THE COURT OF APPEAL

Appeal No. 2014/1159

[Article 64 transfer]

Finlay Geoghegan J.
Peart J.
Hogan J.
BETWEEN/

THE LEOPARDSTOWN CLUB LIMITED

PLAINTIFF/RESPONDENT

AND

TEMPLEVILLE DEVELOPMENTS LIMITED AND PHILIP SMYTH

DEFENDANTS/APPELLANTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 28th day of July 2015

1. The plaintiff ("Leopardstown") is the owner of Leopardstown racecourse. While the racecourse has been functioning as such since 1888, the growth of the south Dublin region means that the racecourse is now surrounded by a built up area immediately adjacent to the M50 motorway. Although racing takes place on the course on 25 days in the course of the year, the owners of the racecourse have endeavoured for some time to ensure that this important site is put to active use throughout the entire year.

2. The second named defendant ("Mr. Smyth") is the principal shareholder and a director of the first named defendant ("Templeville"). As the owner of the racecourse Templeville has had a business relationship with Mr. Smyth since the 1970s. Initially Mr. Smyth was given the exclusive right to operate what was then a squash court at the racecourse. Templeville now runs a fitness, health and leisure centre known as the West Wood Club at the premises.

3. On 1st January 1998 Leopardstown granted Templeville a 35 year lease of the certain lands and premises of the racecourse premises. Mr. Smyth is a party to the lease a surety for the payment of the rent. In June 1998 Leopardstown and Templeville entered into further agreements supplemental to the lease, including making provision for a licence over certain other lands and payments and a licence relating to parking arrangements at the racecourse on racedays.

4. To that end the plaintiff entered into a lease with the first defendant ("Templeville") over certain parts of the land in the early 1980s. There was a further lease in 1993 and, prior to the events which we are about to describe, the relationship between the parties was governed by the grant of a lease in 1998 and a further licence in that year. Templeville is in fact totally controlled by Mr. Philip Smyth and he is the guarantor of the lease.

5. The net effect of these arrangements was that Templeville took possession of certain lands for the purposes of constructing a sports club (known as the West Wood club) and other facilities, including a cafeteria. During this period Templeville arranged for the construction of some eleven tennis courts, seven of which were indoor courts situate within a structure known as "Dome No. 2". The other courts were outdoor courts.

6. It is only fair to say that the relationship between the parties has nearly always been strained and fractious, much of it caused by disputes relating to access and car parking. While this might seem unimportant – even frivolous – both sides apparently considered that car access and car parking were of considerable importance to the manner in which they both did business on the Leopardstown campus.

7. At all events this strained relationship has given rise to a large volume of highly complex litigation over the last decade or so. Other difficulties arose from the fact that Leopardstown had reached an agreement with Dún Laoghaire-Rathdown County Council to effect a land swap in order to facilitate the construction of the M50 motorway. This had also given rise to a major arbitration hearing before Paul Gardiner S.C. in 2008. In his arbitration award Mr. Gardiner S.C. directed that Leopardstown transfer some 5 acres to Templeville to compensate it for the land lost as a result of the construction of the M50 motorway. This award was itself also the subject of complex litigation before the High Court. In an exceptionally detailed and complex judgment – running to over 400 pages – delivered in January 2010 Edwards J. had set aside that award, but that judgment was itself under appeal to the Supreme Court.

8. The details of these various earlier disputes are not particularly germane to the present appeal, save to say that by September 2011 there were some nine major items of actual or threatened litigation outstanding between the parties. Some of this litigation had come to a head and was due to be heard by the High Court in November 2011. The parties at that point engaged in an elaborate mediation process under the auspices of another leading Senior Counsel (Paul Gallagher SC) who acted as mediator. That mediation process was engaged in over seven days starting on 27th September 2011 and it culminated in what has been described as the Mediated Settlement Agreement ("MSA") on 26th October 2011.

9. The MSA comprises a written agreement entered into between Leopardstown, Templeville and Mr. Smyth and includes certain maps and a solicitor's note of the same date. The maps were prepared by Arup Engineers and are central to this appeal. A series numbered 1000 were prepared at the outset of the mediation. A 2000 series followed, but the parties ultimately used the 5000 series maps with maps numbered 5001, 5002 and 5003 being attached to the MSA. These maps were signed by the parties for identification purposes. A consultant to Arup, Mr. Ian Roberts, was the person primarily responsible for the preparation of the maps. I will deal separately with the evidence given to the High Court by Mr. Roberts later in this judgment.

10. The MSA was received and made a rule of court in proceedings between the parties (2004 No. 1082S) on 3rd November 2011. Pursuant to the MSA, Templeville was to make certain payments to Leopardstown and the initial payment was duly made. Unfortunately, however, by early 2012 the relationship between the parties had broken down again.

11. By late February 2012, there were allegations and counter allegations which it is not necessary to describe for the purposes of the appeal, save to note that there were multiple disputes. Leopardstown allege a failure by Templeville to pay revised rent and service charges under the lease as amended by the MSA on the 28th February, 2012. They made allegations of further breaches during March and April 2012. Templeville denied those breaches and made allegations in turn of breaches of the MSA by Leopardstown, particularly relating to events on race days in March, April, May and June 2012. There was during this period correspondence between the solicitors relating to the alleged breaches on each side.

12. On the 15th June, 2012, Templeville's solicitors wrote informing the solicitors for Leopardstown that Templeville had elected to terminate the MSA with immediate effect because of Leopardstown's alleged fundamental breach of the MSA. There was further correspondence where the Leopardstown solicitor sought to have that position reversed, but that did not resolve mattes and on the 10th July, 2012, Leopardstown issued proceedings seeking firstly a declaration that the MSA remained in full force and effect and other consequential reliefs. Leopardstown also sought judgment for liquidated sums allegedly due and owing by the defendants and damages and other consequential relief. A statement of claim was delivered immediately on the 11th July, 2012, the proceedings were entered in the Commercial List and a reply and defence to counterclaim delivered on the 26th November, 2012, and the usual pre-trial procedures and preparations in accordance with Commercial List practices took place and the trial was listed for hearing on the 11th June, 2013.

13. On the 24th May, 2013, the defendants delivered a proposed amended defence and counterclaim and were given liberty to do so pursuant to an order of the trial judge, Charleton J., on the second day of the trial, *i.e.,* the 12th June, 2013. That amended defence and counterclaim pleaded for the first time the claim of the defendants which, as it happens, is now the only issue on the appeal. The new claim was that by furnishing a map used in the negotiations leading to the MSA and referred to in the MSA, Leopardstown had misrepresented that a site which pursuant to the MSA was to be endorsed on the lease from Leopardstown to Templeville "was not materially affected by an underground ESB cable". It was further pleaded that the defendants relied upon the said representation which was false in entering into the MSA and were now entitled to rescind the MSA. On the same facts it was pleaded in the alternative that the MSA was voidable at the instance of the defendants for mistake. On the 13th June, 2013, Leopardstown delivered an amended reply in defence to the counterclaim which it denied the alleged misrepresentation and mistake. They further pleaded that the defendants, their servants, agents and experts were aware of the location of both the said ESB cables including the cable traversing part of the site prior to the execution of the MSA. They also pleaded that the defendants were not entitled to avoid the MSA.

High Court judgment

14. The action was at hearing for fourteen days before the High Court and the order made records fifteen witnesses for the plaintiff and nine for the defendants. In a detailed judgment delivered on the 2nd September, 2013, the trial judge found for Leopardstown and against Templeville and Mr. Smyth on all issues, save he left over the claim for Templeville to relief against forfeiture: see *Leopardstown Club Ltd. v. Templeville Developments Ltd.* [2013] IEHC 526. There was a further hearing on that issue on the 16th October, 2013, following which the trial judge indicated that the court would grant relief against forfeiture. Thereafter certain sums which had been found due and owing by the defendants to the plaintiff had been paid in the sum of €2,437,227.16. The court made final order on the 14th November, 2013 which dismissed the defendants' counterclaim, save in respect of relief against forfeiture.

15. The judgment of the trial judge addressed multiple issues in the claim and counterclaim. The findings of the trial judge in relation to issues which are not the subject of this appeal are not directly relevant save to note that the trial judge on many issues found Mr. Smyth not to be a credible witness and rejected his evidence. He was also critical of certain of the claims made by Templeville.

16. I will presently considere those parts of the judgment relevant to the issue pursued on appeal. In summary, whilst Charleton J. stated that he could not accept that ". . . any misrepresentation of any kind was made by Leopardstown", it appears that the reason for which he rejected the counterclaim of Templeville alleging misrepresentation was his conclusion that Templeville had knowledge of what he referred to as the transverse ESB cable at the time it entered into the MSA on 26th October 2011.

17. On the 28th February, 2014, the defendants lodged a notice of appeal to the Supreme Court. That notice of appeal was against multiple findings and conclusions of the trial judge that set out approximately 36 grounds of appeal. The appeal was transferred to this Court pursuant to the direction given by the Chief Justice (with the concurrence of the other members of the Supreme Court) pursuant to Article 64 of the Constitution on the 29th October, 2014.

18. The appeal pursued before this Court is, however, confined to the rejection by the trial judge of Templeville's claim to be entitled to rescind the MSA (or, alternatively, to claim for damages) by reason of the alleged misrepresentation in the map attached to the MSA referred to as "Arup drawing No. [5002]" in showing only one ESB cable and failing to show a second cable which transverses part of a site proposed to be demised to Templeville pursuant to the MSA. It is, perhaps, striking that the single issue which is central to this appeal is one which was not originally pleaded by the defendants and to which they were only granted leave to pursue by Charleton J. by way of an amendment of pleadings on the second day of the trial.

Submissions of the parties

19. Both parties made detailed written and oral submissions to this Court. In summary, Templeville and Mr. Smyth submit that the trial judge erred in law in failing to consider their misrepresentation claim in accordance with law and in particular in failing to make a determination as to whether the Arup maps presented by Leopardstown to Templeville in the course of the negotiations leading to the MSA contained a misrepresentation of fact in relation to the existence of the ESB cable affecting the site. They also submit that he erred in law in his approach to the determination of the question as to whether Templeville and Mr. Smyth were induced by the alleged misrepresentation to enter into the MSA and Leopardstown's defence that they had knowledge of the true position in relation to the ESB cable and submitted that the inference drawn to that effect was not supported by the evidence. They invite this Court to find that there was misrepresentation; that Templeville was induced thereby to enter into the MSA and that Templeville was entitled to rescind or in the alternative to remit the matter to the High Court for further hearing.

20. Leopardstown contest the errors of law allegedly made by the trial judge; rely upon the findings of fact made by him, in particular the lack of credibility of Mr. Smyth as a witness and the inferences drawn and submit that this Court in accordance with the principles established by the Supreme Court in *Hay v. O'Grady* [1992] 1 I.R. 210, and subsequent judgments should not interfere with the finding of fact made by the trial judge as to the knowledge of Templeville and Mr. Smyth of the true position in relation to the ESB cables at the time they entered into the MSA.

21. The single issue which arises in this appeal is whether that agreement was vitiated by an operative misrepresentation (the details of which I shall presently describe) which would entitle Templeville either to rescission or to damages. In this respect, this Court has had the benefit of hearing an appeal which was focussed entirely on the single question of an alleged misrepresentation. It should be acknowledged that the trial judge enjoyed no such luxury since he was required to address many diverse questions, of which the

question of misrepresentation was just one to be determined in the course of a lengthy and complex trial.

Clause 5 of the MSA
22. Clause 5.1 of MSA provided for the transfer of two sites by Leopardstown to Templeville. One area was for seven indoor tennis courts (Dome 2) and the other was to be used for tennis courts and five a side football (Dome 3). Dome 2 had been built and no issue arises. The issue concerns Dome 3 which was an undeveloped site save that it had been surfaced with hard core prior to the MSA. It is important to stress that Templeville had been in effective occupation of that site since at least 2006 and had, in fact, successfully applied for planning permission in respect of that site in 2007.

23. Clause 5.1 of the MSA provided as follows:-

> "The new site to be demised to Templeville as provided for in the Licence Agreement dated 5th June 1998 and to be endorsed on the lease and to form part of the lease and to be subject to the terms and conditions thereof shall consist of the following parcels of land:-
>
> a) The area used as seven indoor tennis courts and covered by an air dome (dome2);
>
> b) The additional area to be used for tennis courts and/or five a side football pitches and proposed to be covered by an air dome (dome 3);
>
> which two areas are identified and marked out on the map Ref: Arup drawing NO.[5002] attached to this Agreement, where such areas are outlined with a blue verge line and coloured yellow."

24. The legend on the yellow site on the Arup map No. 5002 ("the Arup map") states "Spaces for 7 No proposed tennis courts/football." The yellow site which is largely rectangular in nature is itself immediately adjacent to the M50 motorway. For convenience we propose to describe this site as the "tennis court site".

25. It is now necessary to address the question of the ESB cables and the manner in which these cable(s) were depicted on the Arup map, since this goes to the heart of the alleged misrepresentation. There are, in fact, two high voltage ESB cables which run through the Leopardstown campus. The first is a 220 kV oil surrounded underground cable which was constructed in the early 1970s. This cable traverses the tennis court site ("the transverse cable"), so that, if this cable were depicted on a map one part of the tennis court site would appear as a large oblong and the other part as a much smaller triangle. It is not disputed that the cost of moving the traversing cable would be significant, even assuming that consent from the ESB for this purpose would be forthcoming.

26. The second ESB cable goes along the end of the car park and skirts the tennis court site ("the skirting cable") and passes by Dome 2. The skirting cable was laid by the ESB and went into commission in 2000-2001. Templeville had, in fact, planned to construct Dome 2 somewhat closer to the tennis court site, but it was moved to avoid the skirting cable. The dome structures themselves require an air pumping system. The air pumping systems lie outside the foundations of the dome and push air inside. Such a dome cannot be built over the cable and, furthermore, it appears that no foundation can be laid within 5m. of such a cable.

27. It is agreed that there was no discussion whatever of the traverse cable during the course of the mediation. (The extent to which Templeville was otherwise aware of the traverse cable and its present location is another matter entirely which I will presently, and separately, address in some considerable detail). The difficulty which arises is that the traversing cable renders the tennis court site entirely unsuitable for use with a dome providing for seven indoor tennis courts. The evidence established instead that at most four or five tennis courts with a dome could be built on the site.

28. Critically, however, the Arup map shows the presence of the skirting cable but *not* the traversing cable. This omission to show the traversing cable on the Arup map is at the very heart of the present appeal, because Templeville contends that this omission amounts to a misrepresentation which entitles it to rescind the MSA. While it is fully accepted that this omission was entirely innocent in nature, Templeville nonetheless contends that this was a misrepresentation which nonetheless entitles it to rescind the MSA.

29. Whatever may have been the hopes of the parties at the time of the MSA in October 2011, the fractious relationship which we have already described continued. Matters came to a head on 14th June 2012 when Mr. Smyth claimed that on a casual walk through the tennis court site he noticed blue lines traversing the site. (It should be noted that the trial judge rejected this evidence). While the notice claiming a right to avoid the MSA on the ground of fundamental breach of contract was sent by Templeville on the following day, that notice – rather surprisingly, it might be thought – made no mention of the traversing cable. This issue was only first raised by Templeville in a letter dated 20th July 2012. Indeed, as I have already noted, the issue was only raised in these proceedings following the granting by Charleton J. of liberty to amend the pleadings on the second day of the hearing.

The preparation of the maps for the mediation process
30. Before considering this matter, it is next necessary to address how all of this came about. In the course of the mediation process Leopardstown had retained a consultant engineer, Mr. Ian Roberts, who was familiar with the site and who specialised in the design, management and construction of artificial sports surfaces. Mr. Roberts had been familiar with the Leopardstown campus since 1999. He formerly had held a number of senior positions with Arup and in that capacity had been involved with various projects at Leopardstown. Mr. Roberts had retired as a director of Arups in 2008 and had established his own consultancy firm, Roberts Consulting. He nonetheless maintained close links with Arups.

31. While Mr. Roberts had no involvement in the mediation as such, he participated in a conference call on 4th October 2011 with Leopardstown's general manager, Mr. Matt O'Dwyer, and a Mr. Horan. They informed him of the mediation talks and requested that a map of the site which was to be reserved for seven tennis courts should be prepared, along with a variety of other maps. Mr. Roberts quickly prepared a map in consultation with Arups. The initial version of the map (known as a 1000 series map) showed only the skirting cable. A further series of maps (known as the 2000 series) were subsequently prepared by Mr. Roberts and Arups.

32. An important development took place on 20th October 2011 in that Mr. Roberts was informed that it was now agreed that there would be a dome on the tennis court site. Mr. Roberts accepted in evidence that he had not given any thought to the question of whether the presence of the traverse cable would be consistent with a dome being erected on the tennis court site.

33. Mr. O'Dwyer then instructed Mr. Roberts to prepare a 5000 series drawing. It was intended that these maps would be incorporated into the MSA. In the course of the hearing Mr. Roberts was cross-examined on this point:

> "Q. I must suggest to you that you must have known that the transverse cable would make a dome difficult, if not impossible, on that site?
>
> A. I subsequently know that, but I was not thinking of that at the time. As I say, I produced a drawing pretty much instantaneously just to the 2003/2005 [Series], but I had no thought beyond that."

34. Subsequent to the preparation of the maps Mr. Roberts then met with Templeville's representatives, Mr. O'Sullivan and Mr. Ó'Múire, at the cafeteria at the West Wood club on the morning of October 25th to discuss the technical and other aspects of the mediated settlement agreement which was due to be signed later that day or, at the latest, on the following day. It is agreed that there was no mention by either party of the transverse cable in the course of that meeting. Nor was there any discussion of the possible implications of the presence of the transverse cable. Mr. Roberts further accepted that the presence of the traversing cable meant that seven tennis courts could not be erected within the dome on the tennis court site. While he thought that there might have been difficulties erecting a dome and seven tennis courts on the site one way or the other, the presence of the traversing cable meant that seven courts could not now be constructed.

35. At all events, it is clear that the Arup maps did not show the traversing cable, although the skirting cable was prominently marked in red on the map. It may be fairly inferred that neither Mr. Roberts (nor, for that matter, anyone else on either side) adverted to the potential implications of the traversing cable for the erection of the seven tennis courts and the proposed dome on the tennis court site. This emerges from the following passage of cross-examination of Mr. Roberts:

> "Q. Now, when you are asked to prepare these maps in the context of a dome going up, did you not say to Mr. O'Dwyer, or anybody else, "Have you forgotten about the cable?" or, "You can't build a dome up on that site because of the cable?;
>
> A. I did not think it was any of my business to decide what could or could not be done by Templeville on their site.
>
> Q. Well, your answer is, you did not say it in the first instance?
>
> A. I did not say it, no.
>
> Q. Did you not say it because it never occurred to you or because it occurred to you and you thought it none of your business?
>
> A. It never occurred to me."

The contentions of the parties

36. Leopardstown accepts that the Arup map merely showed the skirting cable and did not show the traversing cable. It nevertheless maintains the following core propositions by way of response to Templeville's claims of misrepresentation:

37. First, the map did not contain a misrepresentation because it did not purport to warrant any particular state of affairs. Templeville had already been in possession of the site under a licence since 2006 and were familiar with that site.

38. Second, Templeville must, in any event, be taken to be aware of the existence of the traverse cable, specifically because its architectural technician, Brendan O'Sullivan, was so aware. Mr. O'Sullivan was not called as a witness, a factor which (as we shall see) played some role in Charleton J.'s conclusion that Templeville were so aware.

39. Third, Mr. Smyth and Templeville were aware of the traversing ESB cable.

40. Fourth, in these circumstances, even if there was a misrepresentation, Templeville cannot show that it relied on this misrepresentation since it already had full knowledge of the existence of the traversing cable. In other words, even if there was a misrepresentation, this was immaterial since Templeville (or, for what amounts to the same thing, Mr. Smyth) already had full knowledge of the existence of the traversing cable and it was not credible to submit otherwise.

41. Fifth, it maintained that this plea of misrepresentation was opportunistic and contrived. If Mr. Smyth and Templeville had been genuinely misled by the map, one might have expected that an objection would have been made in such terms in June 2012 immediately Mr. Smyth first claimed that this came to his attention. Not only was no such objection, but this ground was introduced to the proceedings for the first time on the second day of hearing when Charleton J. granted Templeville liberty to amend its pleadings to raise this point.

42. For its part Templeville responded as follows: First, it contends the judgment under appeal is flawed on this issue in that Charleton J. failed to consider and decide whether or not there was a false representation of fact or deal with the implications of such a misrepresentation. Second, it contends that Charleton J. was in error in concluding that Templeville and/or Mr.Smyth knew of the transverse cable *prior* to the operative date of 26th October 2011, the date on which the MSA was signed. Third, it submits that there is no proper evidential foundation for the finding that Templeville and/or Mr. *Smyth knew of this particular traverse cable which traversed the tennis court site prior to October 2011,* as distinct, for example, from knowing that the Leopardstown campus contained ESB cables or that such cables were in the general vicinity of the tennis court site or that the existence of such cables might have been casually mentioned in a different context many years earlier.

The test for rescission on the grounds of misrepresentation

43. The test for rescission on the grounds of misrepresentation is not in doubt. As McCracken J. said in *Colthurst v. Colthurst,* High Court, 9th February 2000 the parties alleging misrepresentation in such a case must show that:

> "There was a representation of a fact, that the representation was untrue and that the [parties in question] were induced to enter into a settlement by reason of the representation."

44. Another example of this is supplied by the decision of the Supreme Court in *Gahan v. Boland,* (Supreme Court, 20th November 1984). In that case the plaintiff sought rescission of an agreement to purchase a house. It was accepted that the purchaser had inquired of the vendor whether the house in question would be affected by the construction of the projected M50 motorway. It was further accepted that the vendor had assured the purchaser that this was not the case and the purchaser signed the contract based

on that assurance. The purchaser later discovered that the proposed motorway was rooted to pass through the property.

45. While it was accepted that the representation was made innocently, the Supreme Court also noted that the evidence had also established that this representation was false; that it was a material one "with the intention of inducing the plaintiff to act on it" and that it was "one of the factors that induced the plaintiff to enter into the written contract on the following Monday to purchase the property."

46. The defendants had also argued that the purchaser should have pursued his enquiries regarding the proposed route of the motorway "in quarters where he would have been reliably informed as to the true position". But Henchy J. would not accept that the doctrine of constructive knowledge could have any application in this situation:

> "For that reason, it is submitted, he should be held disentitled, for the purposes of rescission, to rely on the misrepresentation made and should be deemed to have constructive knowledge of the true position as to the route of the motorway.
>
> I am unable to accept this argument. I consider it to be well-settled law that the only knowledge that will debar a purchaser from repudiating a contract he has been induced into by the vendor's misrepresentation is actual and complete knowledge of the true situation. It does not lie with a vendor, who has by his misrepresentation induced the purchaser to enter into a contract to purchase, to have his misrepresentation excused or overlooked and to have the purchaser deprived of a right to rescind because he did not ignore the misrepresentation and pursue matters further so as to establish the truth of what was misrepresented. That would be unconscionable and unfair."

47. It is, of course, the case that the "person to whom the representation is made…cannot complain if he knows the misrepresentation to be false and knows the true position": *Strover v. Harrington* [1988] Ch. 390, 407, *per* Browne-Wilkinson V.C. This latter *dictum* essentially sums up the case made by Leopardstown in the event that this Court was to conclude that there had been a misrepresentation.

Issues for consideration

48. In the light of this case-law, I consider that were I standing in the place of the High Court judge, the following issues would have now directly arisen for consideration First, did the omission of the transverse cable on the Arup map amount to a representation? Second, if it was a representation, was this a misrepresentation? Third, if it was a misrepresentation was it material and, specifically, did it induce Templeville to enter into the MSA? Fourth, did Templeville have independent "actual and complete" knowledge of the traversing cable so that even if there was a misrepresentation, it was immaterial? Fifth, should any adverse inference be drawn from the failure on the part of Templeville to call Mr. Brendan O'Sullivan as a witness?

49. As it happens, however, the High Court judge did not approach the matter in quite this fashion. Indeed, Charleton J. made no specific findings on the first three questions which have I have just posed. He instead proceeded directly to consider the question of whether Templeville had prior knowledge of the traversing cable. Assuming, however, that it could have been shown by Leopardstown on the balance of probabilities that Templeville had full and complete knowledge of the traversing cable, it is clear from the judgment of Henchy J. in *Gahan* that this would have been a complete defence to any claim for misrepresentation.

Did Leopardstown establish on the balance of probabilities that Templeville had independent "actual and complete" knowledge of the traversing cable so that even if there was a misrepresentation, it was rendered immaterial by that actual knowledge?

50. A key part of the case made by Leopardstown was that Templeville already had actual and complete knowledge of the true state of facts in relating to the traversing cable so that even if there had been a misrepresentation, it could not in any way have been misled as a result. This was essentially the position adopted by Charleton J. in the High Court as recorded in the following lengthy passage from his judgment:

> "There are two cables running through the Leopardstown campus. One of them, which transverses the seven tennis courts site, is apparently there since the 1970s. This is the transverse cable. The second one, which goes along the edge of the car park and Dome 2 skirting the seven tennis courts site, was laid by the ESB in 2000 and commissioned in 2001. This is the skirting cable. Dome 2 was originally planned much closer to the new seven tennis courts site than it now sits. It was moved by Templeville so as to ensure that its foundations missed any cable. This dome now sits as to its foundations as close as just under 3 m to such a cable. These domes need an air pumping system. These sit outside the line of the foundations of the dome and push air inside. One of the air pumping stations in Dome 2 is over a cable. This establishes knowledge by Templeville that this cable existed and that no dome could be built above it or, according to the ESB position, no foundation could be laid within 5 m of it. Philip Smyth gave evidence that he thought that what was happening in 2000/2001 was that the ESB was decommissioning the original transverse cable, which is the inner cable for these purposes, and replacing it as to function with the skirting cable. This evidence is improbable. In addition, apart from all of this, it should be noted that on the site of the seven tennis courts there are three side-by-side ESB manhole covers, clearly marked with a lightning symbol. This establishes to anyone considering taking any interest in this site that there is a major ESB cable under the ground there. It is not possible to move any of these cables save with the expenditure of millions of euros. This site with the manholes so marked has been in the effective occupation of Templeville for many years.
>
> In addition, the site was the subject of a planning application in 2007. At that stage Templeville were planning to construct seven outdoor tennis courts and to this application Leopardstown put in an observation. This was made by Ian McGrandles on behalf of Leopardstown through a firm called Tíros Resources. In the observation, he refers to an earlier planning application that had been made by Leopardstown in 2002 that included this site. This application showed both cables. It is inconceivable that Templeville did not have regard to this application which was lodged together with appropriate drawings on the 12th July, 2002. In it, drawing D 2443-11 C121 PL1 showed an alignment of two almost parallel 220 kV underground cables one of which traversed the application site. In the observation by Leopardstown on the planning application which was lodged on the 21st February, 2007, and directly relevant to the application being made by Templeville, the following was pointed out: "there are two 220 underground kV ESB cables and an associated wayleave at the western edge of the proposed site" and an observation was made that it was not shown on the site plan as required under the relevant Planning and Development Regulations. That is not all. The local planning authority then engaged by seeking additional information from Templeville, stating: "it will be necessary to consult with ESB regarding the potential impact of development on the ESB cables indicated as traversing the site. Please submit written evidence of consultation with ESB on this matter."

On the 19th July, 2007, Brendan O'Sullivan, on behalf of Templeville, responded to this request including a revised position of the access to the site showing the line of the ESB cable traversing the site marked in yellow and an ESB link box within the application site. Evidence was also submitted of consultation with the ESB by Templeville about the cable traversing the site. Following a meeting with John Daly, who is a manager for high-voltage cables, an e-mail was exchanged between them summarising their discussion as to this transverse cable and making the following points:

> • The proposed tennis courts have been generally located not to conflict with the line of the cable. However, there are possible conflicts on the access routes. Some trial holes were carried out, but it was agreed to carry out a further series to confirm both the position and levels of the cable, as the original levels have been changed, and as there would appear to be a discrepancy between ESB record of the cable and your drawing. Declan Mullen will arrange this with you. An outage of this cable is planned in any case over the summer to carry out annual maintenance testing
>
> • The curved pedestrian entrance will be redesigned to avoid a conflict with the cable circus at the steps, if it proves necessary
>
> • The lower vehicular entrance will be moved from the NE corner to the SE side to avoid conflict
>
> • The proposal to install low shrubs over part of the cable route is acceptable to ESB, provided no trees are installed
>
> • The cable was originally installed in this area in non-road construction, so at all traffic crossing locations, the back filling must be replaced to road construction standards. If the cable depth has been compromised, this may require special provisions to spread traffic loading, such as steel plates/concrete slabs
>
> • All planned signage and fencing posts must be designed to avoid the cable route
>
> • ESB Central Site should be re contacted to obtain an up-two-date record of all ESB services in the area.

This matter could not have been forgotten by Templeville as a corporate entity, nor could Philip Smyth as its controlling mind have been unaware of it or have forgotten it. It is far too important for that.

On the 26th May, 2008, a position paper was submitted by Templeville during the course of the arbitration to Paul Gardiner SC. Since this arbitration was about the land which Templeville claimed to be entitled to, the submission by Templeville described the land and at para.13.5 added:

> A further significant consideration in respect of this strip of land, which Leopardstown seems to have lost sight of, is the fact that an underground ESB cable runs through same. As part of Templeville's planning application process, Templeville has been in discussions with the ESB with regard to its proposed development. Templeville proposed plans to construct the graded embankment with no ground cover planting, the new footpath, the 4 m high fence and the pedestrian entrance gates and parts have been approved in principle by the ESB, subject to final approval at the time of the construction of these works. The ESB's primary concern is to preserve the integrity of this cable. This again is a further complication in relation to this site, and Templeville needs to be granted sufficient land to enable it to carry out the development. Further reference is made to this issue at the top of page 2 of the report prepared by ...

Whilst that arbitration process was ongoing in 2008, Philip Smyth swore an affidavit dated 10th June, 2008, in which he referenced an earlier hearing of April 21st, 2008 and enclosed a copy of the transcript in his affidavit by way of an exhibit. In that transcript, counsel for Templeville referred to a problem with an ESB cable and said: "It's a huge mains cable, apparently, and there are difficulties about building over it or around it." During the mediation process in 2011, a replying position paper was admitted to the mediator Paul Gallagher SC by Templeville. This refers to the new site as not being level and the difficulties concerning the site are specifically referenced to the position paper of the 26th May, 2008 which is appended to that paper. This document goes on to state that Templeville would like the opportunity to have the map within the mediation process, which only shows the skirting cable and not the transverse cable, reviewed by its own expert and compare it with what is marked out on the ground. The map there referenced, Arup 1004, shows a jagged and not a squared off edge to the site, though this was later conceded by Leopardstown, and the transverse cable is absent.

It is impossible not to be satisfied that Templeville had knowledge of the transverse ESB cable. I am satisfied that Philip Smyth, in claiming no knowledge of the cable is giving evidence that, in these circumstances, a court could not accept."

Unawareness of this transverse cable, of which Templeville clearly had knowledge, is blamed on Ian Roberts, the engineer who drew up the relevant map and who decided as a matter of subconscious prudence not to show any features on the interior of the site. Thus, the maps used in the mediation process, including for instance Arup D4352-20, show the skirting ESB underground cable in an approximate position. Ian Roberts was skilfully cross-examined. I entirely accept all of his evidence. In particular, whether conscious or unconscious, putting nothing on the inside of the sites that was to be devised to Templeville was entirely prudent and completely in accordance with a fair-minded desire to avoid trouble. As he put it in the witness box, if in marking the cable within the site he had been even inches out, the result would have been another court case. This is a prudent observation.

On the 27th March, 2012, Toal Ó'Muiré wrote to the solicitor for Templeville in the following terms:

> Brenda [Flood] rang me to ask the question (which I could not answer) as to what Ian Roberts meant by mentioning a "well" in the draft agenda he sent me on 12 March. She was curious because that date was two days before Templeville's testing rig arrived at the racecourse. I said I did not know what Ian meant at the time, and I confirmed to her that I have been instructed by you to deal only with the setting out of boundaries and levels ... I also clarified that the Arup drawings I posted to Kieron [Flood] on 20 March are those which I received that afternoon

> from Ian [Roberts], which I trust are those Kieron is using to check boundaries and levels. Brenda says she will phone Kieron to check this, and will ask him to ring me to let me know what anomalies there may be between that latest set of Arup drawings and the Arup drawing Philip [Smyth] signed as part of the Mediation Settlement last year.

It is disturbing, and it also shows the prescience of Ian Roberts, that Philip Smyth would instruct a highly respected professional person to look for anomalies in an agreement that he had signed months earlier. On the 4th April, 2012, Pat Keogh invited Templeville to a meeting to review the car parking facilities upgrade. Templeville never turned up, and that was done deliberately.

While Philip Smyth was in France, on the 26th March, 2012, acting on an earlier instruction from him, Kieron Flood had walked site with a view to finding differences between the signed map in the mediation agreement and the latest general arrangement of map and he said, among other things: "the underground ESB lines now appear to be running within the site as opposed to along the access road and car parking on the signed map." Brenda Flood was again placed in an impossible position on the instructions of her employer. It is highly probable that she drew this to his attention during one of the several phone calls that she made reporting general and important affairs to him in France 2 to 3 times a week. Yet, in the correspondence, this is not at all mentioned. Philip Smyth did not claim that it was part of his reasoning for not paying the full rent to Leopardstown on the 15th March, 2012.

In terms of what is probable or improbable the situation as it ostensibly developed rules out any acceptance of his evidence. He claims that on June 14th, 2012, he walked the site and noticed blue lines. This happened only by accident, he says, because there was a race meeting on and he was stopped at the Carrickmines car park, which is a pleasant walk in good weather from Dome 2. He claims to have telephoned, through Brenda Flood, Kieran Flood and to have been surprised that there was a transverse ESB cable which might compromise the number of courts that he could put on that site. Kieran Flood described a recollection of Philip Smyth being apparently surprised. Brenda Flood had little recollection of the event. The next day the letter claiming termination for fundamental breach of contract went out. It, however, has no mention of the cable. If there was a horrible surprise, this was the time to mention it. Not until the 20th July, 2012, was the cable referenced in correspondence among a number of points of difficulty as to the site of the seven tennis courts. In the meantime, a letter of the 20th June, complained of a rainy 14th June, race day with only four cars in the Dome 2 carpark, rubbish, a forklift and security barriers. This, in comparison, would be trivial stuff. I regret that I cannot accept any evidence that the cable was first discovered on the 14th June, 2012. Nor can I accept that Ian Roberts acted dishonestly, or gave untruthful evidence, or that there was any kind of sharp practice by Leopardstown, or that Templeville made a mistake or that any misrepresentation of any kind was made by Leopardstown."

51. It will accordingly be seen that Charleton J. relied on the following matters in order to fix Templeville and Mr. Smyth with knowledge of the traversing cable:

52. First, the fact that Dome 2 was moved in order to ensure that its foundations missed the cable. Furthermore, it was improbable that Mr. Smyth considered that the ESB works in 2000 and 2001 involved the replacement of one ESB cable with another. The evidence given by Mr. Smyth to the effect that he had first learnt of the two cables in June 2012 was accordingly rejected.

53. Second, there are three ESB manhole covers side by side on the tennis court site which are clearly marked with legend "ESB" and which suggests that there is a major cable on the site.

54. Third, the existence of the two cables was mentioned in the course of the objections to the 2007 planning application and this was not something which could have been forgotten by Templeville.

55. Fourth, Templeville's solicitors, P.C.L. Halpenny & Son, had submitted a position paper to the arbitrator (Paul Gardiner S.C.) during the course of an earlier arbitration in 2008 which had made reference to the fact that an ESB cable runs through the tennis court site and which was introduced in a submission made in the course of the mediation in 2011.

56. I propose now to consider these individual issues in turn in order to examine whether, taken separately or cumulatively, Leopardstown had discharged the onus of proof of showing that Templeville with actual and complete knowledge of the traversing cable, even assuming that the Arup map's omission to show the traversing cable amounted to a misrepresentation.

The movement of the domes to avoid the cable

57. Counsel for the appellants, Mr. Sreenan S.C., acknowledged before us that Mr. Smyth was effectively the alter ego of Templeville, so that any knowledge of the former could fairly be attributed to the latter. Charleton J. had already made a finding to this effect and I consider that he was fully entitled to make such a finding on the evidence before him.

58. Mr. Smyth gave evidence that he was not aware of the existence of the second cable prior to the events of June 2012. He stated that he was aware of the existence of a cable in the area since Dome 2 was first constructed in about 1996/1997. He accepted that he knew in 2000 that there had been significant cable-laying works carried out across the Leopardstown campus, but he insisted that he thought that this was for the purpose of replacing the first cable, rather than laying a new cable as such. A central feature of Mr. Smyth's evidence was that, so far as he was concerned prior to the events giving rise to this litigation, there always simply been just one cable and that the Arup map had simply reflected this.

> "Q. I am suggesting to you [*i.e.,* Mr. Smyth] that Templeville certainly knew in 2006 and had also known when it was obliged to relocate its dome no. 2 in 1998 that there were problems arising out of the presence of ESB cables on this site.
>
> A. Well, not cables. I never knew there were two cables until [14th June 2012]. I do see them now that there were two cables on certain plans.
>
> Q. But, Mr. Roberts'… letter which is handed over in the arbitration mentioned that there were two kV cables running though the land in question.
>
> A. Well, all I can say is I don't ever remember there being two cables. That's obviously there but then when I saw the plans produced by Arups showing a cable that is the document I relied on at the time."

59. Following an objection made by counsel for Leopardstown, Mr. Sreenan S.C., it was then clarified that the letter in question from Mr. Roberts actually said that "there were two 220 kV underground ESB cables near the edge of the site." The cross examination then

continued:

> "Q. But there were two cables in play near the edge of the site is what Mr. Roberts was mentioning [in the letter] in question.
>
> A. Well, I did not know that and if I did know it, I had forgotten it and I relied totally on the Arup drawing showing one cable at the time I signed the agreement."

60. One of the difficulties with which this Court was presented is that the trial judge effectively discounted the evidence of Mr. Smyth as not being credible. He was, of course, perfectly entitled to arrive at this conclusion. It is, however, not enough for this purpose for Leopardstown to show that Mr. Smyth's evidence should be disregarded. It is rather they who carry the onus of proof of showing on the balance of probabilities that Templeville had actual and complete knowledge of the traversing cable.

61. It is hard nonetheless to draw the inference from this evidence regarding the movement of the dome that Mr. Smyth *must* have known of the traversing cable and that his protestations to the contrary should be discounted. In this regard, it must be recalled that the critical question was whether as a matter of probability Mr. Smyth had complete and full knowledge of the existence of the (second) traversing cable in October 2011 at the time of the completion of the MSA. It is striking that none of the other professionals – on either side – ever adverted to this issue during the course of the mediation, even though some of them had some previous awareness of the traversing cable and would, indeed, have had as much – if not more - reason to retain this knowledge qua professional advisers as Mr. Smyth might have had. Thus, even on Leopardstown's side, while their engineer (Mr. Roberts), their General Manager (Mr. O'Dwyer) and their solicitor (Mr. Jones) all accepted in evidence that insofar as they had previous knowledge of the traversing cable, they either did not advert to this or were not conscious of it during the course of the mediation process.

62. In these circumstances, it does not seem to me that, viewed objectively, Leopardstown have discharged the onus of establishing that the inference should be drawn that Mr. Smyth had a full and complete knowledge of the traversing cable at the time of the mediation in October 2011 *simply* by reason of the fact that at an earlier stage the dome had been moved to avoid the traversing cable, even if Mr. Smyth's evidence is otherwise rejected as not being credible.

The three ESB manhole covers

63. It is accepted that the tennis court site has three ESB manhole covers which are clearly marked as such. It should be recalled that Templeville has been in *de facto* occupation of this site since 2006, so that all associated with the company must be taken to be familiar with all features of the tennis court site. Leopardstown contend that the ESB manhole covers ought thereby to have indicated the presence of a underground traversing cable. It was accordingly suggested to Mr. Smyth in cross-examination that he must have been aware of this in the course of the mediation:

> "Q. . . . although you now accept there is a great big manhole in the middle of the [tennis court] site marked with "ESB" and you have seen the photographs of it, that you were utterly unaware of it when you were in Kilroys [solicitors for Leopardstown during the course of the mediation], is that right?
>
> A. Well it wouldn't have mattered to me and I didn't know it, but it wouldn't have mattered to me. At the time I was looking for planning permission or at the early stage for seven. . . .
>
> Q. I am talking about when you were in Kilroys negotiating the mediation settlement agreement, you were saying you had forgotten completely about the manhole if you had ever seen it?
>
> A. If I had ever remembered it. I didn't notice it."

64. It should also be observed, however, that Mr. Roberts also pointed out in his evidence that the cable was about three to four metres away from the manhole cover, so that it does not as such mark the line of the traversing cable.

65. One way or another, however, I do not consider that the presence of the ESB manhole covers assists the contention of Leopardstown that on the balance of probability that Templeville had actual and complete knowledge of the traversing cable. As Mr. Roberts acknowledged, the manhole covers do not, as such, mark the line of the traversing cable. Even if Mr. Smyth or Templeville should have adverted as a result to the presence of a traversing cable on the tennis court site by reason of the ESB manhole covers, this would at most have amounted to constructive knowledge of this fact and it would not constitute actual knowledge of the line of the traversing cable. Yet as *Gahan v. Boland* makes absolutely clear, the doctrine of constructive knowledge has no application in this context and cannot cure the effect of an otherwise operative misrepresentation.

The 2007 planning application

66. On 19th January 2007, Templeville made an application to Dún Laoghaire Rathdown County Council ("the planning authority") for planning permission to develop the tennis court site. It was envisaged that the existing seven outdoor tennis courts would be replaced by seven new outdoor courts. The application itself was made by Mr. Brendan O'Sullivan of Architectural Computer Management System ("ACMS") on behalf of Templeville. It is not disputed but that the details of this particular application are irrelevant save for what it demonstrates as to Templeville's state of knowledge in relation to the traversing cable issue.

67. The map lodged by ACMS on behalf of Templeville showed only one ESB cable which went close to the existing seven tennis courts. Leopardstown's planning consultants, Tíros Resources Ltd. replied to this application by letter sent to the planning authority on 21st February 2007. The contention made in that letter by Mr. McGrandles, the director of Tíros, was that the application was itself invalid by reason of a series of flaws in the application itself. One of the suggested flaws related to the presence of cables on the land in question, as Mr. McGrandles stated:

> "There are two 220kV underground ESB cables and an associated wayleave at the western edge of the proposed site. This has been indicated in yellow on the Site Plan, but not on the Site Location Map as required by Article 22(2)(b) of the Planning and Development Regulations 2001."

68. As it happens, the planning authority responded on 13th March 2007 with a request for further information which stated that:

> "It will be necessary to consult with the ESB regarding the potential impact of the development on the ESB cable indicated as traversing the site. Please submit written evidence of consultation with ESB on this matter."

69. Contrary to what the trial judge seemed to have understood, it is important to stress that the correspondence from the planning

authority at all stages simply referred to one cable and not to two cables. The trial judge in quoting the above request from the planning authority in his judgment incorrectly referred to "ESB cables" rather "ESB cable." It is likewise clear that Templeville had at all times simply referred to one cable in the course of the planning application, as only cable is shown on the maps submitted on behalf of Templeville: it was Leopardstown which had referred in its correspondence to *two cables*. Nor, contrary again to the impression which the trial judge evidently formed, did the letter of objection from Mr. McGrandles on 21st February 2007 refer to the earlier Leopardstown planning application in 2002 which had shown the two cables on the relevant site maps.

70. Mr. O'Sullivan then responded to the request for further information from the planning authority on 18th July 2007. So far as the request for consultation with the ESB was concerned, Mr. O'Sullivan stated that:

> "I have met with John Daly, Manager, HV Cables, ESBI Engineering and Facility Management on the 8th June and I have enclosed a copy of the summary record of that meeting and have adjusted the layout of the tennis courts based on this meeting."

71. The note referred was the note prepared by Mr. Daly which was in the following terms:

> "• The proposed tennis courts have been generally located not to conflict *with the line of the cable*. However, there are possible conflicts on the access routes. Some trial holes were carried out, but it was agreed to carry out a further series to re-confirm both the position and levels of the cable, as the original levels have been changed, and as there would appear to be *a discrepancy between the ESB record of the cable and your drawing*. Declan Mullan [of ESB Networks] will arrange this with you. An outage of this cable is planned in any case over the summer to carry out annual maintenance testing.
>
> • The curved pedestrian entrance will be re-designed to avoid a conflict with the cable circuit at the steps if this proves necessary.
>
> • The lower vehicular entrance will be moved from the [north east] corner to the [south east] corner to avoid conflict.
>
> • The proposal to install low shrubs over part of the cable route is acceptance to ESB, provided no trees are installed.
>
> • The cable was originally installed in this area in non road construction. So, at all traffic crossing locations the back filling must be replaced to road construction standards. If the cable depth has been compromised, this may require special provisions to spread traffic loading, such as steel plates/concrete slabs.
>
> • All planned signage and fencing posts must be designed to avoid the cable route.
>
> • ESB Central Site should be re-contacted to obtain up to date records of all ESB services in the area." (emphasis supplied)

72. Pausing at this point, it will be seen that Mr. Daly referred only to one cable and even then this note expresses some reservations regarding the actual location of the cable.

73. Mr. O'Sullivan also attached new maps showing only one cable which went close to the seven new outdoor tennis courts. It is, perhaps, significant in this context that Mr. McGrandles accepted that none of the maps submitted by Mr. O'Sullivan in the course of this planning application referred to two cables. While it is true that Mr. O'Sullivan's map showed a cable which went to close to the seven tennis courts which had been proposed in that (2007) configuration – and from which it was accepted by Templeville that the presence of a traversing cable under the tennis court site was to be inferred – part of the confusion stemmed from the fact that the map showed *only one cable*. The evidence from the 2007 correspondence and exchanges only establishes knowledge at that time of one cable relevant to the Dome 2 tennis-court site.

74. The very fact that the email correspondence from the ESB also simply referred to one cable must also be regarded as striking. The planning authority granted permission on 3rd October 2007 and this was appealed to An Bord Pleanála by Leopardstown on grounds unrelated to any cable question and the issue in relation to the cable did not arise further in the course of that application.

75. In these circumstances, I do not see how the material which emerged from the 2007 planning application demonstrates that Templeville (or Mr. Smyth) *must have* known that there were two cables. There was, at best, only one fleeting reference to the two cables which was contained in the Tíros objection to the Templeville planning application. But, contrary to what is stated in the judgment of the trial judge, the Tíros objection did not refer to the 2002 application made by Leopardstown and the subsequent correspondence both from the planning authority and the ESB only referred only to *one cable* and *not* to *two cables*. Whatever one thinks of Mr. Smyth's general credibility as a witness, the single reference to the two cables which was contained in the Tíros objection in 2007 does not *of itself* necessarily lead to the inference that either Mr. Smyth or Templeville must have known immediately prior to the conclusion of the MSA in October 2011 that there were two cables in the immediate vicinity of the tennis court site or that the skirting cable so depicted was different from the traversing cable which was not shown on the Arup map.

The Gardiner correspondence

76. It is clear that the position paper prepared by Templeville in May 2008 for submission to the arbitrator, Paul Gardiner S.C., referred to the fact that "an underground ESB cable runs through" the tennis court site. A copy of that (2008) position paper was then supplied by Templeville as an appendix to a fresh position paper prepared by them in the course of the mediation process. That paper (and the appendix) was supplied to the mediator on 7th October 2011.

77. In his evidence the solicitor for Templeville, Mr. Conor Halpenny, was cross examined about this latest position paper. He stated that the object of that position paper was to demonstrate to the mediator, Paul Gallagher S.C. and to Leopardstown that Templeville's request to "square off" the tennis court site was a reasonable request in order to enable Templeville to carry out the development it wished to carry out. He continued:

> ". . . and if you recall . . . the question of dome had not yet got on to the agenda. This is the 7th October. The dome came on to the agenda on the 10th October. But in short synopsis, it identified that Templeville needs to be able to put in the graded embankment, the footpath, a fence and entrance gates. In having the parking spaces built it needed the ability to have drainage so there could be attenuation tanks that would be connected with the drainage. My recollection

> is that the drainage was only necessary to accommodate Leopardstown so they could park cars on these tennis courts and I think under the planning and environmental regulations you need to have separate drainage when you have got cars being parked in the area and I also flagged that I wanted Leopardstown to assist and cooperate with Templeville to carry out the development. They were the four items identified in the position papers that seemed to be pertinent at that point in time. I did append an extract from the letter to Paul Gardiner which had been sent on the 26th May, 2008 and I appended that because that dealt with the problems relating to the new site in greater detail, but I did not highlight issues that I felt were no longer an issue for the parties . . . there was an issue about the strip of land between the site and the motorway and that has been resolved. Any question relating to that has been dropped and there was an issue about whether or not Leopardstown would build the road that would run between the site and the motorway; that seemed to have been resolved as well, but it was not a contentious issue because Leopardstown were indicating that they would do that. Likewise, I did make reference to para. 13.5 which refers to the ESB cable. I can only deduce that I did not highlight that as being an issue because I did not think it was an issue on the 7th October. When I saw that maps had been furnished to me two days earlier, it did not strike me that the ESB cable was an issue. I can certainly say with certainty that I no knowledge at the time there was two cables. I am conscious that documents have been produced in court that refers to in the context of the arbitration a few years earlier. When it came to the mediation, I was only conscious of one cable."

78. There was, in fact, no suggestion that Mr. Halpenny was ever aware of the existence of two cables or that he had ever addressed his mind to the question of whether any such cable actually traversed the tennis court site.

79. Mr. Matt O'Dwyer, the general manager of Leopardstown, stated that he was aware of the existence of two ESB cables in 2002 at a time when Leopardstown had submitted a major planning application. He accepted that he was generally familiar with the basic aspects of the route taken by the two cables. Mr. O'Dwyer said that not only was he closely involved in the 2002 Leopardstown planning application, but that he also was involved in Leopardstown's objections to Templeville's 2007 planning application. He was also heavily involved in Leopardstown's own planning application of 2007. He acknowledged that he had met at this time with Leopardstown's own advisors, Tíros and Arup.

80. Mr. O'Dwyer stated that he knew the location of the two cables in 2007 although he did indicate that he would have "depended on the architect or Tíros ... to indicate where the cables were." Mr. O'Dwyer gave evidence that whereas he was aware of the two cables in 2007, he was not so aware during the meditation in 2011. Thus, pressed by counsel for Templeville, Mr. O'Moore, S.C., there was an omission on the Arup maps by failing to show the traversing cable, Mr. O'Dwyer replied:

> A. "As far as I am concerned there was not an omission. The only cable that I was concerned with was the one that was actually on the map at the moment. What you are saying to me, back in '07, I was aware that there was two cables and when I looked at this map and saw the cable, I had no recollection of the other cable at the time.
>
> Q. Now, Mr. O'Dwyer, … that is not the evidence you gave a moment ago. I asked you if you were aware at the time that you received this map that there was a cable running closer to the M50 which traversed part of the site and you said "yes"?
>
> A. Sorry, I am now and I was in 2007 but during the mediation I was not concerned or aware at that stage. I only looked at the other cable that was there."

81. The evidence of Mr. Eamon Jones, the solicitor for Leopardstown was in a similar vein. He accepted that although he had been previously aware of the existence of a traverse cable, but that when he saw map 1006A (an earlier version of the 5002 Arup map) "it didn't jump out that there was a second cable there." The situation did not change once the 5000 series maps were drawn up. He accepted that he adverted to the presence of the cable he would have alerted his client as to this omission and would have taken the appropriate instructions.

Overall conclusions as to the state of Templeville's knowledge regarding the traversing cable
82. Following a review of this evidence, the following emerges.

83. First, there was evidence that Templeville was aware of the existence of one cable which *either* traversed the tennis court site *or* which went close to the edge of the site. The only evidence that Templeville was ever told of the existence of two cables was the statement to this effect which was contained in the letter of objection from Tíros in February 2007 in the course of the planning process. Even then, however, the potential significance of this statement *(i.e.,* as to the presence of the two cables) was dissipated by the fact that in their subsequent correspondence *both* the planning authority (*i.e.,* Dún Laoghaire Rathdown County Council) and the ESB only referred to the existence of *one* cable in their subsequent correspondence and exchanges with Templeville in relation to this issue.

84. Second, Leopardstown were fully aware of the existence of the two cables. There is, however, no evidence that any stage after February 2007 was this knowledge drawn to the attention of Templeville. The Arup map showed only one cable (*i.e.,* the skirting cable but not the traversing cable).

85. Third, no one *on either side* gave any thought during the mediation process to the question of whether (a) there was a traversing cable and (b) if so, whether this would appreciably impede Templeville's declared intention of constructing seven indoor tennis courts on the tennis court site.

86. Following a review of this evidence what conclusions can properly be draw at this juncture? It is true that Brendan O'Sullivan must have been aware in February 2007 of the fact that Leopardstown (correctly) believed that there were two ESB cables "at the western edge of the [tennis court] site". But, as has already been noted, the impact of that statement must have been dissipated by the fact that in his subsequent dealings with the planning authority and the ESB the only reference which both of these bodies made was to one cable.

87. This conclusion is re-enforced when one reflects on the fact that there was no evidence that any witness (whether from Templeville or from Leopardstown) gave consideration in the course of the mediation process to the presence of the traversing cable or, if so, what the impact this would have had for Templeville's plans for the tennis court site. If Templeville did have actual and complete knowledge of the traversing cable at the time, it seems curious that this issue would not have been raised by them in the course of the mediation process or that they would ever have agreed to this given that this would have had implications – perhaps even serious implications – for the construction of the seven courts which they had planned.

88. In these circumstances, before considering whether the inferences drawn by the trial judge as to Templeville's state of knowledge are sustainable, it is necessary first to give consideration to the Supreme Court's decision in *Hay v. O'Grady*.

The extent to which this Court is bound by Hay v. O'Grady principles in the case of the findings of fact made by the High Court

89. It is clear from the Supreme Court's decision in *Hay v. O'Grady* [1992] 1 I.R. 210 that any appellate court will pay considerable deference to the views of the trial judge who had the benefit of seeing and hearing the witnesses. It follows that, as McCarthy J. put it ([1992] 1 I.R. 210, 217):

> "If the findings of fact made by the trial judge are supported by credible evidence, this Court is bound by those findings, however voluminous and, apparently, weighty the testimony against them. The truth is not the monopoly of any majority."

90. These principles have been regularly and consistently applied. Thus, for example, in *C v. C.* [2013] IESC 36 the issue before the High Court was whether FC, a nephew of MC (who was herself a ward of court), had exercised undue influence over her. Feeney J. held that there had been such undue influence and that gifts totalling some €900,000 from the aunt to the nephew should be set aside.

91. In his judgment MacMenamin J. first dealt with the nature of the appellate jurisdiction:

> "This Court does not engage in a complete re-hearing of a case on appeal. It proceeds rather on the facts as found by the trial judge and his inferences based on these facts. As *Hay v O'Grady* makes clear, if the findings of fact made by a trial judge are supported by credible evidence, then this Court is bound by those findings, even if there is apparently weighty evidence to the contrary. This Court will only interfere with findings of the High Court where findings of primary fact are not supported by evidence, or cannot in all reason be supported by the evidence (see also *Pernod Ricard and Comrie plc v Fyffes plc* (Unreported, The Supreme Court, 11th November 1988)). Furthermore, in *Hay v O'Grady*, McCarthy J. pointed out that an appellate court will be slow to substitute its own inference of fact for that of the trial judge, where such inference depends upon on oral evidence or recollection of fact. In drawing of inferences from circumstantial evidence, an appellate tribunal is, of course, in as good a position as the trial judge (see also *O'Connor v Dublin Bus* [2003] 4 I.R. 459; *Quinn (A Minor) v Mid Western Health Board and Another* [2005] 4 I.R. 1).
>
> It is necessary to re-iterate that these basic principles as the appeal, presented by F.C., the first named defendant in person, appeared to be premised on the assumption that there were some segments of evidence before the High Court judge which should have lead him to a different conclusion. The questions are whether the findings of fact are based on evidence; and whether inferences are correctly and factually drawn. Moreover, the Court would point out that the main evidence in defence of this claim came from F.C. himself. The trial judge rejected this evidence as being entirely unreliable on a range of the fundamental issues in the case."

92. In *MC* the contention was that a nephew of the ward of court had defrauded his elderly aunt (who herself was a widow without children) of substantial sums of money by representing to her via a forged letter that an inspector from the Department of Social and Family Affairs would be visiting her and that her valuable family home in Dublin should be sold. He then arranged for significant sums to be transferred to him and his partner once that property had been sold.

93. MacMenamin J. observed that the defence claim – that these were gifts freely made by the aunt – rested entirely on F.C.'s credibility:

> "The judge found him to be an entirely unreliable witness. He concluded that his testimony was inconsistent, and that, when information and documents became available which demonstrated his initial evidence was incorrect, the appellant demonstrated a willingness to change his evidence without regard to the truth. The judge concluded that his evidence was "so unreliable and so inconsistent and shifting that I concluded that I was able to place little reliance on F.C.'s willingness to truthfully account for his dealings with his aunt's monies.'"

94. Feeney J. held that the "gifts" were not the result of the autonomous exercise of free will by the ward, but rather that they were the product of undue influence. This finding was affirmed by the Supreme Court, with MacMenamin J. observing:

> "The High Court's findings here were highly dependent on factual context and his view of the nature and quality of the evidence. This Court is entirely satisfied that the High Court judgment was correct in fact and law. The findings of fact were founded on credible, weighty, testimony; the inferences drawn were based on clear, supporting evidence. The judge was well-entitled to hold that the appellant had not discharged the evidential onus of showing the gift was the independent and well understood act of a person in a position to exercise free judgment."

95. In view of the fact that the trial judge effectively discounted the entirety of Mr. Smyth's evidence, Leopardstown have submitted that this Court is bound by those findings having regard to *Hay v. O'Grady* principles. As I have already noted, the trial judge was certainly entitled to reject Mr. Smyth's evidence and gave adequate reasons for doing so: he had the all the advantages of a trial judge of seeing and assessing the witnesses which are denied to the members of this Court, a purely appellate court which is required to approach the matter from the narrow perspective of an arid transcript.

96. Yet this is not the end of the matter. The critical question was whether Leopardstown had established on the balance of probabilities that Templeville had an actual and complete knowledge of the traversing cable, even if the test was not, in fact, stated in those terms in the judgment of the High Court. This resolution of this question in turn accordingly rests on the appropriate inferences drawn by Charleton J. from a consideration of the surrounding facts. So far as the question of drawing inferences in this situation, the following is the key passage from the judgment of McCarthy J. in *Hay v. O'Grady* ([1992] 1 I.R. 210, 217):

> "(3) Inferences of fact are drawn in most trials; it is said that an appellate court is in as good a position as the trial judge to draw inferences of fact. (See the judgment of Holmes L.J. in *'Gairloch,' The S.S., Aberdeen Glenline Steamship Co. v. Macken* [1899] 2 I.R.1, cited by O'Higgins C.J. in *The People (Director of Public Prosecutions) v. Madden* [1977] I.R. 336,339). I do not accept that this is always necessarily so. It may be that the demeanour of a witness in giving evidence will, itself, lead to an appropriate inference which an appellate court would not draw. In my judgment, an appellate court should be slow to substitute its own inference of fact where such depends upon oral evidence or recollection of fact and a different inference has been drawn by the trial judge. In the drawing of inferences from circumstantial evidence, an appellate tribunal is in as good a position as the trial judge."

97. In the present case, the inferences drawn by the trial judge were to some degree based on oral testimony, but were in fact mainly drawn from what amounted to circumstantial evidence. The detailed analysis which he conducted of this complex case truly merits a high degree of respect and deference in respect of the inferences drawn by him. I am nonetheless reluctantly of the view that this Court must find that the inferences drawn by him as to the knowledge which should be imputed to Templeville and Mr. Smyth in respect of the traversing cable was not permissible on the evidence which was before him. I have arrived at this conclusion for the following reasons.

98. First, the trial judge did not, with respect, ask himself the correct question, which was whether, based on the test articulated by Henchy J. in *Gahan*, Leopardstown had established on the balance of probabilities that Templeville had actual and complete knowledge of the true state of affairs. In that context, therefore, it was, for example, irrelevant that Templeville and Mr. Smyth might or ought to have known of the traversing cable by reason of the ESB man hole covers on the tennis court site. This at most established that the defendants had constructive knowledge of the existence of the traversing cable – but which, as we have seen, is in itself insufficient to cure the effect of an otherwise operative misrepresentation.

99. Second, there were certain errors in those findings of fact which we have already noted. The February 2007 letter of objection from Tíros did not refer to Leopardstown's earlier 2002 planning application which application had showed the two cables. The subsequent post-Tíros correspondence from both the planning authority (and, for that matter, the ESB) referred to *one cable* and *not* to *two cables*. For the reasons I have already stated, these errors undermine the foundation of the inference drawn by Charleton J. that Templeville must have known as a result of the existence of the two cables.

100. Third, it is true that both the ESB correspondence ("a traversing cable") and the letter from Templeville's solicitors to Mr. Gardiner S.C. ("an underground cable runs through the site") refers to a traversing cable running through the tennis court site. But when viewed in its proper context this correspondence does not necessarily support the inferences which Charleton J. sought draw. This was because the respective authors of this correspondence were both working on the (incorrect) premise that there was only *one* cable in the vicinity of the tennis court site when in fact there were *two.* Any person armed with simply with the ESB and the Gardiner correspondence who later viewed the Arup map might well be lulled into a false sense of complacency and think that, based on the map, the one cable of which they were aware came very close to the tennis court site, but did not in fact traverse it. It could not be said in these circumstances that any such person had a complete knowledge of the true state of affairs. The true position, of course, is that there were two cables, with one traversing the site and other skirting the boundaries of the site.

101. Fourth, given that no witness – on either side – adverted to the traversing cable prior to the conclusion of the MSA, I do not believe that the inference that Templeville and Mr. Smyth must have had actual knowledge of this fact at the time of the MSA agreement in October 2011 is warranted in the circumstances.

102. One might note, moreover, in this context that at least two important witness called on behalf of Leopardstown – Mr. O'Dwyer and Mr. Jones – candidly acknowledged that whereas they had previous knowledge of the two cables prior to the mediation, they also had overlooked the presence of the two cables during the course of the mediation process. It is accepted that these two witnesses had knowledge of the traversing cable in 2007 but that they both had – on their own admission in evidence – failed to advert to this fact in October 2011 when reviewing the Arup maps in the course of the mediation process.

103. For all of these reasons, therefore, I am reluctantly driven to the conclusion that the inferences drawn by the High Court that Templeville had full and complete knowledge of the traversing cable such as would defeat the operation of any misrepresentation contained in the Arup map cannot be sustained.

What conclusions should flow from this conclusion?

104. What consequences should flow from this conclusion? If this Court had found that the High Court's findings that Leopardstown had full and complete knowledge of the true state of affairs were sustainable, then the appeal would have had to have been dismissed. But given that this Court has come to the conclusion that these findings cannot be sustained in their present form, it seems to me that the Court has little option other than to direct a new trial on the issue of misrepresentation. For the avoidance of any possible doubt, nothing in this judgment should be interpreted as a positive finding that Leopardstown could not establish at that fresh hearing that Templeville had a full and complete knowledge of the true state of affairs regarding the traversing cable: all that I have decided is that the High Court's findings to this effect which are under appeal in this case cannot, for the reasons I have just stated, be sustained.

105. Nor does it follows that these are the only matters which the High Court will have to consider following a remittal of the case to that Court. It is clear that Templeville's claim that the MSA should be voided by reason of the misrepresentation would necessarily fail unless it were to establish on the balance of probabilities that (i) the Arup map amounted to a representation of a material fact; (ii) that the Arup map contained a material misrepresentation and (iii) that this misrepresentation induced Templeville to sign the MSA. In this context, the failure on the part of Mr. Smyth and Templeville to raise this point immediately on learning of the traversing cable in June 2012 (as Mr. Smyth claimed was the case) would be relevant to the question of whether any such misrepresentation (if such there was) actually induced them to enter into the MSA. There may well be other facts relevant to this issue.

106. Even if these questions were answered affirmatively, Leopardstown would still have a complete defence to the misrepresentation claim if it in turn could show on the balance of probabilities that Templeville had full and complete knowledge of the traversing cable.

The failure to call Brendan O'Sullivan

107. In these circumstances, it is not strictly necessary for me to consider of what inferences (if any) should properly be drawn from the failure of Templeville to call Brendan O'Sullivan as a witness. I only do so out of deference to the fact that the point was fully argued on the appeal before us.

108. The starting point is that a court should generally be reluctant to draw an inference from a failure to call a witness. As Charleton J. himself stated on this point:

> "Making an inference on the basis of the failure of a litigant to call readily available and highly important evidence should only be engaged in sparingly."

109. It is nevertheless clear that Charleton J. placed at least some weight on the failure to call Mr. O'Sullivan, even if any adverse inference so drawn was independent of any decision already reached:

> "I regard the absence of Brendan O'Sullivan as a witness as fatal to the claim of surprise and misrepresentation made by Templeville and Philip Smyth. That determination is independent of the decision that I have already made on this issue by

reference solely to the likelihood or otherwise of the evidence presented in testimony."

110. In this Court the appellants submitted that the trial judge was wrong to draw the inference which he did from this failure to call Mr. O'Sullivan to give evidence.

111. Yet there are circumstances in the course of civil litigation where, *provided* that *at least a prima facie evidence* to the contrary has been made out by the opposing party, the appropriate inference can be drawn. The decision in *McQueen v. Great Western Railway Company* (1875) L.R. 10 Q.B. 569 is, perhaps, still the leading authority.

112. In *McQueen* the plaintiff sued for the value of a parcel of drawings which he had entrusted to the defendant railway company for delivery. The goods never arrived, having been stolen while in the custody of the defendant. The defendant pleaded a defence under the Carriers Act. The plaintiff responded that the defence was not available because the goods were lost by reason of having been stolen by the railway company's employees. The trial judge directed the jury that, if the facts, in their opinion, were more consistent with the guilt of the defendant's servants than with that of any other person not in their employ, that was sufficient to call upon the defendants for an answer, which not having been given, the inference might well be that a felony had been committed by some of the defendant's servants.

113. It was held that the direction was wrong and that the jury's verdict in favour of the plaintiff was wrong. The leading statement of principle is that contained in the judgment of Cockburn C.J. ((1875) L.R. 10 Q.B. 569, 574):

> "If a *prima facie* case is made out, capable of being displaced, and if the party against whom it is established might by calling particular witnesses and producing particular evidence displace that *prima facie* case, and he omits to adduce that evidence, then the inference fairly arises, as a matter of inference for the jury and not as a matter of legal presumption, that the absence of that evidence is to be accounted for by the fact that even if it were adduced it would not disprove the prima facie case. But that always presupposes that a *prima facie* case has been established; and unless we can see our way clearly to the conclusion that a *prima facie* case has been established, the omission to call witnesses who might have been called on the part of the defendant amounts to nothing."

114. It was held that a *prima facie* case had not been made out that the defendant's servants, rather than somebody else, had stolen the goods. All that had been established was that the defendant's servants had a greater opportunity of committing the theft.

115. This statement from *McQueen* was recently re-affirmed by the Supreme Court in *Whelan v. Allied Irish Banks plc* [2014] IESC 3. Here the Supreme Court held that the High Court judge was correct not to draw any adverse inference from the failure on the part of the bank to call a potentially key witness in circumstances even where that witness – a senior bank official who had played a key role in an important and complex financial transactions – might well have faced a testing and searching cross-examination. Fennelly J. held that it was critical in this context that the customer had not succeeded in establishing *a prima facie* case against the bank and absent that no proper inference could be drawn from the failure to call that witness.

116. Similar principles have been applied in other common law jurisdictions. Thus, for example, in *Jones v. Dunkel* (1959) 101 C.L.R. 298 the plaintiff sued for damages in negligence arising a road accident in which her husband was killed. The accident itself arose from a collision between two trucks on a dark wet night. There were no witnesses to the accident, but it occurred on a steep winding road which wound up through wood hills. Some evidence of tyre marks suggested that the driver of the other vehicle had crossed on to the wrong side of the road, but he was not called as a witness.

117. A majority of the High Court of Australia held that in those circumstances an adverse inference could be drawn from the defendant's failure to give evidence. The various judgments of the majority stress, however, that while the absence of a witness cannot, as Menzies J. put it ((1959) 101 C.L.R. 298, 312), "…. be used to make up any deficiency of evidence" of the opposing party, nevertheless "evidence which might have been contradicted by the defendant can be accepted more readily if the defendant fails to give evidence."

118. In the present case, I do not consider that this is a case in which an inference could properly be drawn from the failure to call Mr. O'Sullivan as a witness. Here it must be recalled that it is accepted that the issue of the traversing cable was not adverted to, or discussed, by either Mr. Roberts, Mr. Ó'Muire or Mr. O'Sullivan at their meeting in the West Wood club cafeteria on 25th October 2011. It is further accepted that Mr. O'Sullivan knew of the fact that there was a traversing cable when he prepared revised drawings in July 2007, but it has never been suggested that he knew of the existence of two cables, save for a fleeting reference. In essence, his position is (at best) really no different from that of Leopardstown witnesses such as Mr. Roberts, Mr. O'Dwyer or Mr. Jones who all knew of the existence of the traversing cable, but all of whom had not adverted to the presence of this cable during the course of the mediation process.

119. In essence, therefore, no adverse inference could properly be drawn because – just as in cases such as *McQueen* and *Whelan* – the plaintiff had failed to establish a *prima facie* case that Templeville had full and complete knowledge of the traversing cable. The matter would naturally have been different if, for example, Mr. Roberts had stated that the issue of the traversing cable had in fact been discussed in Mr. O'Sullivan's presence at the West Wood cafeteria meeting on 25th October 2011. But since this was not the case and as no such *prima facie* case was so established, I do not consider that any such inference could properly be drawn from the fact that Mr.O'Sullivan was not called as a witness.

Conclusions

120. I may endeavour to summarise my principal conclusions as follows:

121. First, as Charleton J. made no findings of fact regarding whether there had been a representation or whether, if it had, it constituted a misrepresentation of a material fact which induced the parties to enter the contract, this Court as an appellate court cannot now substitute its own findings of fact.

122. Second, it is clear from the case-law that if Leopardstown could establish on the balance of probabilities that Templeville and/or Mr. Smyth had actual and complete knowledge of the traversing cable prior to entering into the MSA agreement, this would in itself constitute a complete defence to a claim of actionable misrepresentation, even if such were ever to be established by Templeville.

123. Third, the findings made by the High Court to the effect that Templeville had such knowledge cannot be sustained. Specifically, the trial judge did not apply the correct legal test in assessing this question, since he should have considered whether Leopardstown had established on the balance of probabilities that Templeville had actual and complete knowledge of the existence of the traversing cable in the manner required by the Supreme Court in Gahan. It was not enough, for example, to point to the existence of ESB

manholes on the tennis court site in order to fix Templeville with knowledge, as this would go constructive rather than actual knowledge only.

124. Fourth, it follows, therefore, that in the light of these conclusions that the appeal must be allowed. For the reasons I have given, the Court finds itself with no real alternative other than to remit afresh the question of whether there was actionable misrepresentation to the High Court. For the avoidance of any possible doubt, nothing in this judgment should be interpreted as a positive finding that Leopardstown could not establish at that fresh hearing that Templeville had a full and complete knowledge of the true state of affairs regarding the traversing cable: all that I have decided is that the High Court's findings to this effect which are under appeal in this case cannot, for the reasons I have just stated, be sustained.

125. I have had an opportunity of reading in draft the judgment of Finlay Geoghegan J.. I agree with what she says at paragraphs 37 and 38 of that judgment and the precise order she proposes.