THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 30

Record Number: 2018/69

Baker J.
Whelan J.
McGovern J.

BETWEEN/

DECLAN O'MAHONY, DIAMOND DEVELOPMENTS LIMITED, BRIDE VIEW DEVELOPMENTS LIMITED, AMBLEDENE LIMITED AND KATHLEEN O'MAHONY

RESPONDENTS

- AND –

PROMONTORIA (GEM) DAC

APPELLANT

JUDGMENT of Ms. Justice Máire Whelan delivered on the 19th day of February 2020

Introduction

1. This is an appeal against a judgment delivered in the High Court (Haughton J.) on the 8th February, 2018 and consequent orders, perfected on the 21st February, 2018, granting specific performance of an agreement for the release and discharge by the appellant of all indebtedness and securities over certain assets of the respondents in accordance with an agreement determined to have been evidenced in writing by email dated 20th June, 2017. The said agreement was determined by the Court to have been varied in terms of the amount of the deposit and as to the mode of implementation thereof.

2. The High Court declared invalid a purported notice of termination of a 2014 settlement agreement served by the appellant on the first and second named respondents on the 7th September, 2017 and dismissed a counterclaim against the second-named respondent. The Court further awarded €20,000 by way of exemplary or punitive damages in favour of the first named respondent.

Background

3. The first named respondent was a successful developer until the economic crash. He had substantial borrowings with AIB Bank Plc. and had granted security to the said bank in respect of same. The second and third named respondents had also provided certain guarantees or otherwise assumed obligations in respect of the said liabilities. The development loans with AIB were transferred to the National Asset Management Agency (NAMA) in December 2009 during the economic crash. Pursuant to the powers provided to NAMA under the National Asset Management Agency Act, 2009, the entity National Asset Loan Management Designated Activity Company (NALM) became legally and beneficially entitled to all of the said facilities, the security and all other rights connected to them.

4. The first and fifth respondents are husband and wife (the O'Mahonys). The fifth respondent was not a party to the original loans or charges and is a party to these proceedings primarily by reason of her beneficial interest in a property adjacent to the family home which was the subject of a guarantee specified in a settlement agreement of 1st October, 2014 referred to hereafter.

5. The settlement agreement provided that the O'Mahonys would be left with their family home together with another property free from debt. The High Court characterised the fifth respondent's involvement thus: -

> "Firstly, that an ancillary dwelling house on a plot beside Mr. and Mrs. O'Mahony's home at Moneygourney, Douglas, be charged to NALM by way of First Legal Charge as security for Mr. O'Mahony's obligations. It is solely because Mrs. O'Mahony had a beneficial interest in this property that she is a co-plaintiff."

Some, but not all, of the secured assets were thereafter sold by NAMA and in particular four specific development properties in Co. Cork remained undisposed of as of January 2017 when the rights of NAMA/NALM under the loans, securities and the 2014 settlement agreement were transferred to Promontoria, the appellant. As of May 2016, the four remaining development properties all situate in Co. Cork were vested in the second respondent, Diamond Developments Limited.

6. Pursuant to the terms of the deed of transfer dated the 27th January, 2017 and made between NALM and the appellant, the latter acquired all the rights, title and interest of NALM/NAMA to the said facilities and the security.

Negotiations and subsequent events

7. Thereafter, there was engagement between Mr. O'Mahony and the appellant with a view to reaching agreement between them for the redemption of the loans, discharging all liabilities and securing unencumbered title to the relevant properties.

8. In or about the month of May 2017, Mr. O'Mahony made an offer to the appellant to discharge the indebtedness for a sum of €4M. By email dated the 9th May, 2017 the appellant rejected that offer and invited an offer "at or above €6M" which was characterised as the appellant's "target price". At all material times communications on behalf of the appellant were primarily through their agent, Capita Asset Services (Ireland) Limited ("Capita").

9. On the 22nd May, 2017 Mr. O'Mahony made an offer to pay €6,000,000 for the release of the four secured properties unencumbered with closing to be effected on the 31st August, 2017. This offer made no reference to the payment of a deposit.

10. On the 6th June, 2017 Capita emailed Mr. O'Mahony stating "… The approval request for this deal is progressing". Certain information was sought, including concerning mezzanine or short-term lending options. The email stated in respect of the appellant "Our client seeks a ten percent deposit upon signing to demonstrate your commitment to the deal".

11. Over two weeks later by email dated the 20th June, 2017, entitled “Heads of Terms and KYC”, the appellant responded to the May 22nd offer. The legal effect of this email was a central issue in the High Court. There was a fundamental dispute between the parties as to whether the said email contained all the essential terms of the agreement between the parties and whether it introduced any new material terms, particularly with regard to the requirement for a deposit of ten percent and whether in substance the said email amounted to a counter offer on the part of the appellant which was never thereafter expressly accepted or performed by the respondents.

12. The respondents argue that they concluded a binding agreement with the appellant in full and final settlement of their indebtedness to it and for the release of the properties charged, which are listed in the Schedule to the plenary summons, free from all claims, securities and demands in consideration of the payment of the total consideration of €6,000,000.

13. The appellant contends that since relevant email communications were expressed to be “subject to contract” the email of the 20th June, 2017 did not give rise to a binding and concluded agreement between the parties.

14. A significant issue between the parties is the materiality or otherwise of the payment of a deposit and the amount of the said deposit and whether same was a material term of the contract.

15. The appellant in the email of the 20th June, 2017 proposed that the structure for the redemption of the mortgages and the release of the four secured properties would be by means of a loan sale deed. Subsequently, it was discovered that the appellant had not been registered in the Land Registry as owner of the charges and that proposed structure was varied to a deed of settlement and release.

16. The appellant contended that if the email sent by Capita on the 20th June, 2017 contained the material terms of a release agreement (which they deny) the respondents had failed to perform the material terms on or before the nominated closing date of the 31st August, 2017. The respondents contended that in the course of further negotiations between the parties from on or about 10th to 14th August, 2017 the parties had varied non-material terms of the agreement including, *inter alia*:

    i. variation on the amount of the deposit from to €600,000 down to €60,000;

    ii. variation in the structure of the release and settlement necessitated in circumstances where the appellant’s ownership of the development loans had never been registered in the Property Registration Authority/Land Registry;

    iii. that the respondents would be responsible for additional legal fees of the appellants;

    iv. that the purchase monies would be paid by the second respondent in respect of whom anti-money laundering (KYC) material would be furnished to the appellant;

v. a deed of settlement and release in respect of the entire transaction would be executed on the 25th August, 2017 and the deposit was payable on that date; and

vi. the balance of the purchase monies was payable by 31st August, 2017.

17. The respondents contend that on the 22nd August, 2017, upon being advised of the source and method of funding, the appellant informed Mr. O'Mahony that it would not complete the release agreement.

18. The appellant disputes the contention that the variations contended for by the respondents to the release agreement were not material. The appellant further contends that the respondents were not ready, willing and able to comply with their obligations should the Court determine that a concluded legally binding agreement had been entered into between the parties in the manner contended for.

19. The appellant contends that it was entitled to serve a notice of termination and demand on the 7th September, 2017 which triggered an obligation to consensually effect a sale of the assets the subject of the security and that such failure amounted to an event of default, triggering an obligation to repay the total sum of €39,741,707.29 together with daily interest accruing upon the expiration of forty-eight hours after receipt of the notice of termination aforesaid.

Application for a non-suit

20. At the trial of the action at the close of the respondents' case after concluding cross-examination of the respondents' three witnesses, all of whom had undergone cross-examination on the stated basis that the appellant's witnesses would testify and contradict their evidence, an application for a direction and dismissal of the proceedings was made on behalf of the appellant on the basis that the defence did not intend to go into evidence. It was contended that the respondents' case had not been made out on the balance of probabilities.

The judgment

21. Judgment was delivered on 8th February, 2018 and runs to 129 pages. The Court noted that the suit was "an action for breach of contract and the Court's primary task is that to decide the contractual issues presented by the pleadings and the evidence."

Grounds for non-suit application

22. The trial judge identified three separate bases for the appellant's application for a direction. Firstly, that no binding contract existed between the parties and the email of the 20th June, 2017 "... in response to an offer from Mr. O'Mahony by email of the 22nd May, 2017 was a counter-offer with new terms." It was contended that Mr. O'Mahony never communicated his acceptance of the 20th June terms and that there was no implied acceptance. It was contended that the deposit was a material term and that the use of the words "subject to contract/contract denied" in communications concerning the amount of the deposit "meant that there was not any agreement in respect of that item" (p. 24).

23. The second basis concerned alterations in the mechanism for completion of the deal, it being contended on behalf of the appellant that as matters had progressed: -

> "…the proposed deal was restructured and became technically different… At the Plaintiffs' solicitor's request and for the Plaintiffs' benefit, the proposed deal was now to be effected by a deed of settlement and release, whereby the loans would be settled for a deposit of €60,000 and a balance paid on closing of €5,940,000 and the charges over the remaining of the properties released, with additional costs being paid to A&L Goodbody, the Defendant's solicitors."

The contention was that this constituted "A new structure, which was so different from the previous agreed structure that there could be no binding agreement."

24. Thirdly it was contended that the respondents had not established that they were "ready, able and willing to complete on 31st August, 2017".

25. The judgment analysed the arguments and submissions advanced on behalf of the respondents in opposition to the application for a direction, noting their contentions that exemplary damages should be awarded on the basis of the manner in which the defence had been conducted in court and the imputations arising from the cross-examination that the first respondent had not been "up front".

26. The judge went on to note at p. 11 of the judgment that in circumstances where the appellant's witnesses had not given evidence: -

> "…they have effectively forfeited the opportunity to dispute the accuracy or contents of any of the relevant documents. I am therefore are entitled to treat such documents as evidence of the truth of their contents."

Having reviewed the evidence, at p. 15 he concludes: -

> "I am satisfied that prior to June 2017, Mr. O'Mahony and the Plaintiffs fully complied with all their obligations under the 2014 settlement agreement."

27. The Court notes the respondents' claim was that: -

> "On 20th June 2017, the Defendant agreed, in consideration of €6m, to transfer the residual loans to the Plaintiffs and release all the security, leaving the Plaintiffs debt free. It is claimed that the Defendant wrongfully repudiated this agreement on the 22nd August, 2017." (p. 16)

In analysing the pleadings the Court noted at p. 20 "The Defence fundamentally denies that there was any binding agreement…" The judgment considered the defence delivered. The Court noted that it was expressly pleaded in the defence that no new consideration was provided in respect of any later agreements observing: -

> "I should say in passing here that this reflects the law as set out in *Pinnel's* case,

but it was not a defence that was actually pursued in argument ..."

28. The judgment noted that the application for a direction was resisted, *inter alia*, on the basis that no contract for sale in the conventional sense of the Law Society General Conditions was contemplated but rather implementation of the agreement was to be by means of a loan sale deed and release. It was argued that the provisions in the email of the 20th of June were "just details" concerning the aspects of completion including the deposit and the provision of anti-money laundering information. It was further contended that even were the email of the 20th June 2017 to be regarded as a counter offer, it had been accepted and the respondents' and appellant's solicitors had acted on foot of same and incurred fees.

29. The respondents further argued that the late introduction of "subject to contract" in emails from the appellant's solicitors on the 30th June, 2017 could not affect the validity of the June agreement. It was contended that the deposit was never a material term and once same was renegotiated to a non-refundable €60,000 there was in fact a variation agreement for a revised deposit to replace the initially contemplated €600,000 deposit.

30. Regarding the change of structure, it was contended that this was not a material change in the contract, it was merely a different conveyancing mechanism "…for achieving the same end..."

31. The respondents contended that it was solely the wrongful repudiation on the 25th August 2017 on the part of the appellant which prevented finalising the deed of settlement and exchange: -

> "Time was never of the essence in respect of the payment of the deposit and…there was no point in the Plaintiffs or their solicitors turning up to close on the 31st August as the Defendants [*sic*] were clearly not willing to close at that point in time."

32. In considering whether the Court was entitled to draw adverse inferences from the fact that witnesses who might be called were not called by the appellant, the judge noted at p. 31 that the Court can do so "… but the Court should do so cautiously." The decision of Kelly J. (as he then was) in *Smart Mobile Limited v ComReg* [2016] IEHC 338 which had considered the earlier decision of the High Court in *Fyffes v DCC and Ors* [2005] IEHC 477 wherein Laffoy J. had followed the reasoning in *Wisniewski v Central Manchester Health Authority* [1998] Lloyds Reports Med. 223 was cited with approval.

33. The judgment reiterated the necessity for caution in drawing inferences from a decision not to call witnesses on behalf of a party to litigation citing Cregan J. in *Flynn v NALM* [2014] IEHC 408. It reiterated the core submission on behalf of the appellant that no evidence was called since it was not required "as the Plaintiffs' case was not made out on the balance of probabilities". Having noted the explanation tendered for why the witnesses were not being called the trial judge concluded, "It is one that I do consider in the context of drawing inferences."

34. The trial judge reviewed the authorities to determine the appropriate test to be applied where the defence was not intending to go into evidence. He outlined in detail the relevant jurisprudence, including *Hetherington v Ultra Tyre Service Limited* [1993] 2 IR 535, the Supreme Court decision in *Schuit v Mylotte* [2010] IESC 56 and *O'Leary v HSE* [2016] IECA 25. He concluded at p. 7 of the judgment: -

> "... I must approach this ruling which is effectively my final judgment, on the basis that the Plaintiffs must establish their case on the balance of probabilities."

35. The Court then considered the proposition advanced on behalf of the respondents that, given the basis and vigorous nature of the cross-examination, the appellant ought to be denied the opportunity to apply for a non-suit. The trial judge cited with approval from the judgment of Ryan J. in *O'Leary v HSE* which had rejected the proposition that the nature of a cross-examination *per se* could deny a defendant the opportunity of applying for a non-suit. At issue in the said case was whether counsel, having put to the plaintiff's witnesses certain statements that defence witnesses were going to make and which, it was posited, would contradict the evidence of the plaintiff's witnesses, whether this mode of cross-examination constituted in substance going into evidence. The Court of Appeal held that it did not "… and neither is there some other rule that would prevent the parties applying for a direction."

The trial judge then concluded at p. 9 of the judgment: -

> "If the Plaintiffs do make out their case on the balance of probabilities, then they are entitled to succeed."

36. The judgment noted that the application for a direction was made on day four, at conclusion of evidence of the respondents' three witnesses who "underwent cross-examination on the basis that the Defendant's witnesses would testify and give certain specified evidence on matters in dispute between the parties". It continued: -

> "It therefore came as a surprise to the Court and also seemingly counsel for the Plaintiffs when the application for a direction was made by [counsel] who indicated that the defence would not be going into evidence."

At p. 9 he stated: -

> "The fact that the Defendant has chosen not to call witnesses, despite the manner in which the Plaintiffs' witnesses were cross-examined, is something from which the Court may draw one or more appropriate inferences."

The trial judge then proceeded to analyse the evidential status of the discovered documents in circumstances where the appellant had reached a decision not to go into evidence.

Concluded contract for sale

37. The judgment then proceeds to make findings on the evidence as to whether a concluded contract for sale had come into existence. The Court reviewed the course of dealings between the parties from January 2017 when the appellant had acquired the interests of NALM under the 2014 settlement agreement. The Court reviewed communications between the parties in April and May 2017 and at p. 41 analysed what it considered to be an important email where Mr. O'Mahony wrote to Mr. McWhinney of Capita on the 22nd May:-

> "Further to your email of the 19th May, I would like to respond as follows. I hereby confirm my formal offer of €6 million to purchase the remaining assets and loan notes, a full and final settlement of all outstanding liabilities."

Mr. McWhinney of Capita replied on the 23rd May: -

> "Thanks for this additional information. Note that the deal is still subject to a formal Promontoria approval and we will revert in due course."

38. The Court reviewed the communications with regard to the initial position of the parties concerning the anticipated structure of the deal. In analysing the email communications between Mr. O'Mahony and Mr. McWhinney of Capita the judgment noted at p. 43: -

> "Clearly, from his response, Mr. O'Mahony understood the key elements of what was required by Promontoria. Also, he was, in his response, up front in relation to the funding. The reference to a single transaction is significant because it is later reflected in the authority that Promontoria gave in relation to the approval."

The judgment attaches weight to other content in the email of the 19th May including that there was no mention of a deposit "It is clear that the key requirements from Promontoria were receipt of €6 million by 31st August, 2017."

It noted that it had been put to Mr. O'Mahony in cross-examination that for there to be a deal:

> "…there would have to be formal legal executed contracts… and this is what was meant by 'go into legals'. Mr. O'Mahony was emphatic in his denial that this was ever discussed, or that he understood this to be the meaning of 'go into legals'."

The judge accepted the first respondent's uncontested evidence on the issue concluding: -

> "I find as a fact that 'go into legals' did not infer entering into formal contracts in the conventional sense but rather refer to the parties' lawyers dealing with the legal documentation required to implement and give effect to the transaction and to close the deal … by 31st August 2017." (pp. 43-44 of judgment)

39. In the course of the judgment the Court notes that the source of funding for the deal was initially Mr. Seamus Geaney, a property developer. The funding was subject to the disposal by the latter of two sites. That was the position as of the 19th May, 2017. By the

7th June, 2017 it became apparent that Mr. Geaney would not be in a position to fund the transaction to meet a completion date of the 31st August, 2017. It was common case that Mr. O'Mahony did not disclose this state of affairs to the appellant or their agent Capita at that time. At p. 44 the judgment notes: -

> "I accept that this was a delicate situation for Mr. O'Mahony at the time and the suggestion was put to him that he wasn't up front with Mr. McWhinney at this time. This, I believe, was unfair and unwarranted in the circumstances, given the commercial circumstances."

40. P. 46 of the judgment noted regarding an email sent by Mr. McWhinney to Mr. O'Mahony on the 6th June, 2017: -

> "I regard this email as a key document because in it, Capita introduced reference to a deposit of 10% upon signing."

The email had raised a series of issues including: -

(a) Regarding funding, it sought information on whether Seamus Geaney (a suggested funder of the transaction) had proceeded to sell two sites and whether completion could be effected by the 31st August. It also enquired whether mezzanine finance or short term lending had been put in place "to provide bridging if the Geaney sales do not complete".

(b) A deposit "our client seeks a 10% deposit upon signing to demonstrate your commitment to the deal."

The Court concluded that: -

> "The sequence envisaged is:
>
> 1. Promontoria approval of the deal.
> 2. … Issuance by A&L Goodbody of a draft Loan Sale Deed …
> 3. Payment of 10% deposit upon signing of Loan Sale Deed."

The judgment noted at p. 47: -

> "Mr. O'Mahony could not recall in evidence whether he expressly agreed to pay the deposit."

41. The judge made findings of fact on the evidence including as follows: -

"1. From 6th June on, Mr. O'Mahony knew that a 10% deposit would be payable as part of the deal on signing the Loan Sale Deed.

2. That the Plaintiffs continued to negotiate and work towards a deal on the basis that such a deposit would be part of it.

3. … Mr. O'Mahony never questioned that there was to be such a deposit …

4. … I also accept Mr. O'Mahony's evidence that he did not regard the deposit as material and that it never became a material part of the discussions between himself and Mr. McWhinney prior to 20th June, 2017.

These findings must be considered in the context of Promontoria and its agents driving the negotiating – dictating the terms would be a better characterisation – and that the key terms known and understood by the Plaintiffs and the Defendant and its agents were that €6m would have to be paid by 31st August, 2017 for release of the loans and security."

42. With regard to the deposit the judgment concluded at p. 47 of the judgment: -

> "I find on the evidence that a deposit of 10% on signing the Loan Sale Deed became part and parcel of the Plaintiffs' proposal and, as a result of the email from Mr. McWhinney, became superimposed on the offer formalised by Mr. O'Mahony in his email of 22nd May, 2017."

The Court observed that: -

> "Firstly, this was not a conventional sale that would involve a conventional agreement for sale with special conditions and Law Society General Conditions of Sale or a deposit payable at an early point in time. The concept of agreement in emails without deposit followed by [a] Loan Sale Deed, which effects the sale of loans, is very different and what was contemplated here was payment of the deposit on signing of the Loan Sale Deed by the Plaintiffs and shortly thereafter, payment of the balance on closing.
>
> Secondly, the relative unimportance of a deposit from Promontoria's perspective is very evident, from Advisory Note 134 approving the sale with payment by one instalment of €6 million and without any reference whatsoever to a deposit payment. Indeed Capita... shows that it prepared that note and did not even bother to include a recommendation in relation to a deposit.
>
> Thirdly, as will be seen when Mr. O'Mahony sought to renegotiate the deposit, it is evident from email exchanges that Mr. McWhinney and Ms. McNamee of Capita had no difficulty agreeing on behalf of Promontoria a a non-refundable deposit of 1% or €60,000." (pp. 48-49 of the judgment)

43. The Court noted from the evidence that prior to the 20th June, 2017 Mr. O'Mahony had obtained access to funding for the €6M purchase price. (p. 50)

The judgment characterises as critical Advisory Note 134 dated the 16th June, 2017: -

> "It was prepared by Capita … with its recommendation to Promontoria and the document sets out the authorisation signed on behalf of Promontoria to Capita to

conclude a contract with the Plaintiffs.

It gives a description at the top by reference to Diamond Developments Limited … it says at the last bullet point:

> 'The central promotor of Diamond Developments is Declan O'Mahony, who now wishes to take back all remaining assets by way of a loan sale.'"

The Court observed that the document stated: -

> "Payment to be made by one instalment of €6m to PGD… by 31st August, 2017…
>
> Upon receipt of the full payment, all security will be released and the borrowers will have no further liability to PGD."

The Court noted that PGD was Promontoria.

The judgment observes at p. 54: -

> "It will be noted that there is no reference to a deposit in this authorisation. From this, it is clear that Capita was expressly authorised to contract with the Plaintiffs to take back all of the remaining assets by way of loan sale for one instalment of €6m plus payment of A&L Goodbody's set fees for the Loan Sale Deed and Release. Although redacted, it is readily apparent that it was signed by an asset manager on behalf of the Defendant and date stamped 19th June, 2017. It is notable that there is no reference in the recommendations or authorisation to the requirement of any deposit and on its face, Capita did not seek authority for a deposit and Promontoria did not require it. If nothing else, this demonstrates how unimportant a deposit was to Promontoria and Capita."

44. The judgment noted at p. 55 the tenor of the email of the 20th June, 2017 from Mr. McWhinney of Capita, "Declan, I can confirm that Promontoria Gem DAC (Promontoria) has made decision." The email identified "Heads of Terms". It identifies "Purchase price €6m. Purchasing entity, TBC" which the Court observed – "I take to mean to be confirmed".

There was reference to exchange "Exchange by 6th July, 2017. 10% deposit payable upon exchange, completion by 31st August 2017."

45. There were additional details regarding the fees of the vendor's solicitors A&L Goodbody and anti-money laundering requirements in connection with any proposed SPV. In attaching weight to the authority of Capita and the importance of the email of the 20th June, 2017 the judge noted at pp. 57-58:

> "The express authority of Promontoria to Capita to communicate this document and these terms clearly overrides this boilerplate limitation on authority. I find that in contrast to Capita's email of the 9th May, and this email was not without prejudice,

and secondly the email was not subject to contract or contract denied.

Thirdly, it was not subject to any conditions precedent.

Fourthly, it did not introduce any new material terms or conditions.

Fifthly, the references to 'exchange' must be read in context, in particular by reference to a Loan Sale Deed in the ensuing paragraph. It meant exchange of the Loan Sale Deed upon which the deposit would be due.

Sixthly, the terms related to exchange, and the term related to A&L Goodbody's fees and the KYC terms related to conveyancing and implementation.

Seventhly, the reference to 10% deposit was not a new term for reasons that I have already stated.

Eighthly, the email on its face did not request or require any further confirmation or acceptance from the Plaintiffs. …

Ninthly, it contained the parties, Promontoria Gem DAC and the Connection 067 Diamond Developments Limited. It contained the parcels by reference to the connection and previous correspondence, in particular Mr. O'Mahony's emails. It set out the price of €6 million. Insofar as the deposit might be said to be legally required, it provided for 10% deposit on exchange.

Tenthly, there was no verbal or written response to this email from Mr. O'Mahony such as the Defendants [*sic*] argue was required to communicate acceptance to the Defendant. In direct evidence, Mr. O'Mahony gave his understanding on receipt of this email. He said at Day two, page 97 of the transcript: 'A. I was saying, great, I am now after getting a formal acceptance of my offer and that I advised my solicitor accordingly that this document had come in and could she just get on, I was at all times just emphasising how the 31st August was the important thing to complete.'"

Court's assessment of the first respondent

46. The Court noted the tenor of the first respondent's witness statement, concluding at p. 59: -

> "I find that Mr. Mahony's subjective understanding and belief was that there was, by this email, a concluded and legally binding agreement. At this point, I should say that I found Mr. O'Mahony to be a good and honest witness. He was aptly described by Mr. O'Flynn in his evidence as a 'straight talker' and I accept his evidence as sound."

Offer & acceptance

47. The Court then considered and addressed the legal arguments which had been advanced, the first being whether the email from Capita dated the 20th June, 2017 was a counter

offer and not an acceptance of the respondents' offer. The trial judge cited *Chitty on Contracts* (32nd edn.) at para. 2.027 where the author states: -

> "The Court must then look at the whole correspondence and decide, whether on its true construction, the parties had agreed to the same terms."

48. At p. 64 the judge outlines the approach he is adopting in determining whether the email of the 20th June amounted to an acceptance or merely a counter offer stating: -

> "I must, as I have already done, look at the whole correspondence and decide if, on its true construction and objectively considered, the parties had agreed to the same terms. Of course, I do not have the benefit of evidence from the Defendant's witnesses. However, there were business people on both sides. Promontoria was driving for a quick sale at €6m. I am satisfied they had what they wanted by 20th June 2017 and the Advisory Note 134 evidences their agreement and the essential terms and their intention to enter binding legal relations and their authority to Capita to communicate this and the essential terms to Mr. O'Mahony and the Plaintiffs. They were, of course, already in legal relations with the Plaintiffs under the terms of the 2014 settlement. This new agreement had the effect of varying that legal relationship and if and when completed, of bringing the 2014 Settlement to an end."

49. At p. 65 the judge expresses the view: -

> "Nor do I consider, in the light of the negotiation and in particular the email from Mr. McWhinney introducing the 10% deposit term and the continued negotiation thereafter, without demur from Mr. O'Mahony, that the email of the 20th June, 2017 introduced any new condition or any new material term. The intention to create legal relations is also clear from the email of the 20th June. It is not headed 'subject to contract' or 'contract denied'. That heads of agreement can constitute a binding agreement was not really disputed."

At pp. 66-67 he found: -

> "That the parties agreed all the essential terms and intended and agreed that all of the terms in the email of the 20th June, 2017 were binding. Words used such as 'terms', 'Promontoria approve', 'this deal has been approved' all connote and demonstrate the finality of the agreement and this was their bargain. There was no need for further acceptance, or any further need for discussion or negotiation. The wording used and the circumstances of this case are such as to lead me to conclude that there is a binding contract … in this case …"

Conduct subsequent to 20th June, 2017

50. The judgment then considers the subsequent conduct, particularly of the first respondent, concluding: -

> "I find that Mr. O'Mahony did telephone [his solicitor] on 20th June to inform her of

the deal and also that he forwarded the 20th June, 2017 email to her on the 22nd June and that he rang her then to stress to her the need to complete on or before 31st August, 2017 and that she would be hearing from A&L Goodbody."

The Court also noted that fees were being incurred by the appellant with their own solicitors "for which Mr. O'Mahony could be liable under the contract". He observed: -

> "It seems to me that further demonstrates that the Defendant regarded itself as contractually bound and hence supports the contention that the letter of the 20th June was not merely a counter offer."

The deposit

51. With regard to the issue of a deposit and variation to same the Court opines at p. 69: -

> "…while the parties may agree that a deposit was not an important or essential term, it became a material term simply by virtue of the emails of Mr. McWhinney of 6th June and 20th of June 2017. It is also thus described in paragraph 18 of the Statement of Claim. The evidence heard and considered does not lay bare all of the interaction between Promontoria and Capita. What can be said at least from the Plaintiffs' perspective and an objective reading of the emails of the 20th June is that Capita stated it had actual authority to communicate a deal that actually included a term requiring payment of a 10% deposit payable on exchange. In my view, the Plaintiffs cannot have it both ways. If, as I have found, the 10% deposit was part of the concluded contract, they cannot seek to negate that in reliance on Advice Note 134. As to the second point it is necessary to outline my relevant findings as to what occurred after 20th June, 2017."

52. The judgment considered email traffic between the parties and their agents including an email of the 5th July, 2017 from Mr. McWhinney to Mr. O'Mahony which the Court found:-

> "…demonstrates just how unimportant to Capita and the Defendant was the amount of deposit payable upon exchange."

He concluded, accepting the evidence of Mr. O'Mahony that the deposit "… was not an issue" (p. 71).

53. The Court having considered and reviewed the evidence and the email communications together with discovered documents concluded at p. 75: -

> "I make certain findings from this evidence. Firstly, the negotiation concluded with Mr. McWhinney confirming that the deposit point is now agreed and that is evident from the last email in this tranche from Mr. McWhinney dated 11th August, 2017, in which he says in the third paragraph:
>
> > 'With the deposit point now agreed, we await comments on the Loan Sale Deed…'"

Secondly, the judge noted: -

> "…it is very evident that the level of deposit was unimportant from Promontoria and Capita's perspective. Thirdly, the introduction of 'Without Prejudice', 'Subject to Contract' and 'Contract Denied' was not intended to relate to the contract terms which I found were concluded and binding on the 20th June, 2017 and it is, I believe, absurd to suggest otherwise. Fourthly, the new deposit had been agreed and the most that could be argued in terms of the effect of the 'Subject to Contract' was that €60,000 instead of €600,000 needed to be inserted in the document effecting the contract, which by this time was a settlement deed. This was merely a conveyancing step."

54. The Court proceeded to consider the email of the 18th August, 2017 headed "Subject to Contract/Contract Denied", from Ms. Brennan of A&L Goodbody. Analysing same the Court concludes at p. 76: -

> "It can be seen, therefore, that the new deposit of €60,000 had in fact been inserted in the draft settlement deed that accompanied this email and it is in Clause 1.1, which refers to a deposit of €60,000 and also by inference in the definition of 'settlement sum', which is now the €5,940,000. Also, it is expressly apparent from the requirement in Clause 2.1 that the deposit be paid as a condition precedent prior to the settlement date of the 31st August, 2017."

55. The Court continues at p. 77: -

> "I have already accepted as correct the proposition from Chitty that renegotiation of a term post contract does not affect the existence of the original contract, that is the general position. … So far as the renegotiation of the deposit is concerned, the correspondence and emails hold no hint that the parties regarded this renegotiation as undermining, let alone rescinding, the deal. I am satisfied that Mr. Mahony's unthinking inclusion of 'Without Prejudice, Subject to Contract and Contract Denied' in his email of the 11th August, cannot be construed as having any meaning. It certainly did not express any intention to rescind."

56. In that regard the Court relied on the decision of *Jodifern v Fitzgerald* [2000] 3 IR 321. At pp. 78-79 he observes: -

> "In my judgment, the email evidence that agreement was actually reached between Mr. O'Mahony and Capita, is subject only to the new deposit term being inserted into a formal implementing document, namely the settlement deed, that was the agreement."

He found that: -

> "In the present case, the insertion of 'Subject to Contract' by Ms. Kelly was not destructive …retrospectively of the agreement made on the 20th June, 2017."

At pp. 79-80 he concluded: -

> "I conclude on this issue firstly that variation of the deposit from €600,000 to €60,000 was agreed and binding on all parties subject only to its formal incorporation into the settlement deed. Secondly that 'Subject to Contract' used in the course of that renegotiation did not negate the agreement of the 20th June, 2017."

Change of structure

57. He then turned to the second ground namely the change of structure for completion, and in particular the contention of the appellant that same was so fundamental as to negate any earlier agreement if such had ever existed. He observed at p. 80: -

> "The test as to whether a variation is merely that or may destroy the whole contract, or give rise to a [rescission], would seem to depend on the intention of the parties to be derived from the evidence as a whole and the nature and extent of the variation."

He cited with approval McGovern J. in *Redfern Ltd v O'Mahony & Others* [2010] IEHC 253 and adopted the approach indicated in the latter judgment observing that: -

> "Under the Draft Loan Sale Deed, the Defendant agreed firstly to sell to the Plaintiffs the loan accounts. That is Clause 2.1. and these were the scheduled loan agreements and security documents, consisting of various charges, guarantees and also the 2014 settlement agreement. Secondly, the Defendant agreed to execute and deliver releases or transfers, being such releases or transfers as were necessary to release the loan assets to the Plaintiffs."

58. He considers and analyses the draft settlement deed and its recitals and terms including its operative terms. The learned judge observes at pp. 86-88: -

> "So the draft settlement differs in that instead of a transfer of the loans or loan assets, the Defendant applies and accepts €6 million in full and final settlement of the secured liabilities; and instead of releases or transfers of the loan assets, the Defendant in Clause 5 agrees to release the Plaintiffs from the facilities or liabilities and to release the charged asset and each registered charge and to release all guarantees.
>
> So far as releases are concerned, I find it difficult to discern any meaningful difference between the Loan Sale Deed and the Draft Settlement and Release. Certainly, from the Defendants' perspective, there is no material difference other than additional legal fees which the Plaintiffs agree to discharge. The change from Loan Sale Deed to payment of €6 million to settle the debt is a change of structure, but again it does not involve any meaningful change from the Defendant's perspective. The significance of a change in structure for implementing the deal needs to be viewed in the context of the core contractual terms. These were that in consideration of €6m Promontoria would relinquish all its interests in the loans and security such that the Plaintiffs would, so far as the Defendant was concerned, hold

the secured assets free from the debt after closing on or before 31st August 2017. These were the parties' original intentions. I am satisfied that it mattered not one whit to the Defendant whether this was achieved through a Loan Sale Deed and releases, or settlement of debt and releases. The correspondence leading to the variation does not evince any intention by the Plaintiffs or Defendant to rescind the original deal. I find that this change in structure was not fundamental or significant. It was purely a change in conveyancing mechanism better suited to achieving the mutually desired end, given the delay in registration of the Defendant as owner of the charges in the PRA. It was prompted by the Plaintiffs' solicitor and taken up and agreed by the Defendant's solicitors…"

In this regard the Court concludes: -

"For the same reasons given earlier in this judgment, in the context of variation of the deposit, the variation of implementation in the structure was actually agreed and the continued use of the 'Subject to Contract' label cannot negate this, or negate the existence of the contract that became legally binding on the 20th June, 2017." (p. 88)

Ready, willing and able

59. The judgment considered the third ground on which the appellant sought a direction, namely that the respondents had not been ready, able and willing to complete. The contention advanced was that it was incumbent on the respondents to show on the balance of probabilities that they were ready, able and willing to complete on the date of completion which was the 31st August, 2017. Reliance in particular had been placed by the appellant on the decision of *Jackson Veitch* [1858] Irish Jurist, New Series, 201. The trial judge observed at p. 90: -

"The decision is so different in detail and so lacking in reasoned judgment and so distant in time as to be of little assistance to the Court in this case."

In *Jackson v Veitch*, McVeigh J. referred to the case of *Cort v Ambergate Railway* (1851) 17 QB 127 in respect of which the trial judge observed: -

"On the facts, of course, that was a very different case and I am satisfied that the *ratio decidendi* was that the Plaintiff in that case was in breach of [a condition] in that he failed to come up with the cash. However, I do accept the general proposition that the Plaintiff in a specific performance suit must be ready, able and willing to complete and must generally plead this, and it is notable that it is pleaded in this case." (pp. 92-93)

60. He concluded: -

"I am satisfied on the evidence that the agreement and performance of it were on track in mid-August 2017. Around this time Mr. O'Mahony had secured Mr. Michael O'Flynn of O'Flynn Construction Co. as funder for €6m. In response to repeated requests from Capita for details of the funder, Mr. O'Mahony emailed a Mr. Peter

Jordan of Capita on the 21st August, 2017 as follows: -

> 'Diamond Developments has entered into an agreement with O'Flynn Construction Company, or a related company, OFC, for the purchase by OFC of certain assets and the provision by OFC of funds in respect of same.'

At this point the Plaintiffs were contract compliant. Out of the blue, at 11.30 a.m. on the 23rd August, 2017 Mr. O'Mahony received a call from Mr. McWhinney who informed him that: -

> 'The boss was in the Belfast Office that morning and he had made a decision that he was not proceeding with the deal.'

I am satisfied that these were the words used and this constituted a repudiation of the agreement concluded on the 20th June, 2017.

It was a wrongful repudiation because there was no good or justifiable reason for it and the Defendant has not gone into evidence to suggest otherwise. I will advert later to the reasons for repudiation emerging from discovered documentation, but none of these could justify the repudiation in law."

61. At p. 97 the judgment notes: -

> "I am satisfied that the Court is entitled to take into account all relevant circumstances when considering whether a purchaser is to be deprived of a right to specific performance in the face of a defence that, on the closing date, he was not able, ready and willing to complete."

In light of the evidence the Court observed: -

> "Non-completion was not the fault of the Plaintiffs in this case. They were, in my view through the involvement of Mr. O'Flynn and his companies, disposed and able to complete it. Common sense must be applied and the Court is entitled to take into account the nature of the transaction, the size of the consideration, and above all, in this case, the fact of wrongful repudiation."

He also observed at p. 99: -

> "There can be no hard and fast rule as to the evidence that may prove readiness and ability to fund a deal on closing. I am satisfied on the balance of probabilities that there was a strong oral agreement and commitment from Mr. O'Flynn and his company with Mr. O'Mahony to pay €6 million to fund the deal, payable through Diamond Developments Limited, and that Avenue were in place to fund some €5 million... I am satisfied that but for the wrongful repudiation, Mr. Berg's and A&L Goodbody's confirmation of that repudiation, that on and up to 30th August, funding would have been arranged and in place for closing on or before 31st August...."

62. The judgment continues: -

> "I would add that Promontoria's attempts to rely on this defence is wholly unmeritorious. It relies to a large extent on their own wrongdoing. Furthermore the discovered documentation reveals no concern whatsoever in relation to the Plaintiffs' ability to come up with the money." (pp. 99-100)

63. Having reviewed other completion issues raised by the appellant, including the identity of the SPV, the CGT Clearance and Family Home Protection Act Declaration, the Court concluded: -

> "I am quite satisfied that on the balance of probabilities, the Plaintiffs were disposed and ready to complete but for the repudiation and even thereafter, and that they will be in a position to complete."

Notice of Termination dated 7th September, 2017

64. The judgment then considered the notice of termination of the 2014 settlement agreement served by the appellant on the respondents on the 7th September, 2017 observing:-

> "The breach alleged in that notice is two-fold. Firstly, its refusal to consensually sell the assets and secondly, it seems to rely on the issue of these proceedings."

The Court rejects both propositions observing: -

> "As to the first, the agreement of 20th June, 2017 was fundamentally a variation of the 2014 settlement in the sense that if the agreement was completed, the 2014 settlement would be at an end. The effect of the 20th June agreement was to suspend the obligation of the Plaintiff to cooperate with sales by Promontoria to other parties pending completion. … Moreover there is no suggestion that prior to 20th June, the Plaintiffs were in breach of the 2014 settlement. On the contrary, I am satisfied that prior to that date Mr. Mahony's co-operation with NALM and subsequently the Defendant was exemplary and beyond reproach." (p. 103)

Exemplary damages

65. The trial judge then turns to the issue of exemplary damages noting that the appellant opposed the claim contending that: -

> "…exemplary damages are only appropriate in cases of tort or breach of constitutional rights and that, in any event the Court should have regard to the factual background, including the high level of …Mr. O'Mahony's indebtedness which …was in the order of €63 million."

66. The Court considered in some detail the decision of *Conway v INTO* [1991] 2 IR 305, particularly the dictum of Barron J. who had stated: -

> "Punitive or exemplary damages arising from the nature of the wrong which has been committed and/or the manner of its commission which are intended to mark

the Court's particular disapproval of the Defendant's conduct in all the circumstances of the case and its decision that it should publicly be seen to have punished the Defendant for such conduct by awarding such damages, quite apart from its obligation, where it may exist in the same case, to compensate the plaintiff for the damage which he or she has suffered. … In our law punitive and exemplary damages must be recognised as constituting the same element."

67. Having considered the jurisprudence and authorities at p. 110 the judge observes: -

> "It seems to me that it would be an artificial distinction to say on the one hand that the manner in which a defence of an action in tort or for breach of constitutional right is conducted in open court may lead to an award of exemplary damages, yet to say on the other hand this cannot arise in relation to an action for breach of contract, also defended in open court. There is the public element in both of them. There is also clear precedent for the award of exemplary damages in *Garvey* and I am persuaded by Judge McCracken's willingness to award exemplary damages in a breach of franchise case, a pure breach of contract case, had he been of the view that the breach was oppressive. I am persuaded that does open to the Court a jurisdiction to award exemplary damages in an appropriate case. The fact that a claim for such is not pleaded cannot bar this, and that is clear from the judgment of Chief Justice Finlay in *Conway* at page 320."

68. The judge proceeded to apply the principles thus identified in regard to exemplary damages to the facts, taking into account discovered documentation and at p. 114 of the judgment considers same, including Advisory Note 0244 of the 6th September, 2017, the day before the notice of termination was served, which he found to be "illuminating" continuing:-

> "In the section dealing with background information, the third bullet point reads:
>
> > 'The agreed DPO (debt pay off) has been abandoned as an off-market offer has been received which may allow PGD (Promontoria) to recover considerably more than the €6 million loan sale consideration.'
>
> Later on in that advisory note, there was a box 'Details, deal terms, terms of contracts' and in the first bullet point appears the following.
>
> > 'CMT (Capita) proposed for Promontoria to discharge ALG's invoices for aborted DPO and settlement agreements. These costs were originally for the borrower. However, this deal was abandoned due to an off-market offer for the subject properties, which was significantly in excess of the proposed €6m deal.'"

The judgment continues: -

> "[Counsel] cross-examined Mr. O'Mahony on the basis that this off market offer did not relate to any offer received by Promontoria and related, if anything, to their

belief that the Plaintiff had received offers. There is no evidence adduced before the Court that backs that up. I am driven to the conclusion on the evidence that Promontoria was motivated to abandon the deal because of a belief that it could realise significantly more than €6m. In other words, it was greedy for more profit and would not countenance the Plaintiffs taking that profit."

The Court also observed: -

"The swiftness with which the Defendant moved after 22nd August to instruct agents to sell the property is also marked in its ruthlessness."

The judgment goes on: -

"As to the conduct of the case, and this is not a personal criticism in any way of eminent Counsel who are obviously acting on instructions, it was a feature of the cross-examination of Mr. O'Mahony firstly that the evidence was put to him on numerous occasions on the basis that his evidence would be refuted by what a defence witness 'will' say. The clear impression given was that the defence witnesses would be called, and, of course, subjected to cross-examination. On Day 3 at the close of the Plaintiffs' evidence, I arranged for an early start the next day in order to start in an attempt to finish with the Defendant's witnesses on that day. There was no hint of a direction application, which came as a surprise at the start of Day 4."

69. The Court noted that on many occasions Counsel had put to Mr. O'Mahony that: -

"He had not been 'up front' with the Defendant and Capita and that he was not being 'up front' with the Court in his evidence. This was a polite way of attacking his credibility, his integrity, his honesty and his truthfulness under oath. For the Defendant not to call any witnesses to give evidence to back up these allegations was egregious misconduct of proceedings in all the circumstances."

70. The Court noted cross-examination of Mr. O'Mahony regarding an understanding ascribed to Promontoria/Capita: -

"They understood that you were flipping the properties for €10 million and playing them for fools."

The Court in this regard observed: -

"If the Defendants were to adopt such a righteous approach to the defence of these proceedings, they should have had the honesty and strength of character to go into evidence in open Court."

The Court noted: -

"I was struck by Mr. O'Mahony's evidence that he had no option but to pursue

these proceedings and that in order to fund them he had to cash in his pension and borrow from his wife and his brother. No financial loss from this was proved but it was a consequence of the Defendant's conduct. The oppressiveness of the Defendant in the period 22nd August to 7th September, 2017 and their conduct of the defence before me demonstrates a callousness and disregard for the Plaintiffs, and in particular Mr. O'Mahony, that justifies an award of exemplary damages and I propose to make one. However, I am mindful that the purpose of such an order is to mark the Court's displeasure. It is punitive. It is to express disapproval of the Defendant's conduct and it should not be excessive. While I might be of the view that a much greater award would be proportionate, I note the relatively small award of McWilliam J. in *Garvey* and Barron J. in *Conway*. I will award €20,000 exemplary damages to the First Named Plaintiff, Mr. O'Mahony." (p. 117)

The Court granted a decree of specific performance, awarded €20,000 exemplary damages to the first named respondent and dismissed the counter-claim against the second named respondent.

The Notice of Appeal

71. The appellant appealed the decision. The key grounds relied upon include:-

i. That the trial judge erred in the manner he dealt with the application for a direction including his application of the law and his drawing of inferences which, it was argued, displayed partiality.

ii. His error in finding that a specifically enforceable contract had come into existence between the parties arose, *inter alia*, from his erroneous treatment of the words "subject to contract" in correspondence between the parties and his construction of correspondence as giving rise to acceptance rather than constituting a counter offer which was never accepted by the respondents.

iii. The appellant contended that the deposit and its amount were material terms of the contract as was the structure intended to give effect to the transaction which the trial judge erroneously failed to characterise as such.

iv. It is argued that the respondents were unable to show that they were "ready, willing and able" to complete the transaction in late August 2017.

v. The appellant contends that its notice of termination the dated 7th September, 2017 was valid and that an award of €20,000 exemplary damages was made on an erroneous basis, the trial judge having erred in finding that the appellant was guilty of "egregious misconduct" and "oppressiveness" in its dealings with the respondents in relation to the alleged contract.

Submissions on behalf of the appellant

Adverse inferences

72. In written submissions and arguments, the appellant contends as follows; Firstly, in regard to *Hay v O'Grady* [1992] 1 IR 210, the appellant emphasises the limitations of the

principles in circumstances where at issue are the inferences drawn by the trial judge. In particular the excerpt from McCarthy J. in that judgment where he stated at p. 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 High Court to draw inferences of fact. ...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 on 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.
>
> [4.] A further issue arises as to the conclusion of law to be drawn from the combination of primary fact and a proper inference - in a case of this kind, was there negligence? ..."

73. The appellant cited the decision of Ryan P. in *Emerald Isle Assurances and Investments Limited v Dorgan & Ors* [2016] IECA 12, a case where the Court of Appeal was satisfied that it was entitled to review the basis on which the High Court judge had drawn inferences referred to in his judgment. Ryan P. concluded that the appellant had established that the conclusions reached by the trial judge were erroneous, observing at para. 47: -

> "The essential facts – all of the facts on which the decision as to the negligence of the second defendant falls to be made – are not in dispute and the question for this Court is whether the inferences and conclusions that were drawn by Kearns P. were correct. In my view, those inferences are reviewable by this Court and they are not correct."

74. The appellant contends that it was not open to the trial judge to draw adverse inferences from the fact that the appellant elected not to call witnesses notwithstanding the manner in which the respondents' witnesses had been cross-examined and the trial judge was not entitled to take a view that such conduct was "...something from which the court may draw one or more appropriate inferences." (p. 9 of judgment)

75. In the notice of appeal at 3.1.8 the appellant contends:-

> "The Judge drew an adverse inference that as a result of the cross examination of the First Named Respondent, which was on the basis that his evidence would be refuted by a defence witness, the impression was given that defence witnesses would be called and subjected to cross examination."

76. The appellant argued that a decision as to whether to call a witness or indeed whether a defendant would go into evidence is often only made as the case proceeds. Reliance was

placed on *Moorview v First Active* [2009] IEHC 214, where Clarke J. (as he then was) stated:-

> "It does not seem to me that the alteration in the Rules of Court applicable to the Commercial Court … could be taken to have altered the substantive law. The law is that a plaintiff is required to establish a *prima facie* case in respect of any issues arising on the pleadings on the basis of admissible evidence tendered on behalf of that plaintiff. …if the plaintiff fails to establish a *prima facie* case on such evidence, then a defendant is entitled to a non-suit and is not required itself to go into evidence…."

77. The appellant placed particular reliance on the decision of this Court in *O'Leary v HSE* where Ryan P. considered whether the manner of cross-examination could have denied the defendants the opportunity of applying for a non-suit. The appellant contends that the High Court had made an adverse inference that as a result of the cross-examination of Mr. O'Mahony on the basis that his testimony would be refuted by a defence witness, an impression was given that defence witnesses would be called and subjected to cross-examination. It was argued that the approach of the trial judge failed to recognise and uphold the decision of the Court of Appeal in *O'Leary*.

78. With regard to the entitlement of a trial judge to draw inferences from the fact that witnesses who might be called have not been called, it was contended that the trial judge erred in relying on the judgment in *Smart Mobile*, which was distinguishable on its facts. *Citing Fyffes plc v DCC plc* [2009] 2 IR 417 and *Flynn v NALM*, the appellant contended that it was a legitimate tactical decision to make within the adversarial process to proceed to cross-examine on such a basis and the High Court ought not to have made an adverse inference from the decision not to call the witnesses in question. The appellant further contends that the adverse inference drawn by the trial judge as a result of the cross-examination of Mr. O'Mahony in circumstances where the appellant's own witness was ultimately not called, displayed a partiality on the part of the trial judge.

Offer and Acceptance

79. The appellant contends that there was no specifically enforceable agreement concluded between the parties citing McDermott & McDermott, *Contract Law* (2nd edition, Bloomsbury Professional, 2017) at para. 2.7 that "…there must be a unqualified acceptance of the terms of the offer".

80. The appellant contended that the payment of a deposit and its amount was a material term of the agreement and that the email dated 22nd May, 2017 did not contain any reference to the payment of a deposit. That the trial judge erroneously had concluded that as a result of an email from Capita dated 6th June, 2017 a deposit of 10 percent on signing had been: -

> "superimposed on the offer formalised by Mr. O'Mahony in his email of 22nd May, 2017."

The appellant argues that the trial judge made a series of errors in the context of the deposit negotiations. It further contends that the email communication of the 20th June, 2017 constituted a counter offer and not acceptance of an offer: -

> "...it was clear from both the documentary and oral evidence that there was no clear and unequivocal acceptance of the terms of the counter offer. The email of 22 May was not accepted but rather different terms were proposed in the 20 June email."

"Ready willing and able to complete"

81. The appellant argued that a fundamental prerequisite to establish entitlement to a decree of specific performance was that a plaintiff demonstrate that he was ready, willing and able to complete on the operative date. The respondents had failed to establish same. In the instant case it is contended that the trial judge misunderstood the legal test which was that: -

> "...regardless of whether or not the Appellant wrongly repudiated the asserted agreement, nevertheless the Respondents were obliged to show that as of the identified and agreed completion date (31 August 2017), they were disposed to and able to complete." (para. 70 of written submissions)

Change of Structure

82. With regard to the change of structure laterally proposed for completion – whereby the second respondent would sell one of its properties to an SPV which would be owned or controlled by a third party – the appellant asserted that a number of critical elements were absent including: -

i. The SPV had not been identified, neither was there any evidence given of an actual agreement concluded by the primary funder, Avenue, to lend the purchase monies in question.

ii. No witness was called from Avenue and Mr. O Flynn, was unable to definitively identify from which company within O'Flynn Construction Group a sum of €1M, being part of the purchase money, would be sourced and no evidence was adduced that such funding was available to any such entity in August 2017.

Exemplary damages

83. Finally, with regard to exemplary damages, the appellant contended that an award of exemplary damages was not appropriate in the context of a simple breach of contract claim and if exemplary damages were appropriate in the context of a simple breach of contract claim, such an award was not justified in this case.

84. The appellant contended that in the neighbouring jurisdiction since the 1909 decision of the House of Lords in *Addis v Gramophone & Co. Limited* [1909] AC 488, such damages are unavailable in the United Kingdom. With regard to the test for exemplary damages, reliance was placed on the decision in *Conway v INTO*. The respondent had sought damages in the nature of exemplary damages in the High Court on the basis that the

appellant's conduct, particularly the conduct of the case, and in particular cross-examination, had been egregious under the third category of exemplary damages identified by Finlay C.J. in *Conway*:-

> "(c) conduct of the wrongdoer and/or his representatives in the defence of the claim of the wronged plaintiff, up to and including the trial of the action."

It was contended that the trial judge had not indicated whether he was confining himself to limb (c). It was contended that the expression of the view by the trial judge at p. 109 of the judgment that: -

> "The manner in which and the reason why the Defendant repudiated the deal in this case, so far as can be ascertained from the evidence, and discovered documents…"

was suggestive of limb (a) of the *Conway* test: -

"(a) The manner in which the wrong was committed, involving such elements as oppressiveness, arrogance or outrage..."

It was contended that neither limb had any application in the instant case.

85. The appellant argued that it is well established that the denial of liability is not an abuse of process and a defendant is entitled to put forward a robust defence without being in fear of the sword of punitive damages.

Submissions of the respondents

Adverse inferences

86. The respondents contend that the Court was entitled to draw adverse inferences from the fact that one party to proceedings did not call witnesses of fact: -

> "Particularly witnesses who are parties to relevant communications and who may be expected to be in a position to give relevant evidence."

It was argued that: -

> "The type of inferences that may be drawn is that the witness' evidence would be averse to the interests of the party in question. This is what is typically referred to as drawing 'adverse inferences.'"

The respondents contend that the alleged inference that "the impression was given that defence witnesses would be called" is neither an inference or adverse. It is instead a clear finding based on the judge's direct observation of the conduct of the case and is wholly supported by the evidence as well as being accepted by counsel for the appellant, who states at p. 46 of Day 4 of the transcript: "Judge, you can take it that I accept that such articulations were made during cross-examination… I am quite happy to make that concession".

87. The respondents contended "that the appellant has identified only one alleged 'adverse inference'" namely that as a result of the cross-examination of Mr. O'Mahony on the basis that his evidence would be refuted by a defence witness, an impression was given that the defence would call witnesses who would be subject to cross-examination.

88. In support of their contention that the trial judge engaged not in drawing an adverse inference but rather in making clear findings of fact based on evidence, reliance was placed on the Supreme Court decision in *Whelan v AIB* [2014] 2 IR 199 at para. 92 where O'Donnell J. had observed that "Each case… involves a consideration of the specific inference which the court is invited to draw."

89. It was contended that the trial judge exercised the discretion to draw adverse inferences correctly with appropriate caution in light of the relevant authorities *including Smart Mobile* and *Wisniewski*. The respondents contend that there is nothing in the judgment which amounts to an adverse inference drawn against the appellant. The respondents argue that the trial judge exercised very considerable caution in exercising his discretion to draw inferences and did not in fact draw a single adverse inference (as opposed to findings on the evidence) from the failure of the appellant to adduce evidence or from the absence of any particular witness, and no such inference has been or could be identified by the appellant.

90. It was contended that the principles in *Hay v O'Grady* are engaged and reliance was placed on the decision of the Supreme Court in *Leopardstown Club Limited v Templeville* [2017] IESC 50 where Denham C.J. stated that: -

> "… an appellate court should not interfere with a primary finding of fact by a trial court which has heard oral evidence, unless it is so clearly against the weight of the evidence as to be unjust."

Offer and acceptance

91. The respondents assert that weight should be attached to the defence as pleaded by the appellant including that the defence failed to plead that: -

(a) The email of the 20th June, 2017 (when read with the variations in August 2017) failed to record the material terms of the transaction or to reflect what was agreed between the parties.

(b) The appellant did not agree the material terms of the agreement.

(c) The requirement of a deposit was material, important or even necessary.

(d) The 20th June email was a counter offer, or intended to be such.

(e) There was no binding agreement because there was no express acceptance by the respondents in respect of a deposit.

(f) That the change in the proposed structure for completion of the transaction which occurred post the 20th June, 2017 was significant or material to the appellant.

(g) That the appellant did authorise its agents to negotiate after the 20th June, 2017 and to include the words "subject to contract" in its communications.

92. The respondents rely on *Supermacs Ireland Limited v Katesan (Naas) Limited* [2000] 4 IR 273 as authority for the proposition that there is scope for a contention that a deposit may not have been considered essential in any particular contract for the sale of land. Further, it was contended that if the appellant wished to argue that no agreement was formed on the 20th June 2017 because the issue of a deposit had not been agreed and it was at that time awaiting a response from the respondents to a counter offer, then it was incumbent on the appellant to adduce evidence in support of that contention direction as the trial judge found.

93. It was contended that there was no evidence of any alleged impact or relevance identified at the hearing as arising from the change of structure and there is no basis in law or fact for interfering with the findings of fact made by the trial judge in that regard.

94. With regard to the requirement to be "ready, willing and able" to complete it was argued that the trial judge made clear findings of fact that the respondents were so ready which were based on evidence adduced at the hearing and there was no basis for disturbing the said findings of the trial judge.

Exemplary damages

95. The respondents rely on the High Court decision in *Slattery v Friends First Life Assurance* [2013] IEHC 136 where the said judgment concluded: -

> "… that the Court is vested with a discretion to award compensatory damages, including aggravated damages, notwithstanding any failure to explicitly plead the latter category."

The respondents contend that exemplary damages were warranted on the basis of findings of the trial judge from evidence adduced at trial that:-

(a) It was implicit that the appellant withdrew from the deal without being aware as to whether or not there were binding Heads of Terms;

(b) On the basis of the discovered emails and documents the real reason that the appellant pulled out of the bargain was that it objected to the possibility, which they perceived, based on hearsay, that Mr. O'Mahony would profit, possibly up to €4M from a deal; and

(c) That the appellant was motivated to abandon the deal because of a belief that it could realise significantly more than €6M and was greedy for more profit and would not countenance the respondents taking that profit.

96. Based on such findings the High Court concluded that the oppressiveness of the appellant in the period from the 22nd August, 2017 to the 7th September, 2017 and their conduct

of the defence demonstrated a callousness and disregard for the respondents and in particular Mr. O'Mahony that justified an award of exemplary damages.

The cross-examination of Mr. O'Mahony

97. The respondents argued that the decision of the trial judge to award exemplary damages was part of a discretion uniquely held by a trial judge who presides over a trial and sees at first-hand how it is conducted and how a litigant or witness is treated during a trial. Accordingly, the award was based on the judge's observation of the evidence and his direct observation of the conduct of the proceedings. It was contended that the award of exemplary damages was validly made in the exercise of the Court's discretion and there was no basis for interfering with it.

Discussion and analysis

Hay v O'Grady

98. The approach that an appeal court ought to take in an appeal from a decision to grant a non-suit application bears analysis and the extent to which the principles articulated in *Hay v O'Grady* apply calls for consideration. The issue was the subject of consideration in the Supreme Court judgment of O'Donnell J. in *Schuit v Mylotte*, a case which concerned an application for a direction by several defendants. An argument advanced before the Supreme Court was on the authority of *Hanafin v Minister for the Environment* [1996] 2 IR 321 that a trial judge's decision on an application for a non-suit was one to which the principles in *Hay v O'Grady* applied, such that if there was evidence upon which the trial judge could come to the conclusion which he did, the decision should not be disturbed on appeal. O'Donnell J. rejected that contention stating: -

> "I cannot agree. *Hanafin* is a case which was very much *sui generis* and has never been treated as an authority of general application on the principles to be applied on an application for a non-suit in personal injuries litigation. That case concerned a petition to set aside the outcome of the constitutional referendum, and it is not easily compared to simple *inter partes* litigation…The test in *Hay v O'Grady* is derived from the fact that an appeal Court which does not hear the evidence must give considerable deference to a trial Court's assessment of the cogency and credibility of evidence given to it. This follows from the different functions of a trial court and appeal Court. As a result, the question for a Court on appeal is essentially a matter of logic: was there evidence whatever its apparent credibility or cogency, upon which the trial judge could come to the conclusion he or she did. The test in *Hetherington v Ultra Tyre Service* and *O'Toole v Heavey* provides in truth little scope for the application of the principle in *Hay v O'Grady* since it is rare that a Court will proceed to assess the credibility of witnesses at the end of the plaintiff's case. While I do not rule out the possibility that a Court could come to the conclusion that the plaintiff's evidence was so incredible that there was no plausible or viable case, in most cases the issue is simply a matter of logic: is there evidence, whatever its relative cogency or strength, upon which a Court could conclude that a defendant was liable. That exercise is very similar to that set out in *Hay v O'Grady*. It does not normally, and did not here, involve the type of assessment of the cogency or credibility which attracts the rule in *Hay v O'Grady*,

and accordingly the decision is fully reviewable on appeal."

99. I take that decision to mean that the principles in *Hay v O'Grady* do not automatically operate when considering an appeal from a decision to grant a non-suit. In each case it is a matter of the application of logic. However, such "rare" cases include those where the trial judge has carried out a comprehensive assessment of the cogency and credibility of the witnesses and they have been subjected to competent and effective cross-examination concerning all salient issues between the parties and the evidence, including documentary evidence. Where same have been thoroughly assessed and evaluated by the trial judge in the process of reaching his determination on the application before him, a process which requires the judge to be satisfied that the plaintiff has established as a matter of probability the facts necessary to support a verdict in his favour, an appeal court may well be less entitled to disregard the rule in *Hay v O'Grady* as not applicable or consider findings as to credibility of such witnesses reviewable on appeal.

100. This is one such "rare" case where the Court did proceed to assess with great care the credibility of witnesses at the end of the plaintiff's case.

Offer and acceptance

101. With regard to the principles governing the formation of a contract for the sale of an interest in land, it must comply with the general principles of the law of contract relating to the formation of a contract. Wylie and Woods in their text *Irish Conveyancing Law* (4th edn., 2019) state at para. 9.02 that the parties to the purported contract: -

> "… must have had an intention to create legal relations, and the terms of their agreement must be sufficiently certain that, if necessary, a Court will be able to see precisely what it is they have agreed. There must have been a proper offer and acceptance, and the agreement must be supported by consideration."

102. Woods and Wylie observe at para. 9.18: -

> "As Geoghegan J pointed out in Supermacs Ireland Limited v Katesan (Naas) *Limited* [2000] 4 I.R. 273 at 286:
>
> > 'Only the material terms need be included in a note or memorandum for it to be sufficient but all the terms, whether they be important or unimportant must be agreed before there can be said to be a concluded agreement.'"

The authors go on to observe: -

> "The absence of a discussion in relation to certain terms will not always prove fatal
>
> as the courts will frequently be willing to imply terms, for example, that the sale is to close within a reasonable time or that there is an obligation to give vacant possession."

In each case it is necessary to consider whether the written offer has been rejected e.g. by a counter offer.

103. In the instant case there was clear evidence to support the trial judge's findings that a binding contract came into existence between the parties for the reasons set out herein.

Subject to contract and the deposit

104. With regard to the use of the words "subject to contract" the use of such language in correspondence does not deprive it of all contractual force. As Woods and Wylie observe at para. 9.15: -

> "It may, for example, and depending on the context, amount to an offer or a rejection of an offer (together with a counter-offer). Similarly, where a concluded agreement has been reached and it is followed by correspondence headed 'Subject to Contract' which varies certain terms, this will not negate the existence of the contract."

105. Where the language "subject to contract" is used in circumstances which concern a non-material additional term of a contract, Buckley, Conroy and O'Neill in *Specific Performance in Ireland* (Bloomsbury, 2012) observe at para. 5.47: -

> "The time at which the phrase has been introduced may be a significant cause of controversy. A key question would be whether the proviso applied (expressly or implicitly) throughout the negotiations or whether it has been introduced *ex post facto* by the legal representatives after the parties consider themselves to have concluded an oral or written contract. The significance of the distinction is identified by Gibson J. in *Thompson v. The King* [1920] IR 365 at 386:
>
> > 'Where an offer and acceptance are made subject to a subsequent formal contract, if such contract is a condition or term which until performed keeps the agreement in suspense, the offer and acceptance have no contractual force. On the other hand, if all the terms are agreed on, and a formal contract is only contemplated as putting the terms in legal shape, the agreement is effectual before and irrespective of such formal contract. Where there is correspondence in the course of which it is alleged that a contract has been created the whole correspondence should be read; but if it appears that a final agreement was come to at any stage, subsequent attempts to introduce new and varied terms must be disregarded.'"

106. With regard to the deposit it is to be recalled that this was not a contract governed by the Incorporated Law Society of Ireland Conveyancing Contract Standard Form. As Hardiman J. observed in *Supermacs Ireland Limited v Katesan (Naas) Limited* at p. 280: -

> "There is no doubt that an agreement in relation to deposit is usual in concluded agreements for the sale of land. But the cases prior to *Boyle v Lee* [1992] 1 I.R. 555 demonstrate that it is not invariable… I believe that there is at least scope for contention that a deposit may not have been considered essential. It seems to me that the factual position will be a good deal clearer after discovery and more importantly, oral evidence …."

107. The provisions of the Land and Conveyancing Law Reform Act, 2009 and in particular section 51, can be seen as a recalibration of the position such that now a term as to the payment of a deposit and the amount of same is not to be deemed, in the absence of an express agreement to the contrary, to be a fundamental or material term of a contract for the sale of an interest in land.

108. The evidence in this case all points to the payment of some amount by way of deposit being an agreed term of this contract. Negotiations regarding the amount of the deposit did not undermine the existence of a binding agreement. In the instant case the parties ultimately agreed to a 1% non-refundable deposit. The email which confirmed same was marked "subject to contract" dated the 10th August, 2017 and sent by Mr. O'Mahony but by then as there was a concluded agreement between the parties identifying all the material terms, the use of the words "subject to contract" had no legal effect.

Change in structure

109. With regard to the significance of a change in structure the decision of *O'Connor v P. Elliott and Company Limited* [2010] IEHC 167 suggests that the mode of transfer of property is not necessarily, depending on the circumstances of the case, a matter that affects the enforceability of the contract. The analysis called for is an assessment as to whether the mode of giving effect to the transaction is of fundamental importance and a matter of substance or whether it of secondary importance, the primary objective being that there be an effective mechanism to achieve the agreement of the parties and that the other party to the transaction has raised no objection with regard to the mechanism proposed or a variation of same introducing a new mode of implementation of the transaction. For instance, a change in mechanism will frequently arise from tax advice relating to the mode of transfer. It is not however an issue that undermines the existence of a contract.

110. Whilst it is clear from the emails and communications that there was discussion as to the mode of transfer of the interest in question and whether there would be a loan purchase, change was precipitated primarily by reason of the non-registration of the appellant's interests over the subject properties in the Land Registry in accordance with the relevant legislation. I am satisfied that there was clear evidence before the trial judge which entitled him to find that the issue of the mode of transfer and the modalities for giving effect to same were not considered material at the time, and in particular in the months of June, July or August of 2017. It follows from the evidence and the discovery that changes in the mode of giving effect to the agreement did not affect the existence of the agreement.

111. A change in structure necessitated by a circumstance or factor not known to one or both parties at the time of the initial agreement is not generally capable of annulling a concluded agreement otherwise specifically enforceable, nor does it have the effect of rescinding the original agreement.

"Ready, willing and able to complete"

112. In the instant case we are not dealing with contractual completion notices in the context of condition 36 of the Law Society's Conditions of Sale 2019 Edition. The common law requirement was that at the point where a party seeks enforcement of the contract they must be either "ready, able and willing" to complete the sale or not so ready by reason of default or misconduct of the other party. The operative date accordingly on the facts of this case is on the date of the institution of the proceedings namely, the 25th August, 2017, some days prior to the agreed completion date of the 31st August, 2017. It was a question of fact for the trial judge to determine whether on the evidence before him the respondents were in a position to complete and pay the purchase monies in their entirety.

113. The Court had the evidence of three witnesses who, notwithstanding robust cross-examinations, each maintained their respective positions that completion was on track, a funding arrangement was in place and the monies would have been available but for the precipitative behaviour of the appellant on the 23rd August, 2017 making a phone call to the first respondent informing him that it was not proceeding with the deal. It is significant that on the 29th August, 2017 a date prior to the agreed completion date, the appellant moved to appoint a sales agent over the properties in question.

Application for a non-suit

114. The relationship between the parties was defined by significant mutual mistrust. Having re-considered the entirety of the cross-examination it is evident that in late August 2017 the appellant was convinced and harboured no doubt but that the first respondent was poised to effect a sale on of the properties for a substantial profit. The appellant harboured no doubt but that they had been misled and had entered into a bargain to dispose of an interest worth over €63,000,000 for less than a tenth of its value to a debtor who was about to profiteer at their expense. In that suspicion they were mistaken as the cross-examination demonstrated.

115. The principles governing an application for a non-suit is to be found in the Supreme Court decision *Hetherington v Ultra Tyre Service Limited and Ors* and the decision in *O'Toole v Heavey* [1993] 2 IR 544.

116. In *Hetherington* Finlay C.J. at pp. 541-542 stated: -

> "… it may be of assistance if I express a view with which I understand my colleagues to be in substantial agreement at present, on the position arising when applications for direction are made. If a defendant to an action being tried by a judge sitting without a jury applies for a direction on the basis that the evidence adduced by the plaintiff is not sufficient to establish a case against him, I think it is reasonable for a judge, if he sees fit, on a trial to inquire from that person as to whether he intends to stand on that application. If he indicates that he intends to give evidence in the event of the application failing, the judge may well properly defer the decision on the issue as to whether a case is being made out by the plaintiff until he has heard all the evidence."

McCarthy J. supported that analysis at p. 542 stating: -

"The party seeking the dismissal of an action should be put to his election as to whether or not he will call evidence."

117. In the subsequent *O'Toole* decision Finlay C. J. returned to the issue, elaborating what the Court considered to be the most appropriate and just procedure to be followed when such an application is made stating: -

"The position would appear to me to be as follows.

[1.] If an action is brought either in tort or contract against one defendant only, and if at the conclusion of the evidence for the plaintiff the defendant applies for a dismiss, then it seems appropriate that the trial judge should inquire from the defendant as to whether in the event of a refusal of that application the defendant would intend to go into evidence.

...

[3.] If upon applying for a non-suit at the conclusion of the plaintiff's case, in a case where one defendant only has been sued, it is indicated that the defendant does not intend, if the application is refused, to go into evidence, then, in effect, the learned trial judge is being asked to determine the following question, which is: having regard to his view of the evidence of the plaintiff, whether the plaintiff has (that being the only evidence before him) established as a matter of probability the facts necessary to support a verdict in his favour. Unless he is so satisfied, he must dismiss the action; if he is so satisfied it appears to me that he must give judgment for the plaintiff."

118. In the instant case the position adopted by the appellant at the close of the respondents' case was unequivocal. There was no intention to go into evidence either on the issue of liability or on the issue of damages.

119. The principles governing the correct approach of a trial judge on an application for a non-suit were considered by the Supreme Court in *O'Donovan v Southern Health Board* [2001] 3 IR 385 wherein Keane C.J. followed the test laid down in *O'Toole v Heavey* emphasising the obligation of the trial judge to take the plaintiff's case at its highest stating at p. 386:-

"If [the trial judge] had been informed by counsel that he would not be going into evidence then the trial judge would have applied the appropriate test which is whether the plaintiff had at that stage discharged the onus of proof and had satisfied him on the balance of probabilities that he was entitled to judgment."

He proceeded to contrast that with the approach to be adopted where counsel reserved the right on behalf of a litigant to go into evidence which did not arise in the instant case.

Whether the trial judge applied the correct principles in determining the non-suit application

120. The decision in *Schuit v Mylotte* involved a case, unlike the instant suit, where there were several defendants. At the time of seeking the non-suit the Court had been informed on

behalf of the second, third and fourth named defendants that if they were unsuccessful in their application for a non-suit it was their intention to go into evidence on the issues of liability as well as damages. Hence, in contrast with the facts in the instant case, in *Schuit* consideration of the plaintiff's claim and witnesses required the trial judge at the direction application to determine merely whether the plaintiff had made out a *prima facie* case and whether there was any evidence from which negligence might be inferred against the said defendants and to consider was there evidence, whatever its relative cogency or strength, upon which a court could conclude that they were liable.

Conduct of cross-examination and punitive damages

121. In a free society the maintenance of the rule of law depends on the right of an individual, whether confronted by criminal sanction or through the enforcement of civil obligation, to enjoy and exercise an opportunity to have their position presented vigorously by an independent profession. In our society the Independent Referral Bar discharges that vital function.

As Lord Pearce observed in *Rondel v Worsley* [1969] 1 AC 191, 274: -

> "It is easier, pleasant or more advantageous professionally for barristers to represent or defend those who are decent and reasonable and likely to succeed in their action or their defence, than those who are unpleasant, unreasonable, disreputable and have an apparently hopeless case. Yet it would be tragic if our legal system failed to provide reputable defenders, representatives or advocates for the latter."

122. McGrath in *Evidence* (2nd edn., 2014, Round Hall) at para. 3-139 considers the requirement to put matters to a witness on cross-examination stating: -

> "As a general rule, a party who intends to call evidence to contradict the testimony given by a witness on examination-in-chief is required to put that evidence to him during cross-examination so that he or she has an opportunity of providing an explanation in relation to that evidence. In *Browne v Dunn* (1893) 6 R. 67 Lord Herschell explained the rationale for this rule as follows –
>
> > '… it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that the imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do so if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. … I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give an opportunity to making any explanation which is open to him; and, it seems to me, that is not only a rule of professional practice in the

conduct of a case, but is essential to fair play and to fair dealing with witnesses.'"

123. McGrath further states at para. 3-141: -

> "This requirement to put matters to a witness applies not only to contradictory evidence but also where a party intends to impeach the credibility of a witness in closing argument and suggest that a witness is not to be believed in relation to a particular matter. In *Browne v Dunn*, Lord Halsbury stated:
>
> '…. nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and that opportunity often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.'" (pp. 76-77 of the judgment)

124. This is illustrative of the professional obligation incumbent on senior counsel to conduct the cross-examinations of the respondents' witnesses in accordance with his instructions. There is no suggestion that at any time he acted otherwise than in accordance with those instructions.

125. Two distinct aspects of the conduct of the appellant at the hearing were singled out by the trial judge in the judgment: -

i. The respondents' witnesses were cross-examined on the express and repeated basis that the appellant would go into evidence and contradict their testimony in a significant number of crucial respects.

ii. The Court was not disabused of that intention until on the morning of the fourth day of the hearing an application for a direction was made by senior counsel on the basis that the appellant did not intend to go into evidence.

Powers of a judge in regard to cross-examination

126. A judge may restrict cross-examination in the course of a hearing where he considers it to be unduly oppressive or improper. *Phipson On Evidence*, (19th edn., 2019) at para. 12-13 states: -

> "A judge may not allow a cross-examination on matters about which the witness could not fairly be expected to have any knowledge."

Constitutional protection of the right to cross-examine

127. McGrath (*op. cit.*) points out at para. 3-86: - "Cross-examination is considered to be of pivotal importance in the trial process."

The author also analyses the constitutional basis of the right to cross-examine at para. 3-88:

> "Given the importance of cross-examination to the trial process, it is unsurprising that the right to cross-examine is considered to be a fundamental procedural right in this jurisdiction, constitutionally guaranteed in both civil and criminal cases."

128. McGrath notes that in *Donnelly v Ireland* [1998] 1 IR 321 at p. 350 Hamilton C.J. described the right to cross-examine as an "essential ingredient in the concept of fair procedures". In the *Criminal Law (Jurisdiction) Bill, 1975* [1997] IR 129 at p. 154 O'Higgins C.J. observed: -

> "An opportunity to cross-examine on behalf of the accused any witness called against him is fundamental to a trial in due course of law and the taking of evidence for production at such trial without such an opportunity would be contrary to the Constitution."

In the context of civil cases the following excerpt of McGrath's text warrants consideration: -

> "The right to cross-examine also enjoys constitutional protection in civil cases by virtue of the guarantee of the personal rights of the citizen contained in Article 40.3.
>
> Delivering the judgment of the Supreme Court in *Re Haughey* [1971] I.R. 217, Ó Dálaigh C.J. stated that Art 40.3 'is a guarantee to the citizen of basic fairness of procedures' which required, *inter alia*, that the defendant in that case 'be allowed to cross-examine, by counsel, his accuser or accusers'.

In *Donnelly v Ireland* Hamilton CJ stated that: -

> 'The central concern of the requirements of due process and fair procedures is the same, that is to ensure the fairness of the trial of an accused person. This undoubtedly involves the rigorous testing by cross-examination of the evidence against him or her.'" (para. 3-89)

The limits of cross-examination

129. I can find no better exposition on the limits on cross-examination in the context of our constitutional position than that set out by McGrath in his text (*op. cit.*). The author states at para. 3-97 that: -

> "The central feature of cross-examination, which distinguishes it from examination-in-chief, is that the cross-examining party is permitted to ask leading questions. This enables the cross-examining party to engage in more intensive questioning of the witness and that cross-examination can be 'hard, detailed, challenging and bruising' (*People (DPP) v D.O.* [2006] IESC 12, (*per* Hardiman J)). A cross-examiner is also permitted to put questions based on information that is inadmissible or that he or she is unable to prove except through cross-examination and to 'pursue any hypothesis that is honestly advanced on the strength of reasonable inference, experience or intuition'…"

130. Hardiman J. in *People (DPP) v D.O*. observed at paras. 38-39: -

> "...it is important to record that this court has on a number of occasions emphasised the central and indispensable position in our system of justice held by what Henchy J. called the 'truth eliciting' process of cross-examination. It is necessarily only to mention: *Kiely v. The Minister for Social Welfare* [1967] I.R. 267; *Re Haughey* [1971] I.R. 217; *Maguire v. Ardagh* [2002] 1 I.R. 385; *O'Callaghan v. Mahon* (Supreme Court, unreported, 9th March, 2005).
>
> In proceedings such as the present where everything that makes life worth living may be at stake, it is to be expected that cross-examination on both sides will be hard, detailed, challenging and bruising. It is equally clear that much discretion must be left to the cross-examiner, for reasons indicted in my judgment in *Maguire v. Ardagh*. No topic can be taboo so long as it passes the criterion of having some proper use in the cross-examiner's task."

131. McGrath further observes at para. 3-97: -

> "However, it is important to note that there are limits to the form, content and length of questioning that is permissible on cross-examination. In particular, cross-examination by counsel is expected to be conducted with restraint and appropriate courtesy in consideration for the witness and he or she cannot put questions based on a factual premise that he or she knows to be false or is reckless as to whether it is false. A cross-examiner should also avoid comment in the course of cross-examination and refrain from unnecessary and personalised attacks on expert witnesses."

132. The author continues at para. 3-100: -

> "However, given the importance and constitutional basis of the right to cross-examine, the discretion of trial judges to disallow questions or otherwise curtail cross-examination is somewhat circumscribed and a trial judge should not rule out a line of questioning unless it is clearly irrelevant or otherwise objectionable."

133. The Supreme Court in *O'Callaghan v Mahon* [2006] 2 IR 32 acknowledged that the right to cross-examination is required by the constitutional guarantee of fair procedures. Geoghegan J. delivering the majority judgment of the Supreme Court held that it was "absolutely essential" that the tribunal should disclose documents that were necessary for the effective cross-examination of a witness who in evidence before the tribunal had made serious allegations of which the applicant had no prior notice or knowledge.

The position in Ireland regarding punitive damages

Exemplary damages are not generally available for breach of contract per se.

134. The purpose of exemplary damages is punitive. It is to punish the wrongdoer and deter such wrongdoing. Hence, it is a prerequisite that there be a finding of wrongdoing. The purpose or rationale in respect of which punitive damages of €20,000 were awarded in the instant case identified in the judgment include, *inter alia*, that the appellant was guilty

of egregious misconduct; "For the Defendant not to call any witnesses to give evidence to back up these allegations was egregious misconduct of proceedings..." and "…oppressiveness … in the period 22nd August to 7th September 2017 and their conduct of the defence before me demonstrates a callousness and disregard for the Plaintiffs, and in particular Mr. O'Mahony, that justifies an award of exemplary damages".

135. The decision of McWilliams J. in *Garvey v Ireland* awarding exemplary damages arising from oppressive, arbitrary or unconstitutional conduct including breach of contract by the government is wholly distinguishable. As is self-evident from its title, the suit was brought in the public law sphere and concerned misconduct by the government in the discharge of its powers.

136. Having considered the cross-examination in its totality it is clear that it was robust. However, it was no more vigorous or comprehensive than might be expected from an eminent member of the Independent Referral Bar. There is no suggestion that it was conducted otherwise than in accordance with counsel's instructions as they stood at that time. A trial is dynamic in nature and the tectonic plates frequently shift beneath the feet of the most self-assured litigant. At the conclusion of the cross-examination the appellant had a great deal to reflect upon.

137. It is evident that instructions changed overnight after the appellant and its witnesses had the opportunity to reflect on the reality that cross-examination had failed to elicit evidence to support the strongly held convictions which had underpinned its conduct. There was no evidence before the High Court that the appellant had formed an intention *ab initio* not to go into evidence. That is a significant consideration.

Punitive damages for breach of contract

138. The academic Solène Rowan in her article "Reflections on the Introduction of Punitive Damages for Breach of Contract" (Oxford Journal of Legal Studies, Volume 30, Issue 3, Autumn 2010) observed: -

> "It is generally accepted that the essence of punitive damages is deterrence and punishment…*Rookes v Barnard* [1964] AC 1129 (HL) 1221(Lord Devlin) …
>
> Other aims of punitive damages include the vindication of the victim's rights (*A v Bottrill* [2002] UKPC 44, [2003] 1 AC 449 [29] (Lord Nicholls)) and marking a legal system's disapproval of the conduct of the wrongdoer (*Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29, [2002] 2 AC 122 (Lord Nicholls))…"

139. Punitive damages are not in general available for breach of contract in this jurisdiction. This proposition originated with *Addis v Gramophone Co. Limited* which has been followed by the Supreme Court. As was observed by Denham C.J. in *Murray v Budds and Others* [2017] IESC 4 at para. 34: -

> "It was established in *Addis v Gramophone Co. Ltd* [1909] AC 488, that Courts would not in general permit damages for worry or upset as a consequence of a breach of contract."

She cited Lord Loreburn L.C. in *Addis* who stated: -

> "To my mind it signifies nothing in the present case whether the claim is to be treated as for wrongful dismissal or not. In any case there was a breach of contract in not allowing the plaintiff to discharge his duties as manager, and the damages are exactly the same in either view. …. I cannot agree that the manner of dismissal affects these damages. Such considerations have never been allowed to influence damages in this kind of case."

140. The Supreme Court also noted that Lord Atkinson in *Addis* had stated: -

> "I have always understood that damages for breach of contract were in the nature of compensation, not punishment…"

Denham C.J. in *Murray v Budds* noted that the House of Lords had relied on *Sikes v Wild* (1861) 1 G. & S. 587 at p. 594 where Lord Blackburn said: -

> "I do not see how the existence of misconduct can alter the rule of law by which damages for breach of contract are to be assessed. It may render the contract voidable on the ground of fraud or give a cause of action for deceit, but surely it cannot alter the effect of the contract itself."

The Court continued: -

> "…if he should choose to seek redress in the form of an action for breach of contract, he lets in all the consequences of that form of action; *Thorpe v Thorpe*, (1832) 3 B. & Ad. 580. One of these consequences is, I think, this: that he is to be paid adequate compensation in money for the loss of that which he would have received had his contract been kept, and no more."

141. The Supreme Court in *Murray v Budds* noted the analysis found in McDermott "*Contract Law*" (Butterworths, 2001) and Denham C.J. observed at para. 38: -

> "The law was further described in *Watts v Morrow* [1991] 1 WLR 1421 by Bingham L.J.: -
>
> > 'A contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure or vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not, I think, founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy. But the rule is not absolute. Where the very object of a contract is to provide pleasure, relaxation, peace of mind, or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead.'"

Denham C.J. stated: -

"I agree with that statement of Bingham L.J."

This represents the considered view of the Supreme Court and has been followed by this Court in *Hemani v Ulster Bank* [2019] IECA 331.

142. In the second edition of *Contract Law*, McDermott & McDermott explain the rationale for the exclusionary rule in regard to punitive damages for breach of contract at para. 23-76 as follows: -

> "Many factors explain the courts' restrictive approach to non-pecuniary losses. The *Addis* decision reflects the individualist orientation of traditional law under which contracts are impersonal relationships, concerned primarily with economic exchange, and do not typically involve other elements of the parties' personalities."

143. The authors go on to analyse *Baltic Shipping v Dillon* [1993] 176 CLR 344 where Mason C.J. observed that: -

> "The conceptual policy foundations of the general rule are by no means clear. It seems to rest on the view that damages for a breach of contract are in essence compensatory and that they are confined to the award of that sum of money which will put the injured party in the financial position the party would have been had the breach of contract not taken place."

144. The authors observe: -

> "A breach of a commercial contract is not generally viewed as a personal or a moral wrong, it is simply an event that gives rise to a liability to pay compensatory damages…
>
> In a contract case the only link between the parties is the private link that they have created by the terms of their contract and the innocent plaintiff 'is not entitled to be made whole; he is entitled to have that which the contract provided for him or compensation for its loss."

145. McDermott & McDermott continue at para. 23.137: -

> "The traditional rule is that there is no scope for an award of damages designed to punish a party who deliberately breaches a contract. However, if a cause of action arises in both contract and tort, exemplary damages may be awarded by placing stress on the tortious aspect of the defendant's conduct."

The authors reference the Canadian decision of V*orvis v Insurance Corp of British Columbia* [1989] 1 SCR 1085 at 1107.

146. It is noteworthy in the landmark House of Lords decision of *A.G. v Blake* [2001] 1 AC 268, Lord Nicholls considered that the deliberateness and cynicism of a breach were, without more, insufficient to warrant a departure from the normal compensatory basis of

damages. It made no difference that the breach enabled the promisor to enter into a more profitable contract elsewhere. (p. 286)

147. In a later decision *Experience Hendrix LLC v PPX Enterprises Inc.* Gibson L.J. [2003] EWCA Civ 323, having considered the deliberate nature of the breach of contract in making a gain-based award, considered that: -

> "No doubt deliberate breaches of contract occur frequently in the commercial world; yet something more is needed to make the circumstances exceptional enough to justify ordering an account of profits."

No claim under Lord Cairns' Act

148. Punitive damages indicate the seriousness of the behaviour of the defaulting party and mark the disapproval by the Court of his conduct. In the instant case no claim was made for damages either pursuant to the Chancery Amendment Act of 1858 (Lord Cairns' Act) or in addition to specific performance. Further, since the coming into operation of the Supreme Court of Judicature (Ireland) Act, 1877 the jurisdiction to award damages where specific performance has been claimed does not depend on there having been any right to specific performance in the first place. Legal certainty is particularly desirable in the field of commerce and trade. If punitive damages are to be generally available for breach of contract there should be clarity and certainty around their introduction. Proponents of the extension of punitive damages to breach of contract suggest that if introduced such awards should be confined to breaches that are 'particularly extreme' or 'outrageous'.

149. The observations of *Lord Nicholls in Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122 at para. 68, made in the context of awarding punitive damages in tort, are worthy of note where he observed that: -

> "…the 'essence' of the conduct constituting the court's discretionary jurisdiction to award exemplary damages is conduct which [is] an outrageous disregard of the plaintiff's rights".

To punish and deter

150. Rowan in her article further observed: -

> "Only in exceptional cases, in particular where the breach is very serious, would the further deterrent effect of punitive damages be propitious. It would in this way be rare and supplementary in nature. Reserving punitive damages for situations in which other remedies are inadequate would achieve symmetry with the operation of the remedy in the law of tort, and also with gain-based relief for breach of contract. In respect of the former, punitive damages are only awarded if compensatory damages are inadequate to punish and deter."

151. It is not the function of the courts to engage in indirect regulation of commercial behaviour through the imposition of punitive damages. As was observed in *A.B. Corporation v C.D. Co.* (the "*Sine Nomine*") [2002] 1 Lloyds Reports 805: -

> "The commercial law in this country should not make moral judgments or seek to punish contract-breakers."

152. I am satisfied that the line of authorities relied upon including *Garvey v Ireland* – which concerned the arbitrary and unconstitutional conduct on the part of the government or on its behalf – are wholly distinguishable from the instant case. The relationship between the parties exclusively sounds in contract and the alleged breaches of a private contract between the parties constituted the subject matter of the litigation. No basis has been established which would warrant an award of exemplary damages calculated to punish the appellant for its failure to perform the contract in question or the mode or tenor of its conduct of the litigation before the Court.

153. Whilst damages are available in both contract and tort, there are significant distinctions in the purposes for which they are awarded and the manner in which they are calculated. In this jurisdiction, the divergence between contract and tort is discernible from their respective remedial frameworks. Historically, save in exceptional circumstances as acknowledged by the Supreme Court in *Murray v Budds*, punitive damages could only arise where the case is such an exceptional, egregious one that manifestly calls for such an award.

154. "Greed" is an emotive word and in commerce a subjective and dangerously imprecise metric. It is for the legislature alone to set boundaries in the field of private contract law in a democratic society.

155. The jurisdiction of the Court to grant exemplary damages was described by Finlay C.J. in *Conway v INTO* at p. 317:-

> "Punitive or exemplary damages arising from the nature of the wrong which has been committed and/or the manner of its commission which are …. that it should publicly be seen to have punished the defendant for some conduct by awarding such damages, quite apart from its obligation, where it may exist, in the same case, to compensate the plaintiff for the damage which he or she has suffered."

Conway is a decision in respect of exemplary damages awarded for tort and breach of constitutional rights and I am satisfied it offers no legal basis for an award of punitive damages for either breach of contract between private parties or the improper conduct of cross-examination.

156. The decision in *Garvey v Ireland* is not of assistance to the respondents either and does not offer a legal basis for an award of punitive damages against the appellant designed to punish it for deliberately breaching the contract. The legal basis for the award in *Garvey* was the arbitrary and unconstitutional conduct on the part of the State. The decision in *Garvey* is wholly distinguishable insofar as a party to the contract was the State and therefore it could not be characterised as a private bargain of a commercial nature between private individuals.

157. Our law does not admit of a punitive damages award for breach of contract *simpliciter* and in the absence of fraud, deceit, concomitant tortious wrongdoing, or breach by a public or State authority of its contractual, statutory or constitutionally mandated obligations. Insofar as the award of punitive damages is referable to breaches of contract, it must be set aside.

Punitive damages for the manner in which the cross-examinations and defence were conducted in court

158. McDermott & McDermott note at para. 23.141: -

> "*In Royal Bank of Canada v W. Got and Associates Electric Limited* the Supreme Court of Canada has allowed exemplary damages for a breach of contract independent of any finding that a tort was also committed."

However, a close analysis of the judgment of the Canadian Supreme Court in *Got* indicates several significant material distinctions between the operative facts and those arising in the instant case. In *Got* the trial judge had found the bank liable in both contract and tort.

159. A crucial finding by the trial judge in *Got* was that the bank had at an early stage misled the Master in obtaining the receivership order by tendering a misleading affidavit. The affidavit in question was found to have failed to meet the duty of candour and utmost good faith required for an *ex parte* order. The Court was satisfied that absent the "false air of urgency created in the affidavit, the receivership order would not have been granted". The trial judge had found the bank liable in tort for conversion of Got's assets and awarded compensatory damages together with exemplary damages to send a clear message of the impropriety of the bank's grave and irrevocable conduct and misuse of the judicial system in misleading the judge in obtaining the receiver.

160. The Canadian Supreme Court on appeal noted at para. 27: -

> "We agree that the bank's conduct did not have to rise to the level of fraud, malicious prosecution or abuse of process to justify an award of exemplary damages."

The Supreme Court concluded at para. 29: -

> "…despite our reservations, we agree that it was within the discretion of the trial judge to award exemplary damages. Viewing the trial judge's concerns cumulatively and giving due weight to the advantage he had to assess the need for deterrence and condemnation of the abuse of the Court's process, as well as the need to maintain proper business practices, we are not prepared to interfere with the award for exemplary damages in this case. We emphasize, however, that an award for exemplary damages in commercial disputes will remain an extraordinary remedy."

161. In the instant case, having reviewed the cross-examination by the appellant's senior counsel of the respondents' witnesses at the trial and the ensuing events following

conclusion of the cross-examination when the following day the Court was informed that a decision had been made to apply for a direction on the basis that the appellant did not intend to go into evidence, the following can be said: -

i. The cross-examination was thorough, comprehensive, intense, but at all times professional.

ii. On no basis could it be suggested that it could have been characterised as an outrageous disregard of the respondents' rights or operating to assist an abuse of its processes by the Court or to violate the rule of law.

iii. At no time did the cross-examination go beyond the appropriate exercise by the appellant of its constitutional right of access to the Court.

iv. If the witnesses were put to the "pin of their collar" and their version of events stress tested with formidable intensity, that is no more than a valid and appropriate exercise of the constitutional rights of the appellant pursuant to Article 40.3 to be afforded every opportunity to defend itself and to avail of the Independent Referral Bar for the purposes of the vindication of its rights by the cross-examination of witnesses. It was at all times open to the respondents to raise objection to any line of questioning and of course the trial judge maintained and exercised the general supervisory jurisdiction in relation to the conduct of the cross-examination.

v. The cross-examination never exceeded at any time the bounds of fairness or professionalism and was throughout a proper use in the cross-examiner's task.

vi. There was nothing in its conduct which called for an award of punitive damages to "punish and deter".

vii. The introduction of a right to punitive damages arising from the conduct of a cross-examination would have a chilling impact on advocacy and would undermine the core functions of the Independent Referral Bar and thereby risk undermining the constitutionally protected right to have the other side's witnesses cross-examined. This would be contrary to the public interest.

viii. Exceptions could arise in extreme cases where the threshold identified by Hardiman J. in *People (DPP) v D.O.* [2006] IESC 12 is met, such as where the liberty of an individual is jeopardised by the improper use of cross-examination.

The award of punitive damages arising from the cross-examination and the conduct of the defence in court must be set aside as trenching on the constitutional rights of the appellant.

Entitlement to draw adverse inferences from failure to call witnesses

162. What was the effect of the appellant failing to call witnesses who would have relevant knowledge of the facts in dispute and who could be expected to be available to a party to give evidence in support of his case? In my view, in the absence of a credible explanation

for an appellant's failure to call material and available witnesses, the trial judge, in light of the tenor of the cross-examination, was entitled to draw the inference that the witnesses in question did not come to court because ultimately, after having heard and considered the evidence of the respondents' witnesses, they felt unable to support on oath the case being put forward by the appellant.

163. In the decision of *Wisniewski* Brooke L.J. (with whom Aldous and Roch LJJ agreed) reviewed the English authorities and set out the following relevant principles:

> "(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

164. As O'Donnell J. observed in the Supreme Court in *Whelan v AIB* at p. 246: -

> "....The drawing of an inference in this context, as indeed in any other, is an exercise in logic: when one party asserts a given set of affairs, which the identified witnesses available to the other party could be expected to rebut if untrue, then, if the second party does not call those witnesses to give evidence, the court may draw the inference in support of the case made by the first party, that those witnesses were not called to give such evidence because they would not in fact rebut the case made by the first party. Each case therefore, involves a consideration of the specific inference which the court is invited to draw. The position is well put in two authorities relied on by the bank in this regard. In *McQueen v. Great Western Railway Company* (1874 - 75) L.R. 10 Q.B. 569 Cockburn L.J. said at p. 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 has been established, the omission to call witnesses who might have been called on the part of the defendants amounts to nothing.'"

165. O'Donnell J. noted with approval the principles in *Wisniewski* which had been adopted in this jurisdiction by Laffoy J. in *Fyffes v DCC and Ors* where the plaintiff alleged that the defendant had engaged in insider dealing in its shares. It submitted that the Court should draw adverse inferences from the failure of the defendants to call two key witnesses.

Laffoy J. cautioned against an overbroad application of the *Wisniewski* principles observing:-

> "As a general proposition, the fact that every witness who may have material evidence on a particular issue was not called, cannot, in my view, give rise to an adverse inference against the party who might have been expected to call all of the witnesses."

Laffoy J. emphasised the fact that the burden of proof rested on the plaintiff and advocated for a restrictive approach to drawing adverse inferences from a failure to call witnesses.

166. In civil proceedings the Court may draw adverse inferences from a party's decision not to give or call evidence as to matters within the knowledge of the party or of witnesses who, it is reasonable to conclude, would have given evidence if asked to do so. Whether or not in any particular instance it is appropriate to draw an adverse inference from the absence of a witness and, if so, the weight to be attached to such inference will always depend on the particular circumstances of the issue to which the evidence would go.

167. In *Murray v DPP [1994]* 1 WLR 1 Lord Mustill observed at p. 5:

> "Everything depends on the nature of the issue, the weight of the evidence adduced by the prosecution upon it … and the extent to which the defendant should in the nature of things be able to give his own account of the particular matter in question. It is impossible to generalise, for dependent upon circumstances the failure of the defendant to give evidence may found no inference at all, or one which is for all practical purposes fatal".

Such an approach is in my view equally applicable in civil proceedings.

168. Lord Lowry in *R v Inland Revenue Comrs, Ex p Coombs (TC) & Co* [1991] 2 AC 283 said at p. 300:

> "…In our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party

could be expected to give evidence. Thus, depending on the circumstances, a *prima facie* case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party, may be either reduced or nullified…"

In the instant case the tenor of the cross-examination leads to one conclusion – that the trial judge was entitled to draw an adverse inference from the appellant's failure to give evidence. The weight to be attached to a appellant's failure to testify varies with the circumstances of the case. It is plain that in this case the trial judge rightly attached a great deal of weight to the silence of the appellant's witnesses. There was an irresistible inference from their failure to testify that they had no satisfactory answer to the respondents' claim. The trial judge was entitled to draw such an inference.

169. However, this must be viewed in light of the constitutional protection accorded to an advocate and the central importance of cross-examination and that it be untrammelled save to the extent that the Court directly intervenes and in the absence of fraud or dishonesty on the part of a practitioner or his client. These are matters which do not arise in the instant case. The fact that a direction was sought by the appellant, notwithstanding the basis on which the respondents' witnesses had been cross-examined, in circumstances where a decision had ultimately been made not to call witnesses, was not a matter such as would warrant a punishment of the appellant by an award of punitive damages.

170. the facts in *Smart Mobile*, a case in the public law domain, are distinguishable in many substantial material respects. Documents discovered demonstrated that Smart Mobile was engaged in conduct calculated to give a false impression that it was ready to proceed with the transaction in circumstances where it manifestly was not. The Court had noted that Smart Mobile had procured an interlocutory injunction from the High Court and at p. 82 observed: -

> "Right up to the opening of the trial, Smart continued to assert its entitlements to have the contract allegedly made between it and ComReg specifically performed. This was the primary relief sought. It was asserted in pleadings, at the hearing on the 13th March and in the pre-trial written submissions. It was abandoned during counsel's opening of the case."

171. Kelly J. noted that averments contained in an affidavit sworn by a witness on behalf of Smart were not true "Although apologies were proffered in respect of this at trial it is difficult to see how such an averment could have come to be made by the deponent."

172. A significant distinguishing factor is that in *Smart Mobile* ultimately at the trial the plaintiffs relied on public law entitlements alone rather than on private contractual rights. Two significant witness statements had been tendered on behalf of Smart, one by a chartered accountant and director of an international firm of accountants and business advisors, the other by an expert on the role of performance guarantees and the licencing

process. Both had purported to support the contention that the draft guarantees being relied upon by Smart were adequate and ought to have been accepted by ComReg. However, neither witness was called to give evidence and the Court was asked: -

> "…to infer from Smart's failure to call any of these witnesses that they had no evidence which might help Smart's case and indeed that Smart was not in a position to support the assertions, both made in the pleadings and the draft statements of evidence."

The Court in *Smart Mobile* had to address the unsatisfactory conduct of Smart, firstly towards the Regulator, a statutory body and secondly towards the Court before which an interlocutory injunction had been improperly obtained. In regard to the latter he observed: -

> "I deprecate the obtaining of an *ex parte* interim injunction on the basis of sworn material which, in one important respect, was simply untrue. … Whilst an apology was tendered for this during the trial that does not remedy the position."

173. In the instant case, by contrast, the inferences to be drawn sprang primarily from the decision not to call witnesses despite the manner in which the respondents' witnesses had been cross-examined. The decisions in *Fyffes, Wisniewiski* and *Smart Mobile* are distinguishable and ought in general to be confined to cases of witnesses who provide statements or swear affidavits in regard to matters of central importance that are later at trial shown by testimony to be inaccurate, baseless or untrue and notwithstanding the provision of such statements or affidavits at earlier stages in the litigation are not called without any or any adequate explanation to testify.

The principle in O'Leary v HSE

174. I am satisfied that the High Court correctly identified and applied the legal principles relevant to the non-suit application on behalf of the appellant and cited a series of authorities including *O'Toole v Heavy*, *Hetherington v Ultra Tyre Service Limited*, *O'Donovan v Southern Health Board*, *Schuit v Mylotte*, *Moorview Developments Limited*, *Murphy v Callanan* [2013] IESC 30 and *O'Leary v HSE*. I am satisfied that the trial judge applied the correct test in determining the application for a direction and same is not open to reproach.

Partiality

175. With regard to the alleged display of partiality I am satisfied that the observations of the trial judge do not amount to evidence of a display of partiality or lack of impartiality.

176. The approach of the trial judge was measured, and he correctly observed that manner of the drawing of inferences from the decision of a defendant not to call witnesses: -

> "The Court may draw inferences, inter alia from the fact that witnesses who might be called are not called, but the Court should do so cautiously."

The misapplication of the test outlined in *Smart Mobile* and the jurisprudence is not evidence of lack of impartiality. It will be recalled that in *O'Leary* it had been argued that it was fundamentally unfair to cross-examine on the basis that a defendant's own expert witnesses would give different evidence and then proceed not to call the said witnesses. It had been contended in the Court of Appeal that this was a breach of common law fair trial procedures. Ryan P. observed: -

> "There is no basis for the contention by the appellant that the defendants' conduct of the case – and, in particular, the manner in which they cross-examined his two expert witnesses – committed them to leading their own evidence and precluded the High Court from determining the applications until they did so. Nor is there any basis for the contention that the procedure was unjust or inequitable or that it entailed a breach of fair trial procedure, Article 40.3 of the Constitution and/or Article 6.1 of the European Convention on Human Rights."

177. Of assistance too is the analysis by the President of this Court as to whether cross-examination on the basis that an expert will contradict the witnesses' evidence could deny a defendant the opportunity of applying for a non-suit without calling the said witness. At para. 55 the learned President stated: -

> "… There is no logical basis on which this could be the case, but the question is whether there is some rule of practice or procedure that might apply in favour of the plaintiff in the circumstances. I am specifically concerned with the issue of cross-examination. Counsel for each of the defendant parties put to the plaintiff's two experts certain statements that their witnesses were going to make or that were contained in reports from their expert witnesses whereby to contradict the experts giving their evidence. This did not constitute going into evidence and neither is there some other rule that would prevent the parties applying for a direction. Indeed, it would have been remiss of Counsel not to put their case to the expert witnesses. But by doing so, they were not advancing down a path that stopped them making the case at the end of the plaintiff's evidence that they did not have a case to meet. It would be a rule that was unjust and unfair and would also make no sense if such were the case. There is no such rule. The point is that Counsel is required to put the case for the defence to the witnesses for the plaintiff so that the latter have the opportunity of commenting on the evidence…"

The learned President continued: -

> "… the nature of litigation is that one party presents and the other party defends, and if the claimant does not succeed in making out a *prima facie* case, then the other party is entitled, as of right, to have the action dismissed. To do otherwise is to impose on a defendant an obligation to prove a negative, that the defendant is obliged, in the case of a claim made against him or her, to positively demonstrate by evidence that he or she was not to blame in the circumstances. There is no such obligation."

At para. 77 Ryan P. observed: -

> "A party is not precluded from applying for a non-suit because his counsel has cross-examined the opponent's witnesses…"

178. The award of exemplary damages was erroneously made and requires to be set aside.

179. Otherwise I would affirm the orders of the High Court.