THE HIGH COURT

COMMERCIAL

[2013 No. 4621P]

BETWEEN:

DUBLIN WATERWORLD LIMITED

PLAINTIFF

-AND-

NATIONAL SPORTS CAMPUS DEVELOPMENT AUTHORITY

DEFENDANT

JUDGMENT of Mr. Justice Twomey delivered on 10th day of May, 2017

Introduction

1. The hearing in this case (the 'secondary litigation'), which lasted five weeks, involved a claim by the plaintiff, Dublin Waterworld Limited ('DWW'), for damages against the defendant, the National Sports Campus Development Authority, for malicious abuse of court process arising from its decision in 2005 to issue and then maintain proceedings (the 'primary litigation') against DWW for VAT of €10,254,600 in respect of a lease by DWW of the National Aquatic Centre (the 'NAC') in Abbottstown in County Dublin. It is alleged by DWW that the primary litigation amounted to the tort of maliciously abusing the process of the Court, since it is claimed that there was no reasonable or probable cause for that litigation and that it was pursued for an improper purpose. Mr. John Moriarty ('Mr. Moriarty') is the managing director of DWW.

2. The primary litigation was issued by Campus and Stadium Ireland Development Limited ('CSID'). At that time it was a State owned company since it was 50% owned by the Minister for Sports, Arts and Tourism, 25% owned by the Minister for Finance and 25% owned by the Taoiseach. These proceedings are however against the National Sports Campus Development Authority, the legal successor and transferee of all liabilities of CSID pursuant to the National Sports Campus Development Authority Act, 2006 and references in this judgment to CSID should be taken to include the National Sports Campus Authority, unless otherwise indicated.

3. The primary litigation, about which DWW complains, was commenced by CSID in 2005 before the Commercial Court, but was referred by that Court to an Arbitrator, who decided that the lease of the NAC was vatable and VAT of €10,254,600 was due by DWW to CSID. The Arbitrator's decision that the Lease was vatable was challenged by DWW in the High Court in 2005, which upheld the Arbitrator's award. This High Court decision was then appealed to the Supreme Court and in 2010 the Supreme Court reversed the High Court decision and in doing so set aside the Arbitrator's finding that VAT was payable on the lease. DWW claims that it suffered very significant reputational damage as a result of being pursued for over €10 million in VAT on a Lease that was not vatable and also that it suffered very significant financial loss as a result of the issue and maintenance of the primary litigation in pursuit of this VAT over a five year period, including the loss of valuable contracts. This trial is however concerned only with liability issues and does not deal with the extent of the damage suffered by DWW.

4. A key issue in this trial, and one that does not appear to have been considered by the Irish courts to date, is whether a plaintiff, who wins his litigation initially before a lower court or tribunal before losing on appeal, can nonetheless be found by the courts to be someone who should never have litigated in the first place, such that he is guilty of malicious abuse of court process and therefore liable for the damage caused to the defendant, over and above the plaintiff's liability for the legal costs incurred by the defendant.

5. To consider this issue in this case, it will be necessary to set out in some detail the alleged wrongful conduct, namely the pursuit of the primary litigation. However, before considering the primary litigation, it is necessary to refer to the technical legal issues which determined whether VAT was chargeable on the lease in this case, since this is necessary to understand not only the primary litigation but also the current dispute between the parties as to whether there was any basis for that primary litigation, which alleged that VAT was due on that lease.

Legal provisions regarding VAT on leases

6. The Value-Added Tax Act, 1972 (the 'VAT Act') provides that the granting of a lease is a taxable supply of immoveable goods for VAT purposes if the lease is a long lease, i.e. for a period of 10 years or more. In this case, the lease of the NAC was signed by DWW as lessee and by CSID as lessor on the 30th April, 2003, for a period of 30 years ('the Lease'). Thus, the Lease was one which was capable of being subject to VAT.

7. Section 10(9) of the VAT Act provides that the value of the leasehold interest for the purposes of calculating the VAT thereon, is the '*open market price of such interest'*. For this reason, section 10(10) of the VAT Act is also relevant, since it states:-

> "the open market price –
>
> > (a) in relation to the value of an interest in immovable goods which is not a freehold interest, means the price, excluding tax, which the right to receive an unencumbered rent in respect of those goods for the period of the interest would fetch on the open market at the time that the interest is disposed of."

8. On this basis, the open market price of the lease was the price or value attributable to the right to receive the unencumbered rent and s. 10 (1) of the VAT Act defined the "*unencumbered rent*" as the "*rent at which an interest would be let, if that interest was let on the open market free of restrictive conditions*."

9. Section 32(1)(t) of the VAT Act delegated authority to the Revenue Commissioners to make regulations in relation to the valuation of leases for the purposes of the VAT Act. Pursuant to this section, the Revenue Commissioners drafted the Value-Added Tax Regulations, 1979, which were duly passed into law. Regulation 19 of those Regulations set out further provisions regarding the valuation of leases. Insofar as relevant, Regulation 19 states:-

"(1) Where –

(a) it is necessary to value an interest in immovable goods for the purposes of section 10 (9) of the Act […]

the value of such rent to be included in the consideration for the purposes of ascertaining the open market price of the interest disposed of shall, in the absence of other evidence of the amount of that price, be –

(i) three quarters of the annual amount of the rent multiplied by the number of complete years for which the rent has been created, or

(ii) the annual amount of the rent multiplied by the fraction of which the numerator is 100 and the denominator is the rate of interest (before deduction of income tax, if any) on the security of the Government which was issued last before the date of the creation of the rent for subscription in the State, and which is redeemable not less than five years after the date of issue (allowance having been made in calculating the interest for any profit or loss which will occur and the redemption of the security),

whichever is the lower."

These two methods for the valuation of leases set out at (i) at (ii) above are known as the 'Formula Method' and the 'Multiplier Method', respectively.

10. Regulation 19 of the 1979 Regulations was amended by the Value-Added Tax (Amendment)(Property Transactions) Regulations, 2002, and the only change to the 1979 Regulations, which is of relevance to these proceedings, was the deletion of the words "*whichever is the lower*" and the insertion of the following wording in its place:-

"However, where the rent payable in respect of the interest so created is less than the unencumbered rent in respect of that interest, the value of the rent to be included in the consideration for the purpose of ascertaining the open market price of the interest disposed of shall be calculated using the unencumbered rent."

It is this Regulation 19, as so amended, which is particularly relevant to the issue of whether the Lease was vatable in this case, in conjunction with s. 99 of the Finance Act, 2002, to which reference will now be made.

Anti-avoidance amendment of legislation regarding VAT on leases

11. Section 99 of the Finance Act, 2002 amended the VAT Act and inserted a new provision, section 4(3A), into that Act. This was enacted as an anti-avoidance provision to ensure that leases were not subject to VAT where the value of the interest in the lease did not equal or exceed the cost of acquiring and developing the property being leased. For a long lease to be taxable after the date of enactment of s. 99 of the Finance Act, 2002, which was the 25th March, 2002, section 4(3A) required the value of the interest in the lease to be equal to, or greater than, the cost of acquiring or developing the property being leased. This test for determining whether leases were vatable is known as the Economic Value Test ('the EVT').

12. The general aim of this provision appears to have been to ensure that if a lessor developed a property then that lessor could not enter into an artificial lease solely for the purpose of his reclaiming VAT on the development costs of the property being leased. For example, if a lessor developed a property at a cost of say €10 million and wanted to reclaim the VAT on his development costs, then that lessor could not enter into an artificial lease which was entered solely for the purpose of his reclaiming VAT on the development costs by entering into a lease with a related lessee at an artificially low rent of say only €100 per annum. Prior to the enactment of the anti-avoidance legislation, this approach would have enabled the lessor to reclaim the VAT from the Revenue on the €10 million of costs incurred in developing the property. This would have meant that the Revenue would get little or no VAT from the lessee since the rent was only €100, yet the Revenue would have to repay hundreds of thousands of Euro in VAT to the lessor on the development costs incurred of €10 million. As noted by two experienced VAT advisers, Dermot O'Brien and Tom Corbett in a conference paper dated 2nd May, 2002, entitled *Section 99 of Finance Act 2002* and subsequently published in the Irish Tax Review:-

"The introduction of Section 4 (3A) into the VAT Act was designed as an anti-avoidance measure. Previously, while VAT was charged on the capitalised value of a lease, it was possible in certain circumstances that the value of the lease could be significantly less than the actual cost of development of a property. Therefore, a person who was not entitled to deduct VAT on expenditure could, by virtue of a lease and leaseback arrangement, incur VAT on a lower leasehold value than on the higher cost of construction, thereby effecting a significant VAT saving. These provisions are designed to counter this."

The decision by CSID that the Lease was vatable

13. It was against this legislative background that CSID considered whether the Lease, which had been executed by DWW on the 30th April, 2003, was a vatable lease.

14. Before dealing with this issue, it is relevant to refer to the Executive Services Team ('EST') of CSID. The EST was a group of individuals who provided executive services to CSID and in particular were involved in making decisions regarding the establishment of the NAC including, inter alia, whether the Lease was vatable. It was made up of a group individuals contracted to provide these executive services from a company called Magahay & Company and that group consisted of Ms. Laura Magahy, Mr. David Conway, Mr. Colm Dunne and Ms. Della O'Donoghue. These four people were the core group dealing with the day to day operations of the NAC and were on-site either full-time or part-time. The EST also provided regular briefings to the Board of Directors of CSID in relation to those day to day operations. In some documentation produced to the Court, PricewaterhouseCoopers ('PwC') is described as being a part of, or a member of, the EST. However, PwC did not provide executive services in the sense of the services which would typically be provided by a company executive. Rather, it is clear to this Court that PwC provided professional advice to the EST and the Board of Directors of CSID in relation to, *inter alia*, tax and in particular to VAT on the Lease.

15. It is relevant to note that there is no dispute between the parties regarding the development costs of the NAC, which were approximately €62 million. Accordingly, it is common case that for the Lease of the NAC to have been subject to VAT the value of the interest in the Lease had to be equal to, or exceed, €62 million, so as to pass the EVT.

16. A key element of the dispute between the parties from late 2002, even before the Lease was executed in April of 2003, was the question of the value of the Lease and whether that value equalled or exceeded €62 million such as to render the Lease vatable. CSID's view was that the value of the Lease exceeded the development costs of €62 million. It maintained that the Lease was valued at €75,960,000 and so passed the EVT and so was subject to VAT. On the other hand, DWW was of the view that the value of the Lease was considerably less than €62 million and therefore it did not pass the EVT and so was not vatable.

17. A VAT invoice was issued by CSID on the 15th May, 2003, which charged DWW the sum of €10,254,600 in VAT, being 13.5% (the applicable rate of VAT) of the value of the Lease, which was stated in the invoice to have a value of €75,960,000. To reach this conclusion, CSID relied on Regulation 19, as amended.

18. Regulation 19, which is set out above, provided that in the absence of other evidence of the open market price of the lease, a lease could be valued using the Formula Method or the Multiplier Method. CSID had obtained a valuation of the Lease from Mr. Liam Cahill of the Valuation Office dated 25th October, 2002 (the 'Valuation Office Report'). This report concluded that:-

> "In my opinion the unencumbered rent is €3.376 million and the open market price for VAT is €35 million."

19. In reliance on the unencumbered rent figure of €3.376 million, rather than the open market price of the Lease, CSID calculated the value of the Lease by using the Formula Method (i.e. three quarters of the annual rent multiplied by the number of years of the Lease, being 30 years) leading to a figure of €75,960,000, which exceeded the €62 million figure. On the 15th May, 2003, a draft of the VAT invoice for the Lease which explicitly relied on the Formula Method was sent by Mr. Dunne of CSID to Mr. John Fay of PwC for his approval (along with an invoice in relation to a licence agreement, which is not relevant to these proceedings). The wording of the invoice for the Lease was amended and approved by Mr. Fay of PwC since he stated, inter alia, in his email of 15th May, 2003, to Mr. Dunne, with a copy to Ms. Magahy and Mr. Conway of CSID and Mr. O'Rourke and Mr. O'Reilly of PwC, that:-

> "I have looked at both draft invoices and the descriptions contained on these are fine. For completeness the invoice to DWW re the capitalised value of the lease, you might make reference to the date of the lease (30 April 2003) and the fact that the capitalised value has been "calculated by reference to the unencumbered rent as determined by the Valuation office and in accordance with Regulation 19 VAT Regulations, 1979".

20. That invoice was then issued by CSID on the 15th May, 2003 to DWW and it stated:-

> "To Capitalised Value of Lease dated 30 April 2003 calculated by reference to unencumbered rent as determined by the Valuation Office and in accordance with Regulation 19, Vat Regulations 1979.

€3,376,000 X 75% X 30 years €75,960,000

Value Added Tax at 13.50% €10,254,600

Now Due for Payment €10,254,600".

The kernel of the dispute in the primary litigation between DWW and CSID

21. Two documents, namely the Valuation Office Report and the VAT invoice issued by CSID, bring into focus the kernel of the dispute between CSID and DWW. The open market price of the Lease was stated by the Valuation Office to be €35 million, which was less than the €62 million which it cost to acquire and develop the property. If this open market price of the Lease had been applied, it would have led to the Lease not passing the EVT and not being vatable. On the other hand, the unencumbered rent was stated by the Valuation Office to be €3,376,000. If one applied the Formula Method to this figure it would lead to the Lease passing the EVT and being vatable, as was done in the invoice.

22. DWW's interpretation of Regulation 19 was that CSID was obliged to use the open market price of the Lease and it was not open to CSID to use the unencumbered rent to pass the EVT. On the other hand, CSID interpreted Regulation 19 as giving it the choice of three methods to value the Lease, namely it could choose the open market price of €35 million or it could subject the unencumbered rent to the Formula Method or the Multiplier Method. The essence of the dispute between the parties in this the secondary litigation is that if it was reasonable for CSID to believe that it had in fact a choice of three methods to value the Lease, or more accurately if it had reasonable or probable cause for instituting the proceedings against DWW for VAT on the Lease based on this belief, then CSID could not be found to have maliciously abused the process of the court. For this reason, a considerable focus of these proceedings is on CISID's professional advice and CSID's belief that it had a choice of three methods of valuing the Lease.

The conflicting interpretations of Regulation 19

23. A key legal issue in this case is that Regulation 19 *prima facie* provides that the Formula Method (or Multiplier Method) is only available where there is an absence of other evidence of the open market price. This is because that Regulation expressly states:-

> "…the value of such rent to be included in the consideration for the purposes of ascertaining the open market price of the interest disposed of shall, **in the absence of other evidence** [emphasis added] of the amount of that price, be [the Formula Method or the Multiplier Method]."

24. The Valuation Office Report contained the open market price of the Lease as well as a value of the unencumbered rent. Nonetheless, the VAT invoice issued by CSID is based on the unencumbered rent being subject to the Formula Method to reach its valuation of the Lease. DWW claims, *inter alia*, that in light of the express language of Regulation 19 it was in fact clear to CSID that the Lease was not subject to VAT and therefore it should have issued neither the VAT invoice nor the proceedings to recover that VAT.

25. On the 30th April, 2010, the Supreme Court held in *Campus and Stadium Ireland v. Dublin Waterworld* [2010] IESC 25, that DWW was correct in its view that Regulation 19 was to be interpreted as meaning that CSID did not have the option of applying the Formula Method to the unencumbered rent to pass the EVT, since the Valuation Office Report contained "other evidence" of the open market price of the Lease and so CSID was precluded from using any other method for the valuation of the Lease. On this basis, CSID lost in the Supreme Court its claim that the Lease was subject to VAT and its claim that it was entitled to pursue DWW for that VAT. This was how the primary litigation concluded.

WHY CSID SUED DWW FOR VAT ON THE LEASE

Reasons given for CSID's interpretation of Regulation 19

26. With the benefit of knowing the correct interpretation of Regulation 19, as held by the Supreme Court on the 30th April, 2010, it may seem strange that up to the 30th April, 2010, CSID interpreted Regulation 19 as entitling it to have a choice of three methods of valuation of the Lease, even where it had an open market price of the Lease, which in the words of Regulation was "other evidence".

27. It is important however to remember that this case (as to whether CSID maliciously abused the process of the court) must be determined from the perspective of CSID prior to 30th April, 2010, and in particular when the proceedings were instituted by CSID in April of 2005, at which time there was no definitive statement by the courts as to the interpretation of Regulation 19. It is equally important that this Court avoids the risk of retrospectively attributing the wisdom after the event (of the Supreme Court judgment) to CSID as to the correct way to interpret Regulation 19, which wisdom was only definitively available for the first time on the 30th April, 2010.

28. For this reason, and also to have an understanding of why this case is now before this Court, it is relevant at this juncture to first refer in some detail to some of the evidence provided to the Court on behalf of CSID for its view that it had a choice of three methods of valuation, and secondly to some of the evidence relied upon by DWW for its claim that CSID did not have reasonable or probable cause to interpret Regulation 19 in that manner.

Reason 1 - Revenue Guidance that there was a choice of three valuation methods

29. The first reason provided for CSID's view (and that of its professional advisers, primarily PwC) that despite the wording of Regulation 19, it had the choice of three methods of valuation, is a document issued by the Revenue's VAT Policy and Legislation Branch on the 6th June, 2002. This document, entitled *'Notes for Guidance of Inspectors'*, states in relation to the EVT in s. 99 of the Finance Act, 2002, that:-

> "This is an anti-avoidance measure designed to counteract the use of artificial devices to reduce the amount of VAT payable on the development of property by or on behalf of non-taxable bodies. The provision determines whether a disposal of a leasehold interest is taxable or exempt, depending on the value.

The provision establishes what can best be described as the 'economic value' rule. This is a rule which sits alongside the general valuation rules contained in Regulation 19 of the 1979 VAT Regulations. A person disposing of a leasehold interest in a property should proceed as before to value the property in accordance with section 10(9) of the VAT Act 1972 and Regulation 19 of the 1979 Regulations and should test this valuation using the 'economic value' test. The new rule impacts only where the valuation is below the 'economic value'.

Normally, commercial arm's-length transactions between taxable persons will pass this test. The focus therefore should be on transactions where the lessee, or the ultimate beneficiary of a series of transactions, is a non-taxable entity or only has partial deductibility.

[…]

The Value-Added Tax (Amendment)(Property Transactions) Regulations 2002 provide that a taxable person **may now use any of the three methods of valuation** [emphasis added] provided for even where an increase in the rent is due to take effect within five years of the date of creation of the interest."

30. The three methods of valuation can be termed (i) the open market price of the lease, (ii) the unencumbered rent subject to the Formula Method and (iii) the unencumbered rent subject to the Multiplier Method. The reference to a rent increase not taking effect within five years is not relevant to the case before this Court. What is relevant is that the 1979 Regulations, as amended (containing the three methods of valuation, but also the term "in the absence of other evidence"), had been drafted by the Revenue Commissioners, and this Guidance Note meant that the drafter of the Regulations was of the view that it should be interpreted as permitting the use of any of the three methods of valuation.

31. This *Note for Guidance of Inspectors* from June 2002 was in similar terms to a previous Revenue Booklet entitled VAT and Property Transactions dated October 2001 which also interpreted Regulation 19 of the 1979 Regulations, prior to its amendment in 2002. It is relevant however to note that, in the context of whether a lessor had three options for valuation or was bound by the open market value of the lease, the changes to the original 1979 Regulations by the 2002 Regulations, are not significant, since, inter alia, the expression *'in the absence of other evidence'* was in the Regulations before and after 2002. Accordingly, the Revenue Booklet although published before the 2002 amendment to the 1979 Regulations is nonetheless relevant to the issue at stake in this case.

32. Unlike the *Note for Guidance of Inspectors*, the Revenue Booklet on *VAT and Property Transactions*' stated at page III that:-

> "Nothing in this guide should be taken as overriding the legal provisions or requirements of the Value-Added Tax Act, 1972 (as amended)."

In the body of that Revenue Booklet it states:-

> "The capital value of a rent created in connection with the disposal of an interest in property in a commercial arms-length transaction is the price, excluding tax, which the right to receive the unencumbered rent would fetch in the open market. **The price may be ascertained in any one of the following ways and the taxpayer may adopt whichever valuation s/he wishes** [emphasis added]:

(a) On a valuation made by a competent valuer (i.e. open market value),

(b) By multiplying three-quarters of the annual rent by the number of complete years in the term of the lease. On this method the value of an annual rent of €100,000 under a lease for 12 years would be ¾ x €100,000 x 12 = €900,000 or

(c) By regarding the capital value as the product of the annual rent and a multiplier based on the most recent national loan. On this basis, if the redemption yield were 4.26%, an annual rent of €100,000 would be valued at €2,347,000 (that is €100,000 x 23.47 – see table at Appendix I)."

33. CSID relied on this evidence of the Revenue's interpretation of Regulation 19, that a lessor could choose any one of the three methods of valuation, as support for the proposition that it was reasonable for PwC and consequently CSID to believe that it had a choice of three valuation methods and thus that CSID had reasonable or probable cause for the primary litigation.

Reason 2 - VAT community of view that there was a choice of three valuation methods

34. The second reason given for CSID's and its professional advisers' view that it had a choice of three methods of valuation was the claim that this was the view of the community of VAT advisers in Ireland at the time when the primary litigation was instituted and right up to the Supreme Court case in 2010, notwithstanding the express terms of Regulation 19. In this regard, evidence was provided to the Court that experienced tax and VAT practitioners, such as Mr. Fergus Gannon, Mr. Jim Somers, Mr. Dermot O'Brien and Mr. Tom Corbett were of the view that a lessor had a choice of three valuation methods.

Mr. Fergus Gannon

35. Mr. Gannon stated in an article in the Irish Tax Review (May, 1995) in relation to the original 1979 Regulations, which as noted earlier contained similar language to the 1979 Regulations which were amended in 2002, that:-

"There are three ways of valuing the lease for VAT purposes:

1. Have it professionally valued

2. Multiply the annual rent by a multiplier (currently 11.68)

3. Multiply the rent by ¾ the number of years in the lease. […]

The landlord has the right to choose any of the three [emphasis added] on condition that there is no provision in the lease for a rent increase for five years."

36. Several years later in the eighth edition of a leading textbook on the subject, entitled *VAT on Property*, (June 2006, Irish Taxation Institute), Mr. Gannon states at Part C, paragraph 3.1:-

> "There is a choice of three ways of valuing a long lease for VAT purposes. The three ways of valuing a long lease for VAT purposes are:
>
> 1. Valuation by a competent valuer or
>
> 2. The formula: ¾ x annual rent (R) x no. of years in the lease (N) or
>
> 3. The multiplier
>
> For many years the choice of picking whichever one you wished was only available where there was no provision in the lease for a rent increase, within the first 5 years.
>
> From 25th March 2002, that is no longer so. It doesn't matter from then on, when the first rent increase is. **The person granting the lease can pick whichever of the three methods of valuation s/he wishes**. [emphasis added] (S.I. number 219 of 2002).
>
> On a different aspect of the choice of three methods of valuation, some VAT specialists are of the view that strictly in law, if you get a valuation of a lease by a competent valuer, **you have to value the lease using the valuer's value, and by virtue of the fact that you have a valuation from a valuer, you cannot use the multiplier or the formula** [emphasis added].
>
> **Whatever about the strict legal position, in practice this is not so.** [emphasis added] The Revenue booklet "VAT on Property Transactions" Chapter 2.2 states "the taxpayer may adopt whichever valuation s/he wishes". That means that in practice the person granting the lease can pick whichever valuation he wishes."

Thus, in this leading textbook, Mr. Gannon repeats in 2006 what he had stated previously, namely that the lessor has a choice of the three methods of valuation.

Mr. Jim Somers

37. Mr. Somers published an article in May 1998 in the *Irish Tax Review* in which he stated:-

> "**The value of a long lease is calculated by one of three methods (taxpayer can choose the method** [emphasis added] provided there is no provision for a rent increase in the first five years);
>
> – valuation by a competent valuer
>
> – ¾ of the total rent payable over the term of the lease or
>
> – multiplying the annual rent by multiplier (currently 15.97%)".

Mr. Dermot O'Brien & Mr. Tom Corbett

38. In a joint seminar paper dated 2nd May, 2002, by Mr. Dermot O'Brien, and Mr. Tom Corbett (coincidentally some years later in 2005, Mr. O'Brien was the Arbitrator appointed by the parties in this case and Mr. Corbett was counsel for DWW in that arbitration), it was noted that with regard to the original 1979 Regulations, that:-

> "Regulation 19 of the VAT Regulations 1979 provides that in the absence of a valuer's valuation one should use the lower value obtained by the formula and multiplier methods. In practice, Revenue accepted that one could use any of the three methods. This practice changed with the publication of a new Revenue VAT and Property Guidelines in October 2001.

> Revenue stated that from thereon the State's legislative position must pertain. However, this had an unforeseen impact on the Finance Act 2002 changes since a rigid imposition of the lower valuation would often mean that the Economic Value test would fail (see later). A new regulation has been **passed whereby it is now enshrined in law that former Revenue practice using any of the three methods is now the correct application**. [emphasis added]
>
> […]
>
> The valuation of a lease is likely to become contentious between a lessor and lessee because depending on the valuation and its impact on the Economic Value Test a supply may be taxable or exempt. A lease which is taxable using one method of valuation may be exempt under another method. **Since new regulations allow a landlord to use any method of the three available**, it is easy to see how difficulties could arise between a landlord and a VAT exempt tenant." [emphasis added]

39. Thus, while the Supreme Court in 2010 made clear that these views were incorrect, it is nonetheless equally clear that prior to the institution of the primary litigation in April 2005, such views were prevalent amongst several well known and experienced VAT advisers in Ireland. Indeed, no evidence was opened to the Court of any views which were published at that time which contradicted these published views on the correct interpretation of Regulation 19, even though, with the benefit of the hindsight of the Supreme Court decision (that Regulation 19 should be interpreted in accordance with its strict wording), it may seem unusual that this was the published view of so many VAT advisers.

40. It is also relevant to note that under cross examination, Mr. Terry O'Neill, a partner in KPMG, the VAT advisers to DWW, did accept that these published views reflected a similarity in interpretation of the VAT regulations between on the one hand respected VAT practitioners at that time and the other hand the Revenue, that common interpretation being that the lessor had a choice of three methods of valuation of a lease.

DWW's initial advice on Regulation 19 was that a choice of three valuation methods was available

41. In the context of the prevalent view of VAT advisers at the relevant time, it is also relevant that DWW's own VAT advice was, at one stage, to the same effect as CSID's. This advice to DWW would not have been known to CSID prior to its issue of the primary litigation on the 26th April, 2005, and so is not evidence as to why CSID and its advisers felt that there were three options for valuing the Lease and so as to whether CSID had reasonable or probable cause for the primary litigation.

42. Nonetheless, it is relevant, in the context of a consideration of the prevalent views amongst members of the VAT adviser community at the time, that CSID's and PwC's view that a lessor, such as CSID, had three options for valuing the Lease, was a view that was shared at one stage by DWW's own advisers. This is because Andersen, DWW's VAT adviser prior to that firm's merger with KPMG in 2002, advised DWW that there were three methods for valuation of the Lease. Mr. Keith Loughman (then employed by Andersen, but after the said merger, an employee of KPMG) sent Mr. Moriarty of DWW a draft report entitled *'National Aquatic Centre, Report on the VAT structure and issues'* under cover of his letter of 1st July, 2002. This Report was prepared four months before the Valuation Office Report dated 25th October, 2002, which valued the open market price of the Lease at €35 million and the unencumbered rent at €3.376 million. In the Andersen Report it is noted that the actual rent payable by DWW under the Lease was €127,000 per annum. In this report, Andersen states that if one subjected the actual rent to either the Formula Method or the Multiplier Method, the resulting figure was below the EVT. Yet Andersen went on to state that:-

> "As the latter two methods [the Formula and Multiplier Methods] are likely to result in valuations below the economic value, CSID would have no option but to use the open market valuation in an attempt to have the disposal value exceed the economic value."

43. Mr. Loughman was more explicit about the choice of three valuation methods in a subsequent memo dated 6th August, 2002, which was prepared by Mr. Loughman and copied to Mr. Moriarty of DWW:-

> "Under current law the assignee can calculate the capitalised value of the assigned interest in any one of three ways [emphasis added]
>
> -Formula method [i.e. rent at date of the assignment x 25 years x ¾]
>
> -Multiplier method [i.e. rent at date of the assignment x relevant government multiplier (currently 19.45)
>
> -Market value of the 25 year interest being assigned as valued by a competent valuer."

44. Thus, CSID's interpretation of Regulation 19, that there were three options for valuing the Lease was a view that was shared by DWW's advisers at one stage, although this view had clearly changed by 16th June, 2003, as evidenced by the letter of that date from DWW to CSID, which is referred to in more detail below.

45. Indeed, as late as 2009, DWW obtained expert advice from Grant Thornton [KW can you find this for me, so I can check it again] for the purposes of introducing new evidence prior to the Supreme Court hearing (which application was not made in the end by DWW). This advice also provided some support for the view that there were three valuation methods open to the landlord, since it stated sated that a:

> "landlord was typically entitled to use one of the three methods to determine the capitalised value of such a lease.[…] While we understand that the Revenue Commissioners in practice allow a choice of valuation methods in such a situation as this, we note on a strict reading of the Regulation 19 it is questionable as to whether the aforementioned "formula method" was available for the purpose of putting a valuation on the lease given that a valuation was available from a "competent valuer".

DWW's VAT adviser's evidence on whether there was any basis for believing that the Lease was vatable

46. It is relevant to note that Mr. O'Neill, a VAT expert with KPMG, gave evidence on behalf of DWW. It appears from his cross examination, that he had not read all the material that was opened to the Court during the trial and so he was led through the relevant documentation by counsel for CSID and then asked:-

> "Q. Now having seen the detailed advices given by PwC that I've just referred you to now, having seen those detailed

advices, do you subscribe to the view, Mr O'Neill, that CSID, as a lay client, considering that advice from PwC that I've showed you could reasonably have formed the view that it had no case to make in support of the correctness of the charge to VAT on the supply of the lease?

A. Sorry, Mr McDonald, when you say that it had no case to make?

Q. No, what I'm saying to you is that when you look at all of the advice that you've seen in the last week and in particular the advice that I showed you, the detailed report that the sent in June 2003 in the letter of advice of 19 June 2003, having looked at those advices, to use ascribed to the view, Mr O'Neill, that CSI D, as a lay client, not a VAT expert, considering that advice and information, could reasonably have formed the view that it had no case to make in support of the correctness of the charge to VAT on the supply of the lease?

A. Apologies, Mr McDonald, but I don't quite understand in respect of where you say it had no case to make.

Q. No, I'm asking you --

A. I know, but ---

Q. --having looked at those advices, are you saying that CSID would reasonably have, or could reasonably have formed the view that it had no case to make in support of the correctness of the charge to VAT?

A. I am not commenting on it, Mr McDonald. In respect of what you're saying in light of my review of the advice, and I've said to you in relation to PwC advice in here, I have not conducted a thorough review of it, so I wouldn't be prepared to comment on that."

47. When one considers that DWW's case for malicious abuse of court process hinges on its claim that CSID had no reasonable basis for the view that the Lease was vatable, it is relevant that Mr. O'Neill, DWW's own witness and an acknowledged expert in VAT, was not prepared to support this claim by stating that it was his view that CSID had no reasonable basis for the view that the Lease was vatable.

48. It is relevant to note that Mr. O'Neill, although an expert in VAT, was not an independent expert witness, since he had advised DWW for many years on the issue of whether the Lease was vatable. Accordingly, one would have thought that if he could have given an answer which was supportive of his client, DWW, he would have given such an answer. Yet, Mr. O'Neill was not prepared to support in his evidence to the Court the very foundation for DWW's claim before this Court. Instead, Mr. O'Neill stated that he was not in a position to comment without reviewing the PwC advice further.

49. While it is perhaps understandable why Mr. O'Neill might not want to undermine his client's case by stating baldly that he believed that CSID had a reasonable basis for its view that the Lease was vatable, this Court does not accept that Mr. O'Neill would have needed to review the advice further to answer the question posed.

50. This is because, first, the question was a relatively straight forward one, even to a non-VAT expert and so would have been very straight forward to a VAT expert such as Mr. O'Neill. Secondly, in his cross examination, Mr. O'Neill was led through the PwC advice upon which he was being questioned and as a VAT expert this PwC advice would have been very easily assimilated by him. Thirdly, Mr. O'Neill had been advising DWW since 2002 on the very issue which was behind the question, i.e. whether the Lease was vatable and so his background knowledge was at a very high level. Fourthly, in his own witness statement, Mr. O'Neill refers to PwC advice to CSID which he reviewed and so he was familiar with at least some of the advice provided by PwC to CSID and he had no issue commenting on that advice in a manner which was supportive of his client's claim in his witness statement.

51. It is also relevant that in his witness statement, Mr. O'Neill focuses on the PwC advice which was provided in three emails which are referred to in more detail to below (which evidence DWW claims support its view that CSID did not have reasonable cause for the primary litigation). Accordingly, Mr. O'Neill would have known, when refusing to answer the question posed in his cross examination, that the very foundation of DWW's case was that the advice which CSID received from PwC made it clear that the Lease was not vatable. He knew therefore the significance of the question he was being asked from his client's perspective. Yet, after being brought through PwC's advice in his cross examination (in addition to the three emails and which evidence CSID claims support its view that CSID did have reasonable cause for the primary litigation), he was not prepared to say that CSID had no reasonable basis for its view that the Lease was vatable.

52. On the balance of probabilities, this Court is of the view that Mr. O'Neill could in fact have answered the question posed without having to review the PwC advice further, but he chose not to do so. If Mr. O'Neill believed that CSID had no reasonable basis for the view that that the Lease was vatable, it is this Court's view that he would have said so, since it would have assisted his client. The inference which this Court draws from his decision not to comment is that his answer would not have assisted his client since the answer would have been that CSID had in fact a reasonable basis for the view that the Lease was vatable, particularly since, as noted at paragraph 41 et seq above, Mr. O' Neill's own firm, KPMG (or more accurately Anderson prior to its merger with KPMG) had previously advised that the Lease could be valued in any one of three ways.

Reason 3 - Confirmation from Revenue that the Lease was vatable

53. The third reason for CSID's and PwC's view that there was a choice of three methods of valuation for the Lease was the fact that PwC had received a number of separate confirmations from the Revenue that VAT was chargeable on the Lease in this case. PwC provided the Revenue with a copy of the Valuation Office Report under cover of its letter of 27th November, 2002, which showed the open market price of the Lease as being €35 million as well as the unencumbered rent being €3.376 million. It is relevant to note that PwC submitted the Valuation Office Report in full to the Revenue, with both the open market price and the unencumbered rent expressly stated therein, which supports the view that PwC was itself confident that it was entitled to choose any of the three methods for valuing the Lease. In a subsequent letter dated 29th April, 2003, PwC wrote to the Revenue stating, *inter alia*, that:-

"It is our understanding that you are now satisfied that CSID is properly registered for VAT. Additionally the grant of the proposed lease by CSID to Dublin Waterworld is a supply of immovable goods for VAT purposes and, subject to the economic value test set out in section 4(3A) Value Added Tax Act 1972, will be chargeable to VAT. CSID propose, in terms of valuing the lease for VAT purposes, to use the unencumbered rent as determined by the Valuation Office and apply the formula as set out in Regulation 19 (1)(d)(i), VAT Regulations 1979 (as amended).

I would appreciate if you would confirm that our understanding set out above is correct."

54. The following day, the 30th April, 2003, PwC wrote to the Revenue stating, inter alia, that:-

> "In a letter of 29 April 2003 we merely required a confirmation that as CSID is properly registered for VAT that the grant of the proposed lease by CSID to Dublin Waterworld would, subject to the economic value test, be a taxable supply. You might confirm same.
>
> Additionally we requested confirmation that the methodology that the company proposes to use to value the lease is satisfactory. As indicated the company will be valuing the lease by reference to the unencumbered rent as determined by the Valuation Office and applying the formula set out in Regulation 19, VAT Regulations 1979 (as amended); being 3/4 of the annual rent (unencumbered rent) x the term of the lease.
>
> As you know, the company, as the person granting the lease, is the person making the supply in accordance with Section 4 of the VAT Act and as a taxable person must firstly determine whether a liability to VAT arises, calculate that liability and report and discharge the liability it its VAT returns."

55. The first confirmation provided by the Revenue that the Lease was vatable was then provided by the Revenue by fax on the 1st May, 2003, to Mr. John Fay of PwC in which Mr. Michael Kelly of the Revenue states, *inter alia*, that:-

> "I wish to confirm that the methodology that the company proposes to use to value the lease is satisfactory, however I am not aware that Dublin Waterworld Ltd. has accepted the valuation of the unencumbered rent as determined by the Valuation Office".

56. The query raised by the Revenue regarding whether DWW accepted the valuation of the unencumbered rent might appear to suggest that it was a pre-condition for VAT to be chargeable, that the lessee have accepted the valuation of the unencumbered rent. However, this was not in fact the case since there was no requirement, under Regulation 19 or indeed the Revenue Guidance that the lessee had to agree the valuation of the unencumbered rent for a lease to be vatable. In this regard, Mr. Fay in his email of 30th April, 2003, to Ms. Magahy of CSID and Mr. O'Rourke and Mr. O'Reilly of PwC, stated, insofar as relevant, that :-

"Therefore attached is a proposed response to the Inspector. I will send this to him first thing tomorrow morning unless there are any comments/amendments. Also he, as you will see, has made reference in the letter to whether DWW has accepted the valuation of the unencumbered rent as determined by the Valuation Office. I am completely at a loss as to how he would have an interest in this. We have, as required, obtained a valuation of the unencumbered rent by the Valuation Office; we are proposing to value the lease using one of the permitted methods under the regulations. We have indicated this to him on two occasions (in writing) in the past. All we are seeking in our letter of 29 April was confirmation that he was satisfied with the method of valuation. Whether this is acceptable to DWW I would have thought should be of little or no interest to him."

57. In light of the Revenue's reference to DWW's acceptance of the valuation of the unencumbered rent in the email of the 1st May, 2003, it is also relevant to note that a second Revenue confirmation was given by email on 7th July, 2004, from the Revenue to Mr. Dunne of CSID. That confirmation contained no reference to whether DWW had accepted the valuation of the unencumbered rent and the email refers to a meeting between Mr. Donagh Morgan, the CEO of CSID, and Clodagh Ni Eidhin and John Shine of the Revenue and states, *inter alia*, that:-

> "Please note that when Donagh Morgan met Clodagh Ní Eidhin and John Shine on 1 June 2004 it was pointed out to him "that it was a matter for the transferor (in this case, CSID) to determined the VAT due." As you are aware the VAT due has been determined in accordance with the VAT legislation and any revision in the VAT liability must also be carried out in accordance with the legislation."

58. A third confirmation from the Revenue of its view that the Lease was vatable was given by email dated the 7th January, 2005, which was prior to the issue of the first proceedings in this case by CSID in the Commercial Court (on the 26th April, 2005). This email is from the Revenue to Mr. Fay of PwC and was dealing with the possibility of revisiting the issue of whether VAT was chargeable on the Lease. This arose from a query from the Comptroller and Auditor General ('the C&AG') as to why fees for legal advice (ultimately to the cost of the Exchequer) were being spent by CSID, a State company, on a dispute over whether the Lease was vatable, when in fact it was cost neutral to the Exchequer. In this context, the Revenue made it clear that CSID could not simply use a different valuation of the Lease because it suited CSID to now argue that the Lease was not vatable, as the VAT on the Lease had been determined in accordance with the VAT legislation. The email of 7th January, 2005, from the Revenue stated, *inter alia*, that:-

> "As you are aware the VAT due has been determined in accordance with the VAT legislation and any revision in VAT liability must also be carried out in accordance with the legislation".

59. The fourth and final confirmation, from the Revenue of its view that the Lease was vatable, was contained in a letter of 26th September, 2011, from the Revenue to Mr. O'Rourke of PwC. Since this letter, unlike the three previous confirmations, was not in existence prior to the issue of the first set of proceedings on the 26th April, 2005, but rather was issued after the Supreme Court judgment, the letter itself is not direct evidence of why CSID felt that there was reasonable or probable cause for its claim that the Lease was vatable. However, the letter is nonetheless of some relevance since it does contain a confirmation, *albeit* retrospective, of the Revenue's position in 2003 regarding whether the Lease was vatable. This letter to Mr. O'Rourke states, *inter alia*, that:-

> "2. It was the Revenue Commissioners' view at the time that Regulation 19 of the Value-Added Tax Regulations 1979 permitted a lessor to choose between the valuation methods outlined in that Regulation. This view was published in our guidelines on Vat and Property Transactions.
>
> 3. Revenue's interpretation at the time was that CSID was obliged to issue an invoice to DWW in 2003 based on a valuation method outlined in Regulation 19 once the valuation methods passed the EVT.

[…]

> 5. The Revenue Commissioners only formed the view that CSID was not a taxable person following the delivery of the judgment of the Supreme Court that Revenue's interpretation of Regulation 19 was incorrect."

60. Based on the foregoing, it is clear that CSID's methodology, of interpreting Regulation 19 as entitling it to conclude that the Lease

was vatable by applying the Formula Method to the unencumbered rent, notwithstanding the existence of an open market price of €35 million, was confirmed by the Revenue as correct.

61. Just as CSID relied on the Revenue's interpretation of Regulation 19 as set out in *Notes for Guidance of Inspectors* and the view at the relevant time of the community of VAT advisers as to how Regulation 19 should be interpreted, CSID also relied on the explicit confirmation from the Revenue that the Lease was vatable. On this basis, CSID believes that it had reasonable or probable cause for its view that it had a choice of three methods of valuing the Lease and therefore for its view that the Lease was vatable and therefore for pursuing the primary litigation.

Reasons given by DWW as to why CSID should not have sued for VAT
62. For its part DWW relies, *inter alia*, on the contents of certain emails set out below (the 'three emails') from CSID's VAT adviser, PwC, as evidence for the claim that PwC did not believe or had no reasonable grounds for believing that the Lease was vatable and therefore that CSID did not have reasonable or probable cause for the primary litigation.

The first email - 27th November, 2002

63. The first email is dated 27th November, 2002 (sent at 4.50 PM) and is from Mr. Fay of PwC to Mr. Conway and Ms. Magahy of CSID and Mr. O'Rourke and Mr. O'Reilly of PwC. This email from Mr. Fay states, insofar as relevant, that:-

> "Attached is a copy of a letter that I propose to fax to Michael Kelly. As you will see we are using the unencumbered rent value that the valuation office included their valuation report and we are applying a multiplier to this (which is currently set at 19.45) to give a valuation of circa 65 million to the Waterworld lease. There are three valuation methods permitted under VAT regulations, viz
>
> valuation by a valuer
>
> rent x the specified multiplier or
>
> 75% x rent x number of years in the lease.
>
> The regs provide for the substitution of an uncumbered rent where the rent specified in the lease is less than the unencumbered one.
>
> While the valuation we are proposing meets the economic value test set out in this years Finance Act (and this is without prejudice to our other argument that the tax point in respect of the lease occurred in February i.e. pre FA, when the project agreement was signed) however you should note that the regulation governing the valuation of leasehold interest states that the mathematical methods of valuation (including the multiplier method set out above) can only be used in the absence of other evidence. In this case we have other evidence (the valuation from the Valuation Office which gives a value of the open market price of €35m). The Revenue have stated in their Notes for Guidance to Inspectors that any of the three permitted methods may be used in practice; I mention this for completeness because we may still get some pushback from Michael Kelly because we are using the unencumbered rent figure stated in the valuation from the Valuation office but we are disregarding their valuation of the open market price and substituting a value which is determined using one of the mathematical methods set out in the VAT regulations.
>
> Is everybody happy that I send the attached and the valuation report to the Inspector tomorrow morning."

64. The draft letter dated 27th November, 2002, to Mr. Michael Kelly of the Revenue attached to that email from Mr. Fay, insofar as relevant, states:-

> "Please find attached a copy of a valuation carried out by the Valuation Office. The valuer has determined the unencumbered rent to be €3,376,048 per annum. Clearly the value of the lease must be determined with Section 10(9)(b) of the Act, i.e. by reference to the unencumbered rent. It is intended that the capitalised value of the lease will be calculated in accordance with Regulation 19 using the multiplier of 19.45 at €65,664,133.
>
> Economic value test (Section 4 (3A), VAT Act 1972) The capitalised value of €65.66M is in excess of the economic value of the property and therefore we believe the provisions of section 4(3A) do not apply."

The second email - 28th November, 2002
65. A second email was sent first thing the following morning by Mr. O'Rourke of PwC to Mr. Fay of PwC and copied to Mr. Conway and Ms. Magahy of CSID and Mr. O'Reilly of PwC and which, insofar as relevant, states:-

> "John and I have agreed the text of the letter… John points out, technically the methodology proposed in the letter is not "perfect" but practically it should be acceptable to Revenue."

66. The draft letter of 27th November, 2002, was duly finalised and sent by PwC with the above wording and enclosing the Valuation Office Report which stated the open market price of the Lease, along with the value of the unencumbered rent, to Mr. Kelly the Tax Inspector dealing with the matter. It is to be noted that this letter was copied by PwC to three senior members of Revenue, namely Ms. Betty Collins of the VAT Administration Branch, Ms. Clodagh Ní Eidhin of the VAT Administration Branch and Mr. Oliver Curran of the Office of Chief Inspector of Taxes. This Court concludes that the decision to copy three senior members of the Revenue with this letter indicates that PwC was confident in its approach to the Lease being subject to VAT. This is because if PwC was lacking in confidence in the strength of its argument, it is likely that it would consider that it would be easier to convince one Revenue official, rather than several, of an argument in which it did not have confidence.

The third email - 17th June, 2003

67. A further email dated 17th June, 2003, was sent by Mr. O'Reilly of PwC to Ms. O'Donoghue of CSID and copied to Ms. Magahy and Mr. Conway of CSID and Mr. Fay and Mr. O'Rourke of PwC. Mr. Fay and Mr. O'Rourke were partners and Mr. O'Reilly was a manager in PwC at that time, which meant that he was a relatively junior employee in the firm - evidence was produced to the Court that in

PwC, the level of hierarchy was; partner, director, senior manager and then manager. In this email, Mr. O'Reilly states:-

> "Attached is a draft reply to John Moriarty's letter of 16 June 2003. If you are in agreement with the contents, the letter should be printed on CSID notepaper and sent to Dublin Waterworld. You should note that use of any one of three methods is an extra statutory practice only. In strictness, CSID should use the valuation (circa €35M) determined by the Valuation Office."

68. The draft letter which he attached and which was subsequently sent to Mr. Moriarty of DWW by CSID stated, insofar as relevant, that:-

> "As you are aware, Regulation 19, VAT Regulations 1979 provides three methods for the valuation (capitalised value) of leases of 10 years or longer in duration. The responsibility for determining the capitalised value of the lease rests with the lessor. To that end, CSID engaged the services of the Valuation Office to determine the unencumbered rent of the lease and the Valuation Office determined the rent to be €3,376,000.
>
> Using the unencumbered rent, the "rent formula method" outlined in Regulation 19(1)(c)(i) was used to determine the capitalised value at €75, 960,000. The Revenue Commissioners have specifically confirmed that the methodology used by CSID is satisfactory. You should note that it has always been the practice that the lessor can choose whichever method he wishes and this is confirmed in the Revenue Commissioners "VAT and Property Transaction" booklet published in October 2001 (paragraph 2.2.1) where it states "*The price may be ascertained in any one of the following ways and the taxpayer may adopt whichever valuation s/he wishes*."

69. Mr. Conway forwarded Mr. O'Reilly's email of 17th June, 2003, to Mr. Lonan McDowell of McCann Fitzgerald, who replied by email on 17th June, 2003 to Mr. Conway, Ms. O'Donoghue and Mr. Dunne of CSID. This email, insofar as relevant, states:-

> "I was talking to Della earlier and suggested that we should have a quick meeting with PwC to get our thoughts together on a response to Mr Moriarty. Having read PwC's suggested reply, however, I would be happy for that to be sent before any meeting. A meeting should take place, nevertheless, to work out the best course of action should DWW continue to refuse to pay the VAT. If I understand the comments in Thomas O'Reilly's covering email correctly, he is indicating that a difficulty may arise as a result of differences between tax practice and the legislation. The full tax and legal implications of this for CSID will have to be worked through and understood before steps are taken to enforce recovery of the VAT."

Reading the three emails in context

70. For its part, CSID points out that these emails should not be read in isolation and must be read in conjunction, first with the terms of the draft letters which PwC were attaching to these emails and recommending that its client, CSID, send to the Revenue and to DWW, which letters both contain express statements that CSID can rely on the use of the unencumbered rent to ensure that the Lease is vatable. In addition, CSID point out that these emails must be read in conjunction with other emails from PwC, letters of advice from PwC, PwC Reports and oral advice from PwC at the relevant time.

Reading the three emails in the context of other emails

71. The first such email from PwC is one dated 6th January, 2003, from Mr. Fay of PwC to Mr. Conway of CSID and copied to Mr. O'Rourke and Mr. O'Reilly of PwC which deals with FA 02 (the Finance Act, 2002) and states, insofar as relevant, that:-

> "As you know we have to date pursued a twin track approach to securing repayment of the outstanding VAT claims; (i) FA02 does not apply because the signing of the project agreement in February 2002 triggered the tax point (viz the lease to DWW) or (ii) if FA02 does apply the value of the lease exceeds the development costs and hence CSID we complies with the new provisions. Once we received the valuation from the Valuation office which showed an unencumbered rent of circa €3.3 million (and a capitalised value of the lease of €35 million) I felt we could (using existing practice) take the unencumbered rent figure and apply a specified "multiplier" (currently 19.45) to give a capitalised value of the lease of €65 million…"

Thus, in this email there is an express advice by Mr. Fay to CSID that the unencumbered rent could be used to make the Lease vatable.

72. Similarly, the three emails upon which particular reliance is placed by DWW must be read in conjunction with the email of 31st January, 2003, from Mr. Fay to Mr. O'Rourke and Mr. O'Reilly of PwC and copied to Mr. Conway and Ms. Magahy of CSID, which states, insofar as relevant, that:-

> "CSID has developed a property and is proposing to make a taxable supply of that to Dublin Waterworld. As I see it, the onus to put a value on that taxable supply rests with CSID; hence the valuation from the Valuation Office. The anti-avoidance provisions in FA 2002 (should they apply) state that if the value of the lease is less than the economic value (essentially the development costs) the transaction is exempt from VAT. However, the onus of fulfilling the economic value test rests with CSID. It has a basis of valuing the lease which meets this condition."

73. Indeed, it is particularly relevant to note that Mr. Fay, who was the VAT partner in PwC, and who had referred in his 17th November, 2002, email to the fact that there was a dichotomy between Regulation 19 and the Revenue's *Notes for Guidance of Inspectors*, was now advising CSID in this email in quite explicit terms that:-

> "As I see it, there is no basis for KPMG/Dublin Waterworld to contend that the lease is not subject to VAT."

74. In the context of advice being given by a professional adviser to a client, in this case Mr. Conway and Ms Magahy, this particular piece of advice, *albeit* when viewed in isolation, is nonetheless quite unequivocal.

75. Another relevant email is that of 19th February, 2003, which Mr. Fay of PwC sent to Mr. O'Reilly of PwC and copied to Mr. O'Rourke of PwC and Mr. Conway of CSID. In this he stated, *inter alia*, that:-

"I agree with your comments, ultimately the issue may have to be resolved by the lawyers.

DWW also raised the issue of referring the VAT matter to an independent expert; while I think this ultimately is a call for Laura my

own view is that we already have referred it to an independent expert, indeed the ultimate independent expert i.e. the Revenue Commissioners. We have asked for confirmation from the Revenue Commissioners that VAT is chargeable and that the valuation method proposed (using the unencumbered rent x the multiplier) is appropriate. We have also asked them to confirm, at KPMG's request, the position in relation to the valuation of a future assignment. Therefore re referring this matter to another professional adviser would not, in my view, be is of any real benefit and indeed I am too sure it is appropriate either given that the matter has been referred to the Revenue Commissioners. If the Revenue holds that the lease is taxable, that is it and no matter what any other adviser may say CSID will have to charge VAT."

76. While Mr. Fay was incorrect in attaching such importance to the views of the Revenue in relation to whether VAT was chargeable, as subsequently became clear in the Supreme Court's decision in 2010 (since the question of the meaning of VAT legislation is ultimately a matter for the courts), it is noteworthy that in this email, as in his email of 31st January, 2003, the VAT partner in PwC was very convinced of his view that VAT was chargeable.

77. This confidence is also shared by Mr. O'Rourke, the relationship partner for CSID, since in his email of the 14th May, 2003, to Mr. Conway, Mr. Dunne and Ms Magahy of CSID and copied to Mr. Fay and Mr. O'Reilly of PwC, he states, *inter alia*, that:-

> "I think the Revenue are really out of the loop now as far as we are concerned. They agree that VAT should be charged and the methodology is as provided by law, so they really have no further role to play in this."

Reading the three emails in the context of letters of advice

78. CSID also point out that the emails to which DWW refer should also be read in conjunction with the formal letters of advice that were received by CSID from PwC such as the letter of 11th September, 2002, to Mr. Sean Benton, the acting CEO of CSID at that time, which states, inter alia, that:-

"In the case of the granting of a long leasehold interest, the VAT is charged by reference to a (notional) capitalised value of the interest at the outset; VAT is not charged on the periodic rents received under the terms of the lease. The capitalised value (or more specifically the open market value) of the lease can be determined by reference to the formulae contained in the VAT Regulation or by a professional valuer."

79. At this stage therefore, which was a month before the Valuation Office Report was issued, CSID was being expressly advised by PwC that CSID had a choice of the three methods of valuation so as to ensure that the Lease was vatable.

80. Similarly a letter of advice was issued on the 19th June, 2003, by PwC to Mr. Morgan, the CEO of CSID, which was the same day as Mr. O'Reilly sent his email referring to "extra-statutory practice". This formal letter of advice was signed by Mr. O'Reilly and was in response to Mr. Moriarty's letter of 16th June, 2003, in which Mr. Moriarty stated, inter alia, that:-

> "In our view the capitalised value of the 30-year lease, and therefore, the corresponding VAT charge indicated by CSID on the invoice are incorrect. This is because Regulation 19 provides that, when ascertaining the open market value of the 30 year lease then, in the absence of other evidence of the amount of that value, CSID can use the "rent formula" or "multiplier" methods to calculate the capitalised value of the lease.

81. It is to be noted that in dealing with this claim by Mr. Moriarty that the Lease was not vatable, PwC in its letter of 19th June, 2003, is quite equivocal in its advice to CSID, since it states, *inter alia*, that:-

> "I refer to your email dated 16 June 2003 attaching a copy of John Moriarty's letter of the same date. […] Regulation 19, VAT Regulations 1979 provides three methods for the valuation (capitalised value) of leases of 10 years or longer in duration. The responsibility for determining the capitalised value of the lease rests with the lessor. To that end, CSID engaged the services of the Valuation Office to determine the unencumbered rent of the lease and the Valuation Office determined the rent to be €3,376,000.
>
> Using the unencumbered rent, the "rent formula method" outlined in Regulation 19 (1)(c)(i) was used to determine the capitalised value at €75,960,000. The Revenue Commissioners have specifically confirmed that the methodology used by CSID is satisfactory. You should note that it has always been the practice that the lessor can choose whichever method he wishes and this is confirmed in the Revenue Commissioners "VAT and Property Transaction" booklet published in October 2001 (paragraph 2.2.1) where it states "*The price may be ascertained in any one of the following ways and the taxpayer may adopt whichever valuation s/he wishes*;"
>
> This was restated by the Revenue Commissioners in their guidance note for Inspectors (dated 6 June 2002) on the anti-avoidance provisions in Finance Act 2002; specifically the economic value test and the application of VAT to the disposal of long leasehold interest."

82. The letter then concludes with the quite unequivocal statement of advice from PwC to CSID that "[o]n this basis, the VAT charge outlined on your invoice dated 15 May 2003 is correct."

Reading the three emails in the context of the PwC Report

83. CSID point out that the emails to which DWW refer must also be read in conjunction with the report prepared by PwC for CSID on the VAT issue, one version of which was entitled a Draft Report and sent on the 30th April, 2003, by Mr. O'Reilly to Mr. Conway, Mr. Dunne and Ms. Magahy of CSID. In relation to the fact that this was a draft report, in his evidence to the Court, Mr. O'Rourke (who is now the managing partner of PwC) stated that there was nothing untoward in sending a draft report to a client for comment and observation since this was done to check on factual inaccuracies which he felt was a common occurrence not just in his firm but in other firms. Indeed in his cross-examination, Mr. Moriarty accepted that Grant Thornton had sent documents in a similar manner to him for his comment and that the Andersen Report prepared for Mr. Moriarty on the VAT on the Lease was also described as a 'draft report'.

84. This Court would not attach too much significance to the fact that the advice in question is contained in a PwC 'draft' Report, as distinct from a report which is issued without that term. First evidence was produced to the Court to the effect that the provision of advice in this manner was a common occurrence. Secondly, this Court would conclude that a lay client, in the sense of either not being a lawyer or a being a company without internal legal expertise such as CSID or indeed DWW, could not in the normal course be expected to ignore the substantive advice in a report from a large and well regarded professional firm, such as KPMG, Andersen or

Grant Thornton, particularly when it relates to a very specialist and complex subject such as VAT, on the basis that it was only contained in a 'draft' Report.

85. The PwC Draft Report was re-issued in June 2003 in substantially the same format as the version issued on 30th April, 2003, and it state, *inter alia*, that:-

> "**Valuation of leases for VAT purposes** Where a lease is subject to VAT, the VAT is chargeable in one upfront sum at 13½% (12½% up to 31 December 2002) on what is known as the capitalised value of the lease. The capitalised value of the lease is calculated in according with one of three methods outlined in the VAT Regulations as follows:
>
> A valuation by a competent valuer or
>
> Multiplying three quarters of the annual rent by the number of years in the lease or
>
> Multiplying the annual rent by a specified multiplier. The multiplier is related to the rate of interest on Government securities and is currently 29.61.
>
> VAT law provides that if the lease contains encumbrances and the rent payable reflects these encumbrances, an unencumbered rent valuation must be obtained from a valuer. When the Revenue wish to seek their own expert advice in relation to valuations, they refer the matter to the Valuation Office. It was decided that CSID would accordingly seek a valuation of the unencumbered rent from the Valuation Office.
>
> The valuation received from the Valuation Office (Appendix 7) shows an unencumbered rent of €3,376,048 and a capitalised value of €35,054,725. As the value of €35,054,725 did not pass the economic value test we advised that the unencumbered rent figure of €3,376,048 should be used in one of the mathematical valuation methods as permitted by VAT regulations".

86. It is noteworthy that the formal letter of advice and Report which are received by the client, in this case CSID, make no reference to the expression "in the absence of other evidence" in Regulation 19 or to the fact that PwC rely for their interpretation of Regulation 19 on, inter alia, the Revenue's guidance on how this Regulation is to be interpreted. Thus, in the formal letter of advice and Report, the client is being given explicit advice ("we advised that the unencumbered rent figure of €3,376,048 should be used in one of the mathematical valuation methods as permitted by VAT Regulations"), without reference to the fact that this advice is based on the Revenue interpretation of Regulation 19, rather than the strict wording of Regulation.

Reading the three emails in the context of the oral advice received by CSID

87. CSID point out that the three emails to which DWW refer must also be read in conjunction with the oral advice provided to it by PwC and McCann Fitzgerald, in particular at the meeting of 25th June, 2003, which was held at the Offices of Public Works ('OPW'). In attendance at that meeting were, inter alia, Mr. Dunne, Ms. Magahy of the EST of CSID as well as Mr. Morgan (the CEO), Mr. Haugh (the Chairman) and Mr. Benton, a director of CSID, Mr. O'Rourke and Mr. Fay of PwC and Mr. Lonan McDowell and Mr. Tomkins of McCann Fitzgerald. There is a contemporaneous handwritten note of that meeting done by Mr. Tomkins, in which 'EVT' appears to refer to Economic Value Test and 'VO' appears to refer to Valuation Office and where he notes, *inter alia*, that:-

> "try to satisfy EVT by using one of the three tests available to us. Method chosen satisfied test. V.O. Unencumbered rent €3m p.a. (They capitalised using non-satisfactory method). We applied different method to that rent and got a higher cap val and passed the test".

88. Based on the evidence provided to this Court by Mr. O'Rourke (which is noted below at paragraph 97 et seq regarding that meeting and the inference which can be drawn this attendance note, it seems that at this meeting there was oral advice from CSID's professional advisers that the Lease passed the EVT. The following day, on the 26th June, 2003, there was a board meeting of CSID and the note prepared by Mr. Morgan in his CEO Report to that board meeting of 26th June, 2003, states, *inter alia*, that:-

> "Con Haugh, Sean Benton and myself met with PwC and McCann Fitzgerald yesterday to consider the options. We agreed that we should follow the advice received from both our financial and legal advisors. This may result in us having to pursue DWW for payment of the VAT invoice."

89. The minutes of that board meeting of 26th June, 2003 state, *inter alia*, that:-

"A meeting was held on 25 June, attended by Chairman Con Haugh, Sean Benton, PwC and McCann Fitzgerald to consider options. It was agreed that CSID should follow the advice of its financial and legal consultants in taking the issues forward."

Evidence by members of the EST and directors of CSID regarding advice received

90. It is also relevant at this juncture to refer to the evidence provided by the executives and directors of CSID of their understanding of the advice received by CSID. Mr. Michael Walsh, a non-executive director of CSID swore at paragraph 31 of his Witness Statement that:-

> "I always understood PwC's advice to be that VAT was chargeable. I would not have proceeded as a Board member to approve a course of action which involves commencing legal proceedings, in the form of arbitration, had I believed that the advice was other than that. I had no reason at all to doubt the advice received which had been confirmed by the Revenue Commissioners."

91. This advice was not controverted by DWW since it chose not to cross examine Mr. Walsh. Similarly, the witness statement of Mr. John Mulcahy, another non-executive director of CSID was not controverted by DWW and he gave sworn evidence at paragraph 5 of his Witness Statement that:-

> "CSID had an executive services team which provided day-to-day executive services to it. PwC were part of that executive services team and were I believe a highly competent professional firm qualified to give tax and VAT advice. As a member of the board I received verbal and written reports from time to time in common with the other board members. The decisions I took at the board and I believe the same to be true for all board members were made on foot of that

advice believing it to be true and accurate. I was of course also aware as events unfolded that the claim to VAT was approved by the Revenue Commissioners and the expert VAT arbitrator and the High Court. Each of the steps confirmed to me, or certainly did not give me reason to doubt but rather confirmed, the advice received from CSID's tax experts PwC."

92. For its part DWW, to support its contention that Mr. Conway was aware that the Lease was not vatable, relied on the cross examination of Mr. Conway regarding Mr. Fay's email of 27th November, 2002, Mr. O'Reilly's email of 17th June, 2003, and Mr. McDowell's email of 17th June, 2003. Each of these emails were sent to Mr. Conway and he was cross-examined as follows:-

"Q. And Mr. McDowell in response, and please just have page 219 in front of you in case, to help you to follow it, Mr. McDowell's response said that if he understood the comments of Mr. O'Reilly's covering e-mail correctly, Mr. O'Reilly was indicating that a difficulty may arise as a result of differences between tax practice and the legislation; isn't that right?

A. That's what the words say.

Q. And were you not already aware of that from as long ago as November 2002?

A. Of the e-mail of 27th November?

Q. No, of that fact -- sorry, I beg your pardon, as a result of the e-mail of 27th November, of that fact, of that difficulty, of that difference?

A. Correct.

Q. Yes.

A. And that's why PwC put forward the recommendation that they did in relation to what was the practice at the time and how VAT could be charged on the lease."

93. While Mr. Conway accepts that he was aware of the contents of the 27th November, 2002, email from Mr. Fay, which highlighted the dichotomy between the practice and the law, CSID point out that he finishes the answer with the statement that PwC had put forward a recommendation on how the Lease would be vatable. CSID also emphasis that earlier in his cross examination he made it clear that he understood that the Lease was vatable since he stated:-

"Q. If you go back to the e-mail of 27th November at Tab 14, just the second last paragraph, do you see the phrase "is everybody happy", do you see that?

A. I do.

Q. So they were asking you and Ms. Magahy for your agreement to this course of action; is that right?

A. They have asked is everyone happy with it. Yes, they are indeed.

Q. And you were?

A. Well, I wouldn't be in a situation to even reply to this because again I was not the VAT expert. And if you look at the situation, here we had PwC, they had reviewed the valuation report, they came back to us and they said 'here's the letter to Revenue'. I wasn't a VAT expert at all, and, you know, I wasn't going to contradict PwC's advice on what was going to go to Revenue. I know this came in, as you can see from the timeline, late in the afternoon and then it came back very quickly, a reply came back very quickly from Feargal O'Rourke and I couldn't see myself actually replying to such advice."

94. Similarly CSID point out that on his re-examination, Mr. Conway states:-

"Q. All right. Now, coming back then to the e-mail that is at tab 14 of book G1 - that's the e-mail of 27th November 2002.

A. Sorry, could I have that tab again?

Q. It's tab 14.

A. Yes.

Q. You were taken through that e-mail in some detail by Mr. O'Moore, if you recall, this morning?

A. I do.

Q. And while Mr. O'Moore was asking you questions about specific questions, you said that you need to look at the e-mail in its totality. Do you recall that?

A. I do indeed.

Q. Looking at the e-mail in its totality, what message do you think it conveys when read in that way?

A. The message it relays to me is that PwC were advising me and going to the Revenue on foot of the valuation. It tells me that, very clearly, we are using the unencumbered rent, why, the whole lot and, you know, it's practice, it can be done. And if you read it in totality with that and the letter that was going to Revenue, I don't think they would've supplied me with a letter that wasn't appropriate or proper to go to the Revenue Commissioners. And what we were doing was correct."

95. And also:-

"Q. Looking at the totality of the material that was provided to you by PwC, what do you think was the position in relation to what you were being advised in relation to whether VAT could be charged on this lease?

A. I was always advised by PwC and it was my understanding that VAT was chargeable on the lease..."

96. Thus, on Mr. Conway's own evidence he was aware of the dichotomy between the practice and the law, he understood PwC's advice was that the Lease was nonetheless vatable.

Evidence of Mr. O'Rourke of PwC regarding advice given to CSID

97. Finally in this context, it is relevant to note that the view expressed by directors and executives in CSID regarding PwC's advice was also consistent with PwC's own view of its advice, since Mr. O'Rourke's evidence was that PwC's advice to CSID was consistently that CSID had a choice of three methods of valuing the Lease and under cross-examination he stated that:-

"Our advice was that the taxpayer had the option – had the alternative of selecting any of the three options available to him. And that, certainly in my view, was consistent with the law, both the VAT Act itself and indeed the import of the anti avoidance legislation that was brought in.

[…]

And if you view our advice in aggregate throughout the thing, throughout the correspondence, its clear advice was the taxpayer had any one of these methods and it could avail of any one of those three methods."

When it came to the detail of the advice, Mr. O'Rourke stated that

"Q. What about the divergence, if I can use that word, the divergence that has been identified between the language of the Regulation and Revenue practice, did that affect the advice that you gave? A. That was all taken into account. Q. In giving the advice

A. Absolutely, yes."

98. In addition, Mr. O'Rourke confirmed in his cross-examination (and this was common case between the parties, since it was relied upon by counsel for both parties in their closing submissions), that not only were the members of the EST and members of the board of CSID told that the Lease was vatable, but that they were told of the dichotomy between the law and practice. This was because Mr. O'Rourke answered questions, regarding the meeting of the 25th June, 2003, at the OPW's offices which he had with Mr. Dunne and Ms. Magahy of the EST of CSID and Mr. Morgan (CEO), Mr. Benton, a director, and Mr. Haugh, Chairman of CSID, in the following terms:-

"Q. This is a meeting at which you say you explained to those present Mr. Morgan, Mr. Benton and Mr. Haugh that the regulations didn't permit the use of the formulae. A. That was *one* of items that was under discussion over the period of that meeting, yes. A. Not in these minutes, no, here, no. Q. Yeah. And you're conscious that they've been asked about this and they've said that as far as they can remember, it wasn't discussed. But you're confident it was? A. Absolutely confident, yes."

Similarly, in further cross examination, Mr. O'Rourke stated that:-

"A. Donagh Morgan, Sean Benton, Laura Magahy, David Conway. These were the principals who were involved on the CSID executive side. Q. Okay. And these are all people who you told 'There's a dichotomy here, the regulations say you can do one thing' 'The regulations say you must do one thing, but you don't have to'? They are all people who you were present at meetings at when that was said to them? A. Yes. And the automatic response and proper response to them would be 'Yeah, VAT's a very technical area'. They would say 'Yes. Are the Revenue Commissioners happy with this approach?' Q. Mr. Morgan and Mr. Benton?

A. Yes. Q. Okay. You're conscious they've said that this was never said to them? A. The-- MR. McDONALD: Well, no, I'm terribly sorry, they never said that in evidence. What they said was they had no recollection of it. MR. McCULLOUGH: Oh, I'm so sorry. MR. McDONALD: Quite a different thing. MR. McCULLOUGH: Yes, all right. MR. McDONALD: When you're talking about events of so long ago. Q. MR. McCULLOUGH: I see. They said A. And if I can add, sorry, if I can add to that Q. We'll look up the transcript, but A. Can I just finish? Q. Yes, of course you can.

A. It's actually very understandable. First, forget the fact that it's 13 or 14 years ago, VAT is a very technical area. And no more than if I'm being briefed on a non tax area, you tend to cut to the chase. And for a non tax professional, the question they would've asked is 'Have we given all the detail to the Revenue Commissioners? Are the Revenue Commissioners happy with the approach we're taking?' And in fact the Revenue Commissioners not just were happy, they were saying CSID was obliged to follow, do it this way. So I can understand Mr. Morgan and Mr. Benton not recalling the technical analysis of Section 99 interacting with the regulation at this stage."

99. It was clear therefore that CSID, both at board level and at EST level, was aware that there was a dichotomy between what Regulation 19 stated and the practice, but it is also clear that Mr. O'Rourke's evidence is that it was PwC's advice to both the board of directors and the EST that the Lease was vatable. It is against this background that the issue of whether CSID was guilty of a malicious abuse of court process must be considered.

THE LAW REGARDING THE TORT OF ABUSE OF PROCESS

100. While the foregoing analysis gives useful context for the present case, it is important to note that the issue before this Court, in the secondary litigation, is not whether the claim in the primary litigation, that the Lease was vatable, was correct or not, since the Supreme Court has established that it was not vatable. Rather, the issue before this Court is whether the decision, by CSID to pursue its claim for VAT on the Lease, amounts to maliciously abusing the process of the court. This will involve an analysis by this Court of the proceedings first issued by CSID in April 2005 and their progress through arbitration, a High Court challenge and finally the decision of the Supreme Court in April 2010. Before undertaking this analysis, it is relevant to refer to the requirements which need to be satisfied for the tort of maliciously abusing the process of the court to be established.

101. There is a paucity of caselaw on the tort of maliciously abusing the process of the Court, which as Murphy J. states in *Bank of*

Ireland Finance Limited v. McSorley, (unreported High Court, 24th June, 1994), at page 7 of his judgment, is the correct name for the tort, rather than malicious prosecution. As noted by Clarke J. in *Independent Newspapers (Ireland) Ltd v. Murphy* [2006] 3 IR 566 at 569, the "precise parameters of such a cause of action remain to be clearly defined" and accordingly one of the parameters which will have be considered in this case is whether a litigant who wins a first instance decision, but loses on appeal, can be found to have maliciously abused the process of the court by instituting those proceedings in the first place.

Dorene v. Suedes

102. The leading case on this area of law in Ireland is the High Court case of *Dorene Ltd v. Suedes (Ireland) Ltd* [1981] 1 IR 312. At page 316 Costello J. states:-

> "a claim for damages at common law will lie for the institution or maintenance of a civil action if it can be shown that the action was instituted or maintained (a) without reasonable or probable cause, (b) maliciously, and (c) that the claimant has suffered actual damage or that the impugned action was one which the law presumes will have caused the claimant damage."

103. In that case, Dorene Limited was accused of having committed the tort by instituting and maintaining proceedings for specific performance of a lease of a premises owned by Suedes (Ireland) Limited. At the time of the institution of the proceedings, Dorene was advised by its own solicitor that "on balance" he was optimistic of the outcome of those proceedings. On this basis, Costello J. held that the institution of the proceedings did not amount to the tort of maliciously abusing the process of the court. However, at a consultation after the institution of the proceedings, Dorene received advice from a Senior Counsel. As noted by Costello J. at page 328 of his judgment:-

> "Counsel's advice was quite unequivocal; he advised that Dorene's claim would not succeed".

104. Despite this advice, Dorene maintained the proceedings and did not discontinue the action for some six months after this advice and attempted to negotiate the lease of the premises with Suedes (Ireland) during this six month period, before then discontinuing the action. On this basis, Costello J. held that the maintenance of the proceedings after the advice of Senior Counsel amounted to malicious abuse of court process since, in light of this unequivocal advice not to litigate, the decision to maintain the litigation was clearly done without reasonable or probable cause and for the ulterior motive of assisting Dorene's bargaining position with Suedes (Ireland) for the acquisition of the premises.

Murphy v. Kirwan

105. The next relevant case to consider is the Supreme Court decision in *Murphy v. Kirwan* [1993] 3 IR 501, which concerned the plaintiff's action for specific performance of an agreement which had been dismissed by Blayney J. in the High Court. In that case, Blayney J. also dealt with the defendant's counter claim that the plaintiff had maliciously abused the process of the court, by instituting the proceedings in the first place. When dismissing the specific performance claim, Blayney J. also adjourned indefinitely the counter claim of malicious abuse of court process. Subsequently, the defendant applied for discovery of legal advice from the plaintiff relating to his specific performance claim. In the High Court, Costello J granted the discovery, despite the plaintiff's claim that the documents were legally privileged. The plaintiff appealed to the Supreme Court and his appeal was dismissed. The Supreme Court considered the law on malicious abuse of court process at page 508, where Finlay C.J. observed:-

> "This is a claim for damages because it is claimed the plaintiff prosecuted the case against the defendant without reasonable cause and maliciously for a wrongful purpose. It is accepted that such a claim, if established, entitles an injured party who suffered loss to damages (see *Dorene Ltd. v. Suedes (Ireland) Ltd* [1981] 1 IR 312) […] Obviously communications between a client and his legal advisers would be highly relevant to such claim. If the client stated the facts of the case correctly to his legal advisers and was advised not to proceed (as happened in *Dorene Ltd. v. Suedes (Ireland) Ltd* [1981] 1 IR 312) this would support an allegation of abuse of process. If the client stated facts correctly and was advised to proceed this would tend to negative it. And if the client misstated the facts to his legal advisers this would strengthen a claim that the proceedings had been instituted for an improper purpose."

106. At page 511 of the judgment Finlay C.J. then considered the requirements of the tort of malicious abuse of court process in the context of the application for discovery:-

> "It therefore becomes necessary to decide as to whether the defendant has given sufficient evidence of a plausible or viable case to support his claim to warrant the making of the order for discovery at this stage.
>
> It appears to me that in a claim made that a person has, by the institution of proceedings, abused the processes of the courts or brought an action for a malicious or improper motive rather than to vindicate his or her rights, the first requirement, though not necessarily a proof in itself, would be to establish either that the claim as brought has failed in its entirety or that it was bound to do so."

107. In this discovery application before the Supreme Court, it was clear that the plaintiff's claim for specific performance in the High Court had indeed failed in its entirety, since it had been dismissed by Blayney J., and accordingly the Supreme Court dismissed the appeal and allowed the discovery of the legal advice obtained by the plaintiff.

108. Although the Supreme Court case dealt with an application for discovery and was not a hearing on whether the plaintiff was guilty of maliciously abusing the process of the court, the judgment of Finlay C.J. is nonetheless a clear statement from the Supreme Court that it is a pre-condition to a successful claim for the tort of maliciously abusing the process of the Court that the primary litigation has failed in its entirety or was bound to do so.

109. As regards claims which have, as Finlay C.J. described them, not failed in their entirety, but which were bound to do so, it seems clear that Finlay C.J. is referring to claims which did not proceed to hearing at first instance but were settled, or otherwise discontinued prior to hearing, as for example had happened in the seminal case of *Dorene v. Suedes*, where the case was discontinued before the hearing.

Bank of Ireland v. McSorley

110. The next relevant case is a High Court decision of Murphy J. in *Bank of Ireland Finance Limited v. McSorely and Macari*, (Unreported, High Court, 24th June, 1994). In that case the Bank sought relief against forfeiture of a lease against the McSorleys on

the grounds that the interest of the lessee (the Macaris) was charged with monies advanced by the Bank. However, at the opening of the case, the Bank discontinued the proceedings and admitted liability for the costs of the McSorleys. The McSorleys proceeded with their counterclaim against the Bank for maliciously abusing the process of the court. In that case, counsel for the Bank had "questioned the wisdom of instituting proceedings for relief against forfeiture". Murphy J. held that the Bank was not guilty of maliciously abusing the process of the court, since he concluded that it was "by no means impossible" that the action would have succeeded. At page 10 of his judgment, Murphy J. states:-

> "Whilst I would accept that the Bank would have had difficulty in persuading the Court that this was a proper case in which to exercise its discretion to grant relief against forfeiture, it is by no means impossible that it would have done so. To my mind, the more contentious issue would have been the terms upon which such relief would have been granted. But even if relief was granted on the basis that all arrears of rent were paid and that the lessee was required to reconstruct the premises in the manner in which the McSorleys agreed to do the figures would seem to indicate that on a sale there would be at least some funds available to reduce the liability of the Macaris to the Bank. Even if this were not so, it does not seem to me that a plaintiff is bound to justify the institution or maintenance of legal proceedings on economic grounds though the manifest absence of such grounds might, in certain circumstances, constitute evidence of malice.
>
> In my view the bank did have reasonable and probable cause for the institution and maintenance of the proceedings."

Independent Newspapers v. Murphy

111. The next relevant case to consider is the judgment of Clarke J. in the High Court case of *Independent Newspapers (Ireland) Ltd v. Murphy* [2006] 3 IR 566. In that case there had been an earlier settlement of a defamation action which had been taken by the defendant against the plaintiff for its publication of an allegedly false claim that the defendant that had been present in a politician's house when money was handed to the politician in a brown paper bag. The plaintiff sought to set aside the settlement on the grounds that the defamation proceedings were a malicious abuse of court process, since they were founded on a false claim by the defendant that he had not been present in a politician's house when in fact he had been present. The Master of the High Court had granted discovery to the defendant of documents in the plaintiff's possession relating to the newspaper article. The substance of the case before Clarke J. therefore was an appeal of the discovery order. Clarke J. allowed the discovery, but varied the terms of the order. He did however have something to say in relation to the substantive tort of malicious abuse of court process, in particular where the primary litigation is compromised, as occurred in that case, in contrast to situations where the primary litigation is finalised by court order. At page 570 Clarke J. states:-

> "13. It is, of course, in principle open to a party to allege that the reason why the court should conclude that proceedings were maliciously prosecuted was because of the assertion by the plaintiff of factual matters which the plaintiff knew not to be true. There seems no reason in principle why, in an appropriate case, the pursuit of a claim in such circumstances, based on an assertion of facts which the plaintiff knew not to be true, would not equally amount to an abuse of process. However, additional difficulties arise where, unlike in *Dorene Ltd. v Suedes (Ireland) Ltd.* [1981] I.R. 312, the proceedings have already been concluded whether by compromise or by determination by the court, without reference to the question of malicious prosecution.
>
> 14. In the latter case (and on the assumption that the plaintiff succeeds), there will be a binding determination by the court to the effect that the facts are as contended for by the plaintiff. Such a finding could only be gone behind in the limited circumstances identified in the jurisprudence such as a case where it can be shown that the plaintiff's success was procured by a fraud on the court (see for example *House of Spring Gardens Ltd. v. Waite* [1991] 1 Q.B. 241). In the absence of the defendant being in a position to have the original order set aside on such grounds, the court could not entertain a second set of proceedings which was predicated upon the fact that the original finding of the court was incorrect.
>
> 15. Somewhat different considerations may well apply in respect of a case which was compromised rather than determined by the court. In those circumstances, there is no finding of a court, binding on the parties, which can only be set aside of very limited grounds.
>
> 16. The precise parameters of the circumstances in which a party, such as the plaintiff, may be entitled to seek to go behind a settlement on such grounds, remain to be the subject of authoritative determination. However it seems to me to be at the very least arguable that it could be the case that a plaintiff, in a position such as the plaintiff, can simply not re-run on the same evidence the action which it had compromised by means of asserting that the claim made by the plaintiff in that action was false to the knowledge of the plaintiff concerned and no more.
>
> 17. The issues which arise in litigation vary. However quite a number of cases turn largely on questions of fact where it is clear, in advance of the hearing, that the parties propose leading contradictory evidence as to key events. Where the parties compromise such an action, such settlement will be based on a view (presumably with the benefit of expert advice) as to the chances of each succeeding or failing in persuading the court that the facts are as they allege. If it were possible, in effect, to reopen such a case, notwithstanding such a settlement, by the defendant simply asserting that the plaintiff's factual contentions were, to the knowledge of the plaintiff, false, without more, then it would, in practical terms, be virtually impossible to compromise any such action."

112. In particular, it will be seen that Clarke J. notes that "additional difficulties" arise in claims of malicious abuse of court process, where that claim was not made as part of the primary litigation, but rather in secondary litigation after the primary litigation has been finalised by a determination of the court, and that determination made no reference to malicious abuse of court process. The case before this Court appears to be such a case since the primary litigation was finalised by the Supreme Court decision on the 30th April, 2010, and there was no reference in that judgment to any allegation by DWW that the primary litigation amounting to the tort of malicious abuse of court process and no evidence was produced to this Court that DWW had alleged in the primary litigation that those proceedings amounted to such a tort.

113. In addition, it is relevant to note that Clarke J. refers to the impossibility (save in cases of fraud) of the Court finding a litigant guilty of malicious abuse of court process where a court had found for that litigant in the primary litigation since the Court "could not entertain a second set of proceedings which was predicated upon the fact that the original finding of the court was incorrect".

114. Clarke J. makes no reference to a situation where a first instance decision is in favour of a litigant, but is subsequently found to be incorrect by an appellate court. It seems clear, nonetheless, that "additional difficulties", to use Clarke J.'s expression, arise in the context of a claim of malicious abuse of court process (which difficulties are referred to in greater detail below), where the court is

being asked to entertain a second set of proceedings which are predicated upon the fact that the first instance arbitration decision of 2005 and the High Court decision of 2005 were both incorrect. While both decisions are indeed incorrect, this only became obvious after the Supreme Court decision on the 30th April, 2010.

Summary of requirements for tort of malicious abuse of court process

115. Based on the foregoing analysis of the caselaw, this Court concludes that the tort of malicious abuse of court process requires that:

> (i) there is an absence of reasonable or probable cause on the part of the litigant, in other words, that there was not even a reasonable chance that the litigation would succeed;
>
> (ii) the primary litigation must have failed in its entirety, or
>
> > a. the only reason that it did not fail in its entirety, was because it was discontinued prior to the hearing, or
> >
> > b. the reason the primary litigation succeeded, if it did, was because of wrongdoing, such as fraud on the court;
>
> (iii) there must be malice on the part of the litigant; and
>
> (iv) actual damage suffered by the litigant, or that the impugned action was one which the law presumes will have caused him damage.

If any of these requirements are not satisfied by DWW, then it will have failed to establish the tort of malicious abuse of court process against CSID.

Application of these requirements to the current case

116. In the current case, the application of these legal principles raises the question of whether a litigant could be said to have taken a case without reasonable or probable cause, where he was successful at first instance, but loses his case on appeal. No authorities were opened to the Court where a litigant was found to have been guilty of malicious abuse of court process where that litigant had been successful in his claim at first instance. Against this background, this Court will consider the history and nature of each of the steps in the primary litigation to see if CSID were guilty of malicious abuse of court process in this case.

DETAILS OF THE PRIMARY LITIGATION

117. By June 2003, the fact that there was a dispute between the two parties, and indeed the substance of that dispute, was evident to both CSID and DWW. By that date the conflicting interpretations of Regulation 19 by CSID and DWW had been put in correspondence between the parties. Mr. Moriarty, the managing director of DWW wrote on the 16th June, 2003, to Mr. Morgan, the CEO of CSID, stating, *inter alia*, that:-

> "We note that the capitalised value has been calculated using the rent formula method as provided for in Regulation 19 Value Added Tax Regulations 1979. In our view the capitalised value of the 30-year lease, and therefore, the corresponding VAT charge indicated by CSID on the invoice are incorrect. This is because Regulation 19 provides that, when ascertaining the open market value of the 30 year lease then, in the absence of other evidence of the amount of that value, CSID can use the "rent formula" or "multiplier" methods to calculate the capitalised value of the lease.
>
> To this end, we have obtained a valuation of the unencumbered rent and an open market valuation of the lease interest based on an unencumbered rent from a professional valuer. This valuation indicates an unencumbered rent in the region of €300,000 per annum and a corresponding open market valuation of the lease interest of approximately €2,500,00 [sic]. Consequently in light of this other evidence the "rent formula" or multiplier methods provided for in Regulation 19 Value Added Tax Regulations 1979 are not appropriate."

118. In reply, on the 23rd June, 2003, Mr. Morgan wrote to Mr. Moriarty stating, *inter alia*, that:-

> "The Revenue Commissioners have specifically confirmed that the methodology used by CSID was satisfactory. I understand that it has always been the practice that the lessor can choose whichever method he wishes and this is confirmed in the Revenue Commissioners 'VAT and Property Transaction' booklet published in October 2001 (paragraph 2.2.1) where it states '*The price may be ascertained in any one of the following ways and the taxpayer may adopt whichever valuation s/he wishes'*."

119. Thus, at this stage in June of 2003 it was clear that the dispute centred on the interpretation of the term "other evidence" in Regulation 19, in light of, *inter alia*, the Revenue's published guidance on the interpretation of that provision.

Initial decision by CSID to arbitrate the VAT claim

120. These conflicting interpretations led to a stand-off between the parties and DWW failed to discharge the VAT invoice dated 15th May, 2003. At a directors' meeting of CSID on the 3rd June, 2004, the CEO (Mr. Morgan) was charged with considering the advice of McCann Fitzgerald, the company's lawyers, regarding this issue and reverting with a recommendation, which he did by means of his CEO's Report to the Board. The background to the CEO's Report is that Clause 10 of the Lease provided that any disputes between the parties (save for certain exceptional areas, and VAT was not one of those exceptions) were to be referred to arbitration.

121. The CEO Report is dated 15th September, 2004, and it was considered at the directors' meeting of CSID on the 17th September, 2004. This Report stated inter alia that:-

"Legal Advice CSID received two advices dated 16 March 2004 and 3 June 2004 from McCann Fitzgerald with regard to issuing proceedings. These advices state that the options open to CSID are:

> (a) Issue High Court summary proceedings claiming the €10,254,600 VAT on the lease together with interest and costs. Dublin Waterworld will argue that there is a dispute and seek arbitration. CSID would argue that there is no dispute in that CSID is the party legally entitled to choose which of the methods of calculation of VAT should be adopted and that, as a

matter of law Dublin Waterworld is obliged to accept CSID's decision. McCann Fitzgerald are of the view that an application to stay any proceedings issued is likely to succeed.

(b) Sue through the Commercial Court, which has recently been established to deal with claims in excess of €1m. The advantage of this process is that it is much faster than proceeding through the High Court. Dublin Waterworld, however, at any time after the service of the summary summons, could issue an application to have the proceedings stayed and referred to arbitration. Again McCann FitzGerald are of the view that Dublin Waterworld would succeed in this.

(c) Go straight to arbitration. This would avoid the delay and costs involved in issuing proceedings which might ultimately be stayed. There are costs associated in using the arbitration option but the Board may take the view that this may be the more pragmatic option in the end. The downside is that Dublin Waterworld will see CSID as having backed down by agreeing to what DWW asked for in the first place. This may colour their dealings with CSID across a range of issues but in terms of corporate governance this has to be accepted."

122. Later on in the Report, he adds that the advice of McCann Fitzgerald was in the context of the advice that had been received from PwC regarding the Lease being vatable, that:-

"having acted upon the advice given in relation to VAT, unless there is some clear reason for revisiting that advice and the steps taken on foot of it, it would seem that the options open to CSID now are to either seek to abandon the claim against Dublin Waterworld or to recover the sum from Dublin Waterworld or to seek to negotiate recovery of a lesser sum and accept liability for the unrecovered amount."

123. His report concluded:-

"Options going forward

(a) issue High Court proceedings against Dublin Waterworld

This would be the logical conclusion of the course pursued by CSID to date. However McCann Fitzgerald advise that a High Court judge is likely to stay such proceedings and recommend arbitration.

(b) Issue proceedings through the Commercial Court

The same advice from McCanns applies to this option.

(c) Refer the matter to Arbitration

The issue here is whether the finding of the arbitrator would be binding on the Valuation Office and the Revenue Commissioners.

(d) Seek a revaluation of the Lease

Preliminary indications from the Valuation Office would suggest they are happy with the valuation. A reduced valuation would mean that CSID does not meet the EVT and therefore VAT would not arise. This has implications for CSID going forward.

(e) Negotiate a lower VAT payment with Dublin Waterworld

Even if this were allowable it would leave CSID with the liability for the remainder of the VAT amount.

(f) Abandon the VAT claim against Dublin Waterworld Even if this were a viable option it would mean that the funding that the Department provided to CSID to settle the VAT invoice with the Revenue would remain outstanding. It would also mean that Dublin Waterworld had a VAT credit for almost €10 million which it could reclaim from Revenue."

124. At the directors' meeting of CSID on the 17th September, 2004, the CEO's Report was considered along with the PwC Draft Report issued in June 2003, to which reference has already been made. This June 2003 Report states *inter alia* that:-

"In order to progress matters and without having to conclude on whether the lease predated the finance act 2002 are not, PwC pointed out that the capitalised value of the lease based on the unencumbered rent determined by the valuation office pass the economic value test in any event. The inspector did not dispute the methodology of the calculations […]

The valuation received from the Valuation Office (Appendix 7) shows an unencumbered rent of €3,376,048 and a capitalised value of €35,054,725. As the value of €35,054,725 did not pass the economic value test, we advised that the unencumbered rent figure of €3,376,048 should be used in one of the mathematical valuation methods as permitted by VAT regulations."

125. On the basis of the CEO's Report, the PwC Report (which, it is to be noted, expressly states that the use of the unencumbered rent was "permitted" by the Regulations and that the methodology was not disputed by the Revenue) and the letters of advice from McCann Fitzgerald dated 16th March, 2004, and 3rd June, 2004, all of which were stated to have been provided to the members of Board of Directors, a decision was taken on the 17th September, 2004, by the Board of Directors of CSID to pursue DWW for the VAT by arbitration.

126. In this context, it is relevant to note that the letter of 3rd June, 2004 from McCann Fitzgerald advised CSID that it was arguable that DWW was legally obliged to accept CSID's decision that the Lease was vatable:-

"In this case, it appears possible to argue strongly that there is in fact no dispute in that CSID is the party legally entitled to choose which of the methods of calculation of VAT should be adopted, that it sought the expert views of the Valuation Office in relation to its choice and then obtained the approval of the Revenue Commissioners for its methodology. Thus it appears possible to argue that, as a matter of law, Dublin Waterworld is obliged to accept see CSID's decision in this regard and that there is not any dispute."

127. There was a delay in proceeding with the arbitration because of the intervention of the C&AG by letter dated the 28th September, 2004. In this letter, the C&AG raised with the Department of Arts, Sport and Tourism, the issue of whether it was appropriate that CSID, a company wholly owned by the State, should incur further costs in its efforts to recover VAT, when there was no net benefit to the State in having the Lease subject to VAT. This was because on the one hand, the Revenue would receive VAT on the Lease from DWW, but on the other hand the Revenue would have to repay to CSID the VAT paid by it on the development of the NAC. This intervention by the C&AG led CSID to consider, with its advisers, whether CSID, as a limited company, could act in the interests of the State by effectively writing off the VAT even though this was not in the interests of the company. It received advice from McCann Fitzgerald on the 25th November, 2004, that it should not be an issue for the directors under Irish law if they acted on the instructions of the shareholders to pursue a certain action which was not in the financial interest of the company. This letter concluded with the suggestion that CSID defer the decision as to whether to pursue the VAT claim against DWW and await definitive instructions from the Department of Arts, Sport and Tourism.

The advice to CSID to litigate, rather than arbitrate, the VAT claim

128. During this period, other breaches of the Lease, in tandem with the non-payment of the VAT invoice, were continuing, *inter alia*, the failure by DWW to furnish audited accounts to CSID, the failure to establish a sinking fund combined with the failure to contribute the sum of €127,000 to that fund and the failure to discharge insurance rent of some €88,000. In light of these breaches, a decision had been taken by the Board of Directors of CSID, at the September 2004 meeting at which it had decided to arbitrate the VAT issue, to also pursue 'vigorously' these issues and if necessary seeking the forfeiture of the Lease.

129. By letter dated 14th February, 2005, Mr. Morgan wrote to the Department of Arts, Sport and Tourism in which he summarises the breaches of the Lease by DWW and the non-payment of VAT and in which he seeks direction from the Department. The Department replied to CSID by letter dated 23rd February, 2005 and insofar as relevant, it states:-

> "The Department has obtained the advice of the Office of the Attorney General in this matter and the views of the Office of the Attorney General are in accord with the advice provided to CSID by your legal advisors. Accordingly, the Department considers that it is not acceptable to allow the tenant to renege on the terms of the lease any longer and therefore it is necessary to enforce the rights of CSID as landlord to recover possession of the property. The Minister has instructed that immediate notice to quit should be served on Dublin Waterworld Ltd.
>
> CSID should therefore now exercise its rights in law and under the lease and request its legal advisors to draft the necessary documents and take all steps necessary to recover the premises. Further, in any communication with DWW the issue of unpaid VAT liability should be raised and the advice of the legal advisors sought on including this in any legal action against Dublin Waterworld for breach of its contractual obligations under the Lease."

130. Following the suggestion that legal advice be obtained, a meeting between Mr. Morgan of CSID, McCann Fitzgerald and counsel took place on the 9th March, 2005, in which consideration was given to whether the VAT claim should be included in the proposed proceedings for the forfeiture of the Lease, which it was planned to institute in the Commercial Court. After this meeting, a letter of advice dated 10th March, 2005, was written by McCann Fitzgerald in which it was stated, inter alia, that:-

> "As you heard at the meeting, both Denis McDonald and Hugh O'Keeffe agreed that the dispute which exists in relation to the issue of VAT is likely to be one which would fall within the terms of the arbitration clause in the lease. However, despite this, they felt that it was worth including it in any proceedings which have to be issued following the service of notice of forfeiture on Dublin Waterworld. There were a number of reasons for their view".

131. The reasons given by Senior Counsel and Junior Counsel at that meeting were first that the €10 million in VAT, which was allegedly due, well exceeded the threshold of €1m generally required for entry into the Commercial Court. On this basis the failure of DWW to pay the VAT provided a useful context in counsels' view for the other breaches of covenant by DWW under the Lease which were being pursued in the Commercial Court. Secondly, counsel felt that even if an application were brought by DWW to stay the VAT element of the claim pending arbitration, the remainder of the case in the Commercial Court should not be affected, although it was accepted that there was a risk of costs being awarded against CSID for the application to refer the matter to arbitration. Thirdly, counsel felt that taking the approach they suggested had the advantage that there was a possibility that the Commercial Court would issue directions in relation to the appointment of an arbitrator and the timeframe within which arbitration should be conducted.

132. Following receipt of this advice on the 10th March, 2005, Mr. Morgan of CSID wrote, on that same day, to the Department of Arts, Sport and Tourism in the following terms, and insofar as relevant, he stated:-

> "We met with our legal advisors and Senior and Junior Counsel yesterday, 9 March, to discuss how we will proceed. I am enclosing a copy of a letter from Helen Collins of McCann Fitzgerald, which sets out the procedural steps that have to be followed and also deals with the timing issues. As you will see we discussed the inclusion of the unpaid VAT liability in the proceedings. The considerations that arise are outlined as points one to four in the letter.
>
> Our legal advisors have asked us to confirm that they include a claim for the VAT in any proceedings that have to be issued following service of the forfeiture notice. I have briefed them on the background to the VAT issue and advised that we do not have a formal response from the Department of Finance. However, I have pointed out that there is clear direction in your letter to raise the VAT liability.
>
> I would be glad to have the confirmation requested in the letter from McCann FitzGerald."

133. By letter dated 11th March, 2005, the Department of Arts, Sport and Tourism replied, insofar as relevant, in the following terms:-

> "The Department confirms that a claim for the unpaid VAT on the Lease should be included in any proceedings that have to be issued following service of the forfeiture notice. This was advised by the Office of the Attorney General. I note the comment in the letter from McCann Fitzgerald that this matter may later be referred to arbitration."

Issue of proceedings by CSID in the Commercial Court

134. Shortly after receiving this direction from the Department of Arts, Sport and Tourism, on the 26thApril, 2005, the primary litigation in this case was commenced in the Commercial Court by the issue by CSID of proceedings against DWW seeking forfeiture of the Lease and possession of the NAC on the grounds that DWW had breached the terms of its Lease. The breaches of the Lease

included, *inter alia*, its failure to pay VAT. In light of the arbitration clause in the Lease, DWW sought in the High Court to have the breach of the Lease concerning VAT dealt with by an Arbitrator. On the 3rd June, 2005, Kelly J. (as he then was) ordered that the VAT issue be referred to arbitration (see his judgment at [2005] IEHC 201).

135. The proceedings concerning the other alleged breaches of the Lease continued in the Commercial Court (*Campus Stadium Ireland Development Limited v. Dublin Waterworld Limited* [2006] IEHC 200). As a result of the breach by the defendant of its covenants in the Lease, the High Court granted CSID possession of the NAC and refused DWW relief against forfeiture of the Lease. At page 112 of the High Court judgment, it is stated:-

> "I take the view that the defendant wilfully declined to honour its obligations pursuant to the lease of 30th April, 2003, wherein it knew it would be taking the lease on trust for Mr. Mulcair and that he would be the operator of the Centre, knew it was not going to trade, declined to meet its various financial obligations save the payment of one insurance premium, declined to pay the capital contribution broken down into five annual payments of £100,000 each, declined to provide audited accounts on time declined to setup the sinking fund and declined to enter into discussions for the purpose of agreeing a capital maintenance programme."

Referral of dispute to arbitration on the application of DWW

136. After Kelly J. referred the VAT issue to arbitration, Mr. Dermot O'Brien was agreed by the parties to be the arbitrator of the dispute. It is relevant to note that counsel for DWW (in the later High Court challenge to that arbitration) accepted that Mr. O'Brien was "an expert arbitrator who knows the VAT code inside out" (see *Campus & Stadium Ireland Limited v. Dublin Waterworld Limited* [2005] IEHC 334). After an oral hearing, Mr O'Brien handed down his award on the 1st July, 2005. Mr. O'Brien stated, insofar as relevant, in his award that:-

> "The issues to be resolved are as follows:
>
> • If the valuer has given his opinion as to the market value of the interest to be disposed of, is CSID then entitled to rely on one of the other formula-based methods of capitalising the lease set out in Regulation 19?
>
> • Is CSID entitled to rely on the opinion of its appointed valuer or does it need to question his method of valuation?
>
> In my opinion, the opinion of the Valuation Office that the open market price of the interest being disposed of by CSID is €35 million is not evidence of the open market price. The nature of the property is unique with no close comparison in the State. Therefore, in my opinion, the figure of €35 million is an estimate and does not provide evidence of its open market price.
>
> I believe, therefore, that CSID was quite entitled to use an unencumbered rent figure to calculate the capitalised value of the lease by means of one of the prescribed formulae in Regulation 19."

Failed High Court challenge by DWW to Arbitrator's award

137. On the 14th July, 2005, CSID issued proceedings to enforce the Arbitrator's award, while DWW sought to set aside the award on the basis that the Arbitrator had mis-conducted himself. In this challenge, reported as *Campus Stadium Ireland Development Ltd. v. Dublin Waterworld* Ltd. [2005] IEHC 334, the High Court refused to set aside the Arbitrator's award for the following reason:-

> "In my view it follows that for this Court to interfere with the award of Mr. O'Brien it would have to be satisfied that the award showed on its face an error of law so fundamental that this Court could not stand aside and allow it remain unchallenged or alternatively Mr. O'Brien misconducted himself or the arbitration to such an extent that it was tainted by a substantial injustice or unfairness.
>
> The defendants were at all times aware that CSID was not relying on Mr Cahill's valuation of the open market price being €35 million and was instead going to rely on one of the alternative formula set out in Regulation 19 of the Value Added Tax Act, 1972, which brought about a situation whereby the open market price was valued at a sum in excess of €75 million. There was evidence before the arbitrator that the property was unique with no close comparison in the State and at the hearing before him the defendants queried that valuation of €35 million suggesting a lower figure. Mr. McCarthy, the valuer from Hamilton Osborne King, was cross examined by Mr. O'Keeffe, Barrister at Law, on behalf of the plaintiffs in relation to the position pertaining if there were two valuations and in summing up it is clear that Mr. O'Keeffe indicated that if there was no clear evidence as regards the open market value you go the unencumbered rent formula and that the question for the arbitrator was as to what CSID was entitled to do. He submitted, during the course of the arbitration, to the arbitrator that there was no evidence of the open market value of the lease and that the plaintiffs then proceeded to do what the legislation required of them and what the Revenue Commissioners had advised them to do and on the basis of the evidence adduced before him and clearly taking into account the submissions of counsel for the plaintiff the arbitrator arrived at a decision whereby in his view because of the unique nature of the property with no close comparison in the state he did not consider Mr. Cahill's opinion respect of the figure of €35 million to be evidence of the property's open market price. He took the view that the opinion of Mr. Cahill was an estimate of the open market price of the property.
>
> I come to the conclusion that on the evidence available, having regard to the submissions as made by Mr. O'Keeffe, during the course of the arbitration the decision arrived at was available to the arbitrator and was one of the possible conclusions that he could have arrived at in respect of the issues before him. I accept that this brought about a situation whereby the arbitrator did not have to decide the central issue which he posed for himself as regards the situation of Mr. Cahill 'having given his opinion as to the market value of the interest being disposed of were CSID then entitled to rely on one of the other formula based methods of capitalising the lease set out in Regulation 19' but in the circumstances of the decision the arbitrator came to the conclusion that there was not evidence of the property's open market price before him and thus it was not necessary for him in the circumstances to answer the very issue that he proposed for himself."

138. It is clear therefore that the High Court held that there was not a fundamental error of law and it decided that the Arbitrator had not misconducted himself in concluding that the Lease was subject to VAT. On this basis, the High Court refused to set aside the Arbitrator's decision. While the High Court accepted that the Arbitrator did not answer the question of interpretation he had asked himself, as to whether CSID had three choices under Regulation 19, the High Court nonetheless held that the conclusion by the Arbitrator that the Lease was subject to VAT was a "decision that was available to the Arbitrator" and thus a decision that the Arbitrator was entitled to make and should not therefore be set aside.

High Court hearing on the forfeiture of the Lease

139. In the context of that High Court decision regarding the Arbitrator's decision, it is also relevant at this juncture to refer again to the separate High Court decision of 21st March, 2006, regarding the forfeiture of the Lease, reported as *Campus Stadium Ireland Developments Limited v. Dublin Waterworld Limited* [2006] IEHC 200. In that case, CSID sought possession of the NAC because of the several breaches of the terms of the Lease by DWW, which was the defendant in that case. At page 104 et seq, the High Court states:-

> "In these circumstances, I find no justifiable cause for the defendant to decline to meet its financial obligations pursuant to the terms and covenants as set out in the lease. Further, I take the view that the defendant and Mr Moriarty took a conscious decision not to meet these financial obligations, save in respect of one insurance payment, and that accordingly the decision not to honour the financial obligations as imposed in the lease was wilful. I take into account however that the financial obligations (apart from the VAT issue which is ongoing) under the lease have now been regulated and complied with save for the payment of some interest that may be due arising on the late payment of the sums that were overdue. […] I regard as particularly significant the fact that the defendant was at all times aware from the forfeiture notice that the plaintiff believed that the Centre was being operated by Dublin Waterworld Management Limited and/or that the plaintiff had assigned the premises to that company, when in fact it knew that it was Mr Mulcair who was the owner/operator, with the defendant simply holding the lease on trust for him. In the replies to particulars dated 24 June, 2005, it is specifically maintained that the defendant operates and manages the premises but avails of the services of Dublin Waterworld Management limited in relation to certain management and supervisory functions at the premises. Further, it is stated that Dublin Waterworld Management Limited has been carrying out certain management and supervisory functions at the premises on behalf of the defendant since prior to the date of the granting of the lease. In my view this was simply not so. The defendant had ceased to trade and held the lease on trust for Mr Mulcair and Dublin Waterworld Management Limited did not provide any services for or on behalf of the defendant. There is no reference in the replies to particulars or in the defence and counterclaim to the existence of Mr Mulcair. Further, it was not until the 22nd July, 2005, that the five signed agreements were made known and provided to the plaintiff herein. I take the view that the conduct of the defendant in this regard was wilful and in breach of the terms of the lease.[…]I have given careful consideration to the defendant's counter claim for relief against forfeiture which would result in my declining to grant an order for possession against the defendant on terms as outlined. I am conscious of the enormity of a decision to decline relief against forfeiture and to grant an order for possession and the undoubted serious financial consequences that will follow the loss by the defendant and associated persons of the lease of the Centre.[…] I have particular regard to the evidence of Mr Morgan which I accept to the effect that trust has broken down between the plaintiff and the defendant because of the events that occurred. While his personal view may carry little weight it would in my view be a reasonable attitude to be adopted by any landlord faced with a similar set of circumstances as pertain in this case. I accept and concur with his view that the arrangements that were put in place were done so behind the plaintiff's back and do not represent what the plaintiff signed up to in the lease.[…] I further note and accept as being reasonable Mr Morgan's view that none of the explanations as offered by Mr Moriarty give any comfort if this Court was to grant relief against forfeiture that the plaintiff would not be back before the Court in the future with the same problems."

140. Although acutely conscious of the enormity of the decision to refuse relief against forfeiture, it is relevant to note that the High Court nonetheless felt that DWW's actions in breaching the Lease justified such refusal. Ironically, the High Court believed that if it refused to grant relief against forfeiture it would eliminate the risk of Mr. Moriarty/DWW being back before the High Court regarding the Lease. Unfortunately this has turned out not to be the case, since the proceedings before this Court prove that the refusal to grant relief against forfeiture did not in fact lead to an end to the dispute between Mr. Moriarty/DWW and CSID which has now continued for some 15 years, albeit that the current proceedings relate to the decision by CSID to institute the previous proceedings rather than the operation of the Lease itself.

High Court's comments in forfeiture case regarding VAT issue

141. This case is also relevant because the High Court referred to the challenge to the Arbitrator's decision regarding the Lease being vatable, which it had heard six months previously, in the following terms at page 90 of the judgment:-

> "The issue as to the non-payment of VAT has been viewed by me as set out in this judgement as being a *bona fide* dispute on the defendant's behalf and I have clearly indicated that in my view the defendant had an arguable case but not one that was ultimately successful."

142. It must be borne in mind that this comment is being made in a forfeiture case which did not deal with the VAT issue, since a stay was in place on the High Court's previous judgment regarding the Arbitrator's award, pending the Supreme Court appeal. Nonetheless, it is of some relevance that the High Court, which had only six months previously decided that the Arbitrator had not committed a fundamental error of law in deciding that the Lease was vatable, was in these forfeiture proceedings, while acknowledging that DWW had an arguable point that the Lease was not vatable, stating that the dispute between the parties was a "*bona fide* dispute". This is because for a dispute to be bona fide, it seems to be implicit that both parties have an arguable case. In this context it is to be noted that in *McSorely* a critical factor in Murphy J.'s finding that the Bank had reasonable or probable cause was the fact that it had received legal advice that it had an "arguable case".

Supreme Court reversal of High Court decision

143. A notice of appeal of the High Court decision was filed by DWW on the 16th December, 2005, and the unanimous judgment of the Supreme Court was delivered by Hardiman J. on 30th April, 2010 (*Campus and Stadium Ireland Development Limited v. Dublin Waterworld Limited* [2010] IESC 25). The Supreme Court reversed the decision of the High Court and set aside the Arbitrator's award. At page 247 of his judgment, Hardiman J. states:-

> "I am further of the view that the arbitrator gravely misled himself on the law in determining that the plaintiff was, entirely at its own option, entitled to rely on the formula. Regulation 19, insofar as relevant, has been quoted above. One thing that is clear from it, and from the guidance publications issued by the Revenue Commissioners, is that one may establish the appropriate value by the evidence of a qualified valuer. But neither the arbitrator nor the revenue in issuing their guidance paid sufficient attention to the presence, in reg. 19 and specifically in introducing the two *formulae* of the phrase "in the absence of other evidence of the amount of that price."
>
> Quite simply, there was not an absence of other evidence in this case. Furthermore, it is clear from the Revenue document of October, 2001 itself that it does not purport to amend the Regulations of 1979, which have the force of law.

[…]

In my view, the errors identified above which afflicted the arbitration are of a nature "so fundamental that the courts cannot stand aside and allow [them] to remain unchallenged."

ANALYSIS OF THE THREE DECISIONS IN THE PRIMARY LITIGATION

144. Having set out the details of the award of the Arbitrator, the judgment of the High Court and the judgment of the Supreme Court regarding the question of whether the Lease was vatable, and whether the Arbitrator was entitled to hold that the Lease was vatable, the next step is to consider the effect of these three decisions, that make up the primary litigation, on the claim by DWW that CSID maliciously abused the process of the court by pursuing this primary litigation.

The results in the arbitration and the two court cases

145. Of the three decisions in the primary litigation, the first two decisions (by the Arbitrator and the High Court) were in support of CSID's claim that the Lease was vatable, while the third decision (by the Supreme Court) rejected CSID's claim that the Lease was vatable. Despite the fact that two decisions in the primary litigation favoured CSID, at the very core of DWW's claim before this Court in this, the secondary litigation, is the claim by DWW that CSID should never have pursued the primary litigation in the first place.

146. As a preliminary point, this Court is not aware of any claims for malicious abuse of court process ever having been taken, let alone having been successful, where the litigant actually won the litigation at first instance, *albeit* that he may have lost on appeal. It seems clear that where a litigant wins at first instance, and indeed wins on a challenge to that first instance decision, before ultimately losing on his appeal to that challenge, such a case presents "additional difficulties" (in the words of Clarke J.) for the Court in finding that the litigant never had a reasonable or probable cause for bringing the proceedings, vis-à-vis a case where the litigant has lost at first instance and either did not appeal or also lost on appeal. The more fundamental question is can a litigant such as CSID, which wins before two dispute resolution bodies, but loses before the third and final dispute resolution body, be found to have wrongfully instituted the proceedings which it won on two occasions, but lost on the third? Before considering this issue, it is first necessary to consider whether the two decisions in the primary litigation in favour of CSID should be disregarded because of wrongdoing, such as a fraud on the court or arbitrator.

Was there any suggestion of wrongful conduct by the Arbitrator or the High Court?

147. If it were the case that the reason CSID had won before the first two dispute resolution bodies was because of fraud on, or by, the arbitrator or, on, or by the court, then clearly this would eliminate the apparent difficulty with this Court finding CSID guilty of malicious abuse of court process, despite its victory at first instance and despites its victory in the challenge to the first instance decision.

148. However, in the evidence which was produced to this Court by DWW, there was no suggestion that the reason that the Arbitrator or the High Court found against DWW was because of wrongful conduct such as fraud. The most that is suggested by DWW is that both the Arbitrator and the High Court were wrong in the conclusions that they reached and on this basis it seems to be accepted by DWW that the Arbitrator, without malice, collusion or other wrongdoing, made a mistake in finding that the Lease was vatable. Similarly it seems to be accepted by DWW that the High Court made an error of law in finding that the decision that the Lease was vatable was one which the Arbitrator was entitled to reach.

149. It follows that this Court cannot, in its consideration of whether there was reasonable or probable cause for CSID to issue and maintain the proceedings in this case, ignore the fact that the Arbitrator and the High Court found for CSID in its claim that the Lease was vatable, since neither decision is tainted in any way. In considering the significance to attach to the fact that CSID won before the Arbitrator and won before the High Court, it is necessary to have regard to the nature of the decisions of the Arbitrator and the High Court in turn.

The nature and effect of the first finding for CSID- the Arbitration

150. The proceedings regarding VAT due on the Lease in this case were instituted by CSID in the Commercial Court. It was only as a result of the application by DWW to have the proceedings stayed and the VAT issue referred to arbitration, that this matter was determined by an Arbitrator. The Arbitrator who dealt with the matter was Mr. Dermot O'Brien and his appointment as the arbitrator was agreed between DWW and CSID. Evidence was produced to the Court that Mr. O'Brien was a former President of the Irish Taxation Institute and a leading VAT practitioner.

Significance that first instance decision was by an arbitrator rather than a court

151. One of the rationales for parties in dispute to choose arbitration, rather than litigation, to resolve their disputes, particularly in disputes about technical areas of law (such as VAT) and technical areas of commerce (such as building contracts), is that it is preferable that the person making the decision has technical expertise in the subject matter of the dispute. Such an approach is likely to avoid a situation where a non-specialist judge might make an incorrect decision because of his misunderstanding of the technical concepts at stake. This is a valid and understandable reason for the popularity of arbitration in Ireland and as noted in Dowling-Hussey and Dunne, *Arbitration Law*, (2nd Ed., 2014, Round Hall), at para. 1-28:-

> "The efficacy of arbitration as a method of dispute resolution will depend, in the first instance, upon the qualifications and suitability of the arbitral tribunal to act as decision-maker. This is especially so where the subject matter of the dispute is of a complex or technical nature. Many complex contracts contain an arbitration clause precisely because arbitration, unlike the litigation process, offers the parties the opportunity to have the dispute determined by a person or persons with experience of the nature, practices and idiosyncrasies of the subject matter of the dispute in question."

152. It is important to note that the decision to agree that a particular dispute will be subject to arbitration is invariably a decision which is voluntarily made by both parties to the dispute, either when signing their commercial agreement or after the dispute has arisen. However, once the parties have chosen voluntarily to have their dispute resolved by an arbitrator, and usually this will be an arbitrator that both parties regard as being sufficiently expert to be entrusted with the technical decision, the law supports and indeed encourages this voluntary choice by granting the arbitration process a greater degree of deference than a decision of a court at first instance. This deference is illustrated by the words of McCarthy J. in *Keenan v. Shield Insurance Company* [1988] I.R. 89 at 96, that it "ill becomes the courts to show readiness to interfere in such a process".

153. This greater degree of deference is illustrated by the fact that the decision of an arbitrator, unlike a decision of a first instance court, is not subject to an appeal on the merits of the decision. As is clear from the High Court and Supreme Court decisions in the primary litigation in this case, a decision of an arbitrator cannot be over-turned simply because the court hearing the appeal would have reached a different decision. Rather, as noted by the High Court in the primary litigation, which was dealing with the position prior to the enactment of the Arbitration Act, 2010:-

> "this court has no jurisdiction to set aside an award of an arbitrator in the absence of a finding that the arbitrator misconducted himself or the proceedings pursuant to s 38(1) of the Arbitration Act 1954 as amended".

154. It is clear from that case and the Supreme Court case in the primary litigation, that misconduct of an arbitrator in this context, includes the commission by the arbitrator of a fundamental error of law or reaching a decision which was not open to the arbitrator to reach.

155. It is this Court's view that it would be contrary to the deference which the courts grant to arbitration, if this Court were not to treat the decision of the Arbitrator in this case, as having the same status as a decision of a court, when assessing the relevance of that decision upon the subsequent claim that the proceedings should not have been instituted. Thus, in assessing whether CSID had reasonable or probable cause for claiming that the Lease was vatable, this Court is of the view that it must have the same deference for the first instance decision obtained by CSID from the Arbitrator that the Lease was vatable, as if it was a first instance court decision. This is particularly so in this case, since the reason that the VAT dispute was not determined by the courts at first instance, was because DWW refused to allow the matter to be dealt with by the Commercial Court and it sought (successfully) to have the VAT dispute referred to arbitration. It is also relevant that DWW choose the person who would make that the decision on the VAT dispute, in the sense that DWW agreed with CSID that Mr. Dermot O'Brien, a recognised expert in VAT, would determine the dispute. In all these circumstances, this Court does not believe that just because the decision at first instance was that of an arbitrator, rather than a court, it has lesser significance to the question of whether the party that took those proceedings had reasonable or probable cause for doing so. Next, consideration will be given to the substance and effect of that first instance decision.

Effect of decision in favour of CSID on whether CSID had reasonable cause

156. It is this Court's view that the fact that a court, or an arbitrator, found that the Lease was vatable must mean that there was reasonable or probable cause for a claim that the Lease was vatable. To put the matter another way, the very fact that on the 1st July, 2005, an independent and experienced Arbitrator, with particular expertise in VAT, found that the Lease was vatable proves to this Court that there must always have been a reasonable chance of such a finding from the moment when CSID decided to issue the proceedings on the 26th April, 2005. This is because the very winning of the primary litigation at first instance, whether before a court or, as in this case, before an arbitrator, must prove that there was always a reasonable chance that the case would be won, and so establishes that there was a reasonable or probable cause for the proceedings.

157. In this Court's view, if a finding by a court or arbitrator at first instance in favour of a litigant is not evidence that, at that time, the litigant had reasonable or probable cause to take that action (even if that decision is reversed on appeal), what better evidence is there that a litigant had reasonable or probable cause, at that time, to take that action? Particularly relevant in this context is the statement of Murphy J. in *McSorely* at page 10 of his judgment that:-

> "Whilst I would accept that the Bank would have had difficulty in persuading the Court that this was a proper case in which to exercise its discretion to grant relief against forfeiture, it is by no means impossible that it would have done so."

158. In this case, the fact that it was not an impossible claim, and thus that CSID had reasonable or probable cause, has been proven by the very fact that it was successful at first instance, notwithstanding that this first instance decision was eventually set aside by the Supreme Court.

159. It is also relevant to note that if DWW had not challenged the Arbitrator's decision first in the High Court and then before the Supreme Court, it is highly unlikely that there would be any question of CSID being accused of the tort of maliciously abusing the process of the court. Rather, it is likely that it would be accepted that the very fact that the first instance decision was in favour of CSID would disprove any claim that CSID did not have reasonable or probable cause for the proceedings, since in such an event the litigation/arbitration would not have been lost in its entirety, which as noted by Finlay C.J in the case of *Murphy v. Kirwan* is a pre-condition of the tort of abuse of court process.

Effect of the Supreme Court reversal of the first instance decision

160. However, as DWW did challenge the first instance decision successfully, albeit on the second attempt before the Supreme Court, it means that DWW's claim is founded on the notion that the Supreme Court finding, that it was not open to the Arbitrator to find that the Lease was vatable, means that the first instance decision of the Arbitrator is to be disregarded for the purposes of determining whether CSID had reasonable or probable cause. Implicit therefore in DWW's claim is the notion that because the Supreme Court found that the Lease was never vatable, CSID should never have instituted the proceedings in April 2005 irrespective of the fact that an Arbitrator (and the High Court) found in its favour.

161. This Court does not agree with the implicit notion in DWW's claim that in determining whether a litigant has reasonable or probable cause, that a first instance decision, which has been reversed on appeal, should be disregarded. Rather, it is this Court's view that a determinative factor in deciding whether a litigant has reasonable or probable cause will, in most cases, be the existence of a first instance decision in favour of the litigant. Indeed, it is difficult for this Court to conceive of a better factor for determining whether a litigant had reasonable or probable cause to litigate than a first instance decision in his favour. While a first instance decision may be reversed on appeal, there will still have been at least one decision in favour of the litigant. In those circumstances, this Court finds it difficult to conclude that where an arbitrator or a court at first instance finds for a litigant, even if reversed on appeal, it could be held that nonetheless the litigant did not have reasonable or probable cause for that arbitration/litigation. This is because reasonable or probable cause does not mean that the litigant is guaranteed to win the litigation. Nor does it mean that if he wins at first instance that he must also win on appeal. Rather it means that there was a reasonable chance that he would be successful in his proceedings. If that litigant wins at first instance, but loses on appeal, it is this Court's view that this is evidence of the fact that he had a reasonable chance of success when he instituted the proceedings and the loss on appeal does not change that fact.

162. For this reason, this Court finds that the Arbitrator's decision that the Lease was vatable is evidence in this case that CSID had reasonable and probable cause for instituting the proceedings on the 26th April, 2005.

Was it malicious abuse of court process for CSID to seek to enforce Arbitrator's award ?

163. The logical difficulty which this Court sees with DWW's claim that CSID was guilty of malicious abuse of court process (even though it won at first instance) is at its most obvious when one considers CSID's issue of proceedings on the 14th July, 2005, to enforce the Arbitrator's award. In the particular circumstances of this case, the Arbitrator's award was that the Lease was vatable and therefore that DWW owed CSID €10,254,600. This award was handed down on the 1st July, 2005. On the 14th July, 2005, CSID issued proceedings to enforce that Arbitrator's award.

164. It has been claimed on the part of DWW that CSID was guilty of malicious abuse of court process in instituting the proceedings on the 26th April, 2005, and continued to be guilty of this tort in light of its decision to maintain those proceedings, right up to the Supreme Court judgment in April, 2010. The Statement of Claim issued by DWW in these proceedings maintains that the proceedings, by CSID to enforce the arbitration award and the defence by CSID to the High Court challenge by DWW to that award, amounts to a malicious abuse of court process. It is therefore clear that DWW's claim before this Court is that CSID should not have sought in July 2005 to enforce the Arbitrator's award and that CSID had no reasonable or probable cause for taking this enforcement action since it knew, or should have known, that the Lease was not vatable. This is in spite of the fact that CSID had a first instance decision in its favour. In essence therefore, DWW's claim is that CSID should have accepted in July 2005 DWW's claim that the Arbitrator got it wrong and that CSID was not in fact owed the €10,254,600 and that there was no basis for it to issue proceedings on the 14th July, 2005, to enforce the Arbitrator's award.

165. For DWW to succeed in this action therefore, this Court would have to conclude that CSID had no reasonable or probable cause to sue DWW for the €10,254,600 which had been awarded to it by an experienced VAT specialist Arbitrator, whose appointment was mutually agreed by DWW and CSID. Yet, it seems clear to this Court that on the 14th July, 2005, CSID had, not only reasonable and probable cause to issue the proceedings to enforce the Arbitrator's award, but *very strong cause* to issue those proceedings. This is because CSID had a first instance decision of an Arbitrator, which in many ways is as legally binding and as enforceable as any court decision, to the effect that the sum was due from DWW. To find for DWW, this Court would therefore be required to conclude that CSID should have ignored the first instance decision of the Arbitrator and should have treated it as incorrect (some five years before the Supreme Court decision to that effect). This Court can see no basis for attributing this type of 20:20 foresight to litigants. For this reason, as well as its previous finding that CSID did have reasonable or probable cause to issue the proceedings on the 26th April, 2005 which ended up in arbitration, this Court also finds that CSID had reasonable or probable cause to issue the proceedings on the 14th July, 2005, for the enforcement of the Arbitrator's award and to defend the challenge by DWW to that award.

166. Next, this Court will consider the effect on the malicious abuse of process proceedings against CSID, of the second finding in favour of CSID, namely by the High Court.

The nature and effect of the second finding for CSID – High Court challenge

167. As a result of the considerable deference that is given to decisions of arbitrators when challenged, referred to above, a High Court challenge to an arbitrator's decision is very limited in its scope, since it is not a full re-hearing of the merits of the claim that was before the arbitrator. In this case therefore, the decision of the High Court not to set aside the Arbitrator's decision is not a decision by the High Court that the first instance decision of the Arbitrator, that the Lease was vatable, was correct. Thus, in considering what significance to attach to that High Court decision (in the context of claim of malicious abuse of court process by DWW), this Court is cognisant of the fact that the High Court was restricted to considering whether the Arbitrator's award showed on its face an error of law so fundamental for it to be set aside. The High Court did not find that the Lease was vatable. Rather it found that the Arbitrator had not made an error of law so fundamental as to justify the setting aside of the award that the Lease was vatable, and that it was open to the Arbitrator to make a decision that the Lease was vatable.

Was there reasonable cause since the High Court upheld CSID's claim?

168. Notwithstanding the limited nature of the challenge to the Arbitrator's award that the Lease was vatable, it is nonetheless significant, in a claim of malicious abuse of court process, that the High Court, on the 26th September, 2005, while not holding that the Lease was vatable, did hold that the Arbitrator had not made a fundamental error of law in holding that the Lease was vatable and that the decision arrived at by the Arbitrator, that the Lease was vatable, was one which he was entitled to make.

169. This is significant because what this Court can say with certainty is that on the date of its judgment on the 26th September, 2005, it was not obvious to the High Court that the Lease was not vatable nor was it obvious to the High Court that the Arbitrator had made a fundamental error of interpretation of Regulation 19. In particular, the incorrect interpretation of the phrase "in the absence of other evidence" in Regulation 19 and the non-binding nature of the Revenue Guide were not so obvious to the High Court, or such fundamental errors in its view, as to lead it to set aside the finding that the Lease was vatable.

170. If it had been obvious to the High Court (as it was to the Supreme Court) that the Arbitrator had made a fundamental error of interpretation of Regulation 19, then this would have led the High Court to set aside the Arbitrator's award on the grounds of fundamental error, as the Supreme Court did on the same facts and the same law in 2010.

171. Thus on the 26th September, 2005, the High Court did not regard the subsequent Supreme Court interpretation of Regulation 19 as being so obvious, or any contrary interpretation to the Supreme Court's as being so fundamental error of law, so as to justify the Arbitrator's award being set aside. Instead, the High Court determined that it was open to the Arbitrator to find that the Lease was vatable. In this Court's view, it would be inconsistent with such a finding (and even taking account of the fact that the Supreme Court reversed this finding) for this Court to now conclude that CSID should have known that there was no reasonable chance of a finding that the Lease was vatable. In this Court's view, if a High Court judge makes a finding that it was open to an Arbitrator to decide that the Lease was vatable (even if that judge is reversed on appeal), this must be evidence that there was a reasonable chance of a court making such a finding. On this basis there was reasonable or probable cause for such a claim to be brought by the litigant in the first place and so this Court concludes that the decision of the High Court on the 26th September, 2005 supports its conclusion that there was reasonable or probable cause for the proceedings issued by CSID in April 2005 and July 2005.

The nature and effect of the one finding for DWW – the Supreme Court decision

172. Since both the Arbitrator's award and the decision of the High Court were overturned by the Supreme Court, and since DWW places a considerable reliance on that Supreme Court decision, it is next necessary to consider the nature and effect of that decision on these proceedings for the malicious abuse of court process.

173. The Supreme Court had to consider the exact same issue as the High Court, namely whether the Arbitrator's finding that the Lease was vatable involved misconduct on the part of the Arbitrator or a fundamental error of law by him, so as to justify the setting aside of that award. There was no suggestion in the hearing before this Court that either the facts or the law before the High Court

and the Supreme Court were other than the same. Thus, the Supreme Court's task was not to rehear the claim that the Lease was vatable on the merits, but rather to determine whether the Arbitrator had misconducted himself or made a fundamental error of law, just as the High Court had done. Yet very different conclusions were reached by these two courts when deciding whether to set aside the Arbitrator's decision that the Lease was vatable.

174. The Supreme Court held that there was an error of law, and in particular, that the Arbitrator did not pay sufficient attention to the phrase "in the absence of other evidence" in his interpretation of Regulation 19, and that there was an error of law in his failure to realise that the October 2001 Revenue Booklet did not amend Regulation 19 since that Booklet did not have the force of law. It was held, *inter alia*, by the Supreme Court that these errors were so fundamental as to justify the setting aside of the award. While it is clear that the Supreme Court regarded these two errors of law as so fundamental as to justify the setting aside of the Arbitrator's award, it is equally clear that the High Court did not regard these errors of law, as either obvious, or if obvious, as so fundamental as to justify the setting aside of the award.

Opposite conclusions by two courts on the same facts and law

175. This fact alone in the primary litigation, which highlights the unpredictability of litigation outcomes, encapsulates the difficulty with a claim for malicious abuse of process where a litigant has won at some stage in the primary litigation, *albeit* that he has ultimately lost. This difficulty can be summarised as follows: if two courts can reach polar opposite conclusions, how can a third court, namely this Court, criticise a litigant (in the sense of finding him guilty of malicious abuse of court process) for failing to exhibit the wisdom of one court (the appeal court), but not the wisdom of the other court (the court of first instance)?

176. This Court is not suggesting that the Supreme Court decision is other than the correct decision. Rather this Court is concluding that the differing outcomes before the two courts (and indeed the decision of the Arbitrator at first instance) illustrate that there was a reasonable chance that a finding that the Lease was vatable would be made and so that there was reasonable and probable cause for the proceedings by CSID.

177. In this Court's view therefore, the very fact that the Supreme Court reversed the High Court and found that the Lease was never vatable, is not, as implied in DWW's prosecution of this claim against CSID, evidence that CSID is guilty of a tort by issuing the proceedings claiming the Lease was vatable in the first place. While the Supreme Court decision does indeed prove that the Lease was never vatable, it is also evidence of the unpredictability of litigation. It demonstrates that what is an obvious or fundamental error for one court, will not be an obvious or fundamental error for another court.

Was it abuse of court process for CSID to contest the appeal to the Supreme Court?

178. A conceptual difficulty which this Court has with the claim of abuse of court process in this case is the allegation in DWW's Statement of Claim against CSID that, just as in April 2005 it should not have instituted the proceedings, and in July 2005 it should not have sought to enforce the Arbitrator's award, nor contested the High Court challenge to that award, so too in September 2005 it should not have contested the appeal, to the Supreme Court, of the High Court decision in its favour.

179. It is implicit in this claim that CSID knew or should have known that the Lease was vatable, even though the High Court had refused to set aside the Arbitrator's decision that the Lease was vatable, and that CSID knew or should have known that the High Court decision was incorrect (some five years before the Supreme Court decision to that effect) and accordingly CSID should have refused to contest the appeal to the Supreme Court and instead conceded that the Lease was in fact vatable.

180. This Court concludes that it is illogical to suggest that in September 2005 CSID should have known that its Lease was not vatable when, not only had it a first instance decision that the Lease was vatable, but it also had a refusal by the High Court to set aside that decision. Accordingly it is this Court's view that in September 2005, not only had CSID reasonable or probable cause for contesting the appeal to the Supreme Court, but it *had strong cause*, since it had a second decision in its favour (albeit that the decision was not on the merits of the claim that the Lease was vatable).

181. Accordingly, this Court cannot find, as urged on it by DWW, that CSID did not have reasonable and probable cause to maintain the primary litigation in the sense of contesting the appeal to the Supreme Court up until 30th April, 2010.

What if DWW had not appealed the High Court decision to the Supreme Court?

182. Since this malicious abuse of court process claim involves proceedings where there was a reversal by the Supreme Court of the High Court's decision, it is relevant to consider the position if DWW had not appealed the judgment of High Court judgment to the Supreme Court. If DWW had instituted a claim for maliciously abusing the process of the court, after it had lost the High Court case, it is clear that it would not have had a chance of convincing any court that it had a claim for malicious abuse of court process against a litigant who had won his case in the High Court (and of course before the Arbitrator). This further highlights the conceptual difficulty that this Court has with a claim for malicious abuse of court process where the accused litigant has won his case in the High Court (as well as before the Arbitrator), as occurred in this case. If a claim of malicious abuse of court process was not open to DWW in 2005 if it had not appealed the High Court judgment, it begs the question what has changed that makes the claim sustainable now, apart of course from the fact that it is necessary for the litigant to have lost the primary litigation (which of course only occurred as a result of the Supreme Court decision in 2010)? In this Court's view, nothing else has changed to make the malicious abuse of court process case more sustainable after the Supreme Court judgment than it was *before* that judgment, since after the Supreme Court judgment, there is still on the court record a High Court decision in favour of CSID (and there is also on the record an Arbitrator's award in favour of CSID).

WHAT IF THERE HAD BEEN NO DECISION IN FAVOUR OF CSID?

183. It remains to be observed that this case has been decided by this Court on the grounds that CSID had reasonable or probable cause for the primary litigation, as evidenced by the fact that it obtained an Arbitrator's decision and a High Court decision in its favour. For this reason, this Court has not had to determine whether CSID had reasonable or probable cause for the proceedings, based on the advice that CSID received at the relevant time from its professional advisers, primarily PwC, but also McCann Fitzgerald and Counsel.

184. For the sake of completeness, this Court would add that if it had to determine that issue, it would conclude that when viewed in the round (i.e. not just the three emails which have been the focus of the plaintiff's case), the advice received by CSID was to the effect that while the recommended approach was not perfect, in the sense that it could not be guaranteed that the interpretation taken by PwC would be upheld by a court, it was nonetheless PwC's professional advice that the Lease was vatable. In addition, it

received advice from McCann Fitzgerald that it was arguable that DWW was legally obliged to accept CSID's decision that the Lease was vatable and advice from Counsel that the claim for VAT should be included in the proceedings before the Commercial Court for the forfeiture of the Lease. While it is true that Mr. O'Reilly, a relatively junior employee in PwC referred in an email to reliance being placed on "extra-statutory practice" which email was sent to Ms. Magahy and Mr. Conway, it is also the case that Mr. Fay, the partner in the firm who was advising on VAT, stated in another email to Ms. Magahy and Mr. Conway in the most unequivocal terms that "there is no basis for KPMG/Dublin *Waterworld* to contend that the lease is not subject to VAT." This, it should be noted, is a long way from a situation in which a client proceeds with his litigation, even though he is told in unequivocal terms that his claim "would not succeed" as occurred in *Dorene v. Suedes*. Therefore, if the Court had to decide the case on this basis, which it does not have to, it would conclude that CSID had reasonable or probable cause for issuing the proceedings in this case.

Conclusion

185. Undoubtedly, like many litigants who have been pursued unsuccessfully through the courts, DWW feels aggrieved by the waste of management time, loss of opportunity and the reputational damage caused by it being implicated in litigation, for which DWW's lawyers (and the lawyers for CSID) get fully paid, but for which DWW receives no financial payment or compensation for loss of management time, even though it wins the case.

186. However, these are grievances shared by all litigants. Such grievances are the primary reason why every person involved in a dispute should have as his or her primary focus the avoidance of litigation where at all possible. If one has to be involved in litigation, it is preferable that it is dealt with as quickly as possible. In this regard, it is difficult for this Court to avoid the conclusion that the real focus of the disappointment, which Mr. Moriarty appears to have, is in reality directed at the Arbitrator and the High Court for making, what he believes (with the benefit of the Supreme Court decision), to be blatantly obvious errors, rather than CSID for instituting the proceedings. This is because if the Arbitrator and the High Court had made the decision which Mr. Moriarty feels was obvious, there would have been no loss caused to DWW. However, it is clear that DWW has no cause of action against an Arbitrator and the High Court for making decisions which were reversed on appeal, and so while Mr. Moriarty's disappointment might be directed at the Arbitrator and the High Court, he can have no cause of action against them

187. The House of Lords case of *Jain v. Trent Strategic Health Authority* [2009] 1 AC 853 has particular resonance for DWW's claim in this Court's view. In that case, the plaintiff and his wife had their nursing home business destroyed by an ex parte court application by the predecessor of the defendant Health Authority for the cancellation of the registration of their nursing home. The cancellation was granted by the magistrate on the basis of a slipshod investigation and inaccurate information. The plaintiffs' only recourse was to appeal to a registered homes tribunal, which they did but it took some four months for the appeal to be heard, by which time their business had been destroyed. The plaintiffs brought an action in tort against the defendant for financial loss as a result of the authority's alleged breach of a duty of care. Although this was not a malicious abuse of court process case, the comments of Lord Carswell and Lord Neuberger are relevant nonetheless to the position of DWW in its unsuccessful hearing before both the Arbitrator and before the High Court. At page 872 Lord Carswell states:-

> "Certainly on the facts which came out before the tribunal in the present case, there was no need whatever to make an immediate order. No harm would have been done to the interests of the patients if the magistrate had adjourned the matter for such time as was required to allow the claimants to advance any explanations they might wish to put before him and make representations why it was not necessary to make an order to protect the patients against serious risk to their life, health or well-being. If this simple step had been taken, there might have been a wholly different result.
>
> […]
>
> Unhappily, improvements in procedure adopted in the future and changes in the law will not help the claimants. They will understandably feel aggrieved by the extent of the power entrusted to officials and the extent of its misuse in their case, and I can only join in the expressions of sympathy which have been made. I am impelled, however, to the conclusion reached by Lord Scott, and from the same reasons, that the common law cannot give them a remedy. I therefore have to agree with regret that the appeal must be dismissed."
>
> Similarly Lord Neuberger at page 873 states:-
>
> "Had the district judge in this case been aware of the need to approach the without notice application of 30 September 1998 in this way (or had he been made aware of the need for this approach by the representative of the authority, as he should have been), it seems very unlikely that claimants would have suffered very serious financial loss, or the justifiable sense of outrage, which they must have suffered. As it is, however, despite the regret I feel at the decision, I too would dismiss this appeal."

188. Similarly in this case, it is regrettable that the Arbitrator did not interpret Regulation 19 literally and find that the Lease was not vatable, in which case DWW would not have suffered the financial loss which it has suffered. However, it is this Court's view that just as the plaintiffs in *Jain* did not have a remedy at common law for the error of the magistrate, so too in the case before this Court, the common law does not give DWW a remedy against CSID for the error of the Arbitrator and the High Court.

189. While Mr. Moriarty's disappointment at being unsuccessfully sued might more justifiably be directed at the Arbitrator, he can have no cause of action against an Arbitrator who is acting *bona fide* as Mr. O'Brien clearly was. For Mr. Moriarty to be successful, his 'legal' disappointment has to be focussed on a different target, in this case CSID. In truth however, the real cause of the majority of its loss, is not the decision of the Arbitrator in June 2005, that went against DWW, nor the decision of the High Court, that also went against it, which was made only three months later in September 2005. Rather, it seems to this Court that a significant factor in the extent of DWW's loss, and accordingly a factor in Mr. Moriarty's disappointment at DWW being sued unsuccessfully, is the fact that there was five year delay in the hearing of the Supreme Court appeal.

190. This is because a significant factor in DWW's claim for damages is the damage suffered to its reputation as a result of the publicity of it having a court order for €10 million against it for a period of five years. In this regard, if the High Court appeal to the Supreme Court had been heard as quickly as the challenge of the Arbitrator's award in the High Court, namely within three months, undoubtedly the extent of the alleged damage to DWW's reputation and loss of opportunity would have been much less. In addition, the disappointment which Mr. Moriarty has at being sued unsuccessfully would also been much less and in those circumstances it is likely that the prospect of DWW engaging in further litigation, rather than concentrating on its business opportunities, would have been a much less appealing prospect.

191. It is important of course to realise that the five year delay in this case was caused by the lack of court resources to deal with

the backlog of Supreme Court appeals. This was well publicised at that time and eventually led to the establishment of the Court of Appeal in 2014. This then led to the consequent drastic reduction in the time period within which High Court appeals are now heard. While it is this Court's view that the five year delay was a significant factor in why this claim was brought by DWW, it does not appear to this Court that this delay is actionable by DWW.

192. Having reached its decision, this Court would finally observe the telling comments of Lord Sumption in his dissenting judgment in the Privy Council decision of *Crawford Adjusters v. Sagicor General Insurance* [2013] UKPC 17 at paragraph 148 where he states:-

> "Litigation generates obsession and provokes resentment. It sharpens men's natural conviction of their own rightness and their suspicion of other men's motives. It turns indifference into antagonism and contempt. Whatever principle may be formulated for allowing secondary litigation in some circumstances, for every case in which an injustice is successfully corrected in subsequent proceedings, there will be many more which fail only after prolonged, disruptive, wasteful and ultimately unsuccessful attempts."

193. Our courts are sadly filled with litigants who would fit the description set out by Lord Sumption. This Court does not purport to attribute that description to any of the parties in this case, but it would observe that 20 days were spent before this Court trawling through evidence regarding events which took place 15 years ago. While this Court's decision is reached on the particular facts of this case, this Court would nonetheless observe that in keeping with Lord Sumption's views, it is this Court's judgment that there should not be an extension of the opportunities for successful litigants to bring secondary litigation against a plaintiff who won his litigation or arbitration at first instance, but loses on appeal.

194. For the reasons set out in this judgment, this Court concludes that CSID had reasonable or probable cause to institute and maintain the proceedings in which it claimed that the Lease of the NAC was vatable. As such, DWW's claim that CSID was guilty of malicious abuse of court process for bringing those proceedings is rejected.