Mr. Cox advances this case on the presumption that such a consultancy attracts no duties of the type which the plaintiffs assert.

668. Apart from his own Gardiner Street project, there is no evidence that Mr. Cox ever provided consultancy services after 1 January 2010 to parties other than the O'Flynn Group and the plaintiffs. From 1 January 2010 to 27 April 2015 when he resigned, he remained in full time engagement, being a combination of his employment by Tiger and his consultancy work – to use his own designation – for the plaintiffs. Originally, he was engaged as an employee only for the O'Flynn Group. When he commenced doing work for VHML entities, and later for O'Flynn Capital Partners, he continued in parallel to be an employee of Tiger. He was not a 'free agent' and the combined roles required his whole time and attention, there being no evidence of work or services for different parties and no assertion that he was free to work for or with other parties, apart from his claim to have an approval which covered the Gardiner Street project. The fact that he sought such approval reveals an understanding on his part of the restrictions which otherwise applied. He denies that it has that meaning, but the length to which he went to obtain the approval and to rely on it in his defence show otherwise.

669. As early as the middle of 2011 Mr. Cox worked for VHML on the Dashwood project. Mr. Nesbitt agreed that he would be paid a fee when that was completed and that fee of €40,000 was paid in December 2011. This was the first recorded such project. It was followed by project Westbrook, another VHML project which concerned a site at Wembley in London.

670. Much of Mr. Cox's time and activity in 2012 related to structuring of the funding for the projects at Birmingham and Coventry. For his role in those projects Mr. Cox was paid an

initial *"advisory fee"* by VHML in October 2012 of £10,000. On 17 January 2013 he was paid an *"initial bonus"* by Grey Willow Limited of £60,000. Ultimately, he was paid a further sum of £500,000 by Grey Willow Limited, pursuant to invoices on 8 May 2014, for £350,000 on 2 December 2014 for €150,000.

671. The invoice narrative for these payments described the services as *"advisory services in relation to financial structuring of property related transactions"*. The invoices were issued by, and payments received by Rockford Advisors Limited.

672. The commitment to pay the sum of £500,000 was made by letter from VHML dated 30 March 2014. In the course of evidence there was some debate as to the true date on which this letter was first produced. It appears to have been produced only after the Jersey based service provider to Grey Willow Limited requested a copy of the relevant engagement letter or contract. The letter is on the letterhead of VHML and is signed by John Nesbitt stating the following:-

> *"Further to our many conversations and discussions in respect of your advisory and structuring advice regarding the various student housing deals. I confirm that Grey Willow will undertake to pay you sterling £500,000 for this work. This deal will be paid in two instalments of £350,000 in May 2014 and £150,000 in January 2015.*

673. The evidence concerning the relationship between Mr. Cox and the plaintiffs shows the following:-

(1) Mr. Cox actively participated in VHML projects notably at Dashwood, Westbrook, Birmingham, Coventry and others.

(2) Although Mr. Cox was informed that these assignments were outside and unconnected to the O'Flynn Group he continued to work throughout this time from the shared VHL and VHML office in London for three days per week alongside Mr. Nesbitt, Mr. Leadbetter and others. For the remaining two days per week, he continued to work from the Dublin office of O'Flynn Group.

(3) Mr. Cox communicated continuously with parties internal and external in relation to potential projects, student accommodation and others in Dublin and elsewhere.

(4) Mr. Cox held himself out as Investment Director not only of Tiger Developments but of the O'Flynn Group and, critically, of VHML, claiming to have "*jointly established and currently overseeing"* VHML.

(5) When O'Flynn Capital Partners was established Mr. Cox participated from the outset in its regular conference calls to identify development and investment opportunities and at which progress reports were taken and tasks assigned. Mr. Cox claims to have participated in these discussions only as a notetaker, yet elsewhere he described himself as a partner in OFCP.

(6) When student accommodation opportunities were identified by Mr. Cox or brought to his attention, internally or externally Mr. Cox never said that this was not his area of responsibility. On the contrary he continued to pursue the relevant contact in certain cases and internally committed to *"staying close"* to such leads.

(7) Mr. Cox proposed the content and structure of the O'Flynn Capital Partners strategy day held on 13 January 2015. He identified parties to be invited including a speaker to address the subject of student accommodation projects. Mr. Cox claims that his role in relation to these matters was incidental and that student accommodation was no part of the agenda. The agenda was wide ranging, and no asset type or sector was excluded.

674. Questions of whether a fiduciary relationship arises were considered by the Federal Court of Australia in *Oliver Hume South East Queenland PTY Limited v Investa Residential Group PTY Limited* (op cit). In that case the court (Greenwood J.) considered it appropriate to examine what it described as the *"the calculus of factual considerations"* and examined whether the person concerned, in that case a Mr. Nankervis, *"assumed or undertook obligations"* giving rise to such a duty.

675. The court quoted extensively and with approval passages from an article by Dr. Finn in the UNSW 1989 Article. Greenwood J. said as follows:-

> *"In his UNSW 1989 Article, Dr Finn observes at p 85 that the received judicial wisdom is that it is 'unwise' and perhaps 'unhelpful' to attempt to provide a general answer to that most basic question: 'when and why will a relationship be a fiduciary one?'. Dr Finn acknowledges that this may be prudent because a 'useful jurisdiction should not be fettered' and the 'perennially repeated observation' is that the 'categories of fiduciary relationship are not closed'".*

676. The court quoted from Dr. Finn where he stated the following:-

> "*The cases suggest that there are two distinct approaches to relationship characterisation, though they overlap in some factual contexts. They entail quite different inquiries. The first requires an* <u>*analysis of the actual legal incidents*</u> [original emphasis] *of a relationship itself in the setting in which it occurs and from this a conclusion is arrived at as to the purpose to be attributed to the relationship and to a party's role in it. Thus, the Restatement Second Agency for example, asserts unequivocally of the principal and agent relationship that 'an agent is a fiduciary with respect to matters within the scope of the agency'. The second approach focuses upon* <u>*the presence (actual or presumed) of factual phenomena*</u> [original emphasis] *in a relationship - an ascendancy or influence acquired, a dependence or reliance conceded, a trust or confidence given - and from these a conclusion is arrived at as to the character to be attributed to the relationship and as to the role of the 'superior' party in it."*

677. The court quoted from Lord Chelmsford in *Date v Williamson* where he put the matter this way:-

> *"Whenever two persons stand in such a relationship that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out*

of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage of the expense of the confiding party, the person so availing himself of his position will not be allowed to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed."

678. The court returned further to Dr. Finn's observations as follows:-

"What is it that renders one person a fiduciary of another and places the two of them in a fiduciary relationship? Dr Finn answers that question in this way at p 46:

> *'What must be shown, in the writer's view, is that the actual circumstances of a relationship are such that one party is entitled to expect that the other will act in his interests in and for the purposes of the relationship. Ascendancy, influence, vulnerability, trust, confidence or dependence doubtless will be of importance in making this out, but they will be important only to the extent that they evidence a relationship suggesting that entitlement. The critical matter in the end is the role that the alleged fiduciary has, or should be taken to have, in the relationship. It must so implicate that party in the other's affairs or so align him with the protection or advancement of that other's interests that foundation exists for the 'fiduciary expectation'. Such a role may generate an actual expectation that the other's interests are being served. This is commonly so with lawyers and investment advisers. But equally, the expectation may be a judicially prescribed one because the law itself ordains it to be that other's entitlement. This may be so either because that party should, given the actual circumstances of the relationship, be accorded that entitlement irrespective of whether he had adverted to the matter or because the purpose of the relationship itself is perceived to be such that to allow disloyalty in it would be to jeopardise its perceived social utility.'"*

679. The court endorsed a passage previously cited with approval by Millet L.J. in Bristol v Mothew

> *"Equity has evolved a series of self contained obligations – obligations which are themselves certain and distinct, and which individually define their own 'fiduciary' for their own respective purposes. These obligations attribute no large significance to the term used to describe the persons to whom each individually applies. In some instances he is referred to as a fiduciary: in other words as a confidant. The term used is unimportant. It is not because a person is 'fiduciary' or a 'confidant' that a rule applies to him. It is because a particular rule applies to him that he is a fiduciary or confidant of its purposes."*

680. Finally, Greenwood J. stated:-

> *"The matrix of fact and contextual circumstances will determine whether a relevant rule applies and if it does, the person will be a fiduciary for the purposes of the rule. Once a person is a fiduciary for the purposes of a relevant rule, remedies peculiar to the equitable jurisdiction apply which are primarily restitutionary or restorative rather than compensatory. The nature of the obligation will also determine the nature of the breach."*

681. The defendants seek to distinguish the principles described in the Oliver Hume case by reference to the fact that the court in that case was concerned with the conduct of a person, a Mr. Nankervis, who was an employee of the parent company of a group which was making managerial decisions and giving directions on strategy in relation to assets held by the subsidiary company to whom it was found by the court that Mr. Nankervis owed fiduciary duties.

682. That is a valid distinction. But the central principle identified by the court, and which I adopt for the unusual facts of this case, is that the categories of fiduciary are not closed and that a finding of fiduciary obligations can flow from evidence of one party reposing

confidence in the other, who in turn gains both confidence and influence. The party gaining such confidence and influence cannot be allowed to profit from abuse of that position. The correct approach is to examine all the circumstances of the relationship, and the conduct of the parties. The answer is not to be found by focussing on labels such as employee or consultant.

683. The court in Oliver Hume focussed on conduct evidencing a reliance, dependence and trust placed which renders one party vulnerable to the actions of the other.

684. I have found earlier that Mr. Cox's relationship with the VHML Group and O'Flynn Capital Partners is not rooted in or governed by the Cox Contract. However, the contract is relevant in that it shows that concepts of loyalty and fidelity were not alien to the relationship. Mr. Cox's relationship with the plaintiffs was never one in which he was a consultant of the 'free agent' type. The evidence shows that the plaintiffs resided in him a trust and confidence, which, to his knowledge, rendered the plaintiffs vulnerable to his actions in pursuing a business opportunity in a sector of development, student accommodation, which he knew to be at the heart of the plaintiffs' business plans and ambitions.

Summary as regards fiduciary duty

685. While there is much contested evidence and submissions regarding the question of whether Mr. Cox performed functions for the plaintiff companies pursuant to the Cox Contract of Employment or as a consultant, the following emerges from the evidence.

(1) Mr. Cox was recruited originally into the O'Flynn Group and employed by Tiger Developments at a senior level having the title Investment Director. His functions pursuant to that contract extended not only to the raising of capital and structuring of finance but also to developing target markets and "finding new leads" to bring to the board.

(2) From the very outset Mr. Cox's duties and functions were never limited only to Tiger Developments. In particular he spent much of his time on Victoria Hall student accommodation schemes.

(3) From 2011 onwards Mr. Cox worked with the evolving parallel structure on a series of projects and opportunities which I have detailed. He never suggested that his role for those entities was more limited or "incidental" than the senior role to which he had been appointed in the O'Flynn Group.

(4) Mr. Cox held himself out as the Investment Director firstly of O'Flynn Group and later as Investment Director of VHML both in biographies and promotional material prepared by himself and for Carrowmore.

(5) From the inception of O'Flynn Capital Partners Mr. Cox participated in ongoing conference calls and emails circulated about development opportunities.

(6) Mr. Cox consistently circulated and participated in email communications about potential introductions and opportunities in Dublin and elsewhere both for student accommodation and other categories of project. In doing so he always circulated the most senior persons in the plaintiffs.

(7) Mr. Cox designed the outline of and participated fully in the O'Flynn Capital Partners strategy day held on 13 January 2015. The focus of the strategy day was to inject fresh energy into O'Flynn Capital Partners, inter alia, by identifying appropriate development opportunities in all states.

(8) In the course of performing those functions Mr. Cox had access to and was entrusted with information as to ongoing and planned projects of the plaintiffs and with contact information concerning opportunities for new projects.

686. The evidence given by Mr. O'Flynn and by Mr. Nesbitt was that during these times they believed that Mr. Cox was acting in a senior position and could be trusted to serve the best interests not only of the O'Flynn Group but also of the plaintiffs.

Findings as regards fiduciary duty

687. In the performance of his functions for the VHML Group and for O'Flynn Capital Partners Mr. Cox participated at senior level in internal meetings and other communications regarding developments undertaken by VHML, including the Birmingham and Coventry project, and regarding opportunities for development in Dublin, both student accommodation and others. He was renumerated at a level which Mr. O'Flynn and Mr. Nesbitt say exceeded that of all others, including themselves.

688. Mr. Cox never said that student accommodation was not his sector or that finding opportunities was not part of his role. He submitted in this trial that his role was limited to the structuring of funding. Yet the evidence is replete with instances where he engages with universities, landowners, investors, intermediaries and others, and took every opportunity to present himself as representing the plaintiffs in relation to the student accommodation sector. The plaintiffs had good reason to believe that in doing so he was acting in their best interests, and they therefore reposed trust and confidence in him in the performance of his functions.

689. Mr. Cox gained knowledge of the plaintiffs' business plans and ambitions and was treated with the seniority, trust and confidence which accompanied the title Investment Director which he continued to employ in his communications internally and externally.

690. I adopt the test applied by the Federal Court of Australia in the Oliver Hume case. The category of fiduciaries is not closed. When the *"calculus of factual considerations"* is applied I conclude that the trust reposed in Mr. Cox to his knowledge was such as to render the plaintiffs vulnerable to his actions and he owed fiduciary duties to the plaintiffs. Even if Mr. Cox believed himself to be a consultant, a case made by him for the first time in response to these proceedings, this label would not in all the circumstances of his role and his conduct relieve him of fiduciary duties. The duties were as follows: -

(1) Not to compete with the plaintiffs without their informed consent.

(2) To disclose to the plaintiffs any opportunity which came to his attention in the sector in which the plaintiffs conducted business and in which, to his knowledge, the plaintiffs were seeking new opportunities, namely commercial property development including student accommodation, in Dublin and elsewhere.

(3) Not to divert such opportunities and the profits thereof for his own benefit and the benefit of others.

(4) To respect the confidentiality of business records and information of the plaintiffs, and not without their informed consent to divulge such information to others.

PART TEN: OFCP STRATEGY DAY

691. On 15 December 2014, Mr. Cox emailed Mr. O'Flynn proposing an outline for the strategy day, stating: -

> *"Following our meeting last week I had spoken to John and Fintan at a high level regarding the proposed day and reorganising speakers for the proposed short external market focus sessions.*
>
> *Proposed venue – Herbert Park Hotel*
>
> *Proposed external presenters*
>
> - *Residential market overview – potentially – Ivan Gaine or Ronan Lyons from DAFT*
> - *Commercial market overview – potentially – Savilles or JLL*
> - *Residential and Dublin student planning overview – Tom Phillips*
> - *Market funding overview – Tom Brown/or replacement from his office."* (Emphasis added).

692. Mr. Cox identified a proposed agenda/running order, commencing at 10.15am. The agenda identified that Mr. O'Flynn would introduce the day at 10.15am and set out his vision for OFCP. From 10.30am to 1.00pm, there would be external presentations.

693. There would be a break for lunch and a break in the mid-afternoon which included provision *"people can make work calls as required"*. For the final afternoon session, the attendees would be a smaller more focused group.

694. Mr. Cox suggested the *"Draft general attendee list"*, as follows: -

> *"Michelle O'Flynn, Patrick Cox, Michael Kelleher, Michael O'Flynn, Fintan Tierney, John Donohoe, Brian Donohoe, John Nesbitt. Brendan Lenihan, Margaret O'Neill, Simon Ledbetter, Mylo Carey, Colette Griffin and Tom O'Driscoll."*

695. He then suggested the more focused group for the afternoon session to be the following: -

> *"Michael Kelleher, Michael O'Flynn, Fintan Tierney, John Donohoe, Brian Donohoe, John Nesbitt, Simon Ledbetter, Patrick Cox and Michelle O'Flynn."*

696. Mr Cox prepared the *"OFCP Strategy Day Actions"*.

697. The meeting was held on Tuesday, 13 January 2015.

698. The meeting was attended by Michael O'Flynn, Michael Kelleher, John Nesbitt, Brendan Lenihan, Margaret O'Neill, Patrick Cox, Fintan Tierney, John Donohoe, Michelle O'Flynn, Brian Donohoe, Tom O'Driscoll, Mylo Carey and Collette Griffin.

699. During the morning, presentations were made by external experts, namely Mr. Tom Phillips, planning consultant, a representative from Sherry Fitzgerald, Mr. Tom Brown of Le Bruin, and a representative of Savills.

700. The minutes record that the afternoon session started with a general overview from Michael O'Flynn on the importance of the strategy day and getting *"everyone's views and a general roundtable discussion"*.

701. Mr. Tierney then outlined the past year in OFCP. He referred to a list of approximately 35 projects which OFCP had considered and described a number of those and why they had not worked out.

702. Presentations were made by John Donohoe and Michael Kelleher, on projects at Lucan and Cabinteely.

703. The minutes include a section headed *"OFCP – unique selling points; key focus areas; key/new targets"* and continues *"There was then a roundtable discussion where everyone gave comments on OFCP and the direction they saw OFCP heading in"*.

704. The minute refers to the contributions from the *"UK team"*, which was Mr. Nesbitt and Mr. Cox. They made points about the challenges of obtaining planning permission and of securing funding partners. One of the bullet points records the following: -

> *"Stick to what you know best. Their view was to stick to residential work for now and specialise in this area over the next 12 months."*

705. Other matters identified in the minutes included financial reporting and structures, building of relationships with banks, marketing, asset management roles, competition and the need to differentiate, and the need for an investment committee structure. The discussion extended to resources and HR, business development, project acquisition, project delivery, and identification of OFCP strengths and weaknesses.

706. There is then a heading: -

> *"Is there a preferred product/location for 2015?"*:
>
> - *Preferred location: Cork and greater Dublin area*
> - *Product priority is residential development but will also concentrate on opportune commercial development (office and retail) as it arises. It was agreed we need to be smart when looking at the commercial and carefully pick the projects we want to look at."*

707. The minute concludes with an *"Action list"* which includes, among its objectives, identification of parties to be met and internal roles and assignments to be made within the company.

708. Mr. O'Flynn gave evidence that, around the time of the strategy meeting and in the lead up to it, he had begun to get impatient with the failure of OFCP to identify a site suitable for student accommodation. He says that, during the round table discussion at the strategy day meeting, he recalls specifically asking Mr. Cox whether there were any sites suitable for student accommodation in Dublin. He said that Mr. Cox responded that there were no suitable opportunities and proffered the advice that OFCP should *"stick to what it knows best"*, being a reference to residential development.

709. Mr. O'Flynn said that he was frustrated at this response but, during the meeting itself, believed that this was a view of the market genuinely held by Mr. Cox.

710. Mr. O'Flynn said that he recalled Mr. Cox stating only a few months earlier that the student accommodation market was undersupplied.

711. Mr. O'Flynn said that he could not understand how Mr. Cox could, in the course of this meeting, be dismissive of student accommodation generally, at a time when, as was later discovered, he was himself pursuing the Gardiner Street opportunity without disclosing it.

712. Mr. Cox did not dispute in cross examination that he had said that O'Flynn Capital Partners should "stick to what it knows best", meaning residential development. Apart from this, he gave a different account of the discussion on this subject.

713. Mr. Cox said that there was very little if any focus on student accommodation. In all of the slides which were presented, only one contained any specific reference, being one line about student accommodation in one of Mr. Phillips 52 slides. There was no mention of student accommodation in the slide presentations from the other external presenters. Mr. Cox refers to the minutes as having recorded this approach. He said that the conclusion reached by those at the day was that *"most people felt primarily residential focus but commercial should also be considered on a case-by-case basis"*.

714. Mr. Cox also said that, at the time of the strategy meeting, he was busy with work relating to his consultancy in the UK for the VHML Group, including, for example, the Paris

Gardens transaction and dealing with a bid submitted by Blackrock in relation to a student accommodation asset in Lincoln, to which he had committed much work.

715. Mr. O'Flynn said that Mr. Cox was clearly not too busy to make the time, on the day of the strategy meeting, for a phone call with Trinity College Dublin in relation to the Gardiner Street project.

716. Mr. Cox disagreed with Mr. O'Flynn's account of his contribution to the strategy day. He said that he had not prepared the minutes of the strategy day. He said that his role in the strategy day, in which he spoke on behalf of the UK team, was about such matters as structuring capital and how to secure support from funders. He said that he provided no input about student accommodation on the day.

717. It was put to Mr. Cox that he was continuing, at that stage, to keep Gardner Street *"under the radar"*. Mr. Cox confirmed that he was keeping the matter confidential but did not deny making the remark that O'Flynn Capital Partners should 'stick to what it knows best', meaning residential development. He said that it was a project in which he had no planning permission, no investor and a time limited option, and that all of these concerns informed his approach in keeping the matter confidential.

718. Mr. Cox also said that he was not the person who organised the strategy day. He said that he *"So I don't think I organised as it, I think I teed up maybe what it should be, but I think others… I don't know who actually did the organisation really on it"* and he recalls having a conversation with Michael O'Flynn about the concept of the meeting. Mr. Cox's email to Mr. O'Flynn of 15 December 2014 shows that Mr. Cox formulated the proposed agenda and list of attendees.

719. Mr. Cox confirms that, by the time of the strategy meeting, he had been in contact with Trinity College about Gardiner Street, and he had been engaged with GSA about the project. He had also lodged the planning application for Gardiner Street, albeit in the name of and by agreement with Mr. Mullins.

720. Mr. Cox said that he did not feel any obligation to disclose Gardiner Street in circumstances where he had the permission of his *"boss"*, Mr. Nesbitt, to undertake a commercial development. He suggested that, if Mr. Nesbitt in the course of the meeting had thought there was anything which ought to be disclosed, he could have done so.

721. Mr. Sreenan, for the plaintiffs, questioned Mr. Cox further on this point as follows: -

"Q. Well, we'll be coming to that. But I suggest to you John Nesbitt knew absolutely nothing about you being involved in a 490-bed development in Gardiner Street and you never told him you were involved in a 490-bed development in Gardiner Street for student accommodation.

A. I'd have to suggest that – you've brought me through the minutes of all these meetings to do with OFCP. I think it's referenced in some of them. There's about 36 transactions that are referenced in the minutes, Judge. One, there's a single line about student accommodation referenced in all those minutes. You know, these were all in retail, office, commercial housing, [their] everything.

I sought off John the right to go and do commercial transactions myself in Dublin. John, whether he knew about student accommodation or office or hotel or retail, they would all be equally as relevant. I had a authority from my line manager, he gave me written authority and I progressed on that basis. If John felt he needed to disclose something, he could have disclosed it.

Q. Well, he could have disclosed about your Gardiner Street development if he knew anything about it. But you had been very careful not to tell them anything about it. You had never said anything about being involved in a development in Gardiner Street or for student accommodation or a 490-bed

development. You never told him about the application for planning permission, your dealings with GSA or anything like that: Isn't that so?

A. No I didn't. But I could have been pursuing a retail accommodation that I wouldn't have told him about and I could have been equally conflicted from the perspective you're presenting to me."

722. Mr. Nesbitt also stated that Mr. Cox's contribution of *"stick to what they do best"*, meaning residential development, was made against the background of the subject of student accommodation being raised at the meeting, yet Mr. Cox made no mention whatsoever of Gardiner Street.

723. Mr. Phillips said that, at the request of Mr. O'Flynn, his presentation included a range of sectors in the development market, including residential and student accommodation.

724. Ms. O'Neill said that, at the strategy day, Mr. Cox stated that the Irish team should stick to what it knew best, namely residential, and had stated that there were no opportunities in the student accommodation market. She considered this strange when the purpose of the meeting was to have everybody involved in OFCP thinking creatively and of finding new opportunities, regardless of the specific sector.

725. Mr. John Donohoe gave similar evidence to the effect that Mr. Cox had recommended that OFCP should stick to residential development.

726. Mr. Michel Kelleher said that not only did Mr. Cox not make any reference to the Gardiner Street scheme, but that even though student accommodation was mentioned, he had not excused himself from the discussion about such a wide range of opportunities.

727. Mr. Fintan Tierney, in his evidence, said that student accommodation was mentioned only peripherally at the strategy day.

728. Under cross-examination, Mr. Tierney restated his recollection that student accommodation had been mentioned only once in all of the presentations to the meeting. He

confirmed also that, when student accommodation was raised, Mr. Cox had said *"Stick to residential, you know, you're good at and known at in Ireland"*. His recollection was that OFCP was not looking for student accommodation sites. Mr. Tierney confirmed that he was not aware of Mr. Cox developing a student project on his own at the time of this meeting.

729. There is a strong difference of recollections as to how much time was spent in the strategy meeting discussing or referencing student accommodation. However, it is not disputed that the subject was discussed, and that in the course of that discussion Mr. Cox said there were no such opportunities in Dublin and expressed his view that OFCP should *"Stick to what it knows best"*, meaning residential accommodation. He did so in the knowledge that he was the only person in the room who was aware of one serious student accommodation project in Dublin, namely the Gardiner Street project being progressed by him.

Communications with Trinity College at time of strategy day

730. The O'Flynn Capital Partners strategy day was held on 13 January 2015. On 12 January 2012 Mr. Cox emailed Mr. Ian Matthews at Trinity College Dublin under the subject *"income strip transaction – Dublin student accommodation"*. He said the following: -

> *"Ian,*
>
> *I would like to meet with you to discuss a Dublin City Centre student accommodation scheme which is in the final stages of the planning process, currently addressing the final planners RFI queries. This is a project we have tried to keep relatively under the radar and so I would appreciate if you would keep this email confidential for now. The project will deliver 500 plus high quality city centre student beds with quality ancillary and communal facilities.*
>
> *I am aware that Trinity College has publicly acknowledged the shortage of bespoke student accommodation beds available to the university and its students and I am aware of the process run by the university a number of years ago and listened to one*

on of your colleagues make a presentation at the 'student accommodation forum' held in the Mansion House in the first half of 2014. While I currently make no presumption regarding the potential that Trinity College could wish to occupy this accommodation, I would be keen to understand and investigate a financial and feasibility question with you which could be a precursor to discussing this project with your colleagues who may deal more directly with estate or accommodation matters.

I have developed many student accommodation schemes primarily in the U.K. and have delivered these projects through a number of different funding structures. A funding structure that has been utilised on a number of U.K. student accommodation transactions over the past 24 months between private developers and certain U.K. universities is referred to as an 'income strip' transaction, the basic elements of this type of transaction are as follows:

[Under a series of bullet points Mr. Cox then describes a structure for the transaction and reasons why a university would consider such a transaction beneficial both for immediate student accommodation needs and long-term estate requirements].

At present it is likely that the funding route we will progress with on this project will be a traditional 'forward funding' structure with an investor with wider exposure to this specific asset class. We are fully confident having put together many of these structures and from initial confidential soundings we are happy this type of structure is imminently deliverable. That said, per the opening line of this email I would like to have an initial discussion with you to understand if it would be useful to investigate the structuring proposed above as I really believe there are real benefits to the university (Trinity) and from a transactional perspective.

I hope you do not mind me sending you this email somewhat speculatively and I look forward to your follow up (easier to get me on my mobile, if you would like to speak

on the phone). Again, I would appreciate if you could keep this matter confidential for now. Kind regards,

Patrick Cox

Managing Director

Rockford Advisors Limited"

731. On Wednesday 14 January 2015 Mr. Cox emailed Mr. Matthews under the subject *"Redacted design statement"* stating the following: -

"Ian, it was good to speak with you yesterday morning, thank you for giving me an overview of the process you are currently undertaking.

I enclose a redacted design statement which hopefully gives you a sense of the location and some very basic visuals of the scheme (you will note a number of pages are removed, as not relevant to you). This is a great development with quality accommodation, all the necessary internal amenities and over 6,500 square foot of varied communal space for residence (excluding external space).

Please feel free to revert with any queries. As per our discussion I will be grateful if you kept this confidential. Kind regards, Patrick."

732. The plaintiffs highlight the fact that the second of these emails refers to a telephone conversation on the previous day, which was the day of the O'Flynn Capital Partners strategy meeting. They say that when the subject of student accommodation was mentioned during that meeting Mr. Cox's contribution was to say firstly that there were no such opportunities in Dublin, and secondly that it would be better for O'Flynn Capital Partners to *"stick to what it knows best"* namely residential development. The plaintiffs submit that it is extraordinary that when the subject of student accommodation was mentioned Mr. Cox made no mention whatsoever of the fact that he personally had embarked on and was at an advanced stage of the Gardiner Street scheme, and that he was talking to Trinity College about it even on the morning of the meeting.

733. Mr. Cox's response on this question under cross examination was that student accommodation was never a material part of the agenda items for the strategy meeting. He submitted that its relative unimportance to O'Flynn Capital Partners was illustrated by the fact that in all the presentations in the course of the day there appeared only one slide, being one of the slides presented by Mr. Phillips which even mentioned student accommodation.

734. This is to be contrasted with Mr. Cox's own email of 15 December 2014 proposing an outline for the day in which he specifically referenced student accommodation as a subject to be considered as part of the presentation of Mr. Phillips.

735. Mr. Phillips stated in evidence that he made his presentation to key management at the request of Michael O'Flynn on 13 January 2015 at the former Clyde Court Hotel in Dublin. He said that at the request of Mr. O'Flynn his presentation covered all sectors of the development market in Dublin including residential and student accommodation.

736. It was put to Mr. Phillips in cross examination that of the 45 slides which he had used only one contained a reference to student accommodation. Mr. Phillips stated that he considered student accommodation to be one strand of development opportunities generally and that it was covered widely in the course of his presentation of development opportunities, residential and others. Mr Phillips believed that OFCP was set up to tackle a number of opportunities including 'residential, commercial and student accommodation'.

737. If Mr. Cox held a view that he had approval of Mr. Nesbitt to undertake any commercial opportunity in Dublin, of whatever category type, even including student accommodation, it is remarkable that, when the subject was raised, he was careful not to mention the fact that he himself had identified such an opportunity, being the Gardiner Street project and instead made the contribution that O'Flynn Capital Partners should "stick to residential". If he considered that he had approval for that project, he would have had no reason to conceal it when the question of student accommodation was raised.

738. Mr. Cox's explanation, that Gardiner Street was at the time still subject to planning, funding and a number of other uncertainties, as the reason he wished to maintain it confidential, carries no weight in circumstances where the purpose of the meeting was to strategise about exploring opportunities for OFCP, in any asset category or sector. Where planning, funding and other uncertainties exist, confidentiality is a prudent and appropriate approach to protect against actions of others in the market. But if Mr. Cox believed that he had an approval from the plaintiffs, there was no justification to conceal the project from them.

739. In circumstances where the purpose of the meeting was to explore all asset categories, identify the market situation and market opportunities and where student accommodation arose for discussion, Mr. Cox, at the very minimum, placed himself in a position of a conflict of interest in that he participated in those discussions while maintaining the secrecy of the one such opportunity which he regarded as good, namely Gardiner Street, and advising against doing business in the student accommodation sector.

PART ELEVEN: DID THE PLAINTIFFS WAIVE DUTIES OWED TO THEM?

740. In the defence delivered on 10 October 2016, the first defendant pleads that, in a letter dated 14 July 2014, Mr. Nesbitt granted approval to Mr. Cox to engage in property development in Dublin. Any such waiver or consent can only operate as a release of the fiduciary duties if it is a fully informed consent.

741. In the amended statement of claim delivered on 7 February 2019, the plaintiffs say that the letter of 14 July 2014 was given only for the purpose of permitting Mr. Cox to build a house and that the circumstances in which the letter was signed were such that Mr. Nesbitt was induced to sign the letter by representations as to the purpose of the letter and in circumstances where the true intention of Mr. Cox and the actions which he was already pursuing in relation to Gardiner Street were not disclosed.

742. Extensive particulars are given in the amended statement of claim relating to the circumstances in which the letter was signed. In an amended defence, Mr. Cox rejects the allegations relating to the circumstances in which the letter was signed and provides particulars. I shall return to these later. Before turning to the content, circumstances and implications of that letter, it is relevant to consider evidence given by the parties relating to a claim made by Mr. Cox in his evidence, but not pleaded in his defence, that he had at an earlier date, obtained the required approval from Mr. Nesbitt.

December 2013

743. Mr. Cox and Mr. Nesbitt met in London in December 2013. At this meeting, Nesbitt informed Mr. Cox, that Grey Willow would make a payment to him of £500,000 in respect of the Birmingham and Coventry transaction. Mr. Cox says that, at this meeting, he informed Mr. Nesbitt that he had plans to invest in commercial property in Dublin. He says that Mr. Nesbitt made no objection to this and raised no concern about it.

744. Mr. Cox says that he informed Mr. Nesbitt that it was his intention to use the £500,000 for this purpose. He informed Mr. Nesbitt that it was not his intention to take the payment immediately. He wanted, firstly, to incorporate a company which would be the company he would use to make commercial investments in Ireland. He would need time to incorporate the company and structure matters and arrange for the opening of appropriate bank accounts into which the payments could be made. Mr. Nesbitt expressed no difficulty with this. Mr. Cox said that he would raise the relevant invoices when the company structure and bank accounts were ready.

745. Early in 2014, Rockford Advisors Limited was duly incorporated and the necessary bank accounts were arranged. Invoices were raised and the payments were made as to £350,000 on 20 May 2014 and the balance of £150,000 on 7 January 2015.

746. Mr. Nesbitt denied that this was the content of the conversation. He agreed that there was such a conversation, but the only discussion was about Mr. Cox using the money to build a house.

747. Mr. Nesbitt was cross-examined on this question and insisted that all he recalled about the meeting was, firstly, that it was the meeting at which he confirmed agreement to pay Mr. Cox £500,000 for the Birmingham and Coventry project and, secondly, that Mr. Cox had mentioned that as he had a growing family and he wanted to move house and that he would buy or build a house.

748. Insofar as Mr. Cox can rely at all on the December 2013 conversation, which predated his first meeting with Mr. Fleming on 28 February, 2014, his continuing fiduciary duty had the effect that he cannot rely on that conversation when so much occurred thereafter. If for example Mr. Cox had truly believed that the December 2013 conversation released him from any restriction in this regard and if in reliance on such a conversation he had implemented his plans and incurred expenditure or otherwise acted to his detriment, there may have been some argument for an estoppel. But that is the high point of any reliance he could place on the December 2013 discussion. There is no evidence that he acted following that meeting to his detriment before he had further discussions with Mr. Nesbitt in which he concealed the facts.

749. Mr. Cox said that he had another conversation on this subject with Mr. Nesbitt in March 2014. In that conversation, he informed Mr. Nesbitt that he had incorporated Rockford Advisors Limited but not yet opened the relevant bank accounts. Mr. Cox's evidence was that, in that conversation, he again referred to his intention to pursue his own property transaction.

May 2014

750. Mr. Cox said that he had yet another conversation with Mr. Nesbitt in May 2014 to confirm to him that he had now set up the necessary sterling account and would arrange to

issue the invoices to Grey Willow. Mr. Cox states that, in the May conversation, he discussed with Mr. Nesbitt his interest in a site at the Donnelly Centre in Cork Street, Dublin. Again, Mr. Nesbitt denies having had any conversation in which Mr. Cox stated his intention to acquire or develop property in Dublin.

751. Mr. Nesbitt said under cross-examination that he could not recall the conversation of May 2014 or the particular suggestion about the Donnelly Centre. He said that they "might" have discussed the Donnelly Centre, but that this was in the context of OFCP or O'Flynn Construction Cork doing a deal in Dublin, because, as far as Mr. Nesbitt was concerned, it was at that time Mr. Cox's job to find such opportunities.

11 June 2014

752. On 11 June 2014, Mr Cox had a meeting with Mr Fleming at Mr Fleming's office to discuss the feasibility study for Gardiner Street. Mr Cox says that on that day he discussed again with Mr Nesbitt the fact that he was looking to put together a deal personally on a development site in Dublin.

753. On 11 June 2014 at 1.24pm Mr Cox wrote another "note to self" headed "note Wednesday 11 June 2014" which reads as follows: -

"I spoke to John Nesbitt today (before meeting LIM (LaSalle Investment Managers) with him) and discussed with him that through my company I have been looking to put a deal together personally on a development site in Dublin either through outright purchase or option. We discussed this in context following a brief discussion about the value of land in Dublin and having had a chat about Johnny Ronan backed by Devsec committing to buying the Burlington House development site for €40.5m. John mused that given where pricing appeared to be at the moment in Dublin, that it may not be the best time currently to do a transaction. I said that I was keen to do some deal and would try to find the right land related

property transaction to do on my own. This discussion was very clean and could not be misconstrued in any way (emphasis added).

In my employment contract it says that I only work on company projects, something I had issue with at the time but as and when one is signing contracts you can agree flexibility. John, who is my direct reporting line and the person with whom I agreed salary terms etc, and who presented me with my contract said at the time that there was no problem working on other projects of a personal nature and that this clause was more for other people in different roles in the group, such that I mentioned at the time that I still jointly owned the company with my father which may carry out projects unrelated to my employment.

Even though I carry out most of my work for entities outside the group I am technically employed by and therefore act on transactions which provide no financial payback in any way to the group (and I earn the bulk of my annual wages over the past number of years from non-group related entities with the full knowledge of the group). (Entities including VHML, VHM (UK) L, palm tree limited, grey willow limited and albert project management, I thought in the interest of full disclosure I would fully acknowledge what I was doing/trying to do to ensure there could be no ambiguity should this matter arise in the future. This is the second occasion I discussed with John my intention to pursue land transactions in Ireland/Dublin in my own right having mentioned to him that I was considering acquiring and developing a site for student accommodation with an Irish party in the scale of circa 100 beds.

I do not believe there is any need for this note but want to ensure that relevant discussions are documented." (Emphasis added).

754. There are a number of curious features of this note: -

(a) The sentence *"this discussion was very clean and could not be misconstrued in any way*" comes out of context and is a strange entry in a note to oneself.

(b) Similarly, the sentence *"I do not believe there is any need for this note but want to ensure that relevant discussions are documented"* is out of context and a curious entry in a note to self.

(c) The statement that *"in my employment contract it says that I only work on company projects, something I had issues with at the time but as and when one is signing contracts you can agree flexibility"* reveals that Mr. Cox clearly understood that he was not free to undertake projects external to his employer. In a note addressed only to himself, it is a strange suggestion that he was somehow not bound by any obligation of loyalty or fidelity. Although the note suggests in the second paragraph that Mr. Cox had agreed with Mr. Nesbitt at the time of his recruitment that there was *"no problem working on other projects of a personal nature"*, he did not give any evidence of that conversation or suggest that this formed any part of his discussions with Mr. Nesbitt at the time of his recruitment.

(d) The reference to *"the interests of full disclosure"* makes no sense if Mr. Cox was referring to disclosure to himself. Clearly, he was not, either by this note or otherwise, making "full disclosure" to Mr. Nesbitt, as he made no reference in conversation with Mr. Nesbitt to the Gardiner Street project he had been pursuing for the previous three months at least.

(e) Mr. Cox says that *"This is the second occasion I discussed with John my intention to pursue land transactions in Ireland"*. According to Mr. Cox's evidence elsewhere, he had already discussed the matter not only once before but also in December 2013, March 2014 and May 2014 at least.

(f) The note refers to a 100-bed development. The intended Gardiner Street project was for a scheme at least four times that size namely in excess of 400 beds as illustrated by the sketch layout which Mr Cox had obtained from Mr Fleming. As recently as 6 June 2014 Mr Cox had instructed Mr Fleming to undertake a feasibility study on the site with a target of 450 beds.

The previous emails with Mr Fleming were on the basis of the availability of bed numbers exceeding 400.

755. Only the first paragraph can, even on Mr Cox's account, be characterised as any form of a record of a conversation with Mr Nesbitt. The remaining paragraphs are in the nature of personal notes or, as counsel for the plaintiffs submitted, an *"examination of conscience"* exercise. Mr Nesbitt in his evidence said that he did not have a conversation with Mr Cox in the terms alleged in the note or in any similar terms and he states that the contents of this note are completely untrue.

756. In cross-examination Mr Nesbitt said that it was his view that the reference to Mr Cox *"looking to put a deal together personally on a development site in Dublin"* meant that this was a reference to a house for Mr. Cox and his young family.

757. Mr Nesbitt confirmed that he recalled the reference to Mr Ronan in the course of the discussion, thereby acknowledging that a conversation of this nature occurred.

758. It was put to Mr Nesbitt in cross-examination that in circumstances where a comment was being made about the value of commercial property in Dublin and including the instance of Mr Ronan acquiring the Burlington House site for €40.5m, that it was not credible that Mr Nesbitt could have considered the reference to "personally" in the note to be a reference to the construction of a house for his family. Mr Nesbitt persisted under cross-examination to assert that this was a reference only to the building of a house.

759. Mr Cox said that he was simply noting to himself as an aide mémoire that he believed the conversation was very clear, that he was at the time looking at *"optioning or buying a site"* and this could not have been misconstrued.

760. Mr Cox said the following: -

"This was a very clean and clear discussion with John. John understood exactly what I was doing. John passed comment about potentially where land prices in Dublin might be at the moment and I am just commenting that it was absolutely clear the discussion".

761. Under further questioning Mr Cox confirmed that this meant only that he believed he had informed Mr Nesbitt that he was *"going to option or buy a site"*. No reference was made to student accommodation, to Gardiner Street or to Mr. Fleming.

762. Mr Cox said that the reference to a 100-bed development in the note of 11 June 2014 was a reference not to the conversation of that day but to an earlier conversation with Mr Nesbitt, being a conversation in May 2014. Mr Cox said that the note *"ended up being a precursor to a letter"*.

763. Mr Sreenan SC for the plaintiffs put the matter to Mr Cox in this way: -

> *"Given the fact that you were approaching Mr Nesbitt, your immediate line boss, for his consent to something, according to yourself, is it your evidence now that you considered that you had no obligation to make full disclosure to him of what you were doing at that point in time or planning to do and that you had no obligation to make sure he understood exactly what you were proposing".*
>
> *Answer: I am not too sure I actually did have an obligation. But in case I did, I made it very clear to Mr Nesbitt that I would be pursuing my own commercial opportunities in Dublin, which I made clear to him. And you can ask me lots of times, I have already told you no in relation to the answers relating to Gardiner Street. I did not disclose details of the transactions I intended to work on to John Nesbitt, but I had his authority to work on buying land, developing land, selling land, buying commercial, buying residential redeveloping commercial, redeveloping residential and selling them. That's what I had his authority to do. It's a pretty wide remit. And John is a clever man, who considered that and approved that".*

764. The note of 14 June 2014 can only have been composed because Mr. Cox had his own reservation about ambiguity in his conversations with Mr. Nesbitt and felt a need to create a private record of his version of events. The onus is on Mr. Cox to prove that he secured informed consent for the project he was pursuing. Having such a reservation, he can only

discharge that onus by the clearest of evidence. This note is no more than Mr. Cox's own description of the conversation, and not proof of a discussion approving the pursuit of a commercial project in competition with the O'Flynn Group or any of the plaintiffs.

Letter of 14 July 2014

765. Although this letter is referred to throughout as the 14 July letter, it was signed by Mr Nesbitt on 08 August 2014. The signed version was emailed to Mr Cox by Mr Nesbitt's personal assistant Ms Jennings on 08 August 2014 at 13.08.

766. The letter is on the letterhead of Tiger Developments and is signed by John Nesbitt, Managing Director, Tiger Developments. The terms of the letter are as follows: -

"Dear Patrick,

Reference your employment contract dated 3rd March 2010 with Tiger Development, whose registered offices are at Beckett House, Barrack Square, Ballincollig, Cork, Ireland and the requirement under section 16 'other interests' specifically 17.1 and 17.2 to get written approval to engage in other business.

It is hereby acknowledged and approved that Patrick Cox in his own right or through Rockford Advisers Limited or any other associated companies can engage in real estate or real estate related activities in Dublin, Ireland. Specifically including but not limited to the acquisition of land, development of land, sale of land, acquisition of residential or commercial investment properties, the redevelopment of residential or commercial investment properties and/or the sale of residential or commercial investment properties.

It is further acknowledged and approved that Patrick can engage in ad hoc communication regarding the above potential transactions during his normal contracted working hours.

No further approvals are required from Tiger Developments Limited for the activities outlined above save in the situation where Patrick Cox or the aforementioned companies wish to carry out the above detailed activities in a different location other than Dublin Ireland.

It is further acknowledged and agreed with Patrick Cox, that should any single project related investment exceed expenditure of greater than €500,000 by Patrick Cox or the aforementioned entities that he will inform Tiger Developments and seek approval not to be unreasonably held".

767. Mr Cox said that he did not feel that he needed written permission from Mr Nesbitt to proceed with a commercial property transaction in Dublin. He said that he had been talking to Mr Nesbitt about this since December 2013. He said that his wife is a solicitor and she told him that he should get the agreement from Mr Nesbitt in writing "in order to protect myself".

768. He continued "she said that Mr Nesbitt could not be trusted as a result of his failure to abide by promises they made to me in relation to a shareholding".

769. Mr Cox said that he told Mr Nesbitt in the middle of July that he wanted a letter confirming that he could pursue his own real estate opportunities in Dublin. He recalled informing Mr Nesbitt that one of the reasons he wanted the letter was that his wife was also a shareholder and director in Rockford Advisers Limited and that she wanted him to obtain the approval in writing. He said that Mr Nesbitt had no objection to this and suggested that Mr Cox should draft the letter which Mr Cox was happy to do.

770. Mr Cox prepared the letter and says that he handed it to Mr Nesbitt in his office and asked him to look at it and see if he was happy to sign it. He said that Mr Nesbitt took the letter and put it on his desk and said that he would look at it and come back to him. He spoke to Mr Nesbitt about the letter again at the end of July in London when he asked him whether he had signed it. Mr Nesbitt said that he had not at this point looked at it but that he would do so the following week and they agreed to speak again on 07 August, which they did.

771. Mr Cox said that he met Mr Nesbitt in his office on 07 August 2014. Mr Nesbitt commented that the letter was very detailed. He asked where Mr Cox was getting the money from, and Mr Cox stated that he was intending to use the money which Grey Willow was paying to him namely the sum of €500,000. Mr Cox said that he asked Mr Nesbitt if he wanted to include in the letter a reference to the amount that he would be committing in the project. According to Mr Cox, Mr Nesbitt said that should be done and the amount could be inserted. Mr Cox said that he agreed that he would then make an appropriate amendment to the letter and send it to Ms Jennings to put on headed paper.

772. Mr Cox amended the letter and emailed it to Ms Jennings so that she could print it for Mr Nesbitt's signature. He received the letter signed by Mr Nesbitt by an email from Ms Jennings on 08 August and collected the original when he was next in the London office the following week. He recalled thanking Mr Nesbitt for the letter.

773. Mr Nesbitt denies this description of events.

774. The first thing Mr Nesbitt said is that he recalls Mr Cox requesting a letter, but for the purpose of permitting him to build a house. He does not recall the exact date of this, but it must have been he says before August 2014 when the letter was signed. Mr Nesbitt recalled that Mr Cox had previously spoken to him about building a house. Mr Nesbitt said that because he regarded the building of a house to be a trivial matter, he did not give the matter much thought and suggested that Mr Cox draft the letter.

775. Mr Nesbitt believed that the note to self of 11 June 2014 was contrived and not an accurate record of a conversation held on that day.

776. Mr Nesbitt's said that Mr Cox never mentioned the possibility of working in his own commercial business or pursuing commercial development opportunities in Dublin or a student accommodation development, even for 100 beds.

777. It is not claimed by Mr Cox that he specifically referenced either Gardiner Street or student accommodation. The case made by Mr Cox is simply that he had obtained approval to undertake a commercial development and that such approval extended to any scheme.

778. Mr Nesbitt said that he never received a draft of the letter in advance of the day it was put in front of him for signing. On 08 August 2014 his personal assistant Ms Jennings put the letter in front of him for signature. He said that this of itself would not be unusual and frequently he would only need to give such letters a cursory glance before signing them. He believed that Mr Cox and Ms Jennings conspired to arrange for the letter to be put in front of him at a time when he was busy and distracted and that it would be signed without careful consideration. The letter was put to him for signing during the very week when the O'Flynn Group was in litigation in the High Court in Dublin challenging the appointment of the receivers by Carbon. He paid very little attention to the letter in those circumstances and said that if he had read the letter carefully he would not have signed it. His evidence was that this was an extraordinarily busy and stressful time and that he was "stressed exhausted and distracted" and he believes that Mr Cox took that opportunity to draft a letter that "was broader than anything discussed with me".

779. Ms Kelleher gave evidence that on an interrogation of the draft of the letter electronically, it was first created on 15 July 2014. It was saved in the "PC home folder".

780. On 06 August 2014 Mr Cox emailed the draft of the letter to Ms Jennings. The version emailed on that day is identical to the signed version of the letter, with the important exception that the final paragraph, which includes the reference to a limit on the expenditure of €500,000, is excluded. That limitation in the final paragraph first appeared in a later version of the letter emailed by Mr Cox to Ms Jennings on 07 August 2014.

781. Mr Cox's evidence was that the final paragraph including the spend limit arose directly from his conversation with Mr Nesbitt on 7 August 2014 about the source of the money, the amount of the money and what it was being used for.

782. On 08 August 2014 the signed version of the letter, including the paragraph containing the spend limit of €500k, was emailed by Ms Jennings to Mr Cox.

783. Six minutes before the final signed version which is relied on by Mr Cox was emailed to Mr. Cox, Ms Jennings emailed also a signed copy to Mr Cox on which there appears a note, accepted by all to be in the handwriting of Ms Jennings in the following terms: *"I also confirm that Sarah Jennings AKA Sierra Juliet will receive 50% of all profits".*

784. The plaintiffs say that this note is evidence of a conspiracy between Mr Cox and Ms Jennings so that the signing of the letter could be arranged as they have alleged, at a time when Mr Nesbitt would be most distracted and would sign it without paying sufficient attention. Ultimately, in evidence, the plaintiffs accepted that they were not actually alleging the existence of any agreement between Mr Cox and Ms Jennings that she would participate in the profits derived by any development authorised by the letter. Nonetheless the plaintiffs claim that this note was evidence of collusion between Mr Cox and Ms Jennings.

785. Mr Cox's evidence on this question was that he believed that this "AKA Sierra Juliet" note from Ms Jennings was no more than "office banter" and not evidence of anything more sinister as the plaintiffs have alleged. Mr Nesbitt and Mr O'Flynn each persisted with the allegation that this revealed that Ms Jennings in some way understood that the consent was being given for a project which would lead to profits and was indicative of the fact that Ms Jennings had secured something very significant for Mr Cox.

786. Mr. Cox said that there was never any discussion about building a house and the letter was never intended for such a purpose. He acknowledged that, at the time when he drafted the letter, he had made progress on Gardiner Street, but it had not reached a point of finality. Therefore, he required a letter which, if Gardiner Street did not progress, would permit him to progress any other projects. That, he said, was the reason why the letter was so wide in purpose and did not refer to the building or buying of a house.

787. In cross-examination, it was put to Mr. Cox that, in the various discussions predating the letter, when he claims that he had said to Mr. Nesbitt that he was looking to pursue a suitable commercial opportunity in Dublin, and that Mr. Nesbitt knew exactly what he was doing, Mr. Cox was already pursuing actively, a specific project, namely Gardiner Street, and yet sought to obtain a wide permission for any commercial property transaction.

788. In reply, Mr. Cox said that there were still a number of uncertainties in relation to the Gardiner Street project so that it was *"by no means a done deal"*. Mr. Sreenan, for the plaintiffs, put it to Mr. Cox that, in circumstances where he was already advanced in his discussions with Mr. Mullins and work with Mr. Fleming and others in relation to a 450-bed development at Gardiner Street, that his description, quoted below, did not make that clear. The description given by Mr. Cox in his evidence in chief, again quoting the note of 11 June 2014, was as follows: -

> *"This is the second occasion I discussed with John my intention to pursue land transactions in Ireland/Dublin in my own right having mentioned to him that I was considering acquiring and developing a site for student accommodation with an Irish party in the scale of circa 100 student beds."*

789. Mr. Cox continued: -

> *"John Nesbitt, it was very clear to him that I was pursuing commercial opportunities myself in Dublin. This note is recording the fact that I discussed with John purchasing a site, outright or through an option, for commercial reasons. This note ended up being a precursor to a letter and I'd be happy again to read the terms of that letter, which John had reviewed, John had considered, and John had signed up. And that is absolutely in keeping with John being aware of me pursuing my own commercial opportunities.*
>
> *If I was pursuing a retail scheme or an office scheme or a hotel scheme, I would have felt no obligation to disclose details of those. I had told John – I'm not too sure I even*

needed to tell John, but I had told him so it was clear, and I got it in writing so it was even clearer."

790. Later, the question was put thus by Mr. Sreenan: -

"Q. Given the fact that you were approaching Mr. Nesbitt, your immediate line boss, for his consent to something, according to yourself, is it your evidence now that you consider that you had no obligation to make full disclosure to him of what you were doing at that point in time or planning to do and that you had no obligation to make sure he understood exactly what you were proposing?

A. I'm not too sure I actually did have an obligation. But in case I did, I made it very clear to Mr. Nesbitt that I would be pursuing my own commercial opportunities in Dublin, which I made clear to him. And you can ask me lots of times, I've already told you no to the answers relating to Gardiner Street. I did not disclose details of the transactions I intended to work on to John Nesbitt, but I had his authority to work on buying land, developing land, selling land, buying commercial, buying residential commercial, redeveloping commercial, redeveloping residential and selling them. That's what I had his authority to do. It's a pretty wide remit. And John is a clever man, who considered that and approved that."

791. Mr. Sreenan put it to Mr. Cox that the reason he wanted the letter at that time was to enable him to do the Gardiner Street development. Mr. Cox replied:

"A. No, that's incorrect. I wanted this letter and I asked for this letter just confirming what I had already agreed with John. And I was just simply getting it put in writing. And I am happy as I sit here today that I did get it put in writing.

Q. And is it your evidence that the Gardiner Street development was not the one that you were actively working on at this time in July of 2014?

A. So we've been. I don't understand. We've been through this for, I don't know, days.

Q. Exactly. You've had John Fleming involved, you had Matheson's involved, we've been through everything that you were doing on that development by July of 2014.

A. Yes. So of course I don't deny I was working in Gardiner Street at this time.

Q. Yeah. You had agreed the option at 6 million at that stage.

A. Yes. Well potentially. It wasn't done, but, yes, it was en route, I had hoped.

Q. And can you explain, therefore, as to why you didn't ask him for a letter to enable you to do the Gardiner Street development?

A. Well, that's very simple Judge. And I think if we look at the letter, at the letter, that can provide even more clarity on it. My discussion with John in and around the letter, the discussions that he recalls, I wanted the ability to go off – and we should just read this, what it says here. It obviously references my employment contract at the start and that I was getting written approval to engage in other business."

792. These exchanges in relation to the letter occurred at a time when many other things were happening. On 17 July 2014, Mr. Cox had received from Mr. Mullins' solicitors execution copies of options to purchase the lands at Gardiner Street, and a lease to Rockford Advisors Limited and related documents. On 18 July 2014, Mr. Cox had confirmed to Mr. Mullins that he and his wife had signed the relevant documents.

793. On 8 August 2014, the day on which the 14 July letter was signed by Mr. Nesbitt, Mr. Cox was informed that Mr. Mullins had signed the Option and the Lease.

794. On the plaintiffs' side, on 29 July 2014, Carbon had appointed receivers and moved to appoint examiners in relation to a number of companies in the O'Flynn Group. In the first week of August, the parties were engaged in the hearing before Irvine J., which resulted later in the discharge of the receivers and dismissal of the examinership petition. At no point did Mr. Cox ever inform Mr. Nesbitt, Mr. O'Flynn or any other representatives of any of the plaintiffs of the fact of the Gardiner Street scheme.

795. In his evidence in chief, Mr. O'Flynn said that he had a conversation with Mr. Cox prior to his departure from the group in 2015. He said that he asked Mr. Cox if he had anything lined up. Mr. Cox had told him that he had no plan but would be spending time with his family over the course of the summer.

796. Ms. O'Neill, the Group Finance Director, said that she had a final meeting with Mr. Cox prior to his departure. She said that she wished him well and asked him if he had anything lined up. He informed her that he would *"like to do something on his own and would spend the month of August (2015) doing headed paper, business cards etc."*. Mr. Cox told her he did not know what direction his new venture might take or what exactly he would get into, and the first thing he would be doing was to take some time with his family.

797. The agreement signed by Mr. Cox and Mr. Nesbitt on 22 June 2015 recording the "Proposed Leaving Arrangements" is of course silent about Gardiner Street. It concludes as follows:

> *"None of the above precludes or restricts me in any way from working on my own business activities during the above months."* (The months mentioned in the agreement are June – September 2015).

798. Mr. Cox remained silent on the Gardiner Street project for the remainder of his time working for the plaintiffs. On his account of matters this would be understandable because he considered that he was under no obligation to disclose the project and he believed he was entitled to maintain confidentiality associated with a project in respect of which he was still

uncertain of certain matters such as obtaining the necessary planning and funding. I would accept that as a reason to keep a project confidential from the wider market, but it does not justify concealing the project from the plaintiffs, particularly if Mr. Cox believed he had been granted approval or 'clearance' by Mr. Nesbitt for such a project. The concealment was carried to its most extreme by the events of 13 January 2015, the day of the O'Flynn Capital Partners Strategy Meeting.

799. In the amended statement of claim the plaintiffs summarised the terms of the letter of 14 July, 2014, the text of which I have set out earlier. They plead that "in or around June or July 2014 Mr. Cox sought a letter for the purported purpose of permitting him to build a house, without breaching the Cox contract of employment, a similar letter having been provided to a previous employee of the plaintiffs for similar purpose".

800. The plaintiffs' plead that Mr. Nesbitt agreed to provide the letter "for that purpose". The plaintiffs refer then in detail to "the note to self of 11 June, 2014 and allege that the matters recorded in the file note were untrue. They say that in order to induce Mr. Nesbitt to provide the letter Mr. Cox "acting alone and/or in concert with Ms. Jennings, misrepresented the purpose of the letter and concealed or failed to disclose Mr. Nesbitt the purpose for which Mr. Cox required the letter". They plead also that acting on foot of the misrepresentations Mr. Nesbitt provided and signed the letter.

801. The plaintiffs then make the following allegations in relation to the representations:

"Particulars

(a) The stated intent and purpose of permitting Mr. Cox to build a house was untrue.

(b) Unknown to the plaintiff or any of them, from at least March of 2014, Mr. Cox was engaged in negotiations with Peter Mullins in relation to the acquisition of the site in Gardiner Street from Mr. Mullins.

(c) From at least March of 2014 Mr. Cox was engaged in discussions with an architect, John Fleming, in relation to the preparation of a planning application in respect of the Gardiner Street project.

(d) On 9 May, 2014 Mr. Cox invited Mr. Mullins to consider entering a zero cost option for 24 months, permitting the first named defendant to acquire the site at Gardiner Street for €6 million.

(e) On 20 May, 2014 Mr. Cox sent copies of a deed of assignment and option agreement, which agreements were the property of the plaintiffs, to a private email account.

(f) By the time the July 2014 letter was signed (on 7 August, 2014) Mr. Cox had agreed to enter a series of option agreements, the effect of which was to entitle Rockford to purchase the site at Gardiner Street for €6 million.

(g) Immediately following the execution of the July 2014 letter, on 8 August, 2014 Mr. Cox and Ms. O'Rourke (being Gillian O'Rourke, wife of Mr. Cox) on behalf of Rockford entered into a series of option agreements with Mullins Investments (SPTE Limited) and Mullins Investments Limited the apparent effect of which was to entitle Rockford to purchase the site at Gardiner Street for €6 million."

802. The statement of claim alleges that the representations were made by Mr. Cox "either well knowing that same were false or recklessly not caring whether they were true or false".

803. The plaintiffs' then claim rescission of the letter. The defendants object that the plaintiffs cannot seek recission of the letter because they were not party to it. Whilst this point was not articulated further, if it was intended to attach significance to the fact that the letter was written on headed paper of Tiger Developments, that would not assist the defendants because Tiger Developments is not a plaintiff.

804. Finally, the plaintiffs say that the "project related investment" by Mr. Cox and/or Rockford "exceeded or will exceed €500,000.

805. The defendants dispute the plaintiffs' description of the "circumstances" in which the letter was signed. In particular they say that at no time did Mr. Cox represent to Mr. Nesbitt that the purpose of the letter was to enable him to build a house.

806. Mr. Cox alleges that the file note of 11 June, 2014 is accurate.

807. Mr. Cox makes the point that on the face of the letter it is clear that it did not relate to a private dwelling house.

808. Finally, Mr. Cox says that "the equity investment made by him at the relevant time did not exceed €500,000".

809. On both sides of the case, the evidence in relation to the 14 July letter does nothing to enhance the credibility of any of the witnesses.

The "house" proposition

810. I am not persuaded of the proposition that the letter or any of the prior discussions related to a private dwelling house for Mr. Cox. My reason for this conclusion is as follows.

811. Firstly, in its terms the letter makes no mention of a house. It refers to "real estate or real estate related activities in Dublin, Ireland". These are stated to be "specifically including but not limited to the acquisition of land and development of land, sale of land, acquisition of residential or commercial investment properties, the redevelopment of residential or commercial investment properties and/or the sale of residential or commercial investment properties and/or the sale of residential or commercial investment properties".

812. Secondly, Mr. Nesbitt's claim that because he was under extreme pressure in the litigation in this court aimed at the survival of the O'Flynn Group and that he therefore did not pay attention to the contents of the letter is undermined by evidence given by several witnesses to the effect that Mr. Nesbitt is an experienced and careful businessperson who was not in the habit of signing letters without understanding their content. Mr. Cox himself gave evidence which was not controverted, that during the course of the interactions relating to the letter Mr. Nesbitt was "perfectly capable and normal".

813. Mr. Cox indicated that "there was no indication that Mr. Nesbitt was suffering from vulnerability or was unable to read correspondence. As adverted to above, he read the letter, commented on how detailed it was and discussed it with me".

814. Mr. Foley gave evidence, which was not contradicted, that in his experience Mr. Nesbitt would not sign a letter without reading it.

815. Thirdly, evidence was given by a number of witnesses, again not contradicted, to the effect that they had built or purchased houses during the course of their employment in the O'Flynn Group and were not required to obtain letters of authority to do so.

816. In the case of one such person, Mr. Simon Fox, the plaintiffs say that he had sought and obtained approval from Tiger Developments to build a house. This was a reference to a small residential development in north London. He had acquired a house and had intended to knock it down and build two houses on the same site and retain only one of the two to live in and sell the other.

817. Mr. Fox gave evidence that he had spoken to Mr. Nesbitt to ask whether he had approval from Tiger to proceed with this development and that Mr. Nesbitt has said that he did not need such approval. Mr. Nesbitt disagrees with that evidence and refers to the draft of a letter which was prepared addressed to Mr. Fox on 14 November, 2007. This draft letter includes the following phrase: "You described to me, some external business you engage in, outside of the role with Tiger Developments. Further to our discussions on this matter I hereby confirm that this specific external business is acceptable". The draft letter continued "If at any stage after the date of this letter, you intend to engage or to be employed in any capacity outside of what is agreed, you will be bound by s.3.1.4 of the Employee Handbook and will be required to go through the notification process again".

818. Mr. Fox said that he did receive that letter in 2007 and that he built the two houses many years later and still lives in one of them. This is the only instance in which it is said that approval was required.

819. Evidence was produced of an email on 14 November, 2007 from Laura Nolan, of the Group's HR, enclosing the draft of the letter to Mr. Fox and also a draft of a similar letter to Mr. Edward Pearse. None of the witnesses were able to say whether Mr. Pearse ever actually acted on that approval, although it is dated the same date in November 2007.

820. Fourthly, it would be extraordinary if Mr. Cox were to have said that the letter was required to permit him to build a house and at the same time he told Mr. Nesbitt that he would wait for the payments of £500,000 from Grey Willow until he had incorporated a company and opened sterling bank accounts to receive the money. How such formalities and such requirements would be necessary in the context of the building of a house for himself and his family was never explained.

821. Fifthly, no explanation was offered as to why a letter consenting to the building of a private house would contain a limit of €500,000. Such a limit would never be the business of an employer, if the house was intended to be a private dwelling for the employee and his family.

822. Sixthly, it would be an extraordinary proposition if any employer would enjoy a "veto" over an employee's plans to buy or build a private house for his family. This would not be the case in any industry other than housebuilding. The question then is whether it is any more credible in the context of the plaintiffs in this case, having regard to the fact that their origins and continuing business included the building of houses. There is no evidence that any of the plaintiffs or the original O'Flynn Group companies were engaged habitually in the development of one-off houses. All of the evidence is that any residential developments of the Group were multiple house builds. It is not credible that a person in their employment would be under such a restriction and therefore would need consent to build his or her own family house.

Informed consent

823. The question of whether the letter was intended to approve the purchase or build of a house does not dispose of the question of a waiver or approval. I have already concluded elsewhere in this judgment that Mr. Cox owed fiduciary duties to the plaintiffs. This duty was a continuing duty at least up to the time he resigned in 2015.

824. Any consent or release of a fiduciary from his duties must be on the basis of an informed consent where all of the facts have been disclosed. In *New Zealand Netherlands Society 'Oranje' v Kuys* [1973] 1 WLR 1126, at 1132 the Judicial Committee of the Privy Council made it clear that "if an arrangement is to stand, whereby a particular transaction, which would otherwise come within a person's fiduciary duty, is to be exempted from it, there must be full and frank disclosure of all material facts".

825. Mr. Cox knew that, through whichever companies or vehicles may be relevant, Mr. Nesbitt and Mr. O'Flynn were interested in all manner of development opportunities in Ireland including Dublin. The clear evidence is that this included student accommodation schemes.

826. From the moment Mr. Cox became aware of the Gardiner Street opportunity he was under a duty to disclose it. He has acknowledged that he never mentioned Gardiner Street itself or student accommodation.

827. With the one possible exception of the December 2013 meeting, in all of the conversations and discussions between Mr. Cox and Mr. Nesbitt in which Mr. Cox says that he obtained consent and ultimately in the discussions leading to the signing of the letter and at the time of the signing of the letter itself Mr. Cox concealed the fact that (a) an opportunity to pursue student accommodation in central Dublin had come to his attention and (b) that he was actively pursuing this and by July had reached agreement with Mr. Mullins through solicitors on the form of documents.

828. Mr. Cox said that it is entirely normal to maintain confidentiality when a project is in its early stages and before planning and funding has been secured. That may be correct in terms of confidentiality from the market in general. But to conceal this information from the plaintiffs to whose business strategy and planning Mr. Cox was privy is a different thing entirely. He knew that student accommodation was within the plaintiffs' business plans and ambitions and that Gardiner Street placed him, while still in the employment of the O'Flynn Group and actively participating in the activities of the parallel structure, in a position of conflict with the plaintiffs' interests. Against this background he took the step of requesting a letter of approval and in doing so took care to conceal the nature of the very project for which he now says the letter was an approval.

829. Mr Cox spent three out of five days in the London office where Mr Nesbitt was based. Mr. Nesbitt said that even where they were working in such close proximity it would be unusual that if a draft of a letter or other communication was being discussed Mr Cox would not have emailed it to Mr Nesbitt for his consideration. He submitted that it was remarkable that when the letter was first drafted Mr Cox sent it only to Ms Jennings to place before Mr Nesbitt for signature. Mr Nesbitt said that he never received a draft of the letter by email from Mr Cox.

830. It may not be unusual that persons would communicate with such a busy and senior person such as Mr Nesbitt principally through his personal assistant. However, I accept the evidence of Mr Nesbitt that it is unusual that nowhere in his inbox does a draft or a copy of the letter appear.

831. For all these reasons I conclude that even though the proposition that the letter was requested in the context only of a house is unsustainable, the most important and the defining feature of this aspect of the case is that the letter was signed by Mr Nesbitt against the background that Mr Cox had concealed the fact that he was pursuing the Gardiner Street opportunity, the very development for which he claims the letter was intended to give

approval. No informed consent or release was given, and the letter cannot be relied on as a release of his fiduciary obligations.

The expenditure limit

832. For completeness, there are two aspects of the final paragraph concerning the spend limit of €500,000 which I have also considered.

833. Mr Cox submits that the meaning of the final paragraph of the letter is that no matter what the scale of the project, if his spend did not exceed €500,000 by the time he left the employment of the Group, the limit mentioned in that paragraph is not exceeded. The plaintiffs submit that a proper construction of that paragraph is that the reference to expenditure of up to €500,000 is intended to define the scale of the project whenever the expenditure would be incurred.

834. The letter cannot be construed to mean that, under its terms, Mr. Cox was confined to a spend of €500k before leaving employment and was thereafter under no limits as to the scale of a project. The plain meaning of the paragraph is to define the scale of the project on which he could embark.

835. As appears from other evidence in relation to the Gardiner Street project, it was never the case that the total expenditure by Mr Cox or Rockford Advisers Limited would be less than €500,000. For example, an essential and first step on the entire process was the taking of an option to acquire the property at Gardiner Street at a price of €6m. Whilst this was later funded by the investment of GSA, it was Mr. Cox's option and he who transmitted the €6m to Mr. Mullins. The project clearly included commitment to such a spend well in excess of €500,000.

836. Evidence was given on behalf of the defendants by Mr. Kieran Wallace, then of KPMG, in relation to the expenditure on the project at Gardiner Street. In his report to the court, he identified expenditure by Rockford Advisors Limited between July 2014 and May 2016 in a total amount of €489,522.79. Mr. Wallace said that the amounts incurred or

expended between July 2014 and the end of April 2015, when Mr. Cox resigned, were €171,900.23. He said that the balance of €317,652.56 was expended from May 2015 onwards and, therefore, after Mr. Cox had resigned.

837. In cross-examination, Mr. Wallace confirmed that there was excluded from his calculations three items. Firstly, the site acquisition cost of €6m, secondly, VAT on the amounts paid out by Rockford Advisors and, thirdly, legal expenses incurred.

838. After protracted exchanges between the parties during the long interval in the trial, Mr. Cox made available the capital gains tax calculation undertaken on his behalf in the context of the calculating the profit on the sale by him of the Gardiner Street property. In Mr. Wallace's report, the sale proceeds are recorded at a sum of €12.5 million. There is deducted from that the amount paid to the vendor Mr. Mullins of €6 million, leaving a gross profit of €6.5 million. From that amount is deducted the costs of Rockford Advisors, in the sum of €489,522.79. This left a profit on the sale before tax of €6,010,477.21. Capital gains tax at 33% was paid in an amount of €1,817,025, leaving a net profit on the sale after tax of €4,193,452.21.

839. It also emerged that, in making his CGT calculation, Mr. Cox had deducted the amount paid by him to Rockford Advisors, not in the amount of €489,000 but a higher amount of €596,550, which included VAT he had paid to Rockford Advisors.

840. Mr. Cox submitted that, because Rockford Advisors Limited was registered for VAT, it was not appropriate to take the VAT inclusive amount but, instead, to use only the VAT exclusive number €489,522.

841. Whichever way this aspect is approached, a proper construction of the final paragraph of the 14 July letter is to treat the phrase *"any single project related investment exceed expenditure of greater than €500,000"* as meaning any project of such a scale and, therefore, the total expenditure associated with the project should be taken into account. Even if a figure below €500,000 was actually incurred or expended before Mr. Cox's resignation, it was clear

that, by that time in any event, he had progressed a transaction which entailed at the least the entry into an option agreement whereby the property would be acquired as a cost of €6 million, however that may be funded, together with additional expenditure on the project itself. This being the case, if I am wrong in my conclusion that because of the concealment of all the facts the letter cannot be relied on by Mr. Cox, the expenditure limit stated in the final paragraph was exceeded. The project was of a scale which clearly exceeded €500,000 in terms of required expenditure.

842. I have already concluded that because the letter was signed in circumstances where Mr. Cox had concealed from Mr. Nesbitt and the plaintiffs the true character of his intentions and the activity already undertaken by him in respect of Gardiner Street, no informed consent was given for the Gardiner Street project. Mr. Cox was, therefore, acting in breach of his fiduciary duties in his failure to disclose the project and diverting it for his own profit and the profit of others.

PART TWELVE: CHRONOLOGY OF GARDINER STREET

843. It is not in dispute that Mr. Cox acquired the option to purchase the Gardiner Street property in August 2014, and developed the profitable student accommodation scheme in collaboration with his co-defendants, and that the plaintiffs did not become aware of it until the involvement of Carrowmore was publicly announced on 9 March 2016. In Part Six I summarised the key events and dates relating to Gardiner Street, commencing with Mr. Cox's meeting with Mr. Fleming on 28 February 2014 and his initial contact with Mr. Mullins. The more detailed chronology and narrative which follows in this next section relates not only to the Gardiner Street project. It includes of necessity references to other events which are best understood together and therefore, occasional repetition is unavoidable. I am referring to events relevant to the claims:

(a) That Mr. Nesbitt had given approval to the pursuit by Mr. Cox of such a project on his own account and for his own profit, and;

(b) That Mr. Cox concealed the project from the plaintiffs in breach of a duty to disclose it and not to divert it;

(c) That the defendants took and used the plaintiffs' confidential documents.

844. After his meeting with Mr. Fleming on 28 February 2014 Mr. Cox approached Mr. Mullins. Following initial rejection, he renewed the approach in May 2014 and in July 2014 reached agreement on commercial terms.

845. On a number of occasions in 2014, Mr. Cox emailed from his Tiger email address to his personal email address option agreements relating to previous projects, including precedent option agreements, which he agreed in cross-examination he ought not to have sent to himself. He said that the option agreement which he ultimately signed for Gardiner Street was drafted by Mr. McLoughlin of Matheson Solicitors independently and, therefore, was not produced by the use of precedent option agreements from within the plaintiffs or any O'Flynn Group company.

846. There was admitted into evidence a witness statement made by Mr. McLoughlin. Mr. McLoughlin confirmed that, when he was preparing the option agreement for the acquisition of Gardiner Street for Mr. Cox, he did not use any form of option *"provided by the plaintiffs as a precedent or a template"*. He outlined his extensive experience in property transactions and that he had been involved in drafting numerous options during his career. He also said that an option agreement is a relatively straightforward document to draft. He said that the body of the option agreement is generic to all options and widely used and that the non-standard provisions are usually those specific to the particular transaction and asset concerned. He also said that he had, at all relevant times, access to standard form option

agreements in the Matheson precedent bank, as well as a variety of options which he used during his career.

847. On Friday, 6 June 2014, a week after instructing Mr. McLoughlin to prepare the option agreement relating to Gardiner Street, Mr. Cox sent a series of emails to himself, attaching information which the plaintiffs say must have assisted him in advancing his plans in relation to Gardiner Street. Mr. Cox denies that he relied on any of this material. Nonetheless, it is informative to note the scale and extent of the material which he assembled and issued through his own personal email address at this time.

848. The first email on 6 June 2014 at 11.03 was a document described as the *"Bonham Street plans"*. This, according to the plaintiffs, was a set of plans relating to a development at Bonham Street which was similar in size to the Gardiner Street development.

849. A second set of the Bonham Street plans was sent at 11.05, being a compliant set. Mr. Cox had received each of these from Mr. Gary East of O'Connell East Architects in Manchester.

The Bridewell Street Appraisal and the Dublin Development Appraisal

850. The second and third emails of 6 June 2014 attached a *"Development Appraisal relating to Bridewell Street Bristol"*. This is a form of appraisal containing financial information for a student accommodation scheme. These forms of appraisal were referred to frequently in the evidence. They typically identify the number of beds planned and a Gross Development Value for the scheme estimated by reference, firstly, to projected rent and other revenues, and secondly, projected operating costs, resulting in projected net revenues. Once the Gross Development Value has been identified, information concerning the development costs is inserted. Development costs include acquisition costs, construction costs, professional fees, finance and other costs. In the Bridewell Street example, the *"combined net*

investment valuation was £54,507,983". Total development costs were estimated £46,827,149, and the resultant developer's profit is identified then at £7,680,834.

851. Within these forms of appraisal, a critical item is the *"land cost"* or *"site value"*. In the Bridewell Street case, the site value was identified at £10 million. It was later explained by the experts that this figure for site value is not necessarily representative of the open market value of the site in an undeveloped state. It is a "residual site value" for land inserted in these appraisals, which takes account of all of the other features of the appraisals including assumptions relating to future revenues, costs of obtaining planning, finance and such matters.

852. The plaintiffs say that the Bridewell Street appraisal, which Mr. Cox issued to himself at 11.14 and 11.23 on 6 June, was of a similar size to the proposed Gardiner Street development, being 450 Students beds. On the same day at 11.43, Mr. Cox followed up with Mr. Fleming in relation to the preparation of a feasibility study, by reference to a scheme of this size. He enclosed also the plans for the Bonham Street scheme, stating "thought you might be interested".

853. The evidence given by the plaintiffs was that these plans, were taken from the server of VHML, the first named plaintiff.

854. Mr. Kearney gave evidence that the creation of such a spreadsheet is not a difficult exercise and would take no more than 1 hour or 1.5 hours to put together. He believed that it did not contain any trade secrets or information and that even by simply googling "development appraisal" one could find such a thing. Equally one could purchase a license and or industry standard appraisal forms even for more complex appraisals which he said were available for as little as €1000 or €1,500 per annum.

855. On 04 September 2014, Mr. Cox emailed to himself the Dublin Development Appraisal. This is headed "*Gardiner Street, Dublin, September 2014-500 beds*". It is in the same format as the Bridewell Street appraisal and Ms Orla Kelleher gave evidence that on

examining the history of this document it also was originally created on 08 February 2011 at 8.23am by PC Tiger as the author. Ms. Kelleher's evidence was that this demonstrated that Mr. Cox had used an original appraisal of the plaintiffs created in 2011 to prepare the Dublin development appraisal for Gardiner Street.

856. On 16 June 2014, Mr Fleming sent to Mr Cox "*an up-to-date feasibility study for Gardiner Street"*.

857. On 24 June 2014 Mr. Cox asked John Ripley and Kate Smallshaw to send him a Word version of a document which had been prepared by Victoria Hall Management UK Limited for "*Plymouth Regent Street – Management Plan*". He received it from Kate Smallshaw on 25 June 2014 and on 18 August 2014 he emailed it to his personal email address. When questioned why he had sent this to his personal email address Mr. Cox said that he considered it something "useful to review" and acknowledged that he considered it useful in the context of Gardiner Street.

858. On 14 July 2014, Mr Mullins' Solicitor Mr Moloney of Moran and Ryan Solicitors emailed to Matheson key documents relating to the proposed option being an *"Intercompany Option"* and an *"Option to Purchase Option"*. Further exchanges took place between the solicitors and on 18 July 2014 Mr Cox confirmed to Mr Mullins that he and his wife had now signed the relevant documents and that his solicitor Matheson was "in funds".

859. On 21 July 2014 Mr Cox emailed Mr Fleming to continue discussions in relation to next steps and to follow up in the arrangement of a pre-planning meeting with Dublin City Council.

860. Arising from this Mr Fleming made contact with Dublin City Council and set up a pre-planning meeting on 25 August 2014.

861. On 24 July 2014 Mr. Cox sent an email to Andrew Timothy Smith, who later was employed by Trinity College, with high level information in relation to Gardiner Street, including a basic map showing the site location.

862. The email was resent thirty minutes later with an additional sentence *"the above is confidential and not for disclosure to any party outside your future employer"*.

863. A recurring theme which is relied on by the plaintiffs is that in numerous communications by Mr. Cox in relation to Gardiner Street he emphasises confidentiality. Mr. Cox says that there is nothing unusual or sinister in emphasising confidentiality, particularly in the stages before planning permission or funding has been obtained for any project.

864. The plaintiffs say that the communications concerning confidentiality are of a particular tone and envisage a heightened level of confidentiality which can only have been intended to ensure that none of the persons with whom Mr. Cox was engaging caused the planning of Gardiner Street to be revealed to the plaintiffs.

865. Confidentiality is appropriate in the early planning of a project where fundamentals such as planning permissions and funding have yet to be served. But confidentiality serves to protect against intervention by market competitors or other third party actors or other unpredictable events. Having regard to my findings as to Mr. Cox's relationship with the plaintiffs, and with his employer Tiger Developments, concealment of Gardiner Street from his then employer and from the plaintiffs was indefensible.

August 2014

866. On 02 August 2014, Mr. Cox emailed to Mr. Nesbitt and Mr. Ledbetter a document described as "*Framework Headline Terms: Carbon and Manco*". This is a draft which he had prepared in the course of his work for the Group "*for discussion and circulation*" of the terms which might apply if a resolution were achieved between the O'Flynn Group and Carbon. The document described proposals whereby a new company "Manco" would be established separate from the asset owning operational companies in the Group and would provide services to the ongoing student accommodation facilities, which were, in the final resolution of April 2015 transferred to Carbon's ownership. This working draft assumed that assets of

Tiger Developments and of Victoria Hall Limited, then in the new ownership of Carbon would be supported by management services provided by a newco, being either VHML or another company in the parallel structure.

867. On the afternoon of 02 August 2014, after sending this document to Mr. Nesbitt and Mr. Leadbetter, Mr. Cox sent it from his pc@tigerdevelopments.com email account to patrickcoxdublin@gmail.com, his personal email account.

868. In evidence Mr. Cox was asked why he had chosen to send this to his personal email account, and he said that he was at home at the time as he had been working on this on a Saturday, and he sent it to his Gmail account so that he could review the document. He said that he did not believe that it included confidential information but was no more than "*a draft ideas document on how to deal with Blackstone*".

869. The evidence given by Mr. Nesbitt was that such a document was highly confidential and sensitive and that there was no valid reason why Mr. Cox would send it to his personal email account.

870. On 8 August 2014 Rockford Advisors Limited entered into an Option to Purchase the Gardiner Street property at from Mr. Mullins a price of €6 million. That was the day the letter of "14 July 2014" was signed. Mr. McLoughlin of Matheson confirmed that day that Mr. Mullins was signing and dating the relevant documents as of that date and that Mr. Cox should arrange insurance on the property. That option was exercised on 4 March 2016 when the contract was signed for the purchase of Gardiner Street by Mr. Cox from Mullins Investment Limited. On the same day a contract was signed for the sale of the property by Mr. Cox to Tsaf 2 Ida Gp Limited. in its capacity as general partner for the intended operating partnership. In March 2016 Carrowmore Property Gardiner Limited and others entered into a Profit Share Agreement for the scheme. On 2 February 2017 Carrowmore Property Limited and others entered into a Construction Delivery Agreement for the scheme.

871. On 18 August 2014 Mr. Cox emailed to himself, at his personal email address, a management plan prepared by Victoria Hall Management (U.K.) Limited (a subsidiary of VHML) which had been submitted to planners in respect of a project at Plymouth, Regent Steet and for which a planning consent had been granted in June 2014.

872. Under cross examination Mr. Cox confirmed that he had sent this to his personal email address on the basis that it was something which would be *"useful to review"*. He confirmed that one of the reasons he was doing so was in the context of Gardiner Street.

873. On 1 September 2014 Mr. Cox requested that Mr. Fleming resend him the Gardiner Street presentation prepared for the meeting with the Dublin City Council planners and stated, *"but remove my name from the box on any drawings and replace with 'RAL'* (the initials of Rockford Advisers Limited), *I would like to get it sent to some people but would not like my name on it"*.

874. On 04 September 2014, Mr. Cox emailed to Mr. Kearney the "*Dublin Development Appraisal Spreadsheet*", stating "see attached appraisal, it would be good to talk through this today. This, and with the market report and the brief site presentation should give you enough information initially to speak confidentially with potential unconditional purchasers".

875. On 05 September 2014, Mr. Kearney emailed Mr. William Redmond of Coream, who was involved in funding of student accommodation structures, cc to Mr.Cox @rockfordadvisors.ie stating: -

> "*Willie please meet Patrick Cox, an expert in student housing and former colleague who has a very exciting off market opportunity in Dublin 1*.
>
> *As discussed earlier, please note the sensitivities around the sale of this development and treat in the strictest of confidence.*

Per the attached model the scheme provides a very attractive IRR. I have also provided some Dublin student accommodation marker research by Knight Frank, the leading agents for this sector."

876. Attached to this email was also a copy of the Dublin Development Appraisal.

877. In an email of 9 September 2014 to Mr. Fleming, Mr. Cox stated the following: -

"Given Ray is the only professional I have sat down with, please advise him to be confidential about the project (client, me), also could you ask him for a note on expected development levies and potential other development contributions based on the envisaged project as discussed when we met.

Lastly could you get me across an up to date version of the presentation given to Mary with the client as 'RAL'. I note the last one sent through was actually different from the presentation sent to Mary".

878. Mr. Fleming acknowledged this email and confirmed that he would *"send an email about client confidentiality to everyone if you like"*.

879. On 6 September 2014 Mr. Cox emailed Mr. McLoughlin requesting a confidentiality agreement on behalf of Rockford Advisors to be issued to certain parties. He said the following: -

"Outside of standard inclusions incorporated in a transactional confidentiality agreement, I would like to specific mention as regards the promoter and its directors (Rockford Advisors) and the need for confidentiality".

880. In early September 2014 Mr. Cox initiated proposals to York Capital in relation to Gardiner Street. In discussions with an agent for York, Mr. Redmond, the agent asked who would be a good person to speak to about site value and value post planning. Mr. Cox replied that the most knowledgeable agent or advisor focused on Dublin student accommodation is the Knight Frank student accommodation team based in London and that the key person there was Mr. Sam Ball. Mr. Redmond thanked him for this information and sought confirmation

that Mr. Cox was happy that he speak to Mr. Ball about Gardiner Street Mr. Cox replied *"it is appropriate to discuss it in detail with Sam. I am comfortable that he is out of the Irish market agent chatter and deals in a confidential manner."*

881. Mr. Cox subsequently met with York Capital and was in direct contact with Mr. Ball about a valuation of the project and of the residual land. Mr. Ball prepared and gave to Mr. Cox on 17 September 2014 an appraisal for Gardiner Street. This appraisal showed the project on completion having a potential market value of €62,580,000. After total development costs of €49,575,670 the *"residual site value"* was stated in the appraisal by Mr. Ball to be €13 million.

882. The manner in which such appraisals are prepared and in which a residual site value is calculated, taking into account planning, finance and other costs, is of significance in the context of the NAMA defence, considered later.

883. On 1 July 2014 Mr. Ball of Knight Frank sent to Mr. Cox at pc@tigerdevelopments.com a report entitled *"Dublin – Market Report on Student Accommodation"*. The report is dated March 2014 and it is unclear when it was first sent to Mr. Cox.

884. On 2 July 2014 Mr. Cox forwarded the Knight Frank report to Michael Kelleher. In his covering note to Mr. Kelleher he stated, *"as discussed please do not circulate externally."*

885. On 18 August 2014 Mr. Cox scanned this report to his personal email address. Also, on 18 August 2014 he forwarded it to Mr. Fleming and Mr. Fleming's associate Cormac Nolan at John Fleming & Associates stating: -

> *"I would like the following to accompany the information which is going to Mary Conway (Dublin City Council planning department) this week. She may have seen something on these line before but it is important to reaffirm the shortage of student accommodation."*

886. In cross examination Mr. Cox insisted that he had not *"taken"* this report from the O'Flynn Group.

887. Mr. Sreenan put to Mr. Cox that he had received the Knight Frank Report at his Tiger Developments email address and therefore in his capacity as an employee of Tiger Developments Limited. Mr. Sreenan put it that he had then forwarded it to his own email address and shared it with Mr. Fleming for use in connection with the planning application for Gardiner Street.

888. Mr. Cox rejected this characterisation. He said that Mr. Ball had sent this to his Tiger address because that was the only email address he knew for Mr. Cox but as far as he was concerned he was receiving it from Mr. Ball in his personal capacity.

889. The report was submitted as an appendix to the planning application to Dublin City Council for the Gardiner Street project in October 2014.

890. There was admitted into evidence a witness statement of Mr. Ball and he was not called to give evidence in person. In his statement Mr. Ball referred to the *"Dublin Market Report"* which he had sent to Mr. Cox in July 2014. He said that this was a *"generic city student accommodation report. The publication of these types of reports is typical of many firms of agents, surveyors and valuers and is considered as part of the marketing of these firms".* Mr. Ball continued *"the report was a generic market report that Knight Frank prepared and distributed to potentially interested parties, in this case Patrick Cox to use in the course of his business and to be provided to parties that he was speaking with in regard to the Dublin student accommodation market. The report is a standard market report such as issued by Knight Frank and many other similar firms on a regular basis. I was aware that I was sending the report to Patrick personally"*.

891. In the same statement Mr. Ball commented on a *"Dublin student accommodation appraisal"* which he had sent to Mr. Cox on 17 September 2014. Mr. Ball said that the appraisal was *"indicative"* and continued as follows: -

"I knew Patrick Cox in 2014 and was aware of his experience in the property sector. To my knowledge Patrick Cox would have had the necessary expertise to construct financial appraisals to assess student accommodation developments. These appraisals are not complex or difficult to do especially when you have the necessary experience and expertise as many people operating in the student accommodation sector would have. There were in 2014 and are now many property agents and advisors who can easily provide relevant information relating to projected incomes, costs and values. There are also many third party operators who would provide projected income, costs and values for student accommodation and do so for free.

892. Mr. Cox shared the two Knight Frank documents being the Dublin Development Appraisal and the Dublin Market Report on student accommodation with the fifth named defendant Mr. Kearney. On 6 September 2014 Mr. Kearney forwarded these reports to Mr. Redmond at Coream, then agent for York Capital, stating the following: -

"Willie,

I would like to introduce you to Patrick Cox, an expert in student housing and former colleague who has a very exciting off market opportunity in Dublin 1.

As discussed earlier, please note the sensitivities around the sale of this development and treat in the strictest of confidence.

Per the attached model, the scheme produces a very attractive IRR. The key metrics are:

Site Price	*€12 million*
Development cost	*€52.4 million*
Total equity	*€17.8 million*
Investment period	*2.75 years*
Total profit	*€13.5 million*

IRR	*33%*
Equity multiple	*1.8X*

I have also provided some Dublin student accommodation market research by Knight Frank, the leading agents for this sector".

893. Mr. Kearney then provided contact details for himself and Mr. Cox.

894. In August 2014 Mr. Cox arranged to meet with representatives of GSA (Global Student Accommodation). The plaintiffs say that Global Student Accommodation, which is one of the largest providers of student accommodation internationally were a group with whom they had a longstanding and strong relationship and that it was inappropriate and in breach of duty for Mr. Cox to approach them. Mr. Nesbitt conceded in evidence that in fact no transaction had ever actually been concluded by any of the plaintiffs with GSA.

895. On 26 August 2014 Mr. Cox emailed Mr. Waterhouse at GSA headed *"Gardiner Site"* as follows: -

"Rob,

Good to speak earlier, please find attached a confidential draft document which will give you a feel for the project and location, you are the only external party to receive this and at this stage I would appreciate if it did not go outside your direct colleagues".

896. In October 2014 Mr. Cox became aware of the possibility that the site at Gloucester Place, adjoining the Gardiner Street site, and which came to be known as the Phase 2 site may become available. Mr. Fleming emailed Mr. Cox about this *"extra site"* on 9 October 2014 as follows: -

"Patrick, that site is just 0.24 acres. Assuming a height of five floors, with twenty five beds per floor (five x five bed units) and using the original building for commercial

areas, you might just stretch to 125 beds, but more likely about 100. Still a great add on if it can be picked up cheaply, John Fleming.

897. This led to engagement with the site owner, Dublin City County Council, and ultimately agreement was reached, and the site became Phase 2 of the scheme.

DTZ report on Dublin student accommodation market

898. In June 2012 DTZ prepared a report headed *"Assessment of the Dublin student accommodation market – for the information of Victoria Hall"*. In September 2014 Mr. Cox requested a copy of this from Sarah Jones at DTZ and she sent it to him on 24 September 2014 with the following email: -

"Hi Patrick,

The attached is for your eyes only, confidential. And apologies for the old format – I have retained the original dates. We would of course be very happy to update if you wanted to add to your list."

899. Following a meeting on 13 October 2014 with Dublin City Council Mr. Cox emailed Dublin City Council on 15 October 2014 under the subject *"Gloucester Place DCC Site Plan"*. He attached what were described as basic initial plans demonstrating how the site could be used. The Gloucester Place site is Phase 2 of Gardiner Street.

900. On 24 October 2014 the application for planning permission in respect of the Phase 1 scheme was lodged with Dublin City Council by EMA Planning, planning and development consultants.

901. The applicant named in the application was Mullins Investments Limited. Mr. Cox in cross examination denied that this was for the purpose of keeping his involvement secret and said that this was simply a matter of convenience and ease at the time.

902. Mr. Cox says that his original intent was to sell onwards the Gardiner Street site without developing it himself for student accommodation. The submission is intended to

demonstrate that Mr. Cox was not planning, at least at the outset, to compete with the plaintiffs. Even if that were correct, it would not be an answer to the case grounded on failure to disclose the opportunity. In this context, there was produced in evidence a report commissioned from KSN Chartered Surveyors and other advisers assessing viability of the scheme. Mr. Cox also obtained from KSN on 5 December 2014 a *"Order of Magnitude Costs"* Report for the scheme. Mr. Duffy of KSN and Mr. Lohan of Lohan Donnelly, Engineers provided comments for Mr. Cox in relation to the result of their site investigation and matters informing the order of magnitude costs.

903. On the same day, 5 December 2014 Mr. Cox forwarded this to Mr. Foley inviting him to *"let me know if you think this is worthwhile information"*.

904. During the months of January, February and March 2015 Mr. Cox progressed matters in relation to planning with Dublin City Council with the support of John Fleming & Associates and BMA Planning. He also remained in contact with Trinity College Dublin, who indicated that they would be holding meetings for presentations addressing suitable student accommodation schemes to be proposed.

905. There are numerous instances of Mr Cox sending to his personal email documents such as appraisals, business plans and drawings related to other projects undertaken by VHML, notably the Birmingham and Coventry projects and a set of plans relating to what is referred to as the Bonham Street scheme. Mr Cox insisted that there was never anything sinister in him emailing or scanning documents to his personal email address. He said that because the servers in Dublin and London did not properly connect, he needed when he was on the move to be in a position to access material through his personal email.

906. The information technology manager of the group Orla Kelleher disputed this account and stated that the virtual private network associated with the Group was at all times functional and would have obviated the necessity for such personal email usage.

907. In April 2015 Mr. Kearney and Mr. Cox made submissions to a number of potential funders in relation to the scheme. Submissions were made on 10 April 2015 to Legal & General and M&G Investments.

908. In the covering communication to these potential funders Mr. Kearney described the intended project at Gardiner Street, advising that it is at the *"final stages of the planning process"*. He identified *"Gardiner Street key numbers"* which included a projected practical completion value of €67.5 million, which included a provision for *"land cost"* at €12 million.

909. On 27 April 2015 Mr. Cox resigned from Tiger Developments.

Events after Mr. Cox's resignation

910. In the immediate aftermath of his resignation Mr. Cox re-engaged with Mr. Foley and Mr. Kearney regarding their new business. He asked Mr. Foley to consider the following: -

> *"What do you think the key activities of a new business would be (just a few points – elevate or summary so to speak)?*
>
> *Briefly, what do you think are the main roles you, me and Eoghan would play in the company?*
>
> *Lastly, what would a new company with the three of us be lacking?*
>
> *Same questions going to Eoghan and I will also have the same answers written".*

911. Mr. Foley replied confirming that he would give these questions some further thought.

912. On 28 April 2015 Mr. Cox reported to Mr. Foley that he had resigned stating: -

> *"I technically resigned from Tiger Developments on Monday and now have no contract – JN has made some commitments – re new VHML contract – I have no intention of signing one – as always they managed this process exceptionally poorly".*

913. Mr. Foley replied stating:

> "*I am not surprised it was handled poorly – par for the course.*

Seems like an okay guy but not sure he has much to offer. [This was a refence to Mr. Shane O 'Flynn having joined the Dublin office of O' Flynn Group]

You need to watch your step even more so now – hopefully the news will be positive on Gardiner Street in four weeks, and it won't matter either way."

914. On 7 May 2015 Mr. Nesbitt's personal assistant Sarah Jennings sent an email to Mr. Cox, still at his tigerdevelopments.com email address enclosing a report of Messrs Goodbody headed *"Irish housing market – from the ground up"*. The report is dated February 2015.

915. Mr. Cox said that he had not requested this email and observed that as far as he was concerned, he was not working under any three months' notice, having resigned with immediate effect on 27 April.

916. On 26 May, 2015 Dublin City Council issued notice of its decision to grant permission for the project at Gardiner Street.

917. On 13 May, 2015 Ms. Jennings sent to Mr. Cox, at his tigerdevelopments.com address a document described as "Victoria Hall Management Limited – Specialist Student Accommodation Provider – develop finance operate and manage". This was an overview of Victoria Hall Management Limited which included in its structure chart, still at that date, Mr. Cox as Investment Director.

918. Ms. Jennings email to Mr. Cox of 13 May, 2015 included also a Sherry Fitzgerald report on the Cork residential market and a document known as the Goodbody Irish Housing Market Report.

919. On 20 May, 2015 Mr. Cox circulated from his address at rockfordadvisors.ie to Mr. Kearney and Mr. Foley a document described as "O'Flynn Capital Partners brochure" stating the following:

"See attached for your information. This is the proposed OFCP brochure going to print. The company's goal is to be predominantly a development partner to external capital.

At this point I couldn't do much less in terms of involvement in this company. I am interested in whether you think there are any themes you could rob from this?

Also we should all be working on our personal bios and circulate for comment. Let's try and get a first draft out by close of play this week. Lastly look at websites and circulate any that you think are interesting as a comparison/template".

920. The attachment was a draft of a brochure of O'Flynn Capital Partners. It is a marketing brochure and described projects undertaken by the company already, some of which referred to historical O'Flynn Group projects.

921. The management team described in the brochure included Mr. Cox. Mr. Cox said that he had already resigned and could not understand why his name was appearing on the brochure at this time. Mr. O' Flynn said that the reason the biography of Mr. Cox appeared within the brochure was that, at the time when that brochure was prepared, he, Mr. O' Flynn and his colleagues had believed that Mr. Cox intended to transfer to the new companies.

922. Questioned about the phrase "are there any themes you would rob from this" Mr. Cox said that this was not a sinister term but used in the colloquial sense of "robbing a cup of tea" or "robbing a bowl of sugar".

923. Mr. Cox said that a brochure is by definition a marketing document and therefore intended to be put in the public domain. He saw nothing unusual or sinister in circulating this among his colleagues for discussion, albeit that it was clearly an O'Flynn Capital Partners internal draft. He simply considered it something which might be "useful to use".

924. On 20 May, 2015 at Mr. Cox's request, Ms. Jennings copied 250GB (gigabytes) of files and folders from the server of Tiger Developments office in London to an external hard drive and gave it to Mr. Cox. This was a server common to Tiger Developments, VHL and VHML. The evidence given by Ms. Kelleher the IT manager of the plaintiffs was that in total 36,677 files were copied and taken by Mr. Cox in this fashion. I shall return to that subject later.

925. In June 2015 further progress was made with Trinity College Dublin when the defendants were invited to make a presentation at the College. The defendants also engaged further with GSA Group during this time.

926. On 30 June, 2015 Mr. Cox emailed to Mr. Kearney a number of documents comprising the following.

1. Grange Road Birmingham – Victoria Hall Management Limited Bank Pack, containing an executive summary of the Birmingham project, financial information and appendices.

2. A document entitled "Victoria Hall Management Limited – Budget for Upper Northgate Street, Chester – prepared for La Salle Investment Management".

3. A document described as "Birmingham Operational Summary".

4. A Budget Proposal for a development at Seven Sisters London.

927. Mr. Cox confirmed that these documents were not his property and that he ought not to have sent them to Mr. Kearney. He said that he sent them to Mr. Kearney because he thought it would be useful for him to see how such information had been presented by Mr. Cox on previous occasions.

928. Mr. Kearney said that when he received these documents, he had no reason to consider that there was anything wrong with receiving them and he had received them in good faith. He agreed nonetheless that it was not appropriate for him to have come into possession of such documents as the VHML Birmingham bank pack or the Birmingham operational development finance information.

929. Mr. Kearney said that he did not look very carefully at these documents and that he did not use them in relation to the Gardiner Street project.

930. In relation to these and many more documents Mr. Cox's evidence was that he had received these from Ms. Jennings generally without requesting them, but he thought that they were "useful to review".

931. Mr. Cox said that he could not speak for why he had sent the Birmingham bank pack to Mr. Kearney, but he said that there was no evidence that these documents were used in the Gardiner Street project.

932. On 22 May 2015, the planning permission for phase one of Gardiner Street issued.

933. On 30 May 2015, Mr. Cox contacted Dublin City Council to confirm that he had obtained the required planning permission in respect of the phase one site and was anxious to progress discussions on the second site. This led to arrangements for a meeting with the City Council to be held on 18 June 2015.

30 June 2015

934. On 30 June 2015, Mr. Cox emailed to Mr. Kearney three documents which the plaintiffs say were important confidential documents namely being the following. Firstly, the Victoria Hall Management Limited (VHML) Bank Pack for Birmingham. Secondly, an operational budget for Upper North Gate Street Chester prepared by Victoria Hall Management Limited and thirdly an Executive Summary prepared for submission to banks in the context of Birmingham.

935. Mr. Cox acknowledged in his evidence that these were documents he should not have sent to Mr. Kearney. He conceded that he believed that it would be useful for Mr. Kearney to review how he Mr. Cox had presented information of this type.

936. On 30 June 2015, Mr. Cox also sent to Mr. Kearney the Birmingham Operational Summary, a document which again Mr. Cox conceded in evidence was not his property for circulation purposes.

937. Finally, on 30 June 2015 Mr. Cox forwarded to Mr. Kearney a budget proposal relating to the Seven Sisters project in London. There was nothing to suggest that the document prepared in relation to the Seven Sisters project was itself authored by or proprietary information of any of the plaintiffs. Nonetheless, the evidence was that Mr. Cox

could only have accessed it through the large volumes of material which he had access to on the hard drive taken on 20 May 2015.

6 July 2015

938. On 6 July 2015, Sarah Jennings, from her Yahoo.co.uk email address, sent to Mr. Cox a Word version of the Birmingham VHML bank pack. Mr. Cox acknowledged that he had asked Ms. Jennings to send it to her. He was unable to explain why he believed that he was entitled to do so at the time, and he said that he simply did not recall all of the circumstances. He said that he "probably thought that was a document which would be useful to review". There was no evidence that the document was ever used by him, save that Mr. Cox forwarded the document on 09 July 2015 to Mr. Kearney.

939. In cross examination Mr. Cox was asked why, since he had previously obtained this document from Ms Jennings in pdf form, he had now sought from Ms. Jennings a word version of the document. Mr. Cox said that he did not know.

940. A meeting was scheduled by Mr. Cox with the investment firm Blackrock on 29 July 2015. In preparation for that meeting Mr. Cox submitted to representatives of Blackrock presentations in respect of Gardiner Street and the Dublin Market Report on Student Accommodation. Mr. Nesbitt and Mr. O' Flynn each gave evidence that Blackrock were important contacts of both VHL and VHML.

31 July 2015

941. The plaintiffs believed that Mr. Cox's final day in employment was 31 July, being the expiry of his three-month notice period. Elsewhere in his evidence, Mr. Cox claimed that his resignation on 27 April 2015 had immediate effect, notwithstanding the three-month notice provision in his contract. Yet, the 31st of July was another active day in terms of documents being transmitted by Ms. Jennings to Mr. Cox. On that day Ms. Jennings emailed a number of items to Mr. Cox including a document entitled "*Draft Development Process*". This is an outline of a step plan for moving from site appraisal to master planning proposals and

ultimately to design and development planning. It emerged in the course of evidence that although the plaintiffs were concerned at the circulation of this document to Mr. Cox by Ms. Jennings the document was in fact the property of Ballymore Developments, albeit that Mr. Cox was accessing it through the plaintiffs' system.

942. Also forwarded to Mr. Cox that day was a document headed "*Victoria Hall Management Limited: LaSalle Investment Management Student Accommodation – The Hive – proposal by Victoria Hall Management Limited*".

943. Mr. Cox said that he had assisted in the preparation of this document, and he simply had it sent to himself "for review". He believed that there was nothing untoward in this being sent to his personal email address, although he could not recall precisely the circumstances in which it was sent to him.

944. Mr. Nesbitt in his evidence in chief expressed the view that the court should be informed by the evidence of the extent to which Mr. Cox was focussed on his own personal project in the period from March 2014 through to August 2015. It was said that he sent no less than 2,900 emails relating to the Gardiner Street project during that time. During that same period of time Mr. Cox received payments totalling €810,475.58 including the various bonuses, top ups, consultancy and advisory payments.

The inbox of Mr. Nesbitt

945. On 03 September 2015 Ms. Jennings sent from her personal email account to Mr. Cox a screenshot of the email inbox of Mr. Nesbitt. This included references to contact with a counter party Rockspring and a potential transaction for the sale of its asset Dashwood. Mr. Nesbitt said that this information was valuable in that it was evidence of Rockspring informing VHML as the manager of the operation at Dashwood of its intention to bring the asset to the market, thereby affording VHML an opportunity to position itself with any potential investor.

946. Mr. Cox agreed in evidence that it was inappropriate that Ms. Jennings should send to him an extract from Mr. Nesbitt's email. He said that he did not know why she had done so. He had a general recollection of having instructed Ms. Jennings before that she should not do so, as he recalled receiving such emails before and believing that they were inappropriate. He stated that he had not requested Ms. Jennings to forward such emails to him.

947. Mr. Sreenan put it to Mr. Cox that this was a gross invasion of the privacy of Mr. Nesbitt's inbox and enquired why Mr. Cox had not taken a stricter approach with Ms. Jennings. Again Mr. Cox indicated that he believed that he had told Ms. Jennings that she should not send such emails.

948. Mr. Cox said that the email about Dashwood was little more than a "heads up" to Mr. Nesbitt of Rockspring's intentions in relation to this asset and therefore not important or valuable information. Mr. Nesbitt disagreed on this point stating that the "heads up" in relation to potential off market transaction was always a valuable piece of information in their business.

7 October 2015

949. On 07 October 2015, Ms. Jennings sent to Mr. Cox a document headed "*Case Study – Coral Development JV: Coventry and Birmingham*". Mr. Cox agreed that he had asked Ms. Jennings for this information in relation to Birmingham and Coventry. In his view this was marketing information and therefore not sensitive or confidential.

950. On 07 October 2015, Ms. Jennings, again from her personal "Yahoo" email address forwarded to Mr. Cox a copy of a Development Project Management Agreement relating to the Birmingham scheme.

951. Mr. Cox acknowledged in his cross-examination that he had asked Ms. Jennings to send this to him because he wanted to review it. He admitted that he ought not to have done so and that it was entirely wrong for him to request it. He insisted that it was not used by him in connection with the Gardiner Street scheme.

21 October 2015

952. On 21 October 2015, Mr. Cox emailed to Mr. Kearney and Mr. Foley two separate documents. One was a document entitled "Goodbody Residential Model." This was described as the "Draft Financial Model – Beech Park Residential Development". The plaintiffs say this was a document which had been prepared for circulation to potential investors in its residential development project at Cabinteely Dublin. The plaintiffs said that this document was confidential to their finance team and key principal persons.

953. The second document was a document entitled "*Residential Template"* and was described as *"Goodbody Residential Input Assumptions*". Mr. Cox confirmed that he had obtained these from the hard drive taken in May 2015. He said that he believed that these were documents which would be "useful for review".

954. Mr. Cox said that residential development was not part of the Carrowmore business plan. He said that Carrowmore have not undertaken either before or since any residential development projects.

955. Mr. Kearney said that he had not done anything with these documents. He did not recall even opening the attachments and he does not know why Mr. Cox sent them to him. He said that he had his own good financial models for residential development if he needed them.

956. Mr. Foley said that he had not asked Mr. Cox to circulate this material. He was unable to confirm whose property these templates were, and he did not know their origin. He confirmed that he did not ask Mr. Cox where he had obtained these financial models.

957. Mr. Foley said that he did not become aware until the commencement of legal correspondence and these proceedings that there were contentious issues in relation to documents alleged to have been taken by Mr. Cox which led ultimately to the process of a formal handover of such materials between solicitors, and with the assistance of Grant Thornton.

958. In Mr. Cox's covering email circulating this material he stated "*mostly for EK to work on and work out. See attached two residential analysis models for phased house building*".

959. None of the answers given in evidence by the three personal defendants contains a justification for the sharing of this information by Mr. Cox with Mr. Foley and Mr. Kearney six months after his resignation.

Capital Providers and Advisors Master List (22 October 2015)

960. On 22 October 2015 Mr. Cox emailed to Mr. Kearney a document headed *"Copy of Capital Providers and Advisors Master List*". The document is a spreadsheet with the names of potential providers of capital and contact details in them. It has separate columns for ranking contacts as to whether they are active, general opportunities or inactive, who they have been introduced by, the names and the individuals within the relevant firms and notes referencing the last contact with each of them. Each contact was categorised as to whether their investments are likely to be by way of equity, debt, mezzanine finance or whether they are only advisors. A series of reference initials are given identifying personnel within the plaintiffs including Mr. Cox, Mr. Ledbetter, Mr. Nesbitt and others. The lists contain hundreds of contact names and details.

961. It was acknowledged in evidence that this document had been obtained from the hard drive downloaded on 20 May 2015.

962. Mr. O' Flynn gave evidence that this document was the "life blood" of an organisation such as the plaintiffs and contained critical market information and was the definitive list which would be consulted on any occasion when it is necessary to approach potential providers of capital. Mr. Cox said in reality it is little more than a list of names from various business cards and other contacts. He said that he believed it to be significantly out of date, but he thought that it would be "useful to review". Mr. Kearney said that he had not paid much attention to this list but acknowledged that it was a wrong thing to have taken.

963. The document contained a note that it was *"last updated 11 January 2011 - SJ"* (Sarah Jennings).

964. On 29 October 2015 Mr. Kearney forwarded to Mr. Cox a "*Carrowmore Contact List*" with the message "*and it beings…".*

965. This document also contains the note "*last updated 11 January 2011 - SJ*". It is in broadly the same format as the version forwarded by Mr. Cox to Mr. Kearney a week earlier.

966. Mr. Kearney said that he did not recall using this actively. Yet the format and origin date of the document revealed that Mr. Kearney's version of 29 October 2015 was based on the version Mr. Cox had obtained from the hard drive downloaded from the plaintiffs' server on 20 May 2015, to which there was added a number of names identified by the defendants.

16 December 2015 email of Liam Foley to Patrick Cox

967. In discussions among Mr. Cox, Mr. Foley and Mr. Kearney, Mr. Cox made proposals regarding potential profit share between them. On 16 December 2015, Mr. Foley emailed Mr. Cox as follows: -

> *"Subject: Gardiner Street*
>
> *Patrick*
>
> *First of all, I would just want to reaffirm how much I am looking forward to getting stuck into Gardiner Street and to the general work of Carrowmore Property Limited. It's been a long lead in and I can't wait to base myself in Fitzwilliam Square.*
>
> *Thanks for reverting promptly on Monday as promised and for reassessing the profit levels as discussed in the previous Friday.*
>
> *I have given it a lot of thought over the past few days, including the brief history of how we got to this point. We (you and I) have explored a number of opportunities over the last five-year period with the aim of establishing a business together. This included dalliances with Coral, Ryan McGarry, Colin Murphy, RFM, RBS and other*

potential opportunities. Ultimately, none came to fruition but were pursued generally on an equal footing.

You mentioned risk/reward at Gardiner Street, and I understand and respect that, but the reality is that I would have been in at the very first opportunity taking an equal risks had it been offered. Had the roles been reversed I believe I would have aimed to involve you very early as I did in RFM, which I know would not have been nearly as lucrative as Gardiner Street is likely to be. Notwithstanding this, the intent was there on my part. I did not hesitate when you suggested setting up a business in Dublin. Ultimately, the point I'm trying to make is that we do have some history. For this reason and being mindful of where the responsibility for project delivery rests, I am finding it hard to reconcile why Eoghan and I are being treated on an equal footing.

Regards,

Liam Foley"

968. The plaintiffs attach significance to the reference to exploring opportunities *"over the last five-year period"* and *"dalliances with Coral, McCarthy etc."* as evidence that, over a prolonged period prior to Mr. Cox's departure and even while Mr. Cox and Mr. Foley were both still employed in the group, they were conspiring against the O'Flynn Group or the plaintiffs. The references to 'exploring opportunities' and 'dalliances' are too general to be evidence of any conspiracy or 'plot'. But references to "the aim of establishing a business together" and to the opportunities having been "pursued" suggest something more substantial.

969. There is nothing unlawful or necessarily sinister where two or more employees in a same organisation have conversations about a potential future for them together later in life, in other words, after they have left the employment of that organisation. Therefore, I do not regard that email as evidence of any wrongdoing or conspiracy. I return to this when considering the pleaded allegation of conspiracy.

970. In January 2016, Mr. Cox and Mr. Kearney met with representatives of the Bank of Ireland to discuss the Gardiner Street scheme. Following the meeting, they sent copies of their biographies and links to developments which they said that they ran before setting up Carrowmore. Under the heading of *"Students Schemes Development Managed"*, they referenced the schemes at Birmingham and Coventry, together with student accommodation schemes at Exeter, Leicester, London (five instances), Plymouth, Sheffield and Wolverhampton.

971. They also listed a sample of non-student projects including Eastgate Business Park, Ballincollig Town Centre, Mount Oval, and a range of other projects in Ireland and the UK.

972. The plaintiffs attach significance to the list of student accommodation schemes submitting that these claims of such experience contradict Mr. Cox's assertion that student accommodation was not his area of responsibility even while in the employment of the Group.

973. In March 2016, Mr. Cox exercised the option in respect of Gardiner Street and completed the purchase of the property from Mr. Mullins. He immediately thereafter executed the sale of the property to GSA for €12.5 million.

PART THIRTEEN: THE TAKING OF DOCUMENTS AND INFORMATION

974. The plaintiffs allege that Mr. Cox took documents and information which were confidential, and which were then used by the defendants in progressing the Gardiner Street project. The defendants say that there is no evidence (with some very limited exceptions which are admitted) that the information was used on the Gardiner Street scheme. They say that they had their own resources both in terms of their skill, experience, knowledge and expertise and in terms of professional services they engaged such as architects and other advisors, to progress the scheme themselves. In response to this, the plaintiffs say that, even if that proposition is correct, the defendants could not have completed Gardiner Street in the

timeframe they did and, therefore, achieved the *"speed to market"* which they achieved with the benefit of information belonging to the plaintiffs.

975. The defendants say also that the plaintiffs are unable to prove two further important features. Firstly, as to which documents are owned by which plaintiffs, if any. They say that much, if not most, of the material which is complained about was in fact material of the original O'Flynn Group companies such as VHL and Tiger, which are not plaintiffs in the case. That would not be an answer in respect of those few documents which are shown to be property of the plaintiffs. But the difficulty is that in the presentation of this aspect of the case the plaintiffs engaged in conflation of ownership, of documents and information.

976. Secondly, they submit that many of the documents concerned do not have the quality of confidentiality which the law would protect.

977. The case law on this issue cited by both parties relates primarily to duties of confidentiality and fidelity imposed on persons who are employees. Mr. Cox was an employee in the original O'Flynn Group, as were Mr. Foley and Mr. Kearney. He was never an employee of the plaintiffs. He did, however, owe fiduciary duties to them. As a fiduciary, his duty extends to observing the confidentiality of the principal and, therefore, it seems to me that the principles outlined in the cases which have been cited are informative.

978. Confidentiality obligations of employees were considered in detail by Clarke J. in *Allied Irish Banks v. Diamond* [2011] IEHC 505. In that case, Clarke J. cited with approval the following passage in a judgment of Goulding J. in *Faccenda Chicken Limited v. Fowler* [1985] 1 All ER 724: -

> *"In my view information acquired by an employee in the course of this service, and not the subject of any relevant express agreement, may fall as regards confidence into any of three classes. First there is information which, because of its trivial character or its easy accessibility from public sources of information, cannot be regarded by reasonable persons or by the law as confidential at all. The servant is at liberty to*

impart it during his service or afterwards to anyone he pleases, even his master's competitor. An example might be a published patent specification well known to people in the industry concerned. Second, there is information which the servant must treat as confidential, either because he is expressly told it is confidential, or because from its character it obviously is so, but which once learned necessarily remains in the servant's head and becomes part of his own skill and knowledge applied in the course of his master's business. So long as the employment continues, he cannot otherwise use or disclose such information without infidelity and therefore breach of contract. But when he is no longer in the same service, the law allows him to use his full skill and knowledge for his own benefit in competition with his former master; and there seems to be no established distinction between the use of such information where its possessor trades as a principal, and where he enters the employment of a new master, even though the latter case involves disclosure and not mere personal use of the information. If an employer wants to protect information of this kind, he can do so by an express stipulation restraining the servant from competing with him (within reasonable limits of time and space) after the termination of his employment. Third, however, there are, to my mind, specific trade secrets so confidential that, even though they may necessarily have been learned by heart and even though the servant may have left the service, they cannot lawfully be used for anyone's benefit but the master's."

979. Clarke J. continued by referring to a passage in his own judgment in *The Pulse Group v. O'Reilly* [2006] IEHC 50 as follows: -

"…in summary, the law is clear. In the absence of an express term in a contract of employment the only enduring obligation on the part of an employee after his employment has ceased is one which precludes the employee from disclosing a trade secret."

980. Clarke J. continued: -

> *"It is clear, therefore, that an employee is entitled to bring that employee's general skill with him wherever he may go. It is only information that goes beyond general skill and knowledge which cannot be used against a former employer."*

981. Clarke J. went on to consider questions relating to the period of time for which it would be reasonable to enforce restrictions on the use of confidential information in the context of competition.

982. In *Mahon v. Post Publications Limited* [2007] IR 338, [2007] IESC 15, Fennelly J. considered the law of confidence in a wider context: -

> *"The law with regard to confidential information is of comparatively modern origin. It was above all developed to regulate the behaviour of private parties and was based on the doctrine of trust. It is independent of contract. A recipient of a confidence must not breach it by communicating the confidential information to third parties. It is, of course, capable of application both to purely personal and to non-commercial information…*
>
> *…Dismissed or defecting employees have not infrequently purloined their former master's technical or commercial information. While employees can be restrained in contract without resort to the equitable doctrine, the latter becomes relevant when the information is conveyed to third parties <u>who are on notice of the confidential character of the information</u>."*

983. Fennelly J. cited with approval a passage previously cited by Kelly J. in *Mahon* from a judgment of Megarry J. in *Coco v. Clark (AN) Engineers* [1969] RPC 41 which he said *"neatly encapsulates the requirements for a successful action based on breach of confidence"* as follows: -

"In my judgment three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene M.R. in The Saltman Engineering Company v. Campbell Engineering Company [1948] RPC 203 on pg.215, must 'have the necessary quality of confidence about it'. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it."

984. On the question of what is truly confidential, Megarry J. continued: -

"First, the information must be of a confidential nature. As Lord Greene said in the [Saltman] 'something which is public property and public knowledge', cannot per se provide any foundation for proceedings for breach of confidence. However confidential the circumstances of communication, there can be no breach of confidence in revealing to others something which is already common knowledge. But this must not be taken too far. Something that has been constructed solely from materials in the public domain may possess the necessary quality of confidentiality: for something new and confidential may have been brought into being by the application of the skill and ingenuity of the human brain. Novelty depends on the thing itself, and not upon the quality of its constituent parts."

985. Fennelly J. referred also to the judgment of Costello J. in *House of Spring Gardens v. Point Blank* [1984] IR 611. In that case, Costello J. cited passages from two English decisions on the circumstances in which an obligation of confidence can be deduced. In *Terrapin Limited v. Builders' Supply Co. (Hayes) Limited* [1960] RPC 128, Roxburgh J. stated: -

"As I understand it, the essence of this branch of the law, whatever the origin of it may be, is that a person who has obtained information in confidence is not allowed to use it as a spring-board for activities detrimental to the person who made the confidential communication, and spring-board it remains even when all the features

have been published or can be ascertained by actual inspection by members of the public."

986. Finally, Costello J. cited a *dictum* of Lord Denning M.R. in *Seager v. Copydex Limited*.: -

"The law on this subject does not depend on any implied contract. It depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it. He must not make use of it to the prejudice of him who gave it without obtaining his consent. The principle is clear enough when the whole information is private. The difficulty arises when the information is in part public and in part private."

987. As Mr. Cox was not an employee of the plaintiffs, the wider principle described by Lord Denning in *Seager* and cited by Costello J. in *House of Spring Gardens* informs my approach to this question. That is that the "broad principle of equity is that he who has received information in confidence shall not take unfair advantage of it". Informed by that principle, I turn now to the evidence as to documents and other information alleged to have been taken by Mr. Cox. There are a number of categories.

988. Firstly, the material copied to a hard drive and taken on 20 May 2015, after Mr. Cox had resigned.

989. Secondly, there are numerous emails in evidence in which Mr. Cox forwarded information from his Tiger email address to his own personal email address. In some cases, the information was then forwarded onwards to others, namely Mr. Foley and Mr. Kearney.

990. Thirdly, there are emails which were forwarded to Mr. Cox by Ms. Jennings from time to time, before and after his resignation, some of which were forwarded onwards to Messrs. Foley & Kearney.

991. There was presented in court a document in tabular form described as "table of documents taken by Patrick Cox – For Court". The table comprised 21 pages listing

documents said to have been taken by Mr. Cox to include the documents taken by copy to the hard drive on 20 May, 2015 and numerous other examples.

992. The table refers in each case to the documents, the date on which they originated or were taken, and a column for "a document owner". The table included many documents in respect of whom the document owner is neither a plaintiff or an O'Flynn Group company. It includes many documents said to have been created or owned by external parties such as "Blackrock", O'Connell East Architects, Knight Frank, Goodbody Stockbrokers – DTZ Sherry Fitzgerald, CRM, JLL". Some are said to be the property of "OFG", which is not a plaintiff.

993. As appears below, a limited number of the items listed were clearly the property of VHML. In respect of the items whose owners were not plaintiffs, the plaintiffs say that Mr. Cox accessed these items in his capacity as senior and trusted employee in the O'Flynn Group. Therefore he never had any business taking them after he resigned, let alone sharing them later with Mr. Foley and Mr. Kearney who by this time clearly had no business receiving or accessing information which Mr. Cox had sourced from within the O'Flynn Group and in some cases in his capacity performing services for VHML.

Evidence of Orla Kelleher and Ronan Magee

994. Orla Kelleher, who is described as the Information Technology Manager of the O'Flynn Group "and associated companies" gave evidence in relation to the IT system and Mr. Cox's IT working arrangements.

995. Ms. Kelleher explained that when the Carbon settlement was being implemented the plaintiffs retained the hardware in their head office and all associated files. Under the agreement with Carbon there was transferred to it only copies of data to which Carbon would be granted access, but that the hardware and data was retained by the plaintiffs.

996. Ms. Kelleher referred to O'Flynn Group being "the O' Flynn Group and associated companies". Although I have concluded earlier that the O' Flynn Group does not extend to companies in different ownership such as the first five plaintiffs, it emerged in Ms. Kelleher's evidence that the IT server and mail servers used by the plaintiffs were all on a common server used by the O'Flynn Group and the plaintiffs.

997. Ms. Kelleher explained that Mr. Cox had four email accounts namely pc@tigerdevelopments.com, which she says was activated in December 2007, at a time when he was operating as a consultant to the Group, PCox@O'Flynnconstruction.ie, also activated in or around December 2007, PCox@O'Flynncapitalpartners.ie, activated in or around January 2014 and PatrickC@VHML.co.uk, activated in or around March 2014. This showed that the "group IT function overlapped between the original O'Flynn Group and the plaintiffs".

998. The Group had an email server and file server in three office locations namely Cork, Dublin and London. The offices were connected on the same network so that information documents files and correspondence can be accessed at any of the three locations without having to connect by way of remote access. Ms. Kelleher explained that the operation of the virtual private network (VPN) facilitated remote access when persons were away from the office.

999. Ms. Kelleher said there was no reason for Mr. Cox to use his personal email addresses for work at any time. She actively discouraged all employees from doing so. The email accounts for Mr. Cox would at all times have been available to him through his two mobile telephones, his company laptop and company desktop computers.

1000. Ms. Kelleher referred to the email of 06 June 2014 from Mr. Cox to his personal email address attaching the Bridewell Street appraisal. She said that the metadata on this document indicated that it had a creation date of 8 February 2011 and an author name of "PC Tiger" being one of Mr. Cox's user logon names. She said that on 04 September 2014 Mr. Cox

emailed to himself a document entitled “Dublin Development Appraisal” which she believed was an appraisal relating to the potential development at Gardiner Street. On inspection of that document and its metadata it had a “created” date of 08 February 2011 and that its author was “PC Tiger”. Ms. Kelleher said she was aware of 209 documents with the same metadata properties comprising 128 development appraisals and 81 Excel sheets made up of cash flows, construction delivery profits and payment schedules. These all had a creation date of 8 February 2011 with the author named “PC Tiger”.

1001. Ms. Kelleher believed therefore that when Mr. Cox created the “Dublin Development Appraisal” for Gardiner Street he did so by copying a template appraisal originally used by O’Flynn Group. She said that when one is using a template appraisal of this type, as Mr. Cox did using the original O’Flynn Group template of 8 February 2011, and inputs into the spreadsheet new variables such as the number of beds, rent per week, number of weeks etc, these are immediately recognised and an appraisal for the new project can be created without the necessity to create an appraisal template “from scratch”.

1002. Ms. Kelleher gave evidence that on 20 May 2015 Mr. Cox, or Ms. Jennings at his request, copied onto an external hard drive the entire contents of two shared drive folders from the O’Flynn Group network on its UK server, used also by the plaintiffs, and the contents from his company email accounts. Ms. Kelleher said that the contents of the shared drive folders from the UK server accounted for the vast majority, which she described as 90% of all information stored on the London server. Ms. Kelleher said that Mr. Cox copied approximately 250 gigabytes of data onto the external hard drive. This amounted to copying and taking a total of 36,677 files comprising commercially sensitive material of the O’Flynn Group and of the plaintiffs.

1003. Ms. Kelleher said that Mr. Cox copied also to the external hard drive the entire contents of his work email accounts. She said that there was no reason for any employee or person to take a copy of the server or shared network drives and that she would never have

asked a user within the company to do so. She said that in circumstances where remote access was always provided there would never been any requirement to copy files from the server.

1004. Before the commencement of these proceedings the plaintiffs' then solicitors PJ O'Driscoll wrote to Mr. Cox and called for the return of such material.

1005. The external hard drive taken by Mr. Cox was returned to PJ O'Driscoll by the defendants' then solicitors McCann Fitzgerald by letter dated 11 May 2016. The hard drive was then examined on behalf of the plaintiffs by the Cyber Security and Forensics team of PWC. Mr. Ronan Magee, a director at PricewaterhouseCoopers gave evidence of the result of his examination of the hard drive.

1006. Mr. Magee said that he took a physical image using forensic acquisition software of the hard drive. Once that image was verified an analysis was preformed using a working copy of the forensic image of the hard drive.

1007. Mr. Magee described the forensic software which was used to examine the hard drive, namely Encase. Encase identified 36,675 files and folders from the image of the hard drive.

1008. According to Mr. Magee 36,615 of these files were taken and downloaded onto the hard drive on 20 May 2015 between the hours of 15.23pm and 18.05pm. He described the names appearing on the files to include such items as the following "*rents by postcode London.doc, VHL (Ireland) – generic design criteria, Davidwhitmarsh.doc, planning details.doc, Hawley Crescent an Excel spreadsheet, Birmingham monthly report number 1, Coventry appraisal rev, financial status report Sparmax, room type schedule, opal gardens, site area Excel spreadsheet, cash account, anticipated cash flow, outline terms of commercial arrangements, Hot's Pretz - Edinburgh – Unit 2, part unit 3 Haymarket 5 Haymarket, Haymarket 2 retail shelves specification final.doc, Adazi – time frames for presentation, and itinerary org portfolio 22 July 2011*." Mr. Magee's evidence was that the 18 categories of documents described above had initially been created between 2007 and 2013 and were copied onto the hard drive on 20 May 2015 when it was taken by Mr. Cox.

1009. Mr. Magee said that if those files were printed, they would run to many hundreds of thousands of pages.

1010. The hard drive was in the possession of Mr. Cox or his solicitors from 15th of June 2015 to 8th March 2016 when it was returned by McCann Fitzgerald to PJ O'Driscoll & Company.

1011. Ms. Kelleher in her evidence in chief clarified that she was unable to verify whether Mr. Cox himself was the person who copied the contents of the shared drive folders from the O'Flynn Group network on its UK server to the external hard drive. She confirmed however that it had been established that the copying onto Mr. Cox's computer was done on 20 May 2015.

1012. Mr. Cox himself confirmed that Ms. Sarah Jennings had copied the material for him onto the external hard drive.

Business plan and asset summary taken 25 March, 2015

1013. On 25 March, 2015 Sarah Jennings emailed to Mr. Cox at his Tiger Developments email address a "Business Plan and Asset Summary along with Excel data as requested".

1014. The attachment to this email were the O'Flynn Group business plan dated 11 March, 2015 together with appendices which included an asset summary document and a cashflow model.

1015. Ms. O'Neill gave evidence that this was all information which was highly confidential as far as the O'Flynn Group was concerned.

1016. Her evidence was that on 15 April, 2015 the group signed settlement terms with Blackstone and there was a deadline of six months within which to raise funds to acquire certain of the assets back from Blackstone. The purpose of this business plan was to provide information to any funders who would support the group in acquiring assets back from Blackstone. Ultimately the assets acquired back were in fact funded by an external investor Avenue Capital.

1017. Ms. O'Neill's evidence was that this was information which was available only to certain key people in the group namely Michael O'Flynn, Michael Kelliher, John Nesbitt and herself. She said that nobody else worked on it except external advisors who for this process were PWC.

1018. Ms. O'Neill said that this was an extremely sensitive document not widely circulated within the group and it was her view that Mr. Cox would not have been entitled to receive it. She was surprised to learn from the discovery that it had been emailed to Mr. Cox by Ms. Jennings on 25 March, 2015.

1019. Mr. Cox gave evidence, which was not contradicted, that this material was all relevant to the exercise of sourcing a funder to acquire assets 'back' from Blackstone, as ultimately occurred. He openly requested this information from Mr. Nesbitt because he and Mr. Leadbetter had been assisting in the process of identifying an appropriate structure for the funding of the acquisition of these assets. Mr. Cox said that he "probably reviewed it" with a view to the financing of the assets which he was looking at in conjunction with Mr. Leadbetter. Mr. Cox said that there was no reason why he would not have this information in the first place when, at the request of Mr. Nesbitt, he was working on the project of the funding of the assets, together with Mr. Leadbetter. He also said that he believed that without his input the investor Avenue may never have come forward or been secured.

The hard drive taken on 20 May 2015

1020. According to Ms Kelleher, who was not contradicted on this point, the copying extended to the entire contents of two shared drive folders from the O'Flynn Group network on the UK server and the contents of Mr. Cox's email accounts. All of these were copied onto an external hard drive. Ms Kelleher said that the contents of these folders accounted for the vast majority, which she estimated to be 90% of the information stored on the London server common to the O'Flynn Group and the plaintiffs. Ms Kelleher said that the quantity was circa

250gbs, a total of 36,677 files. There was also copied the entire contents of Mr Cox's work email accounts.

1021. Mr Cox requested that Ms Jennings make this copy for him after she had informed him that she had been asked by Mr Nesbitt to download files from the server onto a hard drive for his use. Mr Cox said that he believed that this was being done by Mr Nesbitt to ensure that he retained a copy of the information when Carbon Finance took over the business of the O'Flynn Group companies, including Tiger and VHL. His belief was that Mr Nesbitt was fearful that after Carbon took over the O'Flynn Group he may not have had any continuing access to these files.

1022. This does not explain why the information was copied for Mr Cox on 20 May 2015 more than three weeks after his resignation.

1023. If the material copied had extended only to information of VHL and Tiger, neither of whom are plaintiffs in this action, the plaintiffs would have no ground for complaint. However, the evidence given by Mr Nesbitt and by Ms. Kelleher and not contradicted was that the server which was copied was common to VHML, VHL and Tiger.

1024. Mr Cox's explanation that he was only doing what Mr Nesbitt had already done to avoid losing access to the information after the Carbon acquisition was implemented made no sense in circumstances where the Carbon settlement had been concluded in April 2015 and the copying occurred on 20 May 2015, many weeks after control had passed to Carbon and after Mr Cox's resignation. Therefore the O'Flynn Group was no longer in contention with Carbon, and under the terms of settlement the plaintiffs retained the controlling IT function delivering to Carbon only the copies it required for its business going forward.

1025. Mr Cox insisted in his cross-examination that he only requested Ms Jennings to make these copies for him "casually" in circumstances where he believed that Mr Nesbitt had arranged such a copy in anticipation of the Carbon takeover.

1026. Ultimately Mr Cox admitted under cross-examination that it was inappropriate for him to have requested Ms Jennings to make the copy.

1027. It was also acknowledged by Mr Cox that he should not have retained for the year which followed the hard drive or any of the files which he had emailed to himself, returning them only on 11 May 2016 in response to correspondence from the plaintiff's solicitors.

1028. Mr Nesbitt summarised the documents which were included in what was copied by Mr Cox. He described them as including the following: -

"From the circa 37,000 documents taken by Patrick Cox from the hard drive, I identified the most significant and valuable of the proprietary intellectual property copied to the hard drive by Patrick Cox and likely used by the defendants. I identified circa 1,200 of those documents which would be commercially valuable to the defendants. These documents included development appraisals for student and residential developments, bank packs for developments, investor packs and sample presentations, cashflows, development agreements, operating management agreements, monthly and quarterly reports, operational cost report budgets, marketing plans and reports, pricing plans for student developments, financial information packs, pricing strategies, investment summaries and templates, rental pricing models, feasibility studies, student accommodation layouts and specifications which were tried and tested among others. These documents together include all of our intellectual property and our confidential proprietary information which we use to sell our services. They include our experience developed over 35 years in the property business and 20 years in the student accommodation business. Our systems and processes which have been refined and improved over a period of 20 years are our unique selling point. They demonstrate to the investment market the value we can add".

1029. When Mr Nesbitt refers to experience and systems developed over periods of 35 and 20 years he is referring for the most part to the history of the O'Flynn Group, which with the

exception of the sixth named plaintiff, is not a plaintiff. The first four plaintiffs only existed from 2010 onwards, and in the case of the fifth plaintiff 2014 onwards.

1030. To demonstrate the confidentiality of this material Mr Nesbitt explained that when the capitalised value of a proposed student accommodation scheme is being calculated for the purposes of discussions with investors a key ingredient of the information is the net operating income in the scheme. He explained that the reliability of that estimate is important when discussions are being held with intended investors.

1031. Mr Nesbitt said that in student accommodation developments the gross income can generally be easy to calculate by multiplying the number of student beds by market rent, based largely on rent charged in similar developments. But the information which is available only to specialist and experienced student accommodation operators is the operational management budget. This quantifies the amounts to be deducted from the gross income in order to calculate the net operating income for identifying the capitalised value of the investment. He explained the three principal budget items for this are staff costs, statutory/utility costs and repairs and maintenance. This information can be garnered only by direct involvement and experience over many years in the operation of student accommodation and is not information which would be available to the defendants otherwise than through the documents and files taken.

1032. Mr. Nesbitt said that the experience and knowledge of these costs and systems provides them with a competitive advantage over other developers not directly involved in the operation of student accommodation. He said the following: *"Our budgeting knowledge and calculations are reflected in our Investor Packs and Bank Packs, Operational Management Budgets and Property Management Agreements and appraisals which were among the documents taken by Patrick Cox. Having access to those figures allowed the defendants to hold out that they could provide reliable calculation of NOI (Net Operating*

Income) which they could not have done without the benefit of our figures and intellectual property".

1033. Mr. Nesbitt expanded by extending this claim to design information.

1034. Mr. Nesbitt said that since the ultimate purchasers of completed student developments are generally investment funds the information concerning potential capital providers and investors was key information.

1035. The Gardiner Street scheme was opened in September 2017 which meant that the funding arrangements needed to be in place in early 2016. Mr. Nesbitt said that if Mr. Cox had started "from scratch" after he left in July 2015, he would not have been able to achieve a concluded forward funding agreement such as was signed with GSA for Gardiner Street, in sufficient time for the opening in September 2017. He concluded on this subject by saying the following *"the defendant's ability to negotiate a construction delivery profit of €5,784,992 and a construction management fee of €300,000 as well as a profit of some €6.5 million on the sale of the site arose from their ability to assess the ultimate NOI and capitalise value of the investment for the investor using our intellectual property".*

1036. Mr. Nesbitt said that even if the defendants had used other experts, which they did, it would have taken them longer to conclude a deal with Global Student Accommodation. Since the hard drive was copied on 20 May 2015 and the material was returned to the plaintiffs only on 12 May, 2016, Mr. Cox was in possession of the hard drive for a period of twelve months which afforded sufficient time and opportunity to inspect and use documents at a crucial time in relation to the Gardiner Street project.

1037. Mr. Cox confirmed in his evidence that he should not have retained the hard drive or any of the files which he emailed to himself, and he regretted doing so. He stated his opinion however that "none of the files on the hard drive or that I sent to myself during the course of my employment and which were subsequently viewed or sent on amounted to confidential information or trade secrets."

1038. Evidence was given by members of the design team on Gardiner Street to support this contention. That evidence did not extend to financial expertise, and was limited to evidence of a disability access and design consultant (Mr. Eoin O'Herlihy), consulting engineers (Lohan and Donnelly), landscape architects (Margaret Egan) fire safety consultants (Martin Davison) and acoustic consultants (Damien Kelly). Evidence was given by Mr. Ronan McLoughlin that the various option agreements and other legal agreements were not based on any precedents provided to him by Mr. Cox. Mr. Bailey of Global Student Accommodation, in an admitted witness statement, said that it did not rely on the Carrowmore financial appraisal, having its own experience and resources on this aspect, and that it specified design and other changes itself.

1039. Mr. Cox said that transaction documents relating to Gardiner Street were not generated using any of the plaintiffs' information. Insofar as he viewed appraisals which were relevant to the Coventry and Birmingham transactions and insofar as the structure of the appraisal for Gardiner Street in any way reflected these, these were appraisals of a type with which he personally was familiar and had gained his own personal experience of making.

1040. In cross-examination Mr. Cox agreed that he accessed the information on the hard drive and said that he did so principally out of "curiosity". When questioned as to the circumstances in which he accessed the hard drive Mr. Cox said the following:

> "Well, what I am saying is I had it and I accessed it because I had it. Curiosity. But I didn't, as I say I didn't any malice in it (sic). But it was a very ill-informed action to do so".

1041. Questioned as to which documents he looked at in the hard drive Mr. Cox said the following:

> "Oh, very few. I think I looked at some of my emails, very few emails and I think I sent myself – when I say sent myself, I should correct that; I think I sent my colleagues Liam Foley and Eoghan Kearney and in one instance Simon Fox, four

documents of the hard drive in three emails which I shouldn't have done and I regret doing I just simply shouldn't have done it."

1042. The uncontradicted evidence is that the server of the London office copied to the hard drive taken by Mr. Cox comprised documents and information created and owned by O'Flynn Group companies, including Tiger and VHL, and information created and owned by the first plaintiff VHML.

Other documents taken or obtained by Mr. Cox

1043. On 19 May 2014, Mr. Cox emailed from his Tiger Developments address to his personal address an Option Agreement which VHML had earlier in the year negotiated with a counterparty relating to a property known as the Goose at the OVT in Birmingham. This item was clearly a document owned by VHML. Mr. Cox under cross-examination said that had an input himself in preparing and designing this option. He was asked why he had he emailed it to himself at almost exactly the same time when he was giving instructions to Mr. McLoughlin at Matheson for the preparation of Option Agreements to enter into with Mr. Mullins. Mr. Cox acknowledged that he may have emailed it to himself in the context of preparation of his own Option Agreements relating to Gardiner Street, and that he ought not to have sent it to himself. He insisted, however, that the Option Agreement relating to Gardiner Street was separately and independently prepared by Mr. McLoughlin as his solicitor. Mr. McLoughlin confirmed that in his admitted witness statement.

The Bridewell Street Appraisal

1044. One of the starkest examples cited by the plaintiffs is the so called Bridewell Street appraisal, which evolved into a "Dublin Development Appraisal".

1045. On 6 June, 2014 Mr. Cox emailed to himself a document which had been created as an appraisal for a student accommodation scheme in Bridewell Street, Bristol.

1046. The evidence was that it was first created in January 2013. The document was headed "Bridewell Street, Bristol – September 2014". The date of September 2014 is not the date of this document itself. It is the date on which the scheme is projected to be completed and ready to bring to market. The title continues: -

"development name: Liverpool

Number of beds: 450

GEA (gross external area) 17,000."

1047. The appraisal follows the format of describing projected revenues and costs, generating in this case a Gross Development Value of stg £52,471,252.

1048. The appraisal continues by describing "development costs" which includes acquisition costs, construction costs, professional fees and other costs amounting in total to stg of 43,600,525, showing, on this model, a total developer's profit of sterling £7,124,509.

1049. Included within the development costs for this item is "land cost at sterling £6.5 million.

1050. A number of versions of this appraisal were attached to Mr. Cox's email to himself on 6 June 2014, using different figures depending on the numbers of beds and other information, each showing different potential profit.

1051. On 4 September, 2014 Mr. Cox emailed to himself a document which the email describes as "Dublin Development Appraisal". The attachment is an appraisal headed "Gardiner Street, Dublin, September 2014 – 500 Beds – 150,000 square feet". The format corresponds to the format of the Bridewell Street appraisal. It identifies projected revenue associated with student accommodation to arrive at an investment valuation of stg £61,780,131. It then shows development costs comprising acquisition costs, construction costs, fees and other costs, totalling stg £52,173,409, returning a profit of stg £9,606,721. It is noteworthy that on this version of the spreadsheet sterling amounts have been used, as in all VHML appraisals, even though the appraisal is apparently for a Dublin scheme.

1052. Mr. Cox admitted that the Dublin Development Appraisal which he emailed to himself on 4 September, 2014 was "sprung from the Bridewell Street Appraisal". He said that he "amended bits of the Bridewell Street - some of the input from the Bridewell Street appraisal to make this."

1053. Mr. Cox said that this is something which he simply did "for ease". He said that the first Bridewell Street appraisal had been made by him in the course of his employment with Tiger Developments Limited. He said that he could have created the entire appraisal sheet for Dublin within the space of 30 minutes but he did not. He simply used the earlier format for ease.

1054. Mr. Cox emailed the Dublin Development Appraisal to Mr. Kearney and on 5 September, 2014 Mr. Kearney emailed it to Mr. William Redmond of Coream, one of the potential investors with whom the defendants were in discussion about Gardiner Street.

1055. On 2 August 2014, Mr. Cox emailed to himself the Carbon Manco Framework draft document.

1056. Mr. Cox confirmed in his evidence, and was not challenged, that this document had nothing whatsoever to do with Gardiner Street and was not used by him in connection with Gardiner Street. He emailed it to himself because he was working at home on that Saturday. It was a document intended to set out certain basic concepts in terms of how the O'Flynn Group or any of the plaintiffs might collaborate with Blackstone if a settlement were achieved. On the same day, Mr. Cox exchanged emails with Mr. Nesbitt and Mr. Leadbetter in relation to this. There was no evidence that there was anything secretive in terms of Mr. Cox accessing this document at that time.

1057. On 18 August 2014, Mr. Cox emailed to himself a Word version of the Plymouth Regency Street management plan headed *"Victoria Hall Management <u>UK Limited</u> – Plymouth Regency Street"*. In his cross examination it emerged that this document was publicly accessible from the planning file at "Plymouth.gov.uk". In any event, Mr. Cox

confirmed that the document was not used in relation to Gardiner Street and this evidence was not challenged.

1058. On 25 March, 2015 Ms Jennings emailed to Mr. Cox a number of important documents relating to the O'Flynn Group. The email included as a first attachment the O'Flynn Group Business Plan dated 11 March, 2015. Also attached were an asset summary document describing both "Irish assets" and "UK assets" and a third set of documents which were described as cashflows referable to individual assets and valuations.

1059. Mr. Cox said that this was sent to him by Ms. Jennings under the instructions of Mr. Nesbitt. At that time Mr. Nesbitt and Mr. O'Flynn were endeavouring to establish how they would refinance certain assets which could be acquired by non O'Flynn Group entities out of the Group as part of the settlement. A new funding source was required if assets were to be purchased back. Mr. Cox had been asked by Mr. Nesbitt to assist in the process of establishing how the acquisition of such assets out of the group might be funded. He did this in conjunction with Mr. Leadbetter. Therefore, he was entitled to receive and, at that time, use this material.

1060. On 20 May, 2015 Mr. Cox sent an email to Mr. Kearney and Mr. Foley enclosing a copy of the proposed O'Flynn Capital Partners brochure. He considered this was a document which would be "useful to review". He said however that a brochure by definition is a document which is intended for wider publication therefore cannot have been regarded as confidential or secret.

1061. The covering email stated the following: -

> *"See attached for your information. This is the proposed OFCP brochure going to print. The company's goal is to be predominantly a development partner to external capital. At this point I couldn't do much less in terms of involvement in this company. I am interested in whether you think there are any themes you would rob from this? Also we should all be working on our personal bios and circulate for comment. Lets*

try and get a first draft out by close of play this week. Lastly look at websites and circulate any that you think are interesting as a comparison/template.

Patrick".

1062. Mr. Cox insisted under cross-examination that the use of the phrase "are there any themes you would rob from this?" was not indicative of any sinister intent. He said it would be not unusual in any business for parties to seek to copy brochures or other marketing material of others.

The Birmingham Bank Pack and the Chester Budget

1063. On 30 June, 2015 Mr. Cox emailed Mr. Kearney a series of documents which the plaintiffs say are significant and must have been of assistance to the defendants in relation to Gardiner Street. The first was the Birmingham Bank Pack. It contained extensive financial information in relation to the Birmingham project and is described as the Victoria Hall Management Limited Bank Pack for Birmingham. Mr. Cox said that he could not say definitively who was the true owner of this document, but he admitted that it was not his property to take and, let alone pass to Mr. Kearney.

1064. Mr. Kearney said that when he received the documents, he did not think that there was anything improper about receiving them and he received them in good faith. He said that he made no use of the Birmingham Bank Pack.

1065. The second of these attachments was a document headed "Victoria Hall Management Limited - Budget for Upper Northgate Street Chester" prepared for La Salle Investment Management.

1066. Mr. Cox said that such operation budgets are not generally regarded as confidential. Information regarding costs to be input into such a budget would be widely available from multiple sources.

1067. Mr. Kearney admitted to accessing and utilising some lines from this appraisal. The operational budget contains 40-line items which are described as the operational costs

associated with a student accommodation development. They range from such items as salaries, fuel charges, repairs and maintenance, insurance, Sky subscription, temporary workers, admin salaries, salary agency, professional fees, staff recruitment, computers maintenance, advertising, canteen supplies and more. Mr. Kearney acknowledged that in preparing an operational budget within the appraisals and calculations for Gardiner Street he had used seven of these line items namely the entries in respect of telephones, internet, contract cleaning, cleaning materials, insurance, planned maintenance and canteen supplies.

1068. Mr. Kearney agreed that in hindsight he ought to have checked whether he had permission to use this item as it clearly related to a project undertaken by VHML at Chester. He used some of the figures and applied a foreign exchange rate and a margin noting that the costs of many of these items of outlay would have been higher in Dublin than in Chester.

1069. The defendants submitted that there is no special proprietary knowledge in figures such as the cost of telephones, internet, and contract cleaning.

1070. The plaintiffs submit that the significance of this item is not the actual figures included but the benefit of working from a list identifying the cost items in the construction and operation of such a scheme. They submitted that such a budget is a bespoke operational budget and is therefore a critical document informing discussions with an investor or preparation of submissions to investors or banks. The defendants say this is not so unique as to constitute truly confidential proprietary material. Mr. Kearney said that although he used seven of the line items, the operational costs are broadly similar for schemes in Ireland and England, although the cost would be likely to be higher in Dublin than in Chester.

The inbox of Mr. Nesbitt

1071. On 3 September, 2015 Ms. Jennings sent to Mr. Cox a copy of a screenshot of Mr. Nesbitt's inbox with information relating to Rockspring proposing to put their asset Dashwood on the market. Mr. Nesbitt said that this was key inside information about a

transaction before it went to the market which was of value to VHML in positioning itself with a potential investor for the asset.

1072. Mr. Cox acknowledged that it was inappropriate for him to have received from Ms. Jennings the screenshot of Mr. Nesbitt's inbox and he said that he did not know why Ms. Jennings sent it to him. He recalled thinking that it was inappropriate for her to have sent it to him.

1073. On 7 October, 2015 Ms. Jennings emailed to Mr. Cox a copy of the Development Project Management Agreement between Birmingham Hall Limited and Albert Project Management Limited. That was the development management agreement for the Birmingham asset developed with the Coral joint venture. Mr. Cox said that he did not use this in connection with Gardiner Street.

Residential models

1074. On 21 October, 2015 Mr. Cox emailed to Mr. Kearney and to Mr. Foley two documents which the plaintiffs say were significant. The first was described as the "Goodbody Residential model draft financial model – Beechpark Residential Development". The second described as a "residential template" which related to a potential residential development at Bolton Hall, Rathfarnham. In the covering email Mr. Cox said "mostly for EK to work on and work out. See attached two residential analysis models for phased house building".

1075. Mr. Cox said that he did not use any of those documents in connection with Gardiner Street, Carrowmore was never engaged in residential development either before or after this time. When questioned as to what he did with these documents he said simply that he thought it would be "useful to review".

1076. Mr. Kearney said that he did not know that this document related to an O'Flynn Capital Partners project. He did not even recall opening these attachments and he did not know why Mr Cox had sent them. He said that Carrowmore had never looked at residential

development. In any event, Mr Kearney said that he had his own good financial model for any development. He had not asked Mr. Cox where he had obtained these documents. Mr. Kearney said that it was only in May 2016 when he became aware of the issue relating to the hard drive, on which these documents were found and from which Mr. Cox took them in order to circulate to Mr. Foley and Mr. Kearney, that he became aware of the origins of these documents. He learned this after the institution of these proceedings.

1077. The defendants submitted that residential development was never a part of their plans in Carrowmore. Therefore there was no significance to these models being circulated. Under cross-examination it was put to them that in fact the exhibited business plan for Carrowmore included reference to residential developments. Mr Cox said that this was no more than a phrase used in a potential business plan covering all asset categories.

1078. Each of Mr Nesbitt and Ms O'Neill said in their evidence that the Beech Park financial model, which related to a development undertaken by O'Flynn Capital Partners, was by its nature confidential and would have been kept by the finance team and not put into wider circulation.

1079. Mr Cox had no legitimate basis to circulate these models to Mr Foley and Mr Kearney on 21 October 2015, six months after his resignation.

Capital Providers and Advisors Master List

1080. On 22 October, 2015 Mr. Cox sent to Mr. Kearney a document described as "copy of Capital Providers and Advisors Master List". This is the list of contact persons which retained the entry "last updated 11 January 11" by S.J. (Sara Jennings). This document evolved and on 29 October, 2015 Mr. Kearney sent a version to Mr. Cox. Mr. Cox said that he thought that the original list of contacts would be "useful to review". However, in his view it was nothing more than an out of date list of business contacts. However, it was clear from the version presented in court that the contact list evolved in the hands of the defendants, who simply added a number of their own new contacts.

1081. This item was clearly a document owned by VHML.

The Blackrock Heads of Terms

1082. On 7 March, 2016 Mr. Cox sent to Mr. Foley, Mr. Kearney and Mr. Simon Fox a document described as "HOTs signed". This was a document dated 12 August, 2014 described as a heads of terms and signed between Victoria Hall UK Limited and Blackrock UK Property Fund.

1083. Mr. Nesbitt described this document as a fundamentally important "foundation" document for the relationship between VHML and Blackrock. The document outlines the terms on which Blackrock would retain VHML and pay pre-agreed levels of fees associated with the acquisition, development and operation of student accommodation schemes. It contained specific percentage fees for acquisitions and development management fees, including fees already agreed in respect of existing projects at Plymouth and Durham, and operational fees for future assets. Performance fees were set at particular levels of percentages, 15% rising to 30% depending on the rate of return secured on identifiable assets. This was a highly sensitive commercial document confidential to VHML.

1084. Mr. Cox said that this document was not used in the Gardiner Street transaction, but he did not deny that it was confidential VHML information which he shared with Messrs. Foley and Kearney without the permission of VHML. No explanation or justification was put forward for taking such obviously confidential information.

1085. Mr. Cox said that he had negotiated the fees in that document, but he acknowledged that it was confidential information. He agreed that when he sent it on 7 March, 2016 to Mr. Foley and Mr. Kearney he did so because at that time they had identified an opportunity in Leeds and intended to make a proposal to Blackrock for a scheme in Leeds. They had sent a fee proposal to Blackrock in January 2016 and Mr. Cox now shared the VHML Blackrock fee

agreement with his colleagues so that they could all understand what had previously been agreed by Blackrock with VHML.

1086. Mr. Cox insisted under cross-examination that there was no evidence of any improper usage of this information. He regretted sharing it with his colleagues but did not accept that any use was actually made of it.

1087. Each of Mr Cox, Mr Foley and Mr Kearney agreed that this was a confidential document and was the property of VHML. Mr Cox confirmed that he had identified this document in the hard drive copied on 20 May 2015. He said that earlier in 2016 Carrowmore had already made a fee proposal to Blackrock. Mr Foley said that he did not recall ever opening this document or why this email was sent to him. He acknowledged however that it was confidential. Mr Kearney said that he "possibly" opened the document, but he now could see that it is a confidential document. He reiterated that as early as January 2016, three months earlier, Carrowmore had submitted a fee proposal to Blackrock, with whom they had their own contacts.

1088. Whilst there is no definitive evidence as to what use or further use was put to this document, it is clear that there was no legitimate basis or justification for Mr Cox to share this commercially sensitive confidential document, the property of VHML, with Mr Foley or Mr Kearney on 07 March 2016, almost a year after he had resigned from the O'Flynn Group and taken it without permission of its owner.

The Coral Heads of Terms

1089. The Coral Heads of Terms dated 1 April, 2012 related to the terms of the investment to be made by the Coral Fund in the projects at Birmingham and Coventry. Mr. Cox had been instrumental in formulating and agreeing those on behalf of VHML. It was put to Mr. Cox in cross-examination that the Heads of Terms which were prepared for use in connection with Gardiner Street corresponded broadly to the Coral Heads of Terms. He identified material differences and said that Global Student Accommodation themselves had drafted the heads of

terms for Gardiner Street. This was consistent with the evidence given by Mr. Bailey of GSA in his admitted witness statement.

1090. There was put to Mr. Cox a document dated "Spring 2013" which was a draft of a document headed "Victoria Hall Management Limited. University Housing Deals – working with Victoria Hall Management Limited – specialist student accommodation provider – develop/finance/operate/manage". It was drawn to Mr. Cox's attention that on an interrogation of the production of this document the author was PC Tiger which was Mr. Cox's own designation on the plaintiff's systems.

1091. Mr. Sreenan, for the plaintiffs, put it to Mr. Cox that this was a presentation to investors and lenders on behalf of Victoria Hall Management Limited prepared by him. Mr. Cox said that he had limited input into this document. It had a series of bullet points which was more in the style of the writing of Simon Leadbetter than his own. In the "corporate overview" it identified the series of projects under different headings some by Victoria Hall Limited and some by Victoria Hall Management Limited. Under the heading "VHML key points, the aims and objectives included "continue to develop the Victoria Hall brand".

1092. A similar document was created around that time also for which Victoria Hall Management Limited and also having the ownership characteristics in the plaintiff's system of "PC Tiger". Mr. Cox said that this was evidence of Mr. Nesbitt promoting Victoria Hall Management Limited by "piggybacking" on the Victoria Hall brand. Mr. Cox suggested that the ownership "PC Tiger" suggested that he may have started the document but others finished it but he did not believe that much of it was his own input.

Evidence of Mr. Foley

1093. Mr Foley's evidence was that he did not access the hard drive or other material taken by Mr Cox. He was not in a position to give direct evidence in relation to the true ownership of all of the documents referred to in the schedule or copied to the hard drive. Insofar as he had seen such material it did not appear to him to be confidential.

1094. Mr Nesbitt's evidence was that the material on the hard drive was "likely used by the defendants". That is the high point of the plaintiff's evidence regarding usage of the material on the hard drive.

1095. Mr Foley said that insofar as his direct involvement in the Gardiner Street development was concerned it had progressed without reliance on any of the data which the plaintiffs say was taken from them. He believed that the expertise in property development and finance which each of the three personal defendants had themselves, together with professional expertise which they retained and paid for themselves, was more than sufficient to progress the Gardiner Street scheme.

Evidence of Mr. Kearney

1096. Mr Kearney confirmed in his evidence that he had used seven of the line items appearing in the Chester budget in the context of the Gardiner Street appraisal. He did not believe that any of those figures were in themselves confidential. He believed that if there was anything unique about this information it was based not on VHML data, but on the experience of Victoria Hall Limited, which is not a plaintiff.

1097. Mr Kearney said that in relation to the Bridewell Street appraisal, which it is acknowledged evolved into what became the Dublin Development Appraisal, there was in his view no complex formula or sensitive information. He said that the figures which were included in the Dublin Appraisal for Gardiner Street were in fact input by Mr Cox himself.

1098. Mr Kearney said the following:

"Over a two year period the appraisal evolved and became more complex as I changed the format and inputs and added more functionality to tailor it for the Gardiner Street project hence there would be many iterations of the same document. However, those documents are a development of the original Bridewell appraisal. The format of that appraisal is the opposite of a trade secret. The operations used in it are multiplication, addition, subtraction and division. There are no complex formula, cashflows or bespoke investment outputs such as IRR

calculations. The figures on which those calculations are performed were input by Mr Cox to create the Dublin Appraisal".

1099. Mr Kearney continued by saying that when the Gardiner Street development was ultimately sold to Global Student Accommodation ('GSA') the price was negotiated in a process where GSA had itself valued the project based on its own appraisal and not an appraisal presented by the defendants.

Other Witnesses

1100. Witness statements on behalf of a number of parties touching on the subject of design and related information for Gardiner Street were admitted into evidence. In relation to the Dublin Student Accommodation Appraisal, Mr Sam Ball, formerly of Knight Frank had the following to say: -

> *"On 17 September 2014 I sent Patrick Cox an appraisal relating to a potential student accommodation development on Gardiner Street in Dublin. The appraisal projected income and operational costs to create a net operating income position, that was then capitalised at a projected yield to show a value. The appraisal also considered construction and other delivery costs and a resultant residual land value. The appraisal was indicative.*
>
> *I knew Patrick Cox in 2014 and was aware of his experience in the property sector. To my knowledge Patrick Cox would have had the necessary expertise to construct financial appraisals to access student accommodation developments. These appraisals are not complex or difficult to do especially when you have the necessary experience and expertise as many people operating on the student accommodation sector would have. There were in 2014 and are now many property agents and advisers who can easily provide relevant information relating to projected incomes,*

costs and values. There are also many third party operators who would provide projected income, costs and values for student accommodation and do so for free."

1101. Mr O'Flynn said that he was surprised that a person who had previously worked for Knight Frank specialising in this market would have said such things. He said that this amounted to Mr. Ball saying that his previous employer Knight Frank or any other such firm would not have any particular expertise or that there was anything "special" about the formulation of these appraisals.

1102. Mr O'Flynn questioned whether or why the plaintiffs would have taken or used the Bridewell Street appraisal if Mr Ball's denial of the value of such appraisals was correct. He said that it was the inputs to these appraisals which are unique and in respect of which the plaintiffs had particular experience, notably the inputs to operating budgets.

1103. Mr Eoin O'Herlihy is director of Eoin O'Herlihy Access Consultancy Limited. He is an expert consultant on disability access and design. He confirmed in his witness statement (admitted) that all documentation generated by his firm for the Gardiner Street project was generated without reference to or using the documentation of any third party, other than coordinating his design with other design consultants employed on the project.

1104. Mr Gordon Poyntz, of Lohan & Donnelly Consulting Engineers is a Chartered Structural Engineer. He was engaged to provide structural and civil engineering consultancy services in respect of Gardiner Street. He confirmed that all documentation generated by his firm for the project was generated without reference to or using the documentation of any third party.

1105. Margaret Egan is a landscape architect. She confirmed that documents generated by her practice were generated without reference to documents of any other party.

1106. Martin Davidson is a fire safety consultant engaged on the project of Gardiner Street. He confirmed that documents generated by his firm were generated without reference to documents of any other parties.

1107. Ronan McLoughlin is a solicitor and at the time of giving his evidence a partner in the firm of Gallagher Shatter.

1108. Mr McLoughlin said that in May 2014 he was engaged by Mr Cox in respect of the Gardiner Street site. He was instructed to prepare and draft an option to acquire the property from its owner Mr Mullins.

1109. Mr McLoughlin said that the use of options was not uncommon in the Dublin commercial property market at the time, and he had drafted numerous options during his time.

1110. Mr McLoughlin said that an option is a straightforward document to draft, and the body of the agreement would be generic to all options and "very widely used". Mr McLoughlin said that he had access at the time to precedent form options held in the Matheson precedent bank and a variety of options which he had used or seen during his time in practice. He confirmed that he had not needed recourse to any option provided by third parties.

1111. Mr Damien Kelly is an acoustic consultant who was engaged in relation to Gardiner Street. He confirmed the documents prepared by his firm for the project were generated without reference to documents of any other party.

1112. Mr O'Flynn said in his evidence that although these witness statements were all admitted they related principally to architectural engineering, landscape, acoustic, legal and such matters. There was a notable absence of any particular financial or property expertise associated with the inputs.

1113. The final admitted witness statement was from Mr Aaron Bailey, Head of Real Estate Projects at Global Student Accommodation (GSA).

Evidence of Aaron Bailey

1114. Mr Bailey's evidence was as follows: -

"In early October 2014 following engagement with Patrick Cox, GSA made an offer to purchase the Gardiner Street site from Patrick Cox. The offer was made on the basis that it was subject to an acceptable planning consent for not less than 400 student beds. It was GSA's intention at the time to purchase the site outright and to carry out its own development. GSA made this offer on the basis that Patrick Cox informed GSA that he wanted to sell the site.

GSA Management Plan

In mid-October 2014 GSA provided Patrick Cox with a copy of a student accommodation management plan for the Gardiner Street site. This management plan was provided to Patrick Cox so that he could use this management plan in the submission of the planning application for student accommodation on the Gardiner Street site.

GSA specification.

Prior to completion of the transaction James Childs, a consultant to GSA, and I proposed and agreed with Carrowmore Property Limited ('Carrowmore') significant specification changes to the development which had been designed and these changes were incorporated into the construction of the building.

GSA reliance on Carrowmore appraisal.

By this time GSA already had significant experience in student accommodation in Dublin and was then engaged in the construction of a site at Mill Street, Dublin 8. In assessing the Gardiner Street development, GSA made its offer to purchase (through a

development funding agreement) based on its own financial modelling. GSA did not rely on any financial appraisal produced by Carrowmore".

Pre action correspondence regarding confidential information

1115. It was only when the plaintiffs' solicitors PJ O'Driscoll wrote to Carrowmore and to Mr. Cox notifying him that their client had discovered that Mr. Cox had taken documents and information that in response the hard drive and other documents were returned.

1116. Mr. O'Flynn spoke with Mr. Cox in August 2015 and asked him what his future plans were. Mr. Cox said he had no plan and would spend time with his family over the summer. The two met at an event around Christmas 2015 and Mr. O'Flynn enquired again what he was doing. Mr. Cox said he was "looking at a few things" but did not mention any ongoing development. Mr. O'Flynn was at a conference in early 2016 where Mr. Cox, Mr. Foley and Mr. Kearney were together. He became suspicious and started to make enquiries.

1117. As part of an internal investigation, Mr. O'Flynn's daughter, Kate O'Flynn, reviewed emails to and from Mr. Cox. After searching certain key terms, Mr. O'Flynn said the plaintiffs became aware of the development at Gardiner Street. He also discovered that three weeks after his resignation Mr. Cox had copied the entire server, common to the O'Flynn Group and the plaintiffs, to a hard drive which comprised approximately 37,000 documents. On 9 March 2016 an announcement was made that Carrowmore Property Limited ("Carrowmore") would be responsible for the construction and delivery of the Gardiner Street student accommodation.

1118. On 11 March, 2016 the plaintiffs' then solicitors P.J. O'Driscoll and Sons wrote to the directors of Carrowmore Properties Limited and to Mr. Cox.

1119. In the letter addressed to the directors of Carrowmore Messrs. O'Driscoll noted that Carrowmore was competing in a similar business to that of their clients and that four

directors of Carrowmore were persons who were at one time employed by companies in the O'Flynn Group.

1120. The letter was written on behalf of "Our clients: O'Flynn Construction (Cork) and other companies comprising the O'Flynn Group of companies and associated companies."

1121. P.J. O'Driscoll and Sons continued "It is apparent from the early stages of an investigation being conducted by our clients that, while employed by the O'Flynn Group, a person associated with your company emailed information and material which is the property of our clients to his private email address".

1122. There followed further exchanges of correspondence. McCann Fitzgerald solicitors replied on behalf of Carrowmore and Mr. Cox stating that "Mr. Cox did pursue real estate activities in his own right since 2014 while employed by Tiger Developments Limited as he was entitled and permitted to do".

1123. McCann FitzGerald confirmed that Mr. Cox "does have documentation and material that originated with the O'Flynn Group in his possession". They referred to emails and other electronic documents sent to Mr. Cox's own gmail address. They asserted that the documents and information were not used, with one exception. They confirmed that Mr. Cox would delete or return all such material and that they had taken appropriate steps to preserve, and hold secure such material.

1124. Ultimately on 11 May, 2016 McCann Fitzgerald delivered to P.J. O'Driscoll solicitors the following:

> *"1. A copy of all of the hard copy material in Patrick Cox's possession which originated with your clients.*
>
> *2. Original copy of a portable drive. As confirmed in our letter of 4 May, we have not accessed the contents of this portable drive nor has any copy been made of it and*

3. A USB containing a copy of the email and soft copy material in our client's possession which originated with your clients. The password for the USB key will be sent to your Mr. O'Keefe by email today."

1125. McCann Fitzgerald stated that the handover of the enclosed data "does not constitute an acceptance regarding the status of this material as alleged by your clients." The defendants claim that documents and information held by their clients were returned immediately in response to this correspondence. That is correct, but does not mitigate the fact that they were returning material, which they acknowledge ought not to have been held by them, and which had been retained for over a year after Mr. Cox's resignation.

1126. On 13 May 2016 P.J. O'Driscoll replied, noting that *"a review of the materials… will take some time given the quantum of materials involved, which includes:*

- *A banker box of hard copy materials*
- *A USB key containing approximately 285 megabytes of material, and*
- *A portable drive containing approx 49,000 megabytes of material."*

1127. After exchange of further letters, the plenary summons in these proceedings issued on 8 June 2016.

Conclusion as regards confidential information

1128. In Part Nine I have concluded that Mr. Cox owed fiduciary duties to the plaintiffs. These duties extended to an obligation to respect the confidentiality of documents and information of the plaintiffs.

1129. Mr. Cox took a hard drive onto which he had requested that Ms. Jennings would copy the entire server of the London office. That server contained material generated by the O'Flynn Group, including Tiger Developments Limited and Victoria Hall Limited and the first named plaintiff VHML.

1130. Mr. Cox shared with Mr. Foley and Mr. Kearney materials which had been extracted from the hard drive and other documents obtained by email such as budgets, bank packs, and heads of terms with counter parties as important as Blackrock and Coral.

1131. Much of the material concerned was said to be generated by "OFG" which is not a plaintiff. Others were generated by either VHL or VHML, these names in many cases being used interchangeably and loosely. The fact that a common server had been used to serve both O'Flynn Group companies and VHML and others demonstrates at one level a frailty in the plaintiffs' case as to the true identity of the originator and owner of much of the information about which the allegation of taking confidential information was made. But it is clear that on the common server access to documents of the plaintiffs was gained. It is also clear that certain documents taken were the property of VHML. The Heads of Terms agreed with Blackrock were clearly the property of VHML. Similarly, the Birmingham Bank Pack was the property of VHML.

1132. Even in respect of documents and information which the plaintiffs have not shown to be proprietary to them, such as reports of external firms like Knight Frank or DTZ or others, whether these were commissioned by the plaintiffs or by O'Flynn Group entities, Mr. Cox's knowledge of and access to all of this information derived from the senior position which he held in the both O'Flynn Group and in the parallel structure.

1133. Mr. Cox acknowledged that he ought not to have taken the materials concerned, let alone retained the hard drive of other materials for a full year after he resigned, returning them only a year later when called upon by the plaintiffs' solicitors.

1134. The plaintiffs' evidence strongly suggests that at least some of the materials concerned were used in connection with the Gardiner Street project or other plans of the defendants. This is denied and the evidence of Mr. Cox, Mr. Foley and Mr. Kearney that they did not use the data or information cited by the plaintiffs in connection with the Gardiner

Street project is not controverted, save for the inference drawn by Mr. Nesbitt and Mr. O'Flynn that the defendants achieved 'speed to market' by the use of the documents.

1135. Messrs. Cox, Foley and Kearney say that they had their own capabilities to form appraisals and to design Gardiner Street without relying on the plaintiff's documents or information. They also say that much of the information concerned was either commonly available or was within their own skillsets or the skillsets of professionals engaged by them.

1136. Much was made by the plaintiffs of the frequency with which Mr. Cox sent emails from his "pctiger" email or other O'Flynn Group email addresses to his own personal email address. Evidence was given by Ms. Kelleher that employees were discouraged from doing this at any time because the virtual private network system available across the Group, including the plaintiffs was accessible at any location.

1137. The mere act on the part of Mr. Cox of sending documents or information from his business email address to his personal email address is not of itself evidence of unlawfulness. It may be an undesirable practice and a breach of guidelines, and it may even be reckless in terms of the security of information. However, of itself, it is not necessarily evidence of wrongdoing. Where such material is then forwarded to external parties, as occurred in this case, there is a compelling inference that the purpose of first sending them to the personal email account was to conceal the onward external transmission.

1138. There are three deficiencies in this element of the plaintiffs' case. Firstly, in respect of most, but not all, of the documents taken they have been unable to prove who was the true owner. Secondly, many of the documents referred to do not have the characteristics of confidentiality required to give rise to a claim for breach of confidentiality. Thirdly, they have been unable to prove which, if any, documents or information were used by the defendants in the Gardiner Street project or otherwise. Even with those deficiencies, a significant feature of the case is the extraordinary volume of information, including 37,677 files taken in one act,

from both the O'Flynn Group and the plaintiffs and transmitted to Mr. Cox personally and shared with his co-dependents.

1139. In *Mahon v. An Post Communications* Fennelly J. emphasised three elements required if "apart from contract, a case of breach of confidence is to succeed". The first was that the information must "have the necessary quality of confidence about it". The second was that information must have been imparted in circumstances conferring an obligation of confidence. The third element was that there must be an "unauthorised use of that information to the detriment of the party communicating it".

1140. It is clear that much of the information taken was confidential and was taken without the permission of the owners.

1141. Mr. Nesbitt says that it is "likely" that the plaintiffs' information was used. Mr. O'Flynn in his evidence postulates that the information and data must have been taken by Mr. Cox "for a reason". These claims are based on inference and theory and are not proof at the level identified by Fennelly J. in *Mahon*.

1142. The plaintiffs say that even if the defendants could have developed Gardiner Street without the information complained of they achieved "speed to market" which is all important in the student accommodation sector. They say that the defendants could not have achieved an opening for Gardiner Street by September 2017 as they did without the aid of the information taken by Mr. Cox. The defendants in contrast say that it still took a full three years to bring the project to completion and that this cannot properly be characterised as a speedy conclusion. Again, on this subject there is no direct evidence to show that without the material taken by Mr. Cox the project would have taken longer or may not have been completed at all.

1143. When this weakness is taken together with the vagueness on the part of the plaintiffs as to the true ownership of documents taken, the criteria identified by Fennelly J. in *Mahon* for an actionable breach of duty of confidentiality have not been met. That is not the end of

this matter, because the taking and releasing of any confidential information to external parties is relevant to the fiduciary duties of Mr. Cox.

1144. Mr. Cox says that in respect of certain appraisals and the formulae used for presenting appraisals and projections much of the material was generated by him.

1145. In *Allied Irish Banks Plc v. Diamond* Clarke J. considered the position regarding information or skills acquired by a person who is employed. He referred to information which a servant must treat as confidential *"either because he is expressly told it is confidential or because from its character it obviously is so, but which once learned necessarily remains in the servants head and becomes part of his own skill and knowledge applied in the course of his master's business. So long as the employment continues, he cannot otherwise use or disclose information without infidelity and therefore breach of contract. But when he is no longer in the same service, the law allows him to use his full skill and knowledge for his own benefit in competition with his former master".* An employee cannot be expected to "unlearn" the skills and information acquired. Information and knowledge in his head about how to appraise student accommodation schemes he would be free to use in his later career and business ventures.

1146. Clarke J. was considering the position of employees, and Mr. Cox was not an employee of the plaintiffs. But a person in the position of a fiduciary is under no less an obligation than an employee in this regard. His knowledge of the business of the plaintiffs rendered the plaintiffs vulnerable to the actions he took whilst he was still working for them in his senior and trusted role, and at a time when I have concluded he was a fiduciary of the plaintiffs.

1147. The relevance of this aspect of the case is that it illustrates gross disregard on the part of Mr. Cox for even the most basic obligation of confidentiality, by taking as much material as he could access, even after his resignation, retaining it for a year, and releasing it to

Messrs. Foley and Kearney at the time when he had no legitimate reason to access the information himself, let alone share it with others.

1148. My conclusion is that the consequence of the absence of proof of the ownership by individual plaintiffs of documents taken, with some exceptions, and the absence of proof of the use of documents is that no standalone remedy can be granted in respect of this aspect of the case. There is no doubt that Mr. Cox took and shared without their consent certain documents and information which was clearly the property of the plaintiffs and were confidential. The clearest examples of this are the Blackrock Heads of Terms, the Birmingham Bank Pack and the Coral Heads of Terms. Mr. Cox's fiduciary duties extended to the obligation to respect the confidentiality of the plaintiffs files and documents generally, and the taking of copies of 36,677 files and documents which were sourced from a server common to the O'Flynn Group and the plaintiffs, and the sharing of material with Mr. Foley and Mr. Kearney only to return such documents over a year later when the taking was discovered by the plaintiffs was a breach of the fiduciary duties he owed to the plaintiffs.

PART FOURTEEN: CONCLUSION ON THE PLAINTIFFS' CASE AGAINST THE FIRST DEFENDANT

1149. Mr. Cox's relationship with the O'Flynn Group and later with the plaintiffs spanned a period of eight and a half years. For the first three, 2007 to 2009, he had a consultancy role with the Group in association with his father. From 1 January 2010 to 27 April 2015, he was a full time senior employee in the Group. Tiger Developments was the entity selected as his employer for payroll and administrative purposes, and he was paid a salary of €75,000 per annum. He was principally, but not exclusively, engaged in the activities of the Tiger Developments and Victoria Hall divisions of the Group. It has never been contended that his functions or duties as an employee, with the title Investment Director, were confined to the activities of Tiger Developments alone.

1150. From early in 2010, Mr. Cox performed services also for VHML and, from early 2014, for OFCP. Neither of those companies were members of the O'Flynn Group and nothing in Mr. Cox's contract of employment required him to perform services for entities outside the Group. Those entities were the "parallel" structure through which Mr. Nesbitt and Mr. O'Flynn pursued commercial development opportunities which the O'Flynn Group could no longer pursue, including new projects requiring speculative funding and, where necessary, entering into partnerships or joint ventures with new investors. Such projects included student accommodation schemes.

1151. For his work on such projects, including Wembley, Dashwood, Birmingham and Coventry, Mr. Cox invoiced and was paid what were described as "consultancy" or "advisory" fees, in some cases directly and in others through Rockford Advisors Ltd, totalling £810,475.58, between January 2012 and July 2015.

1152. In providing services to the plaintiffs Mr. Cox was party to plans and inquiries regarding potential projects in Dublin and elsewhere. He attended and participated in internal and external meetings at the most senior level and held himself out as representing the plaintiffs in finding such opportunities and formulating plans for them, including the formulation of structures for financing. There are numerous instances where Mr. O'Flynn and Mr. Nesbitt refer such projects to Mr. Cox for investigation and follow up, with site owners, potential investors or other partners. On no occasion did Mr. Cox state that this was not within his sphere of responsibility or expertise.

1153. After his resignation from the O'Flynn Group Mr. Cox took a copy of the entire server of the London office comprising 36,677 files which was common to Tiger, VHL and VHML. Thereafter he transmitted confidential information of the O'Flynn Group and of the plaintiffs to Mr. Foley and Mr. Kearney.

1154. By the time Mr. Cox resigned on 27 April 2015, and even by the time he embarked on the Gardiner Street project in March 2014, he had developed an in depth knowledge of the

business and plans of Mr. Nesbitt and Mr. O'Flynn, much of which was rooted in his direct experience, not only of the plaintiffs (albeit that OFCP was only incorporated in March 2014) but of the O'Flynn Group going back to the start of his full time employment on 1 January 2010 and to his previous three years as a consultant to the Group. Whilst the O'Flynn Group companies (apart from O'Flynn Construction (Cork)) are not plaintiffs, all of this history contributed, firstly, to Mr. Cox's knowledge of the objectives, business plans and ambitions of Mr. Nesbitt, Mr. O'Flynn and, crucially, of the plaintiffs, and, secondly, to the manner in which the plaintiffs entrusted him with a senior role in projects pursued by VHML, including Birmingham and Coventry, and with the task of finding and following up new projects, including student accommodation schemes. The plaintiffs reposed trust and confidence in him and he had access to confidential information of the plaintiffs' plans and projects. The conduct of the parties rendered the plaintiffs vulnerable to his actions. He was a fiduciary of the plaintiffs.

1155. Mr. Cox's fiduciary duties were as follows.

1156. Firstly, to disclose to the plaintiffs' opportunities which came to his attention relevant to their business, namely commercial property development including student accommodation schemes in Dublin and elsewhere.

1157. Secondly, not to divert such an opportunity when it came to his attention for the benefit of himself or others, without their informed consent.

1158. Thirdly, Mr. Cox was under duty to account for any profits earned by the diversion of such an opportunity.

1159. Fourthly, he was under a duty to respect the confidentiality of information and documents of the plaintiffs, and not to take such information and divulge it to his co-defendants, without the plaintiffs' informed consent.

1160. To secure a release or a waiver of a fiduciary duty the consent or approval relied on must be a fully informed consent. The claim by Mr. Cox that Mr. Nesbitt, orally or when

writing on behalf of Tiger Developments, which is not a plaintiff, gave approval to Mr. Cox to pursue a project such as the Gardiner Street scheme has not been made out. The 14 July 2014 letter, signed on 8 August 2014 was signed in circumstances where Mr. Cox concealed not only the true nature of his intentions but also the very project which he had already progressed with the owner of the Gardiner Street site and others. This concealment was maintained before and after the 14 July 2014 letter, and continued until the Gardiner Steet scheme was announced publicly in January 2016.

1161. When Mr. Cox took the Gardiner Street opportunity and diverted it for his own profit and that of his co-defendants he acted in breach of the fiduciary duties described above. The remedy for this breach is that he must account to the plaintiffs for the profits earned.

1162. It matters not whether the plaintiffs would have had the resources or would in fact have pursued Gardiner Street. They were deprived of the opportunity to do so by the first defendant's breach of trust fiduciary duty and the appropriate remedy is that they are entitled to an account of the profits. See *Parr v Keystone Healthcare* [2019] 4 WLR 99.

PART FIFTEEN: LIAM FOLEY

1163. Mr. Foley commenced employment in the Group on 22 November, 1999. His employer was O'Flynn Construction Company, which later changed its name to O'Flynn Construction Cork, the sixth named plaintiff.

1164. The plaintiffs do not say that O'Flynn Construction Cork was the entity through which the Gardiner Street opportunity would have been pursued had it been disclosed by Mr. Cox. The plaintiffs say that VHML and O'Flynn Capital Partners would have pursued it.

1165. Mr. Foley resigned from the Group in April 2013. He provided services to VHML on a consultancy basis for the remainder of 2013. The consultancy was on the basis of an average of two days work per week. It was therefore entirely different to the arrangements of Mr. Cox in that Mr. Foley was clearly understood to be free to work for other clients and

undertake his own business. Mr. Foley's principal activity in the consultancy period related to the Birmingham and Coventry projects, in respect of which he took charge of tendering and other construction aspects.

1166. Mr. Foley's initial title at the time of this appointment was that of Contracts/Purchasing Manager.

1167. Although Mr. Foley commenced employment on 22 November, 1999 a formal letter of appointment was only prepared in respect of him on 24 April, 2007, by the then head of HR Laura Nolan. The copy of this contract is unsigned, and Mr. Foley said that he never received it. He accepted in cross examination that the letter broadly reflected his responsibilities and duties. That acceptance is significant, because the letter clearly expresses a duty of confidentiality and states that it "lasts even after you leave employment".

1168. Mr. Foley's basic gross salary was €70,000 per annum.

1169. In the appointment letter Mr. Foley's responsibilities are described as follows: -

- Developing purchasing strategies, policies, procedures and systems.
- Overseeing the sourcing and tender/negotiation of contracts with suppliers.
- Ensuring that partnerships and value adding relationships can be obtained and maintained for the good of the business – optimising best price, technical specifications, quality and delivery.
- Maintaining adequate knowledge of competitors' activities, business trends, price movements, etc.
- Managing key supply relationships through consistent appraisal and review to improve materials and costs.
- Managing purchasing/contracting.
- Supplying forecast pricing information for the annual budget and business plan.

- Involvement in ad hoc projects relevant to this role.

1170. The letter contained a paragraph stipulating requirements of discretion and confidentiality. It included the following: *"This duty of confidentiality lasts even after you leave employment. Upon termination of your employment for whatever reason, you are required to return all documents, papers, notes of any description or other property belonging to the company, in your possession or under your control, which relate in any way to the affairs of the company, and you must not retain copies of any such documentation."*

1171. The letter contains no reference to the 'Group' or associated companies', although, like other employees, Mr. Foley worked from time to time for Group entities other than the sixth plaintiff.

1172. In 2010 the construction director of the Group for the UK, a Mr. Peatfield left the employment of the Group. Mr. Foley was given the opportunity to fill that role and did so, moving to the UK. In that context he worked principally for Tiger Developments Limited on projects at Renville Road and St. Mary's Gate.

1173. During 2010 Mr. Foley also worked on the project at Wembley which was a VHML project. This is the only project cited on which Mr. Foley worked for VHML while employed in the Group. After resigning employment he took up the two day a week consultancy in 2013 and for a short period to 2014 relating to Birmingham and Coventry, a VHML project.

1174. The plaintiffs cite two individual items of correspondence which Mr. Foley signed on behalf of VHML. One was a letter on 3 December, 2010 authorising a third party, Clovis, payment in respect of the Wembley project. The second was an offer of employment signed on 4 December, 2012 to a Mr. Oats as Project Manager, again signed by Mr. Foley as "Construction Director" on the letterhead of VHML.

1175. The case pleaded in respect of Mr. Foley is that he was an employee pursuant to a contract of employment with the sixth named plaintiff and that he commenced full time

employment *"with the O'Flynn Group in or around 22 November 1999, although a formal contract of employment was not executed until 24 April 2007"*.

1176. It is pleaded that Mr. Foley also undertook work for VHML and APML and that he received payments for that work directly and through his company, Foley Project Management.

1177. It is pleaded that, on termination of his employment, Mr. Foley was obliged to return all documents, papers, notes of any description and other property belonging to O'Flynn Construction Cork and that it was agreed that he must not retain copies of any such documentation. It is pleaded that Mr. Foley *"owed and continues to owe a fiduciary duty and/or duty of loyalty and confidentiality to the plaintiffs"*.

1178. There is then a plea, in para. 30, which is similar to pleas made as against Mr. Cox in the following terms: -

> *"Further and/or in the alternative, if and insofar as the relationship between the plaintiffs and Mr. Foley is characterised as a consultancy or other arrangements, the said duties were express and/or implied terms of the agreement between Mr. Foley and the plaintiffs, and Mr. Foley owed the said duties to the plaintiffs arising from his senior and trusted role within the O'Flynn Group, his agreement to provide services to the plaintiffs and/or the payments made by the plaintiffs."*

1179. Finally, it is pleaded that Mr. Foley has: -

> *"acted in breach of contract and/or breach of duty by appropriating and/or obtaining certain documentation as follows:*
>
> *(a) prior to the termination of his employment, Mr. Foley sent a significant number of documents belonging to the plaintiffs to his private email address, which documents were not returned to the plaintiffs upon the said termination*
>
> *(b) the plaintiffs are not currently aware of the use to which the said documentation has been put by Mr. Foley or the defendants or any of them and*

reserve the right to deliver further particulars following further investigations and/or discovery."

1180. There is no evidence that prior to the termination of his employment Mr. Foley sent documents to his private email address which he failed to return on termination. Subparagraph (a) therefore was an incorrect 'copy and paste' from the corresponding paragraph relating to Mr. Cox.

1181. When particulars were sought of the duties said to be owed otherwise than pursuant to the contract, the plaintiffs repeat replies which are given in relation to Mr. Cox, where they state *"Further or in the alternative, to the extent that the first, third and fifth defendants are found to have provided services to and been paid by the plaintiff companies other than pursuant to the said contracts (in the case of Mr. Foley being his contract with O'Flynn Construction Cork), the first, third and fifth defendants nonetheless owed duties to the plaintiffs identical to the duties owed under the said contract and set out in full at paragraph 19 of the statement of claim".*

1182. In further replies to particulars (21 November 2016), the plaintiffs stated of Mr. Foley the following:-

"The phrase 'senior and trusted role within the O'Flynn Group' is clear and unambiguous; it is intended to mean that Mr. Foley was a senior and trusted employee within the entire O'Flynn Group. Mr. Foley was first employed in 1999 and by virtue of his long service he was entrusted with responsibility for staff and for participating in the appraisal and overseeing various projects. He was given access to confidential business information including financial information relating to projects.

1183. This allegation relates to Mr. Foley's employment with O'Flynn Construction (Cork) and has nothing to do with the parallel structure.

1184. The consultancy payments made to Mr. Foley amounted in total to €158,200. They were made on the following dates and by the following parties: -

6 January 2012	VHML	€20,000
26 October 2012	VHML	€10,000
17 January 2013	Grey Willow	€25,000
(Mr. Foley resigned as an employee in April 2013)		
20 August 2013	VHML	€19,200
25 November 2013	Albert Project Management Limited	€30,000
28 February 2014	Albert Project Management Limited	€24,000
13 May 2014	Albert Project Management Limited	€30,000
		€158,200

1185. Mr. Foley's gross salary was €70,000 but, along with others, in March 2009, he agreed to a 10% pay cut.

1186. The following observations can be made in respect of Mr. Foley's contract.

1187. Firstly, the plaintiffs were unable to prove that the contract was ever signed.

1188. Secondly, the contract is with O'Flynn Construction Company, now the sixth plaintiff. It contains no provisions obliging or requiring Mr. Foley to work for other companies in the Group, although it is common case that during the course of his employment, Mr. Foley provided services relevant to the activities of both Tiger Developments Limited and O'Flynn Construction Cork.

1189. Thirdly, the only provision of the contract said to have any effect enduring after his resignation in April 2013 is the clause requiring him to exercise *"discretion"* and to observe confidentiality, and that *"the duty of confidentiality lasts even after you leave employment"*.

1190. Insofar as the plaintiffs attach importance to the fact of Mr. Foley signing letters on behalf of VHML, namely the letter dated 3 December 2010 to Clovis and the letter of offer of employment for Mr. Oates (4 December 2012), that is the height of any case that he had a role representing VHML. There is no evidence that Mr. Foley provided services on a regular basis, or, critically, held himself out as occupying a position of authority or seniority in the

plaintiff companies, except for the following. Firstly, as an employee of O'Flynn Construction Company up to the date of his resignation in April 2013. Secondly, as a part-time consultant to VHML, Grey Willow and Albert Project Management Limited for which Mr. Foley received the payments described above.

1191. A fundamental difference between the position of Mr. Foley and Mr. Cox is that, after Mr. Foley resigned in April 2013, he was a consultant only part-time and, therefore, was under no restrictions as regards his other business activities. When Mr. Foley first became aware of Gardiner Street in December 2014, none of the considerations examined earlier in this judgment and which have led me to the conclusion that Mr. Cox was a fiduciary of the plaintiffs had any application to him.

1192. The high point of any contractual obligation on the part of Mr. Foley is his acknowledgement under cross-examination that obligation of confidentiality, lasting even after he left employment, applied to him.

1193. The next question to be considered is whether Mr. Foley breached that obligation of confidentiality.

1194. In para. 32 of the statement of claim, it is alleged that, prior to the termination of employment, Mr. Foley sent a significant number of documents to his private email address and that these were not returned to the plaintiffs on termination of employment. Particulars were sought of this allegation but not provided, and no evidence was given of any appropriation of confidential information or documents by Mr. Foley whilst he was an employee of the sixth plaintiff.

1195. Mr. Foley's first involvement in relation to the Gardiner Street project was when Mr. Cox contacted him in December 2014. On 5 December 2014, Mr. Cox sent an email to Mr. Foley forwarding an Order of Magnitude Costs Report for Gardiner Street which Mr. Cox had obtained from Kerrigan Sheanon Newman, Quantity Surveyors. Mr. Cox asked Mr. Foley to *"take a look at the attached and let me know if you think this is worthwhile information"*.

A few days before that email, Mr. Cox had telephoned Mr. Foley to inform him that he wanted to talk to him about a potential project and then Mr. Cox send the email of 5 December 2014 relating to Gardiner Street. Mr. Foley provided some general advice and comments to Mr. Cox in relation to the report of KSN and on such matters as the need to *"develop a client risk register for the project"*. Mr. Foley's evidence was that he was aware in the course of these conversations that this was a project which Mr. Cox was pursuing on his own behalf. In cross-examination, Mr. Foley agreed that he was aware also that Mr. Cox was, at the time, still a full-time employee *"in the O'Flynn Group"*, but he believed that Mr. Cox was also carrying out consultancy work outside of his employment. He did not know the detail of this.

1196. When pressed under cross-examination by Mr. Sreenan as to whether he was surprised that Mr. Foley was pursuing such a potentially large scale development whilst in the full-time employment of the O'Flynn Group, Mr. Foley said, *"It was none of my business what Patrick Cox was doing"*.

1197. Over the early months of 2015, Mr. Cox continued to progress the Gardiner Street project. He consulted Mr. Foley on a few general questions regarding the costings provided by KSN. He had separate conversations with Mr. Kearney.

1198. It was only in April 2015, a full two years after Mr. Foley had resigned from his full time position in the Group, that Mr. Cox, Mr. Foley and Mr. Kearney came together to discuss the formation of a company through which they would pursue this project.

1199. On 28 April 2015, Mr. Cox issued an email to Mr. Foley as follows: -

> *"Liam*
>
> *Three quick high level questions:*
>
> *What do you think the key activities of a new business would be (just a few points – elevator summary so to speak)?*

Briefly what do you think are the main roles for roles you, me and Eoghan would play in the company?

Lastly, what would a new company with the three of us be lacking?

Same questions going to Eoghan and I will also have the same answers written.

Patrick"

1200. Mr. Foley replied to say that he would give this some thought and revert further.

1201. On 28 April 2015, Mr. Cox emailed Mr. Foley stating:-

"The new docs for Gardiner Street are up on the planning portal if you want to look at them.

Trinity asked us to come back and meet them next Wednesday morning – two of the original six presenters have been asked back to meet board members. I am meeting both LNG and MG this week in London before the meeting so should be able to hopefully table real terms for an income strip type transaction (that's the plan anyway)."

1202. Mr. Foley acknowledged this and, in a subsequent email of 28 April 2015, Mr. Cox stated to Mr. Foley:-

"I technically resigned from Tiger Developments on Monday and now have no contract – JN has made some commitments – re new VHML contract – I have no intention of signing one – as always they managed this process exceptionally poorly."

1203. On 29 April, 2015 Mr. Foley replied to Mr. Cox in the following terms

"I am not surprised it was handled poorly – par for the course.

Seems like an ok guy but not sure he has much to offer (a reference separately to Mr. Shane O'Flynn joining the group). *You need to watch your step even more so now – hopefully, the news will be positive on Gardiner in four weeks and it won't matter either way."*

1204. On 8 May, 2015 Mr. Cox, Mr. Foley and Mr. Kearney met in Portlaoise. At this meeting they agreed a plan for the formation of their business together, which led ultimately to the establishment of Carrowmore Property Company Limited in August 2015 in which Mr. Cox, Mr. Foley and Mr. Kearney became the directors and shareholders. Mr. Foley began full-time work with Carrowmore in January 2016.

1205. On 20 May, 2015 Mr. Cox emailed Mr. Kearney and Mr. Foley with a copy of the draft O'Flynn Capital Partners brochure stating the following:

> *"See attached for your information. This is the proposed OFC brochure going to print. The company's goal is to be predominately a development partner to external capital.*
>
> *At this point I couldn't do much less in terms of involvement in this company.*
>
> *I am interested in whether you think there are any themes you could rob from this?*
>
> *Also we should all be working on our personal bios and circulate for comment. Lets try and get a first draft out by close of play this week. Lastly look at websites and circulate any that you think are interesting as a comparison 'template'".*

1206. In Mr. O'Flynn's evidence he expressed his disappointment at the tone of this email. He said that it implied that there was a scheme being formulated by the three personal defendants to "rob" themes or information from the plaintiffs. He was particularly surprised to see that there were no responses from the other personal defendants saying that this was not something that they should be doing.

1207. Thereafter Mr. Cox, Mr. Foley and Mr. Kearney continued their engagement in relation to the Gardiner Street development, including discussions about the engagement of professional advisors, fee structures and the like.

1208. In the context of discussions between Mr. Cox, Mr. Foley and Mr. Kearney around the their respective profit shares in the Gardiner Street project, Mr. Foley wrote an email to Mr. Cox on 16 December, 2015. This is an email to which the plaintiffs attach great importance in

the support of their allegation of a conspiracy between the personal defendants going back over a long period of time. The email reads as follows:

"Patrick,

First of all I just want to reaffirm how much I am looking forward to getting stuck into Gardiner Street and to the general work of Carrowmore Property Limited. Its been a long lead in and I can't wait to base myself in Fitzwilliam Square.

Thanks for reverting promptly on Monday as promised and for reassessing the profit levels as discussed the previous Friday.

I have given it a lot of thought over the past few days, including the brief history of how we got to this point. We (you and I) have explored a number of opportunities over the last five year period with the aim of establishing a business together. This included dalliances with Coral, Ryan McGarry, Colin Murphy, RFM, RBS and other potential opportunities. Ultimately none came to fruition but were pursued generally on equal footing.

You mention risk/reward at Gardiner Street and I understand and respect that, but the reality is that I would have been in at the very first opportunity taking an equal risk had it been offered. Had the roles been reversed I believe I would have aimed to involve you very early as I did in RFM, which I know would not have been nearly as lucrative as Gardiner Street is likely to be. Notwithstanding this the intent was there on my part. I did not hesitate when you suggested setting a business up in Dublin. Ultimately the point I am trying to make is that we do have some history. For this reason and being mindful of where the responsibility for project delivery rests, I am finding it hard to reconcile why Eoin and I are being treated on an equal footing.

I have some ideas in relation to how this can be finalised and my preference is to do it in person on Monday when we meet. Alternatively I am out and about tomorrow and can discuss on the phone or will be free all day on Friday.

In all of this I am conscious of your desire to close this issue out; at this stage I am equally keen.

Regards,

Liam Foley."

1209. The context of this email was that Mr. Foley was resisting a proposal by Mr. Cox in which he and Mr. Kearney would be placed on an equal footing in the context of the profit participation in Gardiner Street. He is saying that his historic relationship with Mr. Cox was such that he Mr. Foley should not be "relegated" to a shareholding corresponding only to that proposed for Mr. Kearney.

1210. The plaintiffs in submissions and in cross-examination both of Mr. Foley and of Mr. Cox said that the references in the third paragraph of this email to previous "dalliances" with various parties suggest that over a period of five years Mr. Cox and Mr. Foley were conspiring to enter business together at a time when they were both in the full-time employment of the O'Flynn Group. Mr. Foley's evidence was that this was no more than Mr. Foley himself attaching weight, in the context of the profit share discussions, to previous discussions the two had about the potential for future work together in the 'post O'Flynn Group era' meaning some point in the time they were no longer in the employment of the Group.

1211. Insofar as this email is the "high point" of the plaintiffs' evidence of conspiracy, it is no such evidence. I reach this conclusion for the following reasons.

1212. Firstly, the evidence of Mr. Foley to the effect that he wrote this email in the context of "pushing back" against an initial proposal concerning profit share was clear and credible. It was in that context that he was "talking up" the prior involvement between the two men.

1213. Secondly, there is no rule of law or other principle which would prohibit two or more persons employed by the same company or firm having conversations about what their future may hold if at some point ahead in the future they were no longer in the same employment.

This is no different to any fellow employees speculating on whether they might in the future form their own business. It is not evidence of intent to harm the interests of their then employer as the plaintiffs allege. (See *AIB v. Diamond*). Even if it were treated as such evidence, the two had different direct employers, and the common "group" employer was the O'Flynn Group itself, not a plaintiff in this case.

1214. Mr. Foley said that insofar as he ever had any conversations with Mr. Cox about such matters they must be seen in the context that he had over a period of time regarded his employment position as precarious and therefore that they needed to have "some sort of a plan B should the O'Flynn Group collapse which was a possibility".

1215. I have described earlier the documents which Mr. Cox circulated to Mr. Kearney and Mr. Foley. Some of these were confidential and Mr. Cox had no business sharing with Mr. Foley and Mr. Kearney such items as the confidential Heads of Terms agreed in August 2014 between VHML and the Blackrock Group. However, I have also noted earlier the absence of any evidence of usage of these documents by the defendants.

1216. In April 2013 Mr. Foley resigned from the O'Flynn Group. Insofar as thereafter he provided consultancy services to VHML or other plaintiffs, his role was entirely different to that of Mr. Cox. It was project specific and it has been described as project management, and management of tenders, particularly in relation to Birmingham and Coventry. He was required to dedicate only two days per week to this consultancy and was free to pursue other projects. He was not therefore in the position of a fiduciary such as I have found applied to Mr. Cox. None of the evidence which led me to the conclusion that Mr. Cox had placed himself in a position of a fiduciary applies to Mr. Foley.

1217. Insofar as Mr. Foley had any obligation of confidentiality after the termination of his employment, there is no evidence that he himself took any material from any of the plaintiffs. Any information or documents of the plaintiffs which came into his possession from December 2014 onwards reached him through Mr. Cox and was not therefore taken by him.

PART SIXTEEN: EOGHAN KEARNEY

1218. Mr. Kearney joined the O'Flynn Group in September 2006 He is a chartered accountant. His employer was O'Flynn Construction Company now O'Flynn Construction Cork, the sixth named plaintiff from 4 September 2006 to 13 July 2011, the date he resigned.

1219. No signed contract of employment in respect of Mr. Kearney was produced. The plaintiffs put into evidence a draft of a letter of appointment dated 24 April, 2007 confirming his appointment as "Acquisitions Manager" of the sixth named plaintiff. That letter noted his commencement date as 4 September, 2006.

1220. The letter was on the headed notepaper of O'Flynn Construction Company (as it then was). It contained a provision requiring Mr. Kearney to exercise "discretion" and stating, "this duty of confidentiality lasts even after you leave employment."

1221. As in the case of Mr. Foley, when Laura Nolan was appointed as a HR manager of the Group in 2007, she undertook a process of preparing letters of this nature and prepared one for Mr. Kearney.

1222. Mr. Kearney said that he does not believe he ever received that letter. Mr. Kearney confirmed that his title was "Group Acquisitions Manager" and acknowledges that his role was to act in that capacity in respect of all companies in the O'Flynn Group.

1223. Mr. Kearney acknowledged that the letter from Ms. Nolan, describing him as "Acquisitions Manager" which contained a confidentiality clause, although never seen or signed by him, contained nothing which would surprise him.

1224. After resigning Mr. Kearney became a consultant in sectors unrelated to the plaintiffs or their business. In May 2013, he was engaged by Mr. Nesbitt to undertake a research report into the Dublin residential property market. He produced a report in May 2013 on "viability of Dublin Residential Property Market Development". Mr. Kearney invoiced Tiger Developments for the report. Mr. Nesbitt subsequently instructed him to invoice VHML which he did, and the invoice was paid.

1225. The report of May 2013 prepared by Mr. Kearney includes as one of its appendices a sample "house site/development appraisal/site residual calculation". This is in a format similar to the format used for student accommodation schemes which identify the gross development value of a site firstly by reference to the income generating capacity of the site used to calculate development value. There is then deducted the project construction and other costs including contributions to infrastructure, planning fees, professional fees and other contingencies, resulting in appraised "residual site value".

1226. Mr. Kearney's evidence was that this was a sample development appraisal and that he did not believe that this form of appraisal would ever be confidential or a trade secret, unless in any particular case it contained information relating to a "live" opportunity. He said that the contents of such appraisals are generally market knowledge. The only confidential elements are typically such items as the purchase price of the site and project specific risks.

1227. Mr. Kearney said that the Dublin Development Appraisal formulated by Mr. Cox in relation to Gardiner Street and which it is acknowledged was a later iteration based on the so called "Bridewell Street appraisal" was no more than a basic form of such appraisal which would be prepared very quickly without the use of any confidential information previously seen by Mr. Cox. He said that the format of these appraisals is "the opposite of a trade secret".

1228. Mr. O'Flynn disagreed with Mr. Kearney's description of these development appraisals. He said that it is the inputs to the appraisal which are critical and it was clear that Mr. Cox had accessed in the "Bridewell Street appraisal" direct information without which such an appraisal could not be made.

1229. There is no direct evidence that in formulating appraisals or other information relating to Gardiner Street use was actually made of information obtained or retained by Mr. Cox which had the necessary character of confidentiality such as would meet the test in *Mahon v. An Post Publication.*

1230. In his evidence in chief Mr. Kearney informed the court that in fact he had used seven-line items from the so called "Chester Operating Budget" which Mr. Cox had emailed to him on 30 June, 2015 along with other documents.

1231. This budget was among the items which Mr. Cox had obtained from the hard drive copied for him by Ms. Jennings, and which Mr. Cox ackowledged that he ought not to have circulated to Mr. Kearney. The items from the Chester operational budget were costs associated with such items as telephones, internet, contract cleaning, cleaning materials, insurance, planned maintenance and canteen supplies. Mr. Kearney insisted that when he received this costs budget and other documents at the time (including the Birmingham Bank Pack) he did not consider that there was anything sinister or unusual about the transmission. He believed that he was receiving these documents in good faith. He said that he made no use of the Birmingham Bank Pack, but acknowledged that he had used the cost figures in respect of the items mentioned above.

1232. Mr. Kearney said that he did not believe that the figures were in themselves confidential, as they could be sourced in other ways. He added that in as much as he used such information as part of the formulation of pricing for negotiations with GSA (Global Student Accommodation) GSA had relied in their own estimates of costs in valuing the project.

1233. Mr. Kearney was heavily involved in the preparation of the business plan submitted to NAMA in April 2010. He agreed in cross examination that this meant that he became privy to extensive information in relation to the affairs of all companies in O'Flynn Group and said he would have "felt under a duty to those companies not to disclose their information".

1234. Mr. Kearney's first knowledge of the Gardiner Street development was in the end of August or early September 2014 when Mr. Cox contacted him to say that he had acquired an option to purchase the Gardiner Street site with a view to securing planning permission for a

student accommodation scheme. Mr. Kearney's evidence was that in the initial approach the intention was that the site would be acquired and then sold on.

1235. Mr. Cox asked Mr. Kearney if he would assist him in appraising the site and provide him with support in approaching potential investors or acquirers.

1236. On 4 September, 2014 Mr. Cox sent to Mr. Kearney the "Dublin Development Appraisal". That is the Gardiner Street appraisal which is said to have first originated as the "Bridewell Street appraisal".

1237. Mr. Cox asked Mr. Kearney if he would look at this appraisal and assist in speaking with potential purchasers.

1238. The next day 5 September, 2014 Mr. Kearney sent a copy of the appraisal to Mr. Redmond at Corean who had connections with potential investors notably York Capital.

1239. In Mr. Kearney's email to Mr. Redmond read as follows:

> *"Willie,*
>
> *Please meet Patrick Cox, an expert in student housing and former colleague who has a very exciting up market opportunity in Dublin 1.*
>
> *As discussed earlier, please note the sensitivities around the sale of this development and treat in the strictest of confidence.*
>
> *Per the attached model, the scheme produces a very attractive IRR. I have also provided some Dublin student accommodation market research by Knight Franke, the leading agents for this sector".*

1240. It was put to Mr. Kearney in his cross examination that the second paragraph quoted above regarding "sensitivities" and confidentiality meant that Mr. Kearney was aware of the fact that Mr. Cox was seeking to conceal the fact of this opportunity from the plaintiffs. Mr. Kearney said that his understanding of the position was that because Mr. Cox had secured only a time limited option and had not yet obtained planning permission, it was entirely normal and reasonable to ask any potential counterparty to treat the matter in confidence. He

put Mr. Cox in touch with a number of potential investors with whom Mr. Cox progressed discussions.

1241. Mr. Kearney's next involvement in the matter was in May 2015. This was when the three personal defendants Mr. Cox, Mr. Foley and Mr. Kearney met on 8 May, 2015 at Portlaoise. At that point they discussed the setting up of a new business together. Mr. Kearney's evidence was that this was the first time he had seen Mr. Foley since he left the O'Flynn Group in 2011.

1242. Mr. Kearney said that when he received the Birmingham Bank Pack and related documents from Mr. Cox on 30 June, 2015 he had not asked for this and did not pay attention to those documents. The Chester Operational Budget was the only one of these items which he had opened when he received, and he did not look at any other of the material sent to him.

1243. Mr. Kearney asked Mr. Cox whether he was "ok to do this", meaning to pursue Gardiner Street, having regard to the fact that Mr. Cox was still, as far as Mr. Kearney was concerned, employed in the O'Flynn Group. Mr. Cox replied that he had "a letter", but Mr. Kearney did not ask Mr. Cox any more questions about that. He did not ask to see the letter and saw it for the first time in the context of these proceedings.

1244. The evidence of Mr. Kearney was that no part of his work in preparing appraisals or presentational material in relation to Gardiner Street was dependent on the use of information passed to him by Mr. Cox.

1245. Mr. O'Flynn said that he did not believe that the defendants could have progressed Gardiner Street without the information contained in this material obtained or taken by Mr. Cox.

1246. Mr. Nesbitt said that if he were to have set about drafting the documents required without the benefit of precedents and templates used and which belonged to the plaintiffs, he would have been unable to do so. He said that these documents *"built up by the Group over many years tried and tested projects and without the benefit of these documents the*

defendants would never have been able to proceed with the development of Gardiner Street and certainly could not have done it at the speed they did it and they would have had to engage more experts risking further the exposure of their involvement in the Gardiner Street project."

1247. Mr. Nesbitt also used phrases like "there had to be a purpose for which Patrick Cox emailed all of these documents to Eoghan Kearney". He said that the various emails to Mr. Kearney and Mr. Foley attaching documents from the O'Flynn Group are examples of the fact that Mr. Kearney knew that the documents being used for Gardiner Street comprised the plaintiffs' documents and he believes that there was nothing to suggest that Mr. Kearney had any difficulty with this.

1248. The plaintiffs' evidence on this subjects suffers a number of flaws. Firstly, Mr. Nesbitt and Mr. O'Flynn consistently referred to documents of "the plaintiffs" without identifying which plaintiffs are concerned and generally conflating the plaintiffs with the O'Flynn Group, which is not a plaintiff.

1249. Secondly, insofar as documents are said to have evolved over 20 years or more then clearly, they are documents not of the first five plaintiffs at least, but of the O'Flynn Group, with the exception of the sixth named plaintiff.

1250. To sustain a claim for breach of a duty of confidentiality against Mr. Kearney, it is necessary for the plaintiffs to show that he was under such a duty, whether pursuant to a contract of employment or otherwise. As far as concerns the contract of employment, Mr. Kearney's evidence is that he never signed a contract in the form which has been presented to the court, although he acknowledged that its contents such as obligations of confidentiality would apply to him.

1251. Mr. Kearney's employment ended on 1 July, 2011, more than three years before he was contacted by Mr. Cox in relation to Gardiner Street.

1252. There is no allegation or suggestion that Mr. Kearney himself took and retained any material or documents in breach of his obligations to his employer. Insofar as he came into possession of any documents owned by any of the plaintiffs, he did so by receiving them from Mr. Cox

1253. There is no doubt that extensive material relating to O'Flynn Group companies was passed by Mr. Cox to Mr. Kearney and Mr. Foley, much of it even after Mr. Cox had resigned, a fact of which they were aware.

1254. The allegation that this material was used to further the Gardiner Street scheme is based for the most part on inference. Some elements of the evidence support that proposition notably the evolution of what was originally the Bridewell Street appraisal to become the Dublin Development Appraisal. But the Bridewell Street appraisal was never the property of O'Flynn Construction (Cork), which is the only company with which either Mr. Foley or Mr. Kearney had a contractual relationship when employed.

1255. There is no evidence to support a case that Mr. Kearney was a fiduciary of any of the plaintiffs, or that he owed continuing duties to them more than three years after ceasing employment with the sixth plaintiff. Whilst he was an employee, he clearly owed duties of loyalty, fidelity and confidentiality to the sixth plaintiff. But, as in the case of Mr. Foley, none of the characteristics of the relationship which lead to the conclusion that Mr. Cox was a fiduciary to the plaintiffs apply to Mr. Kearney.

1256. I am also conscious that the evidence given repeatedly by Mr. O'Flynn was that if the Gardiner Street opportunity had not been diverted in the manner complained of by Mr. Cox, it would have been pursued either by VHML or O'Flynn Capital Partners. Neither of those entities had any relationship with Mr. Kearney by the time he became involved in Gardiner Street.

PART SEVENTEEN: CONSPIRACY

1257. In *Sheehan v. Breccia* [2020] IEHC 256 the court considered the essential elements of the tort of conspiracy and cited with approval the following passage from Halsbury's Laws of England, Vol. 97 2015:

> *"713. Essential ingredients of tortious conspiracy*
>
> *• In order to make out a case of conspiracy the claimant must establish;*
>
> *(1) An agreement between two or more persons, which either:*
>
> *(a) where the means are lawful, is an agreement the real and predominant purpose of which is to injure the claimant. ('unlawful objects conspiracy') or*
>
> *(b) where the means are unlawful, is an agreement an intended consequence of which is to injure the claimant ('unlawful means conspiracy') and*
>
> *(2) that acts done in execution of that agreement result in damage to the claimant."*

1258. The plaintiffs allege that the defendants have perpetrated an unlawful means conspiracy against them. Paragraph 37 of the statement of claim pleads as follows:

> *"Further and/or in the alternative, from in or around January 2014 to date, on dates and at times presently unknown, the defendants, their servants or agents have unlawfully combined and conspired to injure the plaintiffs (or some of them) by an unlawful means, namely by the unlawful acts of Mr. Cox, Mr. Kearney and Mr. Foley herein before set out. The said unlawful acts were done by the persons or person on behalf of itself and/or themselves and its or their co-conspirators in furtherance of the said conspiracy".*

1259. The defendants sought further particulars of this allegation. In replies the plaintiff stated that the plea had been fully particularised in the statement of claim and that the "unlawful means are the breaches of contract and duty identified at paras. 25, 32 and 36 of the statement of claim".

1260. Paragraph 25 of the statement of claim is the allegation that Mr. Cox acted in breach of contract and/or breach of duty by failing to disclose certain commercial opportunities to the plaintiffs and/or diverting them to the benefit of the defendants and appropriating and retaining certain documentation. The particulars given of that allegation are particulars relating to the project at Gardiner Street, a project at Smithfield, and the taking of confidential information.

1261. I have concluded already in this judgment that Mr. Cox acted in breach of fiduciary duties to the plaintiffs in diverting the Gardiner Street opportunity. No such fiduciary duties were owed by the third and fifth named defendant and that no cause of action in contract has been made out against any of the defendants.

1262. Paragraphs 32 and 36 of the statement of claim are the allegations as against Mr. Foley and Mr. Kearney that they acted in breach of contract or breach of duty by receiving and/or appropriating and retaining confidential documents and information. Again, I have concluded that no such case has been made out.

1263. The plaintiffs then sought particulars of the "precise facts and matters on which the plaintiffs rely in support of the alleged unlawful combination and conspiracy". The plaintiffs replied as follows:

> *"33A(iv) This plea has been fully particularised and, in any event is a matter of evidence. Without prejudice to that position the first defendant, third defendant and fifth defendant are each directors of Carrowmore Properties Limited the sixth defendant. It is believed that each of them has had access to the vast quantity or much of the vast quantity of highly confidential commercially sensitive material of the plaintiffs and each of them removed by Mr. Cox and that the said material and information has been used by the defendants and each of them in relation to the business and operation of Carrowmore Property which is now undertaking work in competition with the plaintiffs and each of them with the benefit of the confidential*

information misappropriated from the plaintiffs and which has pursued the clients and investors of the plaintiffs in relation to business opportunities which Carrowmore Properties will be unlikely to have been in a position to pursue without the benefit of the misappropriated material and in particular without the significant sums of monies paid by the plaintiffs to the defendants as an incentive to remain working with the plaintiff company when he was at that time in fact planning and conspiring to compete with them."

1264. The particulars of conspiracy given rest on a series of propositions which are not made out on the evidence examined already in this judgment. The first is an assertion that "it is believed that each of the defendants had access to a vast quantity of confidential commercially sensitive material removed by Mr. Cox". Not all of the documents taken by Mr. Cox were transmitted to his co-defendants. The evidence does not prove an allegation that "each" of the defendants, apart from Mr. Cox, had access to a "vast quantity of… material".

1265. The second is that documents taken by Mr. Cox were used by the defendants in relation to the business and operation of Carrowmore Property "which is now undertaking work in competition with the plaintiffs and each of them … and which has pursued the clients and investors of the plaintiffs in relation to business opportunities which Carrowmore Properties would be unlikely have been in a position to pursue without the benefit of the misappropriated material". Mr. Cox took a vast amount of information which was common to the O'Flynn Group and the plaintiffs. But there is a dearth of evidence to support the allegation that pursuant to a conspiracy, each of the three personal defendants had such access and used it in the manner alleged.

1266. Thirdly, it is said that the defendants and Carrowmore would have been unable to pursue the opportunities they pursued "without the benefit of this misappropriated material and in particular without the significant sums of money paid by the plaintiffs to the

defendants as incentive to remain working with the plaintiff companies when he was at that time in fact planning and conspiring to compete with them".

1267. The plaintiffs have not established that the defendants would have been unable to pursue Gardiner Street without the benefit of the documents taken by Mr. Cox, some of which were shared with his co-defendants.

1268. As regards the payments made, it is part of Mr. Cox's case regarding the 14 July letter that he told Mr. Nesbitt he would be using the £500,000 paid to Rockford Advisors for a property development on his own account. The allegation that this and other payments were made to the defendants "as incentive to remain working with the plaintiff companies" is yet another conflation of the plaintiffs with the O'Flynn Group.

1269. The only non-salary payment ever made to Mr. Kearney was his fee for one report in May 2013, two years after he left the employment of the sixth plaintiff.

1270. Mr. Foley, either directly or through his company Foley Project Management Limited, received non-salary payments totalling €158,200. The first €55,000 was paid as to €20,000 in January 2012, as to €10,000 in October 2012 and as to €25,000 in January 2013. Mr. Foley left the employment of the sixth plaintiff in April 2013. Further payments totalling €103,200 were made thereafter, and it is not disputed that they related to his consultancy work dedicated to the Birmingham Coventry project. There is no evidence linking these payments to Gardiner Street, or that they were made to incentivise Mr. Foley to remain working with the plaintiffs.

1271. I have already concluded that Mr. Cox acted in breach of his fiduciary duties to the plaintiffs. I concluded also that no cause of action for breach of contract has been made out against him.

1272. As regards Mr. Foley and Mr. Kearney I have concluded that they did not owe fiduciary duties to any of the plaintiffs or act in breach of contract. Therefore, on their part no unlawful means have been established.

1273. The consequence of these conclusions is that in his breach of fiduciary duty to the plaintiffs Mr. Cox was alone. There is no evidence of agreement between two or more persons intending to injure the plaintiffs such as would be required to prove conspiracy. Although "lawful means" conspiracy is not pleaded, it is appropriate to record that no evidence was adduced of a predominant purpose of injuring the plaintiffs, which is a required ingredient of 'lawful means conspiracy'.

1274. Each of Mr. Foley and Mr. Kearney were questioned as to whether they had any concern as to whether Mr. Cox, being a fulltime employee of the O'Flynn Group, was "free" to pursue the Gardiner Street opportunity for his own benefit and theirs. Each of them gave evidence that they had raised this question with Mr. Cox and that he replied to the effect that he had "a letter" which approved the pursuit of this opportunity.

1275. It is not appropriate for this court to speculate as to whether Mr. Foley and Mr. Kearney would have acted differently if they had seen the letter.

1276. The question then arises as to whether Mr. Foley and Mr. Kearney were under any obligation to pursue these inquiries any further having regard to the amounts at stake and their knowledge of the business of the O'Flynn Group and of the fact that Mr. Cox was still in the employment of the O'Flynn Group. Although they had that knowledge, there is no evidence that Mr. Foley and Mr. Kearney had an understanding of all the features of the relationship between Mr. Cox and the plaintiffs, including the detailed information analysed earlier in this judgment and which led this court to the conclusion that Mr. Cox was a fiduciary of the plaintiffs and that he breached his fiduciary duty.

1277. Mr. Foley confirmed that his knowledge of Mr. Cox was that he still a fulltime employee of the O'Flynn Group, and that he was doing "some consultancy work" for Mr. Nesbitt's companies.

1278. Finally, the plaintiffs rely on the email exchanges between Mr. Foley and Mr. Cox in two separate respects. Firstly, the December 2015 email in which Mr. Foley recites previous

"dalliances" going back a period of five years. In this email, Mr. Foley is referring clearly to conversations had between himself and Mr. Cox about possible ventures in the future. Any two or more employees are entitled, even whilst still employed by the same employer, to have conversations about what they might do in the future or what business ventures they might follow on their own account. This is not evidence of actionable conspiracy.

1279. In the email exchanges between Mr. Foley and Mr. Cox in the immediate aftermath of Mr. Cox's resignation on 27 April 2015, Mr. Foley said to Mr. Cox *"You'd better watch your step more now, or even more now"*. The plaintiffs treat this email as evidence of Mr. Foley being on notice of the importance of continuing to conceal the Gardiner Street scheme. Mr. Cox and Mr. Foley said in their evidence that this was simply a reflection of Mr. Foley's disappointment at the manner in which he was treated when he resigned. Mr. Foley said that, when he informed Mr. O'Flynn of his intention to resign in April 2013, Mr. O'Flynn had taken this very badly, leading to confrontational discussions between them. Mr. Foley was the author of the words *"You had better watch yourself even more now"*. Mr. Foley's description of the meaning of this expression by reference to his own experience cannot be gainsaid. The use of those words is not evidence of an actionable conspiracy.

1280. The plaintiffs' reliance on these emails, whilst informative as to Mr. Cox's disregard for his fiduciary duties, is insufficient to prove the essential ingredients of an action for conspiracy, whether by unlawful or lawful means.

PART EIGHTEEN: INDUCEMENT AND PROCUREMENT OF BREACH OF CONTRACT

1281. The plaintiff's claim, in para. 38 of the statement of claim as follows:

> *"Further and/or in the alternative, Carrowmore, its servants or agents, well knowing the contractual and other obligations of Mr. Cox, Mr. Kearney and Mr. Foley to the plaintiffs or any of them (hereinbefore set out) wrongfully induced and procured the*

various breaches of contract and/or other obligations hereinbefore set out and/or unlawfully and without justification unlawfully interfered with the contractual and other entitlements of the plaintiffs."

1282. Carrowmore is defined in paragraph 7 of the Statement of Claim as the Sixth Defendant, Carrowmore Properties Limited. In that company Messrs. Cox, Foley and Kearney were directors and held the shares in equal proportions.

1283. When particulars were sought of the contractual and other obligations of which it is alleged Carrowmore induced and procured breaches, the plaintiffs simply referred to the contractual and other obligations recited earlier in the statement of claim. The only breach of contract or of duty which I have found to be made out in the case is breach of fiduciary duty to the plaintiffs on the part of Mr. Cox. I have made no such finding against Mr. Foley or Mr. Kearney.

1284. In paragraph 12 of the Statement of Claim it is alleged that the "acts, omissions, knowledge, concerns and beliefs of Mr. Cox, Mr. Foley and Mr. Kearney are attributable to Carrowmore". When particulars of this allegation were sought the plaintiffs' only reply was to state: -

"This plea is fully particularised and is a matter for evidence and/or legal submission. Without prejudice to that position, as directors of Carrowmore, the acts and knowledge of the First, Third and Fifth Defendants are deemed to be imputed to and attributable to Carrowmore as a matter of law…".

1285. Having found that no actionable breach of contract or breach of duty was perpetrated by Mr. Foley and Mr. Kearney, I am then required to consider whether the position of Mr. Cox as the Managing Director of Carrowmore is of itself sufficient to attract this "attribution" to Carrowmore in respect of his actions. In Carrowmore Property Gardiner Limited, not Carrowmore Properties Limited, Mr. Cox was Managing Director and the owner of 80% of

the shares. In the other companies, including Carrowmore Properties Limited the shares are held equally between the three.

1286. No submissions were made or authority advanced in support of the proposition that "as a matter of law" the actions of its directors and shareholders, let alone a proposition that the actions of one of three directors and shareholders are attributable to Carrowmore. The proposition that this consequence should follow merely because the three personal defendants, against two of whom I have found no unlawful acts, are the directors and shareholders of Carrowmore, cannot without more be a ground to attribute their actions to Carrowmore.

1287. The next element of the "inducement/ procurement" aspect of the case is the allegation that Carrowmore induced and procured breaches of "other obligations" and interfered with "other entitlements of the plaintiffs". The only particulars given are to refer to the obligations and entitlements recited in the Statement of Claim, a circular reference to breach of contract, breach of fiduciary duty and the plaintiffs' rights to confidentiality.

1288. Again, the high point of this allegation is that there must be attributed to Carrowmore the knowledge of its directors and shareholders. There is some force in the submission that such knowledge must be attributed to Carrowmore. But the submission that Carrowmore, being owned and controlled by the personal defendants, itself induced those same persons to act in breach of contract and other obligations to the plaintiffs, is circular and artificial. It cannot be said that the persons who collectively exercise control of Carrowmore, have themselves been induced by that entity to breach contractual and other entitlements of the plaintiffs. This is no more than a fall back argument, to supplement the flawed conspiracy case, and relies on the direct claims of breach of contract and conspiracy which also fail.

PART NINETEEN: THE LONG BREAK IN THE TRIAL

1289. Before I turn to the special pleas made in the Defence, and other objections made by the defendants, it is necessary to refer to the interruption of fourteen months caused by events described below. This is relevant because it was not only disruptive to the conduct of the hearing but a number of issues arose in the 'second phase' which were not put to witnesses who had completed their evidence, including cross-examination, and were not recalled in the second phase. Another unsatisfactory feature was the expansion of the range of issues which were introduced in the case as a consequence of documents produced and inspected during the interval.

1290. When this matter was first listed for hearing it was set down, based on the estimate by the parties, for eight days. Some weeks before the commencement of the trial, the estimate was revised, and an application was made to court to extend the allocated time to sixteen days, which was permitted.

1291. When the case started at hearing, no revision was proposed to that estimate.

1292. Two weeks into the hearing, it became evident that the estimate of four weeks was inadequate. Another event occurred which caused an extraordinarily long interval in the trial.

1293. When this court sat on day 12, which was the third day of the direct examination of Mr. Nesbitt, one of the Senior Counsel appearing was delayed. The court was informed that Counsel was appearing at the same time before the Court of Appeal for a mention of this case. That listing was an appeal against a decision of the High Court (Barniville J. as he then was) refusing certain applications made by the defendants for further and better discovery of documents. A date was now being sought for the hearing of that appeal.

1294. This court commenced the hearing of the action, and it ran into its 12th day without the court being aware or informed of the existence of any outstanding proceedings relating to discovery, let alone an appeal pending before the Court of Appeal. None of the parties to the case either at the opening or over the course of the first eleven days at hearing even

mentioned that matter to this court. It was only when senior counsel appearing in the trial was delayed because of his appearance in the Court of Appeal relating to the discovery matter, that the parties informed this court of the existence of the outstanding discovery issue and appeal.

1295. The court was then informed that the matters the subject of the appeal touched on the evidence which Mr. Nesbitt, then in the witness box on the third day of his evidence in chief, was intending to give relating to the NAMA defence and the disposal of assets in Birmingham and Coventry. It was suggested that his evidence would then be *"paused"* so that he would not give evidence relating to the matters affected by the ongoing discovery dispute, until after the Court of Appeal had determined that appeal.

1296. By this time, it had also become clear that the parties' revised estimate of four weeks to completion of the trial was grossly inadequate.

1297. The parties indicated that their preferred course at this point was to continue with the evidence of a number of other witnesses. They proposed that the hearing would then be adjourned on consent and resume after the Court of Appeal had heard and determined the discovery appeal.

1298. The court acceded to this request. Mr. Nesbitt was 'paused'. Four other witnesses gave their evidence, and the trial was adjourned. None of the parties or the court could have foreseen what occurred next.

1299. The Court of Appeal promptly heard the appeal and dismissed it by a judgment delivered on 2 April 2020. Prompt as this was, it was not before the onset of the COVID-19 pandemic, which precluded the court, at least in the immediate term, resuming the in-person trial. The parties then appeared before this court remotely with a view to fixing a date for the resumption of the trial.

1300. The defendants were willing to resume the trial on the basis of a remote hearing. The plaintiffs resisted this, on the grounds that there would be inequality in terms of the mode of

taking evidence. Eleven of the plaintiffs' witnesses, including Mr. O'Flynn, who gave evidence over seven days, had given their evidence and been cross examined in person. Mr. Nesbitt had given part of his evidence in person over the course of three days. The effect of resuming remotely would be that Mr. Nesbitt's resumed evidence and his cross examination, and the evidence and cross-examination of all the defendants' witnesses would be conducted on a remote basis.

1301. This gave rise to a contentious application. The plaintiffs' objection at this time was that in circumstances where their witnesses had attended in court in person and been cross-examined (except for Mr. Nesbitt) in person, the defendants' witnesses would all do so remotely, thereby causing inequality in the mode of presentation of evidence and a potential injustice. Whilst remote hearings soon became commonplace, even with witness testimony, they were relatively new for cases of this nature. Secondly, no party knew how long the restrictions would last. I therefore accepted the plaintiffs' objection at that time. In doing so I made it clear that the matter should be kept under regular review, particularly if the restrictions continued for a prolonged period which they did.

1302. Many months later the plaintiffs changed their mind and the parties on consent applied to resume the case at hearing using the remote platform Trialview. The hearing then resumed, with day 15 on 21 April 2021, over fourteen months after the adjournment.

1303. As it transpired, the length of the interruption was also contributed to by other events. Firstly, a new application was issued in the Commercial List by the defendants for inspection of documents of discovery over which privilege had been asserted. That application was opposed, and was listed for a remote hearing before this court, but ultimately resolved by agreement between the parties.

1304. Secondly, an application was made by the plaintiffs for leave to amend the Statement of Claim to plead a new document, a Deed of Confirmation of the Carbon Assignment which was executed on 8 October 2020 by Carbon and the plaintiffs during the break in the trial.

That application was opposed and on 13 January 2021 this court delivered judgment refusing leave to amend the Statement of Claim ([2021] IEHC 37).

1305. Thirdly, extensive further correspondence was exchanged between the parties. In the course of this correspondence the defendants delivered on 3 March 2021 "Supplemental Particulars" purporting to be further relies to the plaintiffs' Notice for Particulars dated 27 October 2016 in respect of paragraph 4(ii) of the Defence (the 'NAMA Defence').

1306. The plaintiffs objected to the delivery of these new particulars, giving a number of reasons. Firstly, no leave to deliver new particulars had been sought or granted. Secondly, the particulars were not in truth particulars of the pleaded case. Instead, they contained allegations, for the first time as far as the pleadings were concerned, of fraud. Thirdly, that the particulars of alleged fraud were sought to be introduced in this fashion because the defendants knew that an application to amend the Defence to make such a serious new claim at such a late stage would be refused by the court.

1307. The plaintiffs did not object to these 'March Particulars' being opened before the court, but maintained their objection that they contained new allegations which were not pleaded and therefore are not properly before the court.

1308. These objections were valid, but the contents of the March Particulars are informative in recording the allegations made, and the extent to which the defendants' sought to broaden the case at such a very late stage of the trial.

1309. One of the unsatisfactory effects of the long interval was that a number of issues were introduced in the second phase which were not put to witnesses who gave and completed their evidence in the first phase, notably Michael O'Flynn. The most significant of those was the unpleaded fraud allegation made in the March 2021 Particulars.

PART TWENTY: THE NAMA DEFENCE

1310. The pleaded defence is that insofar as the plaintiffs' claims relate to actions or omissions which were prohibited by NAMA, were not disclosed to NAMA or were not in

accordance with restrictions imposed by NAMA or legislation, the plaintiffs are not entitled to relief, are estopped from claiming relief and/or it would be contrary to public policy to grant relief and the court should exercise its discretion to refuse relief. This is a combination of illegality, estoppel and public policy. The defence was particularised in Replies to be an allegation by the defendants that the plaintiffs were party to the sale of two sites owned by VHL, one in Birmingham and one in Coventry, at an undervalue.

1311. In Witness Statements and Legal Submissions delivered before the hearing commenced the defendants sought to escalate this to an allegation of fraud on NAMA, without applying to amend their Defence to plead fraud.

1312. In the March 2021 Particulars the defendants sought to broaden their case to allege that in fraud of NAMA assets of O'Flynn Group companies were applied for the benefit of the plaintiffs. The March Particulars refer firstly to the use of O'Flynn Group assets from 2010 through to 2015, stating that prior to October 2012 the parallel structure did not pay or agree to pay the O'Flynn Group for the use of assets. They refer in particular to fees totalling stg £474,867 paid by VHL for planning permission at Coventry and Birmingham for the benefit of the parallel structure, without the consent of NAMA.

1313. During the course of the trial and in submissions the defendants broadened their allegations even further. They alleged that NAMA and this court were misled about the reasons for the establishment of the plaintiffs and the manner in which they operated. This is referred to by the defendants as the *"Foundation Lie"*. Examples of the allegation are that the defendants say that the plaintiffs describe the establishment of the parallel structure as having the purpose of securing employment for personnel who would otherwise have lost their jobs in the O'Flynn Group, or who would have left the Group due to salary reductions and other restrictions by NAMA which could only be ameliorated by payment of bonuses and other remuneration through the parallel structure. The defendants submit that in the presentation of

their case the plaintiffs have adduced evidence which is false or fabricated, and the court should mark its disapproval by dismissing the claim.

1314. The plaintiffs object that apart from the allegation of sale at an undervalue the issues summarised above were not pleaded. They submit also that the allegations are not connected to the substance of the claim against the defendants and therefore, even if there were substance to these allegations, they are not a defence to the claims relating to the concealment and diversion of the Gardiner Street project.

1315. The Defence and those objections bring into consideration three separate issues.

1316. Firstly, the pleaded Defence of illegality by reference to the NAMA Act engages a consideration of whether an illegality was perpetrated in relation to the sale by VHL of the Birmingham and Coventry sites, and a consideration of whether that is at law a defence too the plaintiffs' claims against the defendants.

1317. Secondly, the court must consider the application of the maxim 'he who comes to equity must do equity', commonly referred to as the 'clean hands' principle. Under this subject there also falls for a consideration a question of whether the plaintiffs' conduct, or any 'grime on the hands of the plaintiffs', if such 'grime is found' is sufficiently closely connected to the equitable remedy sought, that relief should be refused.

1318. Thirdly, in *Egan v Heatley* [2020] IECA 354, Murray J. said that the 'clean hands' maxim is triggered where a party seeking equitable relief seeks to rely in court on evidence that is false. He said that *"where a party seeks equitable relief by reference to materially false evidence, the question is not whether the evidence was connected with the event alleged to generate the entitlement to that relief, but whether it was used by the party to obtain relief based on that event and has behaved unconscionably and in a manner that is at the same time morally reprehensible and undermining of the integrity of the administration of justice"*.

1319. I shall expand on the application of those principles later. Before doing so I shall examine the pleas made and the evidence adduced.

Pleadings on the NAMA defence

1320. In Paragraph 4(ii) of the Defence pleads as follows:

> *"In the premises and/or insofar as any of the claims herein relate to any acts, omissions and/or decisions which were prohibited by NAMA and/or any relevant legislative provisions and/or which were not disclosed to NAMA in accordance with statutory obligations in that regard and/or in respect of which the consent of NAMA was not obtained and/or such acts, omissions and/or decisions were not in accordance with restrictions imposed by NAMA and/or the provisions of any relevant legislative provisions:*
>
> *(a) the plaintiffs are not entitled to the reliefs claimed or any relief; and/or*
>
> *(b) the plaintiffs are estopped from claiming such reliefs; and/or*
>
> *(c) it would be contrary to public policy to grant the reliefs claimed or any reliefs to the plaintiffs or any of them against the defendants or any of them; and/or*
>
> *(d) in the exercise of its discretion the court should refuse to grant the reliefs claimed or any relief."*

1321. The Defence contained no particulars of the acts, omissions or decisions relied on or of the legislative provisions or restrictions said to be contravened.

1322. In paragraph 4 (iii) the defendants reserved the right to provide further particulars in connection with these matters following discovery.

1323. In the amended Reply the plaintiffs deny that they are disentitled to the reliefs claimed by reason of any of the matters pleaded in para. 4 of the defence. They asserted in particular that the "legislative provisions and statutory obligations referred to in para. 4 were unspecified".

1324. In replies to a Notice for Particulars the defendants asserted that those allegations were adequately particularised, and no further detail was provided.

1325. On 21 December 2016 the defendants delivered supplemental Replies to the Notice for Particulars. They stated that the acts, omissions and decisions of the plaintiffs referred to in paragraph 4(ii) of the Defence included the following: -

> *"* (a) (subparagraph numbering added) *Victoria Hall Limited (O'Flynn Group entity) disposed of two valuable sites in Birmingham and Coventry by agreement with NAMA in 2012. The O'Flynn Group informed NAMA, inter alia, that Victoria Hall Management Limited (the first plaintiff herein) or Victoria Hall Management (UK) Limited (both non O'Flynn Group entities) may be involved in a management capacity with the sites once sold. Victoria Hall Limited sold the sites for approximately £1 million (the "NAMA sale").*
>
> (b) *In advance of the NAMA sale Victoria Hall Management (UK) Limited and Grey Willow Limited (the third plaintiff) attributed a value to the sites of more than £5 million.*
>
> (c) *Subsequent to the NAMA sale, in a transaction arranged by Michael O'Flynn and John Nesbitt the sites were sold to a joint venture involving Grey Willow Limited (the third plaintiff). The joint venture acquired the sites for over £5 million, which facilitated the third plaintiff realising capital from its joint venture partner and gaining a 10% carried equity interest in, and the right to benefit from, a further profit share from the joint venture.*
>
> (d) *The third plaintiff earned more than £10 million from the subsequent sale of the developed sites in or about September to November 2013.*
>
> (e) *The first defendant assisted in structuring the joint venture in question. He sought and obtained reassurance from John Nesbitt at that time that the third plaintiff was not part of the O'Flynn Group or related to or associated with the O'Flynn Group. John Nesbitt informed the first defendant in or about that time that the entities developing the Birmingham and Coventry student accommodation projects (which the*

first defendant understood to mean the first, third and fourth plaintiffs) were not part of or associated with the O'Flynn Group and he was requested not to disclose any information relating to the business of those entities to Brendan Linehan, Group Finance Director of the O'Flynn Group.

(f) *John Nesbitt also informed the third defendant in or about that time that the Birmingham and Coventry student accommodation projects and the entities developing those projects were not associated with the O'Flynn Group, and requested the third defendant not to discuss or disclose any information relating to those projects to Brendan Linehan, Group Finance Director of the O'Flynn Group."*

(g) *In their pleadings herein, the plaintiffs have pleaded, inter alia, as follows:*

(i) The first, second, third and fourth named plaintiffs are owned and controlled by John Nesbitt and, in the case of the first, second and third named plaintiffs the interest of Mr. Nesbitt is currently held indirectly through nominee companies, Elian Elian nominees (JY) Limited and Naile nominees (JY) limited (para. 1A(i) of the replies of the plaintiffs dated 21 November 2016 to the notice for further and better particulars of the defendants);

(ii) Michael O'Flynn has control of the first, second, third and fourth named plaintiffs insofar as he has a future right to acquire control over the affairs of the first, second, third and fourth named plaintiffs at a future date (para. 1A(i) of the replies of the plaintiffs dated 21 November 2016 to the notice for further and better particulars of the defendants); and

(iii) Each of the plaintiffs is a company associated with the O'Flynn Group of companies.

1326. These exchanges represented the state of the case as pleaded at the commencement of the trial. In submissions it became clear that the core of this plea was an allegation of sale at

an undervalue, to the cost of VHL, NAMA and the taxpayers of Ireland. On close reading, that allegation is not stated in the pleading.

1327. In witness statements delivered on behalf of the defendants, the defendants expanded on the allegations relating to Birmingham and Coventry and I shall return to the evidence of those witnesses later.

1328. In written legal submissions delivered before the trial on 16 December 2019 in preparation for commencement of the trial, the allegation regarding Birmingham and Coventry was elevated to an allegation of fraud. The defendants submitted in para. 91 that-

> *"The first to fourth plaintiffs and Mr. O'Flynn and Mr. Nesbitt conspired to defraud Victoria Hall Limited – and therefore NAMA – through the NAMA transaction. The NAMA transaction was therefore a fraud on both Victoria Hall and NAMA. The profits earned in respect of the NAMA transaction were earned using NAMA assets enhanced by the expenditure of monies by a NAMA entity and – on the case which the plaintiffs pursue – with the labour, skill and expertise of employees of NAMA entities, acting for those entities and not, as was actually the position, for the non-NAMA plaintiffs. Mr. Nesbitt presided over all of the foregoing when he was a director – and therefore a fiduciary – of the NAMA entities Victoria Hall and Tiger."*

1329. On 3 March 2021, more than a year into the long break in the trial, and six weeks before the resumption of the trial, the defendants delivered "Supplemental Particulars". No leave to deliver further particulars was sought and no application was ever made for leave to make such a fundamental amendment to the Defence as the introduction of a plea of fraud. The plaintiffs objected to the delivery of the so called "March 2021 Particulars". Their objection was fairly and properly made. Nonetheless they did not object to the March Particulars being opened to and read by the court. Nor did they seek to preclude the defendants adducing evidence in support of their new allegations when the trial resumed. It is therefore appropriate to quote the March Particulars in full as they are informative in

understanding the new allegations. In paragraph 2 of the March Particulars the defendants stated the following:

> *"2 (i) At all material times, John Nesbitt and Michael O'Flynn owed fiduciary obligations to the relevant companies in the Colebridge group and in particular Victoria Hall Limited ("VHL") and Tiger Developments Limited.*
>
> *(ii) On the plaintiffs' pleaded case and evidence at trial, at all material times the business of the Colebridge group, including in particular VHL and Tiger Developments Limited, was subject to restrictions imposed upon it by NAMA as a condition of NAMA providing funding to the Colebridge group so as to permit it to continue to trade.*
>
> *(iii) On the plaintiffs' evidence at trial, from time-to-time VHL made various representations to NAMA that it was carrying on business in accordance with restrictions imposed by NAMA.*
>
> *(iv) On the plaintiffs' evidence at trial (and contrary to the case articulated in the said pleaded case) John Nesbitt (and Michael O'Flynn) established a parallel structure to the Colebridge group and deliberately sitting outside it, which structure included the first four named plaintiffs (and VHM (UK) Limited). This separate structure is hereafter referred to as the "O'Flynn/Nesbitt parallel structure".*
>
> *(v) In fraud of NAMA (and the Colebridge group) the plaintiffs caused the assets of companies in the Colebridge group, and particular those of VHL, to be used for the benefit of the O'Flynn/Nesbitt parallel structure. Commencing with the Wembley transaction 2010 and continuing until the sale of parts of the Colebridge group to Carbon on 24 April 2015, the O'Flynn/Nesbitt parallel structure carried on a significant and valuable business that earned significant profits for the plaintiffs and John Nesbitt. On the plaintiffs' own case, prior to October 2012 the O'Flynn/Nesbitt*

parallel structure did not pay or agree to pay the Colebridge group for the use of the assets for the Colebridge group.

(vi) VHL paid the sum of Sterling £474,867.00 in planning and other fees in respect of the application for planning permissions at Coventry and Birmingham for the benefit of the O'Flynn/Nesbitt parallel structure.

(vii) According to the evidence of Michael O'Flynn, VHL should not have made any payments in accordance with planning for Birmingham and insofar as any such payments were made, they were made without his authority or knowledge and without the consent or approval of NAMA, which he agreed was required. Mr. O'Flynn gave evidence that the application for planning for Birmingham by VHL was a mistake and that having checked with John Nesbitt, neither of them could understand how it had occurred. The defendants will rely upon all of the relevant evidence given by Mr. O'Flynn in this regard.

(viii) According to an affidavit sworn by John Nesbitt on 16 February 2021[7] *(but contrary to the evidence tendered by the plaintiffs at trial) the application by VHL for planning permission for Birmingham was not a mistake. On the contrary according to Mr. Nesbitt the O'Flynn/Nesbitt parallel structure deliberately caused VHL to apply for planning permission for Birmingham and to expend the sum of Sterling £474,867.00 in planning and other fees for the benefit of the O'Flynn/Nesbitt parallel structure. Neither the plaintiffs nor the Colebridge group (including VHL) – who owed a continuing obligation to disclose to NAMA any breach of the obligations imposed upon it by NAMA – obtained consent for or disclosed to NAMA the making of those payments. Those payments were made prior to October 2012.*

[7] This affidavit was sworn in opposition to the defendants' application for inspection of documents brought during the long interruption of the trial.

(ix) With the exception of one payment of Sterling £50,000 the statutory accounts of the relevant companies in the Colebridge group failed to disclose the transactions (which were related party transactions) that the plaintiffs per the affidavit of John Nesbitt sworn on 16 February 2021 admit occurred between Colebridge and entities in the O'Flynn/Nesbitt parallel structure.

(x) The consent of NAMA was not obtained for the aforesaid actions of the Colebridge group, which actions benefited the O'Flynn/Nesbitt parallel structure. The plaintiffs say the O'Flynn/Nesbitt parallel structure loaned Michael O'Flynn Sterling £5 million of the profits (Sterling £10 million) earned by that structure."

1330. In paragraph 2 (c) and (d) the defendants continued as follows:

(i) (subparagraph numbering added)*"If the plaintiffs' pleaded case is correct and the plaintiffs are to be identified with the Colebridge Group, in carrying out or making the said payments, VHL breached section 7(2) of the National Asset Management Agency Act 2009 by intentionally providing false or inaccurate information to NAMA;*

(ii) *If the evidence led by the plaintiffs through the evidence of Michael O'Flynn is correct, and VHL was not aware of and did not consent to the taking and/or use of the sum of Sterling £474,867.00 (or at least the part of that sum referable to the Birmingham planning) for the O'Flynn/Nesbitt parallel structure, the first named plaintiff is guilty of theft contrary to section 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001 ("the 2001 Act").*

(iii) *If the evidence of John Nesbitt per his affidavit of 16 February 2021 is correct and VHL was aware of and consented to the taking and/or use of Sterling £474,867.00 for the O'Flynn/Nesbitt parallel structure*

(i) VHL breached s.7(2) of the National Asset Management Agency Act 2009 by not informing NAMA of same (and concealing same from NAMA);

(ii) VHML failed to keep proper books of account contrary to s.202 of the Companies Act 1990;

(iii) In its annual returns to the Companies office on 13 October 2011, 13 December 2012, 2 July 2013, 26 June 2014 and 17 June 2015 VHML made false statements in returns and financial statements contrary to s.37 of the Companies (Amendment) (No.2) Act 1999.

(iv) *Separately from the foregoing, on 21 November 2019 the plaintiffs caused a letter to be sent to NAMA, which purported to be a disclosure to NAMA of all matters pertinent to the allegations made by the defendants in these proceedings, insofar as those allegations related to obligations owed to NAMA.*

That letter specifically stated that the defendants were alleging:

'That VHL paid the fees associated with the planning application on the Coventry site and the Birmingham University site notwithstanding that the planning permission on the Birmingham University site was applied for by VHML'.[8]

If the evidence of John Nesbitt per the affidavit filed by the plaintiffs on 16 February 2021 is correct, in that letter the plaintiffs failed to disclose to NAMA that in fact the plaintiffs had deliberately caused VHL to pay the sum of Sterling £474,867.00 in planning and other fees for the benefit of the O'Flynn/Nesbitt parallel structure.

In the said letter sent by their solicitors to NAMA on 21 November 2019 the plaintiffs breached s.7(2) of the National Asset Management Agency Act 2009 by intentionally providing false or inaccurate information to NAMA.

Dated 3rd March 2021."

1331. Again, these particulars do not state the allegation of sale at an undervalue.

[8] The planning application was made by VHL, although the consent issued to VHML.

1332. These particulars were delivered at such a late stage that Mr. O'Flynn had given and concluded his evidence, including cross-examination, over the course of seven days. All but two of the plaintiffs' witnesses had concluded their evidence and were not recalled. Mr. Nesbitt had already given evidence over three days but had yet to give his evidence in relation to the Birmingham and Coventry allegations or be cross-examined.

1333. I now turn to the chronology of the sale of the Birmingham and Coventry sites and related events.

PART TWENTY-ONE: THE BIRMINGHAM AND COVENTRY SITES

1334. The Victoria Hall division of the O'Flynn Group was described in the Business Plan presented to NAMA on 29 April, 2010 as one of the largest private providers of student accommodation in the UK, Spain and Germany, having at that time 6,395 bed spaces in operation. It had a presence in fourteen major cities in the UK and Europe. Its business model was to design, develop, and operate student accommodation schemes.

1335. VHL at that time had almost 100% occupancy across its portfolio and room rate growth was at 4% per annum.

1336. According to the plan, VHL was at that time negotiating with universities for new nomination agreements. The company had a capital expenditure plan in place for €2.1 million to keep student accommodation halls in good condition and maintain its competitive advantage. This expenditure could be funded from existing available cashflows.

1337. Under the heading "Value Realisation Strategy" it was said that the student accommodation sector is one of the most attractive asset classes in UK property. The Plan continued *"with a strong and steady income, and rates increasing year on year as more students attend university, it is planned to retain these assets base and seek refinancing with a new bank in say three years' time at the expiration of the existing facility".*

1338. At the time of the Plan the loan balance associated with the Victoria Hall portfolio was €253.2 million.

1339. The appendices to the Plan contained a description of every asset held by the Group. The VHL section included a site in Birmingham and a site in Coventry.

1340. The Birmingham site, comprising 1.13 acres was vacant. It had been acquired by VHL in 2001. The company had previously developed and was operating two student accommodation facilities (Phases 1 and 2) near the University of Birmingham. This third site was even closer to the campus, directly adjacent to the entrance to the University. This is referred to as the VHL site. In respect of this site, the Plan continued:

"Status and zoning: No planning has been submitted, but Birmingham Council have a strategy of regeneration within the immediate area and the land has been agreed as suitable for student accommodation.

Strategy: VH would like to conclude a deal with Birmingham University. The group will then consider options to sell the site or developing it with potential partners."

1341. The proposal was to *"build between 300-500 student beds adjacent to Victoria Hall's existing scheme in Birmingham. The freehold site is on approximately one acre and is subject to land swap negotiations with Birmingham University. These discussions are not due to be completed till Q2 2010 and will determine the scale of future student accommodation development on the site. Birmingham* (meaning the existing Phases 1 and 2) *generates more income for Victoria Hall than any other UK asset."*

1342. The term "swap negotiations" with Birmingham University was a reference to discussions between VHL and the university about an exchange of lands. The VHL site (1.14 acres) was directly adjacent to the University campus entrance. The University owned a site (1.4 acres) nearby but further west from the entrance to the university and directly opposite VHL's Phases 1 and 2. It was the ambition of VHL to swap the sites so that the University would take the VHL site at its campus entrance and use it both for student accommodation and to enhance the entrance. VHL would acquire and then develop the site previously owned

by the University, directly opposite its own Phases 1 and 2, referred to as the "swap site". The University was equally interested in the exchange.

1343. The site at Coventry had on it an old and unused industrial building. It was acquired by VHL in 2005. The development proposal in the Plan for this site was described as follows.

> *"To build approximately 400 student beds within 500 metres of Coventry University on a 1.2 acre freehold site. Meetings have taken place at the council and conceptual design of a scheme has advanced, however the project is currently on hold until the debt finance markets improve.".*

1344. The site was said to be located close to Coventry city centre and within 500 metres from the main entrance to Coventry university. The Business Plan continued

> *"The site is zoned as industrial. No applications for change of use has been submitted, but preplanning consultation has commenced.*
>
> *Strategy: VH would like to conclude a deal with Coventry* (erroneously referred to on this page of the business plan as Birmingham) *University. The group would then consider options to sell the site or developing it with potential partners."*

1345. The plaintiffs say that through this Business Plan NAMA was made aware of the development potential of each of these sites, and in the case of the Birmingham site the potential to achieve greater value by first implementing the land exchange with the University, thereby acquiring and later developing the swap site.

1346. On 24 May, 2010 NAMA communicated its rejection of the Business Plan.

1347. In the letter of rejection NAMA stated that the Group should urgently review its asset disposal programme and provide a ranking of properties for disposal in line with the NAMA debtor business plan requirements.

1348. The rejection letter also stated that all assets should be accounted for at "current market value in the plan" so that the strategy for ongoing action on individual properties could be assessed realistically.

1349. VHL commissioned from DTZ a report and valuation in respect of each of the Birmingham and Coventry sites. The valuation issued on 31 March 2011, stating value as of 31 December 2010.

DTZ Report and Valuation 31 March 2011

1350. DTZ described the sites as comprising student development sites, each having a potential 346 potential bed spaces.

1351. One of the assumptions made in the report was an assumption "that the sites will achieve planning permission referred to and that the scheme is built to comply with this assumed planning consent".

1352. Under the heading "Valuation Methodology" DTZ said the following:

> *"For the proposed schemes we have reviewed the quoting rents for competing university and privately owned student schemes in each of the locations. We have also analysed the rents at the Victoria Hall schemes and have used these as a benchmark in calculating the potential income for each of the proposed student schemes.*
>
> *We have undertaken residual appraisals to determine the capital values these potential schemes would generate and taking into account the likely cost of construction and delivery assuming that these schemes are built to comply with planning consent."*

1353. The report contained commentary on the market for student accommodation, both nationally and regionally and stated its opinion that the market value of the company's interest in the sites as at 31 December, 2010 was for Coventry £500,000 and for Birmingham £380,000 making a total of £880,000.

1354. The report describes the Birmingham site as a vacant development site located on Dale Road directly opposite the Victoria Hall existing student accommodation blocks 1 and 2. It states the site area to be 1.4 acres, which is the size of the swap site, not the VHL site.

1355. The report continues in relation to the swap as follows:

"The proposed development of a student halls of residence on the site is subject to Victoria Hall Limited acquiring the land (the swap site) *currently owned by Birmingham University. This exchange is important because in turn the university will gain the land* (the VHL site) *required to create the university plaza, defined in the Selly Oak Local Action Plan."*

1356. In relation to planning the report states:

"We understand that the development site at Milton Grove is currently under review and at present no planning application has been submitted. The Birmingham City Council planning website does not detail any planning applications relating to this site. We have therefore provided our valuation under the assumption that planning will be allowed for the proposed scheme. We have been provided with architect's drawings for the proposed development, prepared by O'Connell East Architects."

1357. DTZ stated that in calculating its opinion of market value for the site it adopted what is described as the "residual valuation approach". This approach involves a calculation of the gross development value of a completed scheme and then deducting all the costs of construction including finance, developer's profit and contingencies to arrive at a residual land value for the site itself.

1358. Based on certain assumptions regarding rent achievable DTZ arrived at a gross development value of £16,988,553. After purchaser's costs are deducted it was said that the gross development value equates to approximately £16 million.

1359. DTZ then applied the costs of construction, professional fees, site clearance and site works, finance costs, stamp duty, professional fees and other costs to arrive at what it described as a Residual Site Value of £540,000 sterling.

1360. The report concluded as follows:

"Taking the above comments into account it would appear that following the completion of the relief road there will be strong likelihood that planning consent for

the proposed scheme will be granted. Notwithstanding the above, planning risk remains however taking account of comments provided by O'Connell Architects we have allowed 30% for planning risk, which devalues the site value without detailed planning consent to a current market value of approximately £380,000 sterling."

1361. A similar exercise was undertaken in relation to the site at Coventry. In respect of that site the gross development value of the completed development was stated at £17,236,888, which after allowing for purchasers' costs reduced to £16,240,000. When costs of construction, finance, stamp duty, professional fees are all applied, the residual value was stated to be £715,000. DTZ applied a discount of 30% for a "perceived planning risk", reducing the total site value as at 31 December, 2010 to £500,000.

Planning applications

1362. On 22nd June, 2011 VHL applied for planning permission for student accommodation in respect of the site at Coventry. Planning permission was granted on 4 October 2011.

1363. On 22nd September, 2011 VHL applied to Birmingham County Council for planning permission in respect not of the site it owned but of the swap site owned by the University of Birmingham. Planning permission issued on 12 January 2012. When it issued, it named the grantee as VHML, not the original applicant VHL. The circumstances of this switch to VHML are described later.

Engagement with NAMA

1364. On 20 October, 2011 Mr. Nesbitt, in his capacity as Managing Director of VHL, met with Mr. Frank Dowling of NAMA. In the course of that meeting the prospect of sale of the sites at Birmingham and Coventry was discussed. Even though NAMA had stated its policy that the sites be sold, a NAMA approval process had to be followed for any transaction or substantial expenditure associated with assets charged in favour of NAMA banks. The first step was the submission for approval in a prescribed form, known as the Form A. It had become practice to first submit a draft Form A.

1365. On 14 November, 2011 Mr. Tony Barry, signing on behalf of Tiger Developments, submitted a "draft Form A" in respect of these two sites. The "connection name" stated on the Form was Victoria Hall Limited and the "borrower" was described as "O'Flynn Group". Under "Nature of Request" it was stated:

> "Request that IBRC/NAMA provides consent for Victoria Hall to enter into a sale agreement for the sale of its development sites at Alma Road, Coventry and Milton Grove, Selly Oak, Birmingham to an unconnected third party at full market value."

Part B of the form, headed "Background" was completed as follows:

- *"Land at Milton Grove, Birmingham comprises a vacant development site located on Dale Road which is to be Phase 3 of the development. Phases 1 and 2 are located on the opposite side of the road which are within the larger Victoria Hall portfolio.*
- *Land at Alma Road, Coventry is situated opposite the Coventry University "Alma Building" where the estates, human resources and finance departments are based. There is an old industrial unit on this site.*
- *The decision to sell is to realise as much a value as possible in order to pay down debt.*
- *We intend to sell the sites to an unconnected third party at full market value where <u>we would still retain an operational and development management role</u> in connection with the property. This is particularly important in respect of the Birmingham site given its proximity to Phase 1 and Phase 2. It is imperative that <u>we</u> retain operational control over the site to ensure that this new operation is complementary to our existing schemes in Birmingham rather than a direct competitor.* (Emphasis added). The meaning of this paragraph was highly controversial in the case.
- *The sale of these sites will also have the benefit of reducing holding costs particularly in respect of Coventry where the annual rates bill is £61k per annum.*

- *Agents' valuation report for these sites is attached to this Form A."* (The valuation report was the DTZ valuation dated 31 March, 2011 and stated to be a valuation at 31 December, 2010).

1366. Although the DTZ Report of 31 March 2011 predated any planning applications, the draft Form A and related materials make no reference to the fact that since the date of the DTZ Report planning consent for Coventry had been applied for and obtained. Planning consent for the Birmingham swap site had been applied for, although it was not the swap site which was being offered for sale by VHL.

1367. There was also attached to the Form A a summary headed "Coventry and Birmingham" which read as follows:

> *"**Introduction***
>
> *Victoria Hall Limited own the following two (2) sites, which have potential for student accommodation, but both require, substantial development finance.*
>
> ***Properties***
>
> (i) *Coventry. 1.08 acres (0.44 ha) site situated on Alma Street, Coventry, CV15QA.*
>
> (ii) *Birmingham. 1.13 acre (0.46 ha) site situated on Grange Road, Selly Oak, B296BL, adjacent to our existing sites and the University of Birmingham.*
>
> ***Proposal***
>
> *The sale of the Coventry site (£350,000 – December 2010 valuation), and the Birmingham site £550,000 – December 2010 valuation)*
>
> *Victoria Hall our associated company would provide an operational management agreement via a development management agreement; provide construction management services."* (Emphasis added).

1368. In this summary the value figures for Coventry and Birmingham were mistakenly interchanged, making no difference to the total stated valuation of £880,000.

1369. During the evidence at trial, a dispute emerged as to the meaning of the fourth bullet point in the Form A and the underlined sentence in the summary. In particular the parties were in dispute as to what was intended by the phrase "we would still retain an operational and development management role in connection with the property".

1370. Mr. Nesbitt said that the word "we" extended to parties connected or associated with the O'Flynn Group, which on his account of the matter would include VHML.

1371. The defendants said that a proper reading of the text of the form could only mean to a reader that the "we" was the party making the application, namely VHL.

1372. On 5 December, 2011 Mr. Nesbitt, writing from Tiger Developments, wrote to Mr. Dowling and others at NAMA stating that he wished to "recap our discussion". In relation to Coventry/Birmingham he said "…I wish to discuss how our involvement as development managers and operational managers is going to be treated".

1373. Although writing from 'Tiger Developments', an O'Flynn Group company, I have no doubt that as far as NAMA was concerned Mr. Nesbitt was in those communications representing its debtor, namely the O'Flynn Group and making the submission for this consent to sell on behalf of VHL. He was not holding himself out to NAMA as representing the parallel structure.

1374. On any objective reading of this email and the Form A the future role referred to in the fourth bullet point of the Form A was, as it states, that of operational and development management, and nothing more. As to what was meant by the words "we" or "our involvement", it could only mean the applicant VHL, although the plaintiffs suggested otherwise.

1375. On 28 November, 2011 Mr. Eoin Phelan of NAMA replied to Mr. Barry acknowledging the Form A received and stating the following:

"We are approving this request, subject to the following conditions:

1. NAMA Legal to review any joint venture arrangement or sales agreement.

2. All sales proceeds, net of legal costs, to be lodged against existing debt as permanent debt reduction.

3. Formal PI (participating institution)*/NAMA approval of all costs required prior to disposal of the sites.*

4. Purchaser's warranty/confirmation to be completed for both sites.

5. NAMA to be satisfied that the sale is being completed at arm's length to an unrelated third party, independent of the O'Flynn Construction group of companies and associates.

6. Evidence of open marketing (to NAMA's satisfaction) to be provided prior to contracting a sale".

The Gylemuir process

1376. VHL proposed that the sale be handled by a firm of agents based in Edinburgh, Messrs. Gylemuir Capital Limited. NAMA approved the appointment of Gylemuir.

1377. On 19 December, 2011 Mr. Nesbitt emailed to Mr. Dowling a signed Gylemuir instruction letter, marketing budget particulars and proposed marketing list.

1378. The Gylemuir letter confirmed their instructions to commence marketing of the two properties with immediate effect. They set out their fee proposal for the instruction and a separate marketing budget. A fixed fee was stated of £10,000 plus VAT per asset.

1379. Mr. Goddard of Gylemuir also recited his background of experience in the student accommodation market over the previous fifteen years, having previously started and headed up the Knight Frank student property team.

1380. Gylemuir gave a confirmation, as required by NAMA that "we are aware that a duty of care is required with this instruction, and we will act with all professionalism and confidentiality to the highest standard on behalf of Victoria Hall Limited and NAMA".

1381. Gylemuir outlined a timetable for the marketing process. It would commence when VHL approved the particulars and the marketing list. It would culminate in the identification

of a preferred bidder and contracts issuing on 23 January, 2012, and targeting an exchange of contracts by middle of February 2012 and completion four weeks later. The letter was countersigned by Mr. Nesbitt.

1382. Gylemuir provided a marketing budget which identified the costs associated with advertising, signboards and other expenses and surveys amounting in total to £5,450 sterling.

1383. Gylemuir provided for approval draft particulars of each of the properties. The particulars detailed the site locations and other general information such as tenure and viewing arrangements. For Birmingham, under the heading "planning" the particulars stated as follows:

> "The site is suitable for the following uses: B1, B2, B8, student accommodation and residential.
>
> We recommend that interested parties should make their own inquiries with the local planning authority."

1384. Similarly in relation to Coventry standard information was provided regarding the location and other general information relating to the property and an almost identical reference to planning as follows:

> "The site is suitable, following demolition of the existing building for the following uses: B1, B2, B8, student accommodation and residential.
>
> We recommend that interested parties should make their own inquiries with the local planning authority."

1385. No reference was made in those particulars, intended for the marketing campaign, to the fact that planning permission for a student accommodation scheme at Coventry had been obtained on 4 October 2011. In respect of the Birmingham site no mention was made of the prospect, by this time well advanced, of a swap for the larger University owned site in respect of which a planning application had been made by VHL.

1386. Finally, Gylemuir provided a list of what they described as "active potential purchasers".

1387. This list comprised 55 names. They included well-known institutions such as British Land, Blackstone, Aberdeen Asset Management, Aviva, Patron Capital and others. It also included advisors such as Knight Frank, CBRE and Saville. Other potential parties were mentioned in the list, including "Gallagher" which was the party to whom the sites were ultimately sold.

1388. A number of events occurred in January 2012. On 12 January 2012 Birmingham City Council issued planning consent for the construction of a 436-bed student accommodation scheme on the swap site. Although the application had been made on 22 September 2011 by VHL, the consent issued in the name of VHML, following intervention by Mr. Nesbitt at a meeting with Birmingham City Council on 9 January 2012.

1389. On 19 January, 2012, in advance of an updating meeting between Mr. Nesbitt and NAMA, Mr. Goddard provided an update to NAMA directly. He confirmed that the marketing of the two sites had been underway for over a month, and he provided a summary of the "notes of interest generated from the advert in the Estate Gazette on the 7th of January and a wider marketing initiative of the properties".

1390. Mr. Goddard proposed that the marketing period be drawn to a conclusion and that all interested parties be asked to provide their best offers along with proof of funding and a timetable for completion by close of business on 27 January, 2012.

1391. Mr. Nesbitt met Mr. Dowling on 20 January, 2012. No detailed evidence was given of what was said at that meeting.

1392. On 25 January, 2012 Mr. Goddard wrote again to Mr. Dowling confirming that he will bring the marketing period to a conclusion. Interested parties would be asked to submit formal offers by 31 January**,** 2012.

1393. On 27 January, 2012 Mr. Tony Gallagher, of JJ Gallagher, submitted a letter of offer "subject to contract". He confirmed his offer for the purchase of the two sites at £802,000, and that the purchase would be funded with 100% equity from his existing cash resources.

1394. Among the "Conditions" Mr. Gallagher stated, "if the purchaser chooses to develop student accommodation on the sites, the company confirms it will engage the services of Victoria Hall in the operation of the asset". (Emphasis added).

1395. On 7 February, 2012 Mr. Goddard wrote to Mr. Dowling reporting on the outcome of the process. He confirmed that five offers had been received and he provided a summary of all of the offers.

1396. Mr. Goddard confirmed that the offers for the two sites range from £350,000 to £802,000 with varying degrees of conditionality. Having discussed each offer with Mr. Nesbitt his joint recommendation with Mr. Nesbitt was that the offer from J.J. Gallagher Limited be accepted at £802,000 for the freehold interest in both properties.

1397. On 9 February, 2012 Mr. Goddard wrote to Mr. Gallagher confirming that his offer was acceptable and that his client wished to instruct solicitors, subject only to receiving formal approval of the offer from NAMA. He informed Mr. Gallagher that the approval process had started, and he would revert as soon as possible once the approval was in place. The letter was headed "subject to contract".

1398. On 21 February, 2012 Mr. Nesbitt emailed Mr. Dowling referring to recent meetings and telephone calls and attaching an "Abridged version of a typical Operational Management Guideline, as promised".

1399. Mr. Nesbitt's evidence was that he believed that NAMA understood that these were typical operational guidelines which would be used by VHML, although the form provided did not name VHML and simply referred to "NewCo". Mr. Gallagher's offer letter had referred only to "Victoria Hall".

1400. The "Abridged Operational Management Guidelines" were a set of management guidelines for key operational areas relevant to student accommodation, being such matters as security arrangements, staffing, patrol, training and development, a security plan, service levels relating to both accommodation management and administration, building maintenance, waste management, information technology, the provision of telephony and television, marketing, health and safety, insurance, electricity and gas supplies, maintenance and repairs and so on.

1401. On 22 February, 2012 another Form A, again signed by Mr. Barry, was submitted to NAMA requesting the consent of NAMA for Victoria Hall Limited to enter into a sale agreement for the purchase of the sites to an unconnected third party, meaning now JJ Gallagher Limited.

1402. The Background section to the Form A contained the same initial two paragraphs describing the sites themselves and then expanding on the sale process which had been conducted as follows:

> *"From the sales process we conducted we have received five offers. The highest one been (sic) from J.J. Gallagher Limited for £802,000. For the avoidance of any doubt the purchaser has no connection with Victoria Hall nor any member of the O'Flynn Group. In addition to the offer made, it has been further agreed that should the purchaser choose to develop student accommodation on the sites that the company confirms it will engage the services of NewCo in the operation of the asset. NewCo will have the right to use the Victoria Hall Limited brand and operating procedures. Newco will charge an operational management fee of 5% of net rents. This is particularly important in respect of the Birmingham site given its proximity to our existing scheme."* (Emphasis added).

1403. A troublesome aspect of this communication is that there is no evidence that any 'NewCo', whether that be VHML or any other entity brough forward by Mr. Nesbitt was

interested in taking a management or operational role, for a fee of 5% of net rental income, in relation to the VHL site the subject of this application. Having made the application for planning consent for student accommodation on the swap site, and by this time having obtained that consent in the name of VHML the focus of Mr. Nesbitt's attention was clearly on the swap site. Furthermore, the scheme being planned to put to Coral concerned the swap site – not being sold by VHL – and the Coventry site and was, importantly, not limited to a management role.

1404. On 27 February, 2012 VHL received a reply from Mairead O'Sullivan of the "NAMA Unit – IBRC". Ms. O'Sullivan returned the Form A "due to insufficient information" and stated that she had confirmed with NAMA that the following details were required in order to process the request.

> *"1. Purchasers' confirmation that the sale is not to a 'connected person' (draft attached).*
>
> *2. Agent to provide a final report addressed to O'Flynn Construction Company* (an erroneous reference since O'Flynn Construction Company was not a party to this transaction) *to the following:*
>
> > *(a) A summary of the marketing campaign – confirming it was at least one month.*
> >
> > *(b) a recommendation to accept the terms of a purchaser's offer, as the best price reasonably obtainable.*
> >
> > *(c) a statement disclosing any commercial relationship between the agent, debtor, purchaser or purchaser's ultimate beneficial owners in the last five years.*
> >
> > *(d) the agent's confirmation that he/she has reviewed your confirmation relating to connected party sales (.1)*

(e) any commercial relationship between the debtor and the agent in the last five years should also be disclosed.

(d) Duty of care agreement between the agent and NAMA (as attached)

3. Confirmation that all legal/agent fees were tendered in best price obtained. If this is not available, please provide explanation as to why comparable were not sought.

4. Full details of the proposed agreement with the purchaser that should they choose to develop the sites as student accommodation, that they will have the right to use the Victoria Hall Limited brand through NewCo for an operational management fee of 5% of net rents. (Emphasis added).

1405. On 8 March, 2012 Mr. Nesbitt replied directly to Mr. Dowling and Mr. Phelan at NAMA in which he stated the following:

"I confirm that to the very best of my knowledge neither Victoria Hall nor the O'Flynn Group have had any previous dealings with J.J. Gallagher. However, I will provide the proposed structures of the document for him to complete ahead of exchange of contracts."

1406. Mr. Nesbitt then enclosed a report from Gylemuir on the marketing process and containing the requested recommendation and addressing other aspects of Ms. O'Sullivan's letter. He also stated in relation to Mr. Gallagher the following:

"You will recall that the proposed purchaser included in his offer a condition that gave us comfort that should he develop either or both of the sites for student accommodation he would use the Victoria Hall Limited brand through Newco who would receive an operational management fee of 5% of net rents. I will seek a letter from the proposed purchaser confirming this arrangement prior to exchange of contracts." (Emphasis added).

1407. On 23 March 2012 Mr. Gallagher's company issued a letter to VHL stating the following:

"As you are aware, at the current time, we are still assessing the viability of both of the sites between various potential uses: industrial, leisure, residential or student accommodation. However, if we proceed down the route of student accommodation, I undertake to proceed in the following way:

1. We will engage the services of Newco in the operation of the asset in accordance with the attached abridged management guidelines. It is assumed that Newco will have the rights to use the Victoria Hall Limited brand and operating procedures.

2. I am happy to accept that Newco will charge an operational management fee of 5% of net rents per annum.

3. We acknowledge that this commitment is particularly important in respect of the Birmingham site, given its proximity to your existing schemes.

I understand my solicitor is still awaiting the draft contract upon receipt of which we will proceed towards exchange of contracts."(Emphasis added)

1408. On 29 March, 2012 NAMA issued (per Mr. Eoin Phelan) a Notification of Decision in respect of the transaction. It referred to the summary of the request as follows: "Debtor seeks consent for Victoria Hall Limited ("VHL") to enter into a sale agreement for the sale of its development sites at Alma Road, Coventry and Milton Grove, Selly Oak, Birmingham to J.J. Gallagher Limited for a consideration of £802,000 plus VAT."

1409. The Notification indicated that the transaction is "approved" subject to terms and conditions. The terms and conditions were:

- *"NAMA Legal to review and approve the final sales agreement.*
- *The debtor to forward NAMA a copy of any joint venture arrangement (if applicable) for review.*

- *All sales proceeds, net of any sales costs, to be lodged against existing debt as permanent debt reduction.*
- *Formal NAMA approval of all costs required prior to disposal of the sites.*
- *The sale subject to purchasers' warranty or confirmation to indicate compliance with s.172 of the NAMA Act being received.*
- *NAMA to be satisfied that the sale is being completed at arm's length to an unrelated party, independent of the O'Flynn Construction group of companies and associates."*

1410. The form was signed by Eoin Phelan, Portfolio Support Officer on 29 March, 2012.

1411. On the same day, 29 March, 2012 Mr. Nesbitt replied to Mr. Phelan addressing each of the conditions and requesting confirmation that nothing further is required, save for the confirmation from the purchaser of compliance with s.172 of the NAMA Act.

1412. On 29 March, 2012 Mr. Phelan confirmed that the approval was granted and conditions had been met. In the course of the series of emails exchanged on 29 March, 2012 Mr. Phelan reminded Mr. Nesbitt that "if J.J. Gallagher proceed down the route of student accommodation then NAMA to be forwarded a copy of any agreement between J.J. Gallagher and Victoria Hall Limited".

1413. Mr. O'Flynn said in evidence that this reference to Victoria Hall Limited should in fact have been a reference to VHML, since the reference up to that point had been a reference to "NewCo". If this were correct, it was not a small error. The evidence of Mr. Stewart of NAMA was that VHML was never mentioned by name in the Form As or the course of those emails. It would have been news to NAMA to see the name VHML stated.

1414. Ultimately it was agreed that the price of £802,000 would be split, in a manner agreed with Mr. Gallagher. Gallagher Alma Limited became the purchaser of the Coventry site for £456,000 and Gallagher Bournbrook Limited became the purchaser of the Birmingham site for £346,000. The sale contracts were signed on 28 June 2012.

1415. Mr. Gallagher signed the declaration required by S.172 of the NAMA Act that the purchaser is not connected in any way to the owner being in this case VHL, the NAMA debtor.

The exchange of sites and sale by Gallagher

1416. Immediately after acquiring the sites, Mr. Gallagher implemented the exchange of the VHL owned Birmingham site for the University "swap" site. He then on 12 July sold the swap site to Birmingham Hall Limited for a price of £600,000 plus an "overage" of £1.4m, a total of £2m.

1417. On 25 July Mr. Gallagher sold the Coventry site to Coventry Hall Limited for £600,000.

1418. Birmingham Hall Limited and Coventry Hall Limited were each owned by the Coral Partnership. The partners were Coral Investments, an external investment fund, and Grey Willow Limited, Mr. Nesbitt's company. Coral owned 90% of the partnership and Grey Willow 10%.

1419. The defendants say that while the process of marketing the sites and obtaining NAMA approval to sell to Mr. Gallagher was ongoing the plaintiffs were engaged in the preparation of a scheme in which Mr. Gallagher was no more than a "cut out" to facilitate the acquisition of the sites by a structure in which Grey Willow Limited acquired a 10% proprietary interest. When Coral sold out later in 2013, after completion of the development, Grey Willow received for its 10% a sum in excess of £10 million.

1420. The defendants say that scheme appraisals for the Coral transaction attributed a value in excess of £5 million to the sites. They say that none of this was disclosed to NAMA when it was asked to approve the sales to Mr. Gallagher at £802,000. They say that VHL, NAMA and the Irish taxpayers were deprived of the true value attributed to the sites which should otherwise have been available in debt reduction.

1421. VHML earned management fees on the project and Albert Project Management Limited earned fees for its project management role in the development, all paid out of the Coral Investment Structure.

1422. To assess the defendants' allegation, it is necessary to describe two further "streams" of activity which occurred.

1423. The first of these streams is the *"Coral"* stream. That is the process by which the plaintiffs engaged with Coral and planned the funding of the acquisition of the sites from Mr. Gallagher and their development.

1424. The second stream is the planning and construction history. This is said by the defendants to illustrate that, as far back as the summer of 2011, if not earlier, the plaintiffs were progressing planning applications for the sites and engaging with professionals about construction of the developments. They say that all of this was undertaken at the cost of VHL, which bore the planning application fees and other costs without the knowledge of NAMA. They say that this occurred at a time when, on the plaintiffs' own description of the 'NAMA regime' expenditure of that nature by VHL was not permissible and that the ultimate beneficiaries of this expenditure by VHL, through the Coral scheme, were the plaintiffs.

The Coral transaction

1425. Mr. Nesbitt said that he had always viewed the sites at Birmingham and Coventry as having potential for development as student accommodation, as evidenced by the Business Plan of April 2010. He said that once NAMA had determined that these sites should be sold on a *"straight sale"* basis, not involving the swap with the university and not including participation in a joint venture requiring speculative expenditure, there was nothing wrong with him and VMHL, not being debtors of NAMA, exploring all possibilities in relation to these sites, provided they were duly disposed of in accordance with the process approved by NAMA.

1426. Mr. Nesbitt said that, from the very first submission to NAMA in relation to the disposal of these assets, the reference to *"VHL or an associated company"* becoming involved in an operational management or development management role relating to the site was always on the table and, therefore, known to NAMA.

1427. Mr. Nesbitt said that, because of the decision which NAMA had taken, it was clear to him that VHL would never have been permitted to participate in the speculative development of the sites and therefore could never have benefited from fees and profits which VHML, Grey Willow and Albert Project Management Limited ultimately earned.

1428. Mr. Nesbitt said that once a decision was made to put the sites up for sale through Gylemuir, he actively pursued the prospect of participating in the development of the sites and set about engaging with potential bidders who might be willing to purchase them, all with a view to securing a role in the development of the sites. In giving his evidence he made to secret of the fact that his plan was always to engage with new investors who would work with VHML as development managers. Mr. Nesbitt explained that, once the bidding process advanced and Mr. Gallagher emerged as the highest bidder, he made it his business to keep in contact with Mr. Gallagher with a view to exploring what development might be possible if he were successful. At the same time, he engaged with a Luxembourg investment fund named Coral.

1429. Mr. Nesbitt said that Coral is an investment fund which is not in the business of acquiring greenfield sites. They are interested in making an investment in a structure in partnership with a development manager where there is visibility on a yield after the asset has been developed and sold. Coral were, therefore, not interested in simply making a bid to VHL for the sites in the current state.

The VHML appraisals

1430. In preparation for the Coral Scheme, Mr. Nesbitt instructed Mr. Cox to prepare appraisals for student development at each of the sites being the Birmingham swap site and the Coventry site. This was done by Mr. Cox in January 2012. These appraisals were included as part of applications for bank funding, referred to respectively as the Coventry and Birmingham Bank Packs.

1431. The appraisal for Coventry assumed a start date for the facility to be operational as of September 2013. In accordance with the format of these appraisals, it identified, firstly, the 'net investment valuation' of the asset at £21,627,021 being a valuation based on anticipated rental income and other revenues. When development costs were applied to that figure in a total of £17,894,428, the appraisal shows a profit for investors of £3,732,592. Within the development costs, figures are inserted for the acquisition costs, including land, stamp duty, construction costs, planning, demolition and site clearance, professional fees, development management fees, legal, finance and other costs, totalling £17,894,428. Within the heading of "acquisition cost", a figure is included for the land cost at £1 million.

1432. A similar appraisal was prepared, also authored by Mr. Cox, for the Birmingham swap site. The investment valuation was stated at £28,086,730, development costs at £23.8 million and a profit for investors of £4.2 million. Within the acquisition costs, a figure is stated for the *"land cost"* at £4.3 million.

1433. Thus, the combined provisions for "land cost" was £5.2 million. This figure of course contrasts with the aggregate values of £880,000 stated in the DTZ Report as at 31 December 2010, which were the valuations placed by VHL before NAMA, and the price of £802,000 paid by Mr. Gallagher for the sites. The DTZ Report concerned the swap site. The site sold by VHL to Mr. Gallagher was the VHL site, but the site he sold to the Coral structure was the swap site, together with the Coventry site.

1434. Evidence was given by Mr. Andrew Watt, a property consultant and, RICS Registered Valuer.

1435. Mr. Watt explained the manner in which these appraisals are prepared. He said that they are typically prepared by a process which projects total development value of the asset based on a capital value for projected revenues and identifies the costs associated with development and an investor's potential profit. He said that the figure included for acquisition of the land, frequently referred to in such appraisals as the "residual site valuation", is not the same as market value of the site in its undeveloped condition. It is instead a residual figure arrived at in a calculation which starts with the gross development value, which assumes successful planning, construction, completion and funding of the entire scheme and all development costs, and then identifies a provision residual or amount available for *"site acquisition"* if the developer's and investor's target profit is to be achieved. All of this depends on successful completion and takes time to mature.

1436. Mr. Watt explained that there are many variables in the preparation of such appraisals. The most significant of these is the number of units or beds which can be constructed at the site, and the projected rental income. On one site, there can be extensive variations as to the projected number of bed units available. He identified significant differences between the number of beds anticipated in the DTZ valuation and those anticipated in VHML appraisal of January 2012. He said that in the formula for projected revenues and gross development value significant variations can arise. He identified differences between the amounts referred to in the DTZ valuation and the VHML appraisals and said that the most significant factor in that difference was the number of units.

1437. Mr. Watt said that another important difference was that the Birmingham site, the subject of the DTZ valuation, was the site originally owned by VHL and not the swap site in the VHML appraisal. In the cross-examination of Mr. Watt it emerged that on a correct reading of the DTZ report, it also was referring to the swap site. Therefore, the site

comparison is a reference to the same site and that the most significant factor in that difference was the number of units. Mr. Watt maintained that the other variables identified in the appraisal explain the difference between the figures.

The Coral Terms

1438. Mr. Cox and Mr. Leadbetter engaged with CBRE on behalf of Coral. This lead to what Mr. Cox described as the first iteration of the Coral Heads of Terms, received on 30 March, 2012 from CBRE. These were called "Indicative Terms" for the proposed partnership. The text of this document is significant.

> *"This is not an offer but indicative of the deal we may recommend.*
>
> *A new partnership would be formed 'NewCo'. The NewCo would be owned 90% by Coral and 10% by a Victoria Halls company* (which became Grey Willow). *All equity committed will be split by the ownership percentages.*
>
> *Both the sites in Coventry and Birmingham will be purchased by the partnership at a price of £1 million and £4.36 million, respectively. These land values will need to be independently verified.*
>
> *The NewCo will appoint Victoria Halls as "developer" who will be responsible for appointing a contractor and managing development.*
>
> *All development costs will be agreed by way of phased payments prior to entering into a contract. The construction cost to be funded by NewCo on monthly drawdowns at an annual coupon rate of 12.5% with the interests unaccrued until practical completion.*
>
> *The "agreed price" at practical completion is £44.68 million (10% discount to the agreed GDV of £21.6 million plus £28.05 million). A final payment due to the developer would be calculated by the agreed price minus total development costs. Total development costs will include all construction costs, development management*

costs, s.106 payments, NewCo set up costs, coupon payment and land purchase costs. Should total development costs exceed the agreed price Victoria Halls would reimburse the NewCo.

The final payment is dependent upon completion of the building as well as letting and net income in line with forecasts. Should an independent valuation of both properties be in excess of the agreed GDV at practical completion Victoria Halls would be entitled to a payment of 50% of the difference. This payment will be capped at £250,000.

Victoria Halls will be appointed to property manage both properties for a fee of 6% of net income per annum. This fee will be paid by the NewCo. During operation, all net income will be distributed to the owners of NewCo stripped by their ownership of the company. As majority owner of the partnership Coral will have rights to dismiss the Victoria Halls and/or force a sale of one or both properties.

At the end of the partnership Coral's equity will be guaranteed a 12.5% per annum return. Should the return be below this level it will be improved by a transfer of shares in NewCo from Victoria Halls to Coral. If the performance of the partnership is above 12.5% per annum Victoria Halls will be entitled to a performance fee based upon 25% of any returnable 12.5%.

This deal will be subject to acceptable review and reliance upon

- *Appropriate funding being raised (assumption of 60% loan to cost)*
- *Appropriate planning consent and related documents.*[9]
- *Construction contract and warranties.*
- *Professional contracts and warranties.*
- *Meeting professional team.*

[9] By this time planning consent had been issued for both sites.

- *Independent valuation.*
- *Technical site surveys.*
- *Agreeing tax structure.*
- *Subject to contract.*
- *Subject to board approval.*
- *Any due diligence required by Coral."*

1439. Debt funding for the project was sourced from RBS, for the Birmingham site and from Co-Op Bank for the Coventry site.

1440. Coral was contributing £15 million of its own equity.

1441. Grey Willow was to be conferred with a 10% interest "in return for delivering the project and the site" (emphasis added), with potential additional profits for VHML depending on the performance of the asset.

1442. Mr. Cox prepared a further iteration of these terms in April, and SJ Berwin solicitors were instructed to prepare formal draft heads of terms for the partnership on behalf of VHML.

1443. The SJ Berwin version makes it clear that the Heads of Terms were intended to record the basis of an agreement between VHML and Coral Fund concerning the formation of a new "student development partnership", to purchase and "forward fund" student accommodation properties "to be developed and operated by affiliates of VH."

1444. The sites at Birmingham and Coventry would be acquired simultaneously by the partnership and developed in readiness for occupation at the start of the 2013/14 academic year.

1445. Under the heading "Deal Structure" these Heads envisaged the following roles for "VH entities".

1446. Firstly a "VH DevtCo", which became Albert Project Management Limited, would be contracted to manage construction.

1447. Secondly "VH Opco", which became VHM (UK) Limited a subsidiary of VHML, would run operations and asset manage the properties.

1448. Thirdly, VH, which in this context became Grey Willow, would receive a "carried interest" in the assets at 10%.

1449. The Heads of Terms referred to the purchase of the two properties for the net sums of £1.055,000 (1.055 million) for Coventry and £4.6 million for Birmingham.

1450. The limited partnership agreement for this structure was signed by nominees on 13 June, 2012. A number of modifications were made and the final "Amended and Restated Limited Partnership Agreement in relation to the Student Development Limited Partnership" was signed on 28 June, 2012. That was also the day on which Mr. Gallagher's companies contracted to purchase the sites from VHL.

1451. On 12 July, 2012 (Birmingham) and 25 July, 2012 (Coventry) the Gallagher companies contracted to sell the sites to the Coral Entities.

1452. Mr Cox gave evidence of his negotiations with Coral. He said that the figures of £1m and £4.36m for the Coventry site and the Birmingham swap site respectively being inserted in these agreements were the *"deemed"* acquisition prices. This was the agreement made between him on behalf of VHML and Coral as to the value of the sites. It was therefore more than a reflection of 'residual site value', as Mr. Watts had described it.

1453. Mr Cox said that, contrary to the evidence presented by the plaintiffs, the Coral partnership entities purchased the sites from Mr. Gallagher for prices which did not reflect further investment but were the true site values. He agreed however that Coral would not acquire "bare" sites otherwise than as part of an investment proposal where planning permission had been obtained for the project and there was a partner in place to deliver on

planning, construction and other aspects of the project. VHL was, as required by NAMA, only selling sites on a 'straight sale' basis in their current status.

1454. Mr Cox's evidence was that the transaction with Coral was predicated on the proposition that Grey Willow could bring to the table the two sites, to which there was attributed a value in excess of £5m. In return for doing so Grey Willow was to receive 10% of the equity and it was for that 10% that Grey Willow received firstly a cash payment of £2.8m and £11m in profit when schemes were later sold. He said that all parties participating in these discussions including Mr. O'Flynn and Mr. Nesbitt, knew that this scheme would be facilitated by VHL selling to Mr. Gallagher, knowing of the opportunity with Coral, yet recommending to the unknowing NAMA the sale to Mr. Gallagher for £802,000.

1455. The defendants complained that the plaintiffs resisted successfully and therefore never made discovery of documents relating to the plaintiffs' dealings with Mr Gallagher. Very limited such material was before the court, save for Mr. Gallagher's letter confirming an intention that if he developed the sites for student accommodation, which he never did, there would be an operational or management role for "Victoria Hall".

1456. Mr Cox had no direct contact at any point with Mr Gallagher or his representatives, or with NAMA.

1457. By the beginning of July 2012 the terms of the Coral partnership had been agreed. Mr. Cox said that he was then informed by Mr Nesbitt that a difficulty had arisen with Mr Gallagher. Mr Gallagher's solicitor Mr Fisher had raised questions in relation to the transaction, in particular as to whether the parties purchasing from Mr. Gallagher were connected with the original owners of the property namely VHL. Mr Fisher was seeking confirmation that there was no commonality of beneficial ownership between the entities to which Mr Gallagher would sell the sites and VHL, the NAMA debtor from which he was purchasing.

1458. Mr Cox put into evidence another "note to self", this time an email dated 06 July 2012 which reads as follows: -

> *"6th July 2012. Yesterday JN* (John Nesbitt) *informed me that TG* (Tony Gallagher) *the party purchasing the land from Victoria Hall had indicated that he may be uncomfortable if NAMA looked at this transaction in the future. I understand from JN that TG has purchased the sites outright off NAMA and has no further obligations to NAMA as with any normal land transaction post completion.*
>
> *The matter surprised me having been involved in assisting and putting together the transaction from an investor and bank perspective and I wanted to ensure that there was no reason to be concerned. Yesterday I spoke with JN on our conference call line and asked him questions to get comfort for myself relating to an email sent by Barry Fisher. Barry basically posed two questions: could the new entities sign the some [sic] NAMA declaration in regards related parties and whether there was any commonality in beneficial ownership between Victoria Hall Limited* [the party selling the sites to Mr. Gallagher] *and Coventry Hall Limited* [the Coral entity which would purchase from Mr Gallagher]. *John answered that he had not read the declaration but believed he could sign it and confirmed that there was no commonality in beneficial ownership.*
>
> *A key hurdle to overcome in this transaction is for the partnership to be able to purchase land which has an implementable planning consent, in respect of Birmingham this requires a land swap with the Uni and thus requires a party to fulfil this matter before the new partnership could buy the land. My understanding is that this land swap would happen under TG's ownership because NAMA would not be willing to be involved in such a transaction in a peripheral UK location, given everything on its plate, it simply wanted to be rid of the sites. But not having been*

involved nor having seen any correspondence between either JN and TG in respect of the land sales and purchases, I do not know how this was documented or agreed.

Today [6th July 2012] having considered the matter further overnight, I spoke to JN this morning. I told JN, given his explanation to me and again talking through it and confirming it to me on the phone this morning, that he should simply agree to write a letter to TG confirming that he is not a related party to Victoria Hall and has no beneficial ownership in the NAMA debtor and is not himself a NAMA debtor, thus giving comfort to Tony that his dealing in this transaction are fully legitimate. JN said he would be happy to do this as it was true and that he would discuss it with TG this afternoon on the phone. I did point out to JN that if this was incorrect it could have serious implications, because outside of the investor, he is the sole beneficiary of this transaction and that he had negotiated the land related elements of the transaction and the he will have committed that everything is above board to TG and me given the conversations we have had.

While I have not come across situations such as this and being busy at the moment, I wanted to be sure to remember the facts and details of my conversations, I was surprised TG raised the issue of discomfort with JN and wanted to be clear in my own mind that I had asked the necessary questions about the part of the transaction I have not been involved in."

1459. The plaintiffs confirmed to the court that they were not calling into question the dating or provenance of this and similar emails, although they submitted that all such emails were, as they put it, "self-serving".

1460. Mr Cox's evidence at the trial was that in the light of the assurance he was given by Mr Nesbitt that VHML, Grey Willow and others were not connected to VHL or the O'Flynn Group, he was surprised at the assertion made in these proceedings that the non-NAMA plaintiffs were in fact connected or associated with the O'Flynn Group.

1461. Mr Cox produced also at trial a note of 10 July 2012 (Tuesday). This note referred yet again to the conversations held on the previous Friday 6th July, but referred to a second conversation which Mr Cox had on the evening of 06 July, this time with Mr O'Flynn in the call. Mr Cox said that in the second call on Friday Mr O'Flynn had also confirmed that there was no legal reason why Mr Gallagher should not sell the land to the new entity being formed for the purpose of the Coral partnership and *"that it was all above board".*

1462. In Mr Cox's note of 10 July 2012 he continued as follows: -

> *"JN and MOF spoke again on Monday morning 09 July and MOF informed that TG had not returned his calls or texts. That afternoon JN and MOF spoke again, JN put MOF on speaker phone. Michael was annoyed that TG was messing him around. TG had suggested to MOF that JN assign his full interest in the transaction to TG. MOF said that he told TG that this was simply a temporary measure until TG was comfortable and then he would tear up the assignment.*
>
> *Having spoken to a lawyer earlier in the day I informed JN that if he was to assign his interest to TG that he could be in breach of the reps and warranties of the loan documentation Day 1 as he should be up front about beneficial ownership of a shareholding in the SDLP (Student Development Limited Partnership). I asked whether MOF had been informed of this, he said he had. I advised JN that this was something he should not do. JN said he would speak to TG in the morning and get the transaction back on track."*

1463. Two days later, on 12 July 2012, Mr. Gallagher signed the contract to sell the Birmingham swap site to Coral.

1464. The next note put into evidence by Mr Cox was an email dated 24 July 2012 to himself headed *"note 24 July"*. Before turning to its text it is important to state that this note does not, even on its face, purport to be evidence of any event or phone call. It reads as follows: -

"It was agreed by JN and MOF to pay TG an additional £1.4m overage in respect of the Birmingham acquisition on a call the week ending the 13th July, this represents a significant premium over the originally agreed £600k purchase price which I agreed with the limited partnership after JN and MOF originally the purchase price. I said that the premium appeared to be too much and reflected eleventh hour gamesmanship from TG. JN was happy to proceed on this basis in order that we could complete the transaction.

JN was in contact with TG and ME (Mark Edwards, assistant to Mr Gallagher) *over the weekend to try reverse a buy-back provision they wanted to put in place in respect of the Birmingham site. JN agreed with TG that the overage would be payable on one of three events BVCE, sale or PC. JN consulted with MOF over the weekend in respect of this matter. It has proved frustrating to not have been involved in the land elements of the transactions as it has delayed the start on site. The land element of the transaction has proved exceptionally frustrating as it is outside mine or the limited partnership's control and with no contractual obligation on the vendor on a set of agreed terms the purchase process has proved very difficult. CF began to get very frustrated with the vendor last week and threatened to pull out of the Birmingham transaction. I have acted as conduit between all the elements of the transaction and JN who continues to deal exclusively with the land purchase element of the transaction. The Birmingham purchase is expected to take place today if the University signatures are available."*

1465. Mr Cox's evidence was that the respective land values of £1.1m for Coventry and £4.6m for the Birmingham swap site, reflected in the Coral Heads of Terms in April 2012 were amounts which were known to him, and all concerned from the end of March 2012 onwards. He was therefore surprised when Mr Nesbitt and Mr O'Flynn were proposing that a premium be paid to Mr Gallagher on top of the amount of £600,000 which was being

attributed to the Birmingham site. The reason for the increase, characterised as an *"overage"* of £1.4m was apparently to ensure that Mr Gallagher would proceed with the sale to Coral.

1466. Mr. Cox said in his evidence that *"everybody knew"* from the outset of the transaction and from the initial instructions given to him in January 2012 that the plan made by Mr. Nesbitt was that, after Mr. Gallagher had acquired title from VHL, he would be paid £1.2 million for the two sites. A sale by Mr. Gallagher at this price would give Mr. Gallagher a profit of approximately £400,000 over the price of £802,000 he had paid. As matters later transpired, this was increased by an additional £1.4 million when Mr. Gallagher held out for more after he had acquired the title to the sites.

1467. Under cross-examination, Mr. Cox confirmed that he had no direct dealings with Mr. Gallagher and he was not directly involved in the exchanges between VHL and Mr. Nesbitt, and NAMA in relation to the sale of the sites to Mr. Gallagher. His role was confined to the negotiation of the deal with Coral. When pressed as to who *"everybody"* was, Mr. Cox stated that he believed that everybody in the London office knew of this, including not only Mr. Cox but also, of course, Mr. Nesbitt, the architects, lawyers and others, and Coral were proceeding on the basis that the sites could be acquired, initially it was believed at a price of £1.2 million.

1468. Mr. Nesbitt's evidence in relation to engagement with Mr. Gallagher was that Mr. Gallagher refused to conclude arrangements in relation to the sale onwards of the site until after he had completed the purchase of the sites from VHL. It was at that point that Mr. Gallagher complicated matters by seeking additional funding which became the "overage".

1469. The plaintiffs, in their evidence, placed heavy reliance on the fact that the offer of Mr. Gallagher was accepted on 9 February 2012, before the commercial terms with Coral were agreed. Therefore, they said the various iterations of the Heads of Terms, the appraisals and other material relied on by the defendants, all postdated the acceptance of the Gallagher offer. That is true, but more importantly, the binding contracts for sale by VHL to Mr. Gallagher were not entered into until 28 June 2012. Although NAMA had indicated approval of the sale

to Mr. Gallagher, VHL was not bound to complete the sale to Gallagher until those contracts were signed. In the meantime the engagement with Coral was advancing and commercial terms agreed with them. The fact of negotiations with Coral, in which higher values were attributed to the sites was never disclosed to NAMA.

1470. Mr. Foley described his role in relation to the tendering with main contractors for these developments. He was requested by Mr. Nesbitt on at least one occasion not to discuss the Birmingham Coventry project with Mr. Lenihan, Finance Director of the O'Flynn Group. He was given this instruction on a day when Mr. Lenihan was due to arrive at the London office.

Simon Fox

1471. Evidence was given by Mr. Simon Fox on behalf of the defendants. Mr. Fox is a director of Carrowmore Property UK Limited. He was employed by Tiger Developments from 2006 to 2013 as its Development Director, with responsibility for overseeing the Tiger UK Development portfolio.

1472. Mr. Fox was directly involved in relation to the Coventry and Birmingham sites. He was assigned the task of securing the planning permissions on behalf of VHL. He was also involved for VHL in the negotiation of the land swap with the University of Birmingham. Mr. Nesbitt said that he had conducted most of these negotiations himself, although it is clear that Mr. Fox had a role.

1473. Mr. Fox said that he was told by Mr. Nesbitt that the sites were being sold by VHL to Mr. Gallagher who in turn would sell them to a structure in which Mr. Nesbitt and Mr. O'Flynn would be involved. Mr. Fox said that the *"Gallagher transaction"* was common knowledge within the office in the UK. Under cross-examination, Mr. Fox agreed that he had no direct knowledge or information of the engagement with Mr. Gallagher but that

"everyone" in the London office knew that Mr. Gallagher was acquiring the sites from VHL with a view to selling to the Coral structure in which Mr. Nesbitt had an interest.

1474. Mr. Fox said that, at one point during the Gylemuir process, Mr. Nesbitt asked him to source a bid for the sites. Mr. Fox believed this to be a request to source a *"fictitious bid"* and that, in fact, Mr. Nesbitt had even used the word *"artificial"*. Mr. Fox said that he believed from this discussion that the purpose of such a bid was to make the sites appear to be significantly less valuable and would, therefore, enable Mr. Nesbitt to persuade NAMA to proceed with the sale to Mr. Gallagher at £802,000. He believed, therefore, that based on these conversations, the sale to Mr. Gallagher was at below market value.

1475. Mr. Fox said that having considered the concept of making a false bid and having discussed that overnight with his wife, he decided not to assist in doing so and told Mr. Nesbitt this the following day. He said that he was not then asked to be any further involved.

1476. Mr. Nesbitt denied that such a request was ever made of Mr. Fox. Mr. Nesbitt insisted that the Gylemuir process was entirely an open market process in which each step was approved by NAMA. Since Mr. Fox was not directly involved in it, he was in no position to comment on it.

Tony Barry

1477. Evidence was given on behalf of the defendants by Mr. Tony Barry. Mr. Barry was an employee of the O'Flynn Group from 2004 to 2014.

1478. Mr. Barry gave evidence that he, in his VHL Finance Director role, processed many of the payments for costs associated with obtaining planning permission, both for the Birmingham site and the Coventry site. His evidence also was that the work associated with these applications was performed by persons employed by O'Flynn Group companies, notably Tiger and VHL.

1479. Mr. Barry said that Mr. Gallagher had been identified as a *"middleman"* to acquire the sites from VHL and to then sell them to the Coral structure in which Mr. Nesbitt's companies had an interest. He was aware that Mr. O'Flynn knew Mr. Gallagher well and that it was always agreed with Mr. Gallagher in advance of the sale to him that Mr. Gallagher would acquire the site, then effect the swap with the Birmingham University and finally sell the sites to the Coral entities.

1480. Under cross-examination, Mr. Barry confirmed that his knowledge of these matters was simply based on what he described as *"common knowledge"* at the London office. He had no direct knowledge of the arrangements with Mr. Gallagher.

1481. Mr. Barry said that, when he was completing the Form A for NAMA consent for the sale, he enquired of Mr. Nesbitt if the parties to the sale and purchase were connected parties. Mr. Nesbitt informed him that they were not connected and that the required certificate could be given to NAMA.

1482. Mr. Barry said that, as far as he was concerned, NAMA was never aware of the involvement of Grey Willow or the connection of that company to Mr. Nesbitt or, for that matter, with Mr. O'Flynn.

1483. Again, in his evidence, Mr. Barry confirmed that he had no firsthand knowledge either of the communications with Mr. Gallagher or of the communication with NAMA, other than his role in arranging the completion of the relevant Form A and associated documents. Mr. Nesbitt's evidence was that Mr. Barry was simply not a party to the high-level discussions held with NAMA in relation to this and other assets.

Michael O'Flynn evidence

1484. Mr. O'Flynn referred to the Business Plan submitted to NAMA in April 2010. That plan described the assets and the strategy proposed by the O'Flynn Group for them. Mr. O'Flynn stated that he was clear that through the Business Plan and in discussions with

NAMA the O'Flynn Group had disclosed to NAMA the potential associated with the development of the Birmingham and Coventry sites. He had fought to persuade NAMA to develop those sites, but this was a battle which was lost in 2010 when the Business Plan was rejected.

1485. Mr. O'Flynn said that in October 2011 when it had been determined, as part of the cessation of the Rothschild process, that the Birmingham and Coventry sites should be sold "we did not take up the battle again". He never stopped believing in the potential of these and other sites but as NAMA required the disposal of the assets and had made it clear that they were not willing to fund any development of the assets the O'Flynn Group was left with no option but to simply undertake a disposal of the assets as a "straight" sale, and not as part of a joint venture or other speculative transaction.

1486. Mr. O'Flynn was aware that Mr. Nesbitt had hoped that an opportunity could still be found to develop these two sites through VHML. He was aware that Mr. Nesbitt was working with an investment fund Coral to try and persuade them to take an interest in acquiring the sites for development. Although Coral was not in a position to make a bid for the sites in their current state, Mr. O'Flynn believed that if Mr. Gallagher, who was known to him and who is alleged by the defendants to be no more than to be an 'interloper' or a 'cut out', were successful in the acquisition of the sites then it may be possible to persuade him to sell the sites on so that Coral would, in conjunction with VHML invest in the sites.

1487. Mr. O'Flynn's evidence was that if Coral had been ready and willing to acquire the sites directly from VHL in their current state then it could have done so by bidding in the competitive sale process.

1488. Mr. O'Flynn said that despite his efforts to persuade NAMA to fund development of these sites NAMA had repeatedly stated that it had no interest in funding speculative development and the only way forward for VHL as far as concerned these sites was a straight

asset disposal. They were not interested, according to Mr. O'Flynn, in any discussions such as the swap with the University of Birmingham and entry into joint ventures.

1489. Mr. O'Flynn said that he personally was responsible for encouraging Mr. Gallagher to bid for the properties. He could not be certain that Mr. Gallagher would bid or that he would be successful in his bid through the NAMA supervised process. However, he believed, and made no secret of this, that if Mr. Gallagher were successful in acquiring the sites through the NAMA supervised bid process, there would be an opportunity for Mr. Nesbitt and VHL, being "friendly" towards the original O'Flynn Group, to get involved in the development of the site.

Development and planning activity before and after 20 October, 2011

1490. The progression of planning and construction related matters before and after the start of the Gylemuir process is informative to the analysis of the defendants' claims about the Coral Scheme.

1491. The defendants say that the plaintiffs' description of the origins of the parallel structure was that from the day NAMA rejected the Business Plan in May 2010, the constraints of NAMA were such that no expenditure on speculative projects, planning related or otherwise, was permitted by O'Flynn Group companies, including VHL. Therefore, there was no warrant for spending on planning related fees and other costs on the Birmingham and Coventry sites, and yet VHL applied for planning consent on both and spent time and money engaging with construction professionals.

1492. The plaintiffs say that this is incorrect and that during the period of the Rothschild investor process which continued up to October 2011, it was appropriate for them to continue to undertake such ongoing costs including the obtaining of planning permissions as were appropriate to maintain and enhance the value of these or any sites. They say that this was appropriate up until the point at which NAMA stopped the Rothschild investment process. All of this was part of demonstrating for any investors who came forward in the Rothschild

process that appropriate maintenance, including planning status, was continued on sites which had development potential.

1493. The plaintiffs say also that VHL was a profitable company and that its cash position was such that for the purpose of such items as planning application costs, including professional fees, it did not need to borrow or draw down on existing facilities, now under the control of NAMA, or obtain sanction for every item of such expenditure, albeit that it was obliged to provide periodic reports and budgets to NAMA. This description is corroborated in the evidence of Mr. Stewart. He said that in this regard there was a distinction between VHL and other O'Flynn Group companies, having regard to its cash position.

1494. The plaintiffs also say that the exercise of VHL applying for and obtaining planning permission for the swap site was consistent with the ongoing swap negotiations with the University all of which were in the interests of VHL and its creditors. The university had given permission to VHL to apply for planning permission on its site.

1495. None of the defendants or their witnesses were party to high level discussions of this nature with NAMA. They were not in a position to contradict the direct evidence of the plaintiffs as to the ongoing Rothschild process.

1496. The Rothschild process terminated on 20 October, 2011 and the decision was made by NAMA to insist that VHL proceed with the sale of these two sites. The plaintiffs accept that from that date onwards it was not appropriate for VHL to expend money on planning permission or other development charges on of the sites. Mr. O'Flynn said that any such costs incurred by VHL after that date ought to have been cross charged to VHML. Evidence was put before the court as to what cross charging was actually done and what invoices were raised by VHL to VHML and other entities outside the O'Flynn group. I shall be returning to that aspect later.

1497. The plaintiffs accept that planning costs were incurred and paid by VHL after 10 November 2011 which ought to have been reimbursed and were not. Evidence was given by

Ms. O'Neill that this did not prejudice NAMA because when the loans were sold to Carbon in 2014 there was not at the time any provision for settlement of inter company balances between VHL and VHML. That assists the plaintiffs only to a limited extent. VHL was in the meantime "out of pocket" for the costs and the failure to make these reimbursements on a timely basis, or at all must have affected, however marginally, the ongoing debt servicing and pay down obligations of VHL to NAMA, a complaint never made by NAMA.

1498. Work associated with applications for planning permission for Birmingham and Coventry commenced as far back as 2010. In October 2010 Messrs Savills were retained to make the planning application for Coventry and terms of engagement were agreed with them. In May 2011 Savills were retained for the proposed planning application for the Birmingham swap site. Significantly, the engagement letter of Savills dated 18 May, 2011 relating to Birmingham notes that by that time VHL had agreed the terms of a land swap with Birmingham University.

1499. On 22 September, 2011 Savills made the application to Birmingham City Council for planning permission for a 436 bed student accommodation complex at the swap site. The application was made in the name of VHL. The Coventry consent issued on 4 October 2011.

1500. In August, 2011 VHL had already engaged with acoustic consultants around environmental noise study, and with environmental consultants in relation to a habitat survey.

1501. On 22 September 2011 VHL applied for planning consent for the Birmingham swap site, at that time still owned by the University.

1502. The "Rothschild investor process" was brought to an end on 20 October, 2011 when NAMA stated that it was no longer willing to entertain that process and was insisting that VHL progress disposal of certain assets, including the sites at Birmingham and Coventry. Whilst VHL, under the direction of Mr. Nesbitt complied with this by instructing Gylemuir to market the sites and following the Form A process, this did not stop Mr. Nesbitt continuing to

progress plans for developing the sites through another structure, which ultimately became the Coral transaction.

1503. On 27 October, 2011 Mr. Fox, in his capacity as development director of Tiger Developments Limited emailed Mr. Foley and others, including the architects O'Connell East, and consultants Capita, a copy of the planning consent stating *"some points may need to be actioned prior to commencement on site and in this regard we intend to arrange a full design team meeting to discuss the proposed development programme and input likely to be required"*.

1504. On 7 November, 2011 Mr. East of O'Connell East Architects emailed a Mr. Goode at Carillion requesting a fee quote for the role of building controller/inspector of compliance. Separate emails were issued by Mr. East to Mr. Goode in respect of each of Coventry and Birmingham with copies of the planning drawings.

1505. Mr. Fox engaged with Messrs. Capita Symonds, who were later appointed project managers, in relation to the preparation of feasibility costs for the Birmingham project.

1506. In November and December 2011 Mr. Foley engaged with consulting engineers Bailey Johnson Hayes in Manchester in relation to each of the Birmingham and Coventry projects and other projects. The relevant emails related principally to discussions concerning fees, but they illustrate that the engineers were being actively engaged on the project.

1507. On 22 November, 2011 Messrs. Bailey Johnson Hayes provided fee estimates for their role in relation to design, contract procurement and construction.

1508. In the letter enclosing the fee quotes Mr. Hayes of Bailey Johnson Hayes noted that his firm had been involved in the Birmingham site for approximately twelve years from the time of the acquisition of the site by VHL. In relation to Coventry he commented that the matter had not been as protracted but their work had also extended over several years. He continued "you have advised that both of these schemes are to be delivered for August 2013

and consequently along with your other designs we have put in hand the detailed design for tender which I understand from David Salmonds he issued very early in the new year".

1509. On 12 January, 2012, planning consent for the Birmingham swap site was granted. It was issued in the name of VHML.

1510. Mr. Fox announced this to Mr. O'Flynn, Mr. Nesbitt, Mr. Lenihan, Mr. Leadbetter, Mr. Cox and others on 12 January, 2012.

1511. Mr. Cox replied on the same day stating "Well done a great achievement to start the new year. Now all we need to do is find the funding!"

1512. Three aspects of this grant of planning consent are significant.

1513. Firstly that it was issued in the name of VHML and not the original applicant VHL.

1514. Secondly, the issue of the grant to VHML, and not the original applicant VHL, followed a series of discussions with Birmingham County Council, including a meeting on 9 January, 2012 at which Mr. Nesbitt secured the agreement of the County Council to change the name of the planning grantee to VHML.

1515. Thirdly, a feature of the planning permission was a requirement for a financial contribution pursuant to the Town and Country Planning Act, 1990,which provided for financial contributions to be made by applicants towards environmental and other works being undertaken by the County Council itself.

1516. Yates Barnes Solicitors acted for both VHL and VHML. VHL was owed a refund of approximately £136,000 in respect of financial contributions made some years earlier when it had applied for and obtained planning permissions for Phases I and II. The works for which those contributions were made had not been undertaken by the Council, and, absent any variation of agreements made at the time of the original applications, a refund of this amount was due to VHL. Efforts were made in the first instance to negotiate a variation so that Birmingham City Council could retain amounts which would otherwise have been due to refund to VHL. Instead, arrangements were made whereby the amount of £136,000 due to be

refunded to VHL was released to its solicitors Yates Barnes. On the instructions of Mr. Nesbitt to Yates Barnes this money was applied to enable VHML, a different client of that firm, to comply with the statutory payment contributions required in connection with the swap site.

1517. Engagement with architects, engineers, consultants and project managers continued into early 2012. In an email of 15 March, 2012 from Mr. Foley to Mr. Leadbetter in relation to Coventry Mr. Foley reported that the *"scheme was out to tender at present with a proposed programme as follows.*

- *Contractor appointment 27 April, 2012.*
- *Project completion no later than 23 August, 2013."*

1518. On 1 May, 2012 Mr. Jewell of O'Connell East reported to Mr. Nesbitt, Mr. Cox, Mr. Foley and others with a copy of the planning condition "tracker" for Birmingham and Coventry. This is a table outlining the schedule for compliance with individual conditions of the planning permissions. Mr. Jewell reported that in relation to Birmingham and Coventry all pre commencement conditions had been submitted to the planning authority. A number of the outstanding pre-commencement submissions required to be made to the planners could not be submitted until the appointment of the contractor.

1519. The defendants submit that although the plaintiffs say that it was appropriate for them to continue making their plans and speaking with professionals about the development of the sites up to 20 October, 2011, once NAMA terminated the Rothschild process, there was no justification for continuing such activity and expenditure, including development of the resources of employees of the O'Flynn Group including Mr. Cox and Mr. Foley. They say that Mr. Nesbitt was expending time and resources of NAMA debtor entities on projects which NAMA had by that stage decided should simply be sold as sites.

1520. The defendants also say that this continued activity in early 2012 in relation to planning and construction matters reveals that the plaintiffs were always proceeding on the

basis that the Coral Scheme would succeed even before binding contracts for the sale of the sites by VHL for £802,000 were entered into.

The cost of planning permissions

1521. Kieran Wallace, then of KPMG, gave evidence for the defendants by a Report examining the quantum of payments made by VHL relating to the planning based activities for the Birmingham and Coventry sites. The contents of his Report were largely unchallenged, save firstly for some small calculation discrepancies and, secondly that the plaintiffs say that prior to 20 October 2011, the end date of the Rothschild process, there was nothing improper in VHL incurring and paying these costs.

1522. In respect of Birmingham, Mr. Wallace identified invoices and payments totalling £317,878. Of this amount the plaintiffs say £115,474 was expended before 20 October 2011 and the balance thereafter. That balance includes the Birmingham County Council refund of £136,000 which was appropriated by VHML for its contribution relating to the swap site.

1523. The plaintiffs say that an amount of £61,156 was cross charged by invoice issued by VHL to VHM (UK) Limited. This did not explain why the total amounts spent were not cross charged and reimbursed to VHL by VHML, or by any other of the plaintiffs, notably Grey Willow, which ultimately benefitted when the planning consent on the swap site was availed of, and the Birmingham scheme constructed and later sold.

1524. Tony Barry was the European Finance Director of the O'Flynn Group. John Nesbitt and Tony Barry gave conflicting accounts of the cross charging. Mr. Barry said that the only amount he was instructed to cross charge was the £61,320.92 invoiced by VHL to VHM (UK) Limited on 22 May 2015. This invoice was to reimburse a series of payments made by VHL to architects, agents, solicitors, surveyors and other professionals all relating to Birmingham swap site and all being costs incurred or paid after 20 October 2011. The plaintiffs accept that VHL ought to have been reimbursed for this.

1525. Mr. Nesbitt could not explain why VHL had not raised and collected cross charges for other such costs. He said that it was part of Mr. Barry's job to monitor such matters and although Mr. Nesbitt had sought explanations from Mr. Barry in the preparations for the second phase of the trial, Mr. Barry was uncooperative.

1526. Mr. Barry was reporting to Mr. Nesbitt who was Managing Director and clearly his senior in VHL. I am not persuaded by Mr. Nesbitt's explanation that this failure of reimbursement was "all down to Mr. Barry" or could only be explained by Mr. Barry. Mr. Nesbitt had directed or authorised many of the payments and the consequence is that VHL's money was used to obtain the planning permissions and VHML and Grey Willow were the ultimate beneficiaries.

1527. Mr. Nesbitt also put forward a proposition that those monies were a loan. In relation to payments before 20 October 2011 that is inconsistent with the assertion that the spend on planning for the two sites was a valid outlay for VHL itself in maintaining and enhancing value in the context of the Rothschild process. Secondly, Mr. Nesbitt was a director of VHL. VHML was Mr. Nesbitt's company. There was no evidence of a company law compliant authorisation of any loans to a connected party. Finally, the financial statements of VHL did not record those as intercompany balances. The defendants relied on all those frailties to characterise the application of these monies as theft.

1528. The Coventry position is simpler, in that all but one of the payments (the exception being one payment on 2 December 2011 for £12,000) predated 20 October 2011. They amounted in total to £127,824.

1529. All of the payments were for valid third party outgoings, principally professional fees and statutory charges to maintain or enhance the planning status of the assets. The plaintiffs accept that ultimately there ought to have been reimbursement, at least of the payments made after 20 October 2011, which totalled £202,404, only £61,156 of which was cross charged to VHM (UK) Limited. The question for the court is whether the "taking" of these monies,

which occurred under the direction of Mr. Nesbitt, a director and fiduciary of VHL is an act of theft or fraud, and if so what consequence that has for the determination of these proceedings.

1530. Mr. O'Neill gave evidence that inter company balances were not settled when the Carbon Settlement was concluded. Nor is there any evidence that when NAMA sold the loans to Carbon the return was impaired by any of these matters. Mr. Cush for the plaintiffs put to Mr. Stewart that if VHL was left with an unrecovered sum of £144,000 because that balance was not recorded as an asset in its accounts, in the context of the sale of loans of the entire O'Flynn Group, as a matter of probability NAMA suffered no loss as a result. Mr. Stewart replied that "its materiality is probably not in question in terms of the actual consideration paid for the loans." Mr. Dowling, for the defendants, put this aspect differently and suggested to Mr. Stewart that NAMA would have been concerned about these payments "if the court were to find that stg £440,000 of its money was spent and its staff were used to make a gain of stg £12m." Mr. Stewart replied that if those monies could have been captured and applied in debt reduction that would have "been of concern" to NAMA.

1531. Although no party, for good reason of confidentiality, disclosed in the hearing the amount which Carbon paid for the O'Flynn Group loans, Mr. Dowling phrased one of his questions to suggest that on the sale of loans having a par value of €1.8bn the loss to NAMA and the taxpayers of Ireland was €800m. Whatever the exact number paid, no party, including the NAMA witness, has suggested that the €144,000 unrecovered by VHL or for that matter the total amount of £470,000 quoted by the defendants, was material to the loan sale.

1532. Even if the amount of the costs was "de minimus" in the context of the scale of the O'Flynn Group loans and the sale to Carbon, that is not the end of the matter. I have to consider the question of whether, even if the disbursement of the monies was not of a scale material to the overall outcome for NAMA, the conduct of the plaintiffs in relation to this,

acting through Mr. Nesbitt who clearly was "wearing two hats", is such that the court should exercise its discretion to refuse the relief sought in these proceedings.

1533. None of the defendant's witnesses could give direct evidence of the dialogue between the O'Flynn Group and NAMA. The loans of the Group were acquired by NAMA in March 2010 and sold to Carbon in May 2014. This case is not an inquiry into how, over the four years it was 'in NAMA', the O'Flynn Group performed in terms of compliance with the NAMA Act and NAMA restrictions and regulations. There is no evidence that the Group, although disagreeing with NAMA's policy on how to deal with assets, did not co-operate with NAMA, or that NAMA was dissatisfied with the level of compliance by the O'Flynn Group. Perhaps the most significant mark of this is the fact that NAMA did not find it necessary to appoint receivers, a measure it adopted in cases of non-cooperating debtors. Based on a narrative relating only two sites, the defendants seek to portray a different picture, that there was wholesale concealment from NAMA of misapplication of O'Flynn Group assets to the benefit of the plaintiffs, notably by the sale of the sites and relating to the payments of planning and other costs. This unpleaded allegation was introduced in the March 2021 Particulars, more than a year into the long interval in the trial.

Alan Stewart, Chief Legal Officer of NAMA

1534. Mr. Stewart said there was: -

> *"some evidence on the file that there was an awareness of the potential to look for planning on the Coventry site and possibly, although it is not entirely clear, that planning was going to be sought on the Coventry site or perhaps in the course of being sought, that dates from 2010.*
>
> *If VHL had obtained planning permission in Coventry, I wasn't able to come across anything specific on the file to indicate that the permission had been obtained. I did come across one record from October 2011 of a meeting when NAMA was informed of potential development potential of each of the sites as indeed it had been before*

then as well, and that a planning permission could be obtained on both sites, that they had development potential. But that's the only reference I could find around that specific timeframe.

Q. (Mr. Dowling) Ok. So the reference to the development potential of the two sites, that's a reference – that being brought to NAMA's attention in 2010 is that a reference to the business plan?

A. No, just to be clear, the reference to the development potential, earlier in 2010 yes. In the business plan that is referred to and I think it is alluded to also perhaps in some meeting notes that I've seen as well, that they had development potential, these sites. But then there is also a reference to it in October 2011 at the meeting I've mentioned".

1535. Mr. Stewart was asked to comment on the email and draft Form A submitted on 14 November, 2011 and to the meeting of 19 October, 2011.

"Q. But the reference for discussion about the sites being sold and that they had development potential, is that correct?

A. Correct that's right that's correct yes.

Q. And is there any reference in those notes to the fact that planning permission had already been obtained on the Coventry site.

A. Not to the fact that it had already been obtained, not to that fact.

Q. Not to the fact that it had already been obtained. Ok. And there is no other reference other than dating back to 2010 of the application having been made for planning permission? Or of it having been obtained, is that correct?

Q. Yes. The reference to 2010 is a little vague, it just describes Coventry planning update in the context of the business plan. So that's what that refers to. But it does suggest that there was an awareness of planning either going to be sought or may be in the course of being sought."

1536. In relation to the sale and the swap of the Birmingham site Mr. Stewart was questioned further as to NAMA's knowledge and answered as follows:

"So NAMA was aware of the potential for a swap and the benefits of that the borrower said that that would bring. Certainly, we were aware of that. But in terms of the actual implementation of it, that it had been agreed that it was the subject of a legal formality, I had seen nothing on the file that would indicate that that was notified to us. Now it possibly could have been said in telephone calls or meetings. Nothing from the notes of any calls or meetings I had seen in the files would indicate as much.

Q. Ok. And the awareness that you are talking about is the awareness we have discussed that date back to 2010 earlier on, isn't that correct?

A. Yes. So the business plan was the first place. I think its also referenced actually where the 2009 valuation, which was Anglo's valuation as part of the NAMA acquisition process in terms of acquiring the bank assets and putting a value on it. And its also mentioned I think in the DTZ valuation for 2010. So its mentioned in a few places.

I think certainly they were clear about the development potential and that that development potential could only be unlocked through the swap in respect of the Birmingham land. So that much comes across pretty clearly from the file alright. But in terms of trying to convince, I suppose that was with a view to seeing if NAMA would be open to funding a development, or what NAMA's appetite for that was. So I suppose in that context, I suppose some efforts were made, but once it was clear that NAMA wasn't in the business of being at that particular point in time, that's where those efforts seem to have stopped.

I have seen nothing from the file that would indicate anything to do with Coral – that was one of the key words we used to check. So there was nothing to indicate that

anyone was prepared to pay, on a straight sale basis, more than £802,000, which was achieved for the sale of those sites, be that Coral or another party.

Q. Would NAMA have approved a sale if it was aware that?

A. If there was – I mean this is one that calls for me to speculate a little bit, because again I wasn't involved in the connection at the time, but my own experience, if NAMA was aware a party is prepared to pay more prior to a point at which binding contracts became exchanged, then typically NAMA would encourage that that be followed up to see and to gauge what that level of interest is, what the conditionality around any such purchase would be, to see if a better return could be obtained, because that's consistent with NAMA's statutory objective.

Q. Ok and there is no evidence that any consideration like that was given.

A. Not that I could see. It seems that it progressed on the basis of the 802,000."

1537. Counsel for the defendants put to Mr. Stewart the correspondence between VHL and NAMA seeking approval of the sale to Mr. Gallagher and the Form As. Counsel referred to the terms and conditions of approval including a requirement that VHL would forward to NAMA a copy of any joint venture agreement entered into with the purchaser.

1538. Mr. Stewart said that he noted the condition that if J.J. Gallagher proceeded down the route of development of student accommodation then NAMA would be forwarded a copy of any agreement with him.

1539. Mr. Dowling continued:

Q. Now, I don't think – I think its agreed that the joint venture – so Mr. Gallagher sold the sites on to a joint venture and then the joint venture developed the sites. And I think you have already confirmed that there is nothing about the joint venture that actually bought the sites from Mr. Gallagher on the file, isn't that correct? The Coral, sorry, joint venture

A. Nothing about the Coral joint venture on the site. And again if it is the case that J.J. Gallagher sold to Coral then I suppose from the point of view of that condition, perhaps there was nothing further to provide. But that's correct what you've said.

Q. Ok well sorry I don't know you are not aware of this but before VHL sold to NAMA [sic] *there were draft joint venture agreements in place and in fact* (interruption by Mr. Cush as to whether this was a question and Mr. Dowling continued)

Q. Well sorry but in terms of – well just to be clear none of the documents draft or otherwise, about the Coral joint venture or on the file on any date, isn't that right?

A. That's correct.

1540. When asked about the parallel structure Mr. Stewart stated that if counsel was referring to Palm Tree "and those" there was nothing about those companies on the files which he could locate.

1541. In relation to employees working on Birmingham and Coventry Mr. Stewart stated:

"… there was an awareness that the employees were working on some other projects, say for other secured lenders – because there were other secured lenders to the group. So I think there was an awareness that they weren't exclusively working on the NAMA secured assets only. But as regards anything explicit that they were working for this parallel structure, as you keep referring to it, VHML, there is nothing that I can see about that, other than the email I mentioned that copies a person in VHML, but its only a copy.

Q. Yes, and there is no evidence that that was picked up at the time as evidence that somebody was working for a different company than VHL?

A. Nothing to that effect, no.

1542. Mr Cush SC for the plaintiffs cross examined Mr. Stewart as follows: -

"Q. Ok thank you and then just in relation to the sale of the lands at 802, as you mentioned, and there was some reference then to the Coral position and the idea that Coral was attributing a value of 4 million – you recall that mentioned.

A. Yeah

Q. (Mr. Cush) And I think you were careful and correct if I am wrong – but you were careful to say that if you were aware of a willingness to engage in a straight sale prior to becoming committed to a purchaser you would have sought to explore that, is that right?

A. That's correct. Maybe that expression was a little colloquial. I can explain what that means if so. But that's correct.

Q. And by that I presume you to mean a sale on the same terms in respect of the same lands as you were proposing to sell to the prospective purchaser?

A. Essentially, yes. So, it would be a simple sale of the lands simplicter as opposed to anything that would have a requirement around assumptions as to construction costs, ultimate return, you know, some kind of development aspect to it. It would just be a sale of the lands outright to someone who then decides what they do with them, be that development or whatever."

Identity of the applicant for planning consent on Birmingham swap site: the "Mistake"

1543. VHL applied for planning consent on the Birmingham swap site on 22 September 2011.

1544. On 12 January 2012 the decision to grant planning consent was issued by Birmingham Council, showing the "applicant" as VHML.

1545. In a meeting on 9 January 2012 Mr. Nesbitt had persuaded the Council to make this switch so the consent would issue to VHML. No direct evidence was given of the content of that meeting.

1546. The plaintiffs' evidence was that this switch was appropriate because in light of NAMA's decision to sell the VHL site "as is" and not to support VHL in any speculative development, VHL itself was now not going to develop the swap site. This of itself does not explain why, "at the stroke of a pen", the permission should issue instead to VHML, other than Mr. Nesbitt's scheme that his companies would benefit from the planning permission on the swap site after Mr. Gallagher acquired it by exchange with the University.

1547. Nor does it explain why Mr. Nesbitt, being a director and fiduciary of VHL and the shareholder in VHML, instructed Yates Barnes to apply the £136,000 refunded by Birmingham City Council for Phases 1 and 2 of the VHL scheme towards the equivalent payment required as a condition of the VHML planning permission.

1548. In their witness statements Mr. Nesbitt and Mr. O'Flynn each said that VHML had applied for and obtained planning permission for the Birmingham swap site. That was incorrect. VHL applied for the permission but it issued to VHML.

1549. Mr. O'Flynn was questioned as to why VHL applied for planning permission on a site which it did not own and was, having regard to NAMA restrictions, as they had been described by Mr. O'Flynn, never going to develop. Mr. O'Flynn that he had thought, when he saw the name of VHML on the planning decision, that VHML had applied. It was pointed out to him that this was incorrect and VHL had applied. He said he could not understand this. He said that in Ireland a planning permission would never issue to a party different to the applicant. If the application was made by VHL that was a mistake and it should not have applied. He had not given any instruction that VHL apply. He continued

> *"there was no way in the world were we going to get involved in trying to apply under a company that was involved with NAMA. You must understand that NAMA worked on budgets for everything. So there was no question of us suggesting something that would not follow through to payment. So there was a process there. Like we operated with NAMA properly. I don't know how the applicant ended up, maybe*

some of the witnesses actually on the other side might have some knowledge of it, but we have no knowledge of it. It shouldn't have happened, it should have been picked up. I personally had no knowledge of it, no question about that."

1550. Mr. O'Flynn referred to an invoice which had been issued by VHL to Victoria Hall Management U.K. Limited on 22 May 2015 for reimbursement of planning related expenses associated with the application for planning on the swap site. Mr. O'Flynn said that he was pleased to see that there had been such an invoice raised as it would otherwise have been inappropriate for VHL to bear those costs.

1551. Mr. O'Flynn said that it was his policy and that of the O'Flynn Group generally that if a company incurred costs or expenses which it ought not properly to have incurred then there should be a cross charge against the party which ought to have incurred the expense. He said this explained why VHL later invoiced to VHM (U.K.) Limited for these planning costs.

1552. Under cross examination by Mr. Gardiner on behalf of the plaintiffs Mr. O'Flynn said that it was not appropriate to have a NAMA company, VHL, pay for the planning application for the swap site, which was never going to be developed by VHL itself having regard to the NAMA restrictions. Mr. O'Flynn said "I have investigated it and if VHL is the applicant Mr. Nesbitt is as puzzled as I am as to how that happened, so I will leave Mr. Nesbitt to give his own evidence."

1553. It was therefore according to Mr. O'Flynn a mistake that VHL would have applied for planning permission in respect of that site.

1554. During the interruption in the trial, an application was made by the defendants for inspection of documents. That application was resolved without being opened to the court. In response to that application Mr. Nesbitt swore an affidavit on 12 February 2021 in which he described the circumstances in which VHL had applied for planning permission for the swap site. He said that this was done on 22 September 2011 at a time when the Rothschild process was ongoing and VHL was said to hold assets worth in excess of €300m. It had its own rent

roll of €20m and surplus cash available for operational expenses. It had the positive cash flows for asset enhancing expenditure such as planning costs. He said that "within a short period of time and while the planning application was pending, NAMA clarified that it required the O'Flynn Group to restructure its loans and expedite asset disposal towards debt repayment." That was a reference to the decision notified by NAMA on 20 October 2011 to terminate the Rothschild process. This was the point at which any opportunity for VHL to benefit from profit in the swap site, or for that matter development of Coventry, was lost. Up to that date, the expenditure by VHL was appropriate.

1555. In his evidence at the trial Mr. Nesbitt repeated this description, this time contradicting his evidence in chief by the adopted witness statement in which he said VHML had applied for the planning permission.

1556. There is a contradiction between this account and the description originally provided by both Mr. O'Flynn and Mr. Nesbitt to the effect that all development prospects were terminated when NAMA rejected the Business Plan in May 2010. No reference was made in the witness statements of Mr. O'Flynn or of Mr. Nesbitt to the Rothschild process. The defendants characterise the Rothschild process as an invention by the plaintiffs' witnesses to justify spending VHL money on planning for these sites after May 2010. In fact the defendants were unable to contradict or gainsay the evidence given by the plaintiffs as to the ongoing dialogue about the Rothschild process with NAMA in the person of Graham Emmett, culminating in NAMA instructing the termination of the Rothschild process on 20 October 2011.

1557. Whatever about the justification for doing so, the clear evidence of Mr. Nesbitt was that there was no mistake about VHL having applied for the permission. This contradicted Mr. O'Flynn's evidence that it was a mistake for VHL to apply. This contradiction was never satisfactorily explained.

Correspondence with NAMA

1558. Related to this question, much time and attention was taken at the resumed hearing about correspondence between the parties' solicitors and NAMA.

1559. This correspondence commenced with a letter the plaintiffs' solicitors BHK wrote to NAMA on 21 November 2019, six weeks before the date scheduled for the trial of these proceedings. In this letter BHK outlined the nature of the case, and drew the attention of NAMA to the allegations made by the defendants in the "NAMA Defence". Numerous issues were canvased in this and ensuing correspondence which continued into 2021 during the long interval. Having described the allegations made by the defendants and the plaintiffs' responses, BHK said that the O'Flynn Group directors deny the allegations and were unhappy about the allegations being made and were concerned about potential damage to their reputations. They said they were "keen to disclose the above and to engage with NAMA as soon as possible in relation to any question NAMA may have about the allegations being made as outlined above or any other matters in respect of which NAMA has any queries."

1560. On 13 December 2019 Mr. Stewart of NAMA replied. He provided certain confirmations and observations on the background based on a review of files. He very properly declined to address the allegations themselves and the responses, stating that these were matters between the parties. Nor did he take up the invitation to put any queries to BHK.

1561. One of the statements in the BHK letter of 21 November 2019 (paragraph 12) was that the defendants had alleged the following:

> *"That VHL paid the fees associated with the planning application on the Coventry site and the Birmingham University site notwithstanding that the planning permission on the Birmingham University site was applied for by VHML."*

1562. BHK continued:

"VHML had in fact applied for planning permission on the site owned by Birmingham University".

1563. This statement was incorrect. VHL had applied for the planning permission.

1564. This correspondence continued until after the resumption of the trial. It ranged across many issues, including calls by Crowley Millar that BHK made a report of the plaintiffs' conduct to the Garda Síochána pursuant to S. 19 of the Criminal Justice Act 2011. This was followed by a threat that the defendants themselves would do so.

1565. This correspondence took on importance at the resumption of the trial in two ways. Firstly, the defendants say that the first BHK letter misled NAMA, which is an offence pursuant to S.7 of the NAMA Act 2009.

1566. Secondly, the defendants pointed out that the "mistake" proposition put forward by Mr. O'Flynn as to why VHL had applied for the planning permission and the contradictory confirmation by Mr. Nesbitt that VHL had so applied but not by mistake, were all the more irreconcilable in light of:

a. The letter of 21 November 2019 from BHK to NAMA stating that VHML had applied for the planning permission.
b. A witness statement of Mr. Tony Barry delivered five months earlier, on 11 June 2019, had stated that it had been agreed with the university that VHL would apply for the planning permission and in fact stated that VHL did so apply.
c. The change in Mr. Nesbitt's evidence from stating that VHML had applied to stating that VHL had applied.

1567. The defendants submitted that in light of the fact that those matters had been highlighted in advance of the trial it was not credible that the plaintiffs would put forward such contradictory versions, and therefore that lies were being told to the court.

1568. The defendants went so far as to interrupt the trial shortly after it resumed for its second phase with an application that the court direct Mr. Nesbitt to admit perjury. I refused such a direction.

1569. In ensuing correspondence, the defendants' solicitors Crowley Millar identified that in the letter of 21 November 2019 BHK had stated, incorrectly, that VHML has applied for planning permission on the swap site. It was not until 29 January 2021 that BHK corrected this error and informed NAMA that in fact VHL had made the planning application. The defendants state that although that correction was made, the letter of 29 January 2021 was otherwise misleading because it did not expand on the amounts expended by VHL on the planning permissions, which ultimately benefitted VHML and Grey Willow.

1570. Mr. Nesbitt said that when Mr. O'Flynn gave evidence that VHL should not have applied and that it was a mistake for VHL to have applied and that VHL should not have paid the planning fees and costs without NAMA approval, that evidence was incorrect. He said that this was a timeline error. Until termination of the Rothschild process and the insistence on 20 October 2011 by NAMA that VHL progress the sale of the sites "as is", the planning application and the spend by VHL was appropriate, but that after that date it would not have been appropriate and the expenses should have been recharged to VHML and repaid.

1571. Mr. O'Flynn said that before giving his evidence he had consulted Mr. Nesbitt and that an investigation had been undertaken as to how VHL came to apply for planning permission on the swap site. Mr. Nesbitt said that although the defendants had delivered witness statements stating that VHL had made the application he had, in making his witness statement, also made the error of relying on the fact that the planning consent issued described the applicant as VHML.

1572. The position adopted by the plaintiffs on this subject in their sworn evidence is characterised by a series of inconsistencies, as appears from the following:

a) In a witness statement of Mr. Barry delivered on 11 June 2019, seven months before the hearing commenced, he stated that VHL had applied for planning permission on the Birmingham swap site. The plaintiffs were dismissive of this, stating that it was no more than an unsworn statement which was generally replete with inaccuracies. Yet they did not, it appears, check this fact before making their own witness statement on 8 October 2019 which they adopted in their evidence at the trial.

b) The witness statements of Mr. O'Flynn and Mr. Nesbitt made on 8 October 2019 stated incorrectly that VHML applied for and obtained planning permission on the swap site.

c) The letter from the plaintiffs' solicitors BHK on 21 November 2019 stated incorrectly that VHML had applied for planning permission for the swap site.

d) When it was pointed out to Mr. O'Flynn in his evidence in chief that VHL had applied for the planning permission he said that if this occurred it was a mistake and VHL ought not to have done so. He said that he was pleased to see that an invoice had been raised against VHM (UK) Limited to cross charge at least part of the cost associated with that application, because VHL ought not to have incurred such a cost.

e) In his affidavit sworn 16 February 2021 during the long interval Mr. Nesbitt stated that VHL had lodged the planning application as part of the "endeavour to complete the swap with the University and develop that site". In other words, it was no mistake.

1573. In phase two of the trial the defendants cross-examined Mr. Nesbitt at length about those contradictions. In particular they question how it was that BHK were instructed to state in their letter to NAMA on 21 November 2019 that VHML had applied for the planning permission and that both he and Mr. O'Flynn had led evidence to that effect in their adopted witness statements only to change this evidence as soon as challenged. Mr. Nesbitt's reply was simply to state that Mr. O'Flynn was mistaken in his evidence and to state that there was

nothing improper abut VHL applying for the planning permission having regard to the ongoing Rothschild process.

1574. These inconsistencies in the evidence of the plaintiffs arose because the plaintiffs did not verify this fact before making and adopting under oath their witness statements. This is surprising to say the least, because Mr. Barry's witness statement had addressed the point on 11 June 2019, seven months before the trial. However, the narrative on both sides of this case is lengthy and complex. The witness statements which first contain the error that VHML had applied for the swap site planning permission are themselves lengthy. They are a frank description of the plaintiffs' ambitions in relation to the Birmingham and Coventry sites and make no secret of the fact that from an early stage they were interested in finding a way to avail of the development opportunity in which NAMA had no interest. Undoubtedly, they took advantage of the somewhat historic rejection of the Business Plan, but it is very clear that NAMA were 'not for turning'. When the totality of their evidence is taken into account, I am not persuaded that the plaintiffs deliberately misinformed the court on this subject.

Conclusion on Birmingham and Coventry

1575. The defendants claim that the effect of selling to JJ Gallagher for £802,000 is that after the costs disbursed by VHL of planning and other fees, the net amount received by it and paid to NAMA in debt reduction for the role of the two sites was less than £400,000 in circumstances where the approval of the sale to Mr. Gallagher at a gross price of £802,000 was sought and obtained from NAMA without disclosure to NAMA of the following:-

(a) That under the scheme formulated in partnership with Coral companies owned and controlled by Mr. Nesbitt, who was a director and fiduciary of VHL, stood to earn profits from their roles in the partnership, which ultimately exceeded €12m.

(b) That planning permission for the Coventry site had been obtained on 4 October 2011. Not only was this important fact was not drawn to NAMA's attention it

was not highlighted in the Gylemuir marketing, a remarkable omission if the vendor is to obtain the best price possible for the asset.

(c) That for the Birmingham swap site planning permission had been obtained on 12 January 2012. This was after the Gylemuir marketing particulars had been submitted to NAMA and approved, but before Mr. Gallagher's offer was received and accepted.

(d) That on 9 January 2012 Mr. Nesbit has attended at Birmingham City Council and persuaded it to issue the planning permission for the swap site in the name of VHML, despite the fact that VHL had applied for it.

(e) That appraisals prepared by Mr. Cox for VHML and indicative Heads of Terms under discussion with Coral as early as March and April 2012 assigned value of £5.36m to the sites.

(f) That before the contracts for sale to Mr. Gallagher were signed the scheme with Coral was in such an advanced stage that within a matter of weeks of NAMA's approval and the completion of the sale to Mr. Gallagher the following occurred:-

(i) Mr. Gallagher completed the site swap with Birmingham University

(ii) Mr. Gallagher sold the sites to the Coral partnership for £1.2m and an "overage" of £1.4m

(iii) The Coral Partnership terms were updated and amended to confer on Grey Willow a 10% proprietary interest in the schemes.

(iv) Contracts were signed with the contractors and letters of intent signed to enable construction works for the developments to commence.

1576. The defendants submit that the Form A's and the communications with NAMA were misleading. They say that they reference a potential "management/operational role" for a "NewCo" having the right to use the VHL brand. They said that this was intended to convey that the applicant, namely VHL, being the "we" referred to in the Background on the Form A,

would enjoy a future management role. Otherwise, this feature would have been of no interest to NAMA.

1577. I have earlier in this judgment examined the terms of the Forms A. The text of these forms taken on their own convey the impression that VHL would revert to NAMA if the purchaser, who was Mr. Gallagher, developed student accommodation and if "we", which can only be the named applicant VHL, secured a future role in managing the accommodation for the purchaser.

1578. The plaintiffs say that this was no more than a possibility at that time. They say that they were trying to persuade Mr. Gallagher to develop student accommodation at the site and if they had succeeded in doing so the interests of VHL would have been served by having a "friendly operator" on the sites and NAMA would have been informed. It is clear that they did not intend that "friendly operator" to be VHL or an O'Flynn Group company. It is not clear that NAMA were informed of the true identity of any such NewCo or its shareholders.

1579. The Coral scheme to invest in these sites was not capable of being concluded and implemented until after the Gylemuir sale process had concluded and the sites had been sold by VHL, in a process overseen and approved by NAMA and over which the plaintiffs did not enjoy control.

1580. The plaintiffs openly admit that they always had ambition to develop these sites. They acknowledge that they believed that Mr. Gallagher was a person they "could do business with" but that none of this was under their control until after the sale by VHL had been concluded. They say that that sale was conducted by the Gylemuir agency under the supervision of NAMA which approved every step of the marketing and sale process.

1581. Mr. O'Flynn went so far as to say that NAMA were "all over" the transaction and this was yet another instance of NAMA direct supervision. He said that if NAMA were dissatisfied with a process such as this they would have said so and would not have permitted the sale to Gallagher to proceed.

1582. NAMA had stated its policy that it would only fund expenditure on the development and completion of assets and projects which had reached a stage where it could have visibility that making such investment would deliver a return on the investment and debt reduction and would not be a wholly speculative exercise. Nor would it engage in speculative joint ventures or partnerships to develop assets. For the majority of assets charged to NAMA banks and particularly assets located in the U.K., such as Birmingham and Coventry, NAMA's preferred approach was to place those on the market for a "straight sale".

1583. In rejecting the O'Flynn Group business plan NAMA confirmed its requirement that asset disposals be prioritised in line with its debtor business plan requirements. When the Rothschild Investor Process was terminated in October 2011, the Birmingham and Coventry sites were identified as assets for disposal and on 28 November 2011 NAMA approved this course of action.

1584. The draft Form A submitted on 11 November 2011 and the signed Form A submitted on 26 November 2011 each refer to the intention of VHL, as the named owner of the sites, to retain an "operational and development management role" in connection with the property. This was said to be particularly important in respect of Birmingham, given the proximity of the site to existing phases 1 and 2 already owned and operated by VHL.

1585. NAMA approved the decision to sell the sites, the appointment of the agent Gylemuir and the marketing budget. It received updates on the sales process directly from Gylemuir, including the list of interested parties, their offers and any conditionality. NAMA approved the recommendation by Gylemuir to close the process and to accept the Gallagher offer.

1586. The uncontroverted evidence of Mr. Nesbitt and Mr. O'Flynn was that once NAMA rejected the business plan and once the Birmingham and Coventry sites were identified for sale in their existing state, there was no opportunity to change NAMA's mind on this. Mr. O'Flynn said that he had tried to persuade NAMA to change its policy for certain assets because he believed that only by pursuing the development opportunities, with whatever

investment that entailed, could debt repayment be achieved. He said that NAMA were adamant on their position and the O'Flynn Group had no option but to comply. To do otherwise would been seen as uncooperative and would lead to enforcement action against the O'Flynn Group. NAMA therefore exerted its customary measures of control and had insisted the VHL sites be sold in their current condition. That evidence was not controverted and none of the defendants' witnesses were in a position to give any direct evidence of the position of NAMA on this subject. Mr. Stewart, confirmed that this was in fact the policy being pursued by NAMA. Mr. Cox and other defendant witnesses confirmed that they were not directly parties to any of the discussions with NAMA.

1587. Mr. O'Flynn confirmed that when the time came to sell the Birmingham and Coventry sites he did not resume "the battle" to do the swap and develop the sites. He clearly did not revisit this issue with NAMA on behalf of VHL, despite the fact that the alternative scheme to develop these sites led by Mr. Nesbitt and which became the Coral Scheme was well advanced.

1588. The highest bid for the sites was £802,000.00.

1589. The "residual site values" of a combined amount of £5.36m, to which the defendants attach much importance, are found in appraisals prepared by Mr. Cox in January and February 2012 included in the Birmingham Bank Pack and the Coventry Bank Pack and which were used in the discussions with Coral. These were submissions prepared to support loan applications to external funders, Co Op Bank and RBS which issued credit approvals in May and June 2012 respectively.

1590. The appraised site values appear also in the indictive terms submitted by CBRE on behalf of Coral to Mr. Cox on 30 March 2012. In that document it is stated that the sites will be purchased by the partnership "at a price of £1m and £4.36m respectively, those land values to be independently verified". This document refers also to an "agreed price" at

practical completion of £44.68m. The payment to the developer was to be calculated "by the agreed price minus total development cost".

1591. Finally, the land value to be acquired by the partnership was described as "currently appraised as £5,656,586.00" in a Heads of Terms document prepared by Mr. Cox on 13 April 2012.

1592. These residual site values were included in appraisals identifying the investment valuation of the projects when completed at a projected date of September 2013. The appraisal is based on the capitalised value of projected revenues in the projects when completed, after taking account of development costs comprising acquisition costs (including stamp duty and VAT), construction costs (including planning, demolition and site clearance, build costs and legals), professional fees and others, including marketing, development and development management fees, finance costs and bank fees. The manner in which these appraisals were prepared was explained extensively in the evidence of Mr. Watt.

1593. The concept of a residual site value appearing in such an appraisal and not reflecting market value of the site in its current condition was not alien to the defendants. The Gardiner Street appraisal prepared by Mr. Cox in conjunction with Mr. Kearney for submission to potential investors attributed a residual site value for the Phase 1 site of €13.5m. In that case the property had been acquired by Mr. Cox at a price of €6m.

1594. I accept the evidence of Mr. Watt, that these residual site values are an element in appraisals which project a return and a profit which is dependant on the realisation of revenues, expenditure on not only land acquisition, but also the cost of construction, planning, finance professional and other costs and assumes a successful delivery of the entire scheme. In the case of the Birmingham site it also assumed implementation of the site swap with Birmingham University. The 'residential site value' is therefore not the open market value of the site in its undeveloped state, which is all VHL was selling.

1595. The NAMA decision to require that the Birmingham and Coventry sites be sold by a straight sale had the effect that whilst the University was still interested in the land exchange VHL, unlike Mr. Gallagher or any party which purchased, was not free to implement the swap. Nor was VHL permitted to enter a speculative partnership with new investors in which the return for the site would be dependent on the implementation of the swap, expenditure and investment envisaged by the appraisals and successful delivery of the scheme, and the participation of a multiple of parties, including external providers of equity and debt, all of which would take more time to mature.

1596. The defendants invite the court to infer from the appraisals, in which residual site value is only one of the inputs, that the sites were sold for less than open market value. In every property sale the definitive value of land is what the highest bidder pays. The existence of an elaborate scheme, involving only one of the two original VHL sites is not a comparator against the cash price actually bid and paid.

1597. There is no evidence that when Mr. Gallagher acquired the two VHL sites for £802,000.00 any party was willing to offer £5.6 million or any figure higher than £802,000 for those sites in the form of a straight sale, the only form of sale NAMA was willing to approve. Further, only one of the VHL owned sites for sale was included in the appraisal, which related to the Coventry site and the Birmingham swap site owned by the university.

1598. Taking all those facts into account no illegality has been established in the transaction.

Mr. Gallagher's uplift

1599. This still leaves the fact that Mr. Gallagher received a significant uplift on the £802,000.00 he paid for the sites. Within less than one month of acquiring them from VHL Mr. Gallagher's companies had signed agreements for the sale to Coral at a total of £1.2m plus the overage of £1.4m in the case of the Birmingham site. The overage was ultimately funded by Grey Willow out of its participation in the Coral partnership but was only available on the occurrence of certain events. The Birmingham site sold by Mr. Gallagher to the Coral

partnership was not the original VHL site sold to him but the swap site he acquired from the University, now with the benefit of planning permission in the name of VHML.

1600. The high point of the allegation of sale at an under value is that disclosure of the plaintiffs' intentions and their well developed plan for cooperation with investors who ultimately became Coral and external lenders was not made to NAMA at the time when the application for consent to the sale to Mr. Gallagher was made on behalf of VHL. Mr. Stewart confirmed that NAMA was adhering to its policy of approving only a straight sale. NAMA was not in the business of permitting the debtor to engage in future development of such assets or entering speculative partnerships or joint ventures.

1601. Mr. Stewart confirmed in his evidence that NAMA was aware of the potential for a swap with the university and the benefits which the O'Flynn Group had said this would bring. He saw nothing on the file to show that final agreement on the swap had been reached with the University, although it is obvious that the swap had been agreed before the contracts for sale to Mr. Gallagher were signed. Mr. Stewart acknowledged that updates on this could have been provided to NAMA in calls or meetings but there was no evidence on the file to that effect.

Did Mr. Nesbitt have a duty to try to persuade NAMA to change its mind?

1602. The plaintiffs say that it was entirely valid for them to commit to NAMA that if a management agreement or an operational role was secured with the purchaser of the site it would be disclosed. That is correct as far as it goes. However, when regard is had to the advanced stage of the 'Coral' scheme formulated by Mr. Nesbit it is also clear that the Coral scheme envisaged much more than a mere management role at 5% of the net rental income. The description in the Form A of the possibility of a management role for a NewCo having the right to use the brand Victoria Hall at 5% of net rental income without disclosing the equally live, if not more likely, prospect of a more substantial and lucrative role for Mr. Nesbitt's companies, which materialised was selective.

1603. The question for this Court now is whether Mr. Nesbitt was under a duty to make disclosure of the wider scheme when seeking NAMA consent for the sale. NAMA had approved each step in the Gylemuir process. It had determined that it was not interested in developing the assets or participating in a joint venture or permitting VHL to participate in a joint venture. The question therefore is whether, in the face of this position adopted by NAMA, VHL or its directors had an obligation to disclose the Coral plan or a duty to persuade NAMA to deviate from its previously stated position.

1604. Mr. Nesbitt and Mr. O'Flynn all gave evidence that they were "stuck" with the NAMA decision. Mr. Stewart in his evidence said that NAMA had rejected the plan, being aware of the swap and other potential of the sites. He confirmed however that although there was a reference to potential development later, his information was that it was the 2010 NAMA rejection of the business plan which the plaintiffs were relying on and that subject was not revisited in 2012.

1605. It is admitted by the plaintiffs that in the context of the Gylemuir process no attempt was made to persuade NAMA to change from the decision that the two sites be sold on a 'straight sale' basis in their current status. Doing so would have required convincing NAMA that instead of insisting on a straight sale it should have itself or allowed VHL to participate in a series of steps leading to a speculative return, namely the execution of the swap with the University, and entry into the partnership with Coral, where the return would have been dependant on delivery of the completed schemes, a secure future rental income stream, and in the meantime incurring, and borrowing for expenditure on the construction of the facility and all associated costs.

1606. Taking into account the position adopted by NAMA in relation to those assets, which was made knowing the potential route of developing the sites after completing the swap, which would have then entailed further expenditure, I am satisfied that there was no obligation on directors of VHL to revisit that decision with NAMA.

1607. Finally, there is no evidence that Mr. Cox or other persons working on the transaction considered it to be improper. The nearest one comes to such evidence is the "notes to self" made by Mr. Cox. Mr. Cox says that he raised certain questions with Mr. Nesbitt in relation to the transaction and was assured there was nothing untoward. He accepted those assurances and was remunerated for his contribution to the scheme.

1608. Arguably Mr. Cox had no duty to intervene even if he was suspicious. He was acting under the instructions of Mr. Nesbitt who was still his "line manager" in the O'Flynn Group. He says that he prepared the "notes to self" so that he would have a clear recollection of the events if this was required later. This does not explain why he did no more than author these "notes to self" and keep them on his file, relying on them only now in support of his allegations at the trial of this action.

1609. VHL is not a plaintiff. NAMA is not a plaintiff. No evidence has been adduced of NAMA being at any point dissatisfied with the degree of cooperation which it received from the O'Flynn Group from the time NAMA acquired the Group's loans through to the sale of the loans in 2014, including the disposal of the Birmingham and Coventry sites.

1610. The defendants say that this is because the plaintiffs concealed the Coral scheme and the profits they earned from it. But that is to assume that if the Coral scheme had been submitted to NAMA as an alternative option, it would have followed a different course. That is not an assumption the court can make.

1611. Mr. Stewart's evidence was that if an alternative better proposal were on the table before sale contracts were signed NAMA would at least evaluate it and assess any conditionality. No alternative proposal for an outright purchase of the two VHL sites was "on the table".

Fiduciary Duties of Mr. Nesbitt

1612. I have examined the communications between VHL, including Mr. Nesbitt and NAMA prior to NAMA consenting to the sale and before the binding contracts for sale to Mr.

Gallagher were entered into. In his capacity as Managing Director and a fiduciary of VHL, Mr. Nesbitt owed a duty to ensure that VHL obtained the best price obtainable for the sites.

1613. Mr. Nesbitt also owed a duty to ensure that before NAMA, as the holder of the charge on the sites, made its decision it had received all information relevant to the transaction. The sale to Mr. Gallagher facilitated the Coral scheme, in which Mr. Nesbitt's companies benefitted in amounts exceeding £12.5m. That scheme was only capable of being implemented after VHL sold the sites. It was at an advanced stage of formulation before the sale became binding. Therefore, Mr. Nesbitt's interest in that scheme placed him in a conflict with his duties to VHL and to NAMA. In performing these roles, and directing the application and submissions to NAMA, he was under a duty to ensure disclosure to NAMA of all matters potentially relevant to its decision regarding the asset, including his interest in the company which acquired a 10% proprietary interest in the Coral partnership. This he failed to do.

1614. Mr. Nesbitt disclosed to NAMA the fact that a "NewCo" with a license to use the Victoria Hall brand expected to secure a management or operational role if the purchaser of the sites decided to develop them for student accommodation.

1615. Until Mr. Gallagher completed the acquisition of the sites, there was no certainty whether he would retain and develop them or sell them onwards. The evidence is that after he acquired the sites there was a short period of uncertainty as to whether he would sell them, or at least as to the price at which he would sell them. In the end, he completed the swap with the university which VHL had already agreed, and then sold that swap site and the Coventry site to Coral. The fact that Mr. O'Flynn and Mr. Nesbitt were required to persuade him to sell to the Coral companies by increasing the payment to him which they believed they had previously agreed, reveals that they had an expectation that he would sell the sites to Coral, and not that he would develop them for himself and then appoint a 'NewCo' licensed to use the brand Victoria Hall, as managers and operators at a fee of 5% of new rental income.

Therefore, when Mr. Nesbitt showed to NAMA a sample of a "typical Operational/ Management Agreement", such as might be signed by NewCo with the purchaser, there was no reason to expect that Mr. Gallagher would retain and develop the sites for student accommodation and enter such an agreement. A more likely scheme, which was already well advanced by that time, was one in which companies in the parallel structure would participate in a variety of roles, most importantly the Grey Willow role of holding 10% of the equity in return for delivering the land.

1616. VHML was indeed the management company engaged by the Coral partnership. But in the very same transaction its sister company Grey Willow took a far more significant role, being the 10% equity interest.

1617. There are other troubling aspects of these communications.

1618. Firstly, the particulars of the sites prepared by Gylemuir contained no reference to the fact that for Coventry the planning permission for student accommodation had been granted in September 2011. Arguably of less direct relevance was the fact that in the Birmingham case an application for planning permission had been applied for on the swap site. Whilst the swap site was not the site being offered for sale by VHL, it was, coupled with the land exchange with the university, key to the development value. At a minimum, the grant of planning permission to VHL would have been an asset of VHL, albeit only capable of being realised on implementation of the swap. These particulars were submitted to and approved by NAMA. But three difficulties still arise:

a) The DTZ valuations applied discounts for planning uncertainty, now removed in the case of Coventry.

b) NAMA were not informed of the up to date planning status.

c) The Gylemuir particulars in each case state only that the site is suitable for "student accommodation and residential" and "we recommend that interested parties make their own enquiries with the local planning authority".

1619. In circumstances where the Coventry planning consent had been secured, it was a remarkable omission to exclude reference to that fact. The plaintiffs submit that any serious bidder would conduct its own planning enquiries. That is true but in marketing particulars the omission of the existence of an extant planning permission which had been obtained at considerable cost to VHL, was extraordinary, and the omission to disclose to NAMA before it approved the particulars and later the sale, was a serious failure.

1620. NAMA were not informed that, VHL having at its own cost applied for planning permission on the swap site, the permission which issued on 12 January 2012 was in the name of VHML. It is true that it was not the swap site which was for sale, but in the Business Plan the potential for the swap was stated to be key to the development prospects for which VHL had ambitions. That plan was rejected, but NAMA were never told that, with the benefit of fees and costs disbursed by VHL, planning permission had been applied for and then obtained on the swap site, in the name of VHML, following intervention by Mr. Nesbitt with the City Council on 9 January 2012.

1621. NAMA was not informed that a refund of £139,000 in respect of contributions due to VHL relating to Phases 1 and 2 was released by Birmingham City Council to VHL's solicitors and, on the instructions of Mr. Nesbitt, appropriated to comply with financial contribution conditions attaching to the VHML planning permission on the swap site.

1622. As a director of VHL and its fiduciary and as the owner of the VHML companies which stood to benefit from the scheme, Mr. Nesbitt placed himself in a position where his fiduciary duties and personal interests were in conflict. His failure to disclose the matters I have summarised in this section was a breach of fiduciary duties as a director of VHL. I return later to the implications of this for the relief claimed by the plaintiffs.

Do the matters raised in the defence relate to the plaintiff's claims?

1623. The core of the so called "NAMA" defence is the claim that the sites owned by VHL at Birmingham and Coventry were sold at an undervalue. The allegation is based on a

description of events whereby it is said that the plaintiffs misled NAMA as to the value which could be obtained for the sites, and which was ultimately obtained by the plaintiffs themselves notably VHML and Grey Willow.

1624. There also emerges in submissions and evidence allegations regarding related matters. Firstly, that the plaintiffs appropriated assets of VHL and other entities in the O'Flynn group in breach of provisions of the NAMA Act, 2009, the Criminal Justice (Theft and Fraud) Act, 2001, and in breach of provisions of the Companies Acts.

1625. Secondly claims that the plaintiffs' case is built on a foundation of what the defendants call "lies" which should cause the court to exercise its discretion to refuse relief.

1626. My findings earlier in this judgment are that Mr. Cox owed a fiduciary duty to the plaintiffs and that he breached those fiduciary duties by concealing and diverting for his own profit and the profit of others the profits derived from the Gardiner Street scheme. The remedy for such findings would in the ordinary course be a declaration that Mr. Cox acted in breach of fiduciary duty, a declaration that the profits earned in the Gardiner Street scheme are held on trust for the plaintiffs, and an order directing the defendants to account to the plaintiffs for the profits so earned.

1627. These are remedies in equity. Unlike an award of damages or other remedy available in common law once the plaintiffs' rights are established, the equitable remedy based on a breach of fiduciary duty and for an account of profits is subject to equitable principles. This contrast is identified by Murray J. in *T.E. v. Commissioner of An Garda Siochana and Ors* [2021] IECA 113 (para. 142).

1628. In relation to the "clean hands" maxim the court is required to examine whether any "grime" found to be on the hands of a plaintiff is closely and necessarily connected to the claim made in the proceedings.

1629. This question was examined by the Court of Appeal in *Egan v. Heatley* [2020] IECA 354.

1630. Murray J. considered the principle as follows:

> *"Insofar as the 'clean hands' principle is concerned the general legal framework is not controversial. As Keane explains (at para. 3.18) (Keane equity in The Law of Trusts in Ireland 2nd ed. 2011 at para. 3.18), if the conduct of the plaintiff in relation to the particular matter in respect of which he is claiming relief has been inequitable or tainted in some manner to which a court applying principles of equity should have regard, he may be refused relief. The application of the principle to any particular case is, clearly, highly fact sensitive. The maxim will not apply where the irregularity alleged to give rise to its application is trivial. Nor will it operate unless there is an immediate and necessary relationship between the conduct in question, and the equity sued for. As explained by Lord Scott in Grobelaar v. News Group Newspapers [2002] UKHL 40, [2002] 4 All ER 732, at para. 90:*
>
> *'it is long established practice that an equitable remedy should not be granted to an applicant who does not come before the court with 'clean hands'. The grime on the hands must, of course, be sufficiently closely connected with the equitable remedy that is sought in order for an applicant to be denied a remedy to which he ordinarily would be entitled. And whether there is or is not a sufficiently close connection must depend on the facts of each case.*'

1631. Murray J. then described an instance where the 'maxim is triggered' where a plaintiff relies on falsified evidence:

> *"One circumstance in which the Courts have made it clear the maxim is triggered is where a party seeking equitable relief seeks to rely in Court on evidence that is false (see Armstrong v. Shepherd and Short Limited. [1959] 2 QB 384). The decision of the English Court of Appeal in Willis v. Willis [1986] 1 EGLR 62 makes it clear that reliance on falsified documents will bring the maxim into play."*

"Parker LJ expressed the view (at p. 63) that where a party seeks the aid of the court to obtain its assistance via the principles of equity so as to override another's strict legal rights, it is clearly a case for the application of the maxim that he who comes to equity must do so with clean hands. He then said (at p. 63):

'I find it difficult to see how there could be any more serious conduct than that. When a party comes to the Court and seeks to obtain from it equitable relief, it is accepted, as I have said, that he must come with clean hands. I accept also, as was submitted on behalf of the appellants, that not every item of misconduct can possibly be sufficient to deprive a party who seeks equity from being granted the relief he seeks. Some misconduct may be trivial. But when a party acts as these parties have done – and Joanna Willis must be regarded as having been concerned in this, albeit indirectly, in as much as the document was put forward on behalf of both the appellants – it seems to be impossible for this Court to do [anything] other than to take the most serious view of it and to decline to grant equitable relief even if, to which I say nothing because it does not arise on the view I take of this case, they would otherwise have been so entitled.'

Murray J. continued:

"Where a party seeks equitable relief by reference to materially false evidence, the question is not whether the evidence was connected with the event alleged to generate the entitlement to that relief, but whether it was used by the party to obtain relief based on that event. The reason equity precludes an applicant in these circumstances from obtaining any relief derives not from whether they might otherwise have had an entitlement to it (that is why it matters not if the evidence is adduced in order to broadly reflect the facts as they believe them) but because in the course of asserting that claim they have behaved unconscionably and in a manner that is at the same time

morally reprehensible and undermining of the integrity of the administration of justice." (Emphasis added).

1632. The core of the so called "NAMA" defence is to be found in para. 4(ii) of the defence and in the replies to particulars of the defence delivered on 21 December, 2016. That is the case that the acts, omissions and/or decisions of the plaintiffs in relation to the sale of Birmingham and Coventry were in breach of the NAMA Act, 2009 and NAMA's restrictions as they applied to the O'Flynn Group.

1633. The cited acts, omissions and decisions particularised by the defendants are the obtaining of NAMA consent to the sale to Mr. Gallagher of the sites at Birmingham and Coventry for £802,000 in a process led by Mr. Nesbitt as managing director of VHL and therefore as a fiduciary of VHL, without disclosure to NAMA of the plans, which ultimately materialised, whereby Mr. Nesbitt's company Grey Willow participated in the Coral partnership which acquired the sites from Mr. Gallagher and ultimately secured for themselves returns exceeding £12.5 million.

1634. At first pass there is no obvious connection between the plaintiffs' claims relating to the Gardiner Street scheme and the actions of Mr. Cox in relation to it from 28 February, 2014 onwards, and the events of 2011 and 2012 relating to the Birmingham and Coventry sites.

1635. The defendants say that the presentation of the claims and the plaintiff's narrative is based on the proposition that Mr. Cox performed services for them pursuant to his employment contract with Tiger, a company in the O'Flynn Group. The defendants say that this proposition forms part of a narrative which is contradictory and intended to mislead the court.

1636. If there is any connection between the events in relating to Birmingham and Coventry and the Gardiner Street project it is that Mr. Cox's role and performance in the former reveals

that he had in depth knowledge of VHML, its purpose, and the manner in which it operated. Mr. Cox was under no illusion as to the precise identity of the plaintiffs and distinctions and relative roles between them on the one hand and O'Flynn Group companies on the other.

1637. The other, separate elements of the defence which were not pleaded are to be found in a combination of submissions, some of which only arose from evidence in the case as it unfolded. Some also are developed in the controversial "March particulars" delivered on 3 March 2021, more than a year into the long interval in the case.

1638. Before those particulars had been delivered most of the plaintiff's witnesses had given all of their evidence. The only exceptions to this were the evidence of Mr. Dix, a short recall of Ms. O'Neill and most importantly of course Mr. Nesbitt.

1639. These additional features of the case, although not pleaded, must at least be considered by this court in deciding whether to grant the equitable remedies which would flow from a finding that Mr. Cox acted in breach of fiduciary duty. They may be summarised as follows. Firstly, that the plaintiffs defrauded VHL and NAMA by appropriating assets for the benefit of the plaintiffs. The starkest example cited of this activity is the allegation that significant costs, particularly associated with it obtaining planning permission relating to the sites at Birmingham and Coventry, were borne by VHL and not reimbursed by VHML which ultimately benefitted from those costs.

1640. Secondly, the defendants say that the court has been presented with a series of falsehoods. The defendants call these the four lies. The alleged lies may be summarised as follows.

1641. Firstly, the defendants describe as the "foundation lie" the description given in the initial evidence by the plaintiffs as to the timing and establishment and purpose and ownership of the parallel structure.

1642. Secondly, the defendants say that the proposition that Mr. Cox came to provide his services to the plaintiffs having been assigned to do so pursuant to the provisions permitting such an assignment in his contract of employment with Tiger Developments is a lie.

1643. Thirdly, the defendants say that the statement by the plaintiffs that Mr. Cox sought the 14 July 2014 letter for the purposes of building a house was false.

1644. Fourthly the defendants say that reliance was placed by the plaintiffs on the existence of a cost sharing agreement between VHL and VHML. They say that the evidence as it emerged in the course of a trial was such that it was not possible that such an agreement although purported to have been dated 15 October, 2012 and bearing that date could have been executed at that time, having regard to other evidence relating to it.

1645. The remedy which would flow from the findings I have made earlier of breach of fiduciary duty is an equitable remedy. Therefore, the court is required to consider whether any of these questions or allegations, if established, impact on the exercise of the court's discretion. This gives rise to a number of issues, not limited to the traditional maxims of equity.

1646. Firstly, if the plaintiffs have perpetrated an illegality in relation to the Birmingham and Coventry transaction whether that has an effect on the claim against Mr. Cox in relation to Gardiner Street.

1647. Secondly, have the plaintiffs come to court with clean or unclean hands? This also requires if the plaintiffs have come with unclean hands the court is required to examine a question of whether the "grime" is sufficiently closely connected to the claim made by the plaintiffs against the defendants, as to want a refusal of the relief sought.

1648. Thirdly, if the court has been misled, whether in respect of the so called "lies" or otherwise whether the court should as a matter of policy refuse to grant relief.

The application of the maxims of equity

1649. Mr. Cox acted in breach of fiduciary duty when he concealed the Gardiner Street opportunity from the plaintiffs and diverted it for his own profit and the profit of his co-defendants. The remedy for this breach of duty is an order Mr. Cox account to the plaintiffs for the profits earned in the Gardiner Street project. The remedy is an equitable remedy and the court has a discretion to refuse relief if certain maxims of equity apply.

1650. In *Egan v. Heatley*, the court emphasised that there must be a close connection between the wrongful conduct and the remedy at issue. Collins J. agreed with Murray J. that "the authorities make it clear that the presentation of fabricated evidence may be regarded as conduct warranting the refusal of equitable relief".

1651. To apply these principles in this case, the court must consider the following: -

(a) Firstly, is there a close connection between the plaintiffs' claims against the defendants, being the claim arising from concealment and diversion of the Gardiner Street project and the conduct of the plaintiffs invoked by the defendants.

(b) Secondly, have the plaintiffs, in making their claim, relied on falsified documents or fabricated evidence.

1652. As to the first of these questions, a number of things must be stated. In para. 4(ii) of the Defence the defendants made the general plea that *"insofar as any of the claims made in the proceedings relate to acts, omissions and/or decisions prohibited by NAMA or any relevant legislative provisions and/ or which were not disclosed to NAMA… in accordance with statutory obligations… and/ or in respect of which the consent of NAMA was not obtained, and/ or such acts, omissions and/ or decisions were not in accordance with restrictions imposed by NAMA and/ or the provisions of any relevant legislative provisions"*, (a) the plaintiffs are not entitled to the reliefs claimed, (b) are estopped from claiming the

reliefs and/or (c) it would be contrary to public policy to grant the relief, and/ or (d) the court should exercise its discretion to refuse to grant the reliefs claimed.

1653. No particulars were given of any "acts, omissions or decisions" prohibited by NAMA or by any legislation or of how any such conduct related to the claims made by the plaintiffs.

1654. In supplemental replies to particulars delivered on 21 December 2016, the defendants provided their description of the sale of the Birmingham and Coventry sites to Mr. Gallagher. They refer to the sale "for approximately £1 million" and refer also to a valuation of "more than £5 million" attributed to the "sites" by the Coral Partnership for over £5 million. They refer to the 10% interest in the Coral Partnership of Mr. Nesbitt's company, Grey Willow, which later yielded a return for Grey Willow in excess of £10 million.

1655. The requirement described by Murray J. in *Egan v. Heatley* before the court will apply the "clean hands maxim" is that the conduct relied on by the defendants must be conduct of the plaintiffs "in relation to the particular matter in respect of which he is claiming relief". The "grime on the hands of the plaintiffs" must be sufficiently closely connected with the equitable remedy sought. Murray J. said that there must be an "immediate and necessary relationship between the conduct in question and the equity sued for".

1656. As far as relates to the transactions themselves, the events of 2011 and 2012, related to the sale by VHL of Birmingham and Coventry, have no connection to the events of 2014 and onwards relating to the Gardiner Street project. The defendants' case about Birmingham and Coventry is that VHL, NAMA and the Irish taxpayers were deprived of the full value of the sites and that VHL assets, including cash, were applied for the benefit of plaintiffs all to the cost of NAMA and without its approval. The plaintiffs' case is that in breach of his fiduciary duties Mr. Cox concealed and diverted from them, not being NAMA debtors, the profits of the Gardiner Street scheme.

1657. Mr. Cox was paid a total of £570,000 for his role in Birmingham and Coventry. £500,000 was paid by Grey Willow and £70,000 by VHML. Mr. Cox says that he used the

funds he earned from Grey Willow for Gardiner Street. He does not say that without those payments he could never have pursued the project. To the extent that this is a basis for a link, it is not an "immediate and necessary" connection between the plaintiffs' conduct and the "equity sued for" which is his breach of fiduciary duty.

1658. Secondly, when working on Birmingham and Coventry, Mr. Cox was assured by Mr. Nesbitt that Grey Willow was not part of the O'Flynn Group or associated with the O'Flynn Group. They say that Mr. Nesbitt informed Mr. Cox and Mr. Foley that the entities developing Birmingham and Coventry, which included VHML, Grey Willow and Albert Project Management Ltd, were not part of or associated with the O'Flynn Group and that they should not disclose any information related to those entities or their business to Mr. Lenihan, the Group Finance Director of the O'Flynn Group. My conclusion on the plaintiffs' case against Mr. Cox is not grounded on the proposition that the plaintiffs were associated with the Group. It is based on the evidence of his relationship with the plaintiffs and the analysis of his conduct towards them.

1659. A contention that the plaintiffs (except the sixth plaintiff which was in 2014 a member of the O'Flynn Group) were all associated with the O'Flynn Group was maintained by the plaintiffs' for the purpose of invoking provisions in Mr Cox's employment contract which would require him to perform services for "associated" companies of the Group and to maintain the claim that when working for VHML and others he was working pursuant to obligations contained in that contract. I rejected that the proposition. That does not mean that the plaintiffs presented false evidence to the court. It means that the proposition was not sustained on the evidence or a proper construction of the contract of employment.

1660. A more difficult question is whether the plaintiff has come to court with a "narrative" which the defendants say was intended to mislead and is rooted in deliberate falsehoods.

1661. Many of the allegations made by the defendants relate to actions or conduct of the plaintiffs which do not relate to the claims against the defendants. They relate to the Birmingham Coventry transaction and the pleas of breaches of the NAMA Act which the defendants sought, without pleading to this effect, to elevate to an allegation of fraud on NAMA. In doing so the case was widened, long after the close of pleadings and long after the trial had commenced to a trawl of the conduct of the plaintiffs and Mr O'Flynn and Mr Nesbitt. The plaintiffs set for themselves the high bar of proving fraud.

1662. NAMA itself never complained about any of these matters. It treated the O'Flynn Group as a compliant debtor. It conducted its own process for the sale of the loans which it duly completed in March 2014 to Carbon and never complained that it did not receive full cooperation from the obligors.

1663. On the Birmingham and Coventry sites, NAMA applied its own rigorous process of approving the method and timing of sale, the appointment of agents to conduct the sale, the timing of the closing of the bidding process and of course approval of the sale price.

1664. The defendants claim that this transaction proceeded as it did only because important information was concealed from NAMA. Yet none of them could give direct evidence of the dealings between the O'Flynn Group and NAMA or of the dealings between VHL or the plaintiffs and Mr Gallagher. They invoke a selection of documents and limited facts to support their allegation. They were unable to gainsay the evidence that NAMA had determined that the sites be sold on the open market in their current condition and status and that it would not entertain an elaborately structured sequence of transactions which involved a land swap with the university, a joint venture with third party investors, and with new lenders, in which the valuation or the "residual site value" attributed to the sites acquired, one of which was not owned by VHL, was dependent on completing the land swap, completing the construction of the schemes and securing projected revenues, further expenditure and construction, financing and other costs. Nor could they contradict the evidence that Coral

were not in the business of acquiring land merely as sites, but instead were sophisticated investors interested only in making the investment with a developer through a structure of a kind which NAMA had decided not to pursue when it directed the sale of the sites.

1665. The first element of connection is the commonality of parties. Mr Cox was an active member of the team which formulated the structure with Coral. He did this under the instructions of Mr. Nesbitt for the benefit of VHML and Grey Willow. He of course also benefitted when he was paid £570,000 for doing so. Although his "note to self" suggests that he had a concern as to whether the purchaser was connected to the O'Flynn Group he did no more than ask that question, receive an answer assuring him of no connection and made a "note to self" the purpose of which was never explained.

1666. The next connection is Mr Cox's evidence that he used some of the money paid to him for Birmingham and Coventry as capital for Gardiner Street. If that amounts to a connection, it is clearly only that on Mr Cox's account these monies enabled him to undertake Gardiner Street. On no view of the matter can this be regarded as tainting the plaintiffs' position in its Gardiner Street claim.

What happened?

1667. Prior to the establishment of NAMA and the transfer of loans to it, Michael O'Flynn and John O'Flynn together with John Nesbitt and Patrick Kelliher controlled the shareholding in the O'Flynn Group. Individual lenders held security over charged assets and therefore a measure of control over the disposal of such assets. But the overall control of the Group was with the original shareholders through Colebridge Limited.

1668. When NAMA was established, and the loans transferred this had the effect that instead of dealing with diverse lenders the Group had to deal with one secured lender for 90% of its debt. That changed everything as far as concerned the control of the assets and business. When NAMA rejected the Business Plan, the Group cooperated with its requirements. From that point onwards the focus of the attention of both Mr. O'Flynn and Mr. Nesbitt clearly

changed. They embarked upon parallel plans, to use their own phrase. On one side of the parallel, the O'Flynn Group side, their focus was as follows. Firstly to remain compliant with the requirements of NAMA and avoid the prospect of NAMA enforcing on its assets by appointing receivers. In this objective they were successful. Secondly, for as long as they could while complying with NAMA's directions, maintaining the assets of the O'Flynn Group with the aspiration that the debt could be settled or rescheduled with the support of a new investor. This was the so called Rothschild process. When NAMA directed cessation of the Rothschild process, the focus shifted to facilitating the sale of the loans by NAMA to a purchaser "with whom they could do business", as ultimately they did when reaching a settlement with Carbon.

1669. The undisputed evidence is that the O'Flynn Group cooperated with NAMA in the process and this culminated in the sale of the loans to Carbon. All parties were careful during the course of the trial to avoid leading evidence as to the price obtained. However, NAMA accepted the Carbon price and duly completed the loan sale. In all the time when the O'Flynn Group was "in NAMA" NAMA never found it necessary to enforce against the Group. In fact when Carbon later sought to do so it is found to have done so unlawfully.

1670. On the other side of the parallel, the strategy of Mr. O'Flynn and Mr. Nesbitt was the utilisation of VHML, and later other plaintiffs, to pursue new development opportunities which were no longer open to the O'Flynn Group. This is a reference to projects which necessitated speculative new plans, new funding and in many cases entry into joint ventures or partnerships with third parties.

1671. When Mr. Cox worked on projects for VHML, such as Birmingham and Coventry, he was directed to do so by Mr Nesbitt. Mr Nesbitt was still Managing Director of Tiger and of VHL and Mr Cox continued on the payroll of VHL. He was remunerated for his work for VHML by the separate bonuses and consulting payments, but of course he remained on the VHL payroll.

1672. It is not suggested that Mr Cox worked for the benefit for VHML in his spare or leisure time. He clearly spent much of his working week on projects for the parallel structure under the instructions of Mr Nesbitt, all the time being paid by VHL. VHL and the O'Flynn Group, the NAMA obligors were paying for Mr Cox's time.

1673. This means that while pursuing the business agenda of the parallel entities Mr Nesbitt had the dual roles of being a director and therefore a fiduciary of VHL and was the beneficial owner of the VHML companies including Grey Willow. He placed himself therefore in a position of a conflict of interest wearing those two hats.

1674. Long before 28 February 2014 Mr Cox was working for and had been receiving payments from both Tiger and the parallel structure. It was he who formulated the terms of the investment with Coral for the benefit of VHML, Grey Willow and Albert Project Management Limited. None of these structures were therefore a mystery to him and of course none of these arrangements were prejudicial to him. On the contrary he was remunerated for his role in the process.

1675. What does any of this have to do with the plaintiffs' claim?

1676. This case is not a prosecution under the Act, and I do not find that an offence under s.7 has been committed.

1677. It is clear from the correspondence between Mr Frank Dowling and Mr Brendan Linehan that NAMA applied a rigorous rule over the overheads of the O'Flynn Group including payroll. It never considered that it had any reason to treat the O'Flynn Group as noncompliant.

1678. NAMA having taken that approach over the period of more than four years while the O'Flynn Group was "in NAMA" the defendants now invite this Court to find that there has been a diversion of assets and resources which ought to have been applied in debt reduction to NAMA and that this means the plaintiffs come to court with unclean hands. The most they point to in this regard is the sites at Birmingham and Coventry. On those assets it is clear that

an intercompany charge relating to costs of planning and other expenses incurred was due. However, the evidence is that at the time when the loans were being sold by NAMA to Carbon such intercompany balances were not settled. Ms O'Neill gave evidence that the company balances, even if they had been recorded in the financial statements, were not settled in the context of that loan sale or even later in the context of the Carbon settlement. There is therefore no evidence that NAMA suffered a loss.

1679. As for the sale of Birmingham and Coventry there is no evidence that Coral or any other party would pay more to VHL for the two sites which NAMA had been insisted would be sold "as is".

PART TWENTY-TWO: SUMMARY OF DEFENCES

1680. As described earlier, there are three issues I must determine arising from the NAMA defence and related objections made by the defendants. There are:

1) The plea of illegality.
2) The maxim that 'he who comes to equity must do equity', including a consideration of whether any 'grime' found to be on the hands of the plaintiffs is immediately and necessarily related to their claims against the defendants.
3) The submission that the plaintiffs have misled the court and should be refused relief on that ground.

The illegality defence

1681. The plea of illegality in paragraph 4 of the Defence contained no particulars of an illegal act or of the legislation alleged to be transgressed. When particulars were delivered the allegation was that the sites at Birmingham and Coventry were sold by VHL at an undervalue in a transaction from which the plaintiffs benefitted and without disclosure to NAMA of the Coral scheme.

1682. Section 7 of the NAMA act states:

"(2) A person who intentionally, recklessly or through gross negligence provides false or inaccurate information to NAMA commits an offence.

(3) A person commits an offence if the person—

(a) intentionally withholds information from NAMA in breach of an obligation to provide that information imposed by or under this Act, and

(b) does so with the intention of having a material impact upon—

(i) the manner in which NAMA deals with a bank asset,

(ii) a decision by NAMA to refrain from dealing with a bank asset, or

(iii) the value that NAMA determines for a bank asset".

1683. The decision of NAMA to consent to the sale of the sites to Mr. Gallagher was a decision, following an application and representations by VHL and its Managing Director John Nesbitt, relating to the manner in which NAMA dealt with a bank asset, namely the charge on the sites in favour of IBRC which NAMA had acquired in 2010.

1684. Section 7 established a criminal offence carrying penalties of fines and, for a conviction on indictment, imprisonment. A finding that such an offence has been committed can only be made in a trial pursuant to this section, in which all the proofs required would be tested by persons accused. The hearing of this action was not such a trial, and I cannot find that an offence has been committed.

1685. The act does not stipulate any other consequences of providing false or inaccurate information to NAMA.

1686. *Quinn v. IBRC* (in special liquidation) 2015 IESC 29, 2016 IR 2 concerned the question of whether contracts, in this case guarantees and share charges granted by members of the Quinn family in favour of IBRC (formerly Anglo Irish Bank) were enforceable notwithstanding allegations that they infringed the provisions of s.60 of the Companies Act, 1963 (prohibiting a company from giving financial assistance for the purposes of purchasing any shares in that company) and breached provisions of the Market Abuse Directive

(2003/6/EC) Regulations 2005. The court concluded that such contracts were capable of enforcement even if found to be illegal. Clarke J. examined the principles which would inform the court's determination in performing a balancing exercise between the requirements of the relevant statutes and the desirability or otherwise of enforcing the relevant contracts between the parties to the case. That case concerned the potential effect of statutory illegality on contracts and their enforcement. Here I am considering the effect of illegality on a claim for breach of fiduciary duty.

1687. Clarke J. stated: -

> *"The approach adopted in cases such as Euro-Diam Limited v. Bathurst [1991] QB1 sought to solve the problem of attempting to balance, on the one hand the public policy requirement that courts not act in aid of illegal activity with, on the other the injustice to which a "lie where it falls" approach can give rise by inviting the court to decide each case on its own merits. An alternative approach, which seems to me to give rise to a much greater degree of certainty seeks to reconcile the competing principles by having regard to what may be seen to be the policy requirements of the relevant statute which creates the illegality in the first place. On that basis, a court is required to assess whether the requirements of public policy, in respect of a particular statutory provision rendering, as a matter of the public law of the State, a particular type of activity illegal, required a contract sufficiently connected with that particular type of illegality are to be regarded as unenforceable. Such an approach requires each statutory regime (or part of a statutory regime) to be independently assessed to determine whether policy requires particular types of contracts to be treated as unenforceable."*

1688. Later Clarke J. said:

"It is necessary to note that questions may arise as to the extent to which contracts with a greater or lesser connection with the relevant illegality are to be treated as unenforceable. Clearly that issue does not arise if the proper conclusion to reach is that public policy does not require unenforceability at all. But where unenforceability arises, a further question may require to be determined as to just how closely connected to the relevant illegality a transaction may be required to be in order for it to be sufficiently tainted so as also to be treated as unenforceable."

1689. Clarke J. continued:

"a court may well be entitled to take into account the range of express potential adverse consequences of the relevant illegality in assessing whether it is to be implied that those consequences are sufficient in themselves to meet the purposes or policy of the statute.

It may be that an elaborate, significant and proportionate scheme of adverse consequences may be much more likely to lead to the inference that those consequences are sufficient to deal with the relevant illegality. Limited or minor consequences will more readily lead to the opposite inference and, thus, to a conclusion that it is required by policy that relevant contracts should be regarded as unenforceable. In such an assessment, it may well be that a court will be required to be mindful to identify the purpose of the statute (as inferred from its general structure and terms) and to consider whether it should be inferred that the specific consequences, set out in the legislation and to be applied in the case of illegality arising under the statute concerned, are sufficient to meet that statutory purpose."

1690. Clarke J. said the following: -

"Firstly, that one must examine whether there is a close connection between particular type of illegality alleged and the nature of the contract sought to be

enforced. Secondly, the nature and purpose of the statute itself and whether its objectives are in any way defeated if the plaintiff is not deprived of a remedy by reason of an illegality."

1691. The purpose of S. 7 of the NAMA Act 2009 is to sanction misleading of NAMA which interferes with the policies and decisions it takes in respect of assets. Any misrepresentation or material omission in relation to assets being sold, relevant for example to the value of the asset and a decision by NAMA to consent to a sale of a charged asset, attracts the penalties provided by the section. This consequence could only follow a prosecution and trial resulting in conviction.

1692. Section 7 does not stipulate any other consequences. Unlike in *Quinn v IBRC*, I am in this case considering a remedy for breach of fiduciary duty. Nonethless if one adopts an approach taken by Clarke J., the court must enquire if the policy of the Act calls for a consequence proposed by the defendants, namely that the court should refuse relief to the plaintiffs in response to an illegality. Before taking this further, I state the obvious that this court is not charged with determining whether an offence has been committed under the Act. But if this court found that the pleaded defence was made out and that NAMA had been misled, I would be required to consider what the policy of the Act requires as a response that the plaintiffs should be denied relief for the breaches of fiduciary duty which I have found on the part of Mr. Cox.

1693. The claim relating to Gardiner Street is that Mr. Cox owed fiduciary duties to the plaintiffs which he breached by concealing that project and taking it for his own profit and the profit of his co-defendants. No NAMA charged assets are affected by the events giving rise to that claim and any findings on the plaintiffs' case. Later I consider the application of maxims of equity and the 'clean hands' principle and whether any 'grime' on the plaintiffs' hands, if found, is sufficiently closely connected to the equity sued. But as far as concerns the

allegation that the NAMA Act has been breached, I do not find anything in the scheme of the Act or its policy which would call for a response which relieves the defendants in this case from liability to account for the breach of fiduciary duty. Allegations are made by the defendants as to the Gylemuir process and that VHL assets were sold at undervalue with consequential profits to the plaintiffs and their shareholders, and as to the application of O'Flynn Group assets for the benefit of the plaintiffs. But the plaintiffs claim related to concealment and diversion of a profitable opportunity from companies which were not NAMA debtors. There is no sense in which the Act's objective of protecting the value of assets available to repay NAMA debt is compromised or threatened by the events relating to Gardiner Street or by granting the remedy sought by the plaintiffs.

1694. For these reasons I conclude that the illegality pleaded by the defendants cannot be a defence to the plaintiffs' claims or a reason to refuse the relief sought.

Have the plaintiffs come to court with clean hands?

1695. When directing the application and representations to NAMA for consent to the sale of the two sites Mr. Nesbitt was, as he admitted, 'riding two horses'. One had the task of complying with NAMA's decision to get on with the sale of the sites by VHL. The second was to secure the opportunity to develop the sites in collaboration with an investor. The second of those horses was running outside the O'Flynn Group, and it had four legs, namely the first four plaintiffs. This means that the parties who profited from the transaction were Mr. Nesbitt and those plaintiffs. I cannot divorce this fact from my finding that Mr. Nesbitt was selective in his disclosures and representations to NAMA, and in that respect, he breached fiduciary duties as a director of the NAMA indebted VHL. He was the owner and controller of the first four plaintiffs, and they benefitted from the sale of the sites. This leads to the conclusion that the hands of those four plaintiffs are tainted, and the maxim that 'he who seeks equity must do equity' is relevant.

1696. In *Egan v Heatley,* the court put the maxim thus:

> *"... if the conduct of the plaintiffs in relation to the particular matter in respect of which he is claiming relief has been inequitable or tainted in some manner to which a court applying principles of equity should have regard, he may be refused relief. The application of the principle to any particular case is, clearly, highly fact sensitive. The maxim will not apply where the irregularity alleged to give rise to its application is trivial. Nor will it operate unless there is an immediate and necessary relationship between the conduct in question and the equity sued for."*

1697. None of the irregularities cited against the plaintiffs are trivial. The more difficult question is whether the conduct of Mr. Nesbitt as owner of the first four plaintiffs has an "immediate and necessary relationship" to the claims they make against the defendants.

1698. The first and obvious connection is the commonality of the parties, namely the first four plaintiffs and Mr. Cox. Neither the fifth or the sixth plaintiffs had any hand, direct or indirect, in the Birmingham and Coventry transaction. As far as concerns the first four, the defendants in submissions make the connection that the reason they invoked the Birmingham and Coventry transaction was because the plaintiffs had pleaded that they were associated to the O'Flynn Group, and they submit that if this were correct NAMA was misled. But the critical basis for my finding that Mr. Cox owed fiduciary duties to the plaintiffs is not rooted in the claim that they were associated with the O'Flynn Group which I rejected. It is grounded on the analysis of the evidence of the relationship between Mr. Cox and the plaintiffs, the manner in which they acted towards each other, and the trust and confidence reposed by the plaintiffs in Mr. Cox which rendered them vulnerable to his action.

1699. Mr. Cox's evidence is that some, namely £500,000 out of the payments made to him by VHML and Grey Willow for his part in the Birmingham and Coventry transaction were utilised by him as capital for the Gardiner Street Project.

1700. There is no evidence that the Gardiner Street Project, which was funded for the most part by the investment arrangements with GSA, would never have been possible to pursue

without the VHML and Grey Willow payments. I do not find that this evidences the required "immediate and necessary" connection.

1701. If I am wrong about the 'payment' connection, the monies paid to Mr. Cox were, remuneration for his role in Birmingham and Coventry. The defendants have never suggested that the payment and receipt by Mr. Cox of such monies was itself tainted, or illicit. Such tainting may not be required to establish the necessary connection, but it would be unjust to permit Mr. Cox to rely on these payments accepted by him to establish the connection required for the maxim.

1702. In respect of the concealment and diversion of the Gardiner Street transaction itself, and the taking of documents and information of the plaintiffs, there is clearly no connection with the Birmingham and Coventry transaction. The latter occurred in 2011 and 2012, with final return of profit flowing on a date in 2013 when Coral, for its own reasons, decided that the scheme should be sold. The Gardiner Street project came to Mr. Cox's attention in February 2014 and progressed thereafter, long after Birmingham and Coventry had been completed and sold. These temporal and geographic spaces would not of themselves mean there was no immediate and necessary connection. But the projects involved different assets, in different jurisdictions, and different external counterparties. Most importantly, the allegation by the defendants about Birmingham and Coventry is that NAMA were the party misled into approving asset sales to the cost of VHL, NAMA and the taxpayers of Ireland. In the plaintiffs' case the aggrieved parties are not NAMA but the plaintiffs themselves, who are not NAMA debtors.

1703. My conclusion is that the 'grime' which was the breach by Mr. Nesbitt of his fiduciary duty to VHL was not sufficiently closely and necessarily connected with the equity sued for by the plaintiffs and I would not on this ground refuse the relief.

1704. Again, that is not the end of the matter. The test for application of the maxim was expanded upon by the Court of Appeal in *Egan v Heatley,* which I next consider.

Egan v Heatley

1705. In *Egan v Heatley*, Murray J. described the well established 'clean hands' maxim of equity. He then continued by identifying that the maxim is triggered where a party seeking equitable relief seeks to rely on false evidence: -

> *"One circumstance in which the courts have made it clear the maxim is triggered is where a party seeking equitable relief seeks to rely in court on evidence that is false (See Armstrong v Shepherd and Short Limited [1959] 2 QB 384). The decision of the English Court of Appeal in Willis v Willis [1986 1 EGLR 62 makes it clear that reliance on falsified documents will bring the maxim into play."*

1706. In Willis, the appellants concerned had produced in evidence a letter vouching expenditure on a property which was false. No finding had been made that the appellants had themselves been responsible for the fabrication but one of them was aware of the fabrication. The letter was not used at trial and the pleadings amended to delete it when the falsity was discovered by the respondents. Nonetheless, Murray J. continued, *"the fact of production of the letter, the transmission of it by one of the plaintiffs to their solicitor and its use to underpin the pleaded claim was held in itself to require rejection of the defence (sic) in its entirety."*

1707. Murray J. expanded adding the following: -

> *"… it must follow that the question is not whether the plaintiffs presented false documents with a view to supporting their claim that the contract on which they sued was enforceable, but whether they relied upon such evidence in seeking relief that is subject to an equitable jurisdiction."*
>
> *"… the production before a court exercising an equitable jurisdiction of documentary evidence which is manufactured for the purposes of obtaining relief within that jurisdiction, or of testimony which is material <u>and</u> knowingly false will, of itself, debar the plaintiff from obtaining the relief claimed."*

"Where a party seeks equitable relief by reference to materially false evidence, the question is not whether the evidence was connected with the event alleged to generate the entitlement to that relief, but whether it was used by the party to obtain relief based on that event. The reason equity precludes an applicant in these circumstances from obtaining any relief derives not from whether they might otherwise have had an entitlement to it (that is why it matters not if the evidence is adduced in order to broadly reflect the facts as they believe them) but because in the course of asserting that claim they have behaved unconscionably and in a manner that is at the same time morally reprehensible and undermining of the administration of justice."

1708. In *Egan v Heatley* and in *Willis v Willis*, the court was concerned with the production of documents which were found to be forged. In this case the defendants have not alleged forgery. The nearest they come to this was to question the provenance of the Sharing Agreement, which clearly had not been executed by the date which appeared on the version presented to this court. But they submit that the plaintiffs have presented a series of falsehoods in a narrative designed to mislead the court. They submit that these proceedings are 'fraudulent and an abuse of the process of the court and should be dismissed on that basis. They rely on the judgment in *Egan v Heatley*.

1709. The evidence which the defendants characterise as false, and "lies", arises under the following headings: -

A. The so-called 'Foundation Lie'. This is the inconsistent and changing evidence as to the incorporation, shareholding, and purpose of VHML.
B. The Sharing Agreement. This is the reliance by the plaintiffs on a document held out to be dated 15 October 2012 which it emerged did not exist as of that date, and the claim that NAMA were aware of it.
C. A 'lie' about the basis on which Mr. Cox came to provide services to the plaintiffs.
D. A 'lie' about the purpose of the letter of 14 July 2014.

E. The Birmingham swap site planning application. This is the incorrect evidence led by the plaintiffs, and statement made to NAMA, that VHML and not VHL had applied for this planning permission.

A. The 'Foundation Lie'

1710. I have examined this allegation in Part Seven. Undoubtedly the plaintiffs presented a series of versions of the foundation of VHML. They first said it was incorporated after the rejection by NAMA of the O'Flynn Group Business Plan in April 2010. This proved to be incorrect. They then said it only became operational after the rejection of the Business Plan, and this also proved to be incorrect when instances of VHML activity before that rejection were cited. Thirdly, they said that its shareholder was John Nesbitt, who ceded his shares in the O'Flynn Group. It then emerged the shareholding in VHML was owned and controlled (through Palm Tree Limited) up to as late as 2011 by the same persons who owned the O'Flynn Group including Michael O'Flynn, John O'Flynn and Pat Kelliher.

1711. The defendants say that this was more than a series of errors of detail. They point to the fact that the witness statements of Mr. O'Flynn and Mr. Nesbitt are identical on the point, where they put forward the first incorrect version, namely that VHML was only incorporated after the Business Plan rejection.

1712. The defendants submit that when Mr. O'Flynn gave a sequence of incorrect descriptions this was not simply, as was suggested by the plaintiffs, a failure by him to grasp detail of matters in respect of which other persons had more familiarity.

1713. There is some force in these submissions. Nonetheless, although the pleadings and the witness statements are confusing at a first read, I am not persuaded that the plaintiffs set out, as the defendants allege, to mislead the court and 'lie'. From the outset of the trial, it was clear that the parallel structure was intended to be used and was used to pursue development opportunities which he O'Flynn Group could no longer pursue after NAMA acquired its loans in March 2014. The plaintiffs' description of the Business Plan presented by the

O'Flynn Group to NAMA and their response to its rejection was clear. They made no secret of their intention to undertake development opportunities where they found them. Nor was it suggested at any point that NAMA was dissatisfied with the Group's level of co-operation with it once NAMA made its decision rejecting the Business Plan.

B. The Sharing Agreement

1714. I examined this question in detail at Part Four.

1715. Mr. O'Flynn and Mr. Nesbitt each put into evidence on oath a document described as a 'Services Agreement' dated 15 October 2012. In their evidence they said that at all times NAMA was aware of an agreement for shared services between VHL and VHML at an annual fee of £50,000, and of a trademark licence at an annual fee of €25,000. No witness for the defendants could gainsay the sworn evidence of Mr. O'Flynn and of Mr. Nesbitt that they disclosed the sharing arrangements. But the plaintiffs relied on the document purportedly dated 15 October 2012 as evidence of the sharing agreement and in that respect there was a number of defects in this evidence.

1) The O'Flynn Group Group Finance Director said in March 2014 that there was no such 'sharing agreement' in place.
2) A Service Agreement and a Trade Mark License Agreement were produced for the Carbon transaction in March/ April 2015 but not dated.
3) The Chief Legal Officer of NAMA said that on the files of NAMA for these connections there was no copy of a Services Agreement and no evidence that such a document had been received by NAMA.
4) Mr. Stewart said that there was no other record or minute evidencing that the agreement was shown to NAMA.
5) As evidence that NAMA were aware of the existence of VHML, Mr. Nesbitt placed reliance on references in the Forms A submitted for the Birmingham and Coventry transaction to a 'NewCo' having a licence to use the Victoria Hall brand. Mr Stewart

said that this was a reference only to an entity intended to have a role on those two sites, and not of disclosure of the existence of VHML, whose name was never provided to NAMA.

1716. The doubt surrounds the dating of the version of the sharing agreement handed into court. It has not been shown that the agreements concerned are a fiction or a forgery. The defendants' witnesses confirmed that they were not privy to all discussions between the Group and NAMA and therefore cannot gainsay the plaintiffs' evidence on this subject.

C. The basis for Patrick Cox providing services to the plaintiffs

1717. This subject is considered in detail in Part Eight. I rejected the claim that Mr. Cox was providing services to the plaintiffs pursuant to the Contract of Employment he signed with Tiger Developments. Instead, I found that the facts lead to the conclusion that he was a fiduciary of the plaintiffs, having regard to the respective conduct of all the parties towards each other, including the trust placed by the plaintiffs in Mr. Cox which, to his knowledge, rendered them vulnerable to his actions. That conclusion was grounded on the analysis of the contract and the surrounding evidence. It does not mean that the plaintiffs lied or misled the court in advancing this part of the case.

D. The letter of 14 July 2014

1718. This question is considered in Part Eleven.

1719. I rejected the proposition that the letter, even if effective, was only intended to approve the building of a house for Mr. Cox and his family. I did not find that the plaintiffs lied on the subject. Both parties gave unsatisfactory accounts of the events relating to this letter, and I concluded that the decisive fact was that it was signed in circumstances where Mr. Cox concealed the true nature of the plans for which he relies on the letter as consent and the fact that they were so well developed at the time of the letter. Therefore, no informed consent was given.

E. The Birmingham swap site planning application

1720. This subject is analysed in detail in Part Twenty-One.

1721. When it came to presenting their evidence as to the circumstances in which planning permission was applied for on the Birmingham swap site, the plaintiffs led inaccurate evidence. In Part Twenty One I concluded that in the totality of their witness statements and evidence in court, the plaintiffs were open and frank about such matters as their ambitions and plans for development of the sites at Birmingham and Coventry. Whilst the inaccuracy as to who had applied for the planning permission was repeated both in their evidence and in the correspondence between BHK and NAMA and was not trivial, I am not persuaded that the plaintiffs set out, as the defendants allege, to mislead the court with their account of events.

1722. I have considered whether the combination of these issues taken in their totality evidences misconduct in the pursuit of these proceedings or in the reply to the defence, or whether the plaintiffs have, as Murray J. put it in Egan v Heatley, "behaved unconscionably and in a manner that is at the same time morally reprehensible and undermining of the integrity of the administration of justice". The plaintiffs came to court with their valid cause of action arising from the actions of the first defendant, and have met honestly the many counter allegations which were not related to the claim which gave rise to the proceedings or pleaded. For the reasons analysed earlier I am satisfied that they have not acted in a manner which would cause the court to refuse the relief which follows from the findings I have made.

1723. PART TWENTY-THREE: AGGRAVATED DAMAGES

1724. In submissions, the plaintiffs have claimed that an award of aggravated damages should be made. They put forward two grounds.

1725. Firstly, the first apology made by Mr. Cox for taking documents was made in his witness statement delivered two months before the commencement of the trial. The plaintiffs say that no apology was made before then. They also submit that the defendants never

acknowledged that they had used any of the documents taken, apart from extracts from one document referred to in Mr. Kearney's evidence.

1726. Secondly, the plaintiffs invoke the approach taken by the defendants to the litigation in:

i. Making unpleaded allegations of fraud in relation to Birmingham and Coventry.

ii. Expanding during the trial numerous allegations of fraud theft, fabrication of evidence, and of offences pursuant to the Criminal Justice (Theft and Fraud Offences) Act 2001 and the Companies Acts.

1727. Two leading cases are cited in support of this application.

1728. *Conway v Sheehan & Ors* [1991] 2 IR 305 concerned actions taken by the Irish National Teachers Union which were found to be a conspiracy which had the effect of depriving an eight year old child of schooling and infringed the child's Constitutional right to education and training. The Supreme Court took account of the special position and responsibility of the defendants towards the plaintiff at an age when she was particularly vulnerable with regard to education and training.

1729. *Daly v Mulhern* [2008] 2 IR 1 was a road traffic accident case. The defendant had initially apologised and offered to compensate the plaintiff and had repeated the offer. When he later denied the occurrence of the accident and the court found him liable and awarded damages, it also awarded aggravated damages having regard to the manner in which he conducted the defence of the action.

1730. The *Conway* case which concerns the effect on vulnerable children is a different order of gravity from this case. *Daly v Mulhern* is closer in its application to this case. It is a clear authority for the jurisdiction to award aggravated damages arising from the manner of conduct of litigation, including a defendant's conduct.

1731. In relation to the conduct of the defence, I have made my decision after close examination of all the evidence relating to events from 2007 through to 2016. The history was long and complex. In rejecting the defence, I have not found illegality or fraud.

1732. It was inappropriate for the defendants to introduce allegations of fraud, firstly in written submissions and witness statements, and then broaden those allegations during the trial. They never applied for leave to amend the Defence to plead fraud, but instead repeated their allegations liberally during the trial. They also persistently accused the plaintiffs' witnesses of lying.

1733. In the hearing of the case the first defendant admitted that he had no entitlement to take the documents and information he took and hold them for a year after his resignation. The failure to make any apology for such an egregious act until delivery of his witness statement is an aggravating factor.

1734. There were elements of the NAMA defence which were not straightforward. I found that Mr Nesbitt placed himself in a position of conflict between his fiduciary duties as a director of VHL and his interest in the Coral scheme when the totality of his communications about the sale of sites at Birmingham and Coventry are taken into account.

1735. The plaintiffs initiating these proceedings may have believed this was a simple case about wrongful concealment and diversion of a business opportunity by the first defendant. But the case was never so straightforward. It ought to have been clear to the plaintiffs that they would need to be in a position to adduce evidence not only of the relationship with Mr. Cox and his actions, but also to comprehensively and clearly describe their business, and its origins. On most aspects described in this judgment they comprehensively describe their business and its origins insofar as required to properly establish their cause of action against the defendants. But on other aspects, particularly the evidence required to reply to the NAMA defence the narrative was inevitably more complex. They say that many of the complex and challenging issues ventilated in the trial arose from matters not pleaded, and only

particularised long after the commencement of the trial. That is a valid objection. Nonetheless, a number of the allegations warranted a hearing, albeit that I concluded that they were not sufficiently and necessarily connected to the claims against the defendants as to cause the court to refuse the relief claimed and were not made out.

1736. For these reasons I do not consider this to be an appropriate case for an award of aggravated damages.

PART TWENTY-FOUR: REMEDIES AND QUANTUM

The first defendant

1737. The remedy which flows from my conclusion that the first defendant acted in breach of fiduciary duties to the first to fifth named plaintiffs inclusive is that he will be ordered to account to those plaintiffs for all the profits earned in the Gardiner Street scheme together with interest. If and to the extent that the first named defendant is not entitled to or does not receive distributions of such profits, the remedy for his breach of fiduciary duty in diverting the scheme from the plaintiffs will be an order for the payment of damages for breach of duty.

The third, fourth and fifth named defendants

1738. In Parts Fourteen and Fifteen I examined the claims against Mr. Foley and Mr. Kearney. I concluded that they were not fiduciaries of the plaintiffs, and no cause of action was made out against them for breach of confidentiality, conspiracy or otherwise. The claims against them and against the fourth defendant will be dismissed.

The corporate defendants

1739. The second defendant Rockford Advisors Limited was the vehicle used by the first defendant both as a recipient of payments from the plaintiffs, and as part of the structure for the construction and development of Gardiner Street. The orders I intend to make against the first defendant will extend to this company.

1740. The sixth, seventh and eighth named defendants were owned and controlled by Mr. Cox, Mr. Foley and Mr. Kearney, who were directors of each of them. The shareholding was

held equally between them, except for Carrowmore Properties Gardiner Limited, in which the first defendant held 80% of the shares. I have not found any contractual, fiduciary or other relationship between these defendants and the plaintiffs. I have also rejected the claim of conspiracy and the claim that they wrongfully procured or induced breaches of contract or other duties. Although Mr. Foley and Mr. Kearney had knowledge that Mr. Cox was sourcing information whilst still employed by the O'Flynn Group, there is no evidence that they were aware of the facts which have grounded my finding that he was a fiduciary of the plaintiffs. I cannot therefore attribute the wrongful actions of Mr. Cox alone to these companies. There will be no order against these defendants, save insofar as may be required to give effect to orders against the first and second defendants. If required, I shall hear submissions on this question.

Quantum

1741. The plaintiffs' expert Deirdre McGrath, a partner at PWC, gave evidence of the profits earned by the defendants in each of the two phases of Gardiner Street, described in her Reports as 'Lost Profits'. The Report contained an opinion as to the quantum of damages to be awarded. The opinion calculated total damages by reference to lost profit before tax, to which there was applied adjustments for Corporation Tax, discounts for risk and uncertainty, interest and an allowance assuming the profits would be chargeable to Corporation Tax and not Capital Gains Tax. In the case of the first defendant alone, an adjustment was made for Capital Gains Tax on the profit earned for the land at Gardiner Street.

1742. The Report quantified damages for profits lost on each of the phases of Gardiner Street, and illustrated differences between two scenarios, one for a traditional funding of the project by debt and equity, and a second for the 'forward funding' model.

1743. The defendants' expert witness Kieran Wallace, then of KPMG, presented a Report identifying some aspects of the plaintiffs' calculations with which he disagreed. On Day 32 of the trial the court was informed that the experts were agreed on the calculation of profit by

reference to Scenario Two, the forward funding model. That was the funding method implemented by the defendants for the Gardiner Street Scheme and is therefore the appropriate measure for accounting.

1744. The agreement between the experts was that in Phase One the profits earned before tax were €10,782,000, and after Corporation Tax €9,434,000. These figures include the profit earned by Mr. Cox on the sale to the GSA structure of the land at Gardiner Street acquired from Mr. Mullins. For Phase Two, the agreed amount of profit was €2,170,000 before tax and €1,899,000 after tax.

1745. The calculations of discounts and interest were all made on the basis of what would be appropriate if an award of damages were made. It is my intention to make an order that the first and second defendants hold the profits of the Gardiner Street scheme, totalling €11,333,000, on trust for the first five plaintiffs and an order that those defendants account to and pay the plaintiffs such amounts together with interest. I shall, if required, hear submissions as to whether the same interest and other calculations which were provided by the experts on the basis of calculating damages apply where the declaration is that defendants account as trustees of the profit.

1746. The matter will be listed before this court on Tuesday 10 December 2024 at 10.30 am.