APPROVED NO REDACTIONS NEEDED

THE COURT OF APPEAL

Record Number: 2024 No 74
High Court Record Number: 2017/ 6193P
Neutral Citation Number [2024] IECA 298

Allen J.

Butler J.

Hyland J.

BETWEEN/

ANN NOLAN AND ELIZABETH NOLAN AND JOAN NOLAN AND RICHARD NOLAN AND PATRICIA NOLAN AND SALLY NOLAN AND QUEST CAPITAL TRUSTEES LIMITED

PLAINTIFFS/APPELLANTS

-AND-

DILDAR LIMITED AND CIARAN DESMOND AND COLM S MCGUIDE AND DERVAL M O'HALLORAN FORMERLY TRADING UNDER THE STYLE AND TITLE OF MCGUIDE DESMOND SOLICITORS, A FIRM, (THE SECOND NAMED DEFENDANT NOW TRADING UNDER THE STYLE AND TITLE OF CIARAN DESMOND SOLICITORS) AND JOHN MILLETT AND PINNACLE PENSIONER TRUSTEES LIMITED AND DILDAR LIMITED AND JOHN MILLETT INDEPENDENT FINANCIAL ADVISORS LIMITED

AND BY ORDER
DILLON KENNY AND DARREN DENNY

AND BY ORDER
PAUL KENNY

DEFENDANTS/RESPONDENTS

AND BY ORDER
STEPHEN DECLAN MURPHY, EDEL MURPHY, KEVIN JOSEPH MCMAHON, JOHN LYNCH, EFG BANK AG, BNP PARIBAS WEALTH MANAGEMENT, UNITED OVERSEAS BANK LIMITED AND ALLIED FINANCE TRUST AG

THIRD PARTIES

JUDGMENT of Ms. Justice Hyland delivered on the 12 day of December, 2024

INTRODUCTION

1. This appeal concerns a challenge to how the trial judge treated the evidence – both the evidence given, and evidence sought to be admitted – in the course of a 22 day trial about a commercial dispute between a number of parties. Judgment was given on 10 January 2024 ([2024] IEHC 4). The appellants are the trustees of Oaklands Property Trust *("OPT")*, which holds the pension funds of thirteen individual members of the Nolan family. The Nolan family operate a transport and logistics company known as Nolan Transport. The appellants alleged that the sum of €6.9 million was transferred by a previous pension trustee, Pinnacle Pensioner Trustees Limited, the sixth respondent, on their instruction, and that those funds were misappropriated.

2. Between January 2013 and June 2013, the funds were moved in three tranches from an account in Investec Bank in Ireland to the account of a company known as Middle Eastern Continental Development *("MECD")* in a Saudi Arabian bank in Dubai. The monies were then transferred to the account of the company known as Clear Visions Solutions SA *("CVSSA")* in a Swiss bank, EFG Bank *("EFG")* in Zurich. Those funds have not been returned to any of the appellants.

3. After the trial of the action had concluded it emerged that a sum of €1,147,223.75 remained in the CVSSA account and a sum of €462,044.97 remained in the MECD account. In July 2023, the trial judge directed those monies be paid into court. By his judgment of 10 January, 2024 he gave directions with a view to establishing the beneficial entitlement of the appellants and other claimants to the funds in court. That part of the judgment has not been appealed.

4. The CVSSA bank account to which the OPT funds were transferred also contained monies belonging to other persons who had placed funds with CVSSA. The first respondent is an Isle of Man company which is the registered owner of a property in Cork formerly owned by Nemo Rangers, described in the judgment of the High Court as the *"Nemo Rangers"* property. The seventh respondent, Dildar Ireland, is a company incorporated in Ireland. The shareholders of the first respondent hold their shareholding as nominees in trust for Clear Vision Solutions Holdings Inc., which holds its interest in the shares for Paul Kenny, the eleventh respondent, and a John Kenny, and ultimately for their sons Dillon Kenny, the ninth respondent and Darren Kenny, the tenth respondent. For ease of reference, the first, seventh, ninth, tenth and eleventh respondents will be referred to as the "Kenny respondents". On 3 September 2013, €2,828192.79 was transferred from the CVSSA account in EFG to the vendor's solicitors for the purpose of purchasing the Nemo Rangers property. The claim made by the appellants against the Kenny respondents altered over the course of the case, but by the time the matter came before this court, the appellants' claim was that they were entitled to exercise a right of tracing in respect of part of their claim into the Nemo Rangers property held in the name of the first respondent.
5. These proceedings were issued by the appellants in 2017 seeking, *inter alia*, the return of the monies and tracing remedies, and were entered into the Commercial List of the High Court. After a very considerable number of interlocutory applications in the matter, totalling 69, the trial commenced in May 2022.
6. On Day 5 of the trial the proceedings were settled against the second respondent, Mr. Desmond. He consented to judgment in the amount of €6.9 million and costs for "*negligence, breach of contract and breach of fiduciary duty in the context that he controlled CVSSA and that the plaintiff's pension monies were in CVSSA*". That was

the extent of the information given to the Court in this respect. In the pleadings and in the opening in the High Court the appellants had made a wide range of claims against both Mr. Desmond and Mr. Millett, John Millett Independent Financial Advisors Limited and Pinnacle Pensioner Trustees Limited (described as the " Millett respondents", described below in this paragraph). However, because Mr. Desmond compromised his claim with the appellants on Day 5, that part of the case became focussed on the Millett respondents. In summary, the appellants claimed that Mr. Millett was personally liable for fraudulent misrepresentation and deceit; that he and John Millett Independent Financial Advisors Limited, the eighth respondent, owed the appellants' fiduciary duties together with duties in tort and contract; that the eight named respondent was the corporate vehicle through which Mr. Millett dispensed pension and financial services and that Mr. Millett represented that the sixth named respondent, Pinnacle Pensioner Trustees Limited, of whom Mr. Millett is a director, was a suitable person to act as a trustee of OPT. On that basis, and in reliance upon the representations alleged to have been made by Mr. Desmond, the appellants say they consented to Pinnacle becoming a trustee of OPT on 1 December 2012. A claim was also made against the Millett respondents for breach of the appellants' personal data.

7. In his judgment, the trial judge dismissed the claim against the Millett respondents, other than the claim in respect of the unauthorised disclosure of personal data, in respect of which he ordered Mr. Millett to pay to each of the personal appellants the sum of €500 for nominal damages; dismissed the counterclaim of the sixth and eighth respondents in circumstances where they were not represented at the trial; and made an order giving directions in relation to how the funds held in court should be dealt with.

8. A wide ranging appeal was filed on 15 March 2024 against the findings of the trial judge, both in respect of his rejection of the case against the Millett respondents and the tracing claim. However, on Day 2 of the appeal hearing, it was identified that a substantial number of the appeal grounds were no longer being pursued. First, counsel indicated that the tracing claim was no longer being pursued against the Kenny respondents. For that reason, it is neither proposed to describe the findings of the High Court in relation to the Kenny respondents, nor to identify the grounds of appeal in this respect.

9. Counsel also identified that the following aspects of the appeal were no longer being pursued, namely the challenge to the quantum of the award of damages in respect of the data breach; the challenge to the trial judge's refusal to exclude interrogatories; the challenge to the treatment by the trial judge of text messages; and the challenge to the approach of the trial judge to the admissions of Mr. Desmond in the context of the settlement with him. In the circumstances, it is not purposed to address any of the findings of the trial judge in respect of those issues nor the grounds of appeal initially advanced in respect of same.

10. For the sake of clarity, the plaintiffs in the High Court proceedings will be referred to as *"the appellants"* throughout, even where I am discussing the judgment of the trial judge. Equally, Mr. Millett, Pinnacle, and John Millett Independent Financial Advisors Limited will be referred to throughout as *"the Millett respondents"* and Dildar Limited, Dillon Kenny, Darren Kenny and Paul Kenny will be referred to as *"the Kenny respondents"*. Direct quotations of the High Court judge referencing the plaintiffs/defendants in those proceedings will be changed to *"appellants"/ "respondents"* and changes will be noted in square brackets.

SUMMARY OF FINDINGS

11. What remained in the appeal are what might be described as evidential issues. The appellants sought to use Chapter 3 of the Civil law and Criminal Law (Miscellaneous Provisions) Act 2020 (the "2020 Act") to admit into evidence certain documents. No notice of intention to give evidence, together with copies of the documents, had been provided in advance by the appellants but the trial judge held this to be unnecessary given the respondents' concession that the documents sought to be introduced had been "served" within the meaning of s.15(3) by being delivered to the respondents' solicitor in the course of the discovery process.

12. The respondents objected to the introduction of the documents and the appellants argued that no objection was permissible given the failure to serve a notice of objection prior to the trial as prescribed by s.15(2). This judgment explains why the trial judge was correct in concluding no such obligation arose. Where a notice of intention to give the information in evidence, along with the documents sought to be introduced, is served by the party seeking to introduce the documents, then a person wishing to object must telegraph their intention in advance by serving a notice of objection under s.15(2). The two notices go hand in hand. By contrast, if the documents have been served on the other side within the meaning of s. 15(1)(a) - as was conceded to be the case here - there is no obligation to serve a notice of objection in advance.

13. The appellants also challenged the trial judge's decision to refuse their application to admit documents pursuant to s.16(1) and (2)(c) of the Act. This permits a refusal to admit documents on the basis of the interests of justice, including where there is any risk that their admission or exclusion will result in unfairness to any other party, having regard to whether it is likely to be possible to controvert the information

where the person who supplied it does not attend to give oral evidence in the proceedings. The trial judge's decision that the admission of the identified documents would be unfair was undoubtedly a discretionary one. An appellate court may set aside the exercise of discretion by a trial judge in relation to a decision on a procedural application, both where that trial judge has misapplied the law, and where the appellate court considers the conclusion is so fundamentally wrong it ought to be set aside. In exercising that jurisdiction, the appellate court must take into account the context in which the ruling was made, including, where relevant (as here), the intimate familiarity of the trial judge with the case.

14. The trial judge concluded there would be unfairness should the documents be admitted, because evidence had been given by way of interrogatories to suggest that the documents could be qualified by additional evidence. He found that to allow them to be admitted without the makers of the documents being available for cross examination would be unfair as it would immunise the documents from scrutiny. The trial judge was not convinced that the appellants were precluded from proving the documents in some other way, for example by calling the second defendant with whom a settlement had been reached. He found that the appellants had left themselves in a position where they were without a witness to prove the documents. A trial judge is entitled, when considering fairness under s. 16(2)(c), to consider the application in the context of the trial, and why a party needs to rely upon the statutory scheme introduced by the Act. This judgment explains why the appellants failed to establish an injustice to them, or manifest error of assessment, in the exercise of the trial judge's discretion. Another judge might have taken a different view in respect of the question of unfairness; but there was no manifest error of assessment in the exercise of the trial judge's discretion.

15. The remaining issues arose out of the trial judge's findings of a lack of credibility on the part of Richard and Patricia Nolan, key witnesses for the appellants, which findings had serious implications for the remainder of the evidence given by them and the other evidence tendered on behalf of the appellants. He disbelieved them on two core issues, finding that they had not been truthful (a) as to the purpose of putting the funds through the structure, and (b) as to their belief as to how the money was to be held and/or controlled. The appeal focused on the second of these findings. Because he did not believe them in those respects, he treated them as not being credible witnesses, not just in relation to those issues, but generally. Those findings are credibility findings and as such should be treated as findings of primary fact and evaluated according to the test in *Leopardstown Club Ltd. v. Templeville Developments Ltd.* [2017] 3 I.R. 707 i.e. they ought not be set aside unless there is no credible evidence to support them. Having analysed the findings of the trial judge in detail (see below), I concluded there was sufficient evidence to justify his conclusion that the Nolans knew that the money would not be within their control and/or was being invested.

16. The appellants also argued that in relation to areas not affected by the findings of untruthfulness, the trial judge was not entitled to disbelieve them on general credibility grounds where the evidence had not been controverted. They conceded, following the decision in *Shelly-Morris v. Bus Átha Cliath* [2003] 1 I.R. 232, that a judge may allow lack of credibility findings to influence him or her, not just in relation to the specific events where the witnesses are found to be untruthful, but also in relation to other evidence. But they argued this does not apply where the other evidence is not in itself manifestly untrue, and there is no controverting evidence. As a matter of logic, it is difficult to see why this should be so. Why should the sense of

unease generated by a plaintiff's untruthfulness in a particular area be assuaged by the fact that no one has controverted the plaintiff's evidence in another area? The proposition is startlingly wide. It would mean a judge is obliged to accept evidence absent a manifest lack of foundation, despite his or her doubts about the credibility of a witness arising from disbelieving them in respect of other evidence. The establishment of such a rule would considerably limit the discretion of a trial judge and is contrary to the principled approach subtending *Shelly-Morris*. This ground of appeal cannot succeed.

17. Finally, the appellants argue that the lack of evidence controverting specific allegations made by them is itself a form of corroboration, and that the High Court can (and should have) drawn adverse inferences from it. It is clear from *O'Toole v. Heavy* [1992] 2 I.R. 544 that where a defendant does not give evidence, the judge must consider whether the necessary facts to support a verdict in the plaintiff's favour have been established. The trial judge concluded they had not. The decision in *R. v. Inland Revenue Commissioners ex parte TC Coombs & Company* [1991] 2 A.C. 283 is not a hard rule of law requiring a court to draw inferences from the lack of controverting evidence, or treat the silence of the respondents as a form of corroboration. Rather, *Coombs* identifies that a *prima facie* case may become a strong or even an overwhelming case if the failure to give evidence cannot be credibly explained.

18. Here, the trial judge found there was no *prima facie* case. As observed in *Prest v. Pedrodel Resources Limited* [2013] UKSC 34, the concept of the burden of proof has always been one of the main factors inhibiting the drawing of adverse inferences from the absence of evidence. A defendant's decision not to call witnesses is a legitimate tactical move in the adversarial system of litigation. The Millett

respondents were entitled to decide not to give evidence at the conclusion of the appellants' case. Where the trial judge did not find a *prima facie* case, he was entitled not to draw inferences, or treat as corroboration, the absence of evidence from Mr. Millett.

SUMMARY OF FACTS

19. As noted above, the appellants are the trustees of the OPT, which holds the pension funds of thirteen individual members of the Nolan family, including the Nolan appellants, namely Ann Nolan, Elizabeth Nolan, Joan Nolan, Richard Nolan, Patricia Nolan, and Sally Nolan. Immediately prior to the events which gave rise to the proceedings, those pension funds were held in an Irish branch of the international banking company Investec Bank. In autumn of 2012, the members of the Nolan family and their solicitor, Mr. Desmond, held what was described in the judgment as a crisis meeting, as the family were concerned about their personal exposure to outstanding debts that the family owed to Allied Irish Banks and Bank of Ireland. At this meeting, Mr. Desmond advised the family that part of the OPT funds could be used towards the settlement of the apprehended litigation by Bank of Ireland and Allied Irish Bank. In fact, the claims of Bank of Ireland were ultimately settled by Serene Consultancy Limited *("Serene")*, an Isle of Man entity, using funds that had originated in OPT. As held by the trial judge, a structure was put in place to avoid OPT paying the personal debts directly as any such use of the funds would likely have been treated by the Revenue Commissioners as pension in payment to the relevant beneficiaries with tax consequences. The structure put in place involved the transfer of OPT funds into the Dubai deposit account of MECD; . from there to the bank account of CVSSA with EFG in Zurich; and from there to an account of Serene in the Isle of Man.

20. In November 2012 Mr. Millett was introduced to the appellants and a contractual relationship was established between Pinnacle/John Millett Independent Financial Advisors Limited and the appellants, which envisaged that the OPT would transfer monies to MECD, and Pinnacle/John Millett Independent Financial Advisors Limited would assist in making the arrangements for that purpose. MECD was managed by a Swiss corporation, Allied Finance Trust AG *("AFT")*. AFT was a corporate service provider known to the John Millett Independent Financial Advisors Limited and to Mr. Millett.

21. The following is an account of the transfers of the OPT funds to MECD (taken from para 422 of the judgment of the High Court):

    - on 8 January 2013, the appellants transferred €620,000 to MECD. This investment ultimately generated a receipt of €619,000 into the euro account of CVSSA in EFG Bank on 12 January 2013. That sum was subsequently withdrawn from that account and transferred to Serene on 16 January 2013, and was ultimately used to settle personal debts of OPT beneficiaries to Bank of Ireland;
    - on 23 January 2013, €2,480,000 was transferred from OPT to MECD. That investment generated a receipt of €2,449,900 into the euro account of CVSSA in EFG Bank on 30 January 2013;
    - on 7 February 2013, €2,480,000 was transferred from OPT to MECD. Subsequently, this investment resulted in a transfer of €2,477,000 on 14 February 2013 directly from MECD to Serene. The trial judge held that the true purpose of this transfer to Serene was to facilitate an intended settlement of personal debts owed by beneficiaries of the OPT pension fund to Bank of Ireland;

- on 14 February 2013, €2,480,000 was transferred from OPT to MECD. This investment resulted in the receipt of €2,479,860 in MECD's bank account on 20 February 2013. In turn, that investment generated a receipt of €2,477,900 into the euro account of CVSSA in EFG Bank;
- on 7 June 2013, €2 million was transferred from OPT to MECD. This investment resulted in the receipt of a similar amount into the euro account of CVSSA in EFG Bank on 12 June 2013 following which the balance stood at €8,243,925.79. This amount comprised an opening balance of €416,125.79, the three receipts generated from the proceeds of the OPT investments in MECD, and an amount of €900,000 which were funds transferred by the Kenny family.

22. The sum of €6.9 million (the subject of these proceedings) is made up of the transfers on 23 January, 14 February and 7 June 2013. In addition to the euro account, CVSSA also had a sterling account and a US dollar account with EFG Bank. On 12 June 2013, a number of significant transactions occurred on the sterling and US dollar accounts, which resulted in the balance of the US dollar account being US$15,036,710.89.

23. On 3 September 2013, a sum of €2,828,136 was debited to the euro account and sent by SWIFT transfer to Eugene F. Collins, the solicitors for the vendors of the Nemo Rangers property, which left the euro account overdrawn to the extent of €2,584,267. This transfer to Eugene F. Collins was used to complete the purchase of the Nemo Rangers property. The Kenny respondents had transferred to CVSSA funds sufficient to cover the transfer to Eugene F, Collins. After the transfer, CVSSA had in hand funds in excess of the monies which had been transferred by the appellants.

24. It was pleaded by the appellants that Mr. Desmond, in concert with others, had been involved in pledging the funds deposited in the CVSSA account as security for a loan of US $100 million from EFG to CVSSA as part of a complex scheme which was referred to as the *"Kiwi"* structure. When the appellants sought the return of the money in the CVSSA account, the money was not available. As identified above, the only monies remaining are those currently lodged in court.

ADMISSIBILITY OF DOCUMENTS UNDER CIVIL LAW AND CRIMINAL LAW (MISCELLANEOUS PROVISIONS) ACT 2020

First application for admission of documents

25. For reasons that may have been linked to the settlement with Mr. Desmond, and his subsequent absence from the case as a defendant, it became clear as the case progressed in the High Court that the appellants – unless, perhaps, they called Mr. Desmond – did not have witnesses to prove certain documents that they were relying upon. As a result, on Day 15 of the trial, the appellants made an application under the 2020 Act to admit into evidence the copy documents annexed to Ms. Guggenheim's report. Ms. Guggenheim is a Swiss lawyer who had provided an expert report on behalf of the appellants with reference to a number of copy documents, including a loan agreement and pledge document, as well as her interactions with Swiss law experts retained by the Kenny respondents who had prepared a report entitled the "*Bratschi Report*". Various agreements were reached by the Swiss law experts in relation to the loan agreement and pledge document. That evidence was given on the basis that it was without prejudice to the admissibility objections.

26. The first issue dealt with by the trial judge was the applicability of s. 15 of the 2020 Act. Section 15(1) provides as follows:

"*Information in a document shall not, without the leave of the court, be admissible in evidence by virtue of section 14 at a civil trial unless—*

(a) a copy of the document has been served on the other party or parties, or

(b) *not later than 21 days before the commencement of the civil trial, a notice of intention so to give the information in evidence, together with a copy of the document, is served by or on behalf of the party proposing to give it in evidence on each of the other parties to the proceedings*".

27. In the High Court, the Kenny respondents argued that the requirements of s. 15(1) had not been met by the appellants in circumstances where no notice of intention to give evidence, together with copies of the documents sought to be introduced, had been provided by the appellants within the specified time period.

28. The trial judge rejected that argument. At paragraph 253 he noted that the argument ignored the fact that the documents had been provided as part of the discovery and he held that on that basis, the requirements of s. 15(1)(a) had been satisfied. He referred to an extract from *McGrath On Evidence* (3rd ed. Roundhall 2020) which expressed the view that the requirements of s. 15 can be readily satisfied in cases where documents have been provided by way of discovery and that a notice of an intention to adduce evidence of business records was only required in advance of a hearing if copies of the documents have not already been served. The section provides a definition of service at s. 15(3) in relevant part as follows: -

"(3) A document required by this section to be served on any person may be served—

(a) *by delivering it to him or her or to his or her solicitor*."

29. There are other ways in which a document may be served under s. 15(3), but given that the respondents accept that the documents in question were served by having been delivered to the solicitors for the appellants in the discovery process, it is not necessary to consider those. In the circumstances the trial judge held that the document had been served within the meaning of s.15(1)(a). That finding was accepted by the respondents.

30. The next issue that arose was whether there was a necessity for the respondents to object in advance to the introduction of the documents. Section 15(2) provides for a party to object to documents that have been notified to them as follows: -

> "*A party to the proceedings on whom a notice has been served pursuant to subsection (1) shall not, without the leave of the court, object to the admissibility in evidence of the whole or any specified part of the information concerned unless, not later than 7 days before the commencement of the civil trial, a notice objecting to its admissibility is served by or on behalf of that party on each of the other parties to the proceedings*."

31. At para. 254 of the judgment, the trial judge noted that the appellants sought to rely on the fact that no such notice of objection was served by the respondents, but concluded that, since the appellants did not serve any notice under s. 15(1)(b), it followed that s. 15(2) has no application.

32. The appellants now argue that the trial judge erred in permitting the respondents to object to the admissibility of the copy documents where the respondents had not served a notice of objection to evidence under s. 15(2) of the 2020 Act. They rely on para. 5-230 from *McGrath On Evidence* which suggests that, interpreting s. 15(2) such that the obligation to serve a notice of objection only arises where no notice of intention to adduce evidence of business records has been provided, would make

little sense. This is because notice will not be necessary in most cases as the documents will have been served by way of discovery or being exhibited. They contend that no notice of an objection in advance may mean that a party who is unsuccessful in having the records introduced, may be deprived of the opportunity to obtain alternative evidence. They argue that the better view is that notice should be given whenever it is sought to raise an objection. The appellants submit this is the correct interpretation of s. 15(2), having regard to the rules of interpretation of statutes recently restated in *Heather Hill Management Company CLG v. An Bord Pleanála* [2022] IESC 43.

33. The Kenny respondents respond that the appellants do not explain how *Heather Hill* was applicable. The Millett respondents say that the reliance on *Heather Hill* is misconceived and that the trial judge's interpretation was in keeping with proper application of the rules of statutory interpretation.

Discussion

34. The appellants' argument requires a construction of s. 15(2) that is at odds with its plain wording. The text of s. 15(2), read in conjunction with s. 15(1), is perfectly clear. There is no ambiguity or uncertainty. The obligation to serve a notice of objection under s. 15(2) is imposed only on a person who receives the notice of intention to give evidence identified in s. 15(1)(b). The wording of s. 15(2) leaves no room for uncertainty - "*A party to the proceedings <u>on whom a notice has been served</u> pursuant to subsection (1) shall not … object to the admissibility … of the information concerned unless … a notice objecting to ... admissibility is served …*" [Emphasis added.] In other words, it only posits an obligation on those who have received a notice of intention pursuant to subsection (1).

35. Where documents have been served on the other side within the meaning of s. 15(1)(a) the Act, there is no obligation to serve a serve a notice of intention to give the information in evidence. It is only where documents have not been so served that they must be sent, along with a notice of intention to give the information in evidence, to the opposing parties. And it is only in that case that the objection to those documents must be notified in advance by serving a notice of objection. Parties who have been served with documents do not need to telegraph their opposition in advance. In short, there is a somewhat involved regime whereby documents require to be provided, along with a notice of intention to give the information in evidence. The receipt of this notice provokes a corresponding obligation on the recipient to serve a notice of objection if they want to object to the introduction of those documents. However, none of this applies if the documents are served.

36. The arguments of counsel for the appellants at the oral hearing were focused upon the desirability of a different approach. He submitted that the better practice would be – and that good practice is – to serve a s. 15 notice identifying specifically the documents sought to be introduced, even if the documents had been served within the meaning of the section. However, the court is not concerned here with not what is desirable, but rather what is provided for under section 15. In *Heather Hill*, Murray J. notes that the first and most important port of call is the words of the statute itself, those words having been given their ordinary and natural meaning. The words must be viewed in context. In construing the words in context, the court will be guided by the various cannons, maxims, principles, and rules of interpretation. If that exercise in interpreting the words in the light of the context yields ambiguity, then the court will seek to discern the intended object of the statute and the reasons for its enactment.

37. Happily, there is no ambiguity in the words of s. 15(1) and (2). The ordinary and natural meaning of the words make it clear that the requirement to serve a notice of objection only applies where the documents have been served with a notice of intention to give the information in evidence under s. 15(1)(b). It may well be that the authors of *McGrath* are correct in considering that the legislature should have adopted a different system so that, where a large quantity of documents are served within the meaning of s. 15, a notice of objection should be required to allow the recipient to understand in advance what documents are being objected to. But the legislature chose not to adopt this approach. If a change is to be made so that notices of objection should be served in all cases, then the legislature must take the necessary steps.

38. Accordingly, I conclude that the trial judge was correct in deciding the respondents were not precluded from objecting to the admission of the documents despite the absence of a notice of objection.

Second application for admission of documents

39. On their first application, on Day 15, the appellants were unsuccessful in their application to have admitted into evidence the documents sought to be introduced under the Act as the trial judge also ruled that s. 18(1) clearly envisaged some method of authentication. He concluded that there was nothing before the court by way of authentication, with the result that one of the express statutory requirements for the admission of copy documents had not been satisfied. Following that ruling, a second application was made under the 2020 Act on Day 18 of the trial, but this time in respect of two documents only, namely the pledge document of 5 September 2012, and the loan agreement of 28 February 2013, described below. The solicitors for the appellants filed an affidavit exhibiting a letter from the Irish solicitors acting for EFG

Bank in respect of the pledge and the loan agreement which was said to be sufficient to authenticate the documents. However, no decision was ultimately made by the trial judge on these attempts to authenticate the documents as he decided to exclude the documents on a separate basis, i.e. under s. 16 of the Act (see para. 285 of the High Court judgment). In those circumstances, it is not proposed to deal with the grounds of appeal that are concerned with authentication of documents.

40. Under s. 16 decision, the trial judge concluded that, in the interests of justice, the information that might otherwise have been admissible by virtue of s.14 should not be admitted, having regard to the fact that its admission would result in unfairness to the respondents. Section 16(1) provides as follows: -

> "(1) *In any civil proceedings, information or any part thereof that is admissible in evidence by virtue of section 14 shall not be admitted if the court is of the opinion that in the interests of justice the information or that part ought not to be admitted.*
>
> *(2) In considering whether in the interests of justice all or any part of such information ought not to be admitted in evidence the court shall have regard to all the circumstances, including - ...*
>
> *(c) any risk, having regard in particular to whether it is likely to be possible to controvert the information where the person who supplied it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to any other party to the civil proceedings or, if there is more than one, to any of them*".

41. There is no doubt that the documents in question, being the pledge document and the loan agreement, were potentially of significant importance in the trial, although on Day 1 of the appeal hearing, counsel for the appellants accepted that if the appellants'

appeal on the assessment of the oral evidence of the Nolan witnesses failed, even the admission of the documents under the 2020 Act would not "*get him over the hurdle*" in respect of the Millett respondents.

42. To understand the trial judge's ruling, it is important to appreciate the nature of the documents. The first is a document of 5 September 2012, which appears to have been an annex to the application of CVSSA to open an account with EFG Bank. It is entitled *"Pledge and Assignment"*, hereafter described for ease of reference as the *"pledge document"*. The application to open an account to which it was appended was filled in by CVSSA and the application identified that correspondence was to be addressed to AFT in Zurich. On its face, the pledge was signed for and on behalf of Allied Middle East FZC. The handwritten signature which appears over the printed words *"authorized Signature(s)"* is completely illegible. The pledge document identified CVSSA as *"the Pledgor"* and provided that *"I/WE the undersigned"* pledged to EFG Bank all assets, including securities and deposits held or placed at the disposal of the Bank by CVSSA. It provided that the pledged assets as defined at paragraph 1 of the agreement, as well as the claims and other rights assigned, should act as security to the Bank for the payment and performance of all debts and obligations, whether present or future, due or to become due, conditional or unconditional, plus interest etc owed to the Bank by the Pledgor. As I have said, it was signed for and on behalf of Allied Middle East FZC. There was no evidence as to who Allied Middle East FZC was; or as to its connection, if any, with CVSSA; or the circumstances in which the pledge came to be signed.

43. The second document was a loan agreement in the form of a letter dated 28 February 2013 addressed by EFG Bank SA to CVSSA. It was signed on behalf of EFG by Mr. Urs Oberhänsli and Ms. Monika Neumeister and by Mr. Ciaran Desmond for

CVSSA. On its face, It was an agreement whereby EFG agreed to grant a loan facility to CVSSA in the amount of $100 million, being a loan facility repayable on demand at any time with immediate effect. The proceeds of the loan facility were to be used to purchase structured products for the borrower's account with the bank, which would be duly pledged to the bank, being a five-year capital protected note issued by BNP Paribas Singapore and a five-year capital protected note issues by United Overseas Bank Singapore or Deutsche Bank Singapore. There were a number of conditions precedent, including the deposit of a cash amount of not less than USD$15 million on the borrower's account with the bank.

Grounds of appeal

44. Insofar as the admissibility of documents under the 2020 Act are concerned, the relevant grounds of appeal include the following:

- that the trial judge erred in permitting the respondents to object to the admissibility in evidence of the copy documents where the respondent had not served notice under s. 15(2) of the 2020 Act (judgment para.254);
- that the trial judge erred in finding that it was in the interests of justice not to admit said copy documents in evidence and/or that it would be unfair to the respondents to admit said copy documents in evidence, having regard to s. 16 of the 2020 Act (judgment para. 294).

45. At para. 3.13 of their written submissions, the appellants argue that Chapter 3 of the 2020 Act is intended to be permissive and to facilitate the admission of business records in civil litigation. They focus on the fact that the loan agreement and pledge were central to their case, being documents generated by others out of the jurisdiction without notice to the appellants. It was not, they said, open to them to prove the documents themselves. They emphasise that the documents were served on the

respondents long in advance of the trial, without objection and were considered by independent Swiss law experts, including experts engaged by the Kenny respondents, who raised no concerns about their reliability or authenticity. They referred to the interrogatories of Mr. Desmond and Mr. Millett which acknowledged that the monies in the CVSSA account had been pledged to EFG Bank (No. 319 of Millett and No. 208 and 209 of Desmond). All this, it was said, meant that there was no legitimate concern about the authenticity or reliability of the documents. They observed that in the light of Mr. Millett's response to interrogatory 319, it was difficult to see how he might have sought to controvert the existence of the pledge through cross examination.

46. The appellants noted that the 2020 Act did not provide an exception in cases of fraud, despite the identified concern of the High Court judge for Mr. Millett against whom allegations of fraud and deceit were pleaded. The appellants noted that courts in other contexts have recognised the difficulties in proving fraudulent activity, which tends to be clandestine. It was said that to apply Chapter 3 in a way that makes it more difficult for a plaintiff alleging fraud to have admitted into evidence documents which he or she cannot prove directly is not consistent with that recognition. They further noted that the mere admission of the documents would not have precluded Mr. Millett from defending the allegations of fraud and deceit as the appellants would still have had to prove each of the elements of those torts. Thus, it was said, the documents would not have been as prejudicial as the trial judge suggested. They say that equally it was difficult to see what actual prejudice would have been suffered by the Kenny respondents had the documents been admitted, given that their own Swiss law expert had agreed that the effect of the pledge was to preclude CVSSA from withdrawing money from the account without EFG Bank's consent. In short, the

refusal to admit the documents meant the real issues and controversy in the case were never determined and the ruling was highly prejudicial to the appellants.

47. The appellants' submissions do not engage with the concern expressed by the trial judge that Mr. Millett would not have been easily able to interrogate the precise nature of the pledge and the possible conditionality around the pledge. Rather, they focus on his one interrogatory where he confirms the existence of the pledge. Significantly, they do not engage with the point made by the trial judge i.e. that there appeared to have been little thought given as to how the documents might have been proved and that this was not a case where there appeared to be an impossibility of proof. Nor did the appellants – either in the written submissions or at all – indicate why they could not call Mr. Desmond or some other witness in relation to proving the pledge, despite what must have been his deep familiarity with the documents (discussed below).

48. At paragraph 204 of their written submissions, the Kenny respondents observe that the appellants studiously avoid the fact that they could have proved the documents in the ordinary way but for tactical reasons chose not to. At para. 207 they argue the appellants were simply seeking to have the court second guess a ruling on admissibility made on Day 19 of a trial and that both in its own terms and in the context of the run of the case, the decision of the trial judge should be respected by the appeal court. The Millett respondents argue that no error of law or other basis had been identified for the court to interfere with the manner in which the trial judge had exercised his statutory discretion.

Decision of trial judge

49. The applications to admit evidence are dealt with at paras. 286-296 of the judgment. The trial judge commenced by noting that the appellants were pursuing a claim in

fraud and deceit against Mr. Millett which, on the scale of seriousness of claims that can be advanced in civil proceedings, was at the very apex of the scale. The trial judge observed that the stakes were extraordinarily high. He noted that the alleged agreement by CVSSA to pledge the monies held in its account with EFG Bank was a key element of the appellants' claim. He noted that both Mr. Millett and the Kenny respondents had pleaded they were strangers to the circumstances in which any pledging of funds took place. He observed that the evidence pointed to Mr. Desmond being responsible for the opening of the account of CVSSA with EFG.

50. Having identified the terms of s. 16, the trial judge observed that, given that the respondents' case was that they are strangers to the agreement to pledge the funds, and given the evidence as to Mr. Desmond's leading role in dealing with EFG Bank, he found that the other respondents were not likely to be able to controvert the documents on which the plaintiff sought to reply i.e. the very circumstance identified by the terms of s 16(1)(c). He observed that, in view of the nature of the documents, it might be said that the inability to controvert the documents was to be expected. But this was not necessarily the case given the response to certain interrogatories by Mr. Desmond. When Mr. Desmond was interrogated about the facility letter and whether the CVSSA deposits in EFG Bank would be used as part collateral for the EFG loan, Mr. Desmond answered "*Yes*" but qualified his answer by saying that "*the facility was accepted by CVSSA on the basis that the deposits were not at risk*" (Nos. 195 and 210). Similarly, in his answer to interrogatory No. 196, Mr. Desmond had indicated that EFG Bank had indicated since October 2012 that CVSSA would have to pledge US$15 million in cash to EFG to proceed with the EFG loans, but that he had been assured by EFG that the deposit was not at risk.

51. In those circumstances, the trial judge attached an importance to the fact that, if an EFG Bank or CVSSA witness, or Mr. Desmond himself, were called to prove the documents by the appellants, the respondents would have the opportunity to explore that issue with them, and to prove whether the documents represented the whole of the agreement or whether there was conditionality to the pledge as had been suggested by Mr. Desmond in response to the interrogatories. The trial judge noted his obligation to consider the question of fairness by reference to both sides. He observed that it could be said that the respondents could call Mr. Desmond or an EFG Bank witness to address the question as to the completeness of the agreement. However, he stressed that the burden of proof lay on the appellants and that it would reverse the onus of proof were he to leave it to the respondents to call the relevant witness. He noted that to do so would unduly favour the position of the appellants and that if the respondents were forced to call a witness from EFG Bank, they would face the same problem as the appellants in trying to secure the evidence of such a witness. Even if they were able to overcome that difficulty, they would lose the ability to probe the evidence of that witness through cross examination. He observed that similarly they would lose the ability to cross examine Mr. Desmond were they to call him as witness.

52. The trial judge took into account the fact that this was not a case where it was impossible for the appellants to get any evidence from Mr. Desmond or EFG Bank under any of the normal methods by which evidence could be obtained from abroad. He observed that the appellants did not appear to have given sufficient thought to the question of proof in advance of the trial and that the only correspondence produced to the court dealing with proof of documents dated from 19 April 2022, just two weeks prior to the commencement of the trial, in circumstances where the

proceedings were commenced in July 2017 and the witness statements furnished in August 2021. He concluded that there would be an unfairness to the respondents in admitting the documents, and the unfairness to the respondents would be greater than any unfairness that might be suffered by the appellants. The trial judge observed that this meant that the related evidence from Swiss law experts on the documents was necessarily excluded. No case law appears to have been identified by the parties in relation to the interpretation of s. 16(3) and no case law was referred to by the trial judge.

Discussion: Review of discretion by appellate court

53. The decision under review, i.e. that the admission of documents would be unfair, is undoubtedly a discretionary one. Before considering the arguments raised by the appellants, it is useful to recall the nature of the review to be carried out by this court in considering the exercise of discretion by a trial judge. The case law makes it clear that there is scope for an appellate court to set aside the exercise of discretion by a trial judge in relation to, *inter alia*, a decision on a procedural application, even where that trial judge has not misapplied the law but also where he or she has come to a conclusion that the appellate court considers to be so fundamentally wrong that it ought to be set aside (see *Cave Projects Ltd. v. Kelly* [2022] IECA 245. In *Betty Martin Financial Services Ltd. v EBS* [2019] IECA 327, Collins J. observed that there was no *a priori* rule under which an appellate court could only interfere with the decision of the High Court where an error of principle was disclosed, although great weight should be attached to the High Court views. In *Hayes v. Environmental Protection Agency* [2024] IECA 162 (at para. 138), Butler J. summarised the approach of Collins J. as follows:

- *"Whilst the Court of Appeal will pay great weight to the views of the trial judge, the ultimate decision is one for the appellate court, untrammelled by any a priori rule that would restrict the scope of that appeal by permitting the appellate court to interfere with the decision of the High Court only in cases where an error of principle was disclosed (per Irvine J. in Collins v Minister for Justice [2015] IECA 27 applying Lismore Builders Limited v Bank of Ireland Finance Limited [2013] IESC 6). Consequently, the appellant is not required to establish an error of principle as a prerequisite to the Court of Appeal reaching a different conclusion to the High Court.*
- *However, in order to displace the order of the High Court in a discretionary matter, the appellant should be in a position to establish that a real injustice will be done unless the High Court order is set aside. It is not sufficient for the appellant simply to establish that there was a better or more suitable order that might have been made (per Irvine J. in Lawless v Aer Lingus [2016] IECA 235 and Finlay Geoghegan J. in McCoy v Shillelagh Quarries Limited [2017] IECA 185).*
- *Where the High Court does not explain its basis for taking a particular view on a contested issue or fails to engage appropriately with the arguments made, that will necessarily affect the weight to be attached to a trial judge's view on appeal per Doyle v Banville [2018] 1 IR 505).*
- *The potential for interfering with the exercise of a discretion by the High Court is significantly greater where the High Court does not*

> *give sufficient reasons for its decision such that the parties cannot understand the basis upon which the discretion has been exercised (per Law Society v Callanan [2018] 2 IR 195)."*

54. Moreover, although it is true that *Leopardstown* was concerned with the treatment of findings of fact and inferences drawn from those facts, as opposed to the exercise of discretion, the observations of the Supreme Court are of relevance in this context. As MacMenamin J. observed, by virtue of sitting through the entire case, the trial judge will be familiar with the evidence. The insight gained by a trial judge who has lived with the case for several days, weeks or even months, may be far deeper than an appeal court, whose view of the case is much more limited and narrow, often being shaped simply by the issues which are placed before it. As the Supreme Court of Canada pointed out in *Housen* v *Nikolaisen* [2002] 2 SCR 235 appeals are necessarily "*telescopic*." To decide whether an exercise of discretion by a trial judge works a real injustice may be easier for an appeal court to arrive at where, for example, a matter has been heard on affidavit over one or two days and no oral evidence has been before the court. An appellate court is likely to be more circumspect in concluding that the exercise of discretion in respect of a procedural question is manifestly unjust where there has been an extended trial – in the present case over 22 days – and extensive oral evidence has been heard (8 days evidence from Mr. Nolan, 5 days evidence from Ms. Nolan, 4 days evidence from Ms. Carwood and evidence from Mr. John Nolan, Mr. Keith Morris and Mr. Antonio Stano (the latter two being technical witnesses).

55. That background is relevant when reviewing the exercise of the discretion of the trial judge in relation to the admission of documents. Context is important. That does not mean that this court should simply defer to the discretion of the trial judge without a

careful examination of the reasoning behind the decision. As noted earlier, the decision to exclude documents was significant. The review of same cannot be cursory, particularly given the centrality of the documents excluded, and the impact that their inclusion might potentially have had on the appellants' case. Rather, the review must take into account the context in which the ruling was made and the intimate familiarity of the trial judge with the case.

56. In such circumstances, what is described by the Kenny respondents as "*the run of the case*" is part of the context of the application and the decision of the trial judge. In their written submissions, the Kenny respondents point to the following features of the case: on Day 5 it was announced that a settlement had been reached by the appellants with Ciaran Desmond, whereby he submitted to judgment for the entire of the sum alleged to have been misappropriated together with costs; there was then a change of focus to concentrate on Mr. Millett's witness statement; it became clear on Days 5 and 6 that proof of documents would now be a major issue in the case in the light of the settlement with Mr. Desmond; the appellants indicated they would not be calling Mr. Desmond as a witness; the appellants dropped the relief sought against Dylan Kenny and Darren Kenny following the filing of a framework document on 13 of May 2022, responded to on 18 May 2022 by the Kenny respondents and the Millett respondents, and replied to by the appellant on 20th of May 2022; the flagging by the Kenny respondents that they reserved the entitlement to seek to have the appellants' claim dismissed at the conclusion of the appellants' evidence; the submission by the Kenny respondents that the appellants must identify the documents said to be admissible under the provisions of the 2020 Act; the decision by the appellants to identify which interrogatories they sought to rely on prior to the conclusion of the evidence; their subsequent decision to seek to withdraw that list of

interrogatories; the dropping of some witnesses that the appellants had intended to call, notably Mr. Feighan, a pensions expert; the initial application to have documents admitted under the 2020 Act without any authentication and the decision by the trial judge to refuse same on the basis that no authentication had been provided despite the requirement under s. 18 of the 2020 Act; and the further amended statement of claim delivered on 9 of May 2022, some days into the trial.

Application of principles

57. The argument initially made by counsel for the appellants was that the trial judge had come down on the wrong side of the exercise of discretion. When it was put to the appellants during the course of the hearing that more is required to set aside the exercise of the discretion, it was indicated in reply for the first time that two particular factors had been excluded in the consideration of trial judge when exercising his discretion and that he had misapplied s.16 to the facts. These points were not identified in the notice of appeal, and nor were they in the written submissions. However, for the sake of completeness, they will be addressed. First, counsel contended that the trial judge had failed to acknowledge the concession of Mr. Millett that he knew the monies had been pledged – interrogatory 319. But in fact, on further discussion of this point, it became clear that the trial judge had – correctly – ruled that interrogatory 319 was not one of the interrogatories that the appellants sought to rely on and therefore was not part of the evidence in the case (para. 271 of the judgment). The ruling of the trial judge cannot be faulted for failing to rely on a matter that was not in evidence at the trial.

58. Second, counsel argued that the judge failed to take into account the Guggenheim and Bratschi reports, and that the general credibility and substance of the documents had already been established by the fact that no expert bank witness had expressed

any concern or worry about the documents and had prepared a report based on their existence. This argument ignores that fact that the decision of the trial judge was not about the credibility of the documents, but rather whether their inclusion under Chapter 3 would cause unfairness. For that reason, criticism of his decision on this ground is misplaced. Moreover, there is a circularity of reasoning. The appellants are seeking to rely on a joint report that referred to the pledge and the loan agreement to allay a s. 16 concern. But the very purpose of the s. 16 exercise is to decide whether or not the documents should be admitted. In fact, the trial judge did not ignore the Guggenheim report as may be seen at para. 295, where he observes that, having ruled that the copy loan agreement and pledge are not admissible in evidence under the 2020 Act, the evidence of Ms. Guggenheim is largely irrelevant and that he had to exclude her evidence in relation to the loan agreement and the pledge as the appellants had failed to prove those documents. Further, those reports were introduced without prejudice to arguments on admissibility. In summary, where the interrogatory sought to be relied upon was not part of the evidence in the case, and the joint report was itself premised on the admissibility of documents, these arguments cannot be accepted.

59. That leaves the appellants with the core argument made by them: that the exercise of the trial judge's discretion was so manifestly wrong that it ought to be set aside. To recap, the trial judge concluded there would be unfairness to the respondents should the documents be admitted because evidence had been given by way of interrogatories to suggest that the documents could be qualified by additional evidence. To allow them to be admitted without the makers of the documents being available for cross examination in relation to the parameters of the entire agreement would be unfair to the respondents as it would immunise the documents from any

further scrutiny. It must be remembered that this conclusion was reached in circumstances where the trial judge was clearly not convinced that there was no other way that the appellants could prove the documents.

60. Given that Mr. Desmond was a signatory to one of the documents (the loan agreement) on behalf of CVSSA, and must have been aware of the contents of the pledge document (as evidenced by his passport and ESB details having been provided in the context of the opening of the bank account, and Mr. Desmond having been identified as the beneficial owner of the account and a signatory on the account), he could undoubtedly have given sufficient evidence to have allowed the judge to admit the documents had he been called as a witness. Moreover, Mr. Desmond was a defendant to the proceedings until the settlement with him. In those circumstances, it is not surprising that the trial judge placed weight upon the fact that the appellants had chosen not to call Mr. Desmond and had given no explanation of that decision.

61. In respect of other witnesses who might have proved the documents, the appellants' counsel was asked at the appeal hearing whether there had ever been an attempt to obtain a witness from EFG Bank. Counsel indicated on instruction that there had never been any such attempt. In fact, a slightly different position appears to have been adopted in the High Court. The trial judge records the position as follows: *"At the conclusion of the argument on Day 19 … I was informed by counsel for the plaintiffs that the plaintiffs had been unable to secure the attendance of a witness from EFG Bank to prove the alleged loan and that, in those circumstances, the plaintiffs had no further evidence to give"* (paragraph 401).

62. The trial judge did consider how else the documents might have been proved i.e. by the respondents calling Mr. Desmond or a witness from EFG Bank or a witness from CVSSA but concluded that this would have disadvantaged them because they would

not be able to cross-examine that witness on the content of the documents or the circumstances in which they had come to be signed. Given that the concern of the trial judge arose because he thought it was important that there be full evidence in relation to the entirety of the document, and any surrounding conditionality in respect of same, it is not surprising that he was concerned about the possibility that the respondents would be constrained in relation to what they could ask insofar as the documents were concerned. It is difficult to fault his reasoning that this disadvantage should not be visited on the respondents when it arose because the appellants, for undisclosed reasons, had chosen not to call a witness to prove the documents. It was reasonable for him to point to the delay of the appellants in respect of the whole question of proof of documents, and their failure to engage, when it was made absolutely clear shortly before the start of the trial that the respondents were putting the appellants on full proof of certain documents.

63. As a matter of first principle, as the party bearing the burden of proof, the appellants bore the burden of adducing evidence in order to discharge the burden of proof. That obligation remains constant throughout the course of a trial unless there is an agreement to the contrary with the other parties. Here, there was no such agreement in respect of the pledge and the loan agreement.

64. One can possibly understand the surprise of the appellants that the respondents took such a technical attitude to the admission of the documents in question at the trial, given that the parties had agreed that their joint experts would prepare a report on the basis of the disputed documents and that a report was prepared. Indeed, the trial judge makes this very point at the end of his judgment, observing that it was rare for parties in commercial proceedings to adopt such a rigorous approach to the admission of documents into evidence as was taken in this case and that in the majority of trials in

the Commercial List, parties were expected to take a co-operative approach to the smooth and efficient running of trials (see para. 474). But the judge accepted that because of the particular features of the case, namely where allegations of deceit had been made and the respondents had concerns about the veracity of the evidence, such an approach was reasonable.

65. Moreover, the position of the Kenny respondents was well flagged in this regard. The preparation of the Bratschi report, and the introduction of the Guggenheim report at the trial, were done on the basis that this did not mean issues in relation to admissibility would be waived. The solicitors for the appellants had written to the solicitors for the Kenny respondents shortly before the trial asking for consent to admit all discovery documents exchanged as *prima facie* evidence of the truth of their contents on the so called ***Bula/Fyffes*** basis. The Kenny solicitors' reply on 22nd April 2022 had indicated that the Kenny respondents agreed that all documents authored or signed by them and other identified documents could be put before the court on that basis, but that all other documents should be treated as not admitted, unless by specific agreement. By letter of the same day the appellants' solicitors acknowledged the reply. It was indicated that a specific response would be issued in the coming days and it was noted that *"at this stage that the position adopted in each case [was] broadly acceptable to our clients."* In a follow up letter of 26th April 2022 the appellants' solicitors listed the documents which the Kenny respondents agreed to admit and expressly noted that *"... any document not identified above should not be treated as admitted by [the Kenny respondents] without prior agreement."*

66. Similarly, one can understand why the issues as to proof of documents only arose for the appellants late in the trial. Prior to the settlement with Mr. Desmond, they had presumably assumed he would be called as a witness and that they could therefore

prove the documents through him. But responsibility for any difficulties in that respect cannot be laid at the respondents' door.

67. In short, the appellants had left themselves in a position where they were without a witness to prove the documents (being unwilling to call Mr. Desmond by whose answers to examination in chief they would be bound) and were seeking to rely on Chapter 3 of the 2020 Act to prove the documents. A trial judge is entitled, when considering fairness under s. 16(2)(c), to consider the application in the context of the trial, and why a party needs to rely upon the statutory scheme introduced by the Act. The appellants made no submissions acknowledging the difficulty their proposed approach caused the respondents or seeking to explain why the trial judge was wrong to take the approach he did. Rather, they sought to persuade the court that a different decision ought to have been made, without identifying any manifest errors or unfairness in the reasoning of the trial judge or errors of law.

68. In my view, the appellants have failed to establish an injustice to them, or manifest error of assessment, in the exercise of the trial judge's discretion. Another judge might have taken a different view in relation to the exercise of discretion in respect of the admission of documents and the question of unfairness; but to conclude that there was a manifest error of assessment in the exercise of his discretion in the circumstances described above is not made out. In the circumstances, the appeal on the admissibility of the evidence is refused.

TREATMENT OF THE EVIDENCE OF THE NOLANS

69. The other substantive ground of appeal maintained by the appellants concerned the way in which the court treated the evidence of Richard and Patricia Nolan *(the "Nolans' evidence")*. To understand the complaint, it is helpful to summarise at this point the overall approach of the trial judge to the Nolans' evidence. He disbelieved

the Nolans on two key issues – first he noted that they had not been truthful in relation to the purpose of putting the funds through the structure *(the "purpose issue")* and second, he found that they had not been honest as to their belief as to what would happen to the funds when they were put through the structure *(the "deposit issue")*. Because he did not believe them in those respects, he treated them as not being credible witnesses, not just in relation to those issues, but generally. Accordingly, he did not believe their evidence in relation to other issues upon which they gave evidence, even if there was no controverting evidence, and stated that he would require such evidence to be corroborated separately if he was to accept it. In the event, he did not find corroborating evidence on those other issues, and therefore found that the Nolans had not established their case against the Millett respondents on the balance of probabilities. Because he found the Nolans had not proved their case, he did not take into account as a corroborating factor the failure of Mr. Millett to give evidence to controvert the evidence of the Nolans in relation to a series of events.

70. The appellants' complaints on this aspect of the judgment may be divided into three distinct, although related, parts: first, that the trial judge was wrong in concluding the Nolans had been untruthful in saying they expected their monies to be held on deposit; second, that evidence not controverted by the respondents ought to have been accepted without the necessity for corroboration unless it was found to be manifestly untrue; and third, that Mr. Millett's decision to abstain from giving evidence ought to have been treated as corroboration.

The appellants' belief re the deposit of the monies

Grounds of appeal

71. The appellants' notice of appeal identifies the grounds as follows:

- The trial judge erred in rejecting the evidence of Richard Noland and Patricia Nolan; in finding that they were unreliable witnesses; and in finding that they were prepared to engage in deliberate falsehood;
- The trial judge erred in rejecting or failing to have due regard to the appellants' understanding, based on representations of Mr. Desmond and Mr. Millett, that the pension monies the subject matter of the proceedings would be held on deposit and in trust for the benefit of the appellants and that those monies could and would be returned on request;
- The trial judge erred in determining that the appellants' intention in transferring their pension monies to MECD and thereafter to CVSSA was otherwise than in accordance with their evidence, in particular the absence of evidence to the contrary from the Millett respondents or Mr. Desmond (who admitted breach of fiduciary duty in connection with the appellants' monies held by CVSSA).

72. However, at the hearing, counsel for the appellants focused not on the findings of the trial judge relating to the intention of the appellants in transferring the monies, but rather on those relating to the belief as to how and by whom the monies would be held i.e. the deposit issue.

73. The respondents' notice of the Kenny respondents included a plea to the effect that the appellants had not identified any error of the trial judge in his assessment of the credibility or reliability of the evidence given by Richard or Patricia Nolan, that he had an opportunity to study the demeanour and asses the credibility of the witnesses, was well placed to do so, and that his assessment in that regard was one that the appellate court should not interfere with. The Millett respondents plead in their respondents' notice that the trial judge found and addressed the true intentions of the appellants in transferring their monies to MECD and thereafter to CVSSA.

74. In their written submissions, the appellants observe that the conclusions at paras. 226 – 236 of the judgment, i.e. that the trial judge decided not to accept any of their evidence unless corroborated, had significant consequences for them. For example, the trial judge rejected aspects of their evidence concerning the CVSSA transactions, including their evidence that they did not authorise the conversion of their funds from euros to US dollars which formed part of the steps taken to provide security to EFG Bank (para. 426). They argue that *Shelly-Morris v Bus Átha Cliath* did not compel him to adopt that approach, particularly when there was ample credible evidence before the court to substantiate key aspects of the appellants' claim.

75. There is an important difference between the parties in this respect: the appellants characterise his findings on credibility as inferences drawn from findings of fact, whereas the respondents argue that a finding of the credibility of a witness is a primary finding of fact, with the Millett respondents – citing in this regard *Leopardstown* – submitting that it may not be set aside unless unsupported by credible evidence. The treatment of the trial judge's findings in this regard is of course critical, as it affects the legal test applicable to this court's review of the findings: if the findings were finding of fact, they may only be set aside if unsupported by credible evidence. This limitation does not exist for inferences of fact even where such depended on oral evidence, although it is true that an appellate court should be slow to substitute its own inferences of fact where a different inference has been drawn by the trial judge.

76. The Kenny respondents make the point that, even if any of the specific findings by the High Court on credibility were considered erroneous, the trial judge hearing the evidence clearly formed a holistic impression, was entitled to do so, and this court

should not interfere. They note the appellants' submissions make no effort to identify any other plausible reason for the transfers.

77. In the submissions of the Millett respondents, they observe that it is not said by the appellants there was no credible evidence to support the trial judge's findings as to credibility. They argue at para. 66 that the appellants do not identify any error in the trial judge's analysis in respect of the credibility issues, and set out a number of factors relied upon by the trial judge as to why the evidence in question was lacking in credibility.

78. At the appeal hearing, counsel for the appellants focused on para. 228 and argued that the trial judge had fallen into error in saying it was completely unbelievable that the Nolan witnesses were advised and always understood that the OPT funds were simply being placed on deposit on the appellants' behalf in the account of CVSSA in EFG Bank in Zurich. Counsel argues that this was contradicted by the finding at paragraph 162. He argued that the appellants' evidence in this regard was in fact consistent with the finding by the trial judge that the monies were moved in order to be available to meet bank claims. He argued that, if the monies were to be available to meet bank claims, that was consistent with the integrity of the money being preserved until the claims were met. He contended that it was entirely consistent with the appellants' case as to the use to which the funds were to be put that they would be held on deposit EFG Bank, and the fact that they may have been advised to move the monies by the route taken was not inconsistent with the monies being preserved on deposit in EFG Bank.

79. Referring to the trial judge's observation at para. 228 that, for the appellants' plan to work, the OPT funds would have to lose their character as OPT funds and be replaced by something that did not have that character, counsel argued that the power of

insight seemed to suggest that they retained their character as OPT funds. He argued that the Nolans' evidence was that, when the money arrived in the CVSSA bank account, it would be held on deposit for OPT. The only evidence was that the money was (via the transfer mechanism) to be retained in a deposit account on trust for the appellants following the transfer mechanism so they could then access the money to pay their debts.

80. Counsel sought to undermine the reliance by the trial judge on the references to *"investment"* and *"investor"* in documentation associated with the transaction, on the basis that an investment can include investing in a deposit account and that investment as a term was not inconsistent with the placing of money in a deposit account. Accordingly, it was said, the existence of such material should not have been treated as inconsistent with the Nolans' declared belief that the monies would remain on deposit. He further argued there was no evidence that the Nolans authorised the money to be dealt with by being moved from euro accounts to dollar accounts.

81. In response, counsel for the Millets pointed to the MECD application forms and the trial judge's finding that those documents were inconsistent with the case made by the appellants that they understood they were simply transferring money to be held on deposit. Counsel argued that if the Nolans had intended to place funds on deposit as an investment, then the funds could and would have been just transferred directly to the Swiss bank account. The reason for the elaborate structure was to take the monies out of the pension so they would lose their categorisation as pension funds.

82. In his reply, counsel for the appellants submitted that the Nolans did not believe that they were investing in anything but rather believed they were putting the money on deposit. This demonstrates the hypothetical nature of the argument that the deposit

could have been an investment. As identified below, the evidence shows this was not in fact the case made by the Nolans.

83. Counsel for the Kennys argued that neither of the respondents said the structure was illegal. Rather, the case was put up on the basis that the structure was perfectly legal. That meant the appellants had changed the identity of the money through the legal structure, meaning they could not trace into those monies. He observed that the structure involved mixing the Nolans' money with other people's money in CVSSA. He argued that the Nolans knew that their money was not going to be kept separate from other people's money and that it would be mixed with other people's money. Reference is made to para. 100 of the judgment where it is recorded that, according to Mr. Nolan's oral evidence on Day 4, there was discussion between Mr. Desmond and Mr. Lampert in respect of a proposed declaration of trust/power of attorney of the Nolans over the funds. The upshot of the discussion, according to Mr. Nolan, was that it was not possible to proceed with it because there were other people's funds in the account. The power of insight was suggested at that point. In summary, counsel observed that the appellants are stuck with the transaction i.e. from Investec to MECD and on to CVSSA and that, by investing in MECD, the money had lost its original identity.

Decision of trial judge

84. Although one of the grounds of appeal is in relation to the trial judge's findings on the purpose of the transfer, in fact that ground was not pursued by the appellants, either in the written or oral submissions. However, for the sake of completeness and to assist the reader in understanding this judgment, it is necessary to understand that the trial judge concluded that the initial reason given in the proceedings for moving

the funds from Investec i.e. that they were concerned about the stability of Irish banks was untrue. At para. 237 he observed:

> "*For the reasons discussed above, I have come to the conclusion that the evidence of Mr Richard Nolan and Mrs Patricia Nolan is unreliable in a number of important respects. In the first place, the original version of events given by them about the reasons for transferring the OPT funds is utterly implausible and cannot be accepted. Concerns about the instability of the Irish banks were well known by the last quarter of 2012 but the OPT funds were not held in any such bank. They were held in Investec bank and there is no evidence to suggest that there were any concerns about its stability. I cannot accept that the [appellants] were unaware (as Ms Patricia Nolan at times sought to suggest) that the funds were held in Investec bank. This is demonstrably untrue in circumstances where she signed instructions to that bank and she therefore knew in advance of the transfers that the OPT funds were held there*".

85. The judge concluded that the true reason for the transfers was to allow the proceeds of the pension fund to be used to settle creditors' claims against the members of the Nolan family. The meetings with Mr Desmond coincided with demands being made by Allied Irish Banks. But if pension funds were used to pay off a claim against a beneficiary, it would in all probability be treated by the Revenue Commissioners as pension in payment to the beneficiary and that would put the Revenue approved status of the pension fund in jeopardy. It was therefore necessary to put a structure in place that would in some way create a distance between the OPT funds, on the one hand, and the funds used to pay off creditors, on the other. He concluded at para. 162

that this was the real reason for the structure that was put in place and the purported concerns about banking stability did not withstand scrutiny.

86. At the hearing of the appeal, the appellants focused upon the decision by the trial judge to reject the evidence of both Mr. and Ms. Nolan that they were advised and always understood that the OPT funds were simply being placed on deposit on the appellants' behalf in the account of CVSSA in EFG Bank in Zurich. For that reason, that aspect of the judgment is treated in some detail here.

87. The trial judge commenced his assessment of the Nolans' evidence by setting out at considerable length and analysing in detail the evidence given by Mr. Richard Nolan, and Ms. Patricia Nolan. At para. 135, the trial judge recorded the evidence in relation to the execution of the MECD investment application forms. These were forms that Patricia Nolan and other members of the Nolan family signed in blank, leaving Mr. Millett to fill them in. However, the forms contained a number or preprinted statements and the trial judge analysed the reference in those forms to investor/investment/investment amount/investment details, and the proximity of those words to the parts signed by Ms. Nolan and her sister Ann. Later, at para. 223 he concluded that Ms. Nolan and her sister Ann had signed their names in 14 places on the MECD investment application forms. That form contains the following content next to the words "*Signature of Investor*", followed some paragraphs later by a signature of Ms. Nolan and her sister:

> "*I confirm that I have adhered to the requirement to disclose to the Investor that the Investment structure is not governed under any Financial Services legislation, is not regulated by any Financial Services authority or covered by any compensation scheme and that furthermore I have not given or offered any covering advice in relation to the suitability of the investment ....*"

88. The judge also refers to the client declaration on the final page of the document signed by Patricia Nolan which contained, *inter alia*, the following statement: "*...I/We confirm that I have received information on and details of the investment structure by request to the promoters, that I/We understand the risk profile of the investment have been directed to take financial and taxation advice from a suitably qualified independent person and that I/We understand that it is my/our obligation to familiarise myself/ourselves with and accept the risks associated with this Investment.*" He notes that Mr. Nolan agreed in cross examination that the documents were signed to give effect and legitimise the transfer. At para. 225 he notes that, while Ms. Nolan claimed not to have read the documents or to have noticed the use of the words "*investor*" or "*investment*", it was difficult to see how someone signing forms in 14 places in close proximity to those words would not notice the use of those words on the form. He also notes that Ms. Ann Nolan was not called as a witness.

89. Returning to the sequence of evidence, at para. 141 the trial judge summarised a cross-examination of Mr. Nolan by counsel for the Kenny respondents to the effect that, if the appellants had wished to hold the OPT funds in a Swiss bank account, it would have been a very simple matter to have transferred the funds directly from Investec Bank in Ireland to a bank in Switzerland. In the course of the discussion Mr. Nolan indicated that Mr. Desmond had told them he had to move the funds in that way. Mr. Nolan was asked: -

> Q. "*So you have to move it out of the OPT?*
>
> A. *No, he actually said we had to go through MECD Dubai*.
>
> Q. *Yes. Out of OPT through MECD Dubai to CVS SA, that was the scheme that was come up with; isn't that right?*

A. *That was his pension protection plan*.

Q. *That was to move money out of the pension because that's how it could be done lawfully, that's what he told you?*

A. *Yes.*"

90. The trial judge concluded at para. 142 that this exchange shows very clearly that the appellants understood that the structure proposed by Mr. Desmond did not involve merely the holding of the OPT funds on deposit in Switzerland as this was not an approach that could be taken if they wished to generate a method by which the OPT funds could be leveraged to pay personal debts. Instead, a more complex structure was required to be put in place that would involve not only a Swiss bank account held by CVSSA, but also an essential intermediate step involving MECD in Dubai.

91. At para. 150 the trial judge recited the fact that in cross examination, Mr. Nolan's attention was drawn to the fact that each of the instructions given by the OPT trustees to Investec Bank to pay monies to MECD contained a reference to an "*investor number*". At para. 159 the trial judge recorded an exchange that he had with Mr. Nolan in relation to the agreement to route the OPT monies through MECD. The trial judge recorded that ultimately Mr. Nolan said that Mr. Desmond did not give him a good explanation as to why the money needed to be routed in that way. At para. 162 he observed he had been given no plausible explanation by Mr. Nolan for the decision of the appellants to proceed with a structure that involved funds being first sent to MECD, and then paid into a bank account into Dubai, noting it is very difficult to reconcile the investment of MECD with the case made by the appellants that they understood their funds would simply be held on deposit in Switzerland in the account of CVSSA. Equally, he observed that the lack of an explanation undermined the appellants' case that they intended and understood that the funds in the CVSSA

account in EFG Bank would be treated as funds deposited by the OPT. He observed that there must have been a reason for the interposing of MECD in the structure which the appellants agreed to put in place following their interactions with Mr. Desmond and Mr. Millett.

92. At para. 162 the judge goes onto say that: -

> "*There was an obvious problem if pension funds were used to pay off a claim against a beneficiary. In all probability, that would be treated by the Revenue Commissioners as pension in payment to the beneficiary and that would put the Revenue approved status of the pension fund in jeopardy. It was therefore necessary to put a structure in place that would, in some way, create a distance between the OPT funds, on the one hand, and the funds used to pay off creditors, on the other. That seems to me to be the real reason for the structure that was put in place. It is the only plausible reason for proceeding in this way. … This very obviously accounts for the convoluted structure … Plainly, the hope was that any subsequent payments out of the latter would not be characterised as payments made by the OPT itself*."

93. According to the judge's reasoning, the appellants must have understood that the monies would lose their character as OPT funds and that therefore they would not be under the control of the appellants either directly or indirectly whether through a trustee mechanism or in any other way.

94. Considering Ms. Nolan's evidence, the trial judge recited at para. 176 onwards that she gave evidence that she had signed the MECD investment application form but didn't read it. Similar evidence was given in relation to the letters to Investec authorising the payment of monies which referred to investor numbers as detailed above. Again, she said she did not read them. The judge found that he did not

consider that evidence credible given the amount of money that was being transferred. At para. 213, the judge recorded that in cross examination by counsel for the Kenny respondents, Ms. Nolan was asked whether she knew that money was being taken out of the pension, to which she responded "*yes*". She was asked if she knew it was going through MECD, to which she again responded "*yes*". When counsel asked her to confirm that she understood she could not use the pension funds to settle debts unless it went through a certain scheme she responded, "*that was the advice from Ciaran Desmond*". At the end of para. 213, the trial judge observed as follows:

> "*Thus, notwithstanding the [appellants'] case that they understood that the OPT funds were to be held on trust for them in the CVSSA account in Zurich, it is clear that they cannot have understood that the arrangement was equivalent to simply placing OPT funds on deposit in Switzerland. At minimum, they understood that arrangements had to be put in place that would ensure that any payments to be made to settle debts could not be characterised as payments from the OPT*".

95. The trial judge's substantive conclusions are summed up at para. 228, where he concluded that the evidence of both witnesses must be rejected insofar as both of them had sought to make the case they were advised and always understood that the OPT funds were simply being placed on deposit on the appellants behalf in the account of CVSSA in EFG Bank in Zurich and that this element of their case was completely unbelievable. He said their evidence was contradicted by the complex structure utilised by the appellants in respect of the transfers and in particular by the existence within that structure of MECD. He indicated that he had given Mr. Nolan an opportunity to explain why the appellants had agreed to route funds through

MECD if they believed that they were putting funds on deposit in Switzerland. He asked Mr. Nolan what kind of explanation they were given by Mr. Desmond for the involvement of MECD. He did not receive a satisfactory response to either of those questions. The trial judge observed that if the appellants had wished to place OPT funds on deposit in Switzerland, that could readily have been achieved without first transferring the funds to an entity based in the United Arab Emirates. He noted that there must have been a reason for interposing MECD in this way and could not accept that the appellants agreed to its involvement without knowing why they were entrusting the Nolan family pension funds to such an entity. He rejected the evidence of Ms. Patricia Nolan that she did not really understand the necessity for the involvement of MECD. He found that the whole structure put in place in late 2012 and early 2013 was intentionally designed with a view to permitting the appellants to utilise the proceeds of the OPT pension fund in settling the personal debts of the Nolan family members.

96. The judge concluded that by the time the transfers to MECD were instructed by them, the appellants well knew that the OPT could not pay the personal debts directly for fear that any such use would be treated by the Revenue Commissioners as pension in payment to the relevant beneficiaries, and that the appellants needed to put a structure in place that would create a disconnect between the OPT and the payments to be made to creditors of the beneficiaries. In other words, for the appellants' plan to work, the OPT funds would have to lose their character as OPT funds and be replaced by something that did not have that character. He referred to the exchange between Mr. Nolan and counsel for the Kenny respondents which confirmed that Mr. Desmond advised them that they would need to move money out of the pension if they were to proceed with their plan.

97. Paragraph 228 concludes in the following terms:

> "*It is the only rational explanation for their participation in a structure that would see OPT funds transferred first to MECD in the UAE. It is also the only plausible explanation for the failure of the [appellants] to come clean, until a very short time before the trial, about the real reason for the transfers both in their pleadings and in their witness statements. It also explains why the [appellants] invented the unbelievable story about the need to move the OPT funds due to the instability of the Irish banks. The [appellants] plainly did not want to reveal the true reason because of their concern (which I believe dates back to late 2012) that the use of the OPT funds in settlement of claims against beneficiaries would be treated by the Revenue Commissioners as pension in payment to those beneficiaries with all of the taxation consequences that flow from that*."

Discussion

98. This court is satisfied that the findings of the trial judge in relation to Nolans' belief as to how the money was to be held, and who was to hold and/or control the money, are credibility findings. In summary, the trial judge decided he did not believe the Nolans' evidence that they understood the money was to be held on deposit in a Swiss bank for the interest of the OPT. That appears to be squarely a finding on credibility. As per the decision in *Leopardstown*, findings on credibility are to be treated as findings of primary fact. The appellants argue these findings must be characterised as inferences. I cannot agree. It is true that the trial judge disbelieved the Nolans in this regard *inter alia* because of his view as to the taxation consequences of paying pension fund monies to discharge debts, and the necessity of changing the character of those monies if they were to be used to discharge debts

without those consequences. However, that does not in my view convert the findings into inferences: he is not inferring that the Nolans have not told the truth but rather deciding that they have not done so, based on all the material he has before him in respect of the transfers, including evidence of the exchanges between the Nolans and Mr. Desmond, the nature of the structure whereby the money was transferred, the absence of a convincing alternative explanation for the structure, the stated purpose of the transfer i.e. to discharge debt, and the appellants' failure until shortly before the trial to disclose the real reason for the transfers. As such, those findings will be evaluated according to the test in *Leopardstown* i.e. they ought not be set aside unless there is no credible evidence to support them.

99. To evaluate this, it is necessary to recall the core finding of the trial judge at the start of para. 228 i.e. he did not believe that the Nolans understood the OPT funds were simply being placed on deposit on the appellants' behalf. This is not a simple finding that the Nolans could not have believed that the monies were being held on deposit. Rather, the Nolans had made an assertion that had three separate aspects to it: that the monies remained *"OPT funds"*; that the monies were held on deposit; and that the monies were held on the appellants' behalf. Those three aspects went hand in hand i.e. the identity, destination and control of the funds. I have set out in some detail the judge's summary of the evidence to demonstrate that he engaged in some considerable detail with the assertions of the Nolan and carefully evaluated them against a range of evidence. When one attempts to draw together the large amount of evidence considered, the evidence supporting the trial judge's credibility finding may be summarised as follows:

- The nature of the structure itself, whereby funds were transferred first to a company, MECD, lodged in the bank account of MECD, and then transferred by

MECD to a different company, CVSSA, and lodged in CVSSA's bank account, together with other monies;

- That structure was inconsistent with a belief on the part of the appellants that the funds in EFG Bank would be treated as being deposited by the OPT;
- The fact that neither Mr. nor Ms. Nolan could provide any explanation as to why they might have agreed to route funds through MECD if they believed they were simply putting funds on deposit in a Swiss bank;
- The reference to *"investment"* in the Investec letters;
- The reference to *"investors"* and *"investment"* in the MECD application forms;
- The fact that Ms. Nolan accepted the money was being moved out of the pension fund;
- The fact that Mr. Nolan accepted that Mr. Desmond had advised them they would need to move money out of the pension fund;
- The Nolans' level of knowledge and sophistication as business people and Ms. Nolan's status as a solicitor;
- The fact that, as a matter of logic, if the funds had retained their character as pension funds, then they would have been subject to taxation by the Revenue Commissioners had they been used to settle debts of the appellants. To avoid this consequence, it was necessary that they lose their character as pension funds.

100. Returning to the legal test to be applied when evaluating whether the trial judge erred, the appellants must show there was no credible evidence to support the findings of fact. The appellants have taken issue with individual aspects of the judge's findings, as discussed below. But they have entirely failed to engage with the weight of evidence identified by the trial judge in support of his conclusion, and have not even attempted to show this was not credible evidence. None of the above

findings are seriously disputed. In my view, having regard to the evidence before him, the findings made by the trial judge were undoubtedly open to him on the basis of the evidence.

101. The appellants focused upon three issues at the oral hearing: the relevance of the power of insight; the argument that a deposit may be treated as an investment; and the asserted consistency between a desire to have the money available to pay debt and the money being held on deposit. Insofar as the power of insight is concerned, this was an unusual document introduced by the appellants. Mr. Nolan gave evidence that he had brought a draft power of attorney/declaration of trust document – drafted by himself – to a meeting with the bank on 9 January 2013 but had been told it would not be possible to sign such a document. Instead, CVSSA, through Mr. Desmond as shareholder, signed up to a document described as a "*power of insight*" which was also signed by Richard and Ann Nolan as "*authorised persons*". At para. 408, the trial judge observed that when it was suggested that a declaration of trust would not be possible, Mr. Nolan did not take any issue with the so-called power of insight. He was unable to explain in evidence how he thought that power would operate in practice. The trial judge noted that all it purported to do was to allow him to see the money in the CVSSA account.

102. Insofar as counsel for the appellants has identified the power of insight as supportive of the idea that the appellants believed the money was within their control, it is hard to criticise the finding of the trial judge that their lack of protest at the refusal to put a declaration of trust in place was telling (para.408). The fact that they were refused a power of attorney/declaration of trust and instead were given the power of insight document suggests that the Nolans must have understood they did not control the use to which the monies were put. The power of insight gave neither

the individual appellants nor the OPT any kind of control or power over the monies. Despite this, the three tranches of monies were transferred after Mr. Desmond refused to sign the power of attorney document. Moreover, the attempt to have the power of attorney/declaration of trust signed suggests that the appellants had significant doubts about their entitlement to control the monies or dictate where or how they were held. If the appellants believed the monies were being held on deposit to the account of the pension funds, there would arguably have been no need to seek to have a power of attorney or declaration of trust signed. The appellants argued that the wording of the power of insight seemed to suggest that they retained their character as OPT funds. It is true that it contained a reference to the assets deposited by OPT in respect of funds originating from or being directed from OPT or being returned to OPT. But it also contained a clause stating the "*durable power of insight shall be granted until the OPT funds are managed outside the company*", with the company being defined as CVSSA. The wording hardly suggests a simple deposit held on behalf of OPT. But even if one accepts that certain of the wording supported the Nolans' stated belief, the existence of one document – taken into account by the trial judge – that might, for the sake of argument, tend to support the appellants' version of events is not sufficient to disturb findings of fact made on the basis of credible evidence. Appellate courts proceed on the findings of fact of the trial judge and the fact that there is contrary evidence does not alter the position. As MacMenamin, J. observed in *Leopardstown*, appeals should not be: -

> "*Reduced to a piece by piece analysis of the evidence in an effort to show on appeal that the trial judge might have laid more emphasis on, or attached more weight to, the evidence of one witness or a number of witnesses, or one*

document, or a number of documents, rather than others on which he or she relied."

103. Second, counsel argued at the appeal hearing that an investment can be money held on deposit. But that was not the case made by the Nolans in the High Court. There is no evidence from the Nolans that they believed their money was being invested by way of placing it on deposit. In fact, the evidence goes entirely in the other direction: at para. 91, the judge recites the evidence of Mr. Nolan to the effect that he understood *"our lawyer, our solicitor, would be holding them on trust for us in a deposit account…in a simple deposit account in Switzerland."* At para. 127 the trial judge records that Mr. Nolan stated, "*in forceful terms that the plaintiffs were not 'investing in anything'* ". At para. 150, he observes that under cross examination Mr. Nolan rejected the characterisation of the transactions as investments and continued to maintain that the trustees "*were moving funds to a simple deposit account in Zurich*". Thus, although it may well be the case that a deposit may be characterised as an investment, this is categorically not how it was characterised by Mr. Nolan: he specifically rejected the notion that the transactions were investments. That sounds the death knell for this argument. Not surprisingly, the judgment was not appealed on this basis: there is no reference to this argument in the notice of appeal or the legal submissions. Indeed, counsel for the appellants in reply accepted that the Nolans were quite insistent that they did not believe that they were investing in anything, and that what they were doing was putting the money on deposit. In those circumstances, the question as to whether a deposit account may or may not be treated as an investment does not warrant being debated *in abstracto* at appellate level: it is simply irrelevant to this case and the actual evidence presented in the High Court.

104. Finally, the appellants say that their desire to have the money available to pay debts is consistent with their stated understanding that it was on deposit. I fully accept that there is not necessarily an inconsistency between those two states of mind: but that argument in the abstract is not the same as establishing that they believed it. Simply because something is possible does not mean that it actually happened.

105. When one considers the totality of the evidence summarised above, there was sufficient evidence to justify the trial judge's conclusions that the Nolans knew that the money was not within their control and that they knew it was being invested. In the circumstances, the fact that, as a matter of logic, it might have been reasonable for them to believe the monies would be held on deposit because that coincided with their desire to have the money available to repay debt, does not mean the trial judge erred in concluding that they did not in fact believe that; not least because they knew they would need the money to leave the pension in order to achieve the desired effect.

106. For all the above reasons, this ground of appeal must be rejected.

Obligation to accept uncontroverted evidence

Grounds of appeal

107. At the appeal hearing, counsel for the appellants focused heavily on an argument that, in relation to areas not affected by the findings of untruthfulness, the trial judge was not entitled to disbelieve them on general credibility grounds where the evidence had not been controverted. In fact, this argument is not identified in the appeal grounds. It is asserted at ground 4 that the trial judge erred in rejecting the evidence of the Nolans, in finding that they were unreliable witnesses and in finding that they were prepared to engage in deliberate falsehood. At ground 6, it is asserted that the High Court judge erred in determining that the appellants' intention in transferring their pension monies to MECD/CVSSA was otherwise than in accordance with their

evidence, in particular in the absence of evidence to the contrary from the Millett respondents or Mr Desmond.

108. Nonetheless, it is proposed to deal with this argument despite its omission from the grounds of appeal. The appellants readily accept the findings in the decision of *Shelly-Morris* to the effect that a trial judge is entitled to allow lack of credibility findings to influence him or her, not just in relation to the specific events where the witnesses found to be untruthful, but also in relation to other evidence. But they seek to carve out an exception to this approach on the basis that it does not apply where the evidence is not in itself manifestly untrue and there is no controverting evidence from the respondents. In such a situation, they argue that the trial judge must accept uncontroverted evidence where the party has not been found to be untruthful, even if that party has been found untruthful in respect of other evidence. No authority was cited in support of this approach, but it is presented as a matter of first principles.

109. Those arguments are fleshed out in the written legal submissions of the appellants, where they refer to *Hay v. O'Grady* [1992] ILRM 689, *Shelly-Morris v. Bus Atha Cliath* and *Tumusabeyezu v Muresan and the Motor Insurers' Bureau of Ireland* [2021] IECA 191 (where the court identified the danger of over emphasising the demeanour of the witnesses). They argue that the trial judge's rejection of almost the entirety of the uncontroverted evidence of Richard Nolan and Patricia Nolan, including as to the advices and assurances received from Mr. Desmond and Mr, Millett, and their subsequent acknowledgements that the monies had been pledged to EFG Bank, was unwarranted and not required by *Shelly-Morris*.

110. The argument that the trial judge ought to have believed the Nolans in the absence of controverting evidence or specific findings of untruth is premised on an assumption that the only evidence available was that of the Nolans and that absent

controverting evidence, they were entitled to succeed. But the most cursory analysis of the judgment demonstrates this is not the case. An engagement with the entirety of the judgment demonstrates that the trial judge did not simply disbelieve uncontroverted evidence on the basis of previous credibility findings without going any further. In respect of every allegation made by the appellants, he sought to establish whether there was corroboration of that allegation, or evidence tending to undermine the allegation. Simply because the Millett respondents did not go into evidence, that did not mean there was no other evidence. The trial judge considered documents, including emails, texts, and letters. He considered admissible replies to interrogatories. He considered the witness statements, including instances where the Nolans' witness statements did not accord with their oral evidence. He considered the pleadings, the written submissions and the oral evidence. He carried out a detailed trawl of the evidence and analysed it in considerable detail to see whether the appellants had met the requisite standard.

111. Thus the simple proposition that the appellants were entitled to be believed in the absence of controverting evidence from Mr. Millett and Mr. Desmond fails to reflect the layered analysis undertaken by the trial judge. Some of his conclusions are set out below to demonstrate this.

112. But, more fundamentally, as developed below, the argument advanced by counsel for the appellants that the Milletts' failure to contradict the Nolans' evidence should be treated as corroboration of that evidence and/or that the trial judge could not reject the Nolans' evidence in the absence of evidence from the Millett respondents, is flawed as a matter of principle. Even if the trial judge had rejected the Nolans' evidence without considering any other evidence on grounds of credibility, he was

entitled to do so, including in the absence of evidence from Mr. Millett and Mr. Desmond.

Decision of trial judge

113. The facts and conclusions start at para. 403. The trial judge identified that, for the reasons discussed in paras. 226-238, he found that some of the evidence put before the court by the appellants is unreliable and untrue and that raises significant issues about the credibility of other aspects of their evidence. He asked how he could be satisfied as a matter of probability that the remainder of their evidence is truthful and reliable, given they were prepared to give untrue evidence to the court in respect of the matters discussed in paras. 225-238. At the start of para. 404 he identified those aspects of the Nolans' evidence that were uncontroverted and could be accepted and at the end of the same paragraph, he identified that their untruthful account of the advice alleged to have been given to them by Mr. Desmond and by the Millett respondents called into question the balance of the evidence they gave in relation to the advice which they claim was given, or the representations which they claim were made, either by Mr. Desmond or Mr. Millett. At para. 405, he said that, given the untruthful evidence placed before the court, he did not believe he could accept the representations alleged to have been made by Mr. Millett and his company unless there was some other objective or persuasive evidence which supported the case made by the appellants.

114. At para. 406 the judge dealt with the alleged representation that Mr. Millett owned or controlled MECD. The judge observed the only evidence that had been put forward was that of the two witnesses who had showed they were prepared to place false evidence before the court. At para. 407 the judge considered whether there was any corroborating evidence available to support the case but noted that in fact the

interrogatories of Mr. Millett went in the other direction, in that Mr. Millett denied that he had any role in the incorporation or formation of MECD, or that AFT customarily acted on his instructions or directions in relation to the affairs of MECD, or that he had any involvement in giving directions to MECD in relation to its bank account with Abu Dhabi Commercial Bank. Because the only evidence that exists in this respect is given by the two witnesses who had shown themselves to be untruthful, the judge concluded it would not be safe to make a finding on this basis alone. At para. 406 he examined the representation allegedly made by Mr. Millett that any money designated for MECD would be transferred to an account in Dubai or be deposited in the CVSSA account in EFG Bank and would simply rest in that account on trust for the Nolans. He identified that he had already held that the Nolans' case that they were simply placing the OPT funds on deposit in the CVSSA account in Zurich was unbelievable. He observed that in the course of his cross examination, Mr. Richard Nolan had disowned the first part of this alleged representation. The trial judge rejected the evidence that there was a representation made that the money would be held on trust for the appellants, considering it to be incompatible with Mr. Nolan arriving at the meeting in Zurich on 9 of January 2013 – one of the participants in which was Mr. Desmond, described by Mr. Nolan as his trusted solicitor and adviser – with a homemade declaration of trust and his failure to object when told that only a power of insight would be offered as opposed to a declaration of trust. He observed that, had the appellants been relying on a representation that the CVSSA funds would be held in trust for them, they would surely have protested at the failure to put the necessary legal documents in place. The trial judge further held that it was inherently unlikely that a representation could have been made that the proceeds of the transfers to either MECD or CVSSA would be held on trust for the appellants.

He concluded that, even apart from the unreliability of the evidence of the Nolans, there were a number of additional factors that made it unlikely that such a representation was made and in the circumstances the appellants had failed to prove on the balance of probability the representation alleged. Similar conclusions applied to the next alleged representation i.e. that MECD and or Mr. Millett would hold funds on trust for the Nolans.

115. At para. 410 the judge dealt with the representation alleged to have been made by Mr. Millett and the eighth respondent, John Millett Independent Financial Advisors Limited, that the OPT funds would not be used for any purpose without their express consent. He said that that allegation was inconsistent with the arrangements put in place and it was therefore inherently unlikely the representation of this kind could have been made. He observed that even if Mr. and Ms. Nolan had not given untrue evidence about other aspects of the representations alleged to have been made, the appellants would be in difficulty in satisfying the court on the balance of probabilities that such representation had been made. He also noted that this aspect of the appellants' case was undermined further by the failure of Mr. Nolan to protest to Mr. Desmond about the content of Mr. Desmond's email to Mr. Garcia of 4 February 2013, where Mr. Desmond asks that Mr. Nolan should be added as a signatory on the account for the movement of euro funds but make it clear that Mr. Desmond himself would have the final say in relation to that. The trial judge noted that although the email was copied to Mr. Nolan, he did not protest; despite the fact that these assertions are inconsistent with the alleged representation i.e. that the funds could not be used for any purpose without express consent.

116. At para. 418 of his judgment, the trial judge found that there was no evidence to suggest the plaintiffs ever entered into a contract with Mr. Millett in his personal

capacity. He excluded certain emails from Mr. Millett to Ms. Nolan on the basis that, as Mr. Millett had opted not to give evidence, the emails did not form part of the evidence in the case and he could not have regard to them. In both these instances, the trial judge was clearly taking into account the decision by Mr. Millett not to give evidence.

117. The trial judge accepted that there was a relevant contractual relationship between the appellants on one side and Pinnacle, the sixth respondent, on the other, but noted that he was unable to reach a conclusion as to the terms of that contract. He rejected the contention that the terms were as set out in the emails in November 2012 because of Mr. Millett's decision not to give evidence. He concluded that he was not satisfied as a matter of probability that either of the Millett companies were retained to provide investment advice to the appellants, noting that under cross examination, Mr. Nolan was unable to point to any invoice issued by the Millett companies suggesting that advice had been given by either of them in relation to investments. This was in contrast to Mr. Nolan's acknowledgement that Mr. Desmond had raised an invoice in respect of pension and financial advice. At para. 421 the judge noted that, as it was not possible for him to reach any conclusion as to the terms of the contract between the appellants and the Millett respondents, there was no basis on which he could hold that either the Millett companies was in breach of contract with the appellants. He noted that the nature of any alleged contract between the appellants and the Millett respondents was not addressed either in the written or oral closing submissions for counsel for the plaintiff.

118. At the appeal hearing, there was no reliance upon any further findings by the trial judge in relation to the Millett respondents. However, for the purpose of completeness, it should be said that elsewhere in his judgment the judge refused to

make findings on claims which had been made by the appellants on the basis of the evidence given by Mr. Nolan and Ms. Nolan (see paras. 426, 433 and 434).

Discussion

119. The appellants argue that the trial judge was not entitled to disbelieve their evidence where they had not been found to be lying if there was no contrary evidence by the respondents. The appellants acknowledge the approach in *Shelly-Morris* but argue it is not applicable unless there has been a full contest on the facts. They say that it is only in such circumstances that the trial judge can decide to reject a plaintiff's evidence, including because of a lack of credibility in respect of a specific area. They cite no case law in support of this proposition.

120. It is difficult to see why as a matter of logic this should be so. The *dicta* of Hardiman J. in *Shelly-Morris* show that once a plaintiff has been untruthful, their evidence may be permeated with such uncertainty from the point of view of the trial judge that he or she does not feel able to accept it, particularly where it is not corroborated by any other sources. (As demonstrated above, the trial judge took into account any other evidence that was available, whether positive or negative from the point of view of the appellants). The significance of findings of a lack of credibility by a trial judge have recently been emphasised anew by this court. In *Crumlish v. Health Service Executive* [2024] IECA 244, Noonan J. observed as follows:

> *128. The assessment of the credibility of a witness is, perhaps more than any other issue in a case, quintessentially a matter for the trial judge. Although not unheard of, it is a relatively rare event for an appellate court to find that a trial judge erred in their assessment of a witness's credibility. The witness concerned in this case was Mr. Sugrue, who gave evidence before the trial judge over four days. For this Court to conclude that the judge was wrong in*

her assessment of the reliability of his evidence would require something truly extraordinary.

121. Applying first principles to the proposition put forward by the appellants, it is not obvious as a matter of logic why an unreliable person may only be disbelieved where another person controverts their story. Put at its simplest, if a court hears from someone, establishes that they are lying about certain aspects of their evidence and therefore deduces generally that they are not credible, it is difficult to see why there is an obligation to accept their evidence in relation to other matters simply because nobody contradicts that evidence. It is true that disputes are settled in our courts in an adversarial fashion; but it is equally true that the burden always rests on a plaintiff to establish their case on the balance of probabilities. That burden is not shifted to a respondent because the respondent chooses not to go into evidence. The burden remains with the plaintiff. Even where the respondent does not give evidence, the plaintiff still has to surmount that burden. If a person is not believed by the court, then they have not surmounted the burden. The decision by a defendant not to give evidence cannot be prayed in aid to assist the plaintiff in getting over a line that they would not otherwise have got over.

122. Moreover, it is hard to see why the sense of unease generated by a plaintiff's untruthfulness could be assuaged by the fact that nobody has controverted the evidence. For example, in this case when a settlement was reached with Mr Desmond such that he no longer played any part in the proceedings, none of the remining respondents would have been in a position to contradict evidence given by the appellants' regarding their interactions with Mr Desmond. The absence of a contradictory version of events will not dispel such concerns or oblige a person – in this case the judge – to accept what the dishonest person is saying. Returning to

Shelly-Morris, the core finding of Hardiman J. is that a judge is entitled to rely on his or her lack of belief in a person in respect of particular facts where deliberate falsehoods were told, to justify a lack of reliance on other things that person has said. It is hard to see why that entitlement should be limited to a situation where the credibility findings were only arrived at after a contest of fact with another witness from the opposing party. That proposition is startlingly wide. It would mean a judge is obliged to accept evidence absent a manifest lack of foundation, despite his or her doubts about the credibility of a witness arising from disbelieving them in respect of other evidence. The establishment of such a rule would considerably limit the discretion of a trial judge and is contrary to the principled approach subtending *Shelly-Morris*. The appellants did not identify any principled basis upon why this should be so but simply pointed to the fact that *Shelly-Morris* concerned a contested case where evidence had been given by both sides. That this was the factual context of *Shelly-Morris* is not in dispute; but that factual context is not enough to justify the carving out of an exception in the terms contended for. The core rationale identified in *Shelly-Morris* is that a loss of faith in a person's credibility can affect all evidence given by that person. As identified above, there is no reason in logic why that principle should be limited to cases where the evidence is controverted. To do so would be to introduce an unwarranted limitation on the principle identified by Hardiman J. Accordingly, this aspect of the appellants' appeal is rejected.

Obligation to draw adverse inferences from absence of evidence from Mr. Millett

Grounds of appeal

123. Ground 9 of the grounds of appeal pleads that the High Court judge erred in failing to have adequate regard to the Millett respondents failure to give evidence. The appellants argue that the trial judge was wrong not to take into account and/or did

not give sufficient weight to the decision by Mr. Millett not to go into evidence. They say that the lack of evidence controverting specific allegations made by them is itself a form of corroboration, and that the court can (and should have) drawn adverse inferences from it. They rely on *Prest* where Lord Sumption discussed the earlier decisions of the House of Lords in *Herrington v. British Railways Board* [1972] A.C. 877 and *Coombs*. In *Coombs* Lord Lowry had expressed the principle in the following terms:

> *"In our legal system generally the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima facie case may become stronger even an overwhelming case. But, if the silent party's failure to give evidence ... can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party, may be either reduced or nullified".*

124. In response, the Millett respondents argue that the trial judge gave close consideration to the fact the respondents did not go into evidence and did so by reference to the principles set out in *O'Toole v. Heavy.* There, Finlay C.J. explained that where a defendant decides not to tender evidence, the role of the judge is to consider, having regard to the judge's view of the evidence, whether the plaintiff has established, as a matter of probability, the facts necessary to support a verdict in the plaintiff's favour. Unless the judge is so satisfied, the case must be dismissed. The Millett respondents submit that the trial judge considered every aspect of the evidence advanced by the appellants, the manner in which that evidence was

advanced, and were given every bounce of the ball in terms of attempting to establish their case over the course of a very long trial.

Decision of trial judge

125. At para. 438, the trial judge addresses the appellants' submissions that the Court is obliged to take into the account the decision of the Millett respondents not to tender evidence. He observes at para. 439 that he had no difficulty in accepting the principle but said that it applied only where there is sufficient evidence from one party to give rise to an expectation that the opposing party will go into evidence in response. He notes that in the instant case, the application of the principles is therefore very much dependent on whether there is sufficient basis laid out in the appellants' evidence to give rise to an expectation that Mr. Millett would tender evidence in response. He expressed some surprise that the principle was invoked given the very obvious gaps in the appellants' own evidence, in particular the absence of Ms. Joan Nolan or any other plaintiff who worked in the finance department of Nolan Transport. Both Mr. Richard Nolan and Ms. Ann Nolan had given evidence that suggested that Joan Nolan had greater knowledge than them in relation to particular issues, including Serene. The trial judge also noted that the appellants had refrained from calling Mr. Desmond notwithstanding that he had a central role in relation to the structure and had admitted on Day 5 that he controlled CVSSA and was therefore in a position to provide first hand evidence of virtually all of the facts the appellants were asking the court to infer. The trial judge also noted the appellants would not have had to call him *"on the blind"* as Mr. Desmond was the author of countless emails and texts and the appellants also had the benefit of his answers to interrogatories. Moreover, he had admitted negligence, breach of duty and breach of fiduciary duty.

126. In the circumstances, the trial judge held that the principles described by Lord Lowry in *Coombs* are of some relevance by analogy to the decision of the appellants not to call the one witness with the most extensive knowledge of the facts. He considered how the *Coombs* principle was to be applied where a party seeking to rely on it has placed untruthful evidence before the court and referred to the observations of Hardiman J. in *Shelly-Morris* that a court should not take a benevolent approach to a party who has chosen to proceed in that way. Before embarking on a very detailed analysis of the admissible texts, the trial judge at para. 443 returned to the principle described in *Coombs,* noting it was of some relevance and observing that it was open to the appellants to call Mr. Desmond as a witness to prove the details underlying certain text messages so the court could reach a sufficiently informed view as to what the texts meant. However, he said, without evidence as to the details and facts, the court was effectively being asked to guess what the texts related to and to fill in the blanks in a way that best suits the appellants' case.

127. It is important to emphasise that the trial judge did consider the absence of evidence from Mr. Millett in respect of certain issues. At para. 417, the trial judge observed as follows:

> "*As noted in para. 187 above, I am prepared to accept, notwithstanding my belief that Ms. Nolan was an unreliable witness in other respects, that Mr. Millett did not explain the MECD application forms that she signed in June 2013. Although given an opportunity to do so, Mr. Millett did not challenge this aspect of her evidence in the course of his cross-examination of Ms. Nolan. Furthermore, I do not believe that there is any basis on which I could hold that the terms of the MECD placement memorandum were provided to the [appellants] or otherwise brought to their attention. Mr. Millett chose not*

to give evidence and, as a result, there is no evidence before the court that the memorandum was handed over to the [appellants] at any stage…. I am not therefore satisfied, on the balance of probabilities, that it has been established by any of the [respondents] that the OPT investment was on the terms of that memorandum".

128. At para. 450, the trial judge returned to the question of drawing inferences. He observed that in relation to the court being asked to draw an inference in respect of the existence of the pledge, the appellants are asking the court to fill the gaps which they have left in the evidence. He said that to draw an inference favourable to them which would have very serious consequences for the Millett respondents, despite the fact that the appellants could have called Mr. Desmond to plug the gaps but chose not to do so.

129. Commencing at para. 454, the judge set out his conclusions as to whether the appellants had made out their case against the Millett respondents. He bore in mind that it might be appropriate to consider whether any adverse inferences can be drawn from either the failure of Mr Millett to tender evidence or the failure of the plaintiff to call Mr. Desmond.

130. At para. 455, he considered an exchange of texts of 25 July 2013 between Mr. Desmond and Mr. Millett and pointed out that without Mr. Desmond's text (which he held to be inadmissible) the response from Mr. Millett was unclear; and therefore he could not see any basis upon which he could draw an inference from it. He further considered what the position might have been if Mr. Desmond's text had been considered admissible, and asked himself whether the language used by both was sufficient to allow an unfavourable inference to be raised against the Millett respondents. He asked whether Mr. Millett's decision not to tender an explanation in

evidence supported such a finding. He concluded that the exchange was not sufficient to permit the court to draw an unfavourable inference against the Millett respondents, emphasising the seriousness of the charge of deceit, the caution with which the court should draw inferences in the circumstances, the words used by Mr. Millett, and the existence of an alternative and plausible innocent explanation.

131. Finally, at para. 457 the considered a text from Mr Millett of 5 September 2013. Having dissected the content of the text, he noted he could not identify any sufficient basis to connect the text to the appellants. He noted that Mr. Millett could have been required to explain the texts had he opted to give evidence, but that found that there was no sufficient basis to draw an inference that the texts necessarily related to the appellants, or any alleged wrong against them. In those circumstances the judge concluded there was no sufficient basis to draw an adverse inference against Mr. Millett by reason of his decision not to tender evidence. He concluded that the appellants had not made a case that the Millett respondents should have advised them against them proceeding with the structure advised by Mr. Desmond.

Discussion

132. The first ground of appeal concerning the Millett respondents is that the trial judge erred in failing to have adequate regard to Mr. Millett's failure to give evidence. It should be emphasised that the trial judge did not ignore the absence of Millett evidence: as identified in the summary of the judgment above, at paras. 417, 450, 454, 455 and 457, the judge explicitly explains why, in relation to discrete issues, he either did or did not take into account the lack of controverting evidence from Mr. Millett. He also legitimately took into account the appellants' decision not to call evidence in relation to matters where those witnesses would have been able to throw light on issues that the appellants were unable to explain. (see paragraph 443).

133. In oral submissions, counsel for the appellants accepted that the trial judge correctly stated the principle i.e. where a defendant decides not to tender evidence, following *O'Toole v. Heavy*, the task of the judge is to consider, having regard to the judge's view of the evidence, whether the plaintiff has established as a matter of probability the facts necessary to support a verdict in the plaintiff's favour (para.80 of the judgment). Equally, the trial judge correctly acknowledged the principle in *Coombs* that the silence of one party in the face of another's evidence may convert that evidence into proof unless there is credible explanation for same, in which case the effect of his silence may be either reduced or nullified.

134. Given the above, it is difficult to see how the appellants can suggest that the trial judge erred in law in his application of the principle. Their complaint appears to be simply that they do not agree with his conclusion that, on the facts of this case, he was not obliged to treat the absence of evidence as helpful to them, or corroborative of their allegations. This is not a valid ground of appeal.

135. Even assuming this was a valid ground, it is difficult to fault the trial judge's methodical approach to the question of whether the appellants had established the allegations against the Millett respondents and the consequences of that for his treatment of the absence of Millett evidence. At para. 439, referring to *Coombes*, the trial judge correctly observed that this principle applies where there is sufficient evidence from one party to give rise to an expectation that the opposing party will go into evidence in response; and that this was dependent on whether there was a basis in the appellants' evidence to give rise to an expectation that Mr. Millett would tender evidence in return. The judge referred to his very detailed analysis of the material said to have been corroborative of the allegations against the Millett respondents, including texts (both read individually and as a whole – see para. 458), faxes, replies

to interrogatories (including those of Mr. Millett) emails and letters, as well as evidence of the Nolans. He went through the propositions which were said to have been established explicitly or by inference, including the existence of a pledge over the proceeds of the OPT investments in favour of EFG Bank (paras. 445 and 446), the alleged confession by Mr. Millett to the Nolans at a meeting in January 2015, and the alleged duty on the Millett respondents to notify the appellants that EFG Bank was causing difficulty in relation to the release of the funds over the course of the summer of 2013, including in relation to the Nemo Rangers transaction. For the detailed reasons set out in the judgment, he concluded that the appellants had failed to persuade him that they had a case against the Millett respondents based on deceit, misrepresentation or breach of duty (paragraph 459).

136. Applying the case law, it is clear from *O'Toole* that where a defendant does not give evidence, the judge must consider whether the necessary facts to support a verdict in the plaintiff's favour have been established. The trial judge clearly concluded they had not. In such a situation, *Coombes* clearly does not mean he was obliged to treat the silence of the respondents as a form of corroboration. The observation in *Coombs* is a very qualified one i.e. depending on the circumstances, a *prima facie* case may become a strong or even an overwhelming case if the failure to give evidence cannot be credibly explained. Here, for the reasons that the trial judge had explained, there was no *prima facie* case. Moreover, as observed in *Prest*, the concept of the burden of proof has always been one of the main factors inhibiting the drawing of adverse inferences from the absence of evidence (see paragraph 45). In *Prest*, Lord Sumption disavows what he describes as the "*fiercer parts of the statement*" of Lord Diplock in *British Railways v. Herrington*. But what is not disavowed is the statement in

British Railways that a defendant may elect to call not witnesses and that this is a legitimate tactical move in the adversarial system of litigation.

137. The Millett respondents were entitled to decide not to give evidence at the conclusion of the appellants' case given their perception of the case the appellants had made against them. The appellants cannot treat the *dicta* in *Coombs* as a hard rule of law requiring a court to draw inferences from the lack of controverting evidence. Rather, the treatment of a decision not to controvert evidence will depend on the context. In this case, the context does not suggest the trial judge was wrong to decide not to draw inferences, or treat as corroboration, the absence of evidence from Mr. Millett.

138. In conclusion, the appellants fail to engage with the core problem they face *i.e.* the trial judge did not find that there was a *prima facie* case. Once it is accepted that he was correct in holding that the appellants had not satisfied the burden of proof, then his decision not to draw inferences from the Millett respondents' decision not to give evidence and/or not to treat it as corroboration, is in keeping with the case law, including *Coombs* and *O'Toole v. Heavy.* For that reason, the court rejects the appellants' appeal on this ground.

JUDGE APPLIED THE INCORRECT STANDARD OF PROOF

139. The last issue requiring to be dealt with arose only in oral argument, and was not identified in the notice of appeal or written submissions of the appellants. An argument was made by counsel for the appellants that the trial judge erred in the legal test which he applied in evaluating the claim by applying a threshold of certainty as opposed to the balance of probabilities. That argument arises solely from the use of the word *"sure"* in para. 236 in the judgment as follows:

> "*In the circumstances outlined above, I find that both Mr. Richard Nolan and Ms. Patricia Nolan have shown themselves to be unreliable witnesses and to have been prepared to engage in deliberate falsehood. That creates a significant problem for the [appellants]. If these two central witnesses are untruthful and unreliable in respect of such important aspects of their evidence as those outlined above, can the court be* ***sure*** *that they are telling the truth in respect of other elements of their evidence?*"

140. At the hearing, counsel for the appellants argued that the trial judge was seeking a higher degree of certainty than the civil standard envisaged, and was in fact looking for absolute certainty. In response, counsel for the Millett respondents identified that when one goes through the judgment it is clear that the correct test is being applied. In that respect reference was made to para. 404 where the judge concluded as follows:

> "*Since they [Patricia and John Nolan/ Richard] have been prepared to give untruthful evidence in relation to one element of the alleged advice, how am I to believe them, on the balance of probabilities, in relation to the other elements of the advice or representations which they allege were made to them by Mr. Desmond, Mr. Millett or by the eighth [respondent] , John Millett Independent Financial Advisors Limited? If they have given false evidence in respect of one element, how can I be satisfied that it is more probable than not that they have been truthful in respect of the balance?*"

141. Although not identified by counsel, para. 403 is also important. There, the trial judge refers to his findings that the evidence put before the court by the appellants was unreliable and untrue, and observes:

> "*That raises significant issues about the credibility of other aspects of the evidence of Mr. Richard Nolan and Ms. Patricia Nolan. Given that they were*

prepared to give untrue evidence to the court in respect of the matters discussed in paras. 226 to 238, how can I be satisfied, as a matter of probability, that the remainder of their evidence is truthful and reliable? For that reason, it will be necessary, when making findings of fact, to keep in mind the guidance given by Hardiman J. in Shelly-Morris v. Bus Átha Cliath."

142. At para. 320 the judge refers to making findings of fact on the balance of probabilities. At para. 401, he notes the appellants failed to prove their case on the balance of probabilities.

143. Because this argument does not appear in the appellants' notice of appeal or their written legal submissions, it is not before this court. However, because it is a point easily disposed of, it will be considered. I am satisfied that, read as a whole, the judgment clearly demonstrates that the trial judge applied the correct test i.e. whether, on the balance of probabilities, the evidence of the Nolans was truthful and reliable, and could be believed. Had the trial judge applied a standard of certainty i.e. that he had to be *"sure"* that the appellants' evidence was truthful, that error would have been of such magnitude that it would have necessitated a retrial of this matter. That is for the obvious reason that the civil standard does not require certainty on the part of a trial judge as to the veracity of evidence.

144. However, the only basis for the argument that this was the standard applied by the trial judge is the isolated use of the word "*sure*", in a judgment that runs to 317 pages and 474 paragraphs. Of course, it is possible that one reference to an incorrect standard of proof might be sufficient: but the judgment must always be read as a whole. In this case, the court is satisfied that the judgment of the High Court shows that the correct standard was applied. As identified above, on a number of occasions

the trial judge referred to the correct standard i.e. whether he could be satisfied on the balance of probabilities. Further, in the paragraph immediately after that containing the reference to being *"sure"*, the judge refers to *Shelly-Morris v. Bus Átha Cliath*. That case has already been addressed earlier in this judgment. In the context of a discussion about exaggeration by plaintiffs, Denham J observed that the evidence of a plaintiff is critical. She observes it is for the plaintiff to prove his or her case on the balance of probabilities, and that it may be that the deliberate exaggeration is such that the credibility of the witness called into doubt and the burden of proof is not carried.

145. The trial judge was obviously aware of the decision of *Shelly-Morris* and must be taken to be aware of the observation Ms. Justice Denham in relation to the burden of proof. In those circumstances, the court does not consider that the appellant has succeeded in establishing that the trial judge applied an erroneous standard of proof.

CONCLUSION

146. In summary, for the reasons explained in this judgment, I reject the appeal of the appellants on all grounds.

147. The respondents having been entirely successful on the appeal are presumptively entitled to their costs. With the usual caveat that this might increase the burden of costs, if the appellants wish to contend for any other order, I will allow until 13 January 2025 for them to file and serve a short written submission – limited to 1,500 words; in which event the respondents will have fourteen days within which to respond.

148. As this judgment is being delivered electronically, Allen and Butler JJ. have authorised me to say that they agree with it and with the orders proposed.