27TACD2021

BETWEEN/

APPELLANT

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. This determination relates to an appeal against assessments in accordance with section 31 and / or section 31A Stamp Duties Consolidation Act 1999 ('SDCA 1999').

2. The Appellants entered into a Put and Call Option Agreement with a third party which, on the exercise of the Put Option, required the Appellants to purchase a property from the third party. It is the Respondent's contention that the Put Option was validly exercised by the third party by giving the required Notice to the Appellants, and that Notice together with the Put and Call Option Agreement, constituted a conveyance on sale to the Appellants for the purposes of section 31 SDCA 1999 and as such, is liable to stamp duty. Alternatively, the transaction is liable to stamp duty under section 31A SDCA 1999.

3. The Appellants contend that the Put Option Agreement was fully assigned to the bankers of the third party by the time of the giving of Notice to exercise the Put Option. As such, there was no authority or right for the Put Option to be exercised by the third party. The Respondent refutes this and asserts that the nature of the assignment by the third party to its bankers was an assignment by way of a charge only, not an absolute assignment, and accordingly, the exercise of the Put Option by the third party was binding on the Appellants.

4. Further, or in the alternative, the Respondent contends that the Notice of exercise of the Option coupled with the Option Agreement constituted a contract or agreement for the

sale of an estate or interest in land, in respect of which more than 25% of the consideration has passed, and is therefore liable to stamp duty pursuant to section 31A SDCA.

5. This appeal will explore:

- whether section 31 SDCA 1997 applies;
- alternatively, examine whether section 31A SDCA 1997 applies;
- explain the complex tax-related financing structured used by the Appellants to finance their hotel which lies at the heart of this appeal;
- explore the factual matrix of the transactions between the Appellants, the Investors in the tax-based financing structure and The Bank A who financed the Investors;
- examine the 2013 bank loan documentation unpinning the assignment of the Option Agreement originally created in 2006;
- look at the distinction in law between an absolute assignment and an assignment by way of a charge only;
- seek to apply the law to the assignment of the Option Agreement including whether the Notice to exercise the Option issued in 2014 by the Investors to the Appellants was valid or not and whether the Investors still retained that right, consequent upon them entering into a Mortgage , Charge and Assignment Agreement with The Bank A in 2013;
- If the Notice of Exercise of the Option by the Investors is valid, whether that Notice, upon execution, constitutes a document liable to stamp duty;

6. The legal interpretation of documents relating to bank loan facilities provided by The Bank A to the third party Investors goes to the heart of this appeal. This is an interpretation of the law of contract rather than tax law. For this reason, a considerable portion of this determination is devoted to examining these documents.

7. A hearing of this Appeal, under Chapter 4 Part 40A TCA 1997, was held on 26 and 27 February 2020 at the Offices of the Tax Appeals Commission. This hearing was adjourned and recommenced at the Offices of the Tax Appeals Commission on 10 September 2020. The hearing concluded on that day.

8. This is a complex appeal. For that reason, I have set out below a guide to the contents of this determination.

Background

Events in 2005 / 2006

9. The Appellant is a member of a partnership called REDACTED (The Partnership). The Partnership owned the freehold of REDACTED (the Property). In order to facilitate the financing of a development of the Property, The Partnership entered into certain arrangements with a collection of third parties (the Investors). These arrangements were devised as a legitimate tax structure to allow the Investors benefit from certain tax reliefs, while providing low cost finance to The Partnership.

10. By contract for sale dated REDACTED, (the "**2005 Contract**") The Partnership agreed to sell the property to the Investors for a term of 999 years subject to an initial rent of €1,500 per annum. This lease was never entered into and the arrangement rested in contract.

11. At the time this contract was entered into, The Partnership was a partnership which consisted of (the Appellant, Partner 2, Partner 3, Partner 4). An exit mechanism for the Investors was also put in place in the form of a put and call Option Agreement (the "**Option**") dated 3rd November 2006. Under this arrangement, the Investors were granted the option entitled the 'Third Put and Call Option Agreement' to require the Appellant and other members of The Partnership to purchase all of the Investors' rights in the Property. It was a term of the Third Put and Call Option Agreement that the Put Option could be exercised by the Investors by way of notice in writing to The Partnership at any time between 25 October 2013 to midnight on 25 January 2014. At the time the Third Put and Call Option Agreement was entered into, The Partnership consisted of (the Appellant, Partner 2, Partner 3, Partner 4, Partner 5).

Events in 2013

12. Originally, a loan obtained by the Investors to finance their investment in The Partnership Property in 2005/2006, was provided by Bank B. REDACTED, the Investors, in association with the Promoters sought to restructure the Investors' loan by transferring the Investors loan to The Bank A (the "**Bank**"). There appears to have been other associated loans related to the Investor, Promoters and a related Hotel development company, refinanced with The Bank A in 2013 but these were not brought before this appeal.

13. A Facility Agreement (loan agreement) for a sum of €6m was entered into by the Investors with The Bank A, dated 28th February 2013. The parties to this agreement were the Investors and The Bank A with the Promoters, The Partnership, acting as guarantor.

14. As part of the new loan arrangements, the Investors entered into a Deed of Mortgage, Charge and Assignment (the "**Mortgage**") (see Appendix 5) which was dated 28th February 2013. Under the terms of the Mortgage, the Investors were obliged to assign their interest in, *inter alia*, the Option, to the Bank (the "**Assignment**") as security for the loan, As part of the requirement to assign the Option to the Bank, the Investors were obliged to give notice of the assignment in writing (the "**Notice**") (see Appendix 6) to The Partnership.

15. On 28 February 2013, the Investors advised The Partnership of the assignment of their rights, titles and interest in the Option to The Bank A in accordance with the Mortgage.

Events in 2014

Exercise of the option

16. (Notwithstanding the Assignment of the Option to the Bank), the Investors exercised (per the Respondent) or purported to exercise (per the Appellant) the Put Option by notice in writing to The Partnership on 24 January 2014 **(Put Option Notice)** (see Appendix7) addressed to the Appellant on behalf of The Partnership.

Reacquisition of the property by The Partnership

17. Between 24 January 2014 and 27 February 2014 a dispute arose between The Partnership and the Investors and their legal advisors as to the mechanism for The Partnership reacquiring the property from the Investors, as part of the planned unwinding of the tax based financing structure set up in 2005 / 2006. The Investors and their legal advisors argued that the Put Option Notice sent to The Partnership triggered the sale back to The Partnership. On the other hand, The Partnership argued that the Put Option Notice was not validly exercised by the Investors as they had assigned absolutely their rights under the Option to The Bank A. Both sides legal advisers agreed to disagree.

18. The Partnership concluded the repurchase of The Partnership Property by way of the payment of €11,583,650 to the Investors on 27 February 2014. This transaction was executed by parol or oral execution. No document was signed between the parties.

Appellant's actions following the 2014 transactions and the Revenue Commissioners response

19. In March 2014, agents for The Partnership filed a stamp duty return on ROS in respect of the Put Option Notice, disclosing no stampable transaction and a letter of *Expression of Doubt* was delivered to the Revenue Commissioners dated the same day, outlining in detail the circumstances of the transaction. The letter of *Expression of Doubt* included submissions to the effect that the Put Option Notice was not a stampable instrument; that the assignment of the Option by the Investors to the Bank in 2013 meant that the Investors did not have any right to exercise the Put Option Notice on the basis that they had absolutely assigned their interest in the Option to the Bank; as a result of which any purported exercise of the Option by means of the Put Option Notice had no legal effect and therefore could not give rise to an agreement/contract for stamp duty purposes.

20. By reply, some two years later, dated 22 February 2016, the Respondents informed the Appellants that they considered the Put Option Notice to be chargeable to stamp duty under section 31A SDCA 1999. The Respondents further advised the Appellants by letter dated 15 June 2017 that the Put Option Notice may also be chargeable under Section 31 of the SDCA 1999. The Respondent issued a notice of assessment in the aggregate amount of €231,673 in respect of the Put Option Notice to the partners in The Partnership on 22 June 2017. All of the members of The Partnership, including the Appellant, appealed this assessment on 21st July 2017.

21. This is an appeal brought on behalf of the Appellant, REDACTED, relating to his assessment raised by the Respondent on 22 June 2017. However, as the Appellant is a member of the five member partnership, the Respondent is of the view that the Appellant as a partner, is jointly and severely liable for the entire stamp duty liability of The Partnership. Accordingly, the Respondent has assessed him on the full stamp duty amount. Other appeals are outstanding for the other partners in The Partnership and their outcome is expected to be dependent on the outcome of this appeal. For this reason, I will refer to the Appellants in the plural for the rest of this determination, notwithstanding that this appeal is being taken in the sole name of the Appellant.

22. It is the Appellants' position that the Investors assigned their interest in the Put Option to the Bank and therefore the Investors could not have exercised the Put Option calling on The Partnership to purchase the Property. In support of this they argue that when The

Partnership did eventually purchase the Property, they did so entirely voluntarily and not on foot of the exercise of the Put Option by the Investors.

23. It is the Respondents' position that, as a matter of law, the assignment by the Investors to the Bank in 2013 was not an assignment of their legal interest in the Put Option but an assignment by way of charge only i.e. not a legal or absolute assignment. Alternatively, if it was intended to be an absolute assignment that the terms of the Transaction Documents entered into by the various parties show that the assignment was *conditional*, and therefore not *absolute.*

24. Therefore, a key question to be determined in the present case turns on whether the assignment by the Investors to the Bank in 2013 was an absolute assignment or an assignment by way of charge only. It is agreed between the parties that all of the other requirements for section 28(6) of the Supreme Court of Judicature (Ireland) Act 1877 have been complied with.

25. I accept as correct the submission made by Counsel for the Respondent that whether or not there was an absolute assignment of the Put Option to the Bank by the Investors in 2013 is a matter of contractual construction.

LEGISLATION

Relevant Irish Stamp Duty Provisions:

- Section 31 Stamp Duties Consolidation Act 1999 (SDCA 1999)
- Section 31A Stamp Duties Consolidation Act 1999 (SDCA 1999)

These are reproduced in Appendix 1

As it related to the laws of contract:

- Supreme Court of Judicature Act (Ireland) 1877
- UK Judicature Act 1873
- UK Judicature Act 1925

MATTERS NOT IN DISPUTE

The following matters are not in dispute between the parties:

Preliminary Issue- Expression of Doubt

26. There was agreement between the parties at the Appeal hearing that because the Respondent had not made any determination as to the status of the Expression of Doubt, submitted by the Appellants in March 2014, issues relating to the Expression of Doubt would not form part of this appeal. Accordingly, I will not give any further consideration to this matter

On the interpretation of Tax Statutes

27. The Appellants cited the following cases relating to the interpretation of statutes. including:
    a. *Revenue Commissioners v. Doorley* (1933), IR 750
    b. *Inspector of Taxes v Kiernan* (1981) IR 117
    c. *McGrath v. McDermott* (1988) *IR 258*
    d. *Menolly Homes Ltd v. Appeal Commissioners* (2010) *IEHC 49*
    e. *The Revenue Commissioners v. O'Flynn Construction* (2013) 3 IR 533 (under Appeal)-
    f. *Gaffney v. Revenue Commissioner* (2013) IEHC 651
    g. *Dunne Stores v. The Revenue Commissioners* (2019) IESC 50

h. *Bookfinders Ltd. v.* The Revenue Commissioners (Court of Appeal, 4th April 2019)
i. *Howard v. the Commissioner of Public Works* [1994] 1 IR 101

28. I have considered and noted the Appellant's observations and arguments about these cases in my deliberations. The Respondent stated at the hearing that it did not dispute the Appellants' arguments about how to interpret taxation statutes.

Contract law applies to Options

29. The parties agreed that options are contracts and as such they are agreements to which contract law applies.

OVERVIEW OF THE TRANSACTIONS

Appellant's Overview

30. The Appellants state that their grounds of appeal in this case include:
    - The amount of the duty/tax in the sum of €231,673 is incorrect and invalid.
    - The amount of the late filing surcharge in accordance with section 14A of the SDCA 1999 in the sum of €11,583.65 is incorrect and invalid.
    - The total duty/tax due and payable of €243,256.65 is incorrect and invalid.
    - No charge to stamp duty can arise without a stampable instrument.
    - There is no stampable instrument in this case.
    - Without prejudice to the generality of the foregoing:
        - Any purported "Put Option Notice" was invalid,
        - The person purporting to deliver any purported "Put Option Notice" did not have authority to do so.
        - The persons on whose behalf the purported "Put Option Notice" was purportedly delivered did not have authority to authorise same.
        - The transaction, whereby the property was purchased back by the Appellants, subsequent to the disputed exercise of the Put Option Notice, was carried out by parol and/or oral execution only,
        - No written document was created to evidence the transaction.

31. The Option was not validly exercised,

- If there was an instrument in this transaction (*which is denied*) it was a contract and/or agreement for the sale of an estate and/or interest in land which at all material times here to contemplated that there would be a conveyance (*in accordance with the Law Society General Conditions*) and therefore it did not represent a contract and/or agreement for the sale of an equitable estate and/or interest in property and therefore Section 31(1)(a) SDCA 1999 has no application,

- If there was an instrument in this transaction (*which is denied*) it was a contract and/or agreement for the sale of an estate and/or interest in land and therefore Section 31(1)(b) SDCA 1999 has no application,

- If the "Put Option Notice" did give rise to a contract and/or agreement (which is denied) any such contract and/or agreement was afterwards rescinded and/or annulled and/or not substantially performed and/or carried into effect and therefore any duty paid would in any event have to be returned to the Appellants in accordance with Section 31(4) SDCA 1999.

- Payment was not made pursuant to a written contract and/or agreement and therefore Section 31A(1)(b) SDCA 1999 has no application,

- If, and to the extent that, any payment was made it was made pursuant to a separate parol and/or oral agreement and therefore Section 31A(1) SDCA 1999 has no application,

- No payment was made pursuant to the purported "Put Option Notice" and/or any alleged contract or agreement allegedly arising from same,

- No exposure to stamp duty arose until such time as the payment was made and therefore the date any liability to stamp duty (*which is denied*) arose is the date of the payment at the earliest.

The Respondent's Overview of the transactions

32. The Respondent's view of the transactions in question may be summarised as follows:
The Appellants entered into a Put and Call Option Agreement which, on the exercise of the Put Option, required the Appellants to purchase the Property. It is the Respondent's

contention that the Put Option was validly exercised and, together with the Put and Call Option Agreement, constituted a conveyance on sale for the purposes of section 31 of the Stamp Duties Consolidation Act 1999 (SDCA) and as such, is stampable. Further, or in the alternative, the two agreements (The Option and the Put Option Notice) constituted a contract or agreement for the sale of an estate or interest in land, in respect of which more than 25% of the consideration has passed, and is therefore stampable pursuant to section 31A SDCA.

33. The Respondents submit that the Appellants contention that the Put Option was in fact assigned and that there is no authority for the Put Option to be exercised, is incorrect as a matter of fact and law. What in fact occurred was an assignment of the Option by way of a charge only, not an absolute assignment, or was conditional, and accordingly, the exercise of the Put Option was binding on the Appellants.

KEY DOCUMENTS IN THIS APPEAL

1. Key Transaction Documents are set out in Appendix 2.
2. The Third Put and Call Option Agreement dated 3 November 2006. Relevant extracts are set out in Appendix 3.
3. The Facility Agreement dated 28 February 2013. Relevant extracts are set out in Appendix 4.
4. Mortgage, Charge and Assignment dated 28 February 2013. Relevant extracts are set out in Appendix 5.
5. Notification to Appellants (Promotors) of assignment by Investors to The Bank A dated 28 February 2013. Relevant extracts are set out in Appendix 6.
6. Notice of Exercise of the Option on 24 January 2014, is set out in Appendix 7.
7. Correspondence between the Appellants and Investors' advisers pre and post the ultimate purchase by the Appellants in 2014, is set out in Appendix 8.

UK CASE LAW on the difference between an absolute assignment and an assignment by way of a charge only

1) *Tancred v. Delagoa Bay* [1889] 23 Queens Bench Division 239

2) *Hughes v. Pump House Hotel Company Limited* [1902] 2 K.B. 190

3) *Bovis International Inc. v. The Circle Ltd Partnership* [1995] 49 Constr Law Reports 12

4) *Bexhill UK Ltd v. Razzaq* [2012] UK Court of Appeal EWCA Civ 1376

5) *Ardila Investments NV v. ENRC NV* [UK HC 2015] EWHC 1667(Comm)

Irish Case Law on the interpretation of commercial contracts

Analog Devices BV v. Zurich Insurance Co (2005) 1 I.R.274

O'Rourke v. Considine (2011) IEHC 191.

Point Village Development Limited (In Receivership) v. Dunnes Stores (2019) IECA 233

Textbooks on Contract law

The following were cited during the appeal:
Guest on the Law of Assignment
Secured Credit under English and America law
Halsbury's Laws

EVIDENCE

WITNESS EVIDENCE

34. The Appellant, one of the five partners in The Partnership gave sworn testimony in the following terms:

> *"Well the PROPERTY was REDACTED and we purchased it back in early 2000 with a view to developing the house into a REDACTED hotel REDACTED"…*
>
> *"we have been operating as a hotel since 2006. So it was a very significant development to do. It was a very historic and listed building. So we have a lot of work to do to restore it… we had a significant amount of restoration on the original and had to comply with a lot of sensitive environmental rules in order to extend it into a hotel. REDACTED I think in total we spent somewhere in the region of REDACTED million…developing the property during that time and the hotel investors came in as part of that financing package because we had to raise money ourselves as well as through the tax scheme and the tax scheme I think was put in place by the Government at the time to promote exactly these type of developments… We employ approximately REDACTED people in the local area...*
>
> *We engaged with a company called Investment Intermediary, REDACTED…led by an individual called Intermediary A… He helped us put together an investor syndicate…I think it's REDACTED individuals in total, that were involved in it. It was arranged, financing through Bank B and effectively the loan was for a seven year period and the investors who were involved in that obviously had tax allowances that they were able to claim as being part of that investment and the financing that was raised helped us to facilitate the development of the hotel and the surrounding areas at that time."*
>
> *"We had Solicitor B advising both sides of the parties. So we had two different teams in Solicitor B. Our intention always here was to full alignment with the investor group because our interests obviously were much more longer term than the investors in the tax scheme…There were tax advisers involved on both sides. So we had Tax Advisor A on our side and I believe Accountant B on the investor side.*

The Appellant was shown a Memorandum of Agreement dated 5 December 2005 relating to The Partnership Property and he confirmed that:

> "Partner 3, the Appellant, Partner 2 and Partner 4 as the vendors and then we have a number of persons then, starting with REDACTED and they are all described as the *REDACTED* purchasers…as the investor group."

The Memorandum states:

> "*Whereby it is agreed that the vendor shall sell and the purchaser shall purchase in accordance with the annexed special and general conditions of sale, the property described in the within particulars at the purchase price below.*"

When asked why the purchase price was only €1,000, the Appellant replied:

> *"I mean it was a tax driven process or agreement. Right, so they actually weren't going to in effect purchase the property…We were taking the borrowings from the bank in order to develop the property…Well the investors were participating on the basis that they could then claim tax allowances on the back of monies that had been raised against their income tax. So it was a particular scheme that was set up in order to encourage development of hotels across the country at the time…this was the means then by which the purchasers bought the property in the sale by private treaty."*

The Appellant was asked about the background to the documents entitled "Third Put and Call Option Agreement (For the sale of the PROPERTY), dated 3 November 2006" he replied:

> *"when we set up the tax investors we needed a mechanism for agreeing an exit at the end of the tax term which was seven years. So this document was put in place to enable that mechanism to happen with everybody's rights reserved."*

Background to the 2013 transactions

> *"So Bank B was the bank that we originally set the loan up with. That was back in 2006. As we are all aware, Bank B REDACTED and the loans from Bank B ended up being taken over by or were in the process of being taken over of NAMA. It was a very difficult time I think for everybody but in particular they were demanding all sorts of repayments of the loans. They were putting in, looking for statements of net worth. You know -- our loan was perfectly performing. There was no issues with it and the demands that Bank B were placing upon us at the time were pretty onerous. So we engaged with The Bank A who agreed to take the loan over from Bank B because as I said at the beginning, this was always a long-term project for us. We didn't want to disrupt what we were doing and so after, and there wasn't many banks lending for hotel assets back in the time I can tell you as well. So it took a lot of time and effort on*

our behalf in order to get The Bank A to support us in importing the loan away from Bank B/NAMA at that point in time. So we had to re-engage with all of the advisers and the solicitors once we got The Bank A agreement to take over the loan and therefore all of the documentation had to be redone and novated over to The Bank A who then facilitated the loan for us to ensure then that we could still unwind the tax investors at the end. So we paid another significant amount of fees to all of the advisers and legal profession in order to get all that done but it was in the interests of the long-term, for development of the property."

The Appellant was asked to clarify which loans he was referring to when referring to the loans being transferred to The Bank A. He replied as follows:

"No, there were two loans. So the loans that was wrapped up with the tax investors and then there were personal loans that we had as well in relation to the further development. So we couldn't finance all of the development at the very beginning."

COMMISSIONER: *"there a reference to loans in Put and Call Option Agreement?"*

Counsel for the Appellants: *"There is… a Facility Agreement"*

COMMISSIONER: *"To which loans does that Facility Agreement relate to?"*

Counsel for the Appellants "*That would be the Investors Loans*".

The Appellants continued:

"In 2013 we exited (Bank B) *and transported with the facilitation of The Bank A and we did all the paperwork and that allowed us to continue with the business, yes. REDACTED So we were carrying those loans forward and that's what formed part of the …commercial circle."…*

Correspondence between the parties before and after the Notice of Exercise of the Option (Put Option Notice), in 2014

35. In January 2014 there was detailed correspondence between the solicitors acting for The Partnership and the solicitors acting for the Investors both before and after the Put Option Notice of exercise of the Option. Details of this correspondence were presented at the hearing. Extracts are set out in Appendices 7 and 8.

36. In summary, there was significant disagreement between the parties (The Partnership and the Investors) on the interpretation of the documentation associated and connected with the Mortgage in 2013 and the assignment of the Option under the Mortgage. The

Partnership believed that the Investors had assigned to The Bank A absolutely their interest in the Option Agreement and therefore the Put Option Notice of exercise of the Option by the Investors in 2014 was an invalid document and should not be relied upon.

37. This view was communicated to the Investors by The Partnership in 28 January 2014. The following is an extract from that correspondence:

> *"Pursuant to clause 3.2 of the Mortgage, Charge and Assignment dated the 28 February 2013 between the Investors on the One Part and The Bank A on the Other Part, the Investors assigned absolutely all of the Investors rights titles and interests to inter alia the Third Put and Call option, subject the Investors right to redeem.*
>
> *By Notice of Assignment of Material Contracts also dated 28 February 2013, the Investors gave notice to the Promoters* (The Partnership) *of the said assignment, thereby rendering the said assignment and absolute assignment under section 28(6) of the Supreme Court of Judicature Act (Ireland), 1877, which is effective to pass and transfer the legal rights of the Investors in the Third Put and Call Option to The Bank A, together with all legal and other remedies for same and the power to give a discharge for same, without the concurrence of the Investors.*
>
> *Accordingly it follows that the purported exercise by the investors of the put option in the third put and call option by notice to the Appellant is of no effect; the investors cannot exercise a right that they do not have.*
>
> *Since the 28 February 2013, The Bank A was the only person who could have exercise [sic] the said put option. As you will know, the period within which the said put option may be exercised has now expired…"*

38. It should be noted that the above correspondence was not intended by The Partnership to deny the Investors an opportunity to sell back the property to The Partnership. Rather it was to address concerns of The Partnership as to how to restructure the reacquisition of the Hotel property from the Investors.

39. The Investors, through their solicitors, replied on 29 January 2014, that their view was that there was a security assignment or charge created over the Option Agreement, by virtue of the Mortgage dated 28th of February 2013, rather than an absolute assignment by the Investors to The Bank A.

40. On 30 January 2014, The Partnership replied that the assignment in clause 3.2 (of the Mortgage) has all the necessary ingredients to constitute an assignment within the meaning of section 28(6) of the Supreme Court of Judicature Act (Ireland), 1877 and the fact that the assignment was given as security with the provision for redemption does not take away from this fact.

The Partnership went on to say:

> *"Please note that notwithstanding the fact that no contract exists between the investors and our clients (as a consequence of the put option not having been exercised by the person with the right to do so), our clients would be disposed to taking a surrender, to be effected by act and operation of law in the manner previously discussed and pay your clients the price that would have been payable had the put option been exercised."*

Counsel for the Appellants: *"So there is a letter from Solicitor B which is dated the 31st January 2014 and it is addressed to you* (the Appellant) *and it's "Re: PROPERTY" and it says:*

"31 January 2014

Dear the Appellant,

Re PROPERTY

I refer to the recent exercise of the Third Put and Call Option in connection with the above property and enclose for your attention by way of service on you on behalf of the Purchasers in accordance with that Agreement, the Statement of Purchase Price.

The Statement of Purchase Price is contained in a letter dated 31 January 2014 from Accountant B, addressed to Intermediary A of REDACTED (Investment Intermediary)

"31 January 2014

Re: PROPERTY Investor Group

Dear Intermediary A,

Further to recent discussions, we understand that the Third Put and Call Option Agreement between the Investors as the Vendors and Partner 3, the Appellant, Partner 2 and Partner 4 and Partner 5, the purchasers, has been exercised and in accordance with Clause 2.4 (a) (vii) we have set out below the purchase price as calculated as based on information provided by you and Solicitor B and the amounts have not been independently verified by us. If our understanding is incorrect please let us know as soon as possible as this may impact the calculation."

41. In the end both sides (The Partnership and the Investors) agreed to disagree on whether the Option Notice was valid. The property was transferred back to The Partnership by the Investors by parole (oral transfer without documentation) in February 2014 for a consideration of €11,583,650. A video was taken of this event but this video was not presented in evidence at the hearing.

42. **Appellant's Submissions on *section 31* and *section 31A SDCA 1999***

The Appellants argued the following:

"The Revenue Commissioners position … is understood to be that a charge to stamp duty arises on the Alleged Contract for sale of the Land under Section 31 SDCA 1999. This basis is clearly misconceived because Section 31 specifically excludes contracts for the sale of land…

The Revenue Commissioners have also suggested an alternative basis … under Section 31A SDCA 1999. This basis is also clearly misconceived because Section 31A requires that a payment is made pursuant to a contract. Stamp duty is a tax on instruments and therefore the contract pursuant to which the payment is made must be a written contract executed by the parties. The payment in this case was not made pursuant to any such written contract but in respect of another transaction which was not recorded in an instrument.

An additional feature in this case is that the Revenue Commissioners seek to argue that the Alleged Contract was concluded arising from an option by means of a notice sent on foot of the said option to the Appellants. It will be submitted that:

a) the payment was not made pursuant to the Alleged Contract (even if the said notice was valid); and
b) that the Alleged Contract was not concluded by the said notice because the said notice was not valid for a number of reasons including that the Investors had made an absolute assignment of the said option…

Section 31(1), Certain contracts to be chargeable as conveyance is on sale
"(1) Any contract or agreement –
(a) for the sale of any equitable estate interest in any property,
or
(b) for the sale of any estate or interest in any property ***except lands****, tenements, hereditaments, or heritages, or property locally situated outside of the State, or goods, wares or merchandise, or stock or marketable securities (being stock or marketable securities other than any share warrant issued in accordance with section 88 of the Companies Act, 1963), or any ship or vessel or aircraft, or part interest, share, or property of or in any ship or vessel or aircraft, shall be charged with the same ad valorem duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the estate, interest, or property contract in or agreed to be sold ….".*

Inapplicability of Section 31 SDCA 1999
…
The terms of the Option specify that following the exercise of the Option that any contract/agreement that would have ensued was to take the form of the Law Society Conditions. While the Third Schedule to the Option varies the Law Society Conditions in certain respects, however General Conditions 20 and 24 (a) were not altered by the special conditions in this case. The special conditions themselves contemplated that a Deed of Assurance would be provided in the appropriate form. Under general condition 20 (a) the Purchaser is contractually entitled to the conveyance of the Property. Therefore, the Option at all times therefore contemplated that there would be a further assurance/conveyance/completion in respect of any contract arising from the Option. In other words, even if there was a contract arising from the Option/Notice, any payment made pursuant to that contract would need to be made in the context of a contemplated conveyance rather than in respect or pursuant to some other arrangement.

Section 31A (1), Resting in contract
"(1) Where -

(a) the holder of an estate or interest in land in the State enters into a contract or agreement with another person for the sale of the estate or interest to that other person or to a nominee of that other person, and
(b) a payment which amounts to, as the case may be payments which together amounts to, 25% or more of the consideration for the sale has been paid to, or at the direction of, the holder of the estate or interest at any time pursuant to the contract or agreement, then the contract or agreement shall be chargeable with the same stamp duty, to be paid by the other person, as if it were a conveyance or transfer of the estate or interest in the land."
…

…For stamp duty purposes, on the basis that the Option was not validly exercised by way of the Notice, no stampable document had been created by virtue of the Notice. The payment was made pursuant to another arrangement and did not give rise to any stampable document and therefore the transaction was a non-stampable transaction.

A stamp duty return was filed on ROS at that time disclosing no stampable transaction.

In order to protect the Appellants' position, a letter of Expression of Doubt was delivered to the Revenue Commissioners dated 21st March 2014 outlining in detail the circumstances of the transaction and including submissions to the effect that the Assignment of the Option by the Investors to the Bank meant that the Investors did not have any right to exercise the Notice on the basis that they had absolutely assigned their interest in the Option to the Bank as a result of which any purported exercise of the Option by means of the Notice had no legal effect and therefore could not give rise to an agreement/contract for a stamp duty purposes…

…The provisions of Section 31A are anti-avoidance rules intended to apply to resting in contract type situations. The provisions were introduced with effect from 13th February 2013. If the provisions of section 31 applied to resting in contract type situations, then the provisions of section 31A would not have been necessary in the first place.

As outlined above, the provisions of Section 31A apply where the holder of an interest in land enters into a contract/agreement with another person for the sale of that interest in land but only in circumstances where "a payment which amounts to… 25% or more of the consideration from the sale has been paid… at any time pursuant to the

contract or agreement". Only if those circumstances are met is contract/agreement exposed to stamp duty as if it were a conveyance on sale.

In order for Section 31A to apply it is clear therefore that the payment made must be "pursuant to" the contract. Essentially "pursuant to" means following on from or as a consequence of or in accordance with the contract.

It is disputed that there was a valid Notice of exercise of the Option (as outlined above). However, even if there was a valid notice, the provisions of section 31A are still inapplicable because another course of action other than the course of action pursuant to the contract/agreement (if any) was adopted by the parties and the payment in this case was not made pursuant to the Alleged Contract in the circumstances of this case, but on foot of or pursuant to a separate/discrete verbal/parol arrangement. This can be exemplified in particular by the fact that … the sum paid does not represent the price payable under the Alleged Contract.

Clause 2.4 of the Option sets out the various components that make up the price payable under the terms of Option. On the 31st January 2014, the solicitors for the Investors served the Statement of the Purchase Price that was prepared by the Investors' Tax Advisors (Accountant B) pursuant to Clause 2.4(d) of the Option, which stipulated a purchase price of €11,597,843. However, the purchase price paid, according to the submissions, by the Appellants was €11,583,650. The difference of €14,193 arose due to the fact that the Appellants refused to pay all the professional fees specified in the Statement of the Purchase Price in the sum of €44,280 and instead, per the submissions, only paid €30,087. Therefore, the purchase price payable under the Alleged Contract was not paid. Instead the sum of €11,583,650 was, per the submissions, paid under the separate verbal/parol arrangement.

As outlined above it was contemplated by the Option and the special and general conditions of sale (outlined above) that a conveyance/further assurance was to be provided in accordance with the Law Society Standard Contract. However, this was not done and a verbal/parol arrangement was carried out instead and the payment was made not on foot of the Alleged Contract concluded under the Option, but instead on foot of that other verbal/parol contract/agreement and therefore Section 31A has no application in this case.

43. **The Respondent's Submissions on Section 31 and 31A SDCA 1999**

The Respondent argued the following:

"*The Put Option Notice is chargeable to stamp duty under s31 of the SDCA. Section 31(1) provides:*

"Any contract or agreement—

(a) for the sale of any equitable estate or interest in any property, or

(b) for the sale of any estate or interest in any property except lands, tenements, hereditaments, or heritages, or property locally situated outside the State, or goods, wares or merchandise, or stock or marketable securities (being stock or marketable securities other than any share warrant issued in accordance with section 88 of the Companies Act, 1963), or any ship or vessel or aircraft, or part interest, share, or property of or in any ship or vessel or aircraft,

shall be charged with the same ad valorem duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the estate, interest, or property contracted or agreed to be sold."

The exercise of an option creates a binding contract of sale which is enforceable by way of specific performance. Therefore, there is a contract of sale for the purposes of s52 of the Land and Conveyancing Law Reform Act 2009 which provides that "the entire beneficial interest passes to the purchaser on the making…of an enforceable contract for the sale or other disposition of land".

Where the exercise of an option is recorded in writing, the Option Agreement and the exercise of the option may together be considered to form part of the one transaction or contract and thereby render the exercise of the option stampable and chargeable to duty as an agreement for sale of an interest in property under s31 SDCA.

The Partnership in fact paid €11,583,650 for the Property on 27 February 2014 which the Respondents understands reflects the full consideration due for the purchase of the Property.

Further, or in the alternative, a charge to stamp duty also arises pursuant to s31A SDCA which states:

"(1)Where—

(a)the holder of an estate or interest in land in the State enters into a contract or agreement with another person for the sale of the estate or interest to that other person or to a nominee of that other person, and

(b)a payment which amounts to, or as the case may be payments which together amount to, 25 per cent or more of the consideration for the sale has been paid to, or at the direction of, the holder of the estate or interest at any time pursuant to the contract or agreement,

then the contract or agreement shall be chargeable with the same stamp duty, to be paid by the other person, as if it were a conveyance or transfer of the estate or interest in the land."

The law on assignments: What distinguishes an absolute assignment, a conditional assignment and an assignment by way of charge only?

44. ***Appellant's Submission on Assignment Case law***

The Appellants, through Counsel, made the following submissions in relation to the law on assignment and absolute assignment:

"*a chose in action is something that doesn't have a physical existence, it's only something that you can sue for. In this case we have an Option which is a chose in action…"*

"Law Relating to Absolute Assignment

Historically, choses in action were not capable of assignment at common law but were assignable at equity. In circumstances were the chose in action was a legal chose in action the assignee was obliged to sue in the name of the assignor (See Osborne's Concise Law Dictionary, 11th edition). *However, in the case of an equitable chose in action the assignee could sue in his own name. However (in the UK from 1873 and in Ireland from 1877) legal choses of action were made assignable by statute provided certain conditions are met, in particular that it is an "absolute assignment" in writing by the assignor which does not purport to be "by way of charge only" in respect of any debt or other "legal chose in action" in circumstances where express notice in writing has been given to the person affected by the chose in action and this is sufficient to transfer the legal right to the chose in action with the effect from the date of the notice.*

The general meaning of an "absolute assignment" is understood to mean that the assignment of the entirety of the debt/obligation as opposed to just a portion of it and that it is free from conditions. The concept of "absolute assignment" is also generally understood to include an assignment by way of mortgage and/or trust …It is also understood that the distinction between what amounts to a security interest in property and what was regarded as an absolute interest in property is that a security interest is defeasible once the obligation has been performed ...

Section 28(6) Supreme Court of Judicature Act (Ireland) 1877 (UK equivalent of this is the 1873 Act, their 1873 Act which was then replaced by section 136 of the UK's 1925 Property Act) …says that if there is an absolute assignment in writing which isn't purporting to be by way of charge only, then, in law, this has the effect of passing and transferring all the legal rights and remedies to whoever they are assigned to…

The current equivalent UK legislation (Section 136 of the 1925 Law of Property Act) is derived from the 1873 UK Act worded in the same manner as the Irish 1877 Act and is essentially worded in similar terms to those Acts. The commentary and authorities therefore in relation to the UK 1873 Act and Section 136 of the 1925 Act are likely to be of significance when interpreting Section 28(6) of the 1877 Act.

For the purposes of the UK Section 136 it has been repeatedly held that even in circumstances where an assignment is for the purposes of providing security that is still possible to be an absolute assignment (See Secured Credit under English and American Law, George McCormack, page 55). In circumstances where there has been an assignment of intangible property for the purposes of the UK Section 136 the assignee takes over all the legal rights and not just the equitable rights. It has been held in particular that even though a mortgage is only a security it is nonetheless an absolute assignment because the fact that the entire right passes to the mortgagee (*See Hughes v Pump House Hotel Company Ltd [1902] 2 KB 190)…*

It has also been held that an absolute assignment does not mean absolute by way of sale and that the assignment may be absolute even in the context of a mortgage (See Hughes v Pump House Hotel Company Ltd)…

*It is also been held that there can be an absolute assignment of property even where the assignment provides for a redemption on the payment of the debt and is a security transaction (*See *Bovis International Inc. v. The Circle Ltd Partnership [1995]* 49 LR 12 CA)…

It is necessary to consider all of the terms of the instrument and the test is essentially as to whether the intention was clear to give a charge only. On the other hand, if it is clear that the intention was that ownership was to pass to the assignee, that will be an absolute assignment. In circumstances therefore where there has been an absolute assignment, the assignor does not have any legal right to bring proceedings in his own name and the proceedings, if any, must be brought in the name of the assignee only
(See *Hughes v. Pump House Hotel Company Limited* [1902] 2 K.B. 190)…

The mere fact that there is an equity of redemption and/or that there is a proviso for reassignment does not prevent the assignment being absolute or in any way indicate that it operates by way of charge only (See Tancred v Delagoa Bay and East Africa Ry Co. [1889] 23 Queens bench division 239*)...*

In fact, it is submitted that the fact that a reassignment/ re-conveyance of the assets back to the borrower is required is a clear indication that there has been an assignment which required a re-assignment and therefore an absolute assignment..."

The Appellants then went on to open the decision in *Bexhill UK Ltd v. Razzaq* [2012] UK Court of Appeal EWCA Civ 1376. This case relates to a claimant assigning to its bank certain contractual rights and receivables.

The Appellants argued:

"REDACTED we have the same wording in this case, that's cogent evidence I would say that this is an absolute assignment"

The Appellants stated that the seminal case in relation to contractual interpretation from an Irish perspective is the 2005 Supreme Court decision in the case of *Analog Devices v. Zurich Insurance* (S.C. No. 41 of 2003) wherein:

"Held by the Supreme Court, in dismissing the appeal, 1, that, in construing the policies...", there was a contract of insurance in this case, *"... the court had to give effect to the intentions of the parties. Such intentions were to be ascertained objectively from the words used in the policies and taking into consideration the surrounding circumstances or factual matrix..."*

The Appellants stated in relation to the above case

"So you look at the words of the contract and you don't listen to the words of the parties so much as to what was in their heads. So the intention must be taken from the face of the policy."

Counsel for the Appellants further argued:

***"** you have to put yourself, I suppose in probate terms when they're interpreting a Will they call it the arm chair principle. In other words, you must sit down and put yourself in the position of the people who are doing this contract and you must pretend that you are a reasonable businessman with the knowledge of the parties and the circumstances of the case which ..., and that's how you understand their intention objectively... Similarly, when one is speaking of aim, or object or commercial purpose, one is speaking objectively of*

what reasonable persons would have had in mind in the situation of the parties. What the court must do must be to place itself in thought in the same factual matrix as that in which the parties were"…

*So in (*the Mortgage, Charge and Assignment document)*, paragraph 3.1 and paragraph 3.2, the immediately germane wording is paragraph 3.2 which says this, security assignments:*

> *"The mortgagors as beneficial owners and as security as beneficial owners and as security for the payment and discharge of the secured obligations in favour of the mortgagee hereby assign and agrees to assign absolutely in each case in so far as the same are capable of assignment…*

On its face it's clear and simple, the words are plain, clear, unambiguous, it says assign absolutely. You don't need to look any further than that"...

The Appellants referenced the 2011 High Court case of Dermot O'Rourke,v Thomas Considine, Patrick Sweeney and Gerard Prendergast (*O'Rourke v Considine* [2011] IEHC 191.)

(The Appellants quoted from the judgement of Ms. Justice Geoghegan F.)

> *…The first submission made on behalf of the plaintiff is that he continued to be entitled to sue in his name and his name alone for the repayment to him of the unpaid principal and the interest due on the Loan, notwithstanding the assignment of 27th February, 2008. It was not in dispute between the parties that the assignment effected was a legal assignment complying with the requirements of s.28(6) of the Supreme Court of Judicature (Ireland) Act 1877, as it complied with the four conditions... The four conditions are:*
>
> *(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."*
>
> *"Whilst counsel for the plaintiff did not dispute that there was a legal assignment, he did seek to rely on clause 3.1 of the Deed of Assignment to suggest that the plaintiff had a continuing interest by reason of the equity of redemption provided therein. This clause provides:*

'As security for the Secured Liabilities the Assignor as legal and/or beneficial owner hereby assigns absolutely to the Assignee all its present and future rights, title, benefit and interest in and to the Assigned Assets and the Receivables and hereby charges as a first fixed charge in favour of the Assignee all of its present and future right, title and interest in and to the Receivables Account and the Receivables Account Balance PROVIDED THAT upon irrevocable payment and discharge in full of the Secured Liabilities the Assignee will forthwith at the request and expense of the Assignor re-assign or release (as appropriate) the Security Assets to the Assignor"…

In my judgment, clause 3.1 effects an absolute assignment of the Loan Agreement of 9th August, 2006, as an 'Assigned Asset', but gives, as a matter of contract, to the plaintiff, a right to have such asset reassigned to him in the event that there was a full discharge of all the secured liabilities."

"In my judgment, neither clause 16 nor the documents entered into between the plaintiff and the defendants in February 2006 may be properly construed so as to preserve to the plaintiff a right to sue the defendants for recovery of monies due by them on the Loan Agreement prior to the reassignment to him of the Loan Agreement. It follows that at the date of commencement of these proceedings, the plaintiff had no right to sue the defendants."

The Appellants argued that:

"this decision, O'Rourke v Considine clearly formed the view that this is an absolute assignment and the consequence of that, as it would be in the circumstances of this case, is that there was an assignment, he had no right to sue. In the circumstances of our case there is an assignment, it's The Bank A who should have issued the Notice in this case… "

Ms. Justice Geoghegan F concluded:

"Applying the above principles to the construction of the Loan

> *Agreement, I have reached the following conclusions. The assignment by the plaintiff to BOSI in February 2008 of the whole of his rights and benefits under the Loan Agreement meant that subsequent to that date, BOSI was a 'Lender' for the purposes of the Loan Agreement. This follows inexorably from the final sentence of clause 16 as it is expressly stated to 'include every successor, assignee . . .'*
>
> *Thereafter, BOSI was, in accordance with the express terms of clause 16, 'entitled to enforce and proceed upon and exercise all rights, powers and discretions under the Finance Documents as if named therein in place of or in addition to the Lender'."*

The Appellants cited the 2019 Irish Court of Appeal case *Point Village Development Ltd (in Receivership) v. Dunnes Stores.* [2019] IECA 233. The Appellants cited Ms. Justice Máire Whelan:

> *"Writing extrajudicially in 1984 on the role of judges in construing commercial contracts, Lord Goff of Chieveley stated:-*
>
> > *'We are there to help businessmen, not to hinder them; we are there to give effect to their transactions, not to frustrate them; we are there to oil the wheels of commerce, not to put a spanner in the works, or even grit in the oil'.*
>
> *Twenty years later Lord Steyn in 'Democracy through Law: Selected Speeches and Judgments' wrote:-*
>
> > *'A thread runs through our contract law that effect must be given to the reasonable expectations of honest men… The function of the law of contract is to provide an effective and fair framework for contractual dealings'."…*
>
> *<u>Analog and the word the parties used…</u>*
> *Hence, in the light of the jurisprudence from the Supreme Court and until such time as the principal is revisited, it is established law in this jurisdiction that in order to determine the common intention of the parties to an agreement which has been reduced to writing, same must be construed by reference to the document itself. Extrinsic evidence of what may or may not have been in the* mind of the *parties at*

the time of the agreement is not admissible for such purpose.

Appellants' quotes from Authorities

The Appellants made reference to a number of legal authorities in relation to distinction between an assignment and a charge. The Appellants quoted from *"Secured Credit under English and America law"*. (Cambridge Studies in Corporate law by Gerard McCormack)

…Footnote 73, refers to Mr. Justice Denman in Tancred v Delagoa Bay and East Africa Ry Co 1889, and what was said in that case is that:

> *"A document given by way of a charge is not one which absolutely transfers a property with a condition for reconveyance, but is a document which only gives a right of payment out of a particular fund or a particular property without transferring that fund or property."*

The Appellants quoted from Halsbury's Laws of England in the following:

"At 501 under the heading "Absolute assignments" it says:

> *"Apart from the rights under the Policies of Assurance Act 1867, an assignee of a life policy has the right to sue in his own name and the other rights conferred by the general statutory provisions relating to legal assignment of choses in action provided that (1) there is an absolute assignment in writing under the hand of the assignor not purporting to be by way of charge only, and (2) express notice in writing to the insurers has been given. The effective date of the notice is the date on which it is received by or on behalf of the insurers. And the operation of the assignment is subject to equities having priority over the right of the assignee. And an assignment may be absolute notwithstanding that it is by way of mortgage subject to a right of redemption. (footnote 6)"*

Footnote 6 is a reference to the *Tancred decision in 1889.*

45. ***The Respondent's Submissions on Assignment Case law***

"The Respondents suggest that it is for the Appeal Commissioners to engage in a process of contractual interpretation by reference to the objective intention of the parties as expressed in the contract in the commercial context (see Analog Devices BV v Zurich Insurance Co. [2005] 1 I.R. 274). In so doing, and the Appeal Commissioners, supported by the case of Lloyds & Scottish Finance Ltd v Cyril Lord Carpet Sales Ltd [1992] B.C.L.C. 609, are not be required to look through or beyond the wording of the contracts to the substance of the transaction. Furthermore, based on the case of Moorview Developments Ltd v First Active [2009] IEHC 367 at para.4.8, and quoting judge Clarke J., labels attached by the parties "will not necessarily be decisive".

Recent UK case law on whether or not an assignment has been absolute has looked to the full matrix of documents between the parties to determine the nature of the assignment made. In Bexhill UK Ltd v Razzaq ([2012] EWCA Civ 1376) the borrower had assigned its receivables to its lender, a bank, and the terms of the debenture provided that the borrower was to "...collect all Receivables in the ordinary course of trading as agent for [the bank]...". The borrower had initiated proceedings against one of its customers in respect of the receivables and the issue arose as to whether the borrower had the right to sue the customer because the customer asserted that whatever rights the borrower had, constituted "receivables" and it had assigned those rights to the bank. Aikens LJ held that the assignments were absolute because the wording of the assignment clause, which expressly stated that the assignment was to be absolute, was simple and clear.

REDACTED many of the clauses in contention in Bexhill mirror the clauses in the Mortgage, Charge and Assignment dated 28 February 2013 in the within case. In particular, the assignment clause in Bexhill mirrors Clause 3.2 in the Mortgage, Charge and Assignment dated 28 February 2013 whereby Bexhill agreed to assign "absolutely in favour of [Barclays Bank] all of [Bexhill's] rights, title, interest and benefit in the Receivables".

However, the Court considered that the terms of the debenture between Bexhill and Barclays Bank needed to be considered as a whole and this clause on its own was not determinative…

Whether a particular instrument creates an 'absolute' assignment or an assignment 'by way of charge only' is a question of construction of the relevant instrument taken as a whole. That principle and the consequences of an assignment being 'absolute' or 'by way of charge only' were explained by Mathew LJ in Hughes v Pump House Hotel Co ([1902] 2 KB 190 at 193, 71 LJKB 630, 50 WR 660, 2 LDAB 25. See also, eg Court Line Ltd v Aktiebolaget Gotaverken (The "Halcyon the Great") [1984] 1 Lloyd's Rep 283 at 288 per Staughton J) …

In Bexhill the debenture required the assignor to give notice of the assignment to the original debtor, which expressly stated that all rights and remedies had been transferred. Aikens LJ noted that the form of notice was consistent with an absolute assignment because it stated that the assignor had assigned "all its present and future right, title and interest in and to" the relevant agreement, including "all rights and remedies in connection with" it and "all proceeds and claims arising from" it…

The assignment in Bexhill was held to be absolute and the notice was held to be determinative. However, the distinction between the notice in Bexhill and the notice in the present case is important. In Bexhill, the notice expressly stated that all of the assignor's rights and remedies had been transferred to the bank. The Notice of Assignment of Material Contracts in this case makes no reference to the assignor's rights and remedies being transferred to the assignee but instead states that the Investors instruct The Partnership to:

> *'Following an Enforcement Event, to pay all monies due to us under or arising from the [Put Option] to the [Bank] or to its order as it may specify in writing from time to time.'*

It is the Respondents' submission that the effect of this notice is to tell The Partnership that the assignment is in effect conditional on the happening of an Enforcement Event. The wording of this notice is inconsistent with any assertion that the assignment was absolute and therefore is not at all comparable to the notice issued in Bexhill. The Respondents submit that the Appeal Commissioners must place significant weight on the wording of this notice. Furthermore, this notice leaves The Partnership in no doubt as to whom it must pay all monies to before the enforcement event i.e. the Investors. This is entirely inconsistent with the Appellants' submission that there was an absolute assignment…"

The Respondent quoted from *Ardila Investments NV v ENRC NV & Zamin Ferrouis Lts* (UK HC 2015) *as follows:*

> *"In Ardila lnvestments NV v ENRC NV & Zanin, wherein a similar issue arose as to whether an absolute assignment of rights was created by a security assignment by Ardila of its rights under a sale and purchase agreement. In ascertaining whether or not there was an absolute assignment of the rights, the Court reviewed the transaction documents between the parties. In particular, the security document entered into by Ardila had assigned "absolutely, subject to a proviso for re-assignment on redemption of the Secured Liabilities, all of its rights in respect of the Specified Contracts"…*
>
> *While the Court criticised the drafting of the document which assigned the rights, the Court was of the view that while the assignment clause itself referred to the assignment as being absolute, other provisions indicated an intention that it was to take effect by way of charge only. The Court held that the assignment was not of the whole benefit of the contract and did not take effect so as to pass the right to bring proceedings. Absolute, legal and beneficial rights were reserved to the assignor … and the assignor was required to continue to pursue its rights under the contract …*
>
> *Whether or not there was an absolute assignment of the Put Option to the Bank by the Investors is a matter of contractual construction and it is the Respondents' position that on the construction of the actual terms of the Transaction Documents, there was not"….*

Submission regarding the Transactions documentation

46. ***Appellant's Submission***

> *"The key documentation in relation to this matter is as follows:*
>
> ***Option**: Under the terms of the Option the Appellants granted the "Vendors"* (Investors) *the Option to require the Appellants to "purchase all of the Vendor's rights and titles to the Hotel Property" provided that the Option was exercised within the relevant time frame. The Vendors were entitled to assign to the Bank without consent of the Appellants* (under paragraph 4.3(b)).
>
> *The terms of the Option specify that following the exercise of the Option that any contract/ agreement that would have ensued was to take the form contemplated in the Law Society Conditions (see clause.2.5). The Third Schedule to the Option varies the Law Society Conditions in certain respects. However, it is noted that General Conditions 20 and 24 (a) were not specifically altered/overridden by the special conditions in this case. In particular it is noted that the special conditions themselves contemplated that a Deed of Assurance would be provided in the appropriate form (paragraph 3, Third Schedule). On the basis that under general condition 20 (a) the Purchaser is contractually entitled to a conveyance of the Property, this special condition is consistent with the general condition.*
>
> *Therefore, the Option at all times therefore contemplated that there would be a further assurance/conveyance/completion in respect of any contract arising from the Option. In other words, even if there was a contract arising from the Option/Notice, any payment made pursuant to that contract would need to be made in the context of a contemplated conveyance rather than in respect or pursuant to some other arrangement. Section 31 … specifically excludes contracts for the sale of land…*
>
> ***Loan Agreement**: The facility/loan agreement entered into between the Bank and the Investors is dated the 20th February 2013 (sic) and is referred to as a facility agreement (the "Loan Agreement"). Under the terms of the Loan Agreement the Bank loaned the sum of €6 million to the Investors* (paragraph 2). *The purpose of the Loan Agreement was to refinance the previous borrowings* (the Investors had) *from Bank B* (paragraph 3.1)…

As part of the terms of the Loan Agreement the Investors had certain obligations and in particular were obliged to provide a "deed of mortgage, charge an assignment" over, inter alia, the Option…

In addition, the Loan Agreement included a negative pledge restricting the Investors ability to dispose of the Property otherwise than pursuant to the Transaction Documents (including the Option)…

The Loan Agreement includes a number of covenants on the part of the Investors with respect to the exercise of the rights under the Option including in particular an obligation to forward a copy of any Notice under the Option… and the agreement that they will exercise the rights under the Option at the earliest opportunity …

Also, in the case of an event of default, the Loan Agreement provides that the Bank is empowered to exercise rights under the Security Documents including the Option which includes a proviso that the Bank will first request the Investors to exercise their rights under the Option…

Mortgage:
On the 20th February 2013 (sic) the Investors entered into the Mortgage which specified that their obligations will be secured by the Mortgage…

It is important to note that the Mortgage at paragraph 3.1 under the heading "Fixed Charges" makes specific provisions for charges over certain assets…It lists four separate charges which are created:

The first charge relates to the registered land.
The second charge relates to compensation.
The third charge relates to receivables.
The fourth charge relates to an interest in land or any lease…

The Mortgage, Charge and Assignment dated 28th February 2013 to the Bank by the Investors was entered into just under one year ahead of the unwinding of the original tax based financing structure… SCHEDULE 2 PART 2 of that agreement sets out the Material Contracts, as defined to include:

1, The Agreements for Lease.
2. The Option Agreements…

The charges thereby created specifically under the Mortgage do not relate to the Option. Instead, quite clearly and deliberately, the Option (together with the other "Material

Contracts") is dealt with in a separate paragraph 3.2 … under which it is specifically provided that it is assigned absolutely. Under this clear and distinct and separate heading the Mortgage specifically provides that the Investors assign and agreed to assign absolutely as beneficial owners the Material Contracts including the Option. The purpose and intent of the Mortgage is therefore made absolutely crystal clear by separating out what was intended to be covered by a charge dealt with in paragraph 3.1 and what was to be absolutely assigned dealt with in paragraph 3.2…

It should be noted that the assignment of the Material Contracts including the Option is expressed to be done both as beneficial owners and also by way of security (the security issue being merely in addition) and then making it clear that it was intended that it was to be an absolute transfer/assignment and that the matter of security is an "also-ran" or additional feature only…

In addition, the Mortgage provides for a right for the Investors to redeem the Mortgage…

It is worth noting in particular that the Mortgage specifies that the assignment and agreement to assign is to be done "absolutely" and it nowhere makes reference to a charge nor does it express in any way that it is to be by way of charge only. In addition, the Mortgage specifies that the Investors are obliged to deliver a notice of assignment (the "Notice of Assignment") in a particular form executed by the Investors and acknowledged by the Appellants…

The provisions of the Mortgage include a provision that the Investors will remain as "lawful and beneficial owners" of the Secured Assets including in particular the Option. While this may be inconsistent with the absolute assignment as beneficial owners of the Option created under paragraph 3.2, it is however entirely consistent with the ownership of the Land itself remaining with the Investors under the provisions of paragraph 3.1, which create a charge over the Land. Therefore, the clear intention in relation to that paragraph can only have been to relate to the Land, which remained in the ownership of the Investors, and have no application to the Option, which was absolutely assigned…

The Mortgage also includes a negative pledge restricting the ability of the Investors to sell or dispose of the Secured Assets including in particular the Option without the prior written consent of the Bank. It is expressed under the Mortgage that there would be a

reassignment of the Secured Assets (including potentially the Option) at the expiry of the Security Period…

This is consistent with the absolute assignment and would be unnecessary if there had not been an absolute assignment, as the security would otherwise have ended automatically…

It is also worth noting that there are no conditions or limits attached to the Assignment in the Mortgage nor is there any limit placed on any element of the Option assigned under the Mortgage. The full Option is assigned. It is not a partial assignment. The wording makes reference to the Assignment being "absolute" and it is clear that the word "assign" is used and nothing appears in the mortgage document that tends to indicate that the Assignment is not absolute. While there is a right of redemption, there is also contemplated that there will be a re-assignment of the Option at the end of the Mortgage which makes it clear that there was an absolute assignment which required a reassignment."

In relation to the **Notice of Assignment** the Appellants said*:*

"The Notice of Assignment is dated the 20th February 2013(sic) and specifies that it relates in particular to the Option. The Notice specifies that:

> *"We hereby give you notice that we have assigned to The Bank A (the Mortgagee) pursuant to a mortgage, charge and assignment entered into by us in favour of the Mortgagee on 2013 (the Mortgage, Charge and Assignment (Investors)) over all our rights, title and interest in and to the Material Contracts including all monies which may be payable in respect of such Material Contracts."*

It is clear therefore from the wording of the Notice of Assignment that there was an "assignment" of "all our rights, title and interest"; and this was "including all monies which may be payable"…

It is to be noted that the Notice of Assignment was intended to relate only to the Material Contracts (including the Option). The only reference to a charge in the Notice of Assignment was the reference to the fact that there was a "mortgage, charge and assignment" entered into by them under the document called "Mortgage, Charge and Assignment (Investors)". As already outlined above, that document did in fact separately create charges in relation to the Land and created an absolute assignment in respect of the Option. The wording of the Notice of Assignment is therefore consistent only with a

charge having been created over the Land and an absolute assignment occurring in respect of the Option…

The Notice of Assignment gives notice that the Investors have assigned to the Bank on foot of the Mortgage all of the rights of the Investors in relation to the Material Contracts which includes in particular the Option. The Notice of Assignment makes no reference to any charge having been created/granted or that the Assignment was limited in any way to being a charge. It specifies that the Assignment is pursuant to the Mortgage. As already outlined above herein the Mortgage went out of its way to make it clear that there was a distinction in the treatment between the Land and the Option. The Mortgage specifically agreed to assign and did assign the Option as beneficial owners and absolutely (albeit that it did so also as a security) and also subject to a right of redemption and with the right of re-assignment as outlined above. None of the documents include any reference whatsoever that the Assignment was to be "by way of charge only…

It is also worth noting that there are no conditions attached to the Assignment nor is there any limit placed on the any element of the Option assigned."…

In relation to the **Put Option Notice** (of the exercise of the Option given in 2014) the Appellants said*:*

"The Notice, which purportedly exercised the Option, is dated 24th January 2014. The Notice is from the "Investors Agent" and it specifies that the Investors require the Appellants to purchase the Investors rights and title to the Land specifying a completion date for Friday 7th February 2014. The Option contemplates that Investment Intermediary can act as agents for the Investors. As outlined above, the terms of the Option specify that the expression "Vendors" can include permitted assigns. The Option specifies that the Notice "may be given by the Investors Agent on behalf of the Vendors". Because there was an absolute assignment of the Option, neither the Investors nor their agent have the right to exercise the Option….

47. Respondent's Submission regarding the documentation

The Respondent made the following arguments with regard to the documentation associated with the transactions pertinent to this appeal:

> ***"The terms of the Transaction Documents***
>
> *It is the Respondents' submission that the terms of the Transaction Documents entered into by the various parties to this transaction demonstrate that the Investors did not in fact enter into an absolute assignment of the Put Option but entered into an assignment by way of charge only with the Bank. Alternatively, if it was intended to be an absolute assignment, that the terms of the Transaction Documents entered into by the various parties show that the assignment was conditional and therefore not absolute.*
>
> *The Third Put and Call Option Agreement dated 3 November 2006*
>
> *"Clause 2.2 of the Third Put and Call Option Agreement states that the Investors were entitled to exercise their Put Option against The Partnership by notice in writing during the Option Period by delivering the notice to The Partnership.*
>
> *Clause 4.3 of the Third Put and Call Option Agreement states that the Investors were entitled to transfer their interests in the agreement without the consent of The Partnership "provided the transferee (other than the Bank where the assignment is a security assignment) accedes to this agreement".*
>
> *The Facility Agreement dated 28 February 2013*
>
> *Clause 10.2 provides that each Investor undertakes to cooperate with the Bank in any enforcement or realisation of the Investor Security Documents (defined by clause 12 to include the Option Agreements) when the security has become enforceable in accordance with its terms.*
>
> *Clause 21.1.6 provides that each shall "forward to the [the Bank] a copy of any notice issued by the [the Investors] pursuant to any of the Option Agreements…".*
>
> *Clause 21.9 states that the Investors and The Partnership agree that they "shall exercise their rights under the Option Agreements at the earliest opportunity and that the proceeds of such will be used in accordance with Clause 8.1 hereto".*

Clause 22.2.3 provides that where an event of default has occurred, before taking any enforcement action, the Bank will require the Investors to exercise their rights under the Put Option.

Mortgage, Charge and Assignment dated 28 February 2013

Clause 3.2 is entitled "Security Assignments" and provides:

> *"The [Investors], as beneficial owners and as security for the payment and discharge of the Secured Obligations in favour of the [Bank], hereby assign and agrees to assign absolutely (in each case insofar as the same or capable of assignment):*
> *…*
> *3.2.4 the Material Contracts;*
>
> *subject in each case to the right of the [Investors] to redeem this Deed as contained in clause 17 (Release of Security)"*

The Material Contracts are defined to include the Option Agreements.

Clause 3.3 states that upon execution of the Mortgage, Charge and Assignment, the Investors must deliver to the Bank a notice of assignment in respect of the Option Agreements, together with an acknowledgement from the counterparty i.e. The Partnership, in respect of the notice.

Clause 5.1 requires the Investors to represent and warrant that he or she is and will at all times during the Security Period be a "lawful and beneficial" owner of the Secured Assets (which includes the Option Agreements).

Clause 7.1 provides that the security (including the Option Agreements) will become enforceable immediately upon the occurrence of an Enforcement Event and the Secured Obligations then become due and payable.

Clause 17, entitled "Release of Security" states:

"Upon the expiry of the Security Period, the [Bank] shall, at the request and cost of the [Investors] take whatever action is necessary to release or reassign and discharge the Secured Assets from the Security."

The Respondent argued that many of the same conflicting clauses can be found in the Transaction Documents relating to this appeal as were found in both *Bexhill* case and the *Ardila* case. In particular, the Respondent argued:

- *the assignment was stated to be absolute (Clause 3.2 of the Mortgage, Charge and Assignment dated 28 February 2013), however within the same clause, the Investors retained a right of redemption of the Put Option. A right of redemption is inconsistent with an absolute assignment;*

- *the Investors were required to notify The Partnership of the assignment in the manner prescribed, which only required The Partnership to pay the Bank after the happening of an Enforcement Event (Clause 3.3 of the Mortgage, Charge and Assignment dated 28 February 2013);*

- *the Investors at all times represented and warranted that they would be the "lawful and beneficial" owners of the Put Option (Clause 5.1 of the Mortgage, Charge and Assignment dated 28 February 2013);*

- *the security only became enforceable on the occurrence of an Enforcement Event (Clause 7.1 of the Mortgage, Charge and Assignment dated 28 February 2013);*

- *the Investors were required to cooperate with the Bank in any enforcement or realisation of the Put Option when the security has become enforceable in accordance with its terms (Clause 10.2 of the Facility Agreement dated 28 February 2013);*

- *The Bank would not issue the notice under the Put Option but the Investors would actually serve the notice (Clause 21.1.6 of the Facility Agreement dated 28 February 2013)*; and

- *the Bank could not force the Investors to exercise their rights under the Put Option until after an Event of Default (Clause 22.2.3 of the Facility Agreement dated 28 February 2013).*

The Respondent went on to argue the following:

> *"It is clear from the foregoing that the terms agreed between the Investors and the Bank are not sufficient to create an absolute interest. Moreover, it is clear from the correspondence from the Investors' solicitors to The Partnership's solicitors on 29 January 2014 that the Investors were firmly of the view that this was an assignment by way of a charge only and not an absolute assignment.*
>
> *The terms of the Transaction Documents are not sufficiently absolute so as to support the Appellants' contention that there was an absolute assignment of the Put Option. In particular the fact that:*
>
> *(a) the Investors are described as remaining the lawful and beneficial owners of the Put Option (Clause 5.1 of the Mortgage, Charge and Assignment dated 28 February 2013); and*
> *(b) the notice sent to The Partnership left The Partnership in no doubt as to who it was to pay the Put Option monies to before the Enforcement Event i.e. the Investors,*
>
> *are both entirely and inherently inconsistent with the submission that the assignment was an absolute assignment. Accordingly, the Respondents' submit that the Appeal Commissioners should not hold that the assignment of the Put Option to the Bank was an absolute assignment but was in fact, as evidenced by the Transaction Documents, an assignment to the Bank by way of a charge only.*
>
> *It follows that as there was no absolute assignment of the Put Option by the Investors, the Option Agreement and the exercise of the option together formed part of the one transaction or contract and thereby render the exercise of the option stampable and chargeable to duty as an agreement for sale of an interest in property under s31 SDCA. The charge to stamp duty arises within 30 days of the date of execution (see* Section 2(2) SDCA) *of a binding contract for sale, which is the date of the exercise of the Put Option by the Investors (see paragraphs 4.2 and 4.3 above) because it is the notice of exercise which is the stampable*

instrument under the conveyance on sale head under s.31. (see Donegan, *Irish Stamp Duty Law*, at para 12.38.2)…

In 2013, was there an absolute assignment, a conditional assignment or an assignment by way of charge only, of the rights under the Option Agreement 2006, by the Investors to The Bank A?

48. *Appellants' Submission*

> *The Respondent … makes reference to the Bexhill case. It is submitted that this case is entirely consistent with the Appellants' submissions and in that case the assignment was held to be an absolute assignment… The Respondent has made the statement…that; "The Notice of Assignment of Material Contract in this case makes no reference to the assignor's rights and remedies being transferred to the assignee but instead states that the Investors instruct The Partnership to "Following an Enforcement Event, to pay all monies due to us under or arising from the Put Option to the Bank or to its order as it may specify in writing from*
> *time to time." (however)… the Notice of Assignment …wording is as follows:*
>
> > *"We hereby give you notice that we have assigned to The Bank A (the Mortgagee) pursuant to a mortgage, charge and assignment entered into by us in favour of the Mortgagee on 2013 (the Mortgage, Charge and Assignment (Investors)) over all our right, title and interest in and to the Material contracts including all monies which may be payable in respect of such material contracts."*
>
> *It is submitted therefore that it could not be clearer that the Respondent is incorrect in this regard. The Notice of Assignment makes clear and specific reference to the assignors' rights transferred and assigned and for the avoidance of any doubt goes on to say that this includes "all monies which may be payable" in respect of the Option. The submission of the Respondent in this regard therefore flies in the face of the wording of the Notice of Assignment itself. The Respondent makes reference to some instructions which were included within the Notice of Assignment which, largely, relates to steps to be taken after an enforcement event. It is submitted that these are just instructions to deal with that particular eventuality and in no way circumscribe the absolute nature of the assignment which has been made in relation to Option in the Mortgage (where there is a distinct charge made in respect of the Land itself under a separate provision in the Mortgage). While the instructions included in the Notice of Assignment make no reference to the person to whom monies must be paid prior to an enforcement event, the actual notice of assignment itself is absolutely crystal clear that the Investors have "assigned to The Bank A… our right, title and interest in and to the Material Contract including all monies which may be payable in*

respect of such Material Contract." It is submitted that the wording could not be any clearer and that the Respondent cannot blithely skip over the wording of the Notice of Assignment and refer to the instructions in isolation in order to make the submission that there is "no doubt as to whom it must pay all monies to before the enforcement event". In other words, the Notice of Assignment makes it clear that "all monies which may be payable in respect of" the Option have been assigned to The Bank A.

It is noted that the Respondent also makes reference to another case; the Ardila case. While the decision in the Ardila case was that the assignment in that case was not an absolute assignment, the facts of that case were also entirely distinguishable from the present case. In particular it should be noted that it was a limited assignment only and therefore could not in any circumstances have been an absolute assignment ...

Assignment in this case

...the terms of the Mortgage themselves specify that the Assignment is and is agreed to be an absolute assignment and it makes no reference to it being by way of charge only. The Mortgage specifically provides for the creation of a charge of the Land and separately and distinctly provides for an absolute assignment of the Option. There are no limits and/or conditions imposed on the Assignment and the Assignment is of the full rights under the Option. The assignment is in writing and the relevant Notice of Assignment has been provided and therefore comes within Section 28(6). On the basis of the authorities outlined above it is also apparent that an Assignment can be absolute notwithstanding that it is by way of security and/or mortgage and it does not have to be by way of absolute sale... It is also apparent that on the basis of the authorities above that once the assignor has made an absolute assignment that the right to sue and all other legal rights under the Option have passed to the assignee and any action needs to be taken on the part of the assignee and not the assignor...

With respect to (the) paragraphs ... of the Respondents Outline of Arguments which refers to specific provisions of the "Transaction Documents" and compares them to the documents in the Bexhill and Ardila cases it is commented as follows for the avoidance of doubt and without prejudice to the foregoing:

a) There has been no indication in the matters outlined by the Respondent in their Outline of Arguments that the right of redemption is inconsistent with an absolute assignment. What would be inconsistent with an absolute assignment would be a defeasment of the title once the debtor had been repaid. What is required in this case on the other hand is that there would be a re-assignment or re-transfer of the assets back to the

Investors once the debt has been repaid. This is entirely consistent with an absolute assignment. In any event, as already outlined above, the right of redemption naturally would only relate to the Land as opposed to the Option. The Land was subject to a separate and discreet charge dealt with in paragraph 3.1 of the Mortgage.
The Option was dealt with separately and definitively in paragraph 3.2 of the Mortgage where it was the subject of an absolute assignment. It would seem that the Respondent has entirely overlooked this point in the reading of the documentation.

b) While the Investors were required to notify the Appellants of the assignment in the manner prescribed, the Respondent seems to have misunderstood and/or been selective in reading the wording of the Notice of Assignment, as already outlined above. For the avoidance of doubt, the wording of the assignment states that; "… we have assigned to The Bank A… all our right, title and interest in and to the material contract including all monies which may be payable in respect of such Material Contracts." It is absolutely clear therefore that the payment to the Bank was required absolutely, whether before an enforcement event or afterwards. The fact that the instruction seems to refer to the occurrence of an enforcement event is neither here nor there when it is made absolutely clear that there has been an assignment of the right to payment.

c) With regard to the Respondent's submission that the Investors represented that they would be the "lawful and beneficial owners" of the put option, this is another misunderstanding on the part of the Respondent. Clause 5.1 does not refer specifically to the put option at all contrary to what the Respondents have submitted. It merely refers to the Secured Assets. As is implicit from the Respondent Outline of Arguments, the documentation is not well drafted. As already outlined above the Mortgage creates a charge over the Land and creates an absolute assignment of the Option - separately. It is clear therefore when the document is read as a whole that the representation relates to the Land, which has not been absolutely assigned (unlike the Option).

d) With respect to the submission that the security only became enforceable on the occurrence of an enforcement event, that is usually the case in relation to a security arrangement. That does not mean that the Option Agreement was not absolutely transferred /assigned. The Mortgage contemplates that if there is therefore repayment of the loan, then there will be a re-assignment/re-transfer of the Option.

e) With respect to the submission that the Investors were required to co-operate with the bank in any enforcement or realisation of the put option when the security has become

enforceable, it is clear that this is a matter of administrative convenience and/or something that may be desirable in certain circumstances. For example, in the circumstances of the Ardila case it was necessary for both parties to be joined. It is likely therefore that this is included out of administrative convenience and/or an abundance of caution in that regard.

f) It is not clear why the Respondent has said that the Bank would not issue a notice under the put option, but the Investors would actually serve the notice. Clearly there had been an absolute assignment of the Option and therefore this point by the Respondent seems to beg the question. Naturally, the Bank as the absolute assignee of the Option would have been, as the assignee, the person who would be entitled to exercise the Option as already outlined above herein.

g) With respect to the submission that the Bank could not force the Investors to exercise their rights under the Option until after an event of default, the Bank was in a position itself as absolute assignees to exercise the Option. The fact that the Bank felt as a matter of administrative convenience that they would prefer to request Investors to do this is a matter for the Bank…

… it is submitted that the terms of the documentation are very clear and create an absolute assignment of the Option. As already outlined above the Investors remained as the beneficial owners of the Land but not the Option. This is the reason why there was an entirely separate provision relating to charges over the Land and the absolute assignment in relation to the Option. The Notice of Assignment makes it very clear that there was an absolute assignment and that this included any amount payable under the Option. As already outlined above, it is not possible to take any other meaning from this document and the Respondent is clearly mistaken in this regard.

49. Respondent's Submissions

"Whether or not there was an absolute assignment of the Put Option to the Bank by the Investors is a matter of contractual construction and it is the Respondents' position that on the construction of the actual terms of the Transaction Documents, there was not…

It is the Respondents' submission that the effect of this notice is to tell The Partnership that the assignment is in effect conditional on the happening of an Enforcement Event. The wording of this notice is inconsistent with any assertion that the assignment was absolute and therefore is not at all comparable to the notice issued in Bexhill. The Respondents submit that the Appeal Commissioners must place significant weight on the wording of this notice.

Furthermore, this notice leaves The Partnership in no doubt as to whom it must pay all monies to before the enforcement event i.e. the Investors. This is entirely inconsistent with the Appellants' submission that there was an absolute assignment…

In Ardila lnvestments NV v ENRC NV & Anrm, a similar issue arose as to whether an absolute assignment of rights was created by a security assignment by Ardila of its rights under a sale and purchase agreement. In ascertaining whether or not there was an absolute assignment of the rights, the Court reviewed the transaction documents between the parties. In particular, the security document entered into by Ardila had assigned:

> *"absolutely, subject to a proviso for re-assignment on redemption of the Secured Liabilities, all of its rights in respect of the Specified Contracts"…*

While the Court criticised the drafting of the document which assigned the rights, the Court was of the view that while the assignment clause itself referred to the assignment as being absolute, other provisions indicated an intention that it was to take effect by way of charge only. The Court held that the assignment was not of the whole benefit of the contract and did not take effect so as to pass the right to bring proceedings. Absolute, legal and beneficial rights were reserved to the assignor and the assignor was required to continue to pursue its rights under the contract.

Further or in the alternative, the Respondents are of the view that the Put Option Notice is chargeable to stamp duty pursuant to s31A SDCA, being a contract or agreement for the sale of an estate or interest in land in respect of which more than 25% of the consideration has passed.

Was payment made pursuant to the Put Option Notice?

50.*Appellant's Submissions*

The Appellants argued that S31A was not applicable on two grounds

1) there was no valid Exercise of the option
2) Even if there was a valid exercise of the option, the payment made was
    a) a different in quantum
    b) made under an oral agreement…and therefore could not be pursuant to the Put Option Notice.

The Appellants through Counsel argued that:

> **"***First contract law applies to options, option are contracts and they would be agreements or such. I think what this case here is saying that the exercise of the option gives rise to a contract…*
>
> *Secondly, the Option Agreement contemplated that there would be a further assurance, a conveyance or a transfer, … in essence what it says is that the purchaser is entitled to a further assurance or entitled to a conveyance. So it was contemplated that there would be a document. That's what's contemplated in the option because it incorporates these terms and conditions. …. So there must be a situation where the general conditions form part of the contract, and as a result of that then what we're looking at here is, it would be expected, accordance with the contract for there to be a close out document, but that's not what happened. So that wasn't pursuant, it wasn't in accordance with the contract.*
>
> *The third thing that has to happen in relation to this is that the payment must be made pursuant to the contract. We say that payment was made pursuant to something else. It is made pursuant to the alternative arrangement. And the alternative arrangement was the surrender that was done by parole. The parole wasn't in, or the oral part of this and the surrender wasn't in keeping or pursuant to the contract either, and the payment was different. It was in a different amount. It was some €32,000* (based on the submissions made before the hearing the difference was €14,193) *smaller, the Accountant B document, a different amount. That payment therefore was not pursuant to the contract. It was pursuant to the verbal surrender … but it wasn't pursuant to the contract…*

nobody has disputed that there was a surrender by way of parole. No one has disputed that the price was different in relation to this. …"

51. Respondent's submissions

*"Further or in the alternative,(*to section 31 SDCA*) the Respondents are of the view that the Put Option Notice is chargeable to stamp duty pursuant to s31A SDCA, being a contract or agreement or the sale of an estate or interest in land in respect of which more than 25% of the consideration has passed…*

was the payment made pursuant to the option? So this is the transfer of the 11.5 million from the Appellants, the promoters of this scheme, to the investors, and I say yes because this payment came from the Option Agreement. I say there is no other independent evidence of how the payment arose. I say that a businessman, or woman, with common sense would say that what you had here was investors who had a right, a power, to put it to the promoters to purchase the lease. They did so in writing. That option then became binding and enforceable and then the promoters paid the 11.5 million…"

FINDINGS & CONCLUSIONS

History of the transactions

52. The Appellants are the persons comprising the REDACTED (The Partnership). The Appellants were promoters in relation to a transaction involving premises known as REDACTED (the "**Property**"). The Appellants agreed to sell the Property to third party investors (the "**Investors**") by way of a lease for a period of 999 years.

53. An exit mechanism for the Investors was also put in place in the form of a put and call Option Agreement (the "**Option**") dated 3rd November 2006 under which the Investors were granted the option to require the Appellants to purchase all of the Investors' rights in the Property, which option was to be exercised before the expiry date on 25th January. 2014.

54. As part of requirements for the borrowings obtained by the Investors from REDACTED (the "**Bank**") to refinance in 2013 the borrowings on the Property, the Investors entered into among others two agreements with The Bank A. The first was a **Facility** agreement (or loan agreement) dated 28 February 2013. The second was a Deed of Mortgage, Charge and Assignment (the "**Mortgage**") which was dated 28th February 2013. Under the terms of the Mortgage, the Investors were obliged to assign (the "**Assignment**") their interest in, inter alia, the Option to the Bank. As part of the requirement to assign the Option to the Bank, the Investors were obliged to give notice of the assignment in writing (the "**Notice**") to the Appellants. Such a Notice was given by the Investors to the Appellants (called "Promoters" in the Transaction Documents) on 28 February 2013.

55. Notwithstanding the assignment of the Option to the Bank, the Investors nonetheless purported to exercise the Option by way of the Notice in writing addressed to the Appellant dated 24th January 2014. The Appellants (Promoters) disputed that the Option had been validly exercised by means of the Notice. Notwithstanding the disputed nature of the exercise of the Option by means of the Notice, an alternative arrangement was put in place and instead of acting on foot of any (albeit disputed) contract arising on foot of the Option, the Property was transferred back to the Appellants (Promoters) by the Investors orally , without document in February 2014. The consideration given was substantially the same as the amount due under the Option, apart from a small disputed amount relating to professional fees associated with the transaction.

Stamp Duty legislation- Applicability of section 31 to transactions in 2014

The charge to stamp duty

56. I have read and carefully considered the arguments put forward by both sides in relation to section 31 SDCA 1999.

57. Firstly, I accept Counsel for the Appellant's explanation of the operation of stamp duty, that if there is a document in existence the stamp duty charging section says that if that document falls within one of the categories listed in the First Schedule, Stamp Duties Consolidation Act 1999, then it becomes taxable. It becomes a stampable document provided it is *'executed'.*

58. One of the documents that falls within the First Schedule include what is called a *"conveyance on sale"*.

Within the definitions in the SDCA1999:

> *"'Conveyance on sale' includes every instrument…whereby any property, or estate or interest in any property, on the sale…is transferred to or vested in a purchaser…"*

59. Under the general rules of stamp duty it is the conveyance which is stampable. The conveyance in relation to land is the actual Deed of Assurance, which can be a Deed of Transfer or a Deed of Conveyance depending on the land in question.

Section 31 SDCA 1999

60. Section 31 is a deeming section and treats certain agreements as if they were a conveyance on sale. Counsel for the Appellants correctly summarised in his submissions when Section 31 SDCA 1999 can apply to a property transaction (but not in the circumstances arising in this appeal) when he said:

> *"…So, if you do not intend selling the legal interest, if you don't intend providing a conveyance, if you don't intend providing a further assurance or a Deed of Transfer, (and) your intention is to sell the beneficial interest only, you will be caught by Section 31 (1) (a)and that catches you at that point in time then, which is why you need to look at your documentation to see if it was intended to transfer the legal interest, if it was*

intended to provide a Deed of Conveyance, a Deed of Transfer or a further assurance." And that's a significance then of general condition 20 and general condition 24(a), and that's why those are important. Those are applied by the contract in this case.

61. Section 31(1) says:

"Any contract or agreement:

(a) for the sale of any equitable estate or interest in any property,
or
(b) for the sale of any estate in any property except lands, tenements, hereditaments, or heritages, or property locally situated outside the State, or goods, wares or merchandise, or stock or marketable securities…, or any ship or vessel or aircraft, or part interest, share, or property of or in any ship or vessel or aircraft,

shall be charged with the same ad valorum duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the estate, interest, or property contracted or agreed to be sold (Emphasis added)"

62. I accept Counsel for the Appellant's argument that the way the 2005 transfer of the property by The Partnership to the Investors was structured, that Section 31 did not apply to that transaction at that time, because that contract was not a sale of an equitable interest or estate. The 2005 contract was a sale of the full legal and equitable interest, which is the contract and the conveyance.

63. The Option Agreement was originally created in 2005 when the development of the Property was being assisted by the tax-based financing arrangements between the Appellants (Promoters) and the Investors. The Option Agreement was updated in 2006. Its terms specify that following the exercise of the Option that any contract/agreement that would have ensued was to take the form of the Law Society Conditions.

Clause 2.5; "*Terms of Sale – On the exercise of the Put Option or of the Call Option (as the case may be), the Law Society Conditions shall apply save as varied herein and in the Third Schedule … In the event that there is any conflict between the Law Society Conditions and the provisions of this Agreement, the provisions of this Agreement shall prevail.*"

64. While the Third Schedule to the Option varies the Law Society Conditions in certain respects, however General Conditions 20 and 24 (a) were not altered by the special conditions in this case.

65. Counsel for the Respondent argued that

> "*the exercise of an option creates a binding contract of sale which is enforceable by way of specific performance. Therefore, there is a contract of sale for the purposes of s52 of the Land and Conveyancing Law Reform Act 2009 which provides that "the entire beneficial interest passes to the purchaser on the making…of an enforceable contract for the sale or other disposition of land… The Partnership in fact paid €11,583,650 for the Property on 27 February 2014 which the Respondents understands reflects the full consideration due for the purchase of the Property."*

66. However in this appeal a full transfer of the legal and beneficial ownership of the property is envisaged in the Option Agreement.

67. Accordingly, I agree with Counsel for the Appellants that if the Option was validly exercised by the Investors in 2014, as argued by the Respondent, neither Section 31(1) (a) or (b) can apply as a full transfer of the legal and beneficial ownership of the property is envisaged in the Option Agreement.

68. I will now look to see if section 31A SDCA 1999 can apply in this appeal. First I will look to see if section 31A can apply to the exercise of the Option in 2014 and the subsequent purchase back of the hotel property by the Appellants. Later I will examine if section 31A can apply otherwise.

Section 31A SDCA 1999

69. I am grateful to Counsel for the Appellants for his explanation to the background of Section 31A. He explained that Section 31A was introduced in legislation to deal with the situation where matters are left in contract. Up to 2013 land developers would typically allow transactions to rest in contract indefinitely, thereby deferring almost indefinitely, when stamp duty would arise. (New rules to prevent this were introduced in 2006 subject to ministerial order to implement them, but were never implemented). In 2013, those inoperable 2006 provisions were deleted, and were replaced by the new section 31A, which stops arrangements which defer the payment date for stamp duty.

70. Under Section 31A, if someone holds an estate or interest in land and they enter into a contract or agreement for the sale of that interest in land, and they are paid 25% or more of the consideration, then the contract or agreement becomes treated as a conveyance on sale. It only deems that document to be a stampable document if, and only if, the payment of the 25% or more is made *pursuant* to that contract or agreement.

71. For section 31A to apply there must be land and there must be a contract or an agreement for sale. There must be a payment of 25%, and that payment must be pursuant to the contract or agreement. Then in those circumstances it says:

> Section 31A, subsection (1) reads:
>
> *'Where:-*
>
> *(a)the holder of an estate or interest in land in the State enters into a contract or agreement with another person for the sale of the estate or interest to that other person or to a nominee of that other person, and*
>
> *(b)a payment which amounts to, or as the case may be payments which together amount to, 25 per cent or more of the consideration for the sale has been paid to, or at the direction of, the holder of the estate or interest at any time pursuant to the contract or agreement.*
>
> *Then the contract or agreement shall be chargeable with the same stamp duty, to be paid by the other person, as if it were a conveyance or transfer of the estate or interest in the land.'*

72. The Appellants argue that the Notice of exercise of the Option by the Investors was invalid. The Appellants say:
    1. that the Notice (under the Option) isn't an enforceable contract (because they no longer have the right of exercise due to the assignment to The Bank A in 2013). So therefore the subsequent sales proceeds payment made by The Partnership was not made pursuant to that Option contract, but instead pursuant to the alternative arrangement. i.e. the surrender of title to the property by the Investors to The Partnership by parole or oral surrender.
    2. The Appellants also argue that even if I do not accept that the notice was invalid, that an alternative arrangement (transfer by parole or oral surrender) was put in place, and to the extent that there was a valid notice, which the Appellants deny at all times, that

the arrangements under the Option were effectively abandoned and another arrangement for completion was put in place.

3. The Appellants said there was another difference between what was contemplated under the Option and what ultimately transpired. The price ultimately paid was different by a significant sum of money, from what was envisaged under the Option Agreement. While a payment was made, the payment was not made pursuant to the Option contract (that was caused by this alleged valid option notice). It was pursuant to the verbal surrender, but it wasn't pursuant to the Option contract. I might add here that I regard the difference of €14,193, per the submissions put before the hearing, in the context of a consideration of €11,583,650 to be *de minimus* and not significant. In later witness testimony from the Appellant, he asserted, in effect, that the difference was more like €31,000 or €32,000. Even if this could be confirmed, I still do not regard such a difference as a significant sum of money and so I would reject the Appellants' argument on this point.

73. The Appellants argue that section 31A cannot apply. The payment was not made pursuant to a contract. There was no contract. It was abandoned and there was no purchase as was contemplated. Instead, a different mechanism was put in place, and was done by way of surrender. So there was nothing done pursuant to the Notice, even if it was valid.

74. The Respondent argues that the Notice of the exercise of the Option to transfer the property back from the Investors to The Partnership was valid and therefore the subsequent consideration paid by The Partnership to the Investors in the amount of €11,567,093 is subject to stamp duty.

75. The Respondent argued as there was no absolute assignment of the Put Option by the Investors, the Option Agreement and the exercise of the Option together formed part of the one transaction or contract and thereby render the exercise of the option stampable and chargeable to duty as an agreement for sale of an interest in property under section 31A SDCA as an alternative to section 31.

76. The starting point for my consideration of the application of section 31A is:

i) A review of the law and case law on what constitutes an absolute assignment
ii) A review of the documentation associated with the transactions in 2013 and 2014

to establish whether the Put Option Notice of the exercise of the Option was legally exercised

by the Investors and therefore valid.

Case law on Assignment of debts and choses in action.

77. I am obliged to Counsel for the Appellants who explained that a *chose in action* is something that doesn't have a physical existence, it's only something that you can sue for. In this Appeal we have an Option which is a chose in action.

Section 28(6) Supreme Court of Judicature Act (Ireland) 1877

(UK equivalent of this is the 1873 Act, their 1873 Act which was then replaced by section 136 of the UK's 1925 Property Act) states

> *"Any absolute assignment, by writing under the hand of the assignor (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:… "*

78. In effect, this says that if there is an absolute assignment in writing which isn't purporting to be by way of charge only, then, in law, this has the effect of passing and transferring all the legal rights and remedies to whoever they are assigned to.

79. In this Appeal we are examining whether the assignment of the Option by the Investors to The Bank A in 2013 passes over the remedies and claims, et cetera, under the Option to The Bank A at that time. If this has happened then it begs the question as to who is entitled to give Put Option Notice of Exercise of that Option in January 2014, The Bank A or the Investors? The Respondent says is the Investors whereas the Appellants say it is The Bank A. The Appellants argue that the Option has been assigned by the Investors to The Bank A, so how can the Investors exercise the Option since they no longer have that right?

80. So a substantial portion of this appeal was taken up with examining the case law dealing with the rules on assignment and the creation of fixed charges. The principles within the case law were then applied to the particular documentation associated with the transactions in 2013 and 2014 and both sides in this appeal argued for a different outcome.

81. I accept as correct the explanation for the meaning of 'absolute assignment', gleaned by Counsel for the Appellants from Osborne's Concise Law Dictionary, 11th edition:

> *'The general meaning of an "absolute assignment" is understood to mean the assignment of the entirety of the debt/obligation as opposed to just a portion of it and that it is free from conditions. The concept of "absolute assignment" is also generally understood to include an assignment by way of mortgage and/or trust …It is also understood that the distinction between what amounts to a security interest in property and what was regarded as an absolute interest in property is that a security interest is defeasible once the obligation has been performed ...'*

82. I am very grateful to both Counsels for the Appellants and the Respondent for their articulate explanation of the case law and authorities on contract law and the rules on assignment and the rules relating to fixed charges**.**

83. The Counsel for the Appellants opened the following UK cases and extracted certain principles which he then applied to the Transaction Documentation in 2013 and 2014. These cases, the Appellants argued, supported his case that there was an absolute assignment. The cases were:

> *Tancred v. Delagoa Bay* (1889) 23 Queens Bench Division 239
> *Hughes v. Pump House Hotel Company Limited* (1902)2 K.B. 190
> *Bovis International Inc v. The Circle Ltd Partnership (1995)49 Constr Law* Reports 12
> *Bexhill UK Ltd v. Razzaq* (2012) UK Court of Appeal EWCA Civ 1376

84. In the *Bovis* case (1995) *Judge Staughton L J said:*

> *"There was some discussion in the course of the argument as to whether the section contained two requirements, that is to say that the assignment should be (i) absolute and (ii) not by way of charge only; or whether these were merely opposite sides of the same coin. I am surprised that the point*

has not long since been decided in express terms; and in my opinion the answer is tolerably clear from the language of Cozens-Hardy LJ in the Hughes case [1902]...", wherein it was stated:

> *'The assignment of the debt was absolute: It purported to pass the entire interest of the assignor in the debt to the mortgagee, and it was not an assignment purporting to be by way of charge only'."*

85. I also accept as good law the judgement of Millett LJ in the same case;

> *"The Effect of the Mortgage: Issue 1".*
> *... Section 136 of the Law of Property Act 1925 permits a chose in action to be assigned at law provided that it is (i) an absolute assignment, (ii) in writing, (iii) one which does not purport to be by way of charge only, and (iv) is one of which express notice in writing has been given to the debtor."* (Emphasis added). *It is well established that an assignment does not cease to be absolute merely because it is given by way of security and is subject to an express or implied obligation to reassign on redemption."...*

86. Both the Appellants and the Respondent opened the decision in *Bexhill UK Ltd v. Razzaq* (2012) UK Court of Appeal EWCA Civ 1376. This case relates to a claimant assigning to its bank certain contractual rights and receivables. *REDACTED* Also there were close similarities between the banking documentation in *Bexhill* and the Transaction Documents in this appeal.

> "Judge Aikens LJ stated here:
>
> *"Whether a particular instrument creates an 'absolute' assignment or an assignment 'by way of charge only' is a question of construction of the relevant instrument taken as a whole."...*
>
> *"The starting point on the nature of the security granted to Barclays Bank ... must be clause 3. On the face of it clause 3.1.1 Bexhill 'assigns and agrees to assign absolutely in favour of [Barclays Bank] all of its rights, title, interest and benefit in the Receivables', which is consistent with the assignment being absolute ...*

> *As for the more general arguments… that an absolute assignment is inconsistent with the commercial relationship between Barclays Bank and Bexhill, I think this fails to take sufficient account of the distinction drawn between the assignment created by clause 3.1 and the effect of the individual sub clauses in clause 3.2. Clause 3.1 does transfer things in action to Barclays Bank absolutely. Clause 3.2 creates various forms of charge. Both can be characterised as continuing security for the loan facility Barclays Bank has afforded Bexhill….Bexhill can be stated as being the principal to a contract with a third party, but the benefit of the rights under that contract can still be transferred to another… there is a difference between being assignee of a right under a contract and being the party who entered into that contract as principal. It is understandable that Barclays Bank would not wish to take on any of the burdens of contracts with third parties but only have the advantage of any benefits as a signee of rights…*

87. Counsel for the Appellants also opened the Irish case law dealing with the interpretation of commercial contracts in support of his appeal. These were:

> *Analog Devices BV v. Zurich Insurance Co* (2005) 1 I.R.274
> *O'Rourke v. Considine* (2011) IEHC 191
> *Point Village Development Limited (In Receivership) v. Dunnes Stores* (2019) IECA 233.

88. Counsel for the Appellants stated that the *Analog Devices BV* case was a seminal case on the interpretation of commercial contracts, decided by the Irish Supreme Court in 2005. I am, of course, bound by the judgment of the Irish Supreme Court in *Analog devises BV v. Zurich Insurance Co*.

89. I accept as correct the submission made by Counsel for the Appellants that the decision of Lord Geoghegan J in the Analog case to agree with the principles enunciated in *House of Lords. Lord Hoffman in ICS v. West Bromwich B.S*. [1998] is good authority for the proposition that 5 principles that must be applied in interpreting commercial contracts. These principles are:

> *"(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have*

been available to the parties in the situation in which they were at the time of the contact.

(2) The background … the 'matrix of fact' … Subject to the requirement that it should have been reasonably available to the parties and to the exception (at 3) *it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent…

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammar. The meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean….

(5) The 'role' that words should be given their 'natural and ordinary meaning' … On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had…"

90. The Appellants referenced the 2011 High Court case of *Dermot O'Rourke v. Thomas Considine, Patrick Sweeney and Gerard Prendergast (O'Rourke v. Considine.)*

91. Again I am bound by, but would not seek to differ from, the judgement of Ms. Justice Geoghegan L in that case wherein she stated:

> *"... It was not in dispute between the parties that the assignment effected was a legal assignment complying with the requirements of s.28(6) of the Supreme Court of Judicature (Ireland) Act 1877, as it complied with the four conditions... The four conditions are:*
>
> *(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."...*
>
> *"Whilst counsel for the plaintiff did not dispute that there was a legal assignment, he did seek to rely on clause 3.1 of the Deed of Assignment to suggest that the plaintiff had a continuing interest by reason of the equity of redemption provided therein. This clause provides:*
>
> > *'As security for the Secured Liabilities the Assignor as legal and/or beneficial owner hereby assigns absolutely to the Assignee all its present and future rights, title, benefit and interest in and to the Assigned Assets and the Receivables and hereby charges as a first fixed charge in favour of the Assignee all of its present and future right, title and interest in and to the Receivables Account and the Receivables Account Balance PROVIDED THAT upon irrevocable payment and discharge in full of the Secured Liabilities the Assignee will forthwith at the request and expense of the Assignor re-assign or release (as appropriate) the Security Assets to the Assignor"...*
>
> *In my judgment, clause 3.1 effects an absolute assignment of the Loan Agreement of 9th August, 2006, as an 'Assigned Asset', but gives, as a matter of contract, to the plaintiff, a right to have such asset reassigned to him in the event that there was a full discharge of all the secured liabilities."*
>
> *"In my judgment, neither clause 16 nor the documents entered into between the plaintiff and the defendants in February 2006 may be properly construed so as to preserve to the plaintiff a right to sue the defendants for recovery of*

> *monies due by them on the Loan Agreement prior to the reassignment to him of the Loan Agreement. It follows that at the date of commencement of these proceedings, the plaintiff had no right to sue the defendants."*

92. The Appellants cited the 2019 Irish Court of Appeal case *Point Village Development Ltd v. Dunnes Stores.* Again I am bound by the judgement of Ms. Justice Máire Whelan, wherein she stated:

> *"Analog and the word the parties used…*
> *Hence, in the light of the jurisprudence from the Supreme Court and until such time as the principal is revisited, it is established law in this jurisdiction that in order to determine the common intention of the parties to an agreement which has been reduced to writing, same must be construed by reference to the document itself. Extrinsic evidence of what may or may not have been in the* mind of the *parties at the time of the agreement is not admissible for such purpose."*

93. The Respondent quoted extensively from the *Bexhill* case in support of its position. The assignment in *Bexhill* was held to be absolute and the Notice was held to be determinative.

94. The Respondent argued that the distinction between the Notice in *Bexhill* and the Notice (given in 2013 by the Investors to the Appellants, as Promoters, that they had assigned the Option to The Bank A)) in this appeal is important.

95. The Respondent identified correctly that there was some inconsistency in the documentation in the present appeal. Some clauses appear to support absolute assignment while other clauses appear to suggest that the assignment of the Option to The Bank A was to take effect by way of charge only.

96. Here the Respondent quoted from *Ardila Investments NV v. ENRC NV & Zamin Ferrouis Lts* (UK HC 2015).

97. The Respondent argued that whether or not there was an absolute assignment of the Put Option to the Bank by the Investors is a matter of contractual construction and that on the construction of the actual terms of the Transaction Documents, there was not.

98. The Respondent made an argument that reference to the Option being a security asset

in some way weakened the possibility that it had been assigned absolutely. I reject this argument as being incorrect. I believe I am supported in this view by the Appellant's quote from *"Secured Credit under English and America law."* (Cambridge Studies in Corporate law by Gerard McCormack) wherein it says:

> *The test for the application of section 136 (*Law of Property Act 1925.(equivalent to section 28(6) in Ireland)) *is whether for the time being the assignor has unconditionally transferred to the assignee the right to receive payment from the debtor… With a mortgage the assignee has ownership of the debt transferred subject to the assignor's right of redemption. A charge of a debt, however, gives the chargee not ownership of the debt but rather preferential rights thereto, footnote 73"*
> *Footnote 73, refers to Mr. Justice Denman in Tancred v Delagoa Bay and East Africa Ry Co 1889, and what was said in that case is that:*
>
> *"A document given by way of a charge is not one which absolutely transfers a property with a condition for reconveyance, but is a document which only gives a right of payment out of a particular fund or a particular property without transferring that fund or property."*

99. I will now examine the arguments put to me in relation to the Transaction Documents before concluding on whether the Option Notice was validly exercised.

Transaction Documentation

100. I will endeavour to apply the case law principles above to the Transaction documents in this appeal to determine whether there was an absolute assignment of the Option or whether it was an assignment to the Bank by way of a charge only.

101. It seems to me that the documentation prepared in relation to the Material Contracts contains a number of inconsistencies. Some of the language in the Mortgage Security and Assignment Agreement pertaining to the Option Agreement suggests that we are dealing with an absolute assignment whereas other clauses appear more appropriate for the creation of a charge over the Option. However, these inconsistencies are not fatal, in my view, to the argument by the Appellants that the Option was absolutely assigned.

102. I think some of the inconsistencies can be explained by the fact that there were a

number of Material Contracts covered by this Mortgage agreement and that the clauses were trying to cover all eventualities for all types of documents. In some of the Material Contracts there was an intention for absolute assignment whereas in others there was intention to create a charge. The drafting lawyers appear to have had a *belt and braces* approach to the drafting.

103. The correspondence between the lawyers acting for the Appellants and those acting for the Investors, close to the time of sale of the Property in early 2014 indicates that there was substantial disagreement between the Appellants (Promoters) and the Investors as to the meaning of certain clauses in the transaction documents.

I have set out in Appendix 2 a list of key transaction documents.
The key documents worth considering are as follows:

Facility Agreement (Loan Agreement between Investors and The Bank A 2013) (see extracts in Appendix 4)

104. The reason why this 2013 agreement was entered into by the parties was that originally, the loans obtained by the Investors, to make their investment in the The Partnership property, were borrowed from Bank B . Owing to the collapse of that bank, the Investors sought to restructure their loans by transferring the loans to The Bank A .

105. As part of the terms of their Facility Agreement with The Bank A, the Investors had certain obligations and in particular were obliged to provide a "*deed of mortgage, charge and assignment*" over, *inter alia*, "*the Option Agreement…).*
In other words, in order that the Investors could obtain a loan of €6 million from The Bank A in 2013 they must assign over certain rights, including the Option to put The Partnership Property back to the Appellants as Promoters. This was done through another agreement called the Mortgage, Charge and Assignment (Investors) Agreement, dated 28 February 2013.

Mortgage, Charge and Assignment (created in 2013) (see extracts in Appendix 5)

106. On the 28th February 2013 the Investors entered into the Mortgage, Charge and Assignment agreement which specified that their obligations will be secured by that agreement. This is a key document dealing with the issue as to whether the Investors were still entitled in January 2014 to exercise the Option to sell back the Property.

107. Under the Mortgage agreement which was entered into just under one year ahead of

the unwinding of the tax based financing structure in early 2014, the Investors must give the Bank some charges in relation to the land. These are separate from the Option. At paragraph 3.1 of that agreement it specifically sets out the fixed charges in relation to the land.

108. Under the Mortgage agreement there is a form of Notice of Assignment of Material Contracts (a copy of this is reproduced in Appendix 6) required of the Investors. The Investors signed this form and gave a formal notification to the Appellants of that assignment to the Bank on the 28th February 2013. This Notice of assignment includes Notice of assignment by the Investors to The Bank A "*over all our right, title and interest in and to*" the Option Agreement (entered into in 2006 between the Investors and the Appellants as Promoter) "*including all monies which may be payable in respect of*" the Option Agreement.

109. SCHEDULE 2 PART 2 of the Mortgage agreement sets out the Material Contracts, as defined to include:
1. The Agreements for Lease.
2. The Option Agreements.

110. Within the Mortgage, Charge and Assignment (see Appendix 5) clause 3 is headed up "*Charging Provisions".* This part is divided into two sections, namely, "*Fixed Charges*" and "*Security assignments"*

111. At paragraph 3.1 under the heading "*Fixed Charges*" it makes specific provisions for charges over certain assets. Paragraph 3.1 reads;

> *"Fixed Charges. The Mortgagors, as beneficial owners to the intent that the charges contained in this Deed will be a continuing security for the payment and discharge of the Secured Obligations in favour of the Mortgagee, hereby:"*

112. It then lists four separate charges which are created viz., the first charge relates to the registered land; the second charge relates to compensation; the third charge relates to receivables; the fourth charge relates to an interest in any Lease.

113. Within "*Security Assignments*" it states:
"The mortgagors as beneficial owners and as security for the payment and discharge of the secured obligations in favour of the mortgagee..." (The Bank A), *"...* hereby assign and

agrees to assign absolutely...", "... in each case in so far as the same were capable of assignment…3.2.4 the Material Contracts;" (Emphasis added).

114. Within Schedule 4 of the agreement there is a **Notice of Assignment** (see Appendix 6) to be given by the Investors to the Promoters advising them that the Material Contracts, including the Option Agreement, have been assigned to the Bank.

115. The charges thereby created specifically under the Mortgage do not appear to relate to the Option. Schedule 4 of the Mortgage Agreement is a form of specific charge and states that it relates to '*The property comprised in the Folio…County'* and does not refer to the Option.

116. The Option (together with the other "Material Contracts") is dealt with in a separate paragraph 3.2 which reads;

> "*Security assignments – The Mortgagors, as beneficial owners and as security for the payment and discharge of the Secured Obligations in favour of the Mortgagee, hereby assigned and agrees to sign absolutely (in each case insofar as the same capable of assignment):… 3.2.4 the Material Contracts; subject in each case to the rights of the Mortgagors to redeem this Deed as contained in clause 17 (Release of security*)."

117. In relation to the Notice of Assignment dated 28th February 2013 it states;

> "*We hereby give you notice that we have assigned to The Bank A (the Mortgagee) pursuant to a mortgage, charge and assignment entered into a by us in favour of the Mortgagee in 2013 (the Mortgage, Charge and Assignment (Investors)) of all our right, title and interest in and to the Material Contracts including all monies which may be payable in respect of such Material Contract.*"

118. The Notice of Assignment (see Appendix 6) lists three Option Agreements, including the third put and call Option Agreement, which is dated the 3rd November 2006. The operative wording is:

> *"Dear sirs*
>
> *"We (*the Investors*) hereby give you notice that we have assigned to The Bank A (the Mortgagee) pursuant to...", "... the mortgage, charge and assignment entered*

into by us in favour of the Mortgagee in 2013 (the Mortgage, Charge and Assignment) (investors) over all of our rights, title and interest in and to the material contracts including all money which shall be payable in respect of such material contracts." (Emphasis added)

119. There is no mention of the granting of a charge within this notice**.**

120. Within the Mortgage, Charge and Assignment **(see Appendix 5)** there is a clause 17 which deals with the release of the security. Under "Release of security" it says:

"Upon the expiry of the security period the mortgagee shall at the request and at the cost of the mortgagors take whatever action is necessary to release or reassign and discharge the secured assets from the security."

121. The effect of clause 17 is that when the €6 million loan is repaid, the Bank, as mortgagee, will reassign the documents, including the Option right. The case law cited earlier clearly supports the proposition that a right of reassignment does not mean that there has not been an absolute assignment. I accept the Appellant's argument that the clauses in the Transaction Documents relating to release of the security are important:

"because it's raised in a number of the cases, I think Hughes v. Pump House and Tancred, … relating to whether something is an absolute assignment or not… …if it was just a charge you cancel the charge, or the charge evaporates… if there wasn't an assignment it wouldn't be necessary to reassign or transfer it back.". They are *"a key indicator that there has been an absolute assignment".*

Representations and Warranties

122. Within the Representations and Warranties of the Mortgage, Charge and Assignment (see Appendix 5) at clause 5.1 under the heading "Nature of security" it says:

"Each mortgagor represents and warrants to the mortgagee in relation to himself/herself only that he is, and will at all times, during the security period be a lawful and beneficial owner of the security assets."

123. The Respondent argued that that creates an inconsistency because if the Investors had absolutely assigned the Option then how can they warrant and represent that they have the beneficial interest at the same time. I agree with the Appellant's counter-

argument that the Transaction Documents relate to more than just the Options; that there are charges in relation to the land and that the charges created there do not transfer the interest in the land. I agree with the Appellants when Counsel argues that Clause 5.1 is of general application to the whole of the Transaction Documents and as such it is not inconsistent with and does not overrule the terms of the Option contract. Also which means that it doesn't invalidate the contract or any terms of the contract. A breach of a warranty or a representation is remedied by damages.

124. The Respondent cited the *Bexhill* and *Ardila* cases in support of its argument that those cases had similar type clause to the ones in the current appeal and that there were similar inconsistencies in the transaction documents. I do not materially disagree with the Respondent when he asserts that many of the same conflicting clauses in the transaction documents in this appeal were also found in both the *Bexhill* and *Ardila* cases.

125. The assignment in *Bexhill* was held to be absolute and the notice was held to be determinative. The Respondent argued that the distinction between the Notice in *Bexhill* and the Notice (in 2013) in the present appeal is important. In *Bexhill*, the notice expressly stated that all of the assignor's rights and remedies had been transferred to the bank. The Notice of Assignment of Material Contracts in this case makes no reference to the assignor's rights and remedies being transferred to the assignee.

126. It is the Respondents' submission that the effect of this notice is to tell The Partnership that the assignment is in effect conditional on the happening of an Enforcement Event. The wording of this notice is inconsistent with any assertion that the assignment was absolute and therefore is not at all comparable to the notice issued in *Bexhill***.** It is entirely inconsistent with the Appellants' submission that there was an absolute assignment.

127. The Respondent quoted extensively from *Ardila Investments NV v. ENRC NV & Zamin Ferrouis Lts* (UK HC 2015) which held that the assignment was by way of a charge only. The Court reviewed the transaction documents between the parties in that case. In particular, the security document entered into by *Ardila* had assigned *"absolutely, subject to a proviso for re-assignment on redemption of the Secured Liabilities, all of its rights in respect of the Specified Contracts".*

128. The *Bexhill* and *Ardila* cases are UK case law. I believe, however, that I am bound by the Irish court dicta in the cases *Analog Devices BV v. Zurich Insurance Co* (2005);

O'Rourke v. Considine (2011) and Point Village Development Limited (In Receivership) v. Dunnes Stores (2019).

129. In *Analog Devices BV v. Zurich Insurance* wherein:

> *"Held by the Supreme Court, in dismissing the appeal, 1, that, in construing the policies...",* there was a contract of insurance in this case, *"... the court had to give effect to the intentions of the parties. Such intentions were to be ascertained objectively from the words used in the policies and taking into consideration the surrounding circumstances or factual matrix..."*

130. Of particular relevance, in my opinion, is the statement by Justice Geoghegan, where he stated:-

> *"...In general, 'all risks' policies of insurance cover all perils unless they have been unambiguously and clearly excluded. In Rohan Construction v ICI [1988] Griffin J in a judgment, with which Finlay CJ and Hederman J concurred, said the following:*
>
> > *'It is well settled that in construing the terms of a policy the cardinal rule is that the intention of the parties must prevail, but the intention is to be looked for on the face of the policy, including any documents incorporated therewith, in the words in which the parties have themselves chosen to express their meaning. The court must not speculate as to their intention, apart from their words, but may, if necessary, interpret the words by reference to the surrounding circumstances. The whole of the policy must be looked at, and not merely a particular clause'."*

131. I am bound by the judgment of the High Court in 2011 whereby Finlay Geoghegan J. in *O'Rourke v. Considine* identified the four conditions to be met for an assignment to be valid under 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."

132. In this case Judge Finlay Geoghegan J. stated:

> *" In my judgment, clause 3.1 effects an absolute assignment of the Loan Agreement of 9th August, 2006, as an 'Assigned Asset', but gives, as a matter of contract, to the plaintiff, a right to have such asset reassigned to him in the event that there was a full discharge of all the secured liabilities."*

133. In *The Point Village Development Ltd v. Dunnes Stores*, Ms. Justice Máire Whelan stated:

> *"Analog and the word the parties used…*
> *Hence, in the light of the jurisprudence from the Supreme Court and until such time as the principal is revisited, it is established law in this jurisdiction that in order to determine the common intention of the parties to an agreement which has been reduced to writing, same must be construed by reference to the document itself. Extrinsic evidence of what may or may not have been in the* mind of the *parties at the time of the agreement is not admissible for such purpose."*

134. I accept the argument of the Appellants the Mortgage creates a charge over the Land and creates an absolute assignment of the Option - separately.

135. The Notice of Assignment makes clear and specific reference to the assignors' rights transferred and assigned and for the avoidance of any doubt goes on to say that this includes "*all monies which may be payable"* in respect of the Option.

136. I accept the case put forward for the Appellants that the terms of the documentation create an absolute assignment of the Option. As already outlined above the Investors remained as the beneficial owners of the Land but not the Option. This is the reason why there was a separate provision relating to charges over the Land and the absolute assignment in relation to the Option.

137. Given the above and given that both the Mortgage Agreement at clause 3.2 and the Notice of assignment both explicitly state that the assignment is "absolute" it is my view

that the Option Agreement was absolutely assigned by the Investors to the Bank in 2013 and the assignment was not by way of a charge only.

138. Having so concluded, it is my view that the Put Option Notice of exercise of the Option in January 2014 by the Investors in their own name was not a valid exercise of the Option as the Investors had already, in 2013, given away their rights 'absolutely' to The Bank A.

139. Before concluding on Section 31A and its applicability to this transaction, I must pursue a line of argument which was not explicitly put to me by either side in this appeal but which I believe is highly relevant.

Was the consideration of €11,583,650 paid in pursuance to an agreement for a sale of an estate or interest in land?

140. The Facility Agreement entered into by the Investors with The Bank A is dated 28th February 2013**.** The parties to this agreement are the Investors, The Bank A and the Promoters as Guarantors, being the Appellant, Partner 2, Partner 3, Partner 4 and Partner 5. It may appear somewhat unusual that the Promoters /Appellants should be a party to the Investors' loan or Facility Agreement with The Bank A.

Counsel for the Appellants explained:

> *"why was the Appellant a party to that facility agreement when he wasn't getting any benefit under that facility agreement? … he provided guarantee at paragraph 18 of that Facility Agreement. So he is there as guarantor in that agreement. "*

141. In later correspondence with the Tax Appeals Commission, subsequent to the hearing, solicitors acting for the Appellants explained:

The guarantee by the Promoters specified at clause 18 of the Facility Agreement is defined in the Facility Agreement as the "Promoter Loan Guarantee".

> *"Promoter Loan Guarantee means the guarantee contained in this Agreement issued or to be issued on the date hereof by the Promoters* (Appellants*) to the Lender (*The Bank A*) in respect of all of the Borrowers'* (Investors) *obligations to the Lender …"*

Clause 18 reads as follows:

'18. GUARANTEE AND INDEMNITY

18.1 Guarantee and Indemnity
Each promoter irrevocably and unconditionally jointly and severally:
18.1.1 guarantees to the Lender punctual performance by each Borrower of all that Borrower's obligations under the Finance Documents;
18.1.2 undertakes with the Lender that whenever a Borrower does not pay any amount when due under or in connection with any Finance Document, that Promoter shall immediately on demand pay that amount as if it was the principal obligor; and
18.1.3 indemnifies the Lender immediately on demand against any cost, loss or liability suffered by the Lender if any obligation guaranteed by it is or becomes unenforceable, invalid or illegal. The amount of the cost, loss or liability shall be equal to the amount which the Lender would otherwise have been entitled to recover.'

142. As part of the terms of their Facility Agreement with The Bank A, the Investors had certain obligations.

Paragraph 12 of the loan agreement stated;

'Security Documents – To secure the prompt payment and performance to the Lender of the obligations of the Borrowers under this Agreement, the Borrowers shall execute, or shall procure that, the following security documents are executed in favour of the Lender: a deed of mortgage, charge and assignment over the Borrowers rights, title and interest in and to:... the Option Agreements...'

143. In addition, the Loan Agreement included a negative pledge restricting the Investors ability to dispose of the Property otherwise than pursuant to the Transaction Documents (including the Option). Paragraph 21.4 of the Loan agreement stated;

"*Negative Pledge – Neither the Borrowers nor the Promoters shall without the prior written consent of the lender:... 21.4.2 sell, lease (other than Occupational Lease), transfer or enter into any Disposal by one or more transactions or a series of transactions (whether related or not) the whole or any part of the Recourse Assets other than pursuant to the terms of the Transaction Documents save for a transfer or sale to an existing Investor order to a new Investor or under and in accordance with the terms of the Co-ownership Agreement, was transfer or sale has been approved in writing in advance by the Lender, when the lender has, in the case of a new Investor, approve the identity of the new Investor...*"

144. The Loan Agreement includes a number of covenants on the part of the Investors with respect to the exercise of the rights under the Option including in particular an obligation to forward a copy of any Notice under the Option. Paragraph 21.1.6 states

> '*… forward to the Lender a copy of any notice issued by the Borrowers pursuant to any of the Option Agreement or to the extent that the relates to forfeiture, termination or exercise of rights, any notice issued pursuant to any other Transaction Documents to which they are a party…*'

145. The Facility agreement provides that the Investors will exercise the rights under the Option at the earliest opportunity. Paragraph 21.9 states;

> '*The Borrowers and Promoters hereby agree that they shall exercise their rights under the Option Agreements at the earliest opportunity and that the proceeds of such will be used in accordance with Clause 8.1 hereto.*'

146. Also, in the case of an event of default, the Loan Agreement provides that the Bank is empowered to exercise rights under the Security Documents including the Option which includes a proviso that the Bank will first request the Investors to exercise their rights under the Option. Paragraph 22.2 states;

> '*Subject Clause 22.2.3, Clause 22.4 and Clause 20.5 if an Event of Default shall have occurred, then, at any time thereafter, the Lender may:… 22.2.3 exercise the rights and remedies of a mortgage your secured party under the Security Documents provided that: (1) the Lender)…'*

147. These clauses manifestly show how the Facility agreement in 2013, of which the Appellants are guarantors, is inextricably linked to the Option Agreement of 2006 and the ultimate Property sale transaction between the Appellants / Promotors and the Investors / Borrowers. They show the inter-connectivity and inter-dependence of the Option Agreement with the Facility Agreement and the Mortgage Agreement. They also show the need of the Promotors to proceed with the purchase the Hotel Property to meet their guarantee to The Bank A, notwithstanding their view that the Investors were not legally entitled to exercise the Option.

148. The Option Agreement itself, created in 2005 / 2006, states at clause 4.12:

> *'Entire agreement*

(a) this agreement, the transaction documents and any other document to be entered into pursuant to this agreement constitute the entire agreement between the parties hereto in relation to the sale of the hotel property…'

149. The transaction documents referred to here were not put before me at the hearing as they presumably related to the original agreements with Bank B in 2006. However, similar mirroring documents were created in 2013 between the Investors, The Bank A and the Appellants/ Promoters. It seems to me that the 2013 Transaction Documents were "*entered into pursuant to this agreement* (the Option) *constitutes the entire agreement between the parties hereto in relation to the sale of the hotel property."*

150. The above analysis of what transpired supports my view that that the ultimate payment of the consideration of €11,583,650 in February 2014 was in pursuance of an agreement between the Appellants / Promoters for the re-purchase by them of the Hotel Property from the Investors.

151. The the inter-connectivity and inter-dependence of these agreements and the hand of the Promoters in all the arrangements leading to the repurchase of the Hotel property from the Investors is further emphasised by the following exchange during the hearing:

"COMMISSIONER CUMMINS: "Normally in a commercial transaction the bank would set out the terms for the assignment. …my understanding would be that the Bank would determine the terms of the commercial arrangements…
COUNSEL For the Appellants: *"The evidence given by the Appellant yesterday was that Bank B were involved in this as the bank. Bank B found themselves in great difficulty in August 2008, and this loan proceeded then in towards NAMA after that and things were getting difficult.*
The Bank A were introduced by the Promoters in this case in the last 11 months, bearing in mind this is February 2013, and they're exiting out of this in February 2014. So what we're looking at here in relation to this in terms of commercial matrix, is that, the Investors were just doing whatever they were supposed to do. The investors' involvement in things I'm saying was minimal throughout this; they were signing the documents and doing what had to be done. The promoters were rearranging the finance here and moving the loans "

152. The case law, both Irish and UK, cited in this case spoke about the importance of understanding the factual matrix or background when analysing and interpreting

commercial contracts. The following submission from Counsel for the Appellants testifies to the predetermination and inevitability of the purchase by the Appellants of the Hotel Property from the Investors:

> "*So when they assigned their interest in the land to the Bank by taking out a mortgage with the Bank, one year before the expiry period for exit, they would include whatever interest they had, including the Option Agreement when making the transfer to the Bank as part of the mortgage arrangement. The common sense view and the factual matrix of all this was that the Bank was taking over their position, the Investors were on the way out, they've never ran the hotel, they've never paid the rent, they never paid the interest, they never paid the mortgage, the never paid any element of the loan, they're literally just straw figures in this whole scene, they're just people on the fringes of all of this. It's the bank who was putting up the money, the promoters put up the money, the people running the hotel, the developer, they're involved in all this. Economically and practically the investors have no real role to play here.*"

153. The Appellants have argued that the oral transfer of the Hotel Property in February 2014 which triggered the payment of €11,583,650, was a different transaction to the one envisaged by the Option / Put Option Notice of exercise. I disagree. If you examine the constituent elements of the consideration ultimately paid it is almost identical to the structure of consideration set out in the 2013 transaction documents.

154. There were essentially three elements to the consideration paid by the Appellants to the Investors. The Option Agreement in 2006 specified in Clause 2.4 the three elements that would make up the consideration when the transactions of 2006 were unwound by the repurchase by the Appellants/Promoter of the Hotel Property in 2014. It was agreed in 2013 that Accountant B, as independent accountants, would certify what that consideration would be in 2014.

155. In 2014 prior to the sale, Accountant B confirmed the consideration elements were as follows:

i) €6,053,563 (the **The Bank A Sum**), which was the balance due to The Bank A pursuant to the Facility Agreement dated 28 February 2013 between (1) the Investors (as borrowers) (2) the Promoters (i.e. The Partnership) (as guarantors) and (3) The Bank A . (as lender);

ii) €5,500,000 (the **Developer Sum**), which was the balance due to REDACTED (the **Developer**). (This company is wholly owned by The

Partnership) pursuant to a Loan Agreement dated 6 December 2005 between (1) the Investors and (2) the Developer;

iii) a sum equal to all costs, charges and expenses which the Investors have or will suffer as a consequence of exercising the Put or Call Option - €44,280.

156. When the transaction for the repurchase of the Hotel Property was completed by oral transfer in February 2014 elements i) and ii) without variation were included in the consideration. There was a dispute between the parties as to the amount that should be included under element iii). Ultimately, according to the submissions put to me before the hearing, €30,087 was paid under this heading. Later in witness testimony and in advocacy by Counsel for the Appellant's it was asserted that the actual figure paid by the Appellants under this portion was actually close to €13,000. Whichever figure is correct, the amount under this element was minimal.

157. In my view, the consideration paid in February 2014 under the oral purchase of the property by the Appellants was identical in all material respects to that envisaged under the 2006 Option Agreement, notwithstanding that the Appellants has argued that the Option Agreement was not validly exercised by the Investors. This again supports my view that the consideration of €11,583,650 ultimately paid was in pursuance of an agreement, pre-existing to the oral agreement, for the sale of the Hotel property back to the Appellants. That agreement was the aggregation of the 2006 Option Agreement combined with the 2013 Transaction Documents / Material Contracts.

158. In their arguments before me, the Appellants' Counsel asserted:

> *"In 2005 the contract was entered into for €1,000, the Investors bought the land by way of a 999 year agreement for lease. They rested that transaction in contract; later they were to be taken out/ unwound of their investment at the end of the tax life of the hotel building in 2014. The investors never had any intention of retaining their interest in this hotel; they never had any intention of running a hotel; all they wanted were the tax allowances. Under the tax structure the investors borrowed 5.5 million from the Promoters. They borrowed 6 million from Bank B. …"*

159. Section 31A which deals with property transactions resting in contract provides:

(1) Where-

(a) the holder of an estate or interest in land in the state entered into a contract or agreement with another person for the sale of the estate or interest to that other person or to a nominee of that other person, and

(b) a payment which amounts to, or as the case may be payments which together amount to, 25% or more of the consideration for the sale has been paid to or at the direction of, the holder of the estate or interest at any time pursuant to the contract or agreement,

then the contract or agreement shall be charged with the same duty, to be paid by the other person, as if it were a conveyance or transfer of the estate or interest in the land stamp

Conclusion

160. I do not accept the argument of the Respondent that the stampable transaction in this appeal relates to the Put Option Notice of exercise of the Option given by the Investors to the Appellants, coupled with the Option Agreement as I've already determined that this was not a validly exercised Notice.

161. However, I do believe that the payment and consideration made was in pursuance of an agreement between The Partnership and the Investors to transfer or buy the Hotel Property.

162. What was the agreement? That agreement is the combined inter-dependent set of agreements represented by the Transaction documents in 2013 and the Option agreement (2006). It is my view that the Option Agreement executed in 2006 coupled with the 2013 Transaction Documents, including the Facilities Agreement and the Mortgage, Charge and Assignment agreement, executed under the guidance of the Appellants, constitute an agreement in aggregate between the Appellants and the Investors for the sale of the Investor's interests in the Hotel Property and the consideration paid in February 2014 was made pursuant to that agreement.

163. That inter-dependence of the Option Agreement with the Transaction documents in 2013 is manifest by the participating parties to the various agreements. The parties to the Option agreement are the Appellants and the Investors. The parties to the Facility Agreement are the Appellants, the Investors and The Bank A. The parties to the Mortgage agreement, required by the Facility agreement, are the Investors and The Bank A.

164. My view of the intra-linkage, inter-dependence and connectivity between the Appellants, (purchaser) The Partnership and the seller (Investors) is further reinforced by the way in which the consideration was dispensed when the property was ultimately sold in February 2014.

165. It is my view that the payment of €11,583,650 by The Partnership in February 2014 to the Investors was in pursuance of an agreement between the parties for the acquisition of the Hotel Property.

166. For that reason I believe the stamp duty is payable by The Partnership on foot of this transaction under the provisions of section 31A SDCA 1999.

Determination

167. Having considered the evidence and facts, the relevant legislation and related case law, and the submissions of both parties in this appeal, I determine that the Appellants are in law liable to stamp duty on the payment of €11,583,650.

168. Accordingly, I determine that the Appellant and his partners in The Partnership are jointly and severely liable to stamp duty in the amount of €231,673, on foot of the payment of €11,583,650 paid to the Investors in February 2014 for the acquisition of the Hotel Property.

169. I determine that the Respondent should review the calculation of the stamp duty payable by the Appellants in the light of the correspondence submitted by the Appellants after the hearing which casts doubt in my mind that €30,087 was the sum actually paid under item iii) of the Accountant B calculation, referred to at page 80 above.

170. This appeal is hereby determined in accordance with section 949AK TCA 1997.

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PAUL CUMMINS

TAX APPEAL COMMISSIONER

Designated Public Official

11 th day of JANUARY 2021

The Commission has been requested to state and sign a case for the opinion of the High Court in respect of this determination, pursuant to the provisions of Chapter 6 of Part 40A of the TCA 1997.

Appendix 1
Stamp Duty legislation

Section 31 and 31A STCA 1999

Section 31

31.—*(1) Any contract or agreement—*

(a) for the sale of any equitable estate or interest in any property, or

(b) for the sale of any estate or interest in any property except lands, tenements, hereditaments, or heritages, or property locally situated outside the State, or goods, wares or merchandise, or stock or marketable securities (being stock or marketable securities other than any share warrant issued in accordance with section 88 of the Companies Act, 1963), or any ship or vessel or aircraft, or part interest, share, or property of or in any ship or vessel or aircraft,

shall be charged with the same ad valorem duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the estate, interest, or property contracted or agreed to be sold.

(2) Where the purchaser has paid the ad valorem duty in accordance with subsection (1) and before having obtained a conveyance or transfer of the property enters into a contract or agreement for the sale of the same, the contract or agreement shall be charged, if the consideration for that sale is in excess of the consideration for the original sale, with the ad valorem duty payable in respect of such excess consideration, but shall not otherwise be chargeable with duty.

(3) Where duty has been duly paid in conformity with subsections (1) and (2), the conveyance or transfer made to the purchaser or sub-purchaser, or any other person on his or her behalf or by his or her direction, shall not be chargeable with any duty, and the Commissioners, on application, either shall denote the payment of the ad valorem duty on the conveyance or transfer, or shall transfer the ad valorem duty to the conveyance or transfer on production of the contract or agreement, or contracts or agreements, duly stamped.

(4) The ad valorem duty paid on any contract or agreement to which this section applies shall be returned by the Commissioners in case the contract or agreement be afterwards rescinded or annulled, or for any other reason be not substantially performed or carried into effect, so as to operate as or be followed by a conveyance or transfer.

Section 31A

Resting in contract

31A. [(1) Where –

(a) the holder of an estate or interest in land in the State enters into a contract or agreement with another person for the sale of the estate or interest to that other person or to a nominee of that other person, and

(b) a payment which amounts to, or as the case may be payments which together amount to, 25 per cent or more of the consideration for the sale has been paid to, or at the direction of, the holder of the estate or interest at any time pursuant to the contract or agreement,

then the contract or agreement shall be chargeable with the same stamp duty, to be paid by the other person, as if it were a conveyance or transfer of the estate or interest in the land.

(2) Subsection (1) does not apply where, within 30 days of the date on which a payment which amounts to, or as the case may be payments which together amount to, 25 per cent or more of the consideration for the sale referred to in subsection (1) has been paid –

(a) an electronic return or paper return has been delivered to the Commissioners in relation to a conveyance or transfer made in conformity with the contract or agreement referred to in subsection (1), and

(b) the stamp duty chargeable on the conveyance or transfer has been paid to the Commissioners.

(3) Where stamp duty has been paid, in respect of a contract or agreement, in accordance with subsection (1), a conveyance or transfer made in conformity with the contract or agreement shall not be chargeable with any duty, and the Commissioners, where an electronic return or paper return has been delivered to them in relation to the conveyance or transfer, shall either denote the payment of the duty on the conveyance or transfer or transfer the duty to the conveyance or transfer on production to them of the contract or agreement, duly stamped.

(4) *The stamp duty paid on any contract or agreement, in accordance with subsection (1), shall be returned where it is shown to the satisfaction of the Commissioners that the contract or agreement has been rescinded or annulled.*

Appendix 2 – Key Transaction Documents and related correspondence

1. Third Put and Call Option Agreement dated 3 November 2006; (see extracts in Appendix 3)
2. Facility Agreement dated 28 February 2013; (see extracts in Appendix 4)
3. Mortgage, Charge and Assignment dated 28 February 2013; (see extracts in Appendix 5)
4. Notice of Assignment of Material Contracts Agreement, dated 28 February 2013; (see Appendix 6) and
5. Put Option Notice of Exercise, dated 24 January 2014, of the Option Agreement. (see Appendix 7)
6. 2014 Correspondence between Appellants and Investors (see Appendix 8)

Appendix 3

Extracts from Option Agreement

THIS THIRD PUT AND CALL OPTION AGREEMENT is made on the 3rd day of November 2006

BETWEEN:

(1) THE PERSONS WHOSE NAMES AND ADDRESSES ARE SPECIFIED IN THE FIRST SCHEDULE (hereinafter collectively called the "**Vendors**" and any one "**a Vendor"** which expression shall, where the context so admits or requires, include their/his personal representatives, executors, administrators, successors and permitted assigns and shall mean any one or more of them individually or collectively) of the first part; AND

(2) THE PERSONS WHOSE NAMES AND ADDRESSES ARE SPECIFIED IN THE SECOND SCHEDULE (hereinafter collectively called the "**Purchasers"** and any one "a Purchaser" which expression shall, where the context so admits or requires, include their/his personal representatives, executors, administrators, successors and assigns and shall mean any one or more of them individually or collectively) of the second part

WHEREAS:

A. Pursuant to the Contact for Sale the Vendors are entitled to the grant of a 999 year lease of the Hotel Property.

B. Since the execution of the Original Option Agreement Partner 5 has acquired an ownership interest in the freehold title to the Hotel Property subject to and with the benefit of the Contract for Sale and the parties hereto have agreed to enter into this Agreement in Place of the Original Option Agreement.

C. The Purchasers have agreed with the Vendors to grant to the Vendors the Put Option (as hereinafter defined) and the Vendors have agreed with the Purchasers to grant to the Purchasers the Call Option (as hereinafter defined) upon and subject to the terms and conditions hereinafter contained.

Exercise of the Put Option

The Purchasers hereby grant to the Vendors the right to require the Purchasers to purchase all of the Vendors' rights and title to the Hotel Property for the Purchase Price on the following conditions:- …

Exercise of the Call Option

The Vendors hereby grant to the Purchasers the right to purchase all of the Vendors' rights and title to the Hotel Property for the Purchase Price on the following conditions:- **...**

Appendix 4

Facilities Agreement

The facility agreement entered into by the Investors with The Bank A is dated 28th February 2013. The parties to this agreement are the Investors with The Bank A and the Promoters, being the Appellant, Partner 2, Partner 3, Partner 4 and Partner 5.

The following are extracts from the Facility Agreement, pertinent to this appeal

Paragraph 1

Within the interpretation section of the Facility document it says:

Interpretation

Commitment means €6,000,000 (six million euro);

"Deed of Mortgage means a Deed of Mortgage, Charge and Assignment to be executed by the Promoters in favour of the Lender."

The definition of **transaction documents** within the Facility agreement means:

> *"…collectively the Promotor Loan Guarantee, the Option Agreements...",.*

Recourse Assets means: -

a. *All assets undertaking or business of the Borrowers that are or are expressed to be mortgaged, charged or otherwise secured by the Security Documents;*
b. *All proceeds of any Disposal or any insurance proceeds in respect of the asset outlined in (a) above; and*
c. *All proceeds of realization or enforcement of the Security.*

Repayment Date means the earlier of:

(a) seven years and three months after payment was made by the Investors and the Hotel opened and

(b) the date on which the Borrowers received the full sale proceeds following the exercise

of any of the Option Agreements;

Transaction Documents *means, collectively, the Finance Documents, The Agreements for Lease, the Occupational Lease, the Promoter Loan Guarantee, the Option Agreements, the Promoters Guarantee and the Co-Ownership Agreement.*

Paragraph 2

The Facility

The Lender grants to the Borrowers, upon the terms and subject to the conditions hereof, a term loan facility in an aggregate amount of €6,000,000 (six million euro)

Paragraph 8

Repayment

Subject as herein provided, the Borrowers shall repay the Loan in full together with all interest thereon, and all other amounts due hereunder, on the Repayment Date…

Paragraph 10

Recourse

Notwithstanding any other provisions of any Transaction Document but save as provided for in this Clause 10.1 and in Clauses 10.2, 10.3 and 10.4, the Lender's recourse to each investor in respect of such Investor's obligations under the Transaction Documents shall be limited to amounts realised in connection with the enforcement, disposal or other action taken by the Lender in respect of the Recourse Assets, any sale of any of the Recourse Assets or any payments made by any third party to an Investor in respect of any contractual or other obligation owed to such Investor pursuant to the contracts which are comprised in the Recourse Assets…

Each Investor severally **undertakes** with the Lender: -

10.2.1 (to the extent necessary) to co-operate with the Lender in any enforcement or realisation of the Investor Security Documents when the Security has become enforceable in accordance with its terms;

10.2.2 not to contest the priority or validity of any of the Security and/or the Security Documents;

10.2.3 (to the extent necessary) to co-operate with and assist the Lender to remedy any and all defects in the Investor Security Documents and the registration thereof; and

10.2.4 not to amend, vary, release or waive any provision of any of the Transaction Documents without the prior written consent of the Lender, where such amendment, variation, release or waiver is reasonably likely to have, in the opinion of the Lender, an adverse effect on the Lender's position. ..

Security Documents

To secure the prompt payment and performance to the lender of the obligations or the borrowers under this agreement, the borrowers shall execute or shall procure that the following security documents are executed in favour of the Lender:

12.1. A Deed of Mortgage, Charge and Assignment over the borrowers rights, title and interest in and to...

12.1.3. the Option Agreements *"...*

18.1 Guarantee and Indemnity

Each Promoter irrevocably and unconditionally jointly and severally:

18.1.1 guarantees to the Lender punctual performance by each borrower of all that Borrower's obligations under the Finance Documents;

18.1.2 undertakes with the Lender that whenever a Borrower does not pay any amount when due under or in connection with any Finance Document, that Promoter shall immediately on demand pay that amount as if it was the principal obligor; and

18.1.3 indemnifies the Lender immediately on demand against any cost, loss or liability suffered by the Lender if any obligation guaranteed by it is or becomes unenforceable, invalid or illegal. The amount of the cost, loss or liability shall be equal to the amount which the Lender would otherwise have been entitled to recover….

General Covenants

21.1.6 Forward to the Lender a copy of any notice issued by the Borrowers pursuant to any of the Option Agreements or to the extent that they relate to forfeiture, termination or exercise of rights, any notice issued pursuant to any other Transaction Documents to which they are a party; …

Negative Pledge

21.4 Neither the Borrowers nor the Promoters shall without the consent of the Lender:…

Sell, lease (save for Occupational Lease), transfer or entry into any Disposal by one or more transactions or series of transactions (whether related or not) the whole or any part of the Recourse Assets other than pursuant to the terms of the Transaction Documents save for a transfer or sale to an existing Investor or to a new Investor under and in accordance with the terms of the Co-Ownership Agreement, where such transfer or sale has been approved in writing in advance by the Lender, where the Lender has, in the case of a new Investor, approved the identity of the new Investor and where, in the case of an existing Investor, the Lender has approved of the transfer/sale to that Investor and, where the existing or new Investor, as the case may be, has entered into such documents as the Lender and any other party to the Transaction Documents may request, so that it accedes to such Transaction Documents in the place of the assigning or selling Investor. ..

The Borrowers and the Promoters hereby agree that they shall exercise their rights under the Option Agreements at the earliest opportunity and that the proceeds of such will be used in accordance with Clause 8.1 hereto; …

Subject to Clause 22.2.3, Clause 22.4 and Clause 22.5 if an Event of Default shall have occurred, then, at any time thereafter the Lender may:

22.2.3 exercise the rights and remedies of a mortgagee or secured party under the Security Documents <u>provided that:</u>

(1) the Lender shall, unless each of the Promoters are bankrupt, prior to enforcing its security under the Security Documents to which the Investors are a party, first request the Borrowers to exercise their rights under (i) the Option Agreements in accordance with the terms thereof or (ii) the Promoters Loan Guarantee and to apply the proceeds of payments thereunder in or towards repayment of the Loan and all other amounts then due hereunder;

Appendix 5

Extracts from Mortgage, Charge and Assignment (Investors) Agreement (2013)

Enforcement Event means *the occurrence of an Event of Default and the exercise by the Mortgagee of its rights under Clause 22.2 of the Facility Agreement following its compliance with Clause 22.2.3(1) of the Facility Agreement;*

Material Contracts means *the documents outlined in Schedule 2 Part 2 hereto;*

Secured Assets mean *all the assets of the Mortgagors which are the subject of the Security The Mortgagee's recourse to the Mortgagors shall be limited on the terms and conditions set out in Clause 10 of the Facility Agreement.*

Charging Provisions
Fixed Charges
The Mortgagors, as beneficial owners to the intent that the charges contained in this Deed will be a continuing security for the payment and discharge of the Secured Obligations in favour of the Mortgagee, hereby:

3.1.1 Charges as the first fixed charge unto the Mortgagee, and in the case of registered land as registered owner or as the person entitled to be registered as owner, the Mortgaged Property with the payment, performance and discharge of the Secured Obligations and HEREBY ASSENTS to the registration of the charge as a burden on the said property;
3.1.2 Charges as a first fixed charge, all present and future Ancillary Rights and Compensation Rights of the Mortgagors;

3.1.3 Charges as a first fixed charge, the Receivables and the Rental Account;

3.1.4 Charges as a first fixed charge, all of their present and future rights, title and interest in and to any Lease;

Security assignments
The Mortgagors, as beneficial owners and as security for the payment and discharge of the Secured Obligations in favour of the Mortgagee, hereby assign and agrees to assign absolutely (in each case insofar as the same are capable of assignment):

3.2.1. each Lease;
3.2.2. the Receivables;
3.2.3. the benefit of all Ancillary Rights;
3.2.4. the Material Contracts;

subject in each case to the right of the Mortgagors to redeem this Deed as contained in clause 17 (Release of security).

Nature of security
Each Mortgagor represents and warrants to the Mortgagee in relation to himself/herself only that he is and will at all times during the Security Period, be a lawful and beneficial owner of the Secured Assets.

Real Property
to the extent that (with the prior consent of the Mortgagee, he/she/it, together with the other Mortgagors, sells or agrees to sell any part of the Secured Assets) the proceeds of any such sale net of costs and expenses reasonably incurred in connection with such sale and taxes payable by him on such sale shall be subject to the fixed charge created pursuant to this Deed.

6.1.1. The Mortgagors will not do or agree to do any of the following without the prior written consent of the Mortgagee:
(1) create or permit to subsist any Security Interest on any of the Secured Assets (other than a lien arising in the ordinary and usual course of business by operation of law provided any such lien is discharged within 60 days after it arises unless being contested in good faith and by appropriate proceedings); or
(2) sell, transfer, lease, licence. lend or otherwise Dispose of all or any part of their interest in the Secured Assets save as specifically permitted by the Transaction Documents.

7.1.1. The Security shall become enforceable immediately upon the occurrence of an Enforcement Event and the Secured Obligations will be deemed to have become due and payable.

Assignment
The Mortgagors may not assign or transfer all or any of their rights, benefits or obligations under this Deed.

Release of security
Upon the expiry of the Security Period, the Mortgagee shall, at the request and cost of the Mortgagors, take whatever action is necessary to release or re-assign and discharge the Secured Assets from the Security.

The Option Agreements

Notwithstanding such assignment, the Mortgagors' remain liable to perform and observe all obligations on its part contained in the Material Contract and you shall not be in any way responsible for performing or observing those obligations or for any failure on the part of the Mortgagor to do so.

Appendix 6

NOTICE OF ASSIGNMENT OF MATERIAL CONTRACTS

Date: 28 February 2013

To: The Parties Listed in Schedule 1 hereto (the Promoters)

Re: The Agreements for Lease:

Particulars and Conditions of Sale of the Property between the Promoters and ourselves being the parties listed in Schedule 2 hereto (Investors) dated 5 December 2005; and

Particulars and Conditions of the Property between Investors and the Promoters dated 3 November 2006 as amended by a Supplemental Deed to an Agreement for Lease of the Property between the Investors and the Promoters dated on or about the date hereof;

The Option Agreements:

First Put and Call Option Agreement between the Investors and the Promoters dated 3 November 2006;

Second Put and Call Option Agreement between the Investors and the Promoters dated 3 November 2006; and

Third Put and Call Option Agreement between the Investors and the Promoters dated 3 November 2006;

(together the "Material Contracts")

Dear Sirs

We hereby give you notice that we have assigned to The Bank A . (the Mortgagee) pursuant to a mortgage, charge and assignment entered into by us in favour of the Mortgagee on 2013 (the Mortgage, Charge and Assignment (lnvestors)) over all our right title and interest in and to the Material Contracts including all monies which may be payable in respect of such Material Contracts.

With effect from your receipt of this notice, we hereby irrevocably instruct and authorise you:

1. Following an Enforcement Event, to pay all monies due to us under or arising from the Material Contract to the Mortgagee or to its order as it may specify in writing from time to time;

2. to disclose to the Mortgagee (without any reference to or further authority from us and without any enquiry by you as to the justification for such disclosure), such information relating to the Material Contract as the Mortgages may from time to time request;

3. to comply with any written notice or instructions in any way relating to, or purporting to relate to, the Material Contracts, which you receive from the Mortgagee following an Enforcement Event without any reference to or further authority from us and without any enquiry by you as to the justification for or validity of such notice or instructions; and

4. to send copies of all notices and other information given or received under the Material Contract to the Mortgagee.

We are not permitted to agree any amendment or supplement to, or waive any obligation under, the Material Contract without the prior written consent of the Mortgages. These instructions may only be revoked or amended with the prior written consent of the Mortgagee.

Please acknowledge receipt of this notice by signing the acknowledgement on the enclosed copy Ietter and return the same to the Mortgages at REDACTED marked for the attention of REDACTED.

This letter is governed by, and shall be construed in accordance with, Irish law.

Yours faithfully,

Appendix 7

Put Option Notice of Exercise of Option
From Investment Intermediary to the Appellant

To: the Appellant.

On behalf of the persons specified in the Second Schedule
(as "Purchasers")

From: Investment Intermediary
(Formerly Investment Intermediary)
As Investors' Agent
On behalf of persons specified in First Schedule
(as "Vendors")

24th January 2014
We refer to Third Put and Call Option Agreement dated 3rd November 2006 and made between The Investors (file "Vendors" as specified in that First Schedule hereto) (1) and Partner 3, the Appellant, Partner 2, Partner 4 and Partner 5 (2) (the "Purchasers" as specified in the Second Schedule hereto) hereinafter called the "Option Agreement".

Words and expressions defined in the Option Agreement shall bear the same respective meanings in this Notice unless the context otherwise indicates or requires.

In accordance with the provisions of 2.2 of the Option Agreement, and as Investors' Agent for and on behalf of the Vendors, we hereby serve notice on you on behalf of the Purchasers, that the Vendors require the Purchasers to purchase the Vendors' rights and title to the Hotel Property for the purchase price provided at clause 2.4 of the Option Agreement.

Completion of the sale shall take place on Friday 7th February 2014 in accordance with Clause 2.6 of the Option Agreement.

Yours faithfully

Investment Intermediary
as Investors' Agent for the Vendors

Appendix 8

2014 Correspondence between Appellants and Investor's Agents

From REDACTED (Solicitor B) to the Appellant (Appellant)

31 January 2014

the Appellant
…

Re: PROPERTY

Dear the Appellant,
I refer to the recent exercise of the Third Put and Call Option Agreement in connection with the above property and enclose for your attention by way of service on you on behalf of the Purchasers, in accordance with that Agreement, the Statement of Purchase Price.

Yours sincerely,

REDACTED

From Accountant B to Mr Intermediary A

31 January 2014

Mr Intermediary A
Investment Intermediary
…

Re: PROPERTY investor group

Dear Intermediary A,

Further to recent discussions, we understand that the Third Put and Call Option Agreement between the Investors ("the Vendors") and Partner 3, the Appellant, Partner 2, Partner 4 and Partner 5 ("the Purchasers") has been exercised and in accordance with clause 2.4(a)(vii), we have set out below the purchase price. This calculation is based on information provided by

you and Solicitor B and the amounts have not been independently verified by us. If our understanding is incorrect, please let us know as soon as possible as this may impact the calculation…

As per clause 2.4(a) the Purchaser shall pay the aggregate of the following:
Option Description Amount agreement reference 2.4(a)(i)

The principal amount owing by the 6,053,563 Vendors pursuant to the Facilities Agreement and any accrued interest, breakage and other costs payable in connection With same along with any amounts due under hedging arrangement 2.4(a)(ii) …

The total amount owing by the Vendors 5,500,000…

A sum equal to all costs, charges and expenses which the Vendors have or will
Suffer as a consequence of exercising the Put or Call option

Professional fees - €44,280…
Yours sincerely,

Accountant B

Email from REDACTED (acting for the Appellants / promotors) to REDCATED (acting for the Investors)
28 January 2014

Pursuant to clause 3.2 of the Mortgage, Charge and Assignment dated 28th February 2013 between the Investors of the One Part and The Bank A . of the Other Part, the Investors assigned absolutely all of the Investors' rights, titles and interests to inter alia the Third Put and Call Option, subject the Investors' right to redeem.

By Notice of Assignment of Material Contracts also dated 28th February 2013, the Investors gave notice to the Promoters of the said assignment, thereby rendering the said assignment an absolute assignment under section 28(6) the Supreme Court of Judicature Act (Ireland), 1877, which is effective to pass and transfer the legal rights of the Investors in the Third Put and Call Option to The Bank A, together with all legal and other remedies for same and power to give a discharge for same, without the concurrence of the Investors.

Accordingly, it follows that the purported exercise by the Investors of the put option in the Third Put and Call Option by Notice to the Appellant is of no effect; the Investors cannot exercise a right that they do not have…

Email from REDACTED (acting for the Appellants / promotors) to REDACTED (acting for the Investors)

30 January 2014

Your reliance on the importance of the characterization of the assignment in clause 3.2 as an outright transfer or the creation of a security interest is misconceived. I completely accept that the assignment in clause 3.2 creates a security interest. To answer the issue stated above, the specific question is whether an assignment taken by way of security, with a proviso for redemption or re-assignment, can comply with section 28(6), because if it does, it transferred the legal right to exercise the put option from the investors to The Bank A.

The assignment in clause 3.2 has all the necessary ingredients to constitute an assignment within the meaning of section 28(6) and the fact that the assignment was given as security with a proviso for redemption does not take away from this fact.