

**THE HIGH COURT
DUBLIN CIRCUIT COUNTY OF THE CITY OF DUBLIN**

2005 257 & 298 CA

BETWEEN

**ADAM CLAYTON, DAVID EVANS, PAUL HEWSON AND
LAURENCE MULLEN, A FIRM TRADING AS U2**

PLAINTIFFS/ RESPONDENTS

**AND
LOLA CASHMAN**

DEFENDANT/ APPELLANT**Judgment of Mr Justice Michael Peart delivered on the 15th day of November 2006**

1. The Defendant/Appellant (hereinafter referred to as "Ms. Cashman") appeals, by way of re-hearing, against the whole of the judgment of the learned President of the Circuit Court given on the 5th July 2005 following his hearing of the Plaintiffs/Respondents' claim made against her as set forth in the Equity Civil Bill issued herein on the 26th May 2004, and his later order for costs made against the appellant on the 20th July 2005. For the sake of convenience I shall refer to the plaintiffs/respondents as U2.

2. In August 2001 Ms. Cashman placed some items of U2 memorabilia with Christies in London for inclusion in their auction of pop memorabilia which was scheduled to take place on 30th April 2002. Well in advance of same, an auction catalogue was published by Christies, and the items which Ms. Cashman was hoping to sell were included. According to the Equity Civil Bill there were eleven such items included in the catalogue, but prior to auction two items were removed from the auction by Ms. Cashman, leaving nine items remaining for sale. Those items are listed in the Equity Civil Bill as: a pair of black canvas Converse All Star boots (which belonged to Larry Mullen the fourth named plaintiff), a pair of black trousers, a pair of silver earrings, a green souvenir sweatshirt, two souvenir mugs, a Christmas decoration, a Stetson hat, two Polaroid photographs, and a photocopy of a hand-written list of U2 songs for use in styling the band.

3. The issue to be decided in this case is who owns what are described in the Equity Civil Bill as "the disputed items", and these are listed specifically as comprising the pair of black trousers, the silver earrings, the green souvenir sweatshirt, and the Stetson hat. It appears that Larry Mullen has, subsequent to the publication of the catalogue, confirmed that he had given the Converse All Star boots to Ms. Cashman, and no issue arises for determination in relation to those.

4. It is not entirely clear whether the plaintiffs are still laying claim in these proceedings to ownership of the remaining listed items other than the "disputed items", but there is no doubt that the disputed items are the main focus of the claim on the basis that they are regarded by the plaintiffs at least as forming an integral part of the iconic image of the band and as such, according to the plaintiffs, they would never have been gifted to Ms. Cashman as she alleges. The evidence given by Bono might suggest that the sweatshirt might not at the end of the day be regarded as being of much importance, but nevertheless it is included in that part of the claim.

5. On the other hand, the two mugs, the Christmas decoration and the list of songs are of lesser importance to them, and might even come within the meaning of "swag" – a term used by Bono in these proceedings to describe detritus of all kinds which accumulates during a rock band tour and which can simply be thrown out as having no iconic or other value, though he was anxious to exclude from the term "swag", gifts from fans, such as the Christmas decoration, which might be given to the band during the tour – presumably out of respect for the motivation and loyalty of fans who feel the urge to donate such items.

6. In their Equity Civil Bill the plaintiffs state that they are the owners of the four disputed items, and that they wrote to Christies in April 2002 requesting that these items be returned to them, but say that Ms. Cashman has refused to do that. In such circumstances, they seek a declaration that they are the owners of these items and that they are entitled to possession of them, an injunction restraining Ms. Cashman or her servants or agents from disposing of the disputed items "or any property owned by the plaintiffs or any of them", as well as "an order requiring the delivery up of the disputed items and any further property owned by the plaintiffs or any of them."

7. A Defence was delivered by Ms. Cashman on the 2nd December 2002, in which she pleads, *inter alia*, that the so-called disputed items were "gifted" by the plaintiffs, and she denies that those items and any other items set forth in the Equity Civil Bill remain in the plaintiffs' ownership, and states that they are not entitled to possession of same. There are other pleas of a formal kind which I do not need to set out.

8. In Replies to Particulars thereafter she gave some details as to the timing and circumstances in which these gifts are said to have been made. I will deal with those replies in more detail later, when considering certain differences which exist between what is stated in some replies to particulars in that regard, and what she has stated in her evidence before me on this appeal. There are other matters also in respect of which some of her evidence conflicts with things written in her book entitled 'Inside the Zoo with U2' and with some correspondence which has passed between the parties or their respective representatives, and I will come to that.

Background

9. Before considering the evidence which relates specifically to the ownership dispute, there is some general background which it is helpful to set out.

10. During the early months of 1987, U2 were in the United States on what is called the "Joshua Tree Tour". Prior to the commencement of the tour proper on the 2nd April 1987 in Arizona, they had been in rehearsal in the United States. Their Joshua Tree album had been released, and was enjoying huge success on radio and in record sales in the United States, so much so that a decision was soon taken that the band would play in large outdoor stadiums, instead of indoors, in order to play before larger audiences. This move had implications for how the band styled and presented itself at these events.

11. It appears also that towards the beginning of the tour in early 1987, the lady who was employed as the band's stylist, Ms. Smyth, became pregnant and had to be replaced at short notice. Ms. Cashman was her replacement. She was interviewed initially in Dublin, where she met both Bono and Ms. Smyth. She may have met other band members as well. She returned to London and then travelled out to the United States to meet the band members in April 1987. According to her, Bono had seen her portfolio and told her that the band wanted someone who would create a new image for the band in the United States. She was apparently not that keen on working on the road for a rock band, but when she returned to London from Dublin, she received a letter asking her to travel to Santa Fé, California, and she did so.

Her remuneration package

12. Her remuneration was agreed in Dublin on the basis that, instead of being paid the usual salary rate for that job, she was to be paid a higher weekly salary but on the basis that at the end of the tour she would receive no bonus. Nevertheless, it appears that when the tour concluded, Ms. Cashman was deeply hurt by being the only member of the staff not to receive a bonus. She feels that the work she did while she was on the tour was over and above what would have been expected, and that she deserved to have that work recognised in the form of a bonus. This and other disputes at the end of the tour led to a good deal of ill feeling between them and it is a fact that she and the band's management were unable to reach agreement on her re-engagement as the stylist after April 1988. There is no doubt from her evidence that she regards herself as having played an important and crucial role in the improvements to the band's style and image. The plaintiffs on the other hand hold the view that while her work was valuable, she overstates the part she played in the creation of the band's image on the tour.

With the band

13. Bono explained that Ms. Cashman that she had a very good eye, and was extremely good at her job. He was of the view that while the band was, at the time this tour started, extremely good at the music side of the business, they were not so good in relation to style or image and they needed help in that department.

14. Bono has stated that the band was very lucky to have been able to get someone with Ms. Cashman's skill and experience at that time, but stated also that while she was very good at her job itself, she was not so good at dealing with other people and that her rather direct manner could frequently put noses out of joint. He said that this comment related not so much to her relationship with members of the band, but others around the band.

15. Having arrived in Santa Fé she was informed, via a note under her hotel door, that she should travel on to Los Angeles and that someone would contact her there. She went to Los Angeles, but again nobody appears to have met her there. However, she received another message to meet the band at what she called "an impromptu gig" so that she could make an assessment of the band and give a report to them. She did this and on the following day she met the band and Mr McGuinness, and others including the man in charge of lighting for the band.

16. She gave details of what she reported and she made suggestions for improvement in their image. She spoke her mind very frankly, and while some band members may not have appreciated that, she stated that Bono appreciated people who spoke their mind. She is of the view that her suggestions were accepted, and that since the tour was already under way, this meant changes had to be made to the show at that stage.

17. The first concert she recalled attending was in San Francisco. This was a large outdoor arena, and she recalls being shown the wardrobe area, being introduced to Fintan Fitzgerald and Judy Rieth (Williams) who would be her assistants, but that she was very much left to her own devices and left to get on with her job. She became familiar with the various flight cases that served as wardrobes. There were apparently four such cases for storing clothing, two further cases for stage props, towels and so forth, as well as one other which was for storing mirrors. At some later stage an eighth case arrived which housed a large video monitor, that apparatus being used for the purpose of looking at the video recording of each concert so that personnel could assess how the concert went and how the band looked on stage, and suggestions for improvement could be made afterwards.

18. Her evidence is that when she first arrived at the concert venue and the ward-robe area, she found a chaotic situation, with clothing untidily arranged and stored. She immediately set about emptying out all the wardrobes and sorting things out, including by placing a large quantity of stuff in black plastic bags and disposing of it as part of the tidying process.

19. Her duties as a stylist included consulting with and advising the members of the band as to what they should actually wear on stage, at press conferences and so on, as well as purchasing, maintaining, storing and packing up such clothing as the tour moved around the United States during the tour. The evidence has been that when she joined the tour in April 1987, her opinion of how the band members dressed was not high. She would have been openly critical of their existing standards in this regard. In fairness, Bono has acknowledged that this was an area in which the band had a lot to learn very quickly, given the very fast pace of their emerging success in the United States, and presumably worldwide at that time. Indeed, the rapidity of that success had taken them by surprise.

20. She claims to have been instrumental in designing an image for the band, and has stated that her suggestions were enthusiastically embraced by the band, and particularly by Bono. He, in his evidence, has accepted that she was very good at her job and had good ideas which the band needed, since this was an aspect of the band which he felt they needed help with. He does not accept however that she was responsible for actually altering the band's image or creating the image which became associated with the Joshua Tree tour and the Rattle and Hum film which followed. His evidence is more to the effect that her input improved on what was already the image which they wanted for the band at that time. He points to the fact that even before her arrival on the scene as a stylist he was, by way of example, wearing a *Stetson* hat as part of his public image on stage and elsewhere. As support for that, the Court was shown a video of the band members in a shop where such hats were being purchased by the band. It is an undisputed fact that this video pre-dates her involvement with the band. She states that the *Stetson* hat, and the wearing of more leather were her ideas.

21. She has stated that when she arrived, she discovered that Bono liked to wear trousers tucked into boots, but she did not approve of the manner in which this look was achieved. She believed this look could be better achieved if he wore a three quarter length trouser which did not need to be actually tucked into boots. Accordingly she arranged to have a *three quarter length pair of trousers* designed by a gentleman named Steve Linnard, a designer in London, whom she knew. Up to six such pairs may have been made in order to allow for wear and tear over the duration of the tour. One of these pairs of trousers is one of the disputed items in these proceedings.

22. Ms. Cashman states also that she would source items for the band, such as jewellery. By way of example, she states that she would purchase ear-rings from time to time, so that Bono could choose whether or not he liked them to wear. She states that she bought the particular earrings which are among the disputed items, but that after a while Bono stated that they were not comfortable, that he no longer wanted to wear them, and that when she asked if she could have them he said she could, and remarked that they would look better on her than on him.

23. She has also claimed that she was instrumental in Larry Mullen wearing what are referred to as the "*Converse All Star*" boots. This latter matter has been denied by the plaintiffs, even though it has been accepted, as I have already stated, that Mr Mullen has accepted that he signed and donated a pair of these boots to her at some stage. But as corroboration for the assertion that she introduced him to *Converse All Star* boots, the plaintiffs have produced a photograph of Mr Mullen wearing this type of boot at a time well before her arrival with the band. I will return to this matter when dealing with credibility.

24. As part of her work on the tour, she would take *Poloroid photographs* of the band members as they tried different outfits, so that they could all discuss the look and make a decision on what should be worn. Some of those photographs also form part of the disputed items. She took a great many such photographs during the course of the tour so that she could discuss with the band how they looked on stage. It appears that each concert was videoed, and that each evening or the next day perhaps she could look at it from the style perspective and come up with more new ideas for improvement. I shall return to the evidence in that regard.

25. *The sweatshirt and the two mugs* were apparently presented to the band by certain promoters of the concerts. It would appear that the band members liked to drink tea during concerts and the mugs were used for that purpose. There is no evidence that the sweat shirt was worn by the members of the band, but a supply of these sweat shirts was given to the band by the promoters in any event. There is some evidence in that regard also which I will come to.

Access to the band

26. This tour had started in Arizona at the beginning of April 1987, and by the time Ms. Cashman joined later in April, it had reached California. The tour was to conclude in December 1987 with a further concert in Arizona. Each day, according to Bono, the band was performing in a different location, and with about 150 staff involved on the tour, things were frenetic to say the least.

27. There was however a close coterie of people who interacted very closely and directly with the band members, and this group handled matters such as stage arrangements, management, relations with the media, and wardrobe. It follows that Ms. Cashman as the stylist had easy, close and constant access to the band members at all times, being one of a small number of people who had access to what was referred to as the 'inner sanctum' at concerts, namely where the band members changed and prepared for the concert, and relaxed afterwards. Other evidence suggests that there may have been no more than twenty people who had that level of access to the members of the band.

28. Because of the high level and constant access which she enjoyed with members of the band, she developed a close working relationship with them, and, or so it would appear from her evidence at least, particularly with Bono, who himself stated that he perhaps more than the other members of the band was concerned about his image and clothing and that of the band generally. Hers was a position requiring a high level of trust, because of the intimate nature of some aspects of her job. She would, for example, be present when members of the band would be changing before and after concerts, and indeed would assist in getting them dressed for the concerts.

29. Indeed, as I have stated already, part of her job involved *taking photographs* of the members of the band in different clothing so that she could form a view on whether improvements could be made. These photographs were for work purposes, rather than personal photographs of her own. For the most part they would be of the Poloroid or instant variety, not requiring development. She was in the habit of having three cameras with her, one Poloroid camera, one Instamatic camera, as well as a third higher quality camera of her own which she stated to be a Minolta 700 model. Apart from pictures which she took for purely work purposes, she has stated that she would take other photographs of the type anybody might take in order to record events she was involved with. For example, when the band returned to Europe during a break in the U.S tour, it played a concert in Rome, and on that occasion on a visit to the Vatican she took some photographs, including of some band members. She does not regard those photographs as photographs related to her work as such.

30. According to Bono's evidence there was at all times on the tour a clear policy in relation to photographs of the band, namely that they were band property. He believes that this policy was understood by all personnel working with the band. It was because of this policy, according to him, that the band provided the Poloroid cameras and the film. However, it is accepted that the Minolta 700 camera was Ms. Cashman's own personal property. Bono accepted that some photographs, such as those taken by her in Rome, would be her own property, but not those taken in connection with her work on the tour.

31. After the Rome concert Ms. Cashman returned to the United States for the extended portion of the Joshua Tree tour, which according to her became thereafter referred to as the Rattle and Hum tour, since a film was being made of the band at that time, which became known as the Rattle and Hum film. She believes that her workload increased at that point, since the video of a concert would be looked at by her and discussed with the band on the following morning.

End of tour

32. The Joshua Tree tour ended with another concert in Arizona at the end of December 1987. After that concert, the equipment was packed away into what have been called flight cases so that it could be transported back to Dublin. Ms. Cashman was in charge of packing away all the belongings which were her responsibility – in other words the ward-robe department. It appears to have been the case that during the tour the amount of articles of clothing and other paraphernalia which accumulated meant that she had to borrow another flight case, as it is described, from the production department. She states that at the end of the tour the production department wanted that case back, and this meant that there was a good deal of stuff which she could not fit into the remaining cases, and that for this reason she had to put it into her own luggage and bring it back to London.

33. On her return flight she had twelve cases of luggage, and was charged over \$800 for *excess baggage*. She says that two of these cases would have contained her own personal belongings, but that the other ten contained what she had been unable to fit into the available flight cases in the wardrobe department after the borrowed case was returned to the production department.

34. The evidence around this matter is controversial in this case, as the plaintiffs are clearly of the view that much of what she brought home to London in this way was never returned to the band's headquarters in Dublin as should have happened, and has been retained by her, including items such as the disputed items and the other items referred to in these proceedings. It seems to be the plaintiffs' belief that at some later stage, she will place further items for auction at a time of her choosing, and they object to that. Ms. Cashman says that she returned a large amount of property to the band's headquarters.

The video monitor

35. This was apparently a custom built article which housed a video machine and video monitor, and according to some evidence, though not Ms. Cashman's, it had drawers built into it for the purpose of storing video tapes. Fintan Fitzgerald who worked on the tour with Ms. Cashman in the wardrobe department, stated that the video monitor had drawers for holding video films.

36. This machine was, according to her, designed so that she and the band could look at videos of concerts and appraise the quality, so that suggestions for improvement could be made. After the tour ended, it was sent to her home in London as she had further work to do in relation to the film being made. She states that she did not arrange the sending of the machine to her home. She thinks that it would have arrived in early 1988 – perhaps February. She apparently put it in a position in her flat where she could view videos conveniently. Denis Sheehan, the tour manager for the band stated that in mid February 1988 he had some contact with Ms. Cashman about the video monitor during which she told him that the video monitor was broken having fallen down a stairs. He took a

decision at the time apparently that since it was broken, there was no point in trying to get it back to Dublin, so nothing further was done about this item.

37. In her evidence she stated that she no longer has the monitor, but was unable to state when or even how she later disposed of it. She had no idea when it left her flat or how, but stated that it was no longer there.

38. It was however seen in her flat by Ms. Regine Moylett and another person when they visited her flat in the spring of 1991. On that occasion, Ms. Moylett and Ms. Blankson visited the flat on a social occasion in London, and their recollection is of seeing the flat full of other U2 material, such as clothing on rails, as well as the video monitor, and a picture of Bono on the wall. Ms. Moylett states that when she returned to Dublin she informed Ms. Anne Louise Kelly of Principle Management of what she had seen in the flat. She also stated that when she saw it, it seemed not to be broken. Ms. Cashman was asked about that when she was cross-examined and she stated that "it was broken inside".

39. Mr Sreenan referred her to the fact that in her evidence in the Circuit Court she had stated that the video monitor had been given to her by Bono, but that she had not stated this to be the case during this hearing, and that in the Circuit Court she had stated that it had become broken on the road with another band. Before me she stated that the position was that it had fallen down the stairs of her flat.

The inventory

40. Ms. Cashman asserts that in 1996 or 1997 she did a clearout of her flat in London at a time when she was re-organising her furniture arrangements. She stated that she had a good deal of memorabilia and clothing and other material from the tour in her flat for about ten years, and having sorted it out and made an inventory, she engaged a firm of couriers to transport this material to Dublin. She stated that these items were accompanied by a note to Principle Management that she made an inventory of same, a copy of same was signed by Ms. Kelly of Principle Management and sent back to her in London. She has not named the courier company, and neither has she retained the copy signed inventory. Ms. Kelly denies that any material was returned to Dublin and signed for by her. Neither has Ms. Cashman produced any evidence in the form of a receipt for whatever charges were made by the courier company for that transportation to Dublin. There is no evidence either that she has made any unsuccessful inquiries of the courier company concerned, besides her oral evidence before me that she tried to get a copy of the receipt from her courier company but without success. She was asked in cross-examination if, before she returned the luggage to Principle Management in Dublin she telephoned anybody in that company to notify them that she was doing so, and she said that she did not.

End of tour (cont'd)

41. Bono has said that at the end of the tour, all clothing and so forth had to be kept and not discarded or thrown out because the band was still filming for the Rattle and Hum film, and continuity was very important. In addition, he stated that the image for the band remained basically the same until the end of 1989, and for that reason also, the clothing worn by the band on this tour would have been kept intact. He went on to say that in fact the trousers of the type involved in these proceedings were being worn by him even one year later during a tour of Australia, and that he would not have gifted a pair to Ms. Cashman as she alleges. He says that such a thing never happened before or after, and commented also that it would be a strange thing for her to ask that the trousers be gifted to her. He stated that such items would not be discarded except if there were unimportant, but items central to the band's image would not be in that category. He said that anything of any value would be put into storage, and that Paul McGuinness was always insistent about that. It would appear that in 1988 the band had not developed any sort of sophisticated storage facility, but simply stored belongings in their premises at Barrow Street in Dublin. Later on, perhaps by about 1998 a proper archiving system was installed, so that they could keep track of everything.

Post- tour happenings

42. As already mentioned, as soon as the tour ended in December 1987, Ms. Cashman returned to her home in London with, it appears a good deal of baggage belonging to the band, as well as her own belongings. The video monitor was to follow in due course as she had further work to do. Her terms of engagement were that while on tour she was to receive £1000 per week, and when she was not "on the road" so to speak, she was to be paid £500 per week. It was a term of her employment that she would not receive any bonuses. She was to pay her own taxes. It appears that in the early weeks of 1988 attempts were made on both sides to renegotiate terms for her continued employment as a stylist, but these foundered, and in April 1988 her employment ended. Paul McGuinness stated that she was making excessive demands and also that she had been a very difficult person to work with.

The book

43. It would appear also that her agent in a conversation with Ms. Kelly in March 1988 mentioned that Ms. Cashman was going to publish a book about the band. On the 15th March 1988 Messrs. Theodore Goddard, solicitors, London, wrote a letter to her reminding her that she had signed a confidentiality agreement when she commenced her employment with the band by which she bound herself, inter alia, not to write any book about the band. They told her that to write such a book would breach the terms of that agreement and that an injunction would be sought unless an undertaking was received from her that she would adhere to her agreement. It was perhaps unfortunate that these solicitors described her employment as being "a wardrobe girl", as this appears to have offended Ms. Cashman. She describes this slight on her status as being "petty".

44. She does not appear to have engaged solicitors at that time to respond to the letter from Theodore Goddard. But her agent rang Ms. Kelly on the 16th March 1988. According to the memo made of that conversation, her agent stated that Ms. Cashman was not going to write any book. That conversation seems also to have conveyed to Ms. Kelly that the bonus question was still an issue, that Ms. Cashman no longer wanted to work for the band, and that she was about to leave for New York "at the week-end".

45. There is a postscript to the involvement of Theodore Goddard, solicitors, as they issued an invoice to Principle Management for fees for their advice and letters in relation to the book threat, and when adjusting matters between them and Ms. Cashman in relation to her claim for expenses, they deducted this item of £427.72 from the cheque sent to her in settlement. This was another source of friction and ill-will.

46. On the 23rd March 1988, the same agent wrote to Ms. Kelly in which he confirmed firstly that he had stated to Ms. Kelly on the 15th March 1988 that Ms. Cashman was intent on writing a book, and that on the 16th March 1988 she had informed him that she had no intention of writing a book.

47. She was cross-examined about this and said that in fact her agent had just taken some throwaway remark by her boyfriend about her writing a book, and that this was passed on the information. She described it as just a "hearsay remark" from her boyfriend at the time.

48. In fact she did publish a book in 2003 entitled 'Inside the Zoo with U2'. The reference to 'Zoo' is curious since the so-called Zoo

TV Tour by the band was not until 1992/1993. She confirmed to Mr Sreenan in cross-examination that she was part of the decision to use the 'Zoo' reference for the title even though she knew it was misleading as it referred to a later tour.

49. Bono stated in his evidence that he was very annoyed about her publishing a book, and he regards it as a serious breach of confidentiality, and displays an abuse of trust. The band apparently heard in April/May 2003 that she intended to bring out the book. Her publisher had written in April 2003 offering to send a copy of the manuscript for the band to see in advance. The letter stated that she was "*most concerned that her story should be as accurate and fair as is humanly possible.*" They went on to say that she was "*also keen not to cause undue distress to the members of the band since she holds them in the very highest regard*".

50. This offer was declined lest whatever they did or said about it would be interpreted or used by her in a way they did not want. Ms. Cashman was cross-examined about writing the book. She stated in answer that her editor had started working on the book around 1998, but that a good deal of it had been written before that date. She had approached a publisher in about 2000, even though at that stage she did not have a contract for the book, but only a proposal to write a book. In 2002 she succeeded in getting John Blake to publish the book. In cross-examination she confirmed that she had signed a confidentiality agreement, although Mr Sreenan drew her attention to the fact that Mr Rogers has cross-examined Mr McGuinness, Bono and Ms. Kelly on the basis that none had been signed at all.

51. But on the 4th April 1988 she wrote a letter to Paul McGuinness from New York. She states in that letter that she had already written separately to Bono and the band. In her letter to Mr McGuinness she states:

"I have and never ever did have the slightest intention, thought, idea, desire to break confidence about my work with the band or their organisation. Paul I feel very hurt that I never got paid a bonus, which is recognition of ones loyalty and achievement."

52. She goes on to describe how hard she worked on the tour, that she never complained about that, and that in fact she was doing the work of two people. She ends by expressing the extent of her respect both for him and the band, and states that she simply cannot understand why she have received different treatment to everybody else, and asks him to write and tell her what she did wrong.

Dispute as to expenses

53. Apart altogether from the question of a bonus, a further source of disagreement and souring of relations developed over the question of some expense items which were claimed by Ms. Cashman in early 1988. After her return from the United States at the end of the tour, Ms. Cashman submitted a bill for her expenses incurred in relation to her work for the band in January and February 1988. These included car-hire, hotel expenses, air tickets. Principle Management queried some of these items of expenses as they were of the view that some of them were not incurred on work for the band, but were private expenses. Some discussions occurred between her agent and Ms. Kelly of Principle Management in May 1988. It appears that her agent agreed a figure eventually, but during the course of the discussions there was some discussion about the excess baggage charges of over \$800 which she had incurred at the airport on her return to London from the tour. That was eventually explained, and I do not need to detail it any further, but the whole business of expenses gave rise to her seeking advice from solicitors in July 1988. These solicitors wrote a letter threatening proceedings in relation to what was described therein as "the allegation of dishonesty" which they stated had been made against their client by Ms. Kelly. This allegation arose out of the query made by Ms. Kelly to her agent about the use of the company credit card to cover the excess charges referred to. The letter requested payment of outstanding fees and required a full written apology and an assurance that it would not be repeated. Mr McGuinness replied to that letter by stating firstly that the expenses had been settled, and that clearly a misunderstanding had taken place since no allegation was in fact made, and that no question of an apology arose, and that their client had not been slandered. That letter begot another from her solicitors disputing that the expenses had been settled, and without going into precise detail they alleged that there was £773 outstanding. Of that sum the Theodore Goddard fees amounted to £427, and the point was made that these fees were not Ms. Cashman's responsibility. Letters continued to be written in each direction, with proceedings being threatened, and finally a response to that indicating that any such proceedings would be defended fully. Nothing further happened. But Ms. Kelly stated in her evidence that Ms. Cashman was very unhappy about the fees dispute, and that it and matters such as the book threat caused friction. There is no dispute about that I feel.

54. Prior to consulting those solicitors, Ms. Cashman had written a letter to Mr McGuinness dated 12th June 1988 about what she called the allegation of dishonesty, and the outstanding fees.

Placing items with Christies

55. In about August 2001, Ms. Cashman had contact with Christies about putting the U2 memorabilia for auction in a forthcoming auction of pop memorabilia on the 30th April 2002. She says that at the time she was short of money having had some dispute with a financial adviser in London, and having thereby lost some of her funds, according to her oral evidence. She decided to raise some money by selling some items of U2 memorabilia in her possession, and, as she would say, in her ownership.

56. The plaintiffs got wind of the proposed auction, and there was a conversation between a Mr Bowen of Principle Management and whoever was handling the sale in Christies during March 2002. This was followed by A & L Goodbody, solicitors writing to Christies on the 22nd April 2002 in which they stated that five of the six items proposed to be auctioned were genuine they were not the property of Ms. Cashman, and they requested that the items be withdrawn and returned to the plaintiff. In relation to the sixth item, namely the Larry Mullen All Star boots, they state that while Mr Mullen had inspected a copy of the photograph of the boots on Christies' website, and while the signature on the boots resembled his, he had no recollection of signing the boots, and "pending further clarification", they requested that this item be also withdrawn from the auction.

57. Christies responded immediately by letter dated 18th April 2002 by saying that they had consulted Ms. Cashman who had conformed to them that these items had been given to her by members of the band while she was their stylist. They noted also that Messrs. Goodbody had not given any indication as to the basis on which the band members were not the property of Ms. Cashman, and neither had any evidence to that effect been produced. They ended by stating that they could not agree to the return of the items, and intended to proceed with the sale. The band countered this by instructing London solicitors, Messrs. Nabarro Nathanson. Their letter dated 22nd April 2002 set out in some detail the reasons why the band was claiming ownership of the items in question. There is no need to detail the contents of the letter, except to say that the band was of the view that none of the items had become the property of Ms. Cashman, and in relation to the Larry Mullen boots, it was stated that further investigations were being carried out. They required that the items be withdrawn from auction and returned, and proceedings were threatened.

58. Christies eventually withdrew the items from the auction, but retained possession of them pending clarification of the ownership of the items.

59. Ms. Cashman gave evidence that she was in Australia in April 2002 when Messrs. Goodbody first wrote to Christies, and that when she heard about the letter, she was upset at the allegation that she had acquired them dishonestly. She stated that she took advice about it and was told that she needed to find an intellectual property lawyer, and that this had proved difficult for her – hence some delay before solicitors, Messrs Bolt Burdon wrote to Nabarro Nathanson by letter dated 8th October 2002. That letter requested them to inform Christies that their claim to the property was withdrawn, and requested details of who was alleging ownership since, according to the letter, it was unclear on whose behalf they were acting. They also made the point that the items in any event may not have had a large commercial value, and that there was a risk that legal costs might quickly exceed the value of the items. In ease of that situation, they invited the solicitors to get their clients to consider making an offer to purchase any of the items which they wished to acquire. There was no mention of defamation in that letter.

60. By 24th October 2002, Nabarro Nathanson had not been in touch save by way of acknowledgement of the letter and stating that they were instructed by Principle Management Limited, a company called Not Us Limited, and the four members of the band U2. They ended by stating that they were seeking their clients' instructions. Bolt Burdon wrote again by letter dated 24th October 2002 calling for a substantive reply to the question of ownership, and they stated that they had copied that letter also to Christies who continued to retain the items in question. Again it is to be noted that there is no allegation of defamation or threat of proceedings for defamation. Nothing further happened until Ms. Cashman instructed a different firm of solicitors, Messrs. Collins Long wrote to Christies on the 4th December 2002 seeking copies of correspondence from Nabarro Nathanson.

61. The next happening according to the correspondence produced to the Court was a letter dated 14th August 2003 from yet another firm of solicitors acting for Ms. Cashman, namely Messrs. Jens Hills. This letter made it clear that they were acting under a conditional fee arrangement. While the previous letters from Bolt Burdon and from Collins Long had made no mention of these items having been gifted to her, the letter from Jens Hills did so (It is to be noted however that the Christies letter to Nabarro Nathanson dated 18th April 2002 stated that Ms Cashman had told them that the items placed for auction had been given to her by members of the band while she was their stylist). In addition to referring to the gifting of the items, this letter from Jens Hills also for the first time mentioned "malicious falsehood" in connection with Christies being told that their client was not the owner of the items. They invited Nabarro Nathanson to substantiate the factual basis upon which their clients' claim was made, and to particularise the manner in which it is being alleged that their client dishonestly appropriated the item, before their client instigated any proceedings. Nabarro Nathanson responded by stating, inter alia, that they were seeking instructions.

62. This letter from Jens Hills dated 14th August 2003 was replied to by Philip Lee, solicitor, of Dublin on the 16th September 2003. That firm is acting for the plaintiffs in these proceedings. That letter stated that as yet Ms. Cashman had not produced any evidence that the items in question were gifted to her by members of the band, and that the band remained adamant that they were not so gifted to her. They also denied the allegation of malicious falsehood, and went on to say that the band's position was that a former employee of the band should not be permitted to take an unjustified financial or other advantage from that position. They ended their letter by stating that unless Ms. Cashman authorised the return of the items from Christies within fourteen days, English solicitors would be instructed to take further action.

The letter dated 10th October 2003

63. This letter was responded to by Jens Hills & Co by letter dated 10th October 2003 in which they set out the circumstances in which each of the items were gifted to their client. According to this letter the black trousers were disposed of following the end of the tour and that their client sought and obtained Bono's approval to keep them, and that the band had "moved on to a new look and the trousers were now redundant". It stated that the earrings were given to her by Bono and that he made the remark that they would look better on her than on him and that she should have them. They in fact enclosed two photographs of her supposedly wearing these particular earrings at a dinner party. I will need to return to that photograph at a later stage. This letter then stated that the sweatshirt was to be thrown away and that she sought and obtained Bono's approval to keep it. It stated that the mugs belonged to Bono and 'Edge' (the second named plaintiff, David Evans), and that they had been "retrieved from the bottom of their wardrobe trunks" and that they were given to her by Bono and Edge. As far as the Stetson hat is concerned, the letter stated that she sought and obtained Bono's approval to keep it, that it was a "back-up hat used in a photo shoot and is a replica of the one used by him on the Rattle and Him tour". Finally, as far as the disputed items are concerned, the letter stated that the Christmas decoration had been a gift to the band from a fan which was to be thrown away and that she sought and obtained Bono's approval to keep it since it was approaching Christmas time.

64. Apart from addressing how ownership in these disputed items was achieved, this letter went on to set out fourteen other items, or categories of items which Ms. Cashman had in her possession. These included one video which was said to have been given to her by Bono, and upon which, inter alia, she relies for her assertion that she was held in high regard and affection by him and the band at the time. It also includes 88 Poloroids (both of a stylistic nature and personal photographs); 117 photographs of the same kind; 6 'Hasselblad poloroids taken by a photographer named as Matthew Ralston, and who is said to have given them to her after a shoot. He apparently inscribed the back of the first one; a further 23 poloroids taken by the same man and given to her by him; 10 further poloroids taken by other photographers and gifted to her by those photographers; a large framed print of Bono, made from a Poloroid taken by the said Matthew Ralston and containing on the front a dedication to Ms. Cashman by Bono; another large print of Bono said to be taken by a Spanish photographer, and which, it is stated, Bono did not like and gave to Ms. Cashman; five backstage passes; a measurement book; a bible given to her apparently, and duly inscribed, by Larry Mullen; a rosary beads apparently bought by Bono for her in mid-1987; some tour books; and finally an invitation to an art exhibition.

65. The letter went on to refer to the stance taken by the band with Christies in relation to the items placed for auction as contains an implication of dishonest appropriation of the items, and that it is made maliciously. They made the point that it was entirely consistent with the very close relationship enjoyed by Ms. Cashman with the band over what is called a period of two years that members of the band would gift items to her which were no longer wanted or which had a special meaning to her. An entitlement to damages for malicious falsehood was asserted, and the letter then went on to state that after her employment ceased she had been left with certain other property of the band and these were listed as being, inter alia, 12 video tapes, platinum doll, boots, black trousers, over 1000 transparencies and "other items". The letter stated that when she came across these items "several years later" she had voluntarily returned all such property to Ms. Kelly at Principle Management, who, it was stated, had signed an inventory evidencing receipt. It is asserted that such was the action of "individual acting honestly and with a clear understanding of the difference between her own property and that of the band." I have referred to that inventory earlier, and it will be recalled that Ms. Kelly has no recollection of receiving back these goods or signing an inventory, and neither has any copy of the inventory been provided by Ms. Cashman who says that she received one back from the courier company. Certain other matters were included in this letter which are not relevant to the present proceedings.

66. Ms. Cashman in her evidence stated that this letter was written because the band was ignoring the matter.

67. Bono in his evidence expressed his shock at learning that Ms. Cashman still had so much of what he considers to be band

property, and is particularly concerned about so many photographs being included, as he said that there was a very clear policy in relation to photographs. He also had no knowledge that videos were missing, and that it would have been extraordinary of a video was gifted to her as she alleges, albeit that the video mentioned is one in which she herself features in circumstances which I need not go into here. Much was made by Mr Rogers of the fact that this letter voluntarily disclosed the existence of such a large amount of other material in his client's possession, as indicating the truth of what she was saying about having been gifted items by the band, since she had no need to make such a disclosure. Bono suggested that perhaps because she was aware that materials had been seen in her flat in London by Ms. Moylett in 1991/1992 she would have flat that it was best to disclose these items. He accepted that they had known about this material from that time, but had done nothing about it. His view about her possession of the photographs is that it would be unprofessional conduct to sell even personal photographs of the band, since it takes advantage of the intimacy which her job allowed her to have with the band. He stated that the band did nothing about these goods until the proposed sale at Christies, because they feared that there might be more items sold at future auctions, and that during the 1990s they were so busy that nothing was done about it. It was not high on their priorities. He also made the point that the band had not wanted to have to bring these proceedings and did so only after Ms. Cashman's solicitors were threatening defamation proceedings arising out of their solicitor's contact with Christies to stop the auction of the items.

68. Matters seem to have rested with the letter dated 10th October 2003, until a letter dated 13th May 2004 from Jens Hills & Co to the band's London solicitors, Nabarro Nathanson. That letter stated that they had been instructed to institute proceedings and asked if those solicitors would accept service thereof. That letter was copied to Philip Lee, solicitors also. This firm replied by letter dated 13th May 2004 stating that Nabarro Nathanson were no longer instructed in the matter and that they expected to be able to reply to their letter within two weeks. Some further letters were exchanged up to the 21st May 2004, but by then no indication was given that service of the English proceedings would be accepted by Philip Lee solicitors. However, on the 26th May 2004, those solicitors themselves issued an Equity Civil Bill against Ms. Cashman and in which they sought the reliefs already referred to. She entered a without prejudice appearance in person on the 18th August 2004 "for the purpose of contesting jurisdiction only". That document states that the Civil Bill was served upon her on the 17th July 2004. By November 2004, however, solicitors were acting for her here, since they delivered a Notice for Particulars dated 12th November 2004.

69. On the 8th July 2004, the English proceedings were issued in London on the 6th July 2004 in which Ms. Cashman seeks damages for libel and/or malicious falsehood and/or unlawful interference with the performance of a contract between her and Christies, including special and aggravated damages. She sought also a declaration that she is the owner of the items of memorabilia in question, and other ancillary reliefs. That summons contains particulars of the claim, including particulars of the malice and innuendo alleged, and particulars of her loss and damage.

70. Messrs. S.J. Berwin, solicitors in London came on record for the band in these English proceedings and lodged an application in the High Court of Justice there for a declaration that the Court had no jurisdiction in respect of the claim, and an order staying the proceedings in favour of the proceedings already instituted here by way of equity Civil Bill. Since the defamation proceedings in London would inevitably involve determining the question of ownership of the items in question, it was the band's view that this would be more conveniently and less expensively done in the Circuit Court proceedings in Dublin.

71. In due course that application was granted, and a costs order was made against Ms. Cashman in a substantial sum, but was later, by order dated 25th February 2005 stayed pending the determination of the present proceedings, provided that a sum of £1000 per month was paid by her to the present plaintiffs. She has made all these payments according to her evidence. The fact that the plaintiffs sought, obtained and have enforced this costs order against her is something which has naturally caused her further upset.

72. The above account of the evidence of events during the time which has passed since the conclusion of the Joshua Tour seems sufficient to outline the general background to the issues in this case. I will of course deal in more detail with particular parts of the evidence which has been given; in particular that part of the evidence of various witnesses relating specifically to the alleged gifting of the disputed items. Thereafter I will have to reach certain conclusions as to fact and issues of credibility will arise for consideration also.

The Stetson Hat

73. It will be recalled that Ms. Cashman is of the view what the wearing of a Stetson hat by Bono was her idea as part of the re-imaging of the band after her arrival on the tour in April 1987, but that this is denied by the band, and as support for that denial a video was shown to the court in which the band are seen in a hat shop in America purchasing such a hat, and that this video pre-dates her arrival. The band does not deny that this style of hat was part of the image employed by them for that tour. Bono said in his evidence that it was part of his own idea for the band's image on that tour, and that he had sourced the hat himself, and that Ms. Cashman merely improved on the existing idea. He stated that the hat was supposed to be what he described as "an iconic thing" and that it in fact appeared on the cover of the Rattle and Hum album which came out later. He was asked during his direct evidence if he had gifted the hat to Ms. Cashman on the last night of the Joshua Tree tour in December 1987, to which he replied that he was aware that at that time they had more filming to do, and that the hat was very important from a continuity point of view for the film being made, and that he would definitely remember if he had given it to her, and he had no such recollection. Mr Rogers suggested to him in cross-examination that the band members had gifted so many items to her from time to time that he simply could not remember, but Bono was sure that he would have recalled gifting what he called "major pieces" such as the hat or the trousers.

74. During his cross-examination of Bono regarding the gifting of the Stetson Hat, Mr Rogers suggested to him that this hat was given to Ms. Cashman after the final concert by the band which took place in Sun Devil Stadium, Tempe, Arizona, and that it happened when all the equipment was being put into trunks for shipping, and in circumstances where Bono was holding the hat and that Ms. Cashman asked him for it and that he "*plonked it on her head*" and gave it to her. Bono's response was to say that such would be a weird thing to do since they still had more filming to do. When it was suggested to him that there was more than one such hat available, he replied by saying that the hat he was wearing that night was the correct one, and definitely not one to give away, and that it would have been important for continuity reasons for the filming. He stated that it would have been a very strange thing for her to ask him for the hat and for him to give it. He went as far as saying that it would have been a mad thing to do.

75. Fintan Fitzgerald worked in the wardrobe department with Ms. Cashman on this tour and he also stated that the wardrobe items were stage clothing only, which was easily identifiable and would be worn only on stage. He stated that after a concert everything would be packed away and moved out to the next venue. He described the Stetson as being a very important piece of stage clothing since they were still filming. It was very important from the continuity point of view. He was not aware of items being gifted to Ms. Cashman or other people.

76. Ms. Cashman stated in her evidence that the hat was given to her by Bono on that last night in Tempe. She described how after the concert there was a backstage party, a certain degree of chaos, and that Bono was wearing the hat in question. She went on to say that she was gathering up all the clothing to pack away after the tour, and that Bono took off the hat and "*plonked it on her*

head” and that it was no big issue. She said that she asked if she could have the hat and that Bono agreed. She stated that she wanted to have the hat because of all the work that she had done on the tour. She was very proud apparently of having had some association with the creation of the U2 image on the tour. In cross-examination, Mr Sreenan asked her when she had stated to anyone for the first time that when the hat was gifted to her it was “plonked” on her head, since she had not given that evidence in the Circuit Court. She replied that she had stated this for the first time at the present hearing. Mr Sreenan referred to her replies to particulars dated 17th December 2004 where in reply to being asked about the circumstances in which the items were gifted, she had stated:

77. “Stetson hat – The defendant replies – when the items were being packed up and cleared out at the end of the tour”.

78. He referred to a similar response in the reply to further particulars dated 3rd February 2005, and to the fact that it has never been stated that the circumstances were that Bono had “plonked it on her head”.

79. He also referred also to an averment by Ms. Cashman in an affidavit sworn by her on the 22nd March 2005 in answer to a motion brought by the plaintiffs in which they sought an order directing her to provide replies to particulars, which touches upon her inability at that time to recall the gift of the items with the exception of the hat which she states therein was gifted in “extremely memorable circumstances”. In paragraph 7 of that affidavit, she has sworn:

“.....I say and believe that my replies to Notice for Particulars and Replies to Notice for Further and Better Particulars set out the circumstances of the making of each gift to the best of my present ability. Due to the peripatetic industry and the seventeen year intervening period I cannot recall the exact place and date of making of each gift (other than that relating to the Stetson hat which was gifted to me by Mr Paul Hewson, the third named plaintiff, in extremely memorable circumstances). Again I say and believe that I have provided replies to the best of my present ability and that the plaintiffs cannot rationally require any further replies so as to be aware of the grounds upon which I dispute their claims.” (my emphasis)

The ¾ length trousers

80. Bono’s evidence in relation to these trousers is that he did not give them to Ms. Cashman, since they were an important item for continuity reasons related to the on-going filming already referred to. They were, according to him, an important part of the image until the end of 1989. He went on to say that while certain items could become redundant, these trousers did not. He stated for example that they were still worn during a tour of Australia in 1989, referred to as the “Lovetown Tour”. He was cross-examined about the gifting of these trousers, and he consistently denied that he would have given them to her as she alleges at the end of the tour, and stated that there would be something strange about doing so, and that trousers were not the sort of thing one donates to another person. It was put to her that in circumstances where she had arranged for the design and making of these trousers in London by a friend of hers, it was not strange that she should want to keep one of the pairs so made as a souvenir of the tour. Bono replied that it had never happened either previously or since and that it simply did not happen as she states.

81. Ms. Cashman on the other hand has stated in her direct evidence that these trousers were given to her as the tour was nearing an end. She stated that because they were short one trunk, surplus items had to be cleared out, and that accordingly in November/December 1987 she began to clear out what she called “extra stuff” so that it could be thrown away. She went on to state that she asked Bono if he wanted any “stuff” and that he said that he did not. She says that she then asked him if she could have the trousers since her friend, Steve Linnard had designed them, and that he agreed because he was no longer wearing that look, and also that they were no longer the right size for him. In the letter from Jens Hills, solicitors dated 10th October 2003, it is stated that the band had “moved on to a new look” when these were given to her and that they were redundant. This statement appears also in replies to particulars.

82. Mr Sreenan questioned her about this and she accepted that the look had not by then changed, but stated that these trousers no longer fitted him and were no longer in use. This latter point was not stated in the said letter.

The sweatshirt

83. She said in her evidence that the sweatshirt was given to her on the same occasion, and in the same circumstances.

The ear-rings

84. Bono has stated in his evidence that he never gave Ms. Cashman these ear-rings. He stated that it is quite possible that she might have worn the ear-rings, since she was in the habit, according to him, that she would wear items belonging to the band, but he is adamant that he never gave them to her. He could not recall saying to her, as she alleges, that these ear-rings would look better on her than on him and that he no longer liked them. He was prepared to accept that it could have been said to her, but that he certainly had not given them to her. It will be recalled that she has stated that there is a photograph of her wearing these ear-rings in a photograph at a dinner party on the tour and in which she is holding one of Edge’s children in her arms. Fintan Fitzgerald expressed his opinion that the ear-rings shown in that picture are not in fact the ones at issue since the former appear in the photograph to have what he called “drop pear shape” which was absent from the design of the latter. I will return to that matter in due course.

85. In her replies to particulars dated 3rd February 2005, she has stated that these were gifted to her “during the latter part of the Joshua Tree Tour”, and that while she was dressing Bono at a venue he told her that he no longer liked these ear-rings, that he thought they were too big on him and told her that they would look better on her, and asked her if she would like them. That is consistent with her evidence given during the hearing.

86. She stated therein also that she was wearing these when she was photographed for her back-stage pass on the tour, and has relied on that fact as corroboration of the fact that these ear-rings were given to her.

Conclusions

87. I should say at the outset that I have not seen any judgment given by the learned President of the Circuit Court when he found against the defendant, and nor should I, since this hearing is an appeal by way of re-hearing, and is not an appeal by way of review of the decision of the learned President. I have no idea on what basis he reached his conclusions. For my part, this case has much to do with the credibility of witnesses, since the Court is presented with evidence about events dating back about nineteen years. The principal actors in the present case are clearly Bono and Ms. Cashman. There is not so much a conflict in the evidence between these two witnesses. It is more a question that while Ms. Cashman displays a clear recollection of some matters and none about others, Bono has little or no recollection of things having happened in the way she recollects, and must assume therefore that it did not happen that way, as otherwise he would remember it.

88. Faced with such a situation, the Court must look at other evidence in the case in order to see if any objective facts support either side, or tend to show the opposite to be the case.

89. The Court must make its findings of fact on the basis of the balance of probabilities. Another very important aspect of the case in assessing the balance of probabilities is the overall credibility of witnesses. Ms. Cashman has no witness to support or corroborate her evidence and recollections, whereas the plaintiffs have been able to call a number of witnesses in relation to different matters raised by Ms. Cashman.

90. It would be trite to say that sheer weight of numbers of witnesses must not be the determining factor in deciding what probably did or did not happen. Simply because one person says that a thing happened, and ten others say that it did not or that they cannot recall it happening, is not of itself a reason for finding that it did not.

91. It would be natural for example for Ms. Cashman to feel that the witnesses called by the plaintiffs, albeit that some such as Ms. Kelly no longer work for the band, would of course support what is said by essentially their employers or former employers, whereas she left the band's employment in circumstances accompanied by some acrimony and discontent. I bear all that in mind. The Court must look at all the surrounding circumstances, all the material which has been generated by the dispute such as correspondence between the parties and their legal advisers, including the pleadings, affidavits and notices filed from time to time. Where inconsistencies are evident, it must be considered whether these are of importance or whether they relate to peripheral matters only so as not to affect overall credibility.

92. The assessment of credibility is a very difficult aspect of judging. But to assist the task, the finder of fact has the benefit of observing the witness in the witness box in addition to hearing the words spoken and reading the relevant documentary evidence and other papers in the case.

93. In a case such as this, the onus is really on Ms. Cashman to satisfy the court that ownership in these goods passed completely to her by the circumstances in which she says the goods came into her possession. Normally the plaintiffs would have the onus of proof of their case. They are the plaintiffs after all and bring their claim against the defendant. But there is no doubt in this case that at up to a point in time they owned the goods in question. Ms. Cashman is not for one moment saying that this is not so.

94. The plaintiffs in discharge of the onus upon them have stated that they never gave the goods to Ms. Cashman. She says that they did, so she must discharge the onus of satisfying the Court that they did. She must displace the plaintiffs' assertion that they own the goods. The Court's task is not to establish the truth, but to determine as best it can in the face of honestly given yet conflicting evidence on the balance of probabilities what happened or did not happen.

95. An interesting consideration of the problems presented in the assessment of credibility can be found in the words of Lord Pearce to be found in his dissenting speech in *Onassis v. Vergottis* [1968] 2 Lloyd's rep. 403 at p.431, where he states as follows:

"Credibility" involves wider problems than mere "demeanour" which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person, telling something less than the truth on this issue, or, though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so, has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by overmuch discussion of it with others? Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part."

96. This passage has been referred to extra-judicially by Lord Bingham in a paper entitled "The Judge as Juror", which appears in a collection of his speeches and essays entitled: *The Business of Judging*, OUP, 2000. Having referred to that passage, he states at p.6 :

"The main tests needed to determine whether a witness is lying or not are, I think, the following, although their relative importance will vary widely from case to case:

- (1) the consistency of the witness's evidence with what is agreed, or clearly shown by other evidence, to have occurred;*
- (2) the internal consistency of the witness's evidence;*
- (3) consistency with what the witness has said or deposed on other occasions;*
- (4) the credit of the witness in relation to matters not germane to the litigation;*
- (5) the demeanour of the witness."*

97. While this has been written extra-judicially it seems to me to describe in a helpful way the manner in which a judge may be assisted in the task of reaching conclusions as to credibility. They are factors which I will have regard to also.

Bono and plaintiffs' credibility

98. As far as the plaintiffs are concerned, they have the difficulty in meeting the defence of Ms. Cashman, that all they can do is state that it did not happen, not because they recall that it did not happen, but that they do not recall it happening. All they can do is assert the unlikelihood that it could have happened because of the nature of the items in question, namely items important to their stage image and items needed for ongoing filming at the end of the tour. Bono is the only band member giving evidence on behalf of

the plaintiffs. He has no actual recollection of giving these items to Ms. Cashman. I accept that he is honest in making that statement. But I also bear in mind that in the hectic, possibly chaotic and excited moments after a concert has ended, many things might happen that a band member would have no reason to remember after so long. Such a happening may have no particular significance for a band member, such as Bono, yet for the other person what happened could be very memorable indeed and over a long time. For example, he might have signed an autograph for a fan backstage, and while he could not be expected to recall doing that many years later, the fan might easily recall meeting him and obtaining the autograph. That is a simple example sufficient to make the point.

99. In that regard, Bono has stated that the gifting of one of the Stetson hats or the trousers for example would have been something that he would recall since it would have been a very unusual thing to have done, given the significance of those items for the on-going filming. He says that it did not happen because if it had, he would have remembered it. Similarly he has no recollection of giving Ms. Cashman the ear-rings or the sweat-shirt. In so stating, I have no reason to doubt that this is correct. It seems perfectly reasonable that he would not recall these things. These are the so-called disputed items. He could not possibly be expected to recall whether or not there was any conversation about insignificant items such as the souvenir mugs or the Christmas decoration. In relation to the latter item, Bono accepted under cross-examination, that he was not saying that they definitely did not give the decoration to her, and that he could not put his hand on his heart and say that, but simply that he did not recall doing so and believes that he did not.

100. The question of the Poloroid photographs is a different matter since the question of their ownership is not resolved on the basis of whether they were or not given to Ms. Cashman. She does not say that they were, but rather that they are her own property since they would be in the nature of personal pictures taken by her other than in the course of her work.

101. But I could not accept simply from the fact that Bono has no recollection of something happened, that it must have therefore happened in the manner described by Ms. Cashman. Mr Rogers suggested to Bono during cross-examination, that so much was given to her form time to time by the band – for example the rosary beads, the bible referred to, the Converse boots – that it was reasonable to presume that the disputed items and the other items were given as she states and that he simply does not recall it. His answer was, as I have stated, this could well be the case in relation to insignificant matters, but not the items under discussion.

102. I have heard some evidence which would support what Bono believes to be the case. There is the confirmatory evidence from Fintan Fitzgerald, as to the importance of the hat and the trousers to on-going filming. I accept that there was ongoing filming and that it is reasonable to conclude that these items had importance in that regard. That would not of itself preclude the gifting of the items, since there was more than one hat and more than one pair of trousers, but it supports what Bono states in relation to the importance of the items, and the fact that he would not have given them away, since they were still needed.

103. Mr Rogers, quite properly, attempted to suggest that the plaintiffs were motivated by ill-will towards Ms. Cashman because she had published her book about the tour, and that this was affecting his recall of events. But Bono maintained that while they regarded the book as a serious breach of trust, the book was not the reason that the court case was commenced. He stated that this case was commenced because Ms. Cashman had indicated an intention to bring defamation proceedings in London. Mr Rogers referred to the fact that the band was enforcing the London costs order against Ms. Cashman by taking £1000 per month from her pursuant to that order. Bono stated in relation to that that he had no wish to see her out of pocket, but that it was her choice to get this case to Court, and that they had tried to avoid it. However, they wanted to retrieve their property and to stop her selling it. He stated that while there was only a small number of items in the auction, there was a principle at stake and they did not know what other property she had and that she might try and sell in the future. He took exception also to the fact that she had used band photographs in her book – for example those on the back of the cover. I am not satisfied that there is any motive on the plaintiffs' part which results from ill-will or malice. Albeit that much of Bono's evidence concerns his lack of recollection rather than actual recollection, I have no reason to cast doubt on his credibility on the basis of motive or malice.

104. On the basis of the five criteria referred to by Lord Bingham above, I have no reason to make any adverse credibility finding against Bono. In effect that means simply that his evidence remains in tact and undiminished by lack of credibility. But that does not mean that it must automatically trump the evidence put up against it by Ms. Cashman. The probability of events must still be considered in the light of all the evidence.

105. In so far as it is necessary to so find, I should say by way of conclusion on this topic on the plaintiffs' side, I am satisfied that none of the witnesses called to give evidence lack credibility in the legal sense of that term. In reaching that conclusion I do not overlook the fact that Larry Mullen has accepted that he gave the Converse All Star boots to Ms. Cashman and that the signature on them is his. But it must be recalled that this was never in fact denied, and that an opportunity was sought to confirm the position in that regard.

Ms. Cashman and credibility

106. As I have stated, Ms. Cashman needs to discharge the onus of proving her defence to these proceedings, namely that these items were gifted to her by the plaintiffs, and in particular by Bono. Mr Sreenan sought to cast doubt on the reliability or credibility of her evidence by reference to a number of matters.

107. The video monitor is not central to this case, since it is not one of the items sought to be recovered by the plaintiffs. But her evidence as to the monitor was tested considerably. She had said in her evidence before me that the monitor had been broken by falling down a stairs in her flat, yet in 1991 it was seen by two ladies in her apartment in the centre of the floor suggesting that it was still in use. It is also the case that she stated that while the monitor is no longer in her flat, she has absolutely no recollection of the circumstances in which it left her flat. Given the size of this object, she would either have had great difficulty moving this article out on her own, or she would have had to arrange for another or others to remove it for her. The fact that she cannot give any assistance as to how the monitor disappeared from her flat is not credible to me. She was also referred to the fact that in her evidence in the Circuit Court she had stated that the video monitor was given to her by Bono, and also to the fact that in the Circuit Court she had stated that it became broken while she was on the road with another band. She stated in response to that that it became broken when it fell down the stairs in her apartment. This lack of consistency in her evidence was not rejected or contested by her when it was pointed out to her. I am not satisfied that she is being honest and truthful in her evidence in this regard. Her lack of consistency in her evidence in the Court below and in this Court is serious and must speak clearly on the question of overall credibility.

The inventory

108. She has also stated that she returned a large amount of goods to the band's management in Dublin and that she did this through a courier, who according to her obtained from Ms. Kelly a signed inventory by way of receipt of these goods. She has not been able to produce this signed inventory, and neither has she given any detail whatsoever as to what effort she made to get information from

the courier company. She did not name the company, could not recall to what address she sent the property, and has stated that she did not contact Principle Management in advance to tell them that she was returning the property to Dublin. All of that seem implausible to me. It seems likely to me that if she thought the property was worth sending back to Dublin, she must have considered that it had some value to the band, unlike the sort of items which might have been discarded by the band after a concert or a tour, and if it had some value, she would have wanted to ensure that the property arrived at its destination, and that she would be sure to have some evidence of that. Ms. Kelly has no recollection of signing any inventory or of goods arriving back. If I was required to decide as an issue whether or not she had returned these goods to Dublin as she has stated I would find as a matter of probability that she had not. This also affects adversely her overall credibility.

The 'champagne video'

109. She was asked about the so-called "champagne video" to which I have referred. In her evidence she had stated that she had asked Peter Williams, the lighting engineer for a copy of the video of that concert, and that a few days later she was given it. It is not one of the disputed items, but Mr Sreenan sought to make a distinction between what was visible on the video in question, and how she described the same incident in her book. While I accept that what is stated in the book is somewhat different to what I recall having seen on the video when it was played in court, I would not place any importance on that as far as her overall credibility is concerned. The contents of the video really is too peripheral to have any importance to this claim, and even credibility.

110. On the other hand, the letter which Jens Hills & Co wrote to Philip Lee solicitors on the 10th October 2003, presumably having taken Ms. Cashman's instructions, states in relation to that video that "the video was given to our client by Bono...". That difference is certainly something which the Court can consider adversely in relation to her general credibility, even though the provenance of the video is not itself an issue to be determined. It is another inconsistency in her account of events. If I had to decide as an issue herein whether she had been given the video by Peter Williams as she now states in her evidence, this inconsistency would prevent me doing so as a matter of probability. It affects adversely her overall credibility in this case.

The offer of a retainer?

111. Mr Sreenan referred to various passages in her book for the purpose of casting doubt on the truth of what was written in the book. I do not propose to dwell on too much of that. But in so far as it could indicate a willingness to represent fiction as truth generally, including for the purpose of this case I will refer to one passage on page 238. It refers to the end of the tour and her disengagement from the band. She states;

"At the end of the Joshua Tree and Rattle and Hum tours, I was – to my surprise – asked by Paul McGuinness to stay on permanently and work solely for Bono and U2. But, even with the tempting offer of a large retainer, I refused. Surprisingly it was not a difficult decision to make. I felt that I was just not a strong enough person to deal with the internal politics of Principal Management, and besides I still possessed a few brain cells. I needed to be happy in my work. It was as pure and simple as that, and any more time spent among them would have made me feel like I was doing time."

112. Given the evidence which I heard as to the difficulties which Principle Management had in negotiating a new deal with her, including what was regarded as her excessive demands, it is simply not credible that there was the offer of a large retainer which was tempting for her. Paul McGuinness has denied that any retainer was offered to her. I have no reason not to believe him, whereas I have several reasons for not taking at face value what Ms. Cashman says. Mr Sreenan's suggestion that what is stated in the book in this regard is fiction is probably justified, even though she may be entitled to some artistic licence in the way she describes events of biographical nature. But it also speaks to the question of overall credibility.

113. Mr Sreenan suggested to her that the reality was that she had taken home some property of the band after the tour ended, but that in the many years which have passed since then, she has convinced herself that they were gifts. She denied this. But I am satisfied that there is probably truth in that suggestion. Mr Sreenan referred also to the fact that she had apparently entered into an arrangement with the publicist, Max Clifford for the purpose of selling "her story" to a tabloid newspaper for what is called a "five figure sum". He referred to an article which appeared in a Sunday newspaper under the banner "Lola to dish the dirt in revenge on Bono". This article appeared just following the finding against her in the Circuit Court. In it there is a suggestion made by "friends" of hers that she is "so angry about the way she has been treated that now she is prepared to tell the truth about the U2 warts and all ...". She stated that she had spoken to that publicist, that he had agreed to act for her, but that she had not signed any contract. When pressed by Mr Sreenan as to whether she in fact intended to publish more about the band she, somewhat hesitatingly or reluctantly I felt, stated that she did not.

114. I have already referred to the evidence of the video showing the band in a hat shop when Stetson hats were being bought, whereas Ms Cashman states that the idea of such a hat as part of the band's image was hers. There is also the fact that she stated that she introduced Larry Mullen to wearing this type of Converse All Star boots, whereas in the book entitled "U2 by U2", there is a picture of him which predates her involvement by some 3 years or so, and which clearly shows him wearing this type of footwear. This to me is indicative of a person who is inclined to exaggerate her importance and involvement with the band. That is not to gainsay that she performed an important role for the band on that tour. She was employed for that purpose and Bono has freely stated in his direct evidence that she was extremely good at her job. This was not something extracted under cross-examination. But he was of the view that she was not as central and pivotal in the creation of a new image for the band as she may feel, although she was important to the development of their existing image. She disagrees of course, but I am entitled to view her own opinion with the same sort of doubt as I view some of her evidence.

115. I have already referred to the photograph of Ms Cashman holding a child and in which she is wearing an ear-ring. She says that it is one of the silver ear-rings at issue in this case, and that this photograph is support for her evidence that they had been given to her, as otherwise why would she be wearing them at a social occasion with the band.

116. Fintan Fitzgerald has given his evidence of his opinion that the ear-rings being worn in that photograph are different to those at issue herein. The photograph has been enlarged for the purpose of this case, and even without that evidence of Fintan Fitzgerald, I have no doubt that they are different ear-rings to those in the photograph. He is not an expert in the matter of ear-rings and neither am I, but it is frankly quite easily observed that those in the photograph are different in design to those at issue herein. I am entitled to have regard to the fact that Ms. Cashman failed to appreciate that before offering the photograph in evidence. Without the photograph as corroboration, the Court is left only with Ms. Cashman's evidence that these were given to her as she states. Without corroboration, her evidence in this regard suffers from the same frailty as some of her other evidence to which I have referred. It lacks sufficient credibility to reach the level of probability.

117. On the other hand, the photograph of her for the backstage pass seems to show the ear-rings in issue. But she could not say at what point in the tour that photograph was taken, but certainly it shows her wearing what look like the ear-rings in question, but that

alone is insufficient to surmount the other difficulties.

118. Many other instances of inconsistency were adverted to by Mr Sreenan, in relation to replies to particulars and so forth, compared to what has been stated in evidence. He has pointed to the lack of detail contained in many of the replies and has suggested that they are vague. I make no finding in relation to that. There are other matters also such as her level of earnings as claimed in the English proceedings. Again, I prefer not to rely on matters such as that.

119. I have set out as accurately as I can the evidence which Ms. Cashman has given in relation to how she was gifted the disputed items and some other items. I have heard Bono's evidence and the other evidence to which I have referred. To find in favour of Ms. Cashman I would have to be satisfied, in the light of all that evidence and my views on credibility, that it is more probable that the account given by Ms. Cashman is correct. I cannot be so satisfied. The reason for that is that there are many instances as set forth above in some detail where her evidence lacks credibility, plausibility or probability. The instances in question relates in large part to matters peripheral to the main issues, but if I find her evidence unbelievable in those respects, there is little reason why I should give more credence to her evidence in relation to largely uncorroborated and unsupported assertions in relation to the more central issues. In making this finding as to credibility I do not overlook the fact that she was correct in maintaining that Larry Mullen had given her his Converse All Star boots as she had stated from the start.

120. I emphasise that my determination is on the balance of probability. If I needed to be satisfied only to the point of a possibility, rather than a probability, I would be able to find in her favour perhaps, since I do not believe that she is deliberately being untruthful. I believe that for the most part she has convinced herself to the point of honest belief that these goods were given to her, and has developed, sometimes inconsistently as I have described, a story or recollection in relation to same.

121. As a matter of probability therefore I am satisfied that these items remain the property of the plaintiffs, and I affirm the orders of the learned President of the Circuit Court.