Neutral Citation Number: [2007] IEHC 191

THE HIGH COURT

[2000 No. 1682P]

BETWEEN

CONOR CAGNEY

PLAINTIFF

AND

FIRST ACTIVE PLC (FORMERLY FIRST NATIONAL BUILDING SOCIETY)

DEFENDANT

AND

TONY SHERIDAN

THIRD PARTY

Judgment of Mr. Justice Charleton delivered the 15th day of June, 2007

Background

1. The plaintiff is a businessman who lives in Naas, County Kildare. For many years he was an insurance broker and was successful in this occupation. The limited liability company through which he traded has since been wound up. On the evidence before me, it was solvent on winding-up. In 1995 the plaintiff began to get out of the business with which he was familiar by reason of a personal tragedy that had occurred three years earlier. On taking a stroll on a pavement with his wife, a car mounted the footpath and killed her, leaving the plaintiff seriously injured. He was in hospital for a number of weeks. The tragedy devastated his life. Even three years later he was vulnerable and in speaking about this matter some fifteen years later, during the course of this hearing, he found it difficult to control his emotions.

2. In the aftermath of this tragedy, it is obvious to me that the plaintiff was deeply depressed. In addition, he was coping with litigation concerning the accident and was focussed on the amount of compensation which he might recover and how best he might make provision for his two daughters, Helena and Geneviève. It is that financial provision which is the cause of the controversy which I now have to resolve.

The Money

3. The plaintiff, together with his late wife Helena, had an investment in Norwich Union which by 1995 was worth in excess of IR£100,000. He was the survivor on that policy and therefore entitled to the benefit of it. In addition, he had investments elsewhere including in Lombard and Ulster Banking Limited and in the branch of the defendant, which was then the First National Building Society, in Naas, County Kildare and in other places. I am satisfied that he found himself unable to work and reluctant to involve his daughters in administrative duties which had become an unbearable burden to him.

4. The plaintiff cashed in his Norwich Union policy, which he described as a premium bond, and a cheque in the sum of IR£118,325 was made payable to him on 9th May, 1995. Given the administrative requirements usually attendant on the encashment of such a policy, it must have been April or very early May when he gave the instructions to Norwich Union which resulted in that cheque. By letter dated 6th March, 1995 Lombard and Ulster Banking Limited forwarded a cheque payable to the plaintiff's company in the sum of IR£22,836.48. He therefore had a sum in excess of IR£141,000 available to him for the purposes of investment in May, 1995. What happened next, he blames entirely on the defendant bank, formerly a building society.

5. At that time, the plaintiff was friendly with the third party, who described himself in the witness box as Thomas Joseph Sheridan. He is a businessman and investor. He was engaged in clothing manufacture. For some years he has run a number of limited liability companies. At least one of these was heavily invested in by a foreign national. There has been a dispute as to how friendly the plaintiff, Conor Cagney and the third party Tony Sheridan, as he is commonly called, were. Mr. Cagney's answers in relation to this matter were dismissive of any suggestion that a close friendship existed between them. Mr. Sheridan, on the other hand, was keen to emphasize how close they were and how supportive he had been in the aftermath of the tragic death of the late Mrs. Cagney. In that regard, the questions put on instructions, and put properly, were stronger than the actual evidence produced by Mr. Sheridan. Mr. Cagney was keen to emphasize that he was friendly with all his clients and that Tony Sheridan was just another one of them with whom he had good relations. Whereas Mr. Sheridan may have exaggerated the extent of their friendship, I am satisfied that it was close, certainly from the point of view of their mutual interests in business. That friendship has not survived.

6. The plaintiff claims that on 16th May, 1995 he made an agreement with the defendant whereby he invested IR£141,161.48 at the highest yielding rate, in his own name and in that of his daughters Helena Cagney and Geneviève Cagney, which was made repayable on demand. As a matter of fact, this is not what the relevant documents indicate happened. The action by the plaintiff is therefore for conversion, misrepresentation, breach of contract and negligence. The documents disclose that on 17th May, 1995 an account was opened by C. Cagney, of an address which is slightly incorrect, which was a savings account in the defendant and that the opening lodgement was IR£41,161.48, in the name the plaintiff, who described himself as retired, and in the name of H. Cagney, who is described as a student. The document was apparently signed by C. Cagney and H. Cagney. By a document dated the same day, a savings account was opened in the name of J. Sheridan with a vague address, which would be completely insufficient for postal purposes, viz. *"Naas, County Kildare"*, without a telephone number, with an occupation given as property investor and signed by J. Sheridan. The opening lodgement was IR£100,000; the balance of the plaintiff's money.

7. The plaintiff has alleged that these accounts were fraudulently created, that he never signed these documents, nor did his daughter, and this was also her evidence, or Mr. Sheridan, as far as he knows; he suspects that the defendant and the third party are *"in cohoots"* to deprive him of his money.

8. In addition to the foregoing, the plaintiff asserts that there has been another conversion, attracting the same relief as in respect of the first. The plaintiff claims that on the faith of representations similar to those in respect of the first alleged transaction, he gave shares to the defendant, but merely for the purpose of valuation, and these were encashed without his authority, realising IR£10,515.50. By a term account application form dated the 20th August, 1995, an account was opened in the name of M. Cagney and Geneviève Cagney, in the defendant, with an opening balance of IR£10,515.50. It is signed by M. Cagney and Geneviève Cagney, but the last given-name is slightly misspelled. The plaintiff denies that this is his signature or that he signs himself as M. Cagney. His daughter has indicated that the signature on this document is not her signature. Therefore, it is alleged, that it is another forgery by the defendant to add in the earlier two.

9. In its defence, First Active PLC, which was formerly the First National Building Society, denies conversion. It states that certain of the monies are still available to the plaintiff and that the bulk of the money that was put into the J. Sheridan account is, in effect, a

matter over which they have had no control and have committed no wrong. The defendant joined Tony Sheridan as a third party to this claim. In the third party statement of claim, the defendant states that there is a dispute between the plaintiff and the defendant as to the entitlement of the plaintiff to the sum of IR£100,000 and goes on to assert that in the event that the plaintiff is entitled to the return of that money, the ultimate responsibility is that of the third party. It claims an indemnity. A notice of motion was brought by the third party to dismiss the defendant's claim against him. That motion failed. One of the issues I have to consider is as to whether any case could ever be made out between the defendant and the third party.

The Disposal of the Money

10. I now turn to what, as a matter of fact, has happened to all these monies. Dealing with the last account first, the money from the sale of the shares, this has matured and its current value is around €23,000. The plaintiff has refused to touch it. The evidence of Philip Kerrs, of NCB Stockbrokers, has been to the effect that if, instead of investing in this account, the plaintiff had kept his stocks, they would now be worth around €26,000.

11. Now I turn to the IR£41,161.48 account in the names of C. Cagney and H. Cagney. On 17th August, 1995 a cash withdrawal was made from it in the sum of IR£4,558.09. On the evidence, I am satisfied that this amount of money was converted into travellers cheques and that the plaintiff spent the money on a visit to the United States of America. This left IR£36,667.19. The account continues in the same names. On 20th June, 1997 IR£37,000 was taken from this account and put into a new account which was backdated for interest purposes to 3rd January, 1997. This also continues to be in the name of C. Cagney and H. Cagney. This account has accrued interest. Again, the plaintiff refuses to touch it.

12. The largest account, that in the name of J. Sheridan at the unreachable postal address, began with a cheque lodgement on 17th May, 1995 of IR£100,000. On 30th May, 1995, IR£30,000 was withdrawn. On 20th June, 1995 two further withdrawals were made totalling IR£10,000. Another two withdrawals were made on 17th July, 1995 in the sum of IR£23,000. Then, on 18th August, 1995 two withdrawals were made in the sum of IR£10,500. This was followed by a withdrawal of IR£15,000 on 12th September, 1995. A withdrawal of IR£4,500 was made on 12th December, 1995 and a cash lodgement was made to the account in the sum of IR£1,500 on 18th December, 1995. Two withdrawals were made in March, 1996. On 21st March, IR£5,000 was withdrawn and on 27th March, IR£3,000 was withdrawn. In a result, there is less than IR£1,000 in that account. All of these withdrawals were made by cheque. I now turn to the central controversy in this case.

The Claim

13. The plaintiff claims that when he was in hospital after his wife's death, his daughters had no money available to them. He feared similar accidents. He felt that if that should occur, some provision had to be made for them. If there was an account which was in all of their names there would be, first of all, a right of survivorship in law and secondly the account could be organised so that they could each withdraw money immediately on his death or should be become ill; so he withdrew his money from some of his accounts and looked around for an appropriate investment. He claims that he and his children therefore thought that they would approach a building society. This is notwithstanding the fact that having denied holding a building society account on the first day of the hearing, it emerged on the second day that he had a number of accounts with the defendant building society near his home in Naas. He claims that Tony Sheridan became involved in these discussions in April and May of 1997 and that he told him that he had a friend who was a manager of a building society, namely the defendant's branch manager in Kilkenny, Declan McCann. Mr. Sheridan, he claims, told him that Mr. McCann was originally from Daingean, County Offaly. He asserts that there was then two or three meetings with Mr. McCann in his house which discussed the Norwich Union investment and where Mr. McCann was supposed to have told him that he could out-perform the return on that investment. Everybody agrees that there was a meeting in the plaintiff's house in Naas on 16th May, 1995. The plaintiff alleges, however, that there was at least one, and probably two, meetings prior to that time where he was induced by Mr. McCann to encash some of his original investments for the purpose of having a better return, and better conditions, namely that the accounts would not be tied up over a fixed term but would be payable on demand, should he invest in the defendant. Since a number of different accounts have been given as to the meeting of 16th May, 1995, I now want to set them out briefly.

The 16th May, 1997 Meeting

14. The plaintiff says that the representations made by Mr. McCann, on behalf of the defendant, were affirmed at this meeting. He claims that he, his daughter Helena and Tony Sheridan were present together with Mr. McCann and that he gave Mr. McCann the two cheques from Lombard & Ulster and Norwich Union. Mr. McCann is supposed to have completed one application form in respect of the full amount of IR£141,161.48 and then the plaintiff and his daughter Helena signed it. Mr. McCann then asked him for the cheques and while Helena was getting the cheques Mr. Cagney noticed that his daughter's Geneviève's name was not on the form and he asked why not. He was told by Mr. McCann that she was a minor. He said that Helena then asked for a copy of the documents, to which Mr. McCann was supposed to have replied, on behalf of the defendant, that the application form to open an account was as yet incomplete because he had to process it in the office and that it would be sent on later. He said it was never sent.

15. Helena Cagney introduced herself as Helena Marguerita Cagney. The transcript, on occasion, records her name as Hélène. That name was never used in the hearing except on one occasion where she asserted that this was her name and that her father always called her this. At all times during the hearing she was referred to by everyone as Helena, most especially her father. She claims that her signature on the relevant document, H. Cagney, is not hers. She claims to have been present for the entire of the meeting and agrees that Declan McCann and Tony Sheridan were present together with her father. She said that Mr. McCann filled in a savings application form in the three names of her, her sister and her father, with the three dates of birth. She says that she signed it, together with her father and when it was suggested that Geneviève's name should be on it, that Mr. McCann replied that she was a minor. She claimed that a copy was requested in order to have it photocopied but this was fobbed off on the excuse that it would be sent on completion. In every respect, her account mirrors her father's.

16. Declan McCann is a branch development manager of the defendant in Kilkenny city since 1985. He claims that he first met the plaintiff in his home on 16th May, 1995. His function, at that time, was to travel around the country attempting to generate business for his employer. It was not unusual then, and it can still apparently happen, he said, for him to visit people in their homes. He claims that there no preliminary meetings to the one on 16th May, 1995 and that he was first informed of the potential investment by Tony Sheridan, the third party. On the way, going to Kilkenny from a meeting in Dublin, he called into the house of Mr. Cagney at the invitation of Mr. Sheridan. There were three people at the meeting, on his account - Helena being absent. Mr. Cagney left the meeting on a number of occasions and he was aware that there were people in the background, he presumes, the plaintiff's daughters. His account of the meeting was that it took place in the sitting room and that there was a preliminary chat in relation to his family, and by coincidence how the plaintiff knew them from County Offaly. The talk then turned to the investment and Mr. Cagney indicated that he had money to invest and that Mr. Sheridan had recommended his branch to him. He claims that he went through the relevant accounts that were available; there was a discussion on rates of interest. Whereas the plaintiff alleged that a figure of 14% was mentioned, he says that any promise of that kind of return was impossible and that, at the time, one would be lucky to receive a maximum of half that rate of interest. He told the court that there was a discussion in relation to the names of the account and that it came up that some money was to be given to Mr. Sheridan. He claims that he told Mr. Cagney that if this was

done it would be in an account which would no longer be available to him. Whereas he was unclear as to the nature of the business transaction that was being effected between Mr. Sheridan and Mr. Cagney, he realised that some kind of investment was being made. There was a conversation between Mr. Sheridan and Mr. Cagney. The result was an instruction that IR£100,000 be put into account for Mr. Sheridan and that an account in respect of Conor Cagney and Helena Cagney should be separately opened to take up the balance. He said that Mr. Cagney talked glowingly about Mr. Sheridan. Since Mr. Sheridan was already an account holder, putting the IR£100,000 in an account using his middle initial would distinguish it. The relevant forms were given to the clients, for there were to be two accounts, for signature. Mr. McCann could have told me, if he was minded to deceive the court, that he saw the signatures being applied. Instead, he indicated that he did not see the signatures being applied. As it was decided that Mr. Cagney's daughter should go on one account, he was warned that his daughter could therefore take out money and a tick was put in the relevant box as to which holder could withdraw funds. The form in respect of Mr. Cagney and his daughter was taken away and it came back signed. The following day, on looking at the signatures, he thought that the C. Cagney and H. Cagney signatures looked alike but he did not query it. Some shareholding documentation was taken from a table and this was given to him. Mr. Cagney indicated that he did not know the worth of the shares and he suggested putting his younger daughter on to the third account that would later be opened on the strength of the sale of the shares. Mr. McCann said that he was asked to get a share valuation and he told them that he was going to approach NCB stockbrokers, in that regard. There was a product of the defendant, on the market at that time, which was an equity bond which was connected to the stock market, in terms of return, but where the principal sum, unlike in a personal stock market investment, was guaranteed. Mr. McCann claimed that he went away with several share certificates and with the two cheques from Mr. Cagney and that these were endorsed. That last fact, at least, is not in controversy. He then opened the relevant accounts. He got a valuation from NCB and sent it, or brought it, to Mr. Cagney at a later meeting, to which I should shortly turn, which resulted in the opening of the account resultant on the sale of the shares. No one, he said, asked for a copy of the documents. A photocopy machine was, in fact, available in the sitting room which was also a kind of office. He said that Mr. Cagney indicated that he did not want any correspondence coming to his house, because he was going to the United States of America. Mr. Cagney claims that he simply requested that such post should not come for a month or two so that letters would not be piling up inside the glass porch of his house, giving an obvious indication that he was not present. At this point, I note that on the J. Sheridan account document it is written that there should be no correspondence and that the same direction appears on the C. and H. Cagney account and on the later account of M. Cagney and Geneviève Cagney that was opened on the sale of the shares.

17. Thomas Joseph Sheridan told me that after the accident which killed Mr. Cagney's wife, he realised the plaintiff was badly depressed. He said he spent a great deal of time going over to his house and listening and that Mr. Cagney would come to his clothing factory often in order to take tea and talk of luck and ill luck. His insurance business was finished, he would say, and for the sake of his children and his health he wanted to sell it off. He wanted to get involved in something less complex and they talked about the clothing business. After some six months of this talk, they came back to ideas about the clothing industry and, Mr. Sheridan claimed, it was realised by them both that it would not be too big a strain for Mr. Cagney to completely change career and, in effect, become a travelling salesman on his own behalf. Mr. Sheridan asked me to believe that a person who had no connection whatever with the fashion industry, and who had spent his life in insurance, then decided that he was going to make an investment of IR£100,000 in Mr. Sheridan's company, which would result in the manufacture of a particular product, namely designer jeans according to a particular pattern, in which he took no particular interest, and that he would then he would then collect the jeans from the factory, store them in his own office and travel the country knocking on doors of boutiques and drapery stores attempting to sell these, subsequently invoicing in respect of them and then collecting the money. Mr. Sheridan claimed that this was going to be easy because, as he put it, *"we had the product".* He was going to buy the fabric and materials and make a saleable item. Drumming up of customers and the collection of money was to be Mr. Cagney's side of the bargain. Partnership was considered but that was ruled out by Mr. Sheridan's family because, as he put it, *"there were too many problems"*. Mr. Sheridan claimed in evidence that prior to this meeting on 16th May, 1995, he had said to the Plaintiff:- *"how much money do you want to speculate with?"* He claims that Mr. Cagney replied that he had a large amount of IR£100,000 available. Mr. Sheridan claimed that in order to make this scheme work, he warned Mr. Cagney that he would have to take a serious and active part in the business. Mr. Sheridan claimed that four days before the meeting of 16th May, 1995, Mr. Cagney came over and that he was very upset. He felt that the time had arrived for him to make a fresh start and that his stocks and shares were to be sold off . To do him a favour, Mr. Sheridan rang Declan McCann the next day and told him, as he put it, *"the bones of what we were at".* A meeting was therefore arranged, which is the meeting of 16th May. When he drove over to Mr. Cagney's house that day, his friend the plaintiff, and his two daughters were there. He walked in with Declan McCann. He recalls Geneviève and Helena going around pulling out drawers and getting out cheques and other documents. He recalls Declan McCann saying to the plaintiff words to the effect that if his money was put into Mr. Sheridan's name that he would lose control. He claims that in order to differentiate this money from other accounts that he already had in the defendant building society, he required that it should be put in the name of J. Sheridan, his middle name initial. He did not explain the vague and useless postal address. He claimed that he had never described himself, as the form indicates, as a property investor and he claimed that he had never given instruction, as on the form, that no correspondence should be sent in respect of the account. He said that Helena was not present at the meeting as such, but that she came in from another room once or twice. He recalls signing one form and the plaintiff signing another. The meeting finished up by him saying *"I've got to go lads"* and he did not wait for tea, as he put it, but went.

The Shares

18. In order to resolve the facts in relation to this meeting it helps to turn to the second meeting which, it is accepted, took place between Declan McCann, as manager of the relevant branch of the defendant, and the plaintiff. This appears to have happened some time in August of the same year. It is possible to fix the time by reference to the cash withdrawal which was made from the M. and C. Cagney account in the sum of IR£4,588.09 on 17th August, 1995. Both Mr. Cagney and Mr. McCann are clear that traveller's cheques in US dollars were ordered and that within a few days of them becoming available, Mr. McCann called on Mr. Cagney, again on a journey between Dublin and Kilkenny. It is noted, in relation to this matter, that Mr. Cagney, in his evidence, puts the initiative in relation to seeking traveller's cheques on to Mr. McCann. The suggestion made to the court was that Mr. McCann suggested getting him traveller's cheques and not that Mr. Cagney asked for them.

19. There are really only two witnesses to this meeting which took place in Mr. Cagney's house and which probably happened on 19th August, 1995; the document opening the account with the money from the shares being dated the next day, in accordance with his usual practice, by Mr. McCann. Geneviève Cagney also gave evidence; that was to the effect that she could not remember meeting Mr. McCann in the kitchen of her home on that, or on any other, occasion. I am satisfied that this evidence was honest. Two share valuations exist in relation to the bundle of share certificates handed over by the plaintiff to Mr. McCann on 16th May, 1995. The first is dated the 18th May, 1995 and the second is dated the 16th August, 1995. The values given differ by only around IR£300, the latter valuation from NCB coming out at IR£10,962.24. Mr. McCann believes that a share valuation was sent by post to Mr. Cagney prior to this meeting taking place. He is certain that at this meeting he was instructed to sell the shares on the basis of either the first or the second valuation. He also indicated that the pass book in relation to the H. Cagney and C. Cagney account was given to Mr. Cagney on that occasion, by way of abiding with the direction that no correspondence should be sent to the house in respect of that account. Mr. McCann said that his instructions from Mr. Cagney were to sell the shares as soon as possible and to put the funds into an equity bond in the name of Conor and Geneviève Cagney. Share transfer forms were signed in blank in respect of the dozen shares that were to be sold. He claims he was offered tea and that he met Geneviève Cagney in the kitchen. Nothing memorable was

said. He did not see a form being signed. The form was given to Mr. Cagney and it came back signed by both parties who apparently held the shares, namely Mr. Cagney and his late wife Helena. The account was opened the next day, and the money from the share sale was lodged later. The share transfer forms, signed in blank as indicated, were sent to NCB who filled in the details. Because one share did not exist, a copy of that form in blank was kept on the bank's file, or it was later returned by NCB. The form was appropriately signed by Conor Cagney and Helena Cagney. Mr. McCann told me that a query was raised by him, when he saw the form signed in that way at the meeting, as to whether Mr. Cagney was the beneficial owner of the shares. He was assured he was. Mr. Cagney was the survivor to a jointly held chose in action and so that was correct; but that was not something to which Mr. McCann applied his mind.

The Correspondence

20. The plaintiff's account of this meeting in August 1995 was that he gave no direction to sell the shares. The first letter to the defendant, from the plaintiff's solicitors, however, reads, as to the relevant part, as follows:-

> "The Cagney family have come to ask us for help in making an enquiry into an account which they opened at your branch in the First National Building Society in May of 1995. We are also instructed that, a cheque in the sum of IR£118,325 was given by Mr. Cagney to you when you visited at his home address with an instruction to open an investment account in the name of Mr. Cagney and his two daughters. The money came from the surrender of a Norwich Union Investment Policy, having received advice from you that First National Building Society would be able to match that investment. At the same time certain shares certificates were given to you. We understand that you were instructed to sell the shares and place the monies arising from the transaction in the same investment account".

This letter was replied to by the defendant, through Mr. McCann, and in the course of that letter he stated that Mr. Cagney had given him a number of share certificates with a view to organising their sale and he alleged that he had instructed him to put the proceeds into a product called a guaranteed equity bond account in the name of M. Cagney and Geneviève Cagney. To this letter, the solicitors on behalf of the plaintiff replied as follows:-

> "As you correctly point out, Mr. Cagney gave you a number of share certificates with a view to organising the sale of same. Please give details as to when you say Mr. Cagney gave instructions to open an equity bond account and how it came about that an account was opened in the name of M. Cagney and Geneviève.

21. Mr. Cagney was asked in the witness box as to what instruction he gave on the share certificates being handed over. He said that he wanted the shares valued. He denied every receiving a valuation. When he was asked as to what he did to follow up as to where his valuable securities had gone, he made no answer. It seems logical to the court that if somebody gives a valuable item to another individual with a view to having it valued, and perhaps later sold by them, that they will make an inquiry as to the value, if they are not told. Further, it is entirely probable that a person who is trying to sell an item to another person, and who gets a valuation will either indicate that the item should be sold or that the property should be returned. Nothing like that, which conforms to the ordinary course of human conduct, happened on Mr. Cagney's account and the court asks itself the question as to whether this is explicable.

The Final Meeting

22. The final meeting, around which the resolution of these facts turns, as between the plaintiff and the defendant, is one which happened on the 20th June, 1997. The date of that meeting is fixed by reason of the pass book in respect of the C. Cagney and H. Cagney account showing that it was updated on that date, a day on which, the evidence of Mr. McCann indicates, IR£37,000 was put into a different account bearing better interest in the same names, newly opened on that day. Mr. Cagney claimed that in May, 1997 that he rang up the defendant to ask about his investments. On a check being made, there was no account found that included his name and that of his two daughters. He claims to have been horrified when the lady on the telephone said, apparently by the way, that a C. Cagney and H. Cagney account existed which was earning 1% per annum interest. He rang a week later. He claims to have said to somebody that he would like to meet Mr. McCann to discuss this matter. In any event, on 20th June, 1997 he went to Kilkenny and insisted on seeing the manager, notwithstanding that he had no appointment. Mr. Cagney's account of this meeting is that he asked Mr. McCann for copies of the relevant account, as he saw it, which was in his name and those of his two daughters, and that Mr. McCann indicated that there was nothing on the file. The J. Sheridan account was showed to him on the computer and some notes were made on the back of an envelope. This was done after Mr. McCann telephoned Tony Sheridan and got his permission. Mr. Cagney claims to have been speechless at this revelation, as he put it, and he claims that he was threatened with the gardaí if he did not leave. His upset was added to by the fact that he discovered that less than an IR£1,000 was left of the original IR£100,000 put into the J. Sheridan account.

23. Mr. Sheridan's evidence on this matter was to the effect that he recalled being telephoned and asked for permission by Mr. McCann to show Mr. Cagney details of the J. Sheridan account. This he gave. Mr. McCann alleged that when he went back from that meeting to his house, that Mr. Sheridan was there waiting for him. As to what conversation they had, if that happened, Mr. Cagney could not enlighten me. He noticed as well, at that meeting, that there was an account in the name of M. Cagney and Geneviève Cagney. Mr. McCann claimed that what horrified him most of all in relation to what he had learned, was that there was not an account in their three family names which would have rights of survivorship in the event of death, and access in the event of illness.

24. Mr. McCann's account of this meeting is that Mr. Cagney did turn up unexpectedly and that he had to put off a customer, in order to deal with him. The C. Cagney and H. Cagney account was brought up on the computer and the balance showed IR£37,250.96. Mr. Cagney then indicated that he had another account with his daughter and the M. Cagney and Geneviève Cagney account was brought up. A query was then raised as to where the IR£100,000 had gone. Mr. McCann claims that he said that this money had gone to Mr. Sheridan, but that no details could be given unless he got Mr. Sheridan's permission. He contacted Mr. Sheridan and told him that Mr. McCann was there and wanted details of the account. Permission was given. The account was brought up on the computer and details were written out on an envelope. A discussion ensued as to the names on the account and why Geneviève was not there. Mr. McCann told him the rate of interest on the C. Cagney and H. Cagney account, which was low, and said that Mr. Cagney asked whether the defendant could do any better. He was told that he needed a different type of account and suggested a term account. Mr. McCann was asked by Mr. Cagney about backdating the account. He indicated that he could not do so but that he would make enquiries. Mr. McCann said that no surprise was expressed about the M. Cagney and Geneviève Cagney account into which the proceeds of the share sale had been put. No mention was made of the shares at all, or any difficulty in relation to them. Mr. McCann made efforts to backdate the new account with the IR£37,000 in it from the earlier C. Cagney and H. Cagney account, opened in the same names. When it was in fact, it with head-office permission, backdated to 3rd January, 1997, he told Mr. Cagney this on the telephone, some few weeks later, and met with a cold response: *"that's fine".* Nothing else emerged until the solicitor's letter which I have quoted.

Completion of Evidence

25. The evidence as to this controversy is completed by a number of small items. I do not know whether, in the aftermath of this meeting on 20th June, 1997, Mr. Sheridan turned up at Mr. Cagney's house. There is no convincing evidence whether he did or not or as to what either of them may have said to each other. I have been tacitly asked to draw an inference that Mr. McCann ensured that Mr. Sheridan would turn up to Mr. Cagney's house on that evening. There is no basis on which I can draw that inference.

26. In terms of time, later events are somewhat confused. Mr. Cagney claimed that shortly after the meeting in June, 1997 he telephoned head office to complain about the behaviour of Mr. McCann and the wrongs perpetrated against him by the defendant. He claims to have been put through to a man called Cathal Daly. This person is supposed to have threatened him with a slander action which would have the effect of taking his house away from him, either in damages or in court. In July, 1997 a wedding took place of one of Mr. Sheridan's daughters. Both Mr. McCann and Mr. Cagney were present, although they did not speak. Helena Cagney described her father's behaviour during this time as becoming withdrawn. No complaint was made by him to her then, in explicit terms at least, relating to the wrongs allegedly committed by the defendant. She left and went to England because, as she put it, she had had enough. Her father then took an overdose and she was compelled to return. By the following year, the controversy with the bank had been initiated by way of a solicitor's letter. Mr. Sheridan claims that there was very little discussion between him and Mr. Cagney concerning the J. Sheridan account. However, he claims that on one occasion, which is described by him as the final rupture of the friendship, Mr. Cagney called to his factory and told him words to the effect *"I have them at last: they put the money into the wrong account"*. He went on to say that the money was put into the account of J. Sheridan and therefore the bank could not stand over that. Mr. Sheridan claims to have replied *"what do you mean – I'm J. Sheridan"*. Mr. Cagney denies this.

27. Mr. Tadhg Lombard produced a report on the discovery documents in this case. He gave the following opinion:-

> "In my opinion there is no evidence, based on the documentation furnished, that internal control procedures were applied to transactions involving the plaintiff. No receipts or acknowledgements were issued on receiving the money. Documentation was completed in a haphazard fashion. Good and prudent financial practices were not operated so that the society left itself open to claims as in this case. Documents were not maintained in accordance with good business practice or the Building Society's Act of 1989."

A handwriting expert was also called. Mr. Seán Lynch is known to the courts as a scrupulous, careful and honest witness. He examined the question to the signatures on the C. Cagney and H. Cagney account, the M. Cagney and Geneviève Cagney account and on a blank share certificate not forwarded to NBC, or possibly returned by them, but signed in blank C. Cagney and H. Cagney. He reached the conclusion that there was evidence to suggest that the plaintiff could well have signed the questioned documents in respect of the two accounts. During the course of the hearing some additional material was provided to him and his opinion was strengthened somewhat. Forensic scientists are used to using a scale as what connection might be found between two items along a description of: does not suggest; suggests; strongly suggests; and very strongly suggests. Mr. Lynch indicated that there was evidence to suggest that two of the bank documents were signed by the plaintiff but he could not go so far as to say that it was a probability. I take this evidence into account in weighing the entirety of the evidence.

Conclusion

28. The only evidence that I have found to be reliable in this case has been that of Declan McCann. He made genuine efforts to answer questions and he was not evasive in relation to any matter put to him. The suspicion that share transfer documents were signed in blank was, in my view, honestly explained by his evidence and that of Mr. Keers of NCB. The fact that some of the share transfer forms were sent back, the share transfers already having been affected, and were then filed away might suggest a degree of suspicion surrounding this transaction. I am satisfied that there is none. Instead, I am satisfied that what happened was that NCB procedures allowed for the sending out of these documents. I am satisfied that Mr. McCann is honest when he says that he sent the shares and the share transfer certificates, following an instruction to sell the shares in August, 1995, to NCB, as documents signed in blank. The appearance of what is apparently the late Helena Cagney's signature on the only one of these documents we know have was, I am satisfied, directly as a result of the plaintiff putting it there. Nobody else put it there. I have had regard to the evidence of Helena Cagney, the plaintiff's daughter. She has been through an extremely difficult time in attempting to cope with her mother's death and with her father. She has done her very best, as has her sister. I am satisfied that her answers were not satisfactory. Her account of the meeting of the 16th May, 1995 is completely lacking in the kind of detail that brings any transaction to life. Nothing in the measured way in which she gave her evidence, or answered questions, suggested to me that she had actually experienced anything of what she spoke of, concerning any interaction which she claims to have had with Mr. McCann on the 16th May, 1995. The plaintiff's evidence was completely unreliable in relation to the opening of the account, consequent on the sale of the shares. His account of being bullied by the head office of the defendant and by Mr. McCann, I do not find probable. Whereas he might have spoken to head office and legal proceedings may have been mentioned, he made neither a formal complaint nor gave any coherent account of what he said was wrong. It took a solicitor, some nine months later, to sort that out.

29. I find the account given to me by Mr. Tony Sheridan to be not capable of credibility. The facts to which he purported to swear changed even as he sat in the witness box. No reliability can be placed on his testimony. I do not accept any of his evidence. At para. 17 of the third party defence, it is asserted that of the sum of IR£100,00 invested in the business of the third party, by the plaintiff, a sum of IR£63,473.81 will be released to the balance of the defendant or the plaintiff. This plea is made without prejudice to all the other denials in that defence. In addition, a solicitor's letter was opened up to me, with the permission of Mr. Sheridan, which mentioned a different, but similar, sum. It was reasonable, in this context, to theorise that perhaps what was involved was a translation from an Irish pounds amount into Euros and that the third party defence was a clerical error. I do not accept that. When I look at the transactions on the J. Sheridan account, they are not believable as part of the evidence he gave.

30. I am obliged to ask myself, with a view to resolving these facts, what actually happened. I accept the account of Mr. McCann as to the meetings on the 16th May, 1995 and 20th June, 1997. I do not accept that the meeting of 16th May, 1997 came as the second or third in a series of meetings between Mr. Cagney and Mr. McCann. I do not accept Mr. Sheridan's account of a business deal for the manufacture of jeans between him and Mr. Cagney. It was curious that in the cross examination of Mr. Sheridan by the plaintiff that the plaintiff, who represented himself, should have drawn up from the Companies Office the accounts lodged in respect of T. & E. Fashions Ltd., one of the vehicles of Mr. Sheridan. I find it equally curious that Mr. Sheridan should refuse to acknowledge, until he was pressed, that the squiggle applied above the word Director, and over what he said was his wife's signature, in the abridged financial statements for the period ended 31st August, 1997 and for the separate document ended 31st December, 1995 was his signature. The financial statement ending for the 31st August, 1997 contains the following note:-

> "The loan of IR£220,00 was introduced by [redacted] as part of a total investment of IR£1 million conditional to the receipt of an Irish passport. The amount of IR£400,000 was removed from the company after the year end and lodged in an escrow account held by Matheson Ormsby Prentice, subject to the finalisation of the investment. IR£780,000 is now lodged in the escrow account. At 31.12.95 IR£620,000 was on deposit in the company."

31. Both the plaintiff and the third party have been reluctant to tell me what the true nature of their dealing was. I can accept neither of their accounts. I specifically reject Mr. Cagney's account that a fraud was perpetrated by the defendant on him. I regard Mr. Sheridan's account of IR£100,000 being used to fund the makeup of designer jeans as being unbelievable. It seems to me that there is a germ of truth in the statement by Mr. Cagney that he wished to make an investment in mid 1995. It seems to me that it is also true that he was engaged in attempting to persuade his then friend Mr. Sheridan to accept a large investment from him in what then may have looked like a prosperous clothing firm with a good future. That investment was made very unwisely by Mr. Cagney and it was accepted by Mr. Sheridan personally and without any formality such as the issue of share certificates in one or other of his companies and without the preparation of any documents which could be used by either party to ensure the maintenance of trust. In fairness to Mr. Sheridan, he was probably pressured into taking an investment. In fairness to Mr. Cagney, he was deeply depressed: and that situation was evident even during the hearing. Mr. Cagney was, at the time, litigating in respect of the dreadful accident which caused his wife's death. He did not wish to be seen to be working and, in any event, I am satisfied he was incapable by reason of the accident of doing any of the kind of detailed work he had engaged in beforehand. A partnership between Mr. Cagney and Mr. Sheridan was ruled out by Mr. Sheridan and the only alternative was one of investment. As to what rate of return or as to what security there might be on such an investment, the court can have no idea as the court was not told the full truth by either party. It is, however, transparently clear on the evidence that Mr. Cagney did not invest IR£100,000 of his money into the defendant bank but instead put it into the account of T. Sheridan with an ambiguous address, for whatever reasons that are best known to himself and Mr. Sheridan. I am also satisfied that Mr. Sheridan described himself to Mr. McCann, as on the document, as a property investor and further that he insisted that no correspondence in relation to this account should be sent to his address, whatever it was. Mr. McCann's evidence is accepted instead of Mr McCann's or Mr. Sheridan's.

32. There followed a course of dealings between the parties which I am satisfied, on the balance of probabilities, had nothing to do with the manufacture of jeans. Mr. Sheridan first told the court that some units of jeans were made up and that the cost of this would have been, on an estimate, a rough one, IR£5,000. There then remained IR£95,000 out of the original monies. Even if this were true and the cost of the manufacturing enterprise was higher, Mr. Sheridan has still retained, to this day, the vast majority of the IR£100,000 that he accepted from Mr. Cagney. These figures were changed later in Mr. Sheridan's evidence. There may have been some discussion as to repayment and it may well be the case that Mr. Cagney mentioned his daughters in this context. However, it is unimpressive that the court is being asked to accept a story that this money went into T. & E. Fashions Ltd., for the benefit of Mr. Cagney and his daughters while, at the same time, a sum of less than half of that, was offered by way of a without prejudice letter, and a different sum was mentioned as being available in the third party defence.

Alternative Facts

33. As a matter of probability, the court's view is that Mr. Sheridan has had, since May of 1995, IR£100,000 of the plaintiff's money. If that money had been invested at a reasonable rate of interest it would now be available. That money, with interest, may yet be repaid: but is there anything the court can do about it? In an appropriate case the court can apply O. 15, r. 13 of the Rules of the Superior Courts. This provides:-

> "No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added. No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent in writing thereto. Every party whose name is so added as defendant shall be served with a summons or notice in manner hereinafter mentioned, or in such other manner as the Court may direct, and the proceeding as against such party shall be deemed to have begun only on the making of the order adding such party."

34. The fundamental rule of pleading is that parties may not plead alternative facts, as opposed to inferences that might be drawn from primary facts. The duty of the court is to decide the questions before it. Those questions are put before the court by the parties alleging facts in pleadings. The question here was an allegation that the defendant building society had disobeyed the plaintiff's instructions as to how to invest his money with them. I have found that the plaintiff never told the defendant building society, now a bank, to open an account for the entire of the money available to him in May of 1995, in the names of him and his two daughters. Instead, some money was invested in a joint account between him and one of his daughters and later, on the sale of shares, other monies were invested in an account in his name and that of his other daughter. Instead of including IR£100,000 of that money into one or other of those accounts he, instead, invested that by putting it into a friend's business or businesses by instructing the building society to open an account in his friend's name and over which he would have no control.

35. Can the court, as a matter of law, re-plead the plaintiff's case for him? Counsel for the third party has argued that to do this would be both unfair and a breach of the fundamental rule that facts cannot be alleged in the alternative.

36. The defendant and the third party have come to court to deal with an allegation by the plaintiff that, in effect, a conversion, amounting to a fraud, was perpetrated on him by the bank acting in tandem with the third party. That never happened. The court is not entitled to choose a set of facts based on the evidence before it and then start to add alternative parties, or change the pleadings, so that the court can make what it might think is a satisfactory order. Instead, what O. 15, r. 13 allows is for the court to join parties and to dispose of the cause before it. The cause is only before it, however, on the basis of facts alleged. Here, the facts alleged by the plaintiff were completely different to the facts as have been eventually found by this court. Mr. Cagney is not entitled to come before the court and to say, on the one hand, that he has been subject to a conversion by the defendant, which failed to carry out his banking investment instructions while, at the same time, saying that if this is not true then Mr. Sheridan got his money through a business investment and has not paid it back. If Mr. Cagney had joined Mr. Sheridan as a defendant or as a co-defendant, and had pleaded that Mr. Sheridan had taken his money and not got it back, I would be now able to consider making an order based on the facts which I have found. Mr. Cagney has, instead, produced an unbelievable tale, which I reject, of underhand dealings by the defendant. I am obliged to find out the truth. I can make no order unless the facts I find are asserted by a plaintiff who seeks a remedy based on an account that he asserts is the truth.

Result

37. In the circumstances, I am dismissing the plaintiff's case against the defendant. The defendant does not have, and never had on the basis of the facts alleged by it, any case against the third party. That case is dismissed as well. I will hear submissions as to costs.