[2020] IEHC 243

THE HIGH COURT

COMMERCIAL

[2017 No. 6193 P.]

[2017 No. 170 COM.]

BETWEEN

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

PLAINTIFFS

AND

DILDAR LIMITED, CIARAN DESMOND AND COLM S. MCGUIRE AND DERVAL M. O'HALLORAN, FORMERLY TRADING UNDER THE STYLE AND TITLE OF MCGUIRE DESMOND SOLICITORS, A FIRM, JOHN MILLETT, PINNACLE PENSIONER TRUSTEES LIMITED, DILDAR LIMITED AND JOHN MILLETT INDEPENDENT FINANCIAL ADVISORS LIMITED

AND BY ORDER

DILLON KENNY AND DARREN KENNY

AND BY FURTHER ORDER

PAUL KENNY

DEFENDANTS

AND BY ORDER

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

THIRD PARTIES

JUDGMENT of Mr. Justice David Barniville delivered on the 22nd day of May, 2020

Introduction

1. This judgment deals with a number of interlocutory applications made by three of the defendants in the proceedings, namely, Dildar Ltd. ("Dildar Ireland"), the seventh defendant, and Dillon Kenny and Darren Kenny, the ninth and tenth defendants, who are members of the Kenny family. I will refer to the applicants as the "Kenny defendants." The proceedings have been brought by the plaintiffs who are a number of members of the Nolan family together with a corporate trustee entity, as trustees of a Nolan family pension fund.

2. It is quite difficult adequately to convey the extraordinary nature of the proceedings and of the claims and counterclaims being made by the various protagonists, which include allegations of fraud, deception and wrongdoing made by the plaintiffs against their legal and financial advisors and similar allegations by their legal advisors against a range of individuals, banks and other entities around the world, as well as allegations of wrongdoing of various kinds made as between the Nolan and Kenny families. At the centre of the various aspects of the proceedings is a money trail extending to jurisdictions including Panama, the British Virgin Islands (BVI), Hong Kong, Singapore, the United Arab Emirates (UAE), Germany, France, Switzerland and the Isle of Man, as well as this jurisdiction.

Summary of the Proceedings

3. It is not easy to briefly summarise the plaintiffs' case in this introduction so this summary is necessarily lengthy. The plaintiffs' case is that they entrusted a sum of in excess €6.96 million, representing a portion of the pension funds of thirteen members of the Nolan

family, which were held in a unit trust entity called the Oaklands Property Trust (the "OPT"), to their solicitor, Ciaran Desmond (the second defendant)("Mr. Desmond"), who at the relevant time was in practice in a firm of solicitors with the third and fourth defendants, and their pensions and financial advisor, John Millett (the fifth defendant) and companies operated by him as part of his business (the sixth and eighth defendants)(together, "Mr. Millett").

4. The plaintiffs contend that, in a series of complex transactions, their funds were initially invested with an entity called Middle East Continental Development Limited ("MECD") in the UAE (Dubai or Abu Dhabi) before being transferred to an account in a bank in Zurich called EFG Bank AG ("EFG Bank"), the fifth third party, in the name of a Panamanian company called Clear Vision Solutions SA ("CVSSA") (referred to in the pleadings as the "Clear Vision account"). The plaintiffs allege that Mr. Desmond controlled CVSSA and that Mr. Millett controlled MECD. Mr. Millett denies that he ever controlled MECD, which he claims was established and controlled by Allied Finance Trust AG ("Allied Finance"), the eighth third party. Mr. Desmond disputes that he was in control of CVSSA, but admits that he was the sole nominee shareholder of that company on behalf of the seventh plaintiff, Quest Capital Trustees Limited ("Quest"), that the accounts of CVSSA in EFG Bank were controlled by Allied Finance and that the monies transferred into those accounts were transferred at the direction of Mr. Millett and by MECD, which he says was controlled and governed by Allied Finance.

5. Difficult as it may be to believe, the complexities multiply from that point on. The plaintiffs claim that, without their knowledge, Mr. Desmond, with the knowledge of Mr. Millett, procured CVSSA to pledge the cash deposits in the Clear Vision account as collateral for obtaining finance to purchase investment products to be issued by a number of the third parties in Singapore. Mr. Desmond disputes all of this and makes various allegations against the third parties in relation to the use of the funds contained in the Clear Vision account. It will be necessary to consider in greater detail what is alleged to have occurred later in the judgment when dealing with the application for the modular trial.

6. Critically for the purposes of the present applications, the plaintiffs also claim that in September, 2013, without their knowledge or consent, Mr. Desmond and Mr. Millett used approximately €2.828 million of the plaintiffs' funds, which were in the Clear Vision account, to finance the purchase by an Isle of Man company, Dildar Limited ("Dildar IOM"), the first defendant, of development lands in Cork which were formerly owned by Nemo Rangers GAA Club (the "Nemo lands"), which were purchased by Dildar IOM that month for €3.017 million. As well as claiming damages and other reliefs against Mr. Desmond and Mr. Millett arising out of the alleged misappropriation of their funds, the plaintiffs also claim beneficial ownership of Dildar IOM and of the Nemo lands which they claim were purchased substantially with their funds. They rely on representations allegedly made by Mr. Millett to a corporate services company in the Isle of Man called Mann Made Corporate Services Limited ("Mann Made"), to the effect that the origin of the funds for the purchase of the Nemo lands was the OPT and that the beneficial owners

were members of the Nolan family. They also allege that Mr. Millett represented to Mann Made that the Nolan family were the beneficial owners of Dildar IOM. The plaintiffs make a series of allegations against Paul Kenny and allege that he conspired with and also acted in concert with Mr. Millett in his dealings with Mann Made.

7. The plaintiffs' claim of beneficial ownership of Dildar IOM and of the Nemo lands is, however, disputed by all of the defendants, including Mr. Desmond, Mr. Millett and the Kenny defendants (as well as by Paul Kenny who was more recently joined as a co-defendant to the proceedings and delivered a joint defence with the Kenny defendants). They all maintain that the Kenny family, who were also clients of Mr. Desmond and Mr. Millett, are the beneficial owners of Dildar IOM, which they say was incorporated for them and that the purchase price for the purchase by that entity of the Nemo lands came entirely from Kenny family monies, with the vast bulk of the purchase price coming from funds which were in the same Clear Vision account (or in another account in the name of CVSSA) in EFG Bank in Zurich, as were the plaintiffs' funds. At least some of the funds are said by them to represent Kenny family monies which had been transferred to that account from funds which another member of the Kenny family, John Kenny, a brother of Paul Kenny, had also invested with MECD in Dubai. Another substantial portion of the purchase monies are said by them to have come from a different Clear Vision named corporate entity, called Clear Vision Solutions Holdings Inc. ("CVSH"), a BVI company, allegedly owned by Paul Kenny and John Kenny.

8. Mr. Desmond applied for and obtained liberty to join eight third parties (one of those third parties (Allied Finance) successfully applied to set aside the third party proceedings against it) and a whole host of allegations have been made as between Mr. Desmond and those third parties, concerning the immensely complex circumstances in which the funds of the plaintiffs and others in the Clear Vision account may have been used and ultimately taken by one or more of those third parties to the detriment of the plaintiffs and other investors.

9. This brief summary, convoluted and all as it may be, barely does justice to the claims and counterclaims which have been levelled between the parties and the third parties to the proceedings and merely skims the surface of those competing claims.

The Kenny Defendants' Applications

10. The applications brought by the Kenny defendants (which term, for the purpose of these applications, does not include Paul Kenny, who was only joined as a defendant to the proceedings just prior to the hearing of the applications) which require determination in this judgment can conveniently be divided into two groups. The applications were all made in the same notice of motion which was issued by the Kenny defendants on 15th May, 2019. They were case managed in the Commercial List and the two groups of applications were heard separately. It is, however, convenient to deal with all of the applications in this single judgment. A separate judgment is being delivered on the same date as this one which deals with an application for discovery brought by the plaintiffs against Paul Kenny.

11. The first group of applications dealt with in this judgment is the application by the Kenny defendants for:-

    (1) An order for a modular trial at which the issues as between the plaintiffs and Dildar IOM and the Kenny defendants as to the beneficial ownership of Dildar IOM and of the Nemo lands would be tried in a separate module before the trial of the issues between the plaintiffs and the other defendants (including Paul Kenny) and between Mr. Desmond and the third parties;

    (2) An order directing that the plaintiffs' claims against Dildar IOM (both in relation to the beneficial ownership of that company and in relation to the beneficial ownership of the Nemo lands) be confined to a monetary claim for the sum of just over €2.828 million, which the plaintiffs claim represent their monies taken from the Clear Vision account, plus interest.

12. The second group of applications arise from the interlocutory injunction granted in favour of the plaintiffs as against Dildar IOM and Dildar Ireland on 26th July, 2017, shortly after these proceedings were commenced. The plaintiffs sought an interlocutory injunction against Dildar IOM and Dildar Ireland (and against a number of the other defendants) concerning the Nemo lands. Both Dildar IOM and Dildar Ireland initially gave undertakings to the High Court on 11th July, 2017 not to: (1) dispose of and/or alienate and/or encumber the Nemo lands and (2) take any steps to dispose of or alienate the Nemo lands prior to 26th July, 2017 or further order of the court. On 26th July, 2017, the High Court (Gilligan J.) made an order restraining Dildar IOM and Dildar Ireland from taking any step to dispose of, alienate or encumber the Nemo lands or any part of them pending the trial of the action as to the plaintiffs' claim to a proprietary interest in that property. Dildar IOM and Dildar Ireland did not oppose the order made against them. The order expressly noted the plaintiffs' continued undertaking as to damages. There had been some inconclusive correspondence around that time about the nature and extent of the undertaking as to damages given by the plaintiffs. At the time the order was made, Darren Kenny and Dillon Kenny were not parties to the proceedings. They were subsequently joined as defendants, on their own application, which was opposed by the plaintiffs, by the Court of Appeal on 31st October, 2018.

13. Having been joined as defendants, their solicitors revived the issue of the plaintiffs' undertaking as to damages and further correspondence was exchanged. Being dissatisfied with the outcome of that correspondence, the Kenny defendants brought applications (in the same notice of motion which sought the modular trial and the other relief summarised earlier) seeking:-

    (1) An order directing the plaintiffs to:-

        (a) identify the extent and source of the resources (whether in the form of real or personal property, howsoever held) available to them to meet their undertaking as to damages;
        (b) describe the basis of their title to those items of property; and

(c) provide certain information in relation to the trust of which the plaintiffs claim to be trustees including:

(i) the nature of the trust;
(ii) the assets held by the trust; and
(iii) the beneficiaries of the trust;

(2) An order directing the plaintiffs to fortify their undertaking as to damages; and

(3) (Apparently, in the alternative), an order:

(a) vacating the "*undertakings*" given by Dildar IOM and Dildar Ireland to the court on 11th July, 2017 in relation to the Nemo lands (it should be noted that the Kenny defendants clarified at the hearing that what they were actually seeking to vacate were the orders made by the High Court (Gilligan J.) against those companies (without objection from them) on 26th July, 2017 rather than the undertakings given by them on 11th July, 2017 which had been superseded by the subsequent order; and
(b) vacating the *lis pendens* registered by the plaintiffs in relation to the Nemo lands on foot of the proceedings.

14. It will be seen, therefore, that the applications brought by the Kenny defendants cover a large range of issues and require a clear understanding of the issues arising between the parties on the pleadings (as clarified or expanded upon in the affidavit sworn for the purposes of the applications) as well as the procedural background to those applications.

15. It should be noted that, so far as I can see, almost all of the facts are in dispute between the plaintiffs and the Kenny defendants (and Paul Kenny), between the plaintiffs and the other defendants and between Mr. Desmond and the third parties. Needless to say, I am not in a position to resolve any of those factual disputes at this stage of the proceedings. That will be a matter for trial, whether a modular trial is directed or otherwise.

16. It is also important to bear mind that Mr. Desmond and Mr. Millett were not parties to the applications. Nor were the third parties. This is so, notwithstanding that quite a bit was said (on affidavit and in submissions) about Mr. Desmond and Mr. Millett and their alleged roles in relation to the plaintiffs' funds and those of the Kenny family. It has been necessary, therefore, for me to exercise considerable caution and restraint in what I say about the case being made against them by the plaintiffs and in referring to the case made by and against Mr. Desmond and others in the third party proceedings, insofar as any of that may be relevant to the determination of the applications now before the court. I should stress that Mr. Desmond and Mr. Millet deny the claims and allegations of wrongdoing against them as do those of the third parties who have delivered defences.

17. Nor, formally at least, was Paul Kenny a party to these applications. Mr. Kenny was joined as a co-defendant to the proceedings (and became the eleventh defendant) by order of the High Court (Haughton J.) made on 15th July. 2019, on the plaintiffs' application. His position is closely aligned with that of the Kenny defendants and was, where necessary

and appropriate, conveyed to the court by counsel and solicitors for the Kenny defendants, who are also acting for Mr. Kenny in the proceedings.

18. For various practical reasons the two groups of applications were heard separately, with a gap of some four months or so between the hearings. A further complication arose due to the joinder of Paul Kenny on 15th July, 2019, while the applications were awaiting a hearing. Mr. Kenny delivered his defence, as part of a composite document which also contained the amended defence of the Kenny defendants and the counterclaim of the ninth and tenth defendants, on 31st July, 2019. That was the day following the hearing of the second group of applications concerning the plaintiffs' undertaking as to damages and the *lis pendens* on 30th July 2019. The first group of applications was heard on 27th November 2019. I felt it necessary and appropriate to deal with both groups of applications in this single judgment.

Structure of Judgment

19. In this judgment, I will deal first with the Kenny defendants' applications relating to the proposed modular trial and their attempt to confine the plaintiffs' claims, insofar as Dildar IOM and the Nemo lands are concerned, to a monetary claim. I will then deal with their applications in relation to the plaintiffs' undertakings as to damages and the related matters.

Summary of Decision

20. For reasons set out in detail in this judgment, I have concluded that the Kenny defendants' applications should be determined as follows. Their application for a modular trial should be refused, as should their application for an order that the plaintiffs' claim in relation to Dildar IOM and the Nemo lands be confined to a monetary claim or that they should be directed to elect, at this stage, as to whether to pursue a proprietary claim or a monetary claim. However, I have decided to direct the plaintiffs to provide certain further particulars in relation to the maximum value of their claim in relation to Dildar IOM and the Nemo lands. Such further particulars should be provided within a period to be agreed or ordered by the court.

21. I have decided that the Kenny defendants' application for disclosure orders in relation to the plaintiffs' personal resources should refused. I have similarly decided that most of the Kenny defendants' application in relation to further disclosure concerning the assets of the OPT should also be refused. However, I have decided that it would be appropriate to direct the plaintiffs to furnish certain further information and clarifications on affidavit in relation to the information provided concerning the cash assets of the OPT which were referred to by the plaintiffs' counsel in court and subsequently in an affidavit sworn by David Kavanagh on 22nd August, 2019.

22. I have also decided that the Kenny defendants' application for the plaintiffs to fortify their undertaking as to damages should be refused. The Kenny defendants have not discharged the onus of demonstrating evidentially that the plaintiffs will not be in a position to honour their undertaking as to damages, should it be necessary for them to do so. In addition, I have decided that the Kenny defendants' application for an order vacating the

order made by the High Court (Gilligan J.) on 26th July, 2017 should also be refused, as should their application for an order vacating the *lis pendens* registered by the plaintiffs in relation to the Nemo lands on foot of the proceedings. The Kenny defendants have not established any good grounds for obtaining those reliefs.

Kenny Defendants' Application for Modular Trial

(a) General

23. The Kenny defendants' applications for a modular trial and for the confinement of the plaintiffs' claims in relation to Dildar IOM and the Nemo lands to a monetary claim were made (together with the other applications, the subject of this judgment) by a notice of motion which was issued on 15th May, 2019. The applications were grounded on an affidavit sworn by Darren Kenny on 14th May, 2019. That affidavit dealt with both groups of applications dealt with in this judgment. A replying affidavit was sworn on behalf of the plaintiffs by Patricia Nolan on 11th June, 2019, which similarly responded to both groups of applications made by the Kenny defendants. Darren Kenny swore a second affidavit in response on 24th June, 2019. While Patricia Nolan swore a second affidavit on 24th July, 2019, that affidavit concerned the Kenny defendants' application in relation to the plaintiffs' undertaking as to damages and the *lis pendens* and not their applications for a modular trial. Ms. Nolan swore a further affidavit (her third affidavit) on 6th September, 2019, which dealt with the modular trial application. That affidavit was in turn responded to by Darren Kenny by means of his third affidavit which was sworn on 10th October, 2019. The final affidavit sworn for the purposes of this group of applications was an affidavit sworn by Jennifer Darcy, the plaintiffs' solicitor, on 22nd November, 2019.

24. It will be necessary to summarise the case made for and against the modular trial sought, as well as the attempted confinement of the plaintiffs' claim, insofar as Dildar IOM and the Nemo lands are concerned, to a monetary claim. However, before doing so, it is unfortunately necessary to delve deeper into the claims being advanced by the plaintiffs and to examine how those claims are being defended, not only by the Kenny defendants, but also by the other defendants in the proceedings, including Mr. Desmond and Mr. Millett. It will also be necessary to refer to some of the assertions made in the course of the third party proceedings brought by Mr. Desmond against the eight third parties.

(b) The Pleaded Claims

(i) The Plaintiffs' Claims

25. The plaintiffs' various claims are now contained in their amended statement of claim which was delivered on 19th July, 2019. They plead that they have brought the proceedings as trustees of the OPT, which is said to comprise the pension funds of some thirteen members of the Nolan family. Quest (the seventh plaintiff) appears to be a corporate trustee and the administrator of the OPT.

26. The plaintiffs' claim is that in October and November, 2012, their solicitor, Mr. Desmond, advised them that funds which they had on deposit in Ireland were "*at risk"* and that "*as a result of the prevailing banking and economic crisis affecting the country*", he advised them to transfer those funds to be held on deposit overseas (amended statement of claim, para. 10).

27. The plaintiffs claim that Mr. Desmond introduced them to Mr. Millett in November, 2012, as being a person who could advise them on their pension affairs and that they agreed to act on Mr. Millett's advice that a company of which he was a director, Pinnacle Pensioner Trustees Limited ("Pinnacle"), the sixth defendant, would be suitable to act as trustee of the OPT. They claim that Mr. Desmond and Mr. Millett made certain representations to them concerning their funds. They allege that Mr. Desmond told them that he could offer them a safe investment for their funds in a deposit account in Switzerland through a company which they allege he controlled, namely, CVSSA. They claim that Mr. Millett also told them that he could offer them a safe investment for their funds in the form of a deposit with MECD, a company which they allege Mr. Millett controlled in Dubai. The plaintiffs plead that they acted on foot of the advice allegedly given and that Mr. Desmond advised them that their funds would be transferred to a deposit account held by MECD in Dubai and would, thereafter, be transferred to an account held by CVSSA in EFG Bank in Switzerland (i.e. the Clear Vision account) and that both Mr. Desmond and Mr. Millett informed them that CVSSA and MECD were managed by Allied Finance (a wealth management and investment advisory business in Switzerland which was joined by Mr. Desmond as a third party, but subsequently succeeded in having the third party proceedings against it set aside).

28. The plaintiffs allege that various representations were made to them by Mr. Desmond and by Mr. Millett concerning the particular investment structure in which the plaintiffs' funds would be invested. They claim that those representations included that Mr. Desmond was the controller and beneficial owner of CVSSA, that he exercised full control over the Clear Vision account in EFG Bank, that CVSSA would hold the funds on trust for the plaintiffs and that CVSSA would be managed by Allied Finance. The plaintiffs allege that similar representations were made by Mr. Millett in relation to the funds initially transferred to MECD.

29. The plaintiffs allege that, in total, funds amounting to €6.96 million from monies held by the OPT with Investec in Dublin, were transferred on various dates between January, 2013 and May, 2013 to MECD's account in Dubai (although some of the documentation provided to the court makes reference to Abu Dhabi) and ultimately to the Clear Vision account with EFG Bank in Zurich. They claim that one of the transfer instructions signed by them expressly referred to "*MECD (Dildar)".* Those transfers, they say, corresponded to credits to the Clear Vision account totalling €6.927 million (net of charges) on various dates between January, 2013 and June, 2013.

30. The plaintiffs make a series of allegations against Mr. Desmond to the effect that he told them on various occasions between February, 2013 and January, 2015 that their funds remained "*intact*" and unencumbered in the Clear Vision account and that he and Mr. Millett were in a position to return them to the plaintiffs on demand. Particulars are provided in respect of the alleged representations made to that effect by Mr. Desmond.

31. The plaintiffs claim, however, that far from being safe, their funds were fraudulently dealt with by Mr. Desmond and by Mr. Millett in two different respects. First, they plead that in

March, 2013, without their knowledge or consent, but with the knowledge of Mr. Millett, Mr. Desmond "*procured*" CVSSA to pledge the cash deposits in the Clear Vision account (which included the plaintiffs' funds and other funds) as collateral to acquire a loan of $100 million from EFG Bank ostensibly to purchase investment products to be issued by BNP Paribas Singapore ("BNP"), the sixth named third party, and United Overseas Bank Limited in Singapore ("UOB"), the seventh named third party, or Deutsche Bank Singapore (amended statement of claim, paras. 26 and 28 to 31). Second, the plaintiffs plead that in September, 2013, without their knowledge or consent, Mr. Desmond and/or Mr. Millett used €2.828 million of the plaintiffs' funds in the Clear Vision account to fund the purchase by Dildar IOM of the Nemo lands (amended statement of claim paras. 27 and 32 to 41).

32. With reference to this latter claim, the plaintiffs allege that in May, 2013, Mr. Desmond submitted a bid to agents appointed by a receiver appointed over the Nemo lands which was accepted; and that in May, 2013, Mr. Millett gave instructions to Mann Made in the Isle of Man to incorporate Dildar IOM as a special purpose vehicle to acquire the Nemo lands and identified to Mann Made that the origin of the purchase price for the property was the OPT and that the Nolan family members were the beneficial owners of the OPT. The plaintiffs further claim that Mr. Millett represented to Mann Made that the Nolan family members were the beneficial owners of Dildar IOM and furnished copies of their identification documents (including copies of their passports and other materials) to Mann Made. They plead that Mr. Millett furnished Mann Made with a "source of funds" flowchart (a copy of which was exhibited by Ms. Nolan) which evidenced the OPT as the investor, MECD as the investment vehicle, CVSSA as the investment manager's sub-vehicle and Dildar IOM as the ultimate purchaser of the Nemo lands.

33. The plaintiffs plead that, without their knowledge, consent or authority, Mr. Desmond and/or Mr. Millett caused the sum of €2.828 million to be paid out from the plaintiffs' funds in the Clear Vision account to an account of a firm of solicitors in Dublin to finance the purchase by Dildar IOM of the Nemo lands. They plead that Mr. Millett subsequently sought to persuade Mann Made that members of the Kenny family and not the Nolan family were the beneficial owners of Dildar IOM and that Mr. Millett now denies that the Nolan family members are the beneficial owners of that company (as do Mr. Desmond, the Kenny defendants and Paul Kenny).

34. The plaintiffs make a series of claims and assert several causes of action, including fraud, breach of fiduciary duty and conspiracy, against Mr. Desmond and Mr. Millett arising from the alleged diversion of their funds in the manner alleged, for which they claim damages.

35. The plaintiffs claim that they are the beneficial owners of Dildar IOM and rely on the representations made by Mr. Millett to Mann Made concerning the incorporation and ultimate beneficial ownership of that company. They also claim that they are the beneficial owners of the Nemo lands, being the primary asset of Dildar IOM, which they allege was purchased with their funds. Declarations are sought by the plaintiffs to give effect to their alleged beneficial ownership of Dildar IOM and of the Nemo lands.

36. The plaintiffs plead that they commenced proceedings in the Isle of Man seeking a declaration that they are the beneficial owners of Dildar IOM and that those proceedings were stayed by the High Court of Justice in the Isle of Man on January, 2019, on the application of Dillon Kenny, Darren Kenny, Paul Kenny and his brother, John Kenny, on the grounds that that issue is the subject of these proceedings in the Irish Courts.

37. In addition to the claims made by the plaintiffs in relation to Dildar IOM and the Nemo lands, and the responses and counterclaims advanced by the Kenny defendants to those claims (to which I will turn shortly), the plaintiffs also make a series of claims in the amended statement of claim against Paul Kenny, following his joinder as a co-defendant in July, 2019. Those claims are set out at paras. 50 to 57 of the amended statement of claim and in the reliefs sought.

38. The plaintiffs claim that Paul Kenny conspired and acted in concert with Mr. Millett in various respects concerning the representations allegedly made to Mann Made in September, 2015 and September, 2016 in relation to the beneficial ownership of Dildar IOM. For example, it is alleged that Paul Kenny acted with Mr. Millett in misrepresenting the position in relation to the ownership of Dildar IOM to Mann Made, in attempting, retrospectively, to change records of the ownership of Dildar IOM to disguise the fact that the plaintiffs had been recorded as its beneficial owners and that their funds had been used to purchase property on its behalf, in providing a false account of the ownership of Dildar IOM and in assisting Mr. Millett in allegedly breaching his fiduciary duties to the plaintiffs. The plaintiffs claim that Paul Kenny is a joint tortfeasor with Mr. Millett in a number of respects. They also allege that Paul Kenny acted with Mr. Millett in breaching the plaintiffs' personal, privacy and property rights, including their rights to their personal data under the Data Protection Acts. Damages, including exemplary damages, are sought by the plaintiffs against Paul Kenny on several different bases.

(ii) Mr. Desmond's Defence and Third Party Claims

39. Mr. Desmond delivered his defence to the original statement of claim on 15th June, 2018. I did not receive any further defence he may have delivered in response to the amended statement of claim. I proceed, therefore, on the basis of Mr. Desmond's original defence. It is necessary to refer to parts of the defence in order to better understand the Kenny defendants' application for the modular trial and the plaintiffs' opposition to that application.

40. Mr. Desmond disputes the advice which the plaintiffs allege he gave to them in relation to their monies. He pleads that the plaintiffs had formed the intention of using their pension funds as a "*shelter against their creditors and indirectly* [to] *address their banking debts*" (Mr. Desmond's defence, para. 8). Mr. Desmond pleads that he did not give the plaintiffs any advice in respect of the use of their funds for that purpose and that the advices he gave were limited to:-

    (a) introducing the plaintiffs to Mr. Millett; and

(b) advices regarding the "*availability of possible structures (but not the structure itself) of the type which the plaintiffs ultimately availed of and attending various meetings in connection therewith."* (defence, para. 8)

41. Mr. Desmond claims that the plaintiffs had an existing relationship with Allied Finance (since 2011) and that it had previously advised the plaintiffs on a complex international transaction. He says that Mr. Millett also had an existing long-term business relationship with Allied Finance (defence, para. 9). Mr. Desmond admits that he introduced the plaintiffs to Mr. Millett and makes certain admissions in relation to the investment structure agreed with the plaintiffs, but denies making the representations alleged by the plaintiffs.

42. At para. 14 of his defence, Mr. Desmond pleads that an investment structure was agreed between MECD and Allied Finance, the objective of which was to hold and make investments, using CVSSA, in capital protected deposit funds and other secure financial instruments under the guidance and direction of Allied Finance. He further pleads that Allied Finance was retained by CVSSA to ensure proper monitoring and implementation of the structure and to give financial and commercial advice to the plaintiffs as to its suitability for the planned objectives. Mr. Desmond then pleads that the plaintiffs, with Mr. Millett and Allied Finance, agreed to place the plaintiffs' funds in Abu Dhabi in MECD, an entity controlled by Allied Finance, and that MECD invited funds from investors, including the plaintiffs, whose funds were transferred on foot of a private placement information memorandum issued by Allied Finance on behalf of MECD in August, 2012, which he says was prepared by Allied Finance and Mr. Millett. He further pleads that Mr. Millett and Allied Finance created loan instruments between MECD and CVSSA on foot of which investments were made by MECD into the account of CVSSA with EFG Bank and that the loan instruments between MECD and CVSSA envisaged an annual return of 8% which required *"a complex leverage investment structure with capital guarantees to make this return*" (defence para. 14). If anything, that was an understatement of the complexity of the transactions involved.

43. Mr. Desmond pleads that CVSSA's accounts with EFG Bank were controlled by Allied Finance and that Mr. Desmond was a confirmatory signatory in respect of those accounts. He says that CVSSA legally and beneficially held all funds in EFG Bank, that Mr. Desmond was the sole shareholder in CVSSA, holding those shares on trust for the plaintiffs and *"other investors*"; that Mr. Desmond acted as "*nominee shareholder*" on behalf of the plaintiffs and "*other investors*" at the request of Allied Finance; that such monies as were transferred to the accounts of CVSSA in EFG Bank were transferred at the direction of Mr. Millett to account in that bank nominated by Mr. Millett and MECD, which was controlled and governed by Allied Finance; and that any transfers of monies from CVSSA's accounts with EFG Bank, relating to funds received from MECD and "*Kenny family money",* required the consent and approval of Mr. Millett and the approval of CVSSA "as effected by" Allied Finance. Mr. Desmond pleads that the plaintiffs were aware of and agreed to this structure (defence, para. 15).

44. Mr. Desmond denies that he had full control over CVSSA or the Clear Vision account and asserts that that account was controlled by Allied Finance, with Mr. Desmond having "*confirmatory signatory rights only*". He says that he believes that MECD was controlled by Mr. Millett and Allied Finance (defence, para. 16).

45. Mr. Desmond pleads that the transfer of the plaintiffs' monies from Investec Bank (in Dublin) to MECD occurred at the direction and with the authority of the plaintiffs and Mr. Millett and that the transfer of monies from MECD to CVSSA occurred with the direction and with the authority of the plaintiffs, Mr. Millett and Allied Finance. He denies that the transfers were made pursuant to any agreement with him or on foot of any alleged representations made by him (defence para. 18).

46. While Mr. Desmond admits that he made certain representations in relation to the status of the monies, on foot of enquires made by the plaintiffs, he pleads that these were made on foot of threats made and duress exerted by the plaintiffs (defence, para. 22).

47. As regards the use of the funds in the account or accounts of CVSSA, Mr. Desmond disputes the plaintiffs' claims as to what is alleged to have happened to their monies. He denies that he had full control over CVSSA or the Clear Vision account and pleads that the account was controlled by Allied Finance. He pleads that he relied on the representations of third parties in relation to the cash deposits of CVSSA and that he made it clear in writing to the third parties on numerous occasions, that the funds could not be drawn down on the basis that there was any security or pledge over the monies and that he was assured by the third parties that that was the position (defence, para. 26).

48. At para. 29, Mr. Desmond provides particulars of the actions of the third parties which he claims caused loss and damage to the plaintiffs. He pleads that he relied on representations made by EFG Bank and by Allied Finance that the proposed investment did not represent any risk for CVSSA and, by extension, to the plaintiffs and that, on that basis, a loan sanction in the amount of US$100 million issued from EFG Bank to CVSSA in February, 2013. He pleads that when he was shown the facility letter by Allied Finance prior to drawdown in February, 2013, in his capacity as nominee shareholder of CVSSA and fiduciary of "*five direct investors (not including the plaintiffs)",* he indicated his objection to the CVSSA deposits with EFG Bank being used as collateral for the transaction and that he repeated that objection to various of the third parties on several occasions and gave specific and unambiguous instructions not to proceed unless there was no risk to the deposit monies. He asserts that, notwithstanding those objections and directions, and unknown to him, the "*deal*" ultimately went ahead in such a way that the deposit funds of CVSSA were put at risk by EFG Bank. He alleges that a number of the third parties, including BNP and UOB and Mr. McMahon, Mr. Murphy and Mr. Lynch, have been unjustly enriched in the amount of €5 million at the expense of the plaintiffs and *"other investors (who are not party to these proceedings)".* He contends that a fraud was perpetrated by BNP and UOB on EFG Bank which was organised by Mr. Murphy, Mr. McMahon and Mr. Lynch, in conjunction with agents of BNP, EFG Bank and UOB and that the true situation was not disclosed to him until Summer, 2014 when EFG Bank called in a

guarantee from BNP and UOB, who had not renewed their guarantees, leaving a shortfall of US$10.5 million which EFG Bank made up from the deposits in CVSSA's name.

49. Mr. Desmond pleads that this was the root of the losses of which the plaintiffs complain. He alleges conspiracy involving a number of the third parties and their officials. He makes further allegations in relation to those entities and the manner in which the funds held by CVSSA with EFG Bank were dealt with, at paragraph 39 of his defence.

50. As regards the Nemo lands, Mr. Desmond denies that the plaintiffs' funds were used to finance the purchase by Dildar IOM of the Nemo lands and pleads that he believes that the monies used to purchase the Nemo lands was "*Kenny family money*".

51. Mr. Desmond denies all allegations of wrongdoing against him and seeks to attribute responsibility for the plaintiffs' losses to others, including Mr. Millett, and a large number of other persons and entities involved in the investment structure, a number of whom were joined as third parties on his application.

52. Mr. Desmond's amended third party statement of claim in the third party proceedings was delivered on 6th November, 2018. It sets out in somewhat more detail, the nature of his complaints against the various third parties, as well as the circumstances in which he claims that the plaintiffs sought advice from him (see, for example, para. 15). Mr. Desmond accepts that a "*significant portion of the plaintiffs' pension monies which were invested in* [the] *scheme have been substantially lost in circumstances"* pleaded by him (the amended third party statement of claim, para. 18).

53. At para. 19, he describes, in what he calls "*simple summary terms",* the plan for the investment of the plaintiffs' pension monies as follows:-

> *"…the plan was for the plaintiffs' pension monies to be held in a Swiss bank for approximately five years earning up to an 8% annual return using a complex leveraged investment structure with capital guarantees. Each of the proposed third parties were involved in the investment structure…"*

54. Mr. Desmond refers to the various third parties and their alleged roles in the investment of the plaintiffs' monies. The first four third parties are Irish individuals. Mr. Desmond claims that the first, third and fourth third parties, Mr. Murphy, Mr. McMahon and Mr. Lynch, made certain representations to him concerning international investment and financing opportunities they had available in Singapore, which were backed by their own funding and resources and would enable an investor to borrow monies from Singapore banks at attractive interest rates (para. 21). He further pleads that it was represented to him that BNP was satisfied to provide a guarantee in respect of the investment structure, in reliance on a counter-indemnity and the security of the investments of Mr. Murphy and that Mr. Murphy and Mr. McMahon would ultimately be responsible for the guarantee given in respect of the investment through their company, another Clear Vision named entity, Clear Vision Solutions Limited ("CVSL"), a Hong Kong company.

55. It should be noted that it is similarly pleaded by BNP in its defence to the amended third party statement of claim delivered on 26th June, 2019, that it had been represented to it that Mr. Murphy was the beneficial owner of certain companies, including CVSSA, and that he was the ultimate owner and controller of CVSL, the Hong Kong company.

56. Mr. Desmond alleges that misrepresentations were made by a number of the third parties on foot of which the plaintiffs' pension monies were invested in the complex investment structure described by him, which involved placing deposits in EFG Bank in the name of CVSSA, the Panamanian company, and transfers to and from MECD in Abu Dhabi (in circumstances pleaded in greater detail at paras. 33 to 42 of the amended third party statement of claim). Mr. Desmond claims that he was given the wrong impression by the third parties that the deposits of CVSSA in EFG Bank were not at risk, when that was not the case. Ultimately, as indicated earlier, there was a shortfall of €10.5 million which EFG Bank recouped from the CVSSA deposits (some of which Mr. Desmond accepts were ultimately beneficially owned by the plaintiffs), to cover the shortfall and that this was the root of the losses of which the plaintiffs complain (para. 53).

57. I was also provided with copies of the defences of those third parties who have delivered defences in the third party proceedings (that is all of the third parties, except Allied Finance, who are no longer a third party as the third party proceedings against them was set aside by the High Court (McDonald J.) in May, 2019, and Mr. McMahon, who failed to deliver a defence and against whom judgment in default of defence was granted by me on Mr. Desmond's application earlier this year).

58. Each of the third parties who has delivered a defence to the third party proceedings denies the various allegations made against them by Mr. Desmond. Some provide further detail in relation to the investment structure involved, such as EFG Bank, BNP and UOB. Reference is made by EFG Bank, in its defence to the amended third party statement of claim, to the involvement of CVSL with BNP in Singapore. In its defence, BNP pleads that it was represented to it by Mr. Desmond that he was a director of a number companies allegedly owned and controlled by Mr. Murphy, the first third party, including CVSSA, and that Mr. Murphy was the ultimate owner of CVSL, the Hong Kong company (BNP's defence, para. 5). BNP pleads that it understood that the monies the subject of the complaints made by Mr. Desmond against it, were monies owned and/or controlled by Mr. Murphy and that Mr. Desmond was Mr. Murphy's tax lawyer and a director of a number of companies owned or controlled by Mr. Murphy, including CVSSA (paras. 6 and 7). BNP refer to the genesis of the investment structure the subject of the proceedings, which was a prior structure involving the New Zealand dollar presented by BNP in which it was proposed CVSL would invest (called the "Kiwi structure"), but that the investment structure ultimately put in place differed significantly from that. CVSL is referred to as BNP's client (para. 26(h)). The investment structure ultimately put in place and implemented, according to BNP, was as described at para. 27 and subsequent paras. of its third party defence. BNP's defence is replete with references to dealings and communications it had with several of the other third parties in relation to CVSL concerning the investment transaction. It pleads that it was told by Mr. Murphy and by

Mr. McMahon that Mr. Murphy was the beneficial owner of CVSSA and that the funds in an account in CVSL's name with BNP were those of Mr. Murphy. There are numerous references to CVSSA and CVSL in BNP's defence.

59. In its defence to the third party proceedings, UOB makes express reference to the role of Mr. Desmond. It pleads that he was introduced to UOB as Mr. Murphy's tax advisor in Ireland and that it was represented to UOB that Mr. Murphy was to be the ultimate beneficial owner of two investment holding accounts to be opened with UOB which were to be involved in an investment structure involving a financial product in the nature of a protected structure of capital guarantee, which it was stated BNP had agreed to provide to Mr. Murphy (UOB's defence, para. 4). UOB's defence also makes reference to CVSL and its role in the investment structure ultimately put in place and explains UOB's role in that structure.

(iii) Mr. Millett's Defence and Counterclaim

60. I have been furnished with the defence and counterclaim delivered by Mr. Millett in response to the original statement of claim. I am not aware as to whether a further defence and counterclaim was delivered by Mr. Millett in response to the amended statement of claim. In his defence, Mr. Millett denies the allegations made against him and his companies. He pleads that it was represented to the plaintiffs that if they wished to restructure their pension affairs, John Millett Independent Financial Advisors Limited ("JMIFA"), the eighth defendant, would carry out the necessary administrative functions and that Pinnacle would act as the pensioner trustee (Mr. Millett's defence and counterclaim, para. 9(c)). Mr. Millett denies that he controlled or had any interest in MECD, but pleads that he did make certain representations to the plaintiffs about MECD (para. 13). Included among the representations which Mr. Millett pleads were given, was that MECD was established by Allied Finance as a conduit to protect client assets in the UAE and was solely managed, owned and controlled by Allied Finance (see also para. 16(b)). Mr. Millett pleads that JMIFA drew up a private placement investment memorandum to ensure compliance with relevant financial regulatory requirements, that it was to act as a placing agent and to facilitate the transfer of assets from the OPT to MECD and that, in return, the OPT was to receive a loan note from MECD. Mr. Millett further pleads that he understood that it was envisaged that funds would be moved onwards from MECD to CVSSA, *"a company controlled by Mr. Desmond"* (para. 15(d)). The function of Pinnacle, as pensioner trustee, was, Mr. Millett says, to "*countersign transactions to MECD*" and that once funds were transferred from the OPT to MECD, its role had been fulfilled.

61. Mr. Millett asserts that the plaintiffs were aware and agreed that they were transferring funds to CVSSA "*under the control of Mr. Desmond*" and were happy to accept that (para. 15(h)).

62. Mr. Millett asserts that a total of €10,060,000 was transferred by the OPT to MECD between January, 2013 and June, 2013. He provides a table at para. 17(a) of his defence, showing transfers he contends took place during that period from Investec in Dublin to

Abu Dhabi Commercial Bank PJSC ("ADCB") for MECD and then from MECD to CVSSA (save for two transfers which were to another entity called Serene Consultancy Limited). Mr. Millett pleads that all of the transfers were authorised by the plaintiffs. He further pleads that he was a stranger to the Clear Vision account and to any account or accounts held by CVSSA. Later on in his defence, however, he pleads that the Clear Vision account was under the control of Mr. Desmond (para. 34(b))

63. Mr. Millett sets out the circumstances in which he says he signed the transfer instruction dated 28th May, 2013, which contains the reference to "*MECD (Dildar)"* (para. 19). Mr. Millett claims that this was a "*typographical error"* on his part and that that was explained to Patricia Nolan by telephone on 5th June, 2013, that he offered to reissue a corrected transfer instruction but that the plaintiffs decided against requiring this for reasons of timing.

64. At para. 24, Mr. Millett pleads that none of the plaintiffs' funds were used to finance the purchase by Dildar IOM of the Nemo lands, although he also denies that he or his companies had any knowledge of any of the transactions on the Clear Vision account and that they were strangers to the true position in relation to the plaintiffs' funds once they were transferred from MECD. Mr. Millett pleads on several occasions that neither the OPT's funds, nor any of the plaintiffs' funds, were used to finance the purchase of the Nemo lands (paras. 34, 35 and 36).

65. Mr. Millett makes a series of admissions and assertions at paras. 31 to 33 concerning his dealings with Mann Made in the Isle of Man in relation to the incorporation of Dildar IOM. He explains that, on behalf of JMIFA, he gave instructions to Mann Made to incorporate Dildar IOM as a vehicle for the acquisition of the Nemo lands. He denies that he identified the OPT as the "*origin of the funds simpliciter*" and pleads that he identified MECD as the source of the funds and acknowledged to Mann Made that the OPT was the "*main contributor*" to MECD (para. 31).

66. Mr. Millett pleads that Mr. Desmond and Paul Kenny gave instructions to him for JMIFA to form a company in the Isle of Man "*as a vehicle for the Kenny family to seek to acquire"* the Nemo lands (para. 32(a)). However, he says that the Kenny family did not want their involvement in the proposed transaction to become known and that instructions were given to him (through Mr. Desmond, who was acting as solicitor for the Kenny family) not to disclose any information which could establish such a link. He states that it was necessary for anti-money laundering purposes to identify the persons wishing to form the company in the Isle of Man and the source and flow of funds, as well as the beneficial owners of those funds. In order to satisfy that requirement, Mr. Millett pleads that, on the instructions of Mr. Desmond and Paul Kenny, the OPT was "*hypothetically identified*" as the "*potential owner*" of the company to be formed. He says that it was "*always intended that the identity of the true beneficial owners, the Kenny family members David (sic) and Darren Kenny*" would be disclosed and made known to Mann Made as soon as the company was formed (para. 32(d)). He states that Mann Made was given information concerning the members of the OPT as the parties wishing to form the company, including

their identification and address documentation, but that neither the plaintiffs nor any member of the OPT intended or instructed JMIFA to form a company or to open a bank account in the Isle of Man.

67. Mr. Millett says that, on the instructions of Mr. Desmond and Paul Kenny, the information provided to Mann Made in relation to the OPT was corrected in telephone conversations and by correspondence in June, 2013 (para. 32(e)). He claims that Mann Made was made aware that the true beneficial owners of Dildar IOM were Darren Kenny and Dillon Kenny, that it was never at any time proposed that funds belonging to members of the OPT or the Nolan family would be directed into Dildar IOM and that no such monies or funds were ever so directed (paras. 32(f) and (g)). He pleads that the funds used to purchase the Nemo lands came from *"Kenny family funds that had in the first instance been transferred to MECD and onwards from MECD to CVSSA, together with other funds not originating from MECD"* (para. 32(h)). Mr. Millett pleads that, on Mr. Desmond's instructions, JMIFA intended to remove references to members of the Nolan family once Dildar IOM was established and when, or if, it became the vehicle use to purchase the Nemo lands. However, that intention was not *"immediately carried into effect"* (para. 32(i)). Mr. Millett claims that all information provided (presumably to Mann Made) was *"designed to be readily altered prior to any transaction"* relating to the Nemo lands coming into effect and he refers to the "*advice and direction of Mr. Desmond"* (para. 32(k)).

68. Mr. Millett pleads (at para. 33) that JMIFA furnished Mann Made with a "*hypothetical source of funds chart*", which showed the OPT as the "main contributor" to MECD, MECD as the investment vehicle and CVSSA as the vehicle to be used by Mr. Desmond. He pleads that the chart and narrative contained a *"hypothetical source of funds which was known to Mann Made not to be correct"* (para. 33(a)). He pleads that the proposed structure was designed to allow for "*flexibility at a later stage",* before contracts were signed and any funds were transferred by the Kenny family (para. 33(b)). He then refers to further contacts with Mann Made, on the instructions of Mr. Desmond and Paul Kenny, concerning the beneficial ownership structure of the Nemo lands and the potential non-involvement of Dildar IOM (para. 33(c)).

69. At para. 37, Mr. Millett pleads that he has always denied that the Nolan family members are the beneficial owners of Dildar IOM.

(iv) Defence of Kenny Defendants

70. Separate defences were originally delivered by Dildar Ireland, the fifth defendant, and by Darren Kenny and Dillon Kenny, the ninth and tenth defendants. Following the delivery of the amended statement of claim on 19th July, 2019 and the joinder of Paul Kenny on 15th July, 2019, a composite document was delivered on behalf of all of those parties, the seventh, ninth, tenth and eleventh defendants, entitled the *"Amended Defence of the seventh, ninth and tenth defendants, Counterclaim of the ninth and tenth defendants, and Defence of the eleventh defendant"* on 31st July, 2019 (the "amended defence"). All of those defendants are now referred to in the amended defence as the "Kenny defendants", although it should be stressed that, as noted earlier, although Mr. Kenny is included in

that description, he is not a moving party in the two groups of applications dealt with in this judgment.

71. The Kenny defendants plead, at para. 43 of the amended defence, that Mr. Desmond and Mr. Millett were advisors to the Kenny family which had placed *"substantial family monies under their care and management (as the plaintiffs claim to have done)"*.

72. The Kenny defendants deny that any money or property belonging to the plaintiffs or any of them was applied in or towards the purchase by Dildar IOM of the Nemo lands (para. 11(a)).

73. At para. 13 of the amended defence, the Kenny defendants plead that bids for the purchase of the Nemo lands were submitted by Paul Kenny, on behalf of Darren Kenny and Dillon Kenny and on behalf of "*the corporate entity intended to be the purchaser*" of the Nemo lands, which was stated initially to have been intended to be CVSH, a BVI company stated to be owned by Paul Kenny and his brother, John Kenny. They plead that that corporate entity was ultimately changed to Dildar IOM, the name of which derives from the Christian names of Dillon Kenny and Darren Kenny. They plead that Mr. Desmond was acting as agent for, and on behalf of, "*the Kennys and their corporate entities*" in bidding for and in the purchase of the Nemo lands (para. 13).

74. At para. 14 of the amended defence, the Kenny defendants plead that Mr. Millett gave instructions (to Mann Made) for the incorporation of Dildar IOM, on the instructions of Paul Kenny which were given on behalf of Dillon Kenny and Darren Kenny.

75. At para. 15, the Kenny defendants plead that they are strangers to what may had been said or represented by Mr. Millett to Mann Made as to the origin of the funds for the acquisition of the Nemo lands or as to the identity of the beneficial owners of Dildar IOM.

76. The Kenny defendants deny that any funds for the purchase of the Nemo lands came from the OPT or otherwise from the Nolan family. They deny that the Nolan family members are, or were at any time, the beneficial owners of Dildar IOM or that they had or have any beneficial interest in the Nemo lands (para. 16). They make repeated pleas to that effect throughout the amended defence and in the counterclaim (see, for example, para. 17).

77. As regards Dildar Ireland, the seventh defendant, they plead at para. 23 of the amended defence, that a planning application lodged in respect of Nemo lands inadvertently and inaccurately identified Dildar Ireland as the owner of that property.

78. At para. 27 of the amended defence, and in subsequent paragraphs, Paul Kenny and the other Kenny defendants deny the allegations and claims made against Mr. Kenny at para. 50 and in subsequent paras. of the amended statement of claim. They plead that Mr. Millett expressly acknowledged to Paul Kenny that the account Mr. Millett gave to Mann Made as to the ownership of Dildar IOM was "*wholly unbeknownst to"* Mr. Kenny.

79. Then, at para. 33 of the amended defence, the Kenny defendants state that:-

(1) Questions as to the ownership of Dildar IOM and of the Nemo lands can *"most expediently, conveniently and appropriately be determined in these proceedings";*

(2) The two corporate shareholders of Dildar IOM hold the entire issued share capital of Dildar IOM in trust for CVSH (the BVI company which they plead is to be distinguished from CVSSA, the Panamanian company, referred to in the amended statement of claim). They plead that the entire issued share capital of Dildar IOM is held in trust for Dillon Kenny and Darren Kenny and that the two corporate shareholders executed declarations of trust in favour of CVSH for the entire issued share capital of Dildar IOM.

80. Dillon Kenny and Darren Kenny have brought a counterclaim against the plaintiffs. They plead that Dildar IOM was incorporated for the two of them for the purpose of acquiring the Nemo lands and that they are the beneficial owners of the entire issued share capital of that company. They plead that the Nemo lands were acquired using only funds belonging to the "*Kenny family*". They assert that Dildar IOM is the registered owner of the Nemo lands which are beneficially owned by that company or, in the alternative, by Dillon Kenny and Darren Kenny. They seek declarations to that effect in the counterclaim.

81. The amended defence of the Kenny defendants concludes by noting an intention by those defendants to offer expert evidence in various fields, including forensic accounting and foreign laws *"to the extent that the same may be relevant".* It can fairly be said that the factual matters alleged in the pleadings of the various parties and third parties refer to a dizzying array of exotic jurisdictions, extending from Panama and the BVI in the west to Hong Kong and Singapore in the east. One can see, therefore, why it might be thought that experts of foreign law might be required.

(c) Common Features of the Pleadings

82. It will be apparent from the description of the various claims and counterclaims made by the parties and third parties in their pleadings that, on the basis of the pleadings alone, there are several features or aspects of the claims pleaded in the case being made by the plaintiffs in relation to the beneficial ownership of Dildar IOM and of the Nemo lands which are common to, or overlap to an extent with, the wider case being made by the plaintiffs against Mr. Desmond and Mr. Millett (and the third party claims in turn being made by Mr. Desmond against the third parties). That is so before one even starts to consider the affidavit evidence put before the court in respect of the Kenny defendants' application for a modular trial (to which I will turn shortly).

83. The common features which emerge from the pleadings include (but are not limited to) the following. Mr. Desmond and Mr. Millett were advisors to, and acted for, both the plaintiffs (the Nolan family members) and for the Kenny family. There is no dispute about that. It is an admitted fact on the pleadings (and on the affidavit evidence). Both families claim to have placed substantial monies under the care and management of Mr. Desmond and Mr. Millett. The funds of both families are alleged to have been transferred to an account, or accounts, of CVSSA in EFG Bank in Zurich. The plaintiffs' funds were allegedly transferred to the Clear Vision account (held by CVSSA in EFG Bank) having initially been

transferred in various tranches from Investec in Dublin to MECD in the UAE (Abu Dhabi or Dubai) and in turn transferred by MECD to that account, or an account, of CVSSA with EFG Bank. It is pleaded by Mr. Desmond that any transfer of monies from the CVSSA account or accounts with EFG Bank, which came from MECD or which represented Kenny family money, required the consent of Mr. Millett and the approval of CVSSA. The monies used by Dildar IOM for the purchase of the Nemo lands are alleged to have come from the Clear Vision account (or from an account of CVSSA with EFG Bank). The plaintiffs claim that the sum of just over €2.8 million, which was transferred from that account to an account of a firm of solicitors in Dublin in September, 2013 in order to purchase the Dildar land represented their funds in that account (which had previously formed part of the funds transferred to the account from MECD). On affidavit, as we shall see, the Kenny defendants claim that a sum representing 90% of the purchase price for the purchase of the Nemo lands, just over €2.7 million, came from funds in the Clear Vision account (or another CVSSA account with EFG Bank). They maintain that of that amount, a significant portion was represented by the proceeds of an investment which John Kenny had made with MECD, with the balance coming from monies invested by Paul Kenny in a Kenny family foundation. They further maintain on affidavit that the sum of just over €300,000 (including the booking deposit) came from CVSH, the BVI company allegedly owned by Paul Kenny and John Kenny (see para. 12 of Darren Kenny's affidavit 10th October, 2019).

84. CVSSA and MECD are, therefore, alleged both by the plaintiffs, and by the Kenny defendants, to have been centrally involved in the transactions, and money trail, by which their respective funds are alleged to have been used to purchase the Nemo lands. Those entities, as well as other corporate entities bearing the Clear Vision name, are also alleged to have been involved in the wider case which the plaintiffs make against Mr. Desmond and Mr. Millett (and in the third party claims Mr. Desmond seeks to make against the various third parties). Claims and counterclaims and allegations are made throughout the pleadings, with particular reference to the investment scheme allegedly involving the plaintiffs funds, to a number of Clear Vision named corporate entities, namely, CVSSA (the Panamanian company), CVSH (the BVI company) and CVSL (the Hong Kong company), with conflicting contentions as to the owners and ultimate controllers of those entities.

85. The existence of these common features and the alleged involvement of one or more of these entities in the transactions, which ultimately led to the purchase of the Nemo lands, and in the transactions which form part of the wider case made by the plaintiffs against Mr. Desmond and Mr. Millett are all factors relevant to the Kenny defendants' application for a modular trial. I will revert to them and consider their significance later in this judgment after I have sought to summarise the grounds advanced by the Kenny defendants in support of their application for a modular trial and the grounds of objection raised by the plaintiffs in response.

(d) Kenny Defendants' Case for a Modular Trial

86. On affidavit and in submissions, the Kenny defendants have contended that the court should direct a modular trial, with the module being proposed by them, namely, the trial of issues between the plaintiffs and the Kenny defendants concerning the beneficial ownership of Dildar IOM and of the Nemo lands, being the first module to be heard. They contend that the proposed module concerns a single property (the Nemo lands) which was acquired by Dildar IOM in a distinct and discrete transaction in September, 2013. They maintain that at the heart of the dispute between the plaintiffs and the Kenny defendants is the source of the funds which were used to purchase the Nemo lands and, in particular, whether those funds came from the Nolan family or from Kenny family monies. They assert that the question as to who funded the purchase of the Nemo lands, and the related question as to who beneficially owns Dildar IOM, are separate and distinct from the rest of the claims advanced by the plaintiffs in the proceedings and, in particular, are separate and distinct (a) from the claims made by the plaintiffs against Mr. Kenny and Mr. Millett concerning the alleged misappropriation of €6.96 million from the plaintiffs and (b) from Mr. Desmond's third party claims against the third parties.

87. The Kenny defendants assert that the proposed module could conveniently be tried separately and in advance of the other issues in the case and that they would be prejudiced, if required to participate in a single trial of all issues in the proceedings, when the vast majority of those issues do not concern them. The proposed module would remove the need for Dildar IOM and the Kenny defendants participating in the entirety of the proceedings which will be lengthy (estimated by the Kenny defendants at at least twelve weeks). They contend that there is no reason to involve the Kenny defendants in the entirety of the case and that it would be unfair to them to do so. They assert that the plaintiffs' case against them is ready for hearing, whereas the case against the other defendants and, in particular, the case against Mr. Desmond and Mr. Millett is not. They allege that they are prejudiced as a result of the delay in the determination of the issues concerning the Nemo lands and point to losses which they claim they have suffered and will continue to suffer as a result of that delay, by reason of being unable to develop the Nemo lands and to profit from the development as well as having to continue to incur the carrying costs of the development.

88. The Kenny defendants contend that, while they would be prejudiced if the court did not direct a modular trial with their proposed module being determined first, the plaintiffs would not be prejudiced if such an order were made. They assert that the plaintiffs would in any event have to establish that it was their monies which were in the Clear Vision account and which were taken from that account and used to fund the purchase of the Nemo lands by Dildar IOM. They contend that a modular trial will lead to a significant saving in terms of time and costs (with their proposed module lasting two to three weeks) and would be in the interests of the parties generally and in the interests of the litigation since the issues they wish to have determined in their proposed module would, in any event, have to be heard and determined in the proceedings as the plaintiffs will have to establish that their monies were in the Clear Vision account as part of their case against the defendants also.

89. The Kenny defendants contend that the plaintiffs have been unable to identify any issue in the wider case which they have made against Mr. Desmond and Mr. Millett that overlaps with the issues which would be determined in the proposed first module. While they accept that there may be an overlap in the witnesses who may have to give evidence in the proposed module, and in the wider case brought by the plaintiffs against Mr. Desmond and Mr. Millett and others, such as Mr. Desmond and Mr. Millett themselves, an overlap of witnesses does not necessarily preclude a court from directing a modular trial and ought not to do so in the circumstances of this case. They maintain that the overlap of witnesses is not of any great significance on the facts of this case.

90. As regards the position of Paul Kenny, the Kenny defendants initially suggested on affidavit that the issues concerning Paul Kenny were solely concerned with the beneficial ownership of Dildar IOM and with the Nemo lands and that there was no overlap between those issues and the wider case which the plaintiffs have brought against the other defendants. The position of the Kenny defendants, however, shifted somewhat in the course of the exchange of affidavits and in the written and oral submissions. While submitting that the joinder of Paul Kenny amounted to a contrivance on the part of the plaintiffs, and added nothing to the substance of the case in relation to the ownership of the Nemo lands or of Dildar IOM, it came to be accepted on the part of the Kenny defendants in the course of the hearing that they were not suggesting that the plaintiffs' claims against Paul Kenny (as pleaded in the amended statement of claim) would be dealt with in the proposed first module. Those claims, they accept, would have to be dealt with in a later module. Nonetheless, the Kenny defendants maintain that the involvement of Paul Kenny in the proposed first module and in a subsequent module of the proceedings ought not persuade the court to decline to direct a modular trial.

91. The Kenny defendants further maintain that there is no overlap between the issues the subject of their proposed module and the third party proceedings brought by Mr. Desmond against the third parties as the claims made in those proceedings do not involve Dildar IOM or the Nemo lands or the Kenny defendants themselves.

92. The Kenny defendants contend that the plaintiffs have sought to conflate issues in relation to the ownership of the Nemo lands and of Dildar IOM with the wider fraud claims which they have made against Mr. Desmond and Mr. Millett.

93. In further support of their proposed module, the Kenny defendants assert that the basic question in the proposed module is: who provided the money used to purchase the Nemo lands? The Kenny defendants are heavily involved in that issue. However, the balance of the claims made by the plaintiffs in the proceedings, they say, do not concern them or Dildar IOM and it is, therefore, logical for the court to direct a modular trial with their proposed module being heard first.

94. The Kenny defendants maintain that the fact that Kenny family monies and the plaintiffs'/Nolan family monies "*went through*" MECD and CVSSA accounts does not change the position or render the proposed modular trial inappropriate (see the third affidavit of Darren Kenny, para. 10). They further contend that the fact that the Kenny

family and the Nolan family both used Mr. Desmond and Mr. Millett as their advisors, similarly, does not alter the position.

95. As observed earlier, the Kenny defendants provided more detail in relation to the source of the monies used to purchase the Nemo lands in the third affidavit of Darren Kenny (at para. 12). In that affidavit, Darren Kenny swore that the purchase price for the Nemo Lands of €3.01 million was paid in three stages. The first was the booking deposit of €50,000 which was lent to Dildar IOM and came from a couple of sources. The second was the 10% contract deposit of €301,700 (inclusive of the booking deposit), which was lent to Dildar IOM and came from CVSH, the BVI company allegedly owned by Paul Kenny and John Kenny, which was originally intended as the corporate vehicle to purchase the Nemo lands. The third stage involved the payment of the 90% balance of the purchase price of €2,715,300. Darren Kenny swore that that sum was provided by way of a loan to Dildar IOM and came from two sources. The first source was from John Kenny, out of funds received by him on the realisation of an investment of STG£1.6 million which he had made with MECD. The second source was Rachel Ross Assets SA, a company owned by the Caroma Foundation, a Kenny family foundation, out of funds of €900,000 invested by Paul Kenny with it. Darren Kenny stated that the closing funds were transferred directly from the Clear Vision account (held by CVSSA with EFG Bank) to a firm of solicitors in Dublin and that it was only those completion funds that went through that account, which was the same account from which the plaintiffs allege their monies were taken.

96. The Kenny defendants contend that their dispute with the plaintiffs is essentially limited to funds that went through the Clear Vision account (or an account of CVSSA with EFG Bank) and that the complex arrangements allegedly put in place in relation to the investment transactions involving the plaintiffs' monies (which are the subject of their claims against Mr. Desmond and Mr. Millett and Mr. Desmond's third party claims) are of no concern to the Kenny defendants.

97. The Kenny defendants reject the suggestion made by the plaintiffs that Mr. Desmond and Mr. Millett might not give evidence, or, at least, could not be compelled to give evidence if they were otherwise unwilling to do so, at the hearing of the proposed first module. They maintain that Mr. Desmond and Mr. Millett are amenable to the court. I should stress that as noted earlier, Mr. Desmond and Mr. Millett were not parties to the applications the subject of this judgment, and, by recording this argument, I am not in any way intending to suggest or imply that they would not attend the hearing or would not comply with any obligation to attend. The Kenny defendants' position is that Mr. Desmond and Mr. Millett could give evidence at the trial of the proposed first module and that any overlap between the evidence they might give during that module and in further modules in the case should not preclude the court from directing the modular trial.

98. The Kenny defendants further state that it is not suggested by the plaintiffs, at least not on affidavit, that the application for a modular trial is a device or strategy such as might persuade the court not to direct such a trial.

99. Finally, the Kenny defendants reject the contention advanced by the plaintiffs that they have no standing to bring the application in circumstances where they seek to rely on the position of Dildar IOM. They note that the Court of Appeal ruled that Dillon Kenny and Darren Kenny are necessary parties to the proceedings and have brought these applications, including the application for a modular trial on their own behalf and not on behalf of Dildar IOM. As has Dildar Ireland, the seventh defendant.

(e) Plaintiffs' Case Against Modular Trial

100. In the affidavits sworn on their behalf, and in their written and oral submissions, the plaintiffs have objected to the proposed modular trial on a number of grounds. They contend that the court should not depart from the default position that there should be a unitary or single hearing of all issues in the case and that the Kenny defendants have failed to put forward any good reason as to why the court should move from that default position to a modular hearing. They stress the importance of the court appreciating the wider context of the various transactions involving Mr. Desmond and Mr. Millett (as well as the role they allege was played by Paul Kenny).

101. The plaintiffs rely on, what they maintain will be, a significant overlap of witnesses relevant to the module proposed by the Kenny defendants and those relevant to the balance of their case. They also rely on the alleged overlap or "*interconnectedness*", as their counsel put it, of the facts and issues in the case as between the Kenny defendants' proposed module and the balance of the case.

102. As regards the alleged significant overlap of witnesses, the plaintiffs make specific reference to Mr. Desmond, Mr. Millett and Paul Kenny. They refer to the alleged "*central role"* of Paul Kenny in dealings and interactions which Mr. Millett had with Mann Made in the Isle of Man, in September, 2015 and September, 2016. They also refer to a number of meetings which they claim, on the basis of documents obtained by them by way of discovery from Mr. Millett, that Paul Kenny was involved with Mr. Desmond and Mr. Millett in May, 2013, concerning the incorporation of Dildar IOM and the purchase of the Nemo Lands. It should be noted that counsel for the Kenny defendants stressed to the court that Paul Kenny strenuously rejects the allegations made by the plaintiffs against him on the basis of those documents and disputes the authenticity of certain of the documents relied upon by the plaintiffs as well as the veracity of the contents of those documents. While Paul Kenny did not swear any affidavit in respect of the Kenny defendants' application, he did swear an affidavit in response to the plaintiffs' application for discovery against him in which he similarly denied the allegations made against him on the basis of documents obtained by the plaintiff on discovery. It is unnecessary for the purpose of this judgment to recite in detail the allegations sought to be made by the plaintiffs against Mr. Kenny on the basis of the documents contained in Mr. Millett's discovery. It is sufficient to note that they have made serious allegations in the pleadings to the effect that Paul Kenny was closely involved with Mr. Millett concerning the information provided to Mann Made concerning the beneficial owners of Dildar IOM and of the funds used to purchase the Nemo lands. They have relied on his presence with Mr. Millett at meetings with Mann Made in the Isle of Man, where it is alleged that attempts were made retrospectively to

change the information provided to Mann Made concerning the beneficial ownership of Dildar IOM and of the funds used to purchase the Nemo lands.

103. The plaintiffs' case against Paul Kenny is set out at paras. 50 to 57 of the amended statement of claim. The plaintiffs also rely on the terms of para. 32 of Mr. Millett's defence in which Mr. Millett makes reference to the instructions he claims to have received from Mr. Desmond and Paul Kenny in relation to the incorporation of Dildar IOM and the provision of information to Mann Made concerning the ownership of that company and of the ownership and source of funds for the purchase by the company of the Nemo lands. By way of example, they refer to para. 32(d) of Mr. Millett's defence, where it is pleaded by Mr. Millett that in order to satisfy anti-money laundering requirements in the Isle of Man, acting on the instructions of Mr. Desmond and Paul Kenny, the OPT was "*hypothetically identified as the potential owner*" of Dildar IOM. The Kenny defendants plead that they and Paul Kenny are strangers to what may have been said by Mr. Millett to Mann Made (see para. 15 of the amended defence). However, in his second affidavit (at para. 11), Darren Kenny states that Paul Kenny informed him that Mr. Millett told Paul Kenny "*latterly*" that Mr. Millett had referred to the Nolan family's pension trust "*unbeknownst to the Kennys*" and on his own initiative, in order to circumvent the Isle of Man's anti-money laundering requirements which Mr. Millet described as "*administratively cumbersome*". The plaintiffs further rely on para. 14 of the amended defence of the Kenny defendants and of Paul Kenny, where it is pleaded that Mr. Millett gave instructions for the incorporation of Dildar IOM, on the instructions of Paul Kenny, given on behalf of Dillon Kenny and Darren Kenny.

104. The plaintiffs contend that it would be much less likely that Mr. Desmond and Mr. Millett would be prepared to give evidence at a modular hearing where the first module was that proposed by the Kenny defendants, in circumstances where they are defendants in the wider case being brought by the plaintiffs in which allegations of fraud and misappropriation have been made against those defendants. The plaintiffs point to the seriousness of the claims made against them. They point to the alleged lack of reality in the plaintiffs themselves calling (whether on foot of a subpoena or otherwise) Mr. Desmond and Mr. Millett to give evidence as part of such a module, in circumstances where the plaintiffs are making a case in fraud against them. The plaintiffs, therefore, point to the risk that Mr. Desmond and Mr. Millett may not be prepared to, or otherwise be available, to give evidence in such a proposed first module.

105. The plaintiffs also contend that the module proposed by the Kenny defendants is not at all divisible from the other issues in the case. They maintain that the issues the subject of the proposed module are neither net nor simple, but rather are extremely complex and would require the court to delve in detail into facts relevant to the rest of the case which the plaintiffs seek to maintain against the other defendants, including Mr. Desmond and Mr. Millett.

106. Apart from the overlap of witnesses, which they assert is significant and will lead to a significant duplication in costs in the event that the modular hearing requested by the

Kenny defendants were granted, the plaintiffs rely on an overlap of, or interconnectedness between, the facts relevant to, and the issues required to be considered in, the proposed first module and those arising as part of the balance of the case being made by the plaintiffs. The plaintiffs assert that the case they seek to make in relation to the Nemo lands is part of, and is connected to, the wider fraud which they allege in the proceedings. They refer to alleged connections between the fraud which they claim was committed against them and the investments apparently made by the Kenny family. They refer to the admitted fact that Mr. Desmond and Mr. Millett were also advisors to the Kenny family, as well as the Nolan family, and maintain that they advised the Kenny family on similar investment structures. In that regard, they refer to the involvement of CVSSA and other Clear Vision entities as well as MECD. They further refer to what they describe in submissions at the hearing as a "*common cast*" of individuals dealing with the Kenny family's monies and those involved in the alleged fraud committed against the plaintiffs and refer in that regard to Mr. Desmond, Mr. Millett and Paul Kenny. They point to the money trail involving the plaintiffs' funds and those of the Kenny family which are alleged to have been in the Clear Vision account (or, in any event, in an account of CVSSA with EFG Bank), with all of the plaintiffs' funds, and some of the funds from the Kenny family side, coming from MECD.

107. The plaintiffs contend that, while they have not yet obtained discovery from Paul Kenny (and a judgment on their application for such discovery is being delivered at the same time as this judgment), the case they make against Paul Kenny is not solely related to the Nemo lands themselves, but also concerns his alleged involvement in the claimed deception of Mann Made in the Isle of Man concerning the beneficial owners of Dildar IOM and the source of funds used for the purchase of the Nemo lands. While they state that the full extent of the alleged involvement of Paul Kenny is still unclear, the documents they have obtained to date on discovery from other parties (and, in particular, from Mr. Millett) demonstrate a significant involvement on his part. They doubt that Paul Kenny can be separated from Mr. Desmond and Mr. Millett in terms of the hearing of the case. They further contend that because of the alleged involvement and role of Paul Kenny, their claim against him is not readily capable of being determined by way of a modular hearing in the module proposed by the Kenny defendants or, in any event, in isolation from the plaintiffs' case against Mr. Desmond and Mr. Millett. They rely on the significant interconnection between Paul Kenny, the investment of Kenny family monies, Mr. Desmond, Mr. Millett, CVSSA and MECD.

108. I observe at this point that, as noted earlier, the position of the Kenny defendants evolved somewhat during the course of the hearing. It was ultimately accepted on their behalf that the case which the plaintiffs seek to make against Paul Kenny would not be dealt with in the first proposed module put forward by the Kenny defendants.

109. The plaintiffs reject the contention that the Kenny defendants would be prejudiced if a modular trial on the terms sought by them were refused. The plaintiffs do not accept that a modular trial would result in any saving of court time or costs. On the contrary, they maintain that the cumulative costs involved in hearing the modules would be greater than

the costs of a single trial. They point further to the overlap of witnesses that would be involved (and the potential that some witnesses, such as Mr. Desmond and Mr. Millett, might not be available at the hearing of the first module proposed by the Kenny defendants). They further disagree with the time estimate for the hearing of the main action put forward by the Kenny defendants. The plaintiffs contend that the main action should take between seven and eight weeks and not twelve weeks as suggested by the Kenny defendants. They disagree that such a module could be insulated or "*Balkanised*", to use counsel's term, as proposed by the Kenny defendants and suggest that evidence would need to be given in relation to the money trail, the advice given, the relationships with Mr. Desmond and Mr. Millett, the investments allegedly made with the plaintiffs' monies, and how their monies were transferred to and between the various accounts and so on. They accept that the third party proceedings would not necessarily need to be heard at the same time as the main action. They maintain that the main action could be heard by Michaelmas term, 2020 (although that hope was expressed at a time before the current Covid-19 pandemic restrictions and the consequent devastating effect on court business).

110. The plaintiffs claim that they would be prejudiced if the modular trial proposed by the Kenny defendants were directed by the court. Apart from being subjected to greater costs by virtue of being involved in such a modular trial, the plaintiffs claim that there is a real risk that the court would proceed in hearing the proposed module on the basis of incomplete evidence and would be "blinkered" in conducting that module without a full picture of what is alleged to have happened to their monies and of the various persons involved. They say that the court would have only a partial or incomplete picture of the fraud alleged at such a modular hearing. They contend that this would greatly prejudice them.

111. The plaintiffs do maintain that the application by the Kenny defendants for a modular trial is a strategy designed to suit them, in that it seeks to defer focus on the involvement of Paul Kenny and to distance themselves from the wider case being advanced by the plaintiffs.

112. As a fall-back position, the plaintiffs state that the Kenny defendants' application is premature and that any consideration as to whether a modular trial should take place should be for the trial judge who could decide how to structure the hearing and could permit persons to attend for parts of the hearing and to be excused from other parts which might not directly involve them. Such a decision, they say, should best be left to the trial judge at a time when all of the witness statements and evidence have been exchanged and the court is familiar with the evidence intended to be given. They contend that it would be an error of principle for the court to direct a modular trial at this stage of the proceedings.

(f) Applicable Legal Principles: Modular Trials

113. There is no real dispute between the parties as to the legal principles applicable to the court's jurisdiction to order a modular trial or as to the circumstances in which that jurisdiction should be exercised.

114. There is now express provision in the Rules of the Superior Courts ("RSC") for modular trials. Order 36, rule 9 RSC was amended by the Rules of the Superior Courts (Conduct of Trials) 2016 (SI No. 254 of 2016). Order 36, rule 9(1) now confers a general power on the court to order in any cause or matter, and at any time or from time to time:-

"(a) that different questions of fact arising therein be tried by different modes of trial;

(b) that one or more questions of fact be tried before the others;

(c) that one or more issues of fact be tried before any other or others."

115. Order 36, rule 9(2) confers express power on the judge in certain circumstances, including cases listed for trial in the Commercial List, to make an order:-

"(i) directing that the trial be conducted in particular stages (in this rule, "modules") and determining the questions, issues or set of questions or issues of fact, or of fact and law, to be the subject of each or any module, and the sequence in which particular modules shall be tried;

(ii) specifying the nature of the evidence, or the witnesses, including expert witnesses, required to enable the court to determine the questions or issues arising in each or any module;

(iii) directing the exchange and filing in court, either in advance of each or any module or following the conclusion of the module concerned, of written submissions on the questions or issues of law arising in that module."

116. Prior to this amendment to O. 36, it was held that the court had an inherent jurisdiction to direct a modular trial (*McCann v. Desmond* [2010] 4 I.R. 554 (High Court, Charleton J.) ("*McCann")* and *Weavering Macro Fixed Income Fund Limited v. PNC Global Investment Servicing (Europe) Limited* [2012] 4 I.R. 681 (Supreme Court) ("*Weavering*")). It had also been held that the court had such a jurisdiction under the rules applicable to the Commercial List in O. 63A, r. 5, as part of the general power of the Judge of the Commercial List to make orders in relation to the conduct of proceedings entered into that list *"as appears convenient for the determination of the proceedings in a manner which is just, expeditious and likely to minimise the costs of those proceedings" (McCann,* per Charleton J. at para. 5, p. 557).

117. The principles governing the exercise by the court of its jurisdiction to order a modular trial have been considered in a number of judgments of the High Court and in one judgment of the Supreme Court. The parties are agreed on the relevant authorities and on the principles to be derived from them. Where they disagree is on how those principles should be applied in the present case. I refer to the relevant cases below and, where appropriate, I note the particular parts of the judgments on which the parties rely in support of their respective positions.

118. The principles applicable to the court's discretion as to whether to order a modular trial were first considered in detail by the High Court (Clarke J.) in *Cork Plastics (Manufacturing) & ors v. Ineos Compound UK Limited & anor* [2008] IEHC 93 ("*Cork Plastics*"). In that case, an order was sought directing a modular trial, whereby issues of liability and questions of principle concerning the approach to quantum would be tried first, with questions concerning the calculation of damages being left over for subsequent determination. The court emphasised that the default position is that there should be *"a single trial of all issues at the same time*", although there are circumstances in which there can be a departure from that position. The court indicated that it is *"normally just and convenient to have such a single trial"* (para. 3.1). Clarke J. noted that the perceived advantage of a modular trial is that, depending on the outcome of the earlier module or modules, subsequent modules may either become unnecessary or may be capable of being dealt with *"in a much more focused fashion*" (para. 3.2). He was dealing in that case with the most common type of modular trial where issues of liability and quantum may often be dealt with separately. Clarke J. noted that where the proceedings are "*straightforward and relatively concise",* there is a risk that a modular trial will increase the time and expense of the proceedings, in the event that the plaintiff succeeds (para. 3.2). Therefore, in "*straightforward litigation",* and in the absence of "some unusual feature", the risk that the proceedings would be longer and more expensive, if dealt with on a modular basis, would normally outweigh any possible advantage in terms of court time and cost.

119. Clarke J. considered the circumstances and factors which might lead a court to take a different view and to direct a modular trial. He gave some examples of such factors.

120. First, he stated that the most obvious factor is the "*complexity and length of the likely trial*" (para. 3.4). He observed that lengthy cases, where liability and quantum give rise to significant and complex issues, are potentially amenable to modular trials.

121. Second, the possibility of an appeal from the court's decision in the first module is a relevant factor, although Clarke J. noted that it may be possible for a court to take appropriate measures to deal with any difficulties which might arise in the event of an appeal (para. 3.6).

122. Third, Clarke J. identified as another important factor the need to "*insulate a party*" who is involved in only some of the many issues in a case from having to spend the time and incur the expense of attending a lengthy trial, where many of the issues have no relevance to that party (para. 3.9). The Kenny defendants place significant reliance upon this factor. The plaintiffs, on the other hand, maintain that the factual circumstances in which they claim their monies were used to purchase the Nemo lands, and the role of Paul Kenny, are not as limited or as confined to the specific issues which the Kenny defendants wish to have tried in their proposed module, for the reasons summarised earlier.

123. Fourth, where the question is whether to split the trial of liability and quantum, a factor which would point in favour of such a split, would be where there are various approaches

to the calculation of damages which might arise depending on the basis on which liability might be established (para. 3.10).

124. Fifth, the "*likely relative length and complexity of the respective modules*" proposed is a significant factor. Clarke J. gave as an example a case where there is a very net issue on liability, but quantum gave rise to complex issues. That type of case would be an appropriate candidate for a modular trial (para. 3.11).

125. Sixth, another relevant factor is the extent to which there might be *"significant overlaps in the evidence or witnesses that would be relevant to all models*" (para. 3.12). Clarke J. noted that it might be the case that a number of the same witnesses may be required to give evidence on both liability and quantum modules, where the trial is split in that way, and that, if so, the advantages of a modular trial will be diminished, although it may be possible to separate out the evidence which a particular witness might have to give in respect of the two hearings. The problem in relation to the overlapping of evidence and witnesses as between different modules of a modular hearing, he stated, will be "*compounded by any difficulty in defining the boundaries of the modules with sufficient precision*". These factors are of undoubted relevance and significance to the proposed modular trial sought by the Kenny defendants in the present case. The Kenny defendants seek to minimise the significance of any overlap of evidence or witnesses, whereas the plaintiffs place very great reliance on those factors in their objections to a modular trial.

126. Seventh, Clarke J. stated that "*significant weight*" should be placed by the court on *"true prejudice"* which might be suffered by one side in the absence of a single or unitary trial and distinguished such prejudice from a "*perceived tactical prejudice*" (para. 3.13). Importantly, for present purposes, Clarke J. stated:-

> *"If there were established to be a real risk that the court's view on earlier modules might legitimately be influenced by evidence which would more properly arise in a later module, or conclusions to be reached in relation to such evidence, then it would be difficult to envisage that the court could countenance a modular trial. Obviously the extent to which it can be said that any such risk exists needs to be realistically assessed."* (para. 3.13)

Added to that is the corollary position that a real risk that the court might be deprived of evidence at the hearing of the first or an early module, on the basis that such evidence might be given at a later module, should also be a factor pointing against a modular trial. Such a risk would undoubtedly also have to be "*realistically assessed".*

127. Finally, Clarke J. noted that there might well be *"a whole range of other special or unusual circumstances that may arise on the facts of any individual case and may need to be given all due weight*", over and above those expressly identified by the court in *Cork Plastics* (para. 3.14). Clarke J. was rightly recognising that the facts of each case may give rise to particular reasons or factors which point in favour of or against the appropriateness of a modular trial.

128. Having set out the general considerations applicable to modular trials, Clarke J. then considered the application of those principles to the facts of the case before him. Most of the further discussion in the case is not of direct relevance for present purposes. The court concluded that it was appropriate to split the trial of liability and quantum and to direct a modular hearing on that basis. On the point of the alleged overlap between the evidence which might arise on both modules, Clarke J. was not satisfied that there was any significant overlap between the evidence which would have to be given in the separate modules and that any "*marginal disadvantage*" to any witness who would have to give evidence twice was a *"very marginal consideration"* (para. 4.4). Clarke J. was ultimately satisfied that there was a "*very strong case indeed*" for concluding that the *"logistical advantages of the modular trial proposed*" were *"likely to significantly outweigh any possible disadvantages*" (para. 4.5). The Kenny defendants place considerable reliance on the conclusion by Clarke J. that the fact that some witnesses might have to give evidence twice was not a significant factor in the assessment. The plaintiffs, however, point to what they say is the very significant role of certain witnesses such as Mr. Desmond, Mr. Millett and Paul Kenny, which distinguishes the present case from *Cork Plastics.*

129. The next case in sequence is the judgment of the High Court (Charleton J.) in *McCann*. A modular trial was sought in that case in which certain issues were sought to be tried in advance of other issues. Having noted that the *"default position is a full hearing*" (at para. 7, p. 558), Charleton J. set out on a non-exhaustive basis the questions which a court would have to consider in deciding whether to order a modular trial. In summary, those questions (and answers given by Charleton J.) were as follows:-

    (1) Are the issues sought to be tried by way of a preliminary module, "*readily capable of determination in isolation from the other issues in dispute between the parties?".* Charleton J. stated that a modular trial should not be directed if the case *"could be characterised as an organic whole, the taking out from which of a series of issues would tear the fabric of what the parties need to litigate, so that the case of either of the plaintiff or the defendant would be damaged through being seen in the isolated context of a hearing on a number of limited issues."*

    (2) Will there be a clear saving of court time and costs if a modular trial is ordered? This is not the only factor to be considered but is one which should be seen *"in the context of the need to administer justice in the entire circumstances of the case."*

    (3) Would a modular trial prejudice any of the parties? If it would, such as where one party's case is weakened by having a part of it heard in advance of another part, then a modular trial should not be ordered.

    (4) Is the application for a modular trial a "*device*" to suit the party seeking it or does it *"genuinely assist the litigation by being of help to the resolution of the issues"*? (para. 7, p.558)

The Kenny defendants and the plaintiffs have sought to rely on these questions, but, unsurprisingly, have asked the court to give polar opposite answers to them.

130. Clarke J. considered the principles applicable to modular trials in a later judgment in the High Court in *Donatex Limited & anor v. Dublin Docklands Development Authority* [2011] IEHC 538 ("*Donatex*"). Having reiterated some of the observations he made in *Cork Plastics* and having referred, with approval, to the considerations identified by Charleton J. in *McCann*, and having noted that they did not differ in any material way from the principles discussed in *Cork Plastics,* Clarke J. identified "*two broad considerations*" which the court has to consider in deciding whether to direct a modular trial. They are:-

> *"A. Whether there is a logical division of the case into modules as a result of which it is realistic to hope that so dividing the case will truly save time and costs; and*
>
> *B. Whether there might be any true prejudice to any of the parties (as opposed to mere tactical disadvantage) as a result of the proposed division*." (para. 2.8)

131. The Supreme Court considered the principles applicable to modular trials in *Weavering*. In that case, the High Court had directed a modular trial of eight issues (which are set out at para. 2.22 of the judgment). The Supreme Court overturned that direction. In a judgment delivered by Clarke J., the Court reviewed and endorsed the principles and factors relevant to modular trials set out in *Cork Plastics* as well as the summary of questions to be addressed in determining whether a modular trial should be ordered set out by Charleton J. in *McCann*. The Court then sought to extract some principles to be derived from the case law (para. 6.6). Some of the principles discussed by the court are of relevance to the present case.

132. Having referred to some of the similarities between modular trials and trials of preliminary issues, the Court noted that where issues are tried first on a modular basis (such as liability and/or causation), the trial court will hear all matters relevant to those issues (whether of a fact of law) and come first to a conclusion of those issues. The Court stated that if, while hearing such a module, the trial court were to form the view that it could not safely reach a final conclusion on some or all of the issues to be determined in the module, without also considering evidence and legal argument relevant to issues intended to be dealt with in a later module, the court could "*act in an appropriate way to ensure that no injustice is caused"* (para. 6.6). Presumably the Court had in mind that the trial court could defer ruling on the earlier module until the subsequent module was heard and then rule at the same time on both modules, or something like that. The court further noted that when a modular trial is sought, there are a *"range of practical circumstances to which the court should have regard in determining whether, in reality, there is likely to be a net benefit in directing a modular trial."* The court continued:-

> *"The factors that may be important in determining where the balance lies may vary from case to case depending on all the relevant circumstances of the case in question."* (para. 6.6)

133. Some of the observations made, and conclusions expressed, by the Court in its consideration as to whether a modular trial would be appropriate on the facts of that case are of undoubted relevance to the present case. The Court observed (at para. 7.3) that in most cases the questions which the High Court might have to address in deciding whether to direct a modular trial would not go beyond the *"purely practical or logistical sort of issues*" identified in the earlier cases, although the position may be different where the opposing party can point to prejudice, such as where there are "*connected credibility questions, some of which might arise on liability and some on quantum"* (para. 7.3). Normally, however, the issue is whether a modular trial will be more efficient and cost effective. However, the Court took the view that the type of modular trial which was directed by the High Court in that case gave rise to different considerations as specific issues were directed for trial which formed only part of the question which would be likely to arise in determining the potential liability of the defendant to the plaintiff. The Court stated that, on one view, *"the decision to strip out those issues for early determination may place the modular trial direction in this case at the more substantive end of the spectrum"* (para. 7.3).

134. Later, in the judgment, Clarke J. stated that where a court is asked to direct a modular trial involving some, but not all, of the issues relevant to liability, the court had to exercise "*significant care… to ensure that there are unlikely to be significant links between the issues which might arise in respect of other aspects of the liability question such as would render it unfair and/or inefficient to separate out the liability issues in the manner under consideration*." (para. 7.8). The existence of a likelihood of "*significant links*" between the issues and consideration as to whether it would be unfair or inefficient to separate out the issues in different modules is, therefore, an important factor for the court to consider in deciding whether to direct a modular trial.

135. The Supreme Court did go on to state that where liability issues "*fall into clearly discrete and separate categories"*, where some issues can be tried *"without any reference to others and without any fear of injustice or inefficiency"*, a modular trial could be ordered (para. 7.8). The plaintiffs rely on these *dicta* in support of their objection to the proposed modular trial here. They maintain that there are significant links between the issues sought to be tried in the first proposed module and the balance of their case. They also assert that this is not a case in which liability issues can be placed into clearly discrete and separate categories where they can be tried without any reference to other issues and without any fear of injustice or inefficiency. The Kenny defendants do not agree.

136. The Supreme Court referred in its judgment to the difficulty in directing a modular trial where the first proposed module would require the court to engage in a *"detailed exploration of the precise factual circumstances"* relied upon by the plaintiff in support of its cause of action (para. 7.1.2). The Court was clearly of the view that a modular trial would not be appropriate where the first proposed module would require *"a drilling into the detailed facts*" (para. 7.15) or a "*detailed consideration of the facts*" (para. 7.16). The Court also held that the first module directed by the High Court was "*insufficiently precise*

and its parameters… open to legitimate debate" (para. 7.16). The plaintiffs rely on these *dicta* in resisting the modular trial sought by the Kenny defendants.

137. The Supreme Court concluded that there was, "*at least a significant risk*" that the modular trial directed by the High Court (which the Supreme Court described as a "*case management direction"*) could have *"a very significant practical effect on the run of the case to the real (rather than tactical) detriment of one of the parties"* (para. 7.19). On one view, the Court stated, the first module directed by the High Court in that case would require "*delving into the facts*" which would remove the advantage of directing a modular trial.

138. While concluding that the particular form of modular trial directed in that case was not appropriate "*in all the circumstances and at* [that] *stage*", the Court went on to state:-

> "*Whether, at a different time in the progress of these proceedings, it is appropriate to direct a modular trial on some basis which overcomes the difficulties identified in this judgment, is a matter to be decided at that time."* (para. 8.1)

139. The plaintiffs rely on those dicta in support of their contention that it should be left to the trial judge to determine how the trial proceeds and whether the Kenny defendants can be excused from participating in parts of the trial which do not directly concern them.

140. Finally, the Kenny defendants relied on the recent judgment of the High Court (Twomey J.) in the long running proceedings concerning the Blackrock Clinic, *Sheehan v. Flynn & ors* [2018] IEHC 188 ("*Sheehan*"). In that case, one of the defendants, Breccia, sought an order directing a modular trial of the remaining issues in the proceedings. The plaintiff opposed that application as he wished to have a unitary trial.

141. The High Court (Twomey J.) decided that the remaining four issues in the case could be divided up into discrete areas which should be heard on a modular basis. The Court relied on what Clarke J. referred to in *Cork Plastics* as the "*special or unusual circumstances"* of the case. Twomey J. concluded that there were two special and unusual circumstances in the case. The first was that the proceedings had already involved an extensive use of scarce court resources by the parties. The Court had already heard part of the proceedings in modular form. The second was that there had been a successful request for the recusal of the judge previously hearing the case. Having regard to those two special or unusual circumstances, and the public interest in the use of scarce court resources as efficiently as possible, Twomey J. held that it was appropriate that the remainder of the proceedings should be dealt with in three modules.

142. While bringing this judgment to my attention, and while relying on certain analogies which they submitted could be drawn from the case, it was fairly conceded on behalf of the Kenny defendants, that the facts of the case and the reasoning given in the judgment of Twomey J. were very specific to the particular case. It was, however, pointed out that Twomey J. was very influenced by the fact that a large amount of court time had been

expended on the various issues in the case and that that was also the objective of the Kenny defendants in seeking the modular trial in this case.

143. I accept and will apply the principles identified in these cases in determining the Kenny defendants' application for a modular trial.

(g) Application of Legal Principles on Modular Trial and Decision on Kenny Defendants Application

144. It is certainly the case that the court has jurisdiction to direct a modular trial in an appropriate case. Prior to the amendment to the RSC in 2016, the High Court and Supreme Court confirmed that the court had an inherent jurisdiction to direct a modular trial in an appropriate case. The power to do so is now expressly provided for in Order 36, rule 9.

145. The principles to be applied in determining whether the court should exercise that jurisdiction have been discussed in the previous section of this judgment.

146. I must start from the position that, unless there is good reason to the contrary, there should be a single unitary trial of all issues in the case. It is for the party who proposes that a modular trial should be conducted to demonstrate why the court should depart from that default position.

147. The two broad considerations which the court must consider in deciding whether to direct a modular trial are those identified by Clarke J. in the High Court in *Donatex*. They are essentially (a) whether there is a logical division of the case into modules such that it is realistic to believe that such a division will lead to a saving of time and costs; and (b) whether true prejudice might be caused to any of the parties as a result of the proposed division (not including "*mere tactical disadvantage").*

148. I accept that many of the factors considered by Clarke J. in the High Court in Cork Plastics are relevant to the court's assessment as to whether a modular trial should be directed. I observe, however, that the type of modular trial proposed in that case was a much more straightforward one than in the present case. In that case, it was sought to have issues of liability and questions of principle concerning quantum tried first, with the calculation of damages being left over to a subsequent module.

149. With respect to the various factors identified by Clarke J. in *Cork Plastics,* it seems to me that while "*complexity and length of the likely trial"* are relevant factors, that cuts both ways. The issues in the case may be of such complexity (and so interconnected) that it is simply not possible logically to divide the case in modules without the risk of real prejudice to one or other of the parties.

150. The possibility that one side may appeal the court's determination of an earlier module is relevant and, perhaps, more so in this case than in the circumstances discussed by the court in *Cork Plastics.* The findings as to the nature of the relationship between the plaintiffs and a number of the other defendants such as Mr. Desmond, Mr. Millett and Mr. Kenny, which may be made following a hearing of the first proposed module, may be

highly relevant to the subsequent module concerning the plaintiffs' claim against Mr. Desmond, Mr. Millett and Mr. Kenny. That said, it might be possible for the court to fashion an order so as to avoid or reduce the possibility of an appeal proceeding while the subsequent module is being heard. However, it is necessary to consider whether the court should be put in that position. The factors in favour of a modular trial would have to be very significant before the court should be required to consider at this stage whether it could attempt to fashion such an order if an appeal were sought to be brought from its determination of the first module.

151. The need to "*insulate*" a party who is involved in some, but not all of the issues is also a relevant factor. However, that factor raises the question as to whether it is possible clearly to delineate the role of the particular party so as to safely conclude that that party can be removed from involvement in subsequent modules. In my view, this factor poses a particular problem in this case for reasons on which I will shortly elaborate.

152. I also accept that the likely relative length and complexity of the respective modules would be a significant factor in circumstances where one of the proposed modules involves a very net issue (such as a liability issue), but other modules (which would only be reached in the event of a finding in favour of the plaintiff on the first module) give rise to greater complexities. In the present case, however, the Kenny defendants' contention that it would be possible easily to deal discretely with the issues concerning the purchase, and the beneficial ownership, of the Nemo lands and the beneficial ownership of Dildar IOM is completely over optimistic, by reason of the significant interconnection between the plaintiffs, Mr. Desmond, Mr. Millett, Paul Kenny and other members of the Kenny family (including the Kenny defendants) and the intertwining nature of those relationships.

153. I am also of the view that there would be significant overlaps of witnesses and evidence were I to accede to the Kenny defendants' application for a modular trial. Those overlaps, at the very least, extend to the plaintiffs themselves and to Mr. Desmond, Mr. Millett and Paul Kenny, as well as potentially to witnesses giving evidence in relation to the money trail followed by the plaintiffs' monies as well as a significant portion of the Kenny family monies, both of which, to a significant degree, passed through MECD in the UAE and the Clear Vision account (or some account of CVSSA) in EFG Bank in Switzerland. It seems to me that those witnesses and the evidence they give are relevant not just to the module proposed by the Kenny defendants, but also to the wider claim brought by the plaintiffs arising from the loss of their funds.

154. This likely overlapping of evidence and witnesses between the different modules is also, in my view, compounded by the real difficulty in defining the boundaries of the modules with the necessary precision (being another of the factors mentioned in Cork Plastics). Contrary to the contention advanced by the Kenny defendants, I cannot see how the module proposed by the Kenny defendants could be heard without hearing evidence as to the relationship between the plaintiffs and Mr. Desmond and Mr. Millett, on the one hand, and as between the Kenny defendants (and other members of the Kenny family such as

Paul Kenny and John Kenny) and Mr. Desmond and Mr. Millett, on the other. Leaving aside the potential difficulties in securing the voluntary attendance of Mr. Desmond and Mr. Millett at the hearing of the module proposed by the Kenny defendants, there is a real difficulty in separating out the evidence to be given by those persons at the proposed first module, from that to be given by them in the subsequent module or modules in respect of the wider claim brought by the plaintiffs. The proposed modular hearing goes far beyond and is much more complex than splitting the trial as between liability and quantum and there is, in my view, a real difficulty in defining the boundaries between the modules with precision.

155. I also accept that significant weight should be given by the court to true prejudice which might be suffered by one of the parties in the event that a single or unitary trial was not to take place. I accept the plaintiffs' contention that there is a real risk that they will be prejudiced if the proposed modular trial is directed by the court, at this stage at least. At best, the court would be embarking upon the hearing of the first proposed module without a full and complete picture of the relationships between the plaintiffs and Mr. Desmond and Mr. Millett on the one hand, and as between the Kenny defendants (and other members of the Kenny family, including Paul Kenny and John Kenny) and Mr. Desmond and Mr. Millett, on the other. Nor will the court hearing the first proposed module have a full picture of the evidence relevant to the case which the plaintiffs make against Paul Kenny concerning the establishment of Dildar IOM and subsequent events which are alleged to have occurred in the Isle of Man, all of which, the Kenny defendants accept, will not take place at the hearing of their proposed first module.

156. There is, in my view, a real difficulty in defining the boundaries of the various modules precisely. That in turn gives rise to a risk that there is likely to be, as the plaintiffs contend, a duplication of time and costs rather than a saving of such costs in the event that a modular trial were directed by the court. I do accept that from the Kenny defendants' point of view, it would be better for them if the court directed a modular trial and that, in that sense, they would be prejudiced if the modular trial sought by them were refused. However, the difficulty in separating out and extracting the issues the subject of the proposed first module from the other issues in the case, in my view, strongly militate against a modular trial. The prejudice that would be suffered by the Kenny defendants would be the same prejudice which any defendant suffers by having to defend itself against allegations made in the course of a lengthy hearing. That is a normal incident of litigation and is a prejudice which can be addressed, if necessary, by an appropriate order for costs at the conclusion of the case, if the Kenny defendants are successful in defending the proceedings.

157. There is, in my view, a range of circumstances that arise on the facts of this case (as they are alleged by the parties) which must be taken into account in determining whether it is fair and just to direct a modular trial. As Clarke J. indicated in *Cork Plastics* in the High Court and in *Weavering* in the Supreme Court, the relevant factors in determining where the balance lies on the question as to whether a modular trial should be ordered vary from case to case. It seems to me that the facts of this case (as they are alleged in the

pleadings and elaborated upon in the affidavits) go beyond pure practical or logistical issues and give rise to a real risk that a modular trial would have a very significant practical effect on the running of the case to the serious detriment of the plaintiffs. I am also satisfied that there are likely to be significant links between issues which might arise at the hearing of the first proposed module and issues and evidence which will arise at the hearing of the balance of the case, which would render it unfair as well as being inefficient to divide up the hearing into modules as is proposed by the Kenny defendants.

158. I do not believe that the module proposed by them is one which can be treated as a discrete and separate module which can be heard and determined without reference to issues and evidence which will arise in the balance of the case without giving rise to a real risk of injustice. The interconnection between the various parties and the particular links between them as alleged in the pleadings and elaborated upon in the affidavits, are such that a court hearing the first module proposed by the Kenny defendants would be required to engage in a detailed exploration of facts going beyond those that might be said to be directly and solely relevant to the purchase and ownership of the Nemo lands and the incorporation and ownership of Dildar IOM. In order to get a full picture of the relationships between the parties and the money trail involved, a court would have to *"drill into the detailed facts"* (in the words of Clarke J. in *Weavering*) and engage itself in a detailed consideration of the facts at such a proposed first module which would render the direction of a modular hearing pointless and counterproductive. That is particularly so in circumstances where it is, in my view, extremely difficult, if not impossible, to clearly define the boundaries between the modules.

159. One of my main concerns stems from the significant interconnection between the various parties and issues insofar as they appear from the pleadings and the affidavits (as I have summarised them earlier). I described in some detail earlier in this judgment the common features which emerge from the pleadings and the affidavits as between the case made by the plaintiffs in relation to the Nemo lands and Dildar IOM and the wider case they make in relation to the loss of their funds. I highlight again here the fact that Mr. Desmond and Mr. Millett advised and acted for both the plaintiffs (and members of the Nolan family) and the Kenny defendants (and other members of the Kenny family, including Paul Kenny and John Kenny). Both families claim to have entrusted substantial funds to Mr. Desmond and Mr. Millett for investment.

160. The funds of both families are alleged to have been transferred to the Clear Vision account or to another account or accounts held by CVSSA in EFG Bank in Switzerland. The plaintiffs' funds came to that account via MECD in the UAE. The plaintiffs claim that in excess of €2.8 million was taken from the Clear Vision account to purchase the Nemo lands. Mr. Desmond, Mr. Millett and the Kenny defendants and Paul Kenny claim that while 90% of the purchase price for the Nemo lands (just over €2.7 million) came from the Clear Vision account (or another CVSSA account with EFG Bank), they were Kenny family monies and not the plaintiffs' monies.

161. Of the monies in the Clear Vision account which the Kenny defendants and Paul Kenny maintain represent Kenny family monies, a significant portion is alleged to have come from an investment which John Kenny made with MECD. Some of the purchase monies are said to have come from a Clear Vision named entity, CVSH, a BVI company allegedly owned by Paul Kenny and John Kenny. CVSSA and MECD are implicated, both by the plaintiffs and by the Kenny defendants as being an essential part of the money trail through which the funds used to purchase the Nemo lands passed. CVSSA and MECD also form part of the money trail relevant to the plaintiffs' wider claims against Mr. Desmond and Mr. Millett and others (and are relevant to the third party claims made by Mr. Desmond against the various third parties). Clear Vision named companies feature throughout the pleadings of the various parties and third parties and are, to varying degrees, alleged to have a role in both the Nemo lands acquisition and the investment structure through which the plaintiffs allegedly lost the balance of their funds. The Clear Vision named companies involved to various degrees as alleged in the pleadings are CVSSA (the Panamanian company in whose name the funds were held with EFG Bank in Switzerland allegedly for the plaintiffs and for members of the Kenny family which was also allegedly involved in the wider fraud alleged by the plaintiffs); CVSH (the BVI company allegedly owned by Paul Kenny and John Kenny which was to be the original purchaser of the Nemo lands); and CVSL (the Hong Kong company allegedly owned by the first third party (Mr. Murphy who is also alleged to be the ultimate owner of CVSSA and which was allegedly involved with others in the fraud perpetuated against the plaintiffs).

162. The relationships between the parties and the transactions involved (both the acquisition of the Nemo lands and the alleged investment transaction in the far east) are eye wateringly complex. The interrelationship between the parties, as alleged on the pleadings, means that the situation is, to my mind, far too murky and blurred for me to be able confidently to divide out the proposed module concerning the acquisition of the Nemo lands and Dildar IOM from the wider case. I would not at all be confident that a hearing involving all of the necessary witnesses could take place at the proposed first module. I would be concerned either that relevant witnesses would be absent from that module or that, if they were present, it would significantly undermine the practical advantages which the defendants claim a modular trial would generate.

163. It is common case that Mr. Desmond and Mr. Millett would have to give evidence at the hearing of the first proposed module. However, on one view, that module does not directly concern those defendants. It may be that they would not be prepared to give evidence voluntarily at the hearing of that module, in defence of their interests as defendants in the wider case against them, and that the plaintiffs (or the Kenny defendants) might have to subpoena them to give evidence. Having to do so would, by definition, put the party issuing the subpoena at a significant disadvantage in terms of having to call the witness and, if necessary, having to seek leave to cross-examine them. I should make clear again that I am not in any way suggesting that either Mr. Desmond or Mr. Millett would not comply with their legal obligations to attend, but I am drawing attention to a real risk that they may seek, quite properly, to protect their interests in

terms of the wider case and may require to be subpoenaed, which would in turn put the party serving the subpoena at a significant disadvantage. That disadvantage would not arise in the case of a single or unitary trial.

164. I am satisfied that there is a risk that if the court were to direct a modular trial on the basis of the first module proposed by the Kenny defendants, the court would be required to deal with that module on a blinkered basis and on the basis of potentially incomplete evidence and without having the full picture. That risk is much less in the case of a single trial. On the other hand, if Mr. Desmond and Mr. Millett do give evidence at the hearing of the proposed module, it is difficult to define the precise boundaries of their evidence. What would they say, for example, about the wider allegations being made which do not directly concern the Nemo lands or Dildar IOM? How could their evidence be corralled in the manner implicitly suggested by the Kenny defendants? I do not think that it could, without at least giving rise to a real risk of injustice and a risk that, rather than leading to a saving of time and costs, there would be a duplication of time and costs.

165. Similar issues arise in relation to Paul Kenny. The Kenny defendants accept that the plaintiffs' damages claim against Paul Kenny will not form part of their proposed module, but would be heard after it. However, Paul Kenny would undoubtedly be a significant witness at the hearing of the proposed first module having regard to the allegations made against him by the plaintiffs concerning the incorporation of Dildar IOM and the purchase of the Nemo lands and concerning the various other meetings allegedly involving Mr. Desmond, Mr. Millett and Paul Kenny and Mann Made in the Isle of Man and having regard to what is pleaded in relation to Paul Kenny in the pleadings of others (such as Mr. Desmond and Mr. Millett). It would again, in my view, be duplicative of time and costs were a modular trial to be ordered in circumstances where Mr. Kenny, who is likely to be significant witness, would be likely to have to give evidence in more than one module.

166. In summary, therefore, I am satisfied that, in the particular circumstances of this case, it would not be appropriate or in the interests of justice for me to direct a modular trial. The Kenny defendants have not persuaded me that a single or unitary trial should not take place. In my view, for the various reasons discussed above, it is not possible to divide the case into modules in a way that would be likely to result in a saving of time and costs. On the contrary, it would be likely to lead to a duplication of such time and costs. Further, I believe that a modular trial would be unjust and would be likely to lead to prejudice, particularly to the plaintiffs. I am satisfied that such prejudice is not a mere tactical disadvantage but is a real risk of genuine prejudice caused by the potential absence of evidence and witnesses at the trial which may involve the court in hearing the proposed module on the basis of incomplete evidence. On the other hand, if all of the evidence were to be adduced at the hearing of the first proposed module, then there would be no significant saving of time and costs. I do not accept that the case can be divided appropriately or conveniently into the modules suggested by the Kenny defendants nor am I satisfied that the module which they seek to have tried first is one merely involving a single property and a single transaction. This ignores completely the alleged interrelationship between the parties and the money trail. To order a modular trial on the

facts (as they are alleged on the pleadings and in the affidavits) would, in my view, involve the court in doing more than merely case managing the case but would amount to a significant substantive interference by the court in the case in a way which has the real potential to lead to injustice. Therefore, I refuse to direct a modular trial.

167. As a fall-back position, the plaintiffs opposed the Kenny defendants' application for a modular trial on the basis that it was premature and should await the making of discovery by Paul Kenny. However, I do not believe that it is necessary to await that discovery. I am in a position to deal with, and to reach a decision on, the application at this stage of the proceedings.

168. While I am refusing to order a modular trial at this stage, it may well be that, having considered the witness statements and the submissions of the parties, the Judge of the Commercial List or the trial judge, if a trial judge is nominated in sufficient time in advance of the proposed trial, may take the view that it is possible to schedule the conduct of the trial in such a way that, if a particular party or parties, such as the Kenny defendants and Paul Kenny, do not wish to be present for a particular period of the trial, such can be accommodated in the scheduling of witnesses and issues at the trial.

169. The estimated length of time of the hearing, whether of a modular trial or of the full trial itself, was canvassed in the affidavits sworn on behalf of the parties. The Kenny defendants' estimate of the length of the hearing of their proposed module was two to three weeks. The plaintiffs' estimate for the full trial is seven to eight weeks. Since I have concluded that it is not possible fairly to direct a modular trial, it is appropriate to touch on the length of the trial itself. It is, in my view, premature to provide an accurate estimate of the trial at this stage, in the absence of witness statements and completion of the discovery process. However, it seems to me that the Kenny defendants' estimate of twelve weeks is probably more accurate than the plaintiffs' estimate of seven or eight. However, this should be kept under review. So too should a decision on whether the third party proceedings should be heard with or separate from the main proceedings. I have reached no decision on that question yet and would need to hear the views of the relevant parties (including Mr. Desmond, Mr. Millett and the third parties themselves).

Kenny Defendants' Application to Confine Plaintiffs' Claim to Monetary Claim

(a) Kenny Defendants' Case for Confinement

170. The Kenny defendants seek an order directing that the plaintiffs' claim against Dildar IOM be confined to a money claim for the sum of €2.828 million plus interest. They initially sought that order pursuant to the inherent jurisdiction of the court. However, they also now contend that the court has jurisdiction to make the order under O. 63A, r. 6(iv) RSC.

171. The Kenny defendants place reliance on the manner in which the plaintiffs have pleaded their claim in relation to the Nemo lands. They note that at para. 26 of the amended statement of claim, the plaintiffs plead that their funds were used to finance Dildar IOM's purchase of the Nemo lands in whole, or in part, in September, 2013 *"without the knowledge or consent"* of the plaintiffs. They submit, therefore, that the plaintiffs had no knowledge of or intention to purchase the Nemo lands, whether through Dildar IOM or

otherwise. As they see it, the best the plaintiffs can say is that just over €2.828 million of the purchase price of the Nemo lands of €3.017 million came from the plaintiffs' funds and that the plaintiffs should be entitled to the return of those monies plus interest, in the event that they are successful in their claim involving Dildar IOM and the Nemo lands.

172. The Kenny defendants initially requested the court to direct that the plaintiffs' claim against Dildar IOM be limited to the monetary amount the plaintiffs claim represents their funds plus interest. The Kenny defendants' position shifted somewhat during the course of the exchange of affidavits and submissions. In their written submissions, the Kenny defendants submitted that the court should direct the plaintiffs to elect as between their claim to a proprietary interest in the Nemo lands and their alternative monetary claim since the court cannot grant both reliefs. Essentially, the Kenny defendants ask the court to direct the plaintiffs at this stage of the proceedings to decide whether they are pursuing their claim to a proprietary interest in the Nemo lands and Dildar IOM or whether they are maintaining a personal monetary claim. The Kenny defendants contend that it would not cause the plaintiffs any "*undue hardship*" to direct, at this stage, that their claim be confined to a monetary claim. On the contrary, they contend that it would cause "*undue hardship*" to the Kenny defendants if the court permitted the plaintiffs to maintain their claim to a proprietary interest in the Nemo lands and Dildar IOM and would not be of any additional benefit to the plaintiffs in circumstances where the plaintiffs had no knowledge of or intention to purchase of the Nemo lands whereas the Kenny defendants did intend to purchase and develop them. They claim that, in reliance upon the decision of the House of Lords in *Foskett v. McKeown & ors* [2001] 1 AC 102 ("*Foskett*"), the plaintiffs must elect as to which of the remedies they seek as between the proprietary and personal monetary remedies sought by them in connection with the Nemo lands and Dildar IOM and that they should be required to make that election at this stage. Therefore, rather than requiring the court to direct that the claim be confined to a monetary claim, the Kenny defendants' position shifted somewhat to the extent that what they now ask the court to do is to direct the plaintiffs to elect as between the proprietary and monetary remedies sought by them.

173. During the course of argument, counsel for the Kenny defendants raised the possibility of an alternative resolution of the issue under which the plaintiffs would indicate the maximum monetary value of their claim by way of further particulars or by means of an expert valuation report, so that the Kenny defendants could consider paying that amount into court or into a joint account, have to enable them to deal with and develop the property.

(b) The Plaintiffs' Response to Confinement Application

174. The plaintiffs resist the Kenny defendants' application for them to confine their claim (or to elect as to whether they are pursuing a proprietary or personal monetary claim) with respect to Dildar IOM and the Nemo lands on a number of grounds.

175. First, they dispute the Kenny defendants' *locus standi* to bring the application. They maintain that it is not open to the Kenny defendants to seek relief on behalf of Dildar IOM, the ownership of which is disputed in the proceedings.

176. Second, the plaintiffs contend that the application to confine their claim is misconceived on various grounds. They argue that the Kenny defendants are estopped from seeking this relief in circumstances where they successfully applied to the High Court of Justice of the Isle of Man to stay proceedings there on the basis that the beneficial ownership of Dildar IOM could be dealt with in these proceedings. The plaintiffs also contend that the application for them to confine their relief to a monetary claim is misguided on the authorities. They too rely on *Foskett*. The plaintiffs maintain that they are entitled to pursue their claims in the alternative up to and including the trial and cite some authority to that effect (including *Johnson v. Agnew* [1980] AC 367 and *Egan v. Heatley* [2019] IEHC 383). They accept that they are not entitled to obtain relief on both bases, but assert that they are not required to make an election at this stage.

177. The final ground on which they oppose the Kenny defendants' application to confine their claim to a monetary claim, is prematurity. They argue that the issue can only be determined in light of the evidence given at the hearing and not at this stage of the proceedings. It should be said, however, that the plaintiffs' counsel accepted in his submissions that the counsel for Kenny defendants had made a constructive suggestion in his submissions and that he would take instructions on that suggestion and inform the court if progress could be made on it. It seems, however, that progress was not possible and no agreement was reached in relation to the suggestion. I will come back to this suggestion later.

(c) Decision on Kenny Defendants' Confinement Application

178. For reasons which I will now explain, I do not believe that it would be appropriate for me to direct the plaintiffs, at this stage, to make any election in terms of the relief which they seek concerning the Nemo lands or Dildar IOM or to confine their claim to a monetary one.

179. I can quickly deal with some of the plaintiffs' objections at this point. First, I do not accept that the plaintiffs' objection based on the *locus standi* of the Kenny defendants is well founded. The Kenny defendants are not seeking relief on behalf of the Dildar IOM, but are rather seeking relief in their own right. The Court of Appeal has already held that the ninth and tenth defendants, Dillon Kenny and Darren Kenny, are proper defendants to the proceedings and entitled to maintain a claim to the beneficial ownership of Dildar IOM by way of counterclaim. I see no difficulty with the Kenny defendants' standing to bring the application seeking the confinement of the plaintiffs' claim to a monetary claim.

180. Second, I do not accept that the Kenny defendants are estopped from bringing the application by reason of their successful application to the High Court of Justice of the Isle of Man to stay the plaintiffs' claim before that court concerning the beneficial ownership of Dildar IOM on the basis that that issue could be dealt with in the Irish proceedings. It does not seem to me that the Kenny defendants' application to confine the plaintiffs' claim to a monetary claim, or for the court to direct the plaintiffs to make an election at this stage, is necessarily inconsistent with that application in the Isle of Man or is one which they should be estopped or otherwise precluded from bringing by reason of their successful application to stay the proceedings in that jurisdiction. I am not prepared to

find, on the basis of the evidence before me, that the Kenny defendants are estopped and should otherwise be precluded from bringing the application by reason of their successful application to stay the plaintiffs' claim in the Isle of Man concerning the beneficial ownership of Dildar IOM.

181. However, I am not satisfied that the Kenny defendants' application is at all well founded. First, I do not accept that the court has jurisdiction to make the order sought under O. 63A, r. 6(iv) RSC. That provision entitles the court at an initial directions hearing (which is either fixed at the time the proceedings are entered in the Commercial List or dealt with at the same time as that application) to give directions to facilitate the determination of the proceedings in the manner mentioned in O. 63A, r. 5 (namely, to enable the proceedings to be determined in a manner which is *"just, expeditious and likely to minimise the costs of those proceedings"*). Among the directions which the court can make at the initial directions hearing are directions:-

> *"(iv) for the defining of issues by the parties, or any of them, including the exchange between the parties of memoranda for the purpose of clarifying issues;"*

182. The court is not being asked by the Kenny defendants to "*define*" the issues between the parties at an initial directions hearing. Rather, the Kenny defendants are asking the court to make a substantive order confining the plaintiffs to a monetary claim insofar as the Nemo lands and Dildar IOM is concerned or, as the application was refined at the hearing, requiring the plaintiffs to elect at this stage as to whether to pursue a proprietary claim or a monetary claim in respect of those lands and that company. Apart from the fact that such an application is not being made at the initial directions hearing (with which the specific rule relied upon is concerned), the application goes way beyond merely seeking to "*define*" the issues, as I have indicated. I do not accept, therefore, that the court has jurisdiction to make the order sought under Order 63A, rule 6(1)(iv).

183. The Kenny defendants maintain, in the alternative, that the court has an inherent jurisdiction to make the order sought. That may be so. However, it is unnecessary for me to reach a concluded view on that point as the plaintiffs accept that it is not open to them to obtain judgment on the basis of both the proprietary and monetary claims. They accept that they must elect as between them but maintain that that election can take place at the trial and following the evidence in the case.

184. The Kenny defendants have asked the court to confine the plaintiffs' claim or to require the plaintiffs to make their election at this stage. I do not believe that the plaintiffs should be required to do at this stage or that the court should confine their claim in the manner suggested. The plaintiffs accept that they have made claims asserting a proprietary interest in respect of the Nemo lands and in respect of the beneficial ownership of Dildar IOM and have also maintained a monetary claim in respect of the monies they allege were used by Dildar IOM to purchase the Nemo lands. They also accept that they cannot obtain relief under both heads of claim.

185. Both parties accept that the decision of the House of Lords in *Foskett* is relevant and should be applied by the court. I should add that aspects of the judgment of Lord Millett, who delivered the majority judgment on behalf of the House of Lords, have been cited with approval in a number of previous Irish cases (see for example: *Re Varko ltd* [2012] IEHC 278 and *Re Custom House Capital ltd* [2017] IEHC 484). However, it does not seem to me that *Foskett* is of any assistance to the Kenny defendants in terms of the point in time at which the court might intervene to limit or confine a plaintiff's claim in the manner suggested.

186. It is unnecessary to outline in any great detail the facts of *Foskett* save to say that the plaintiffs entrusted a large sum of money to a property developer to purchase plots in a property development in Portugal. The scheme was never carried out. The developer, in breach of trust, used some of the purchasers' monies to pay premiums on a life insurance policy for a number of years. The developer divested himself of any beneficial interest in the policy and directed that it be held for the benefit of his children. The developer committed suicide. The insurance company paid the proceeds of the policy to the trustees of the policy. The purchasers obtained a declaration that the land, the subject of the development, and the shares in the company which was to develop it were held in trust for them. They obtained a large sum of money under a compromise with the bank from whose accounts some of the money had been misappropriated. They then brought an action against the trustees and the beneficiaries of the insurance policy.

187. The House of Lords first held that the purchasers were able to follow their money into the policy when the premiums were paid and from there into the hands of the trustees, when the death benefit was paid to them, so as to obtain reimbursement from the policy proceeds of the amount of the premiums paid with their money together with interest.

188. The House of Lords also held (this time, by a majority) that where a trustee wrongfully used trust money to provide part of the cost of acquiring an asset, the beneficiary was entitled, at his option, either to claim a proportionate share of the asset or to enforce a lien upon it to secure his personal claim against the trustee for the amount of the misapplied money. The Court held that as the beneficiaries of the policy were volunteers and had not themselves contributed to the premiums, the purchasers were entitled to a share in the proceeds of the policy which was proportionate to the premiums paid out of the trust money.

189. Lord Millett (in delivering the majority judgment of the House of Lords on this part of the appeal) stated that the "*basic rule*" was as follows:-

> "*Where a trustee wrongfully uses trust money to provide part of the cost of acquiring an asset, the beneficiary is entitled at his option either to claim a proportionate share of the asset or to enforce a lien upon it to secure his personal claim against the trustee for the amount of the misapplied money. It does not matter whether the trustee mixed the trust money with his own in a single fund before using it to acquire the asset, or made separate payments (whether*

simultaneously or sequentially) out of the differently owned funds to acquire a single asset." (per Lord Millett at p. 131)

190. Lord Millett went on to state that there is a mixed substitution whenever the claimant's property has contributed in part only towards the acquisition of the new asset and that it is not necessary for the claimant to show that his property has contributed to any increase in the value of the new asset. He further stated that the:-

> "*The primary rule in regard to a mixed fund, therefore, is that gains and losses are borne by the contributors rateably. The beneficiary's right to elect instead to enforce a lien to obtain repayment is an exception to the primary rule, exercisable where the fund is deficient and the claim is made against the wrongdoer and those claiming through him. It is not necessary to consider whether there are circumstances in which the beneficiary is confined to a lien in cases where the fund is more than sufficient to repay the contributions of all parties. It is sufficient to say that he is not so confined in a case like the present… On ordinary principles such persons [namely, the trustees and the children of the developer who were volunteers] are in no better position than the wrongdoer, and are liable to suffer the same subordination of their interests to those of the claimant as the wrongdoer would have been. They certainly cannot do better than the claimant by confining him to a lien and keeping any profit for themselves."* (per Lord Millett at p. 132)

191. The decision of the House of Lords in *Foskett*, however, does not indicate the point in time at which the option or election as between the proprietary claim and the personal claim must be made or exercised. The plaintiffs maintain that that election can be made following the evidence at the hearing and does not have to be made before that. They rely on the recent judgment of the High Court (Allen J.) in *Egan v. Heatley* [2019] IEHC 383. The potential relevance of that case is that the plaintiffs had sought specific performance and, in the alternative, damages in lieu of specific performance and only indicated at the opening of the case that they were dropping the claim for specific performance and seeking damages in lieu. There was no issue with that and the court held that the plaintiff was entitled, in an action for specific performance, to elect whether to ask the court for specific performance or for damages in lieu and the issue then was the appropriate date on which the damages should be assessed. It was not held that the plaintiffs ought to have made their election at an earlier point in time. However, the case is of limited assistance as there does not seem to have been any dispute about the plaintiffs' entitlement to seek both reliefs up to and including the trial.

192. I accept the submission advanced by the Kenny defendants that in determining the equitable relief which it may be appropriate to grant in the circumstances, the court will be required to have regard to equitable principles and the interests of justice (see, for example: *Blight v. Brewster* [2012] EWHC 165(Ch) (at para. 69); and Spry: "*The Principles of Equitable Remedies*" (9th Ed), (2014), p. 4)). However, that does not assist in identifying the point of time at which the election must be made by a plaintiff.

193. In my view, the plaintiffs in this case are entitled to maintain their claims to a proprietary interest in the Nemo lands and to beneficial ownership of Dildar IOM and their alternative monetary claims and are not required, at this point in the proceedings to exercise an election between those claims. Nor, in my view, is it appropriate for the court to direct that the plaintiffs be confined to their proprietary claim or their monetary claim, as initially sought by the Kenny defendants. However, if the plaintiffs pursue both alternatives up to and including the trial, the plaintiffs run the risk on costs in that, if they fail to elect and fail ultimately to establish an entitlement to a proprietary remedy, but succeed in obtaining a monetary judgment, the court may well take the view that additional unnecessary time was expended by the plaintiffs in achieving that result for which they should be penalised in costs.

194. While the plaintiffs may be entitled to maintain their claims on the alternative basis as they have sought to do, with the possible costs risk, it does seem to me that the proposal made by counsel for the Kenny defendants in the course of his submissions was a constructive one and would facilitate the efficient running of the proceedings. That proposal, it will be recalled, was for the plaintiffs to provide material to the defendants setting out the maximum value of their claim in respect of the Nemo lands (and Dildar IOM), supported by particulars and/or a report of an expert. If that were done, the Kenny defendants could take steps to lodge funds representing that value in court or on joint deposit and, thereby, potentially secure the plaintiffs' agreement to the release of the orders restraining Dildar IOM and Dildar Ireland from dealing with the Nemo lands. The plaintiffs were to consider that proposal and to respond and inform the court of the position. However, I was not given any update on this.

195. While I have decided that it would not be appropriate to confine the plaintiffs' claim to a monetary one or to direct the plaintiffs to exercise their election as between their proprietary claim and their monetary claim at this stage, it does seem to me that, as part of my jurisdiction in the case management of these proceedings in the Commercial List, the court does have the power to direct the plaintiffs to furnish particulars of what they say is the maximum value of their claim in monetary terms, whether valued as a proprietary interest or as a personal claim, in relation to the Nemo lands and Dildar IOM. The period of time in which those particulars must be provided can be the subject of further discussion with counsel or agreement between the parties or an order of the court. Thereafter, the plaintiffs will have to deal with this issue by way of evidence in their witness statements. While the court cannot force the parties into any arrangement involving the lodging of monies and the vacation of the order made, I would certainly not discourage the parties from seeking agreement along those lines. Again, if it is not possible to reach such agreement, depending on the findings made by the trial judge, a failure to reach agreement may have costs consequences for one or both of the parties.

196. In summary, therefore, I refuse to make an order directing that the plaintiffs' claim in respect of the Dildar IOM and the Nemo lands be confined to a monetary claim or directing the plaintiffs to elect as between their proprietary claim and their personal monetary claim with respect to Dildar IOM and the Nemo lands at this stage. I have,

however, indicated further directions which should be made on foot of the suggestion made by counsel on behalf of the Kenny defendants at the hearing.

Kenny Defendants' Applications Re Plaintiffs' Undertaking as to Damages: Vacate Injunction: Fortify Undertakings: Vacate Lis Pendens

(a) General

197. I now turn to the second group of applications brought by the Kenny defendants arising from the undertaking as to damages given by the plaintiffs to the High Court on 26th July, 2017. As noted earlier, the Kenny defendants seek various reliefs arising from the plaintiffs' undertaking as to damages. First, they seek disclosure of information concerning the resources available to the plaintiffs personally and to the OPT to meet their potential liabilities on foot of the undertaking as to damages. Second, they seek an order that the plaintiffs fortify their undertaking as to damages. Third, by way of alternative relief, they seek to set aside the orders made against Dildar IOM and Dildar Ireland on 26th July, 2017 and a further order vacating the lis pendens registered by the plaintiffs in relation to the Nemo lands.

(b) Factual Background to Application

198. Prior to issuing their motion seeking those reliefs on 15th May, 2019, solicitors for the Kenny defendants, Michael Powell Solicitors ("MPS"), engaged in correspondence with the plaintiffs' solicitors, McEvoy Corporate Law ("McEvoys"), in relation to the plaintiffs' undertaking as to damages. Before considering the evidence put before the court and the submissions advanced by the parties in support of and against the reliefs sought by the Kenny defendants in this second group of applications, it is necessary to refer to the correspondence exchanged between the parties' solicitors concerning the plaintiffs' undertaking as to damages and to orders actually made by the court in July 2017.

199. The plaintiffs sought orders by way of interlocutory injunction against Dildar IOM and Dildar Ireland and against a number of the other defendants on 11th July, 2017. Dildar IOM and Dildar Ireland gave certain undertakings in relation to the Nemo lands to the High Court (Gilligan J.) that day. The order drawn up did not record any undertaking as to damages given on behalf of the plaintiffs. However, Patricia Nolan, the fifth plaintiff, who swore the affidavit grounding the application for interlocutory injunctive relief on 6th July, 2017 stated at para. 70 of that affidavit:-

> *"It has been explained to me that I must give an undertaking as to damages if the court is minded to grant injunctive relief. The meaning and effect of such undertaking has been explained to me and I confirm that the plaintiffs agree to provide an undertaking as to damages"*

200. The interlocutory injunction application was adjourned to 26th July, 2017. On that occasion, Dildar IOM and Dildar Ireland did not object to an order being made restraining them, their servants or agents and any person having notice of the making of the order, from "*taking any step to dispose of, alienate or encumber*" the Nemo lands or any part of them pending the trial of the proceedings in which the plaintiffs claim a proprietary interest in those lands. Dildar IOM and Dildar Ireland were given liberty to apply.

201. The order made on 26th July, 2017 expressly recorded the plaintiffs' undertaking as to damages in the following terms:-

> *"And the court noting the continuing of the plaintiffs' undertaking to abide by any order which the court may make as to damages in the event of the court being of the opinion that the defendants (or any one or more of them) shall have suffered any damage by reason of this order which the plaintiffs ought to pay."*

It should also be noted that Mr. Desmond and Mr. Millett (and his companies) continued certain undertakings they had earlier provided in relation to the Nemo lands on 11th July, 2017.

202. In advance of the hearing date for the plaintiffs' application for interlocutory relief on 26th July, 2017, MPS wrote to McEvoys on 24th July, 2017 on behalf of Dildar IOM and Dildar Ireland (they subsequently ceased acting for Dildar IOM in circumstances where it was decided by Mann Made that Dildar IOM should adopt a neutral position in the proceedings). In that letter, MPS stated that, without making any concession in relation to the merits of the plaintiffs' claims, Dildar IOM would not oppose an interlocutory restraining order against it in relation to the Nemo lands subject to "*the usual undertaking in damages to be given by*" the plaintiffs. They stated that Dildar Ireland had no interest in the property but to avoid "*unnecessary contention and cost",* it would not oppose a similar order against it, subject again to the plaintiffs' undertaking as to damages. On the issue of the plaintiffs' undertaking as to damages, MPS stated:-

> *"Separately, the plaintiffs appear to sue as trustees on behalf of trusts as to whose assets we have no information, other than that they have allegedly suffered very serious loss through wrongdoing. In those circumstances, our clients are concerned about the plaintiffs' ability to make good on their undertaking in damages. We should be grateful for an explanation of the plaintiffs' financial standing and to know whether they are to give the undertaking in damages in their personal capacities."*

MPS sought a response to their enquiries in advance of 26th July, 2017.

203. It appears that MPS did not receive a response to their letter prior to the hearing on 26th July, 2017. The undertaking as to damages given by the plaintiffs was recorded in the order of that date in the terms I have just indicated. After the order was made, MPS wrote again to McEvoys on 3rd August, 2017. They referred in that letter to the plaintiffs' undertaking as to damages and stated:-

> *"We note that the plaintiffs' counsel confirmed to the court that the undertaking was given by the plaintiff's (sic) personally."*

The letter continued:-

> *"Our counsel confirmed to the court that he had made an enquiry of the plaintiff's (sic) counsel as to the financial standing of the plaintiffs and that we awaited a*

response, which we still do. Very simply, we require to be satisfied that the plaintiffs jointly and severally have sufficient means to compensate our clients on foot of their undertaking to the court."

204. It appears that there was no response to that letter either. There was no disagreement by McEvoys on behalf of the plaintiffs with the assertion in the letter that it had been confirmed to the court, on behalf of the plaintiffs, that the undertaking as to damages was being given by the plaintiffs personally. There is nothing in the order of 26th July, 2017 to suggest that the undertaking was given other than personally by the plaintiffs. Nor is there such limitation or qualification in para. 70 of Ms. Nolan's grounding affidavit. That would not, of course, preclude the plaintiffs from seeking a contractual right of indemnity under the terms of the trust of which it is claimed they are trustees (the OPT), assuming such a contractual right exists. Although MPS indicated that they were awaiting a response from McEvoys concerning the financial standing of the plaintiffs, no response was forthcoming.

205. Nothing more was said about the undertaking as to damages until MPS wrote to McEvoys on 29th March, 2019, almost 20 months later. That letter was expressly written by MPS on behalf of the ninth and tenth named defendants, Dillon Kenny and Darren Kenny, who had by that stage been joined as defendants to the proceedings on their own application by the Court of Appeal, on foot of the judgment of that court delivered on 31st October, 2018. Their application to be joined as co-defendants had been refused by the High Court on 18th December, 2017. The MPS letter of 29th March, 2019 dealt with a number of issues including a proposal that the plaintiffs would relinquish any claim to ownership of the Nemo lands and that the ninth and tenth defendants would place the sum of €2.828 million on deposit pending the determination of the proceedings and also contained a proposal for a modular trial. The letter also made reference to the plaintiffs' undertaking as to damages. MPS stated that their clients would *"in due course, direct Dildar IOM, the beneficiary of your clients' undertaking in damages, to recover from your clients the loss and damage that it is currently suffering and will continue to suffer as a result of the hindrance to its legitimate plans for the development of the Nemo site*". The letter continued:-

"We have previously asked your clients to give assurances as to their means and ability to meet any claim that may be made on foot of that undertaking, but have not received any response to that request. We repeat that request."

206. McEvoys replied to the proposal concerning the modular trial and concerning the lodgment of the €2.828 million in return for the plaintiffs relinquishing their claim to ownership of the Nemo lands, pending the determination of the proceedings. That letter did not address the issue raised concerning the plaintiffs' undertaking as to damages. McEvoys addressed that issue in a subsequent letter to MPS dated 15th May, 2019. That was the date on which the Kenny defendants issued their motion seeking the various reliefs dealt with in this judgment. In their letter of 15th May, 2019, McEvoys responded for the first time to the queries raised in relation to the plaintiffs' undertaking as to

damages, notwithstanding that those queries had been raised as far back as July, 2017. Their letter took issue with the entitlement of the ninth and tenth defendants to query the plaintiffs' undertaking as to damages on the basis that no injunctive relief was sought against the ninth and tenth defendants and no undertakings as to damages were given to them. McEvoys maintained that Dildar IOM was the primary party affected by the plaintiffs' undertaking as to damages and, if the plaintiffs were unsuccessful in their claims, it would be for Dildar IOM to make out its claim for damages in due course. It was further stated that since Dildar Ireland was asserting no interest in the Nemo lands, McEvoys could not see that it could maintain any claim on foot of the plaintiffs' undertaking as to damages. The letter continued:-

> "*Notwithstanding the foregoing, please be advised that our clients confirmed to us that the pension funds maintained by them are considerably in excess of €2,828,192.79, the sum referenced in [the MPS] letter. Accordingly, there are significant assets available to substantiate the undertaking as to damages given in July, 2017."* (emphasis added)

The letter concluded by referring to the possibility that the ninth and tenth defendants would have to provide cross undertakings as to damages.

207. MPS replied on 16th May, 2019. They contended that the sum of money referred to in the McEvoys letter was not the "*relevant benchmark figure".* They further stated that the plaintiffs had not provided any detail or given any evidence in respect of the value of the pension funds. Finally, they queried how an undertaking as to damages could be enforced against assets held in a pension fund.

208. While the Kenny defendants' motion was issued on 15th May, 2019, the parties continued corresponding about the undertaking as to damages up to the week prior to the hearing of that part of the motion. MPS wrote to McEvoys on 23rd July, 2019, on behalf of the Kenny defendants. In that letter, they requested an undertaking from each of the unit holders within the OPT (namely, the thirteen individual members of the Nolan family), as well as from their independent pension trustees that the assets within the trust are sufficient to discharge the damages and costs which would be payable to the Kenny defendants in the event that they succeeded in defending the claim and demonstrating that they suffered loss as a consequence of the undertaking not to dispose of or sell the Nemo lands having been given when it ought not to have been given. In fact, it should again be noted that an order was made against them without opposition rather than an undertaking being given MPS sought a further undertaking that such assets would be immediately available to the Kenny defendants for the purpose of allowing them to "*recoup their damages and costs".* Certain further confirmations were also sought from the trustees and from the Revenue Commissioners.

209. McEvoys replied by letter dated 24th July, 2019. In that letter, they referred to clause 22.05 of the Trust Deed establishing the OPT (which provides for a right of indemnity for the trustees of the OPT in the circumstances set out in the clause (the "Trust Deed")). McEvoys also referred to a letter dated 11th June, 2019 from Quest Capital Trustees

Limited ("Quest"), the pensioner trustee and administrator of the OPT (which was exhibited to the replying affidavit of Patricia Nolan sworn on 11th June, 2019 in response to the Kenny defendants' motion). In that letter (the "Quest letter"), it was stated that Quest *"can confirm that the current value of assets held by the trust is in excess of €3,000,000"* (emphasis added). The Quest letter concluded by stating that if there were any queries, contact could be made with David Kavanagh, a director of Quest. McEvoys further stated in their letter that:-

"The assets, subject to the limitation of €3,000,000 will be available should damages and costs be awarded against the plaintiffs." (emphasis added)

210. I am not clear where the reference to the "*limitation*" of €3 million came from and that was not explained in McEvoys' letter.

211. That concluded the correspondence between the parties prior to the hearing of that part of the Kenny defendants' motion concerning the plaintiffs' undertaking as to damages.

(c) The Affidavit Evidence

212. The affidavit evidence in respect of the Kenny defendants' application concerning the plaintiffs' undertaking as to damages is briefly summarised below. Darren Kenny, the tenth defendant, swore the grounding affidavit on behalf of the Kenny defendants on 15th May, 2019. In that affidavit, he referred to the prejudice which he contended has been and will continue to be suffered by the Kenny defendants and by Dildar IOM. He maintained that Dildar IOM and its beneficial owners have been severely prejudiced by the proceedings, the order made on 26th July, 2017 and the *lis pendens* registered by the plaintiffs over the Nemo lands which has prevented funds being raised to carry out the planned development of 50 houses and 153 apartments and commercial units on the Nemo lands for which planning permission was ultimately granted by An Bord Pleanála in May, 2018. Darren Kenny referred to the plan to develop the lands on a phased basis between November, 2019 and August, 2022. He stated that Dildar IOM has "*continuing carrying costs*" in the order of €390,000 per annum in respect of its funding of the purchase of the Nemo lands. He referred to the original projected profit on the sale of the houses within the planned development of in the order of €15 million. He also asserted that the postponement of the development delays the benefits to the Kenny defendants of net rental income on the development of the apartments of in the order of €2 million per annum. He referred to the risk that the planning permission would expire which would involve further costs in seeking to extend or renew the permission. He also asserted that the delay in the development had prevented the Kenny defendants from taking an "equity release" from the Nemo lands to fund other projects. He contended, therefore, that Dildar IOM and the Kenny defendants have been put to real prejudice with very substantial financial implications "*running to many millions of euro*" as a result of the proceedings, the order made on 26th July, 2017 and the *lis pendens.*

213. Having referred to that alleged prejudice, Darren Kenny devoted very little space in his affidavit to that part of the Kenny defendants' application concerning the plaintiffs' undertaking as to damages. He referred to the correspondence between MPS and

McEvoys up to the date in his affidavit (which I have referred to earlier). He asserted that the plaintiffs' financial capacity is "*entirely opaque"* and that it is unjust that the plaintiffs should not explain their resources and fortify their undertaking as to damages in light of the prejudice which is allegedly being suffered by Dildar IOM (see para. 41).

214. It is notable also that Darren Kenny said very little in his affidavit about that part of the application which seeks to vacate the *lis pendens.* No detail whatsoever was provided in relation to the lis pendens registered in respect of the Nemo lands or the basis on which the Kenny defendants were seeking to have the *lis pendens* vacated.

215. Patricia Nolan, the fifth named plaintiff, swore the principal replying affidavit on behalf of the plaintiffs on 11th June 2019. She took issue with the standing of the Kenny defendants to seek any relief on behalf of Dildar IOM and also indicated that Dildar Ireland was not at risk of any loss and, as a consequence, no relief in relation to the plaintiffs' undertaking as to damages should be granted to it. She further objected to the ninth and tenth defendants seeking relief in circumstances where they were not parties to the proceedings at the time the orders of 11th July, 2017 and 26th July, 2017 were made and were joined in the proceedings on their application a considerable time after the order was made. Ms. Nolan disputed the entitlement of the ninth and tenth defendants to maintain any claim based on alleged losses sustained by Dildar IOM. Apart from disputing the entitlement of the Kenny defendants to rely on alleged losses being suffered by Dildar IOM, Ms. Nolan also disputed the evidence of those losses put forward by Darren Kenny. She noted that no vouching evidence whatsoever had been provided in support of the alleged losses.

216. As regards the Kenny defendants' application for the plaintiffs to fortify their undertaking as to damages, Ms. Nolan contended that Dildar Ireland had no stateable basis for the claim on foot of the undertaking as to damages, as it has not asserted any ownership interest in the Nemo lands. As regards the ninth and tenth defendants, she contended that they had no entitlement to seek fortification of the plaintiffs' undertaking as to damages as no order was made against or undertaking given by them. Ms. Nolan contended that the only party to whom the plaintiffs' undertaking as to damages was material was and is Dildar IOM and that the Kenny defendants have no standing to seek relief on its behalf. Without prejudice to that, Ms. Nolan stated that the plaintiffs *"have adequate assets to satisfy their undertaking as to damages*" provided to Dildar IOM. At para. 55 of her affidavit, Ms. Nolan confirmed that the "*trust assets currently have a value in excess of €3 million and that there are no claims on the trust assets by any creditors*". She exhibited the Quest letter (to which reference has already been made). Ms. Nolan concluded by asserting that the Kenny defendants have no standing to apply to vacate the undertaking given by Dildar IOM. Again, I assume that this was intended to be a reference to the order made against Dildar IOM on 26th July, 2017. There was no specific reference to the *lis pendens* in Ms. Nolan's affidavit.

217. Darren Kenny replied to that affidavit by means of his second affidavit which was sworn on 24th June, 2019. He disputed the challenge to the Kenny defendants' standing to bring

the application and pointed out that the application was not brought by or on behalf of Dildar IOM. He stated that Dildar Ireland was suffering a loss by reason of the delay in the proceedings, in that it had been established to carry out the development of the Nemo lands and had expended substantial monies to that end which it was prevented from recouping as the development of the Nemo lands was stalled as a result of the proceedings. He contended that the losses to which the orders of July, 2017 gave rise far exceeded the sum of €3 million referred to by Ms. Nolan in her affidavit. He exhibited a document in the form of a spreadsheet setting out projections (the "projections spreadsheet"), which he contended showed that a delay of up to three years in the development would give rise to losses in excess of €7.675 million with a longer delay causing greater losses. The projections spreadsheet, he said, did not include other losses such as the loss of opportunity referred to in his previous affidavit. Mr. Kenny was critical of the Quest letter and suggested that the pension assets could be beyond the normal means of enforcement of an undertaking as to damages and made no reference to any restrictions on the plaintiffs' ability to access the assets. Nor did it address the concerns which the Kenny defendants have in relation to the plaintiffs' financial resources and their availability to the relevant defendants, including Dildar IOM (para. 20).

218. Mr. Kenny stated that once the ninth and tenth defendants succeeded in establishing their beneficial ownership of Dildar IOM and the Nemo lands, Dildar IOM would immediately seek to enforce the plaintiffs' undertaking as to damages for a sum far in excess of the €3 million referred to by Ms. Nolan. In those circumstances, he contended that the plaintiffs were obliged to make full disclosure concerning their ability to honour the undertaking as to damages.

219. Ms. Nolan responded in a second affidavit sworn by her on 24th July, 2019. Insofar as it had previously been suggested by the Kenny defendants that the plaintiffs had delayed bringing and prosecuting the proceedings, Ms. Nolan rejected that suggestion. She referred to the repeated defaults by various of the defendants which required the plaintiffs to bring motions and also to the delays caused to the proceedings by virtue of the joinder of the various third parties.

220. Ms. Nolan contended that the losses alleged were not those of the Kenny defendants but of Dildar IOM and also that no credible material had been put forward to substantiate the alleged losses. She further pointed to the MPS letter of 29th March, 2019 where it was suggested that if the plaintiffs relinquished their claim to a proprietary interest in the Nemo lands, the Kenny defendants would lodge the sum of €2.828 million and explained that that was why the plaintiffs had referred to the sum of in excess of €3 million in the Quest letter. It seems to me, however, that the parties were clearly at cross purposes on this point as, in putting forward the suggestion they made in the letter of 29th March, 2019, MPS were referring to the claim being made by the plaintiffs concerning the alleged use of their funds to purchase the Nemo lands and not the claim being advanced by the Kenny defendants in respect of the alleged losses suffered by reason of the delay in the development of the Nemo lands due to the proceedings.

221. Ms. Nolan stated that the Quest letter was referring to assets of the trust and that as the plaintiffs had commenced the proceedings as trustees of the pension assets which had been misappropriated, they were advised that they would be entitled to indemnified out of the trust assets in the event that they sustained any damage by reason of maintaining the proceedings for and on behalf of the OPT. I would add at this point that Ms. Nolan did not appear to acknowledge (expressly at least) that the undertaking as to damages was given by the plaintiffs personally and was not in any sense limited, restricted or qualified in the affidavit Ms. Nolan swore in July 2017 grounding the injunction application or in the order of 26th July 2017, albeit that the plaintiffs may have an entitlement to be indemnified out of the trust assets pursuant to clause 22.05 of the Trust Deed.

222. During the course of the hearing of the Kenny defendants' application in relation to the plaintiffs' undertaking as to damages on 30th July, 2019, counsel for the plaintiffs informed the court that he was instructed by the plaintiffs (and was prepared to put this on affidavit) to say that, with respect to the assets of the trust referred to in the Quest letter, "*I am told that there is €3 million in cash*" and that "*this question of assets maybe not being readily available doesn't arise"* (Transcript p. 121). Arising from that statement, I took up the offer that such confirmation be put on affidavit and adjourned the hearing to enable that to be done.

223. David Kavanagh, a director of Quest, swore an affidavit on behalf of the plaintiffs on 22nd August, 2019. He explained that Quest has responsibility for managing the plaintiffs' trust assets on a day to day basis. At para. 4 of his affidavit, he stated:-

> "*I hereby confirm that there is currently a minimum of €3,000,000 in cash with Bank of Ireland in Dublin, being an asset of the Oakland Property Trust, which said sum of money is unencumbered."* (emphasis added)

224. Darren Kenny swore a third affidavit on 2nd September, 2019 in response to that affidavit. He asserted that the undertaking given by the plaintiffs to the court on 26th July, 2017 was not limited and binds the plaintiffs personally and not merely in their capacity as trustees of the relevant pension fund. He criticised the failure by the plaintiffs to put forward any information concerning their assets against which the undertaking as to damages could be enforced. He suggested that the plaintiffs' failure to provide information in relation to their personal assets was sufficient of itself to warrant the court discharging the order made on 26th July, 2017 or, in the alternative, directing the plaintiffs to provide security for the undertaking as to damages and/or to make full disclosure of the personal financial position of each of the plaintiffs.

225. Mr. Kenny was also critical of the terms of Mr. Kavanagh's affidavit. He pointed out that Mr. Kavanagh had not referred to the actual value of the assets of the OPT and had not provided any evidence demonstrating that there was €3 million in cash available to the OPT. He further noted that Mr. Kavanagh had referred to there being "currently" a minimum of €3 million cash in the OPT but that no undertaking had been given that that balance would remain at that level and would not be reduced. He stated that the reference to the cash being "unencumbered" did not clarify the level or amount of creditor

claims which may exist or are likely to exist in the future in relation to the OPT. Finally, he noted that the sum referred to did not amount to even 50% of the Kenny defendants' alleged likely losses (on the basis of the figures contained in the projections spreadsheet exhibited by him). On that basis, Mr. Kenny requested the court to discharge the order made on 26th July, 2019 or, in the alternative, to direct the plaintiffs to provide security for their undertaking as to damages and/or to make full disclosure of the personal financial position of each of the plaintiffs.

(d) Submissions of the Parties on the Undertaking as Damages and Lis Pendens

226. The parties furnished helpful written submissions and made oral submissions at the hearing in which they expanded upon the points made in the affidavits and relied on several authorities which I will discuss below. While very little was said on affidavit by the parties concerning the application to vacate the *lis pendens,* and that does create a difficulty in relation to that aspect of the Kenny defendants' application, they did address the relevant authorities in the written and oral submissions.

(e) Legal Principles Re Undertaking as to Damages

227. Before setting out my conclusions on the Kenny defendants' application in relation to the plaintiffs' undertaking as to damages, it is necessary to refer to some of the relevant legal principles applicable to undertakings as to damages. This is not in any way intended to be an exhaustive discussion of those principles but to identify the principles which appear to me to be most relevant to the issues which arise on this part of the Kenny defendants' application.

228. First, in most cases, a party seeking an interim or interlocutory injunction will be required to provide an undertaking as to damages. The purpose of requiring such an undertaking is to strike a fair balance between the respective rights of the party seeking the interim or interlocutory injunction and of the party against whom the orders are made (see: *F. Hoffman – La Roche & co. AG v. Secretary of State for Trade and Industry* [1975] A.C. 295, *America Cyanamid co. v Ethicon ltd*. [1975] A.C. 396 and the comments of Peart J. in *Quinn* (referred to below). Such an undertaking has been described as the "*price which the person asking for an interlocutory injunction has to pay for its grant"* (per Neill L.J. in *Cheltenham & Gloucester Building Society v.* Ricketts [1993] 1 WLR 1545 ("*Cheltenham*"), approved by Clarke J. in the High Court in *Estuary Logistics v. Lowenergy Solutions Limited* [2008] 2 I.R. 806 ("*Estuary*") and by Laffoy J. in the High Court in *Caldwell v. Tracey* [2012] 2 I.R. 419) ("*Caldwell*"). Fennelly J. in the Supreme Court in *Minister for Justice, Equality and Law Reform v. Devine* [2012] IESC 2, referred to the "*invariable practice*" of requiring an undertaking as to damages, at least at the interim stage of proceedings, although the court did not exclude the possibility of there being exceptional cases, such as in the case of an impecunious applicant, where the court might dispense with the undertaking as to damages (see the judgment of Fennelly J. at paras. 64, 65 and 66). In his judgment in that case, O'Donnell J. discussed some of the circumstances in which a court could give an injunction, notwithstanding that the undertaking as to damages was of little or no worth (see paras. 23 and 24).

229. However, the general position is that an undertaking as to damages is almost invariably required. Such an undertaking was provided in the present case. There is an issue as to the scope of that undertaking and I will address that question shortly.

230. Second, the undertaking as to damages is given not to the party against whom the interlocutory injunction or order is made, but to the court: "*The undertaking is not given to the party enjoined but to the court"* (per Neill L.J. in *Cheltenham* at p. 1551; per Clarke J. in *Estuary Logistics* at paras. 7-8, pp. 809-811; and per Laffoy J. in *Caldwell* at para. 33, pp. 431-432). This principle was also confirmed by Peart J in the High Court in *Irish Bank Resolution Corporation Limited v. Quinn & ors* [2013] IEHC 437 ("*Quinn*"). At para. 76, Peart J. stated that the undertaking as to damages is *"an undertaking which the plaintiff gives to the court"* (para. 76, p. 24). This is an important principle in the context of the present application as the plaintiffs have contended that the undertaking as to damages really only has relevance in the case of Dildar IOM which has not brought an application in relation to the undertaking as to damages.

231. Third, the undertaking as to damages is not intended to be a complete indemnity for the parties affected by the orders made. That is again clear from the judgment of Peart J. in *Quinn* at para. 76, page 24.

232. Fourth, generally an undertaking as to damages will not be limited in amount, although the ultimate calculation of the undertaker's liability on foot of the undertaking will depend on similar rules to those applied by the courts in assessing damages for breach of contract: *Cheltenham, Estuary Logistics* and *Caldwell*.

233. In *O'Mahony v. Horgan* [1996] 1 ILRM 161, O'Flaherty J. (with Blayney J. concurring) in the Supreme Court stated:-

> *"As regards the undertaking as to damages, I know of no case where a limit has been put on the amount that may be required to be paid, if it is held that the injunction was improperly obtained, nor do I think it right in principle that such a limit should be placed in view of the far-reaching implications involved in any restraint that is imposed on a party by reason of such an injunction prior to judgment."* (per O'Flaherty J. at p. 170)

234. Hamilton C.J. did not find it necessary to consider whether the trial judge was entitled to place a monetary limit on the undertaking which was required to be given by the liquidator in that case.

235. It is possible that, in certain types of cases, the court may permit a monetary limit to be placed on the amount of an undertaking as to damages (such as in the case of such an undertaking given by a liquidator as in *In Re D.P.R. Futures Limited* [1989] 1 W.L.R. 778 ("*DPR*")). The issue was touched upon by Peart J. in the High Court in *Quinn* where he observed that the remarks of O'Flaherty J. in *O'Mahony* were *obiter* and had to be seen in the context in which they were made, where a limitation had been placed on the undertaking as to damages in circumstances where the full amount payable under the

insurance policy at issue in that case was clear and ascertained and where there was no apparent reason for limiting the undertaking to the amount fixed by the trial judge. Peart J. noted that the case before him was very different and that the undertakings given in the case were "*unlimited in nature*" (para. 101, pp. 32-33).

236. However, it is unnecessary for me to express a view on whether an undertaking as to damages can be limited in monetary terms because of the terms of the undertaking at issue here. The undertaking as to damages given by the plaintiffs in this case (and recorded in the order of 26th July, 2017) is not limited in monetary terms. The undertaking given is unlimited, subject of course to the proper assessment or calculation of any liability of the plaintiffs on foot of undertaking, should that stage ever be reached.

237. Fifth, generally when receiving an undertaking as to damages and granting an interim or interlocutory injunction, the court must be satisfied of the ability of the party giving the undertaking to meet a claim on foot of it (see: Kirwan *"Injunctions Law and Practice*" (2nd Ed.), paras 6-160 – 6-161, pp. 249-250;). The court can refuse to grant an interlocutory injunction, in the exercise of its overall discretion, if it is not satisfied that the party giving the undertaking as to damages will be in a position to honour it: see, for example: *Martin v. An Bord Pleanála* [2002] IEHC 83 and *Szabo v. Kavanagh* [2013] IEHC 491.

238. Although MPS, on behalf of Dildar IOM and Dildar Ireland, did correspond with McEvoys, on behalf of the plaintiffs, both before and after the order was made on 26th July, 2017, and while clarification was sought that the undertaking as to damages was provided by the plaintiffs personally, neither Dildar IOM nor Dildar Ireland urged the court on that occasion not to grant the order on the basis of any doubt as to the ability of the plaintiffs to meet any liability on foot of the undertaking as to damages. The issue was not raised again (apart from the letter of 3rd August 2017) until March, 2019, some 20 months later. It was very fairly and appropriately stated in the course of the hearing, on behalf of the Kenny defendants, that the issue in relation to the undertaking was not pressed until March, 2019.

239. Sixth, a party giving an undertaking as to damages has an obligation to draw to the attention of the court any material change for the worse in its financial position. An example of this can be seen in the English case of Staines v. Walsh [2003] EWHC 1486. In that case, in the context of a freezing order where a cross-undertaking as to damages was given, Laddie J. stated:-

> *"Certainly, so long as the freezing order is in force, it appears to me that there is a continuing obligation on a claimant, not only to be willing to honour the cross-undertaking in damages, but to draw at least the defendant's attention to any material change for the worse in his financial position. If, for example, a claimant obtains a freezing order on the basis that he has £500,000 worth of assets and those assets disappear in large part, in my view it is inherent in the freezing order jurisdiction that he must disclose that change in position to the defendant who can then, no doubt after taking legal advice, either seek a voluntary removal or*

reduction in the freezing order or go to court to seek such a removal or reduction." (per Laddie J. at para. 36)

240. It seems to me that having regard to the significance of the undertaking as to damages in the exercise by the court of its discretion as to whether to grant an interim or interlocutory injunction, the principle stated there applies equally in Ireland where an undertaking as to damages is given.

241. Seventh, the onus of demonstrating to the court that the undertaking as to damages provided is or would be inadequate in terms of the losses which would be likely to be suffered as a result of the granting of the interim or interlocutory injunction rests with the party alleging such inadequacy. In other words, the party or parties against whom the interim or interlocutory injunction is granted and who seeks to challenge the adequacy of the undertaking as to damages must demonstrate evidentially the losses which they contend will be suffered as a result of the order for the purpose of demonstrating that the undertaking is inadequate. That is clear from the judgment of Millett J. in *DPR*. That case was referred to by Peart J. in *Quinn* where the court accepted that the onus was on the party alleging an inadequacy in the undertaking as to damages to "*quantify as best they can the losses which may accrue to them as a result of the injunctions being in place, and in doing so not to confuse losses they may suffer generally as a result of the securities being in place, and those attributable to the injunctions"* (per Peart J. at para. 88, p. 29).

242. It is also relevant in this context to draw attention to the observations of Hardiman J. in the Supreme Court *Dunne v. Dun Laoghaire Rathdown County Council* [2003] 1 IR 567 ("Dunne"). In that case, the defendant took issue with the adequacy of the plaintiffs' undertaking as to damages in the context of an application to prevent the removal of parts of a national monument as part of a road building scheme. In commenting critically on the defendant's submission, Hardiman J. stated that the defendant's averments had not pointed to the alleged potential losses with "sufficient precision". He continued:-

> *"It is stated that delay in the motorway project would be expensive and more generally prejudicial, and there is no doubt that this is so. But there is no statement as to the precise way in which this claimed injunction and the proceedings commenced will delay the motorway. Nor has the defendant advanced any precise legal or factual basis for the losses it says will be incurred should an injunction be granted. The contract with the contractors has not been produced nor any basis of calculation or estimation suggested. The mention of the huge sum of €144,000,000 as the contract price of the South Eastern Motorway is, no doubt, properly calculated to make any court hesitate on the threshold of interlocutory relief. But neither this figure nor the much smaller, still very significant, weekly figure quoted above have been related in any way to the actual scope of the proposed injunction… In my view, it is not sufficient, either from the point of view of establishing a balance of convenience or attacking the undertaking, simply to mention huge sums of money without relating them either to the specific relief*

sought or to the specific liability for which the plaintiffs, by virtue of their undertaking, may become responsible." per Hardiman J. at pp. 579-580)

243. Later in his judgment, Hardiman J. stated:-

> "…the attack on the undertaking as to damages, like the attempt to influence the balance of convenience, has not been supported by any sufficiently convincing statement of the actual costs of the present injunction." (per Hardiman J. at p. 581)

244. It seems to me that these observations are relevant to the onus of proof which rests upon the Kenny defendants to demonstrate the alleged inadequacy of the undertaking as to damages given by the plaintiffs and to the nature of the evidence required in order to substantiate their concerns in relation to the ability of the plaintiffs to meet any liability on foot of that undertaking.

245. Eighth, in certain circumstances, where the court has a concern in relation to the ability of a party to meet its obligation on foot of an undertaking as to damages, it may require the undertaking to be fortified or supported by some form of security or payment into court. That is not the normal situation. Indeed, in *Harding v. Cork County Council* [2006] 1 I.R. 294, Kelly J. described a "*fortified undertaking as to damages*" as being "*most unusual*" (at p. 302). He agreed with the view of Herbert J. in *O'Connell v. Environmental Protection Agency* [2001] 4 I.R. 494 where he described the occasions on which a court might require such a fortified undertaking as being "*very few*" (at p. 509). In *Harding*, Kelly J. stated:-

> *"If such a fortified undertaking as to damages is to be required then a proper evidential basis has to be set for it and such does not exist in the present case."* (per Kelly J. at p. 302)

246. Peart J. in the High Court also briefly considered the issue as to whether a more fortified undertaking (than the one already given) should be provided by the special liquidators in that case as a condition of the injunctions remaining in place. He was not satisfied that anything further was required. He did state, however, that it might be different if he had been satisfied *"to the required extent by the personal defendants, upon whom the onus rests, that losses which could accrue to them as a result of these injunctions being in place were likely to exceed by a significant amount the amount of the fortified undertaking offered*" (per Peart J. at p. 102).

247. Ninth, in principle, it is possible for a party to apply to court to revisit the issue as to the adequacy of an undertaking as to damages and, depending on the particular circumstances in which that application is made, the court may consider whether to adjust, vary or fortify the undertaking (as was considered by Peart J. in *Quinn*). To that extent, I accept the submission advanced by the Kenny defendants that the court can consider an application to vary an interlocutory order previously made. The Kenny defendants relied upon the judgment of the Court of Appeal (Mahon J.) in *Irish Bank Resolution Corporation Limited v. Quinn & ors* [2015] IECA 84. While such an application

may be permitted in principle, whether the court will grant that application will depend on the particular facts and circumstances of the case.

(f) Application of Principles Re Undertaking as to Damages: Decision on Kenny Defendants' Application

248. Having considered the evidence, the submissions and the legal principles summarised above in relation to that part of the Kenny defendants' application concerning the plaintiffs' undertaking as to damages, I now set out my conclusions on the application and the reasons for them.

249. First, I am satisfied that the undertaking as to damages recited in the order of 26th July, 2017 was given personally by the plaintiffs. Although the plaintiffs have brought their proceedings in their capacity as trustees of the OPT, the undertaking as to damages was not qualified or restricted to the plaintiffs' capacity as trustees. The fact that the undertaking as to damages was given personally by the plaintiffs is supported by the terms of the undertaking as recited in the order. The order simply refers to the "*plaintiffs' undertaking to abide by any order which the court might make as to damages…*". It is not qualified by the plaintiffs' status as trustees of the OPT trust or otherwise. That conclusion is also supported by the evidence.

250. The grounding affidavit of Ms. Nolan sworn in July, 2017 contained an undertaking as to damages on behalf of the plaintiffs which was not in any way qualified, limited or restricted (see para. 70 of that affidavit).

251. MPS, then acting on behalf of Dildar IOM and Dildar Ireland, queried whether the plaintiffs would be giving the undertaking as to damages in their personal capacities in their letter of 24th July, 2017. There was no reply to that letter. They again raised the issue in their letter to McEvoys of 3rd August, 2017, where they expressly noted that the plaintiffs' counsel had confirmed to the court (on 26th July, 2017) that the undertaking as to damages was given by the plaintiffs personally. There was no response to that letter and the assertion contained in it was never disputed in correspondence. Nor has it been disputed on affidavit on behalf of the plaintiffs that the undertaking was given personally. The plaintiffs did contend that they would be entitled to an indemnity in respect of any liability which they might ultimately have on foot of the undertaking as to damages and relied on clause 22.05 of the Trust Deed. It is not necessary for me to decide, on this application, whether the plaintiffs would be entitled to such an indemnity and that is an issue which may arise for determination (if at all) at a later stage or indeed after the conclusion of these proceedings.

252. Second, the plaintiffs' undertaking as to damages is not subject to a monetary limit. Should it be necessary for any of the defendants to seek to enforce the undertaking as to damages, it is well established that ordinary principles of contract law, such as causation and remoteness and so on, apply (see, for example: *Cheltenham*, pp. 1551-1552, *Estuary*, paras. 7-8, pp. 809-811; *Caldwell*, para. 33, pp. 431-432; *Quinn* (Peart J.), para. 76, pp. 24-25). Other than that, however, the undertaking as to damages is not

subject to any monetary limit (notwithstanding the implicit suggestion to the contrary in the letter from McEvoys to MPS dated 24th July, 2019).

253. Third, no challenge was made by Dildar IOM and Dildar Ireland, or by any of the other defendants, to the plaintiffs' ability to meet any liability which they might have on foot of the undertaking as to damages, at the hearing before Gilligan J. on 26th July, 2017. Apart from raising certain queries by way of correspondence both immediately before and in the week following that hearing, no actual steps were taken on behalf of those defendants to challenge the ability of the plaintiffs to meet any liability they might have on foot of their undertaking. I have referred earlier to the relevant correspondence. After the MPS letter to McEvoys of 3rd August, 2017, no further steps were taken concerning the plaintiffs' undertaking as to damages until almost 20 months later when MPS, on behalf of Dillon Kenny and Darren Kenny, the ninth and tenth defendants, wrote to McEvoys on 29th March, 2019. By that stage, Dillon Kenny and Darren Kenny had been joined as defendants by the Court of Appeal. It was fairly accepted on behalf of the Kenny defendants that the issue of the undertaking as to damages was not pressed until the letter of 29th March, 2019. When the issue was raised in that letter, it was addressed in the correspondence from McEvoys to which I have referred earlier and in the Quest letter (exhibited by Ms. Nolan to her affidavit of 11th June, 2019). Much of the correspondence thereafter was directed to the issue as to the assets of the OPT which would be available in the event that the plaintiffs were required to honour their undertaking as to damages. In my view, if issue was to be taken as to the inadequacy as to damages, it should have been done and progressed much earlier than the Kenny defendants' application, which issued in May 2019.

254. Fourth, the plaintiffs have disputed the *locus standi* of the Kenny defendants to challenge the plaintiffs' undertaking as to damages, on the basis that if any loss was suffered as a result of the order made on 26th July, 2017, it would be a loss suffered by Dildar IOM and not any of the other defendants and that Dildar Ireland, which is not the owner of the lands, could not claim in respect of any loss. However, I do not accept that the Kenny defendants do not have standing to bring the application.

255. One of the grounds on which the plaintiffs have challenged the *locus standi* of the Kenny defendants to agitate the issue of the undertaking as to damages is that they are seeking to rely on a "reflective loss" of Dildar IOM which is not permitted on the authorities, such as *Alico Life International Limited v. Thema International Fund PLC* [2016] IEHC 363 (Costello J.) ("*Alico*").

256. However, I do not accept that the Kenny defendants do not have standing to advance arguments in relation to the adequacy of the plaintiffs' undertaking as to damages. It is said on affidavit that Dildar Ireland was to be the developer of the Nemo lands and expended substantial monies in doing so (see, for example, para. 14 of the second affidavit of Darren Kenny sworn on 24th June, 2019). There can be no issue with its standing to challenge the undertaking. Furthermore, as the plaintiffs undertaking as to damages was given to the court and not specifically to any particular defendant (such as

Dildar IOM and Dildar Ireland), it may be open to other defendants (such as Dildar Ireland) to seek to make the case, if it arises, that they are entitled to enforce the undertaking as to damages.

257. Finally, while it is unnecessary for me conclusively to decide on this application, I am not convinced that the reliance by the ninth and tenth defendants on the losses which they say will be suffered by Dildar IOM are necessarily "reflective losses" of that company such as may be caught by the rule referred to by Costello J. in *Alico*. Their position, as stated to the court, is that if they succeed in defeating the plaintiffs' claim to beneficial ownership of Dildar IOM and succeed on their counterclaim, they will be in a position to ensure that Dildar IOM seeks to enforce its rights under the plaintiffs' undertaking as to damages in respect of any loss which it may have sustained. However, as I have indicated, it is not necessary for me to express a concluded view on that issue as, on any view, Dildar Ireland has the standing to raise the issue, as do any of the other defendants (including the ninth and tenth defendants) in circumstances where the undertaking is given to the court and not specifically to the parties enjoined by the particular order.

258. Notwithstanding all of this, despite the fact that they may have standing to bring the application, I am quite satisfied that the Kenny defendants' application challenging the adequacy of the plaintiffs' undertaking as to damages must fail. While in principle, it may well be open to a person to seek to raise issues in relation to the adequacy of an undertaking as to damages where circumstances may have changed or matters moved on (as in the case of the interlocutory orders which were the subject of the judgment of Mahon J. in the Court of Appeal in *Quinn*), that is not the position here. While some correspondence was exchanged around the time of the order of 26th July, 2017, the issue was let sit and was not pursued in the period between then and late March, 2019, after the ninth and tenth defendants were joined as co-defendants. As the Kenny defendants are asking the court to exercise a discretion to review the adequacy of the plaintiffs' undertaking as to damages, the court is entitled to consider, as among the factors to be taken into account, the failure to challenge the adequacy of the undertaking at the time and, more particularly, the significant delay in raising the issue again. I am not satisfied that the Kenny defendants have provided an adequate or indeed any real explanation for that delay. There is no reason why, for example, Dildar Ireland could not have taken the matter forward in August, 2017 in the absence of a satisfactory response from McEvoys to the MPS letters. There is no reason why the issue could not have been raised by that defendant at any stage in the period between August, 2017 and March, 2019. Nor is there any reason why it had to wait for the joinder of the ninth and tenth defendants on foot of the judgment of the Court of Appeal in October, 2018. In my view, the significant delay on the part of the Kenny defendants in seeking to challenge the adequacy of the plaintiffs' undertaking as to damages is an important factor in my decision that their application should be refused. However, it is not the only factor I have taken into account. As I outline below, I am, in any event, not satisfied that the Kenny defendants have put forward sufficient material to discharge the onus which is on them to demonstrate evidentially that the plaintiffs will not be in a position to honour their undertaking as to damages.

259. Nor am I satisfied that Kenny defendants should be entitled to seek further information from the plaintiffs in their personal capacity, in circumstances where they did not press the issue with any great vigour in July/August, 2017 and only raised the issue again in late March, 2019. In my view, the Kenny defendants should not be entitled to seek the further disclosure they seek at this stage in relation to the plaintiffs' personal assets and liabilities (bearing in mind that failure to discharge the onus on them, as discussed further below). It might be considered that the position in relation to the Kenny defendants' application for further disclosure in respect of the trust assets should be the same and should meet the same fate. However, the significant difference is that the plaintiffs did volunteer certain information in relation to the trust assets in the Quest letter, in Ms. Nolan's replying affidavit of 11th June, 2019 (paras. 54 and 55), in counsel's submission to the court on 30th July, 2019 and in Mr. Kavanagh's affidavit on behalf of Quest sworn on 22nd August, 2019. There are still some gaps and uncertainties in the information provided. I am prepared to direct the plaintiffs to provide certain further information arising from the terms of Mr. Kavanagh's affidavit, arising from the concerns expressed by the Kenny defendants.

260. In the first place, the plaintiffs must provide further details concerning the account or accounts in Bank of Ireland in Dublin which, at the time of Mr. Kavanagh's affidavit, contained a *"minimum of €3,000,000 in cash".* These details should include evidence of the balances in the relevant accounts (such as copies of up to date statements). In my view, this information should be provided in order that the Kenny defendants and the court can verify and confirm the details provided in Mr. Kavanagh's affidavit. Appropriate undertakings as to confidentiality must be provided by the Kenny defendants in return for this information together with an undertaking that the information provided will be used solely for the purpose of the proceedings and any attempted enforcement of the plaintiffs' undertaking as to damages.

261. Second, the plaintiffs should clarify what is meant by the statement in Mr. Kavanagh's affidavit that the stated sum of money was, at the time, "*unencumbered*". I accept that there is some lack of clarity about that term (as contended by Mr. Kenny at para. 9 of his third affidavit of 2nd September, 2019). Is the term "*unencumbered*" intended to mean that the cash is not charged, pledged, mortgaged or otherwise secured in favour of a creditor? Or is it intended to mean that there are no claims on the trust assets by any creditors, as stated by Ms. Nolan at para. 55 of her affidavit of 11th June, 2019? It is important that this issue is clarified. The plaintiffs should do so and I will afford some time for that to be done.

262. Third, Mr. Kavanagh's affidavit was sworn on 22nd August, 2019, at that stage it was stated there was a minimum of €3 million in cash. As I have indicated earlier, there is a continuing obligation on a party who has provided an undertaking as to damages to bring to the attention of the opposing party any material change for the worse in the former's financial position. I do not know whether there has been any such material change for the worse. I will, therefore, also require the plaintiffs expressly to confirm that the position remains as it was when Mr. Kavanagh swore his affidavit and that there has been no

change for the worse since then. All of this information and these confirmations should be provided on affidavit.

263. I am not prepared to order that the plaintiffs provide any further or additional information or details over and above those just indicated.

264. As I outlined earlier, the onus of proof rests on the Kenny defendants to establish that the plaintiffs will be unable to meet the liability which the Kenny defendants say they will have on foot of the undertaking as to damages. That onus lies not only in relation to the quantification of the losses being alleged by the Kenny defendants but also on the issue as to whether the plaintiffs should be required to fortify their undertaking as to damages. In my view, the Kenny defendants have not discharged the onus of proof which rests upon them on either front. The evidence as to alleged losses set out in Darren Kenny's first affidavit of 14th May, 2019 is very vague and completely unsubstantiated. It is not supported by any documentation or by a report, such as from an accountant. Similarly, the projections spreadsheet exhibited by Mr. Kenny to his second affidavit of 24th June, 2019 is equally lacking in evidential support. I accept the criticisms made of that document by the plaintiffs' counsel at the hearing. In circumstances where the Kenny defendants were challenging the ability of the plaintiffs to meet their obligations under their undertaking as to damages, I would have expected that the single page projections spreadsheet would have been supported by additional evidence and a detailed explanation as to where the figures contained in the spreadsheet came from. I would have expected that the Kenny defendants would have provided an accountant's report and information from their lenders backing up the figures contained in the spreadsheet. Instead, a single page spreadsheet document was relied on by Mr. Kenny. He did not outline who prepared the document or indicate the context in which it was prepared. He did not, for example, state that he prepared it himself. Nor did he explain where all of the figures had come from. I have referred earlier to the cases such as *Dunne*, *Harding* and *Quinn*, where the courts have required sufficient proof of claimed losses in circumstances where it is said that an undertaking as to damages is insufficient or that fortification of the undertaking should be provided.

265. Having considered the material put forward by Mr. Kenny in his affidavit and by way of the projections spreadsheet, I am not satisfied that the Kenny defendants have discharged the onus which rests upon them to establish that the plaintiffs' undertaking as to damages (supported by the information provided, and to be provided on foot of this judgment, by the plaintiffs and Quest in relation to the cash assets of the trust) is deficient.

266. I have reached the same conclusion in relation to the Kenny defendants' request that the plaintiffs fortify their undertaking as to damages. Fortification of an undertaking as to damages is very much the exception and will be directed in very few cases, as the authorities make clear. Having regard to my conclusion that the Kenny defendants have not discharged the onus of proof upon them to establish losses of the order relied upon, I

am not satisfied that this is an appropriate case in which to direct the plaintiffs to fortify their undertaking as to damages.

267. It follows from this that I am not prepared to vacate the order made on 26th July, 2017 against Dildar IOM and Dildar Ireland. The Kenny defendants have not established a valid basis for vacating that order.

(g) Application Re *Lis Pendens*

268. The Kenny defendants, in addition to seeking an order vacating the order made on 26th July, 2017, have also sought an order vacating the *lis pendens* registered by the plaintiffs in relation to the Nemo lands on foot of the proceedings. I have refused the application to vacate the order made on 26th July, 2017 for the reasons outlined above. As regards the application to vacate the *lis pendens*, for the reasons set out below, I am also refusing the Kenny defendants' application.

269. There is no dispute between the parties as to the legal principles applicable to the vacating of a *lis pendens*. Section 123 of the Land and Conveyancing Reform Act, 2009 provides that a court may make an order vacating a *lis pendens* by (*inter alia*) any person affected by it, on notice to the person on whose application it was registered in the following circumstances:-

> *"(i) where the action to which it relates has been discontinued or determined, or*
>
> *(ii) where the court is satisfied that there has been an unreasonable delay in prosecuting the action or the action is not being prosecuted bona fide."*

270. The Kenny defendants rely on s. 123(b)(ii) in support of their application and contend that this is a case in which there has been unreasonable delay in the prosecution of the action and that the action, insofar as the plaintiffs seek to assert a proprietary interest in the Nemo lands, is not being prosecuted *bona fide.*

271. In *Tola Capital Management LLC v. Linders (No. 2)* [2014] IEHC 324 ("*Tola Capital*"), Cregan J. held that a court may make an order vacating a lis pendens if it is satisfied (a) "*that the action as a whole is not being prosecuted in a bona fide manner*" or (b) "*if particular steps in the prosecution of the action are not being taken in a bona fide manner"* (per Cregan J. at para. 132).

272. As regards the jurisdiction to vacate the lis pendens on the grounds of unreasonable delay in the prosecution of the action, I considered that issue *in Hurley Property ICAV v. Charleen Limited* [2018] IEHC 611. I held in that case that in enacting s. 123(b)(ii), the Oireachtas was intending to impose an obligation on a litigant who has registered a *lis pendens* to prosecute the proceedings expeditiously and that that obligation was over and above the normal obligation which already exists under the RSC (para. 81). Applying *dicta* of Haughton J. in the High Court in *Togher Management Company Limited v. Coolnaleen Developments Limited (In Receivership)* [2014] IEHC 596, I concluded that:-

> *"… correctly construed, the provisions of s. 123(b)(ii) of the 2009 Act impose a particular obligation on a person who has commenced proceedings and registered a lis pendens to move with greater expedition than would normally be required or than is required under the Rules of Superior Courts. Such a person would, in my view, be required to act with particular 'expedition and vigour' (to adopt the words used by Haughton J. in Togher) in the prosecution of the proceedings."* (para. 82)

273. I also concluded that the focus of the section was on examining delay in the prosecution of the "*action*" which starts when the proceedings are commenced. Therefore, in considering whether a delay in the prosecution of the action has been "*unreasonable*" for the purposes of the section, the court must focus on the period after the commencement of the proceedings rather than on any period of time prior to commencement (para. 83). There were very significant delays in the prosecution of the action in that case.

274. In their written submissions, the Kenny defendants baldly stated that it could not be said that the plaintiffs have prosecuted their claim to a proprietary interest in the Nemo lands on a *bona fide* basis and that their lack of expedition in the prosecution of the proceedings also gives the court ground to vacate the *lis pendens* (para. 60 and 61 of the Kenny defendants' written submissions). The Kenny defendants sought to expand upon their complaints in their oral submissions at the hearing, relying on alleged delays in the delivery of a statement of claim, the delivery of different versions of a statement of claim (including the most recent version, the amended statement of claim delivered on 19th July, 2019), the opposition by the plaintiffs to the application for entry in the Commercial List and alleged delays on the part of the plaintiffs in making discovery. It should be said, however, that none of this was put on affidavit and the plaintiffs were not afforded the opportunity of addressing these complaints in their replying affidavits.

275. The plaintiffs disputed the application to vacate the *lis pendens* in their written submissions. They rejected the contention that the action was not being prosecuted *bona fide* or that there has been an unreasonable delay in prosecuting the action. They pointed to the explanation provided on affidavit as to why the application to enter the proceedings in the Commercial List was opposed. At para. 5 of her second affidavit, Ms. Nolan explained that the plaintiffs sought clarity as to whether any officer of Dildar IOM had instructed that an application for entry of the proceedings in the Commercial List be brought and further that the plaintiffs were never opposed to expeditious case management of the case. The plaintiffs outlined in their written submissions that some delays have occurred in the prosecution of the proceedings due to the joinder of third parties as well as the application by the ninth and tenth defendants to be joined as co-defendants to the proceedings. They also referred to the defaults on the part of a number of the defendants in complying with the directions made by the court and in delaying making discovery. The plaintiffs submitted that they had brought motions to compel compliance with the directions and to progress the litigation. At para. 49 of the written submissions, the plaintiffs indicated various matters which had impacted upon the progress of the litigation (to which can be added the plaintiffs' joinder of Paul Kenny in July, 2019).

276. In oral submissions, the plaintiffs maintained that they had not been materially in breach of any direction made by the court and that there had in fact not been any material delay in the conduct of the proceedings as the proceedings have been case managed by the court. As regards the alleged delays in the exchange of discovery documents, it was pointed out that the plaintiffs were anxious to ensure that there was a simultaneous exchange of documents in circumstances where some of the defendants had not, by that stage, sworn their discovery affidavits. They stated that that position had been explained to the then Judge of the Commercial List (Haughton J.) at various directions hearings. Fundamentally, however, the plaintiffs objected to the manner in which the allegations of delay were made by the Kenny defendants, by way of oral submissions rather than on affidavit.

277. I am satisfied that the Kenny defendants' application to vacate the *lis pendens* has no merit. First, it falls with the rejection of their application to vacate the order of 26th July, 2017. Second, the Kenny defendants have failed to demonstrate that either of the grounds for vacating a *lis pendens* in s. 123(b) of the 2009 Act has been satisfied on the facts. I am not satisfied that the plaintiffs are not prosecuting their action in a *bona fide* manner (in either sense referred to by Cregan J. in *Tola Capital*). The plaintiffs have brought the proceedings arising from the alleged loss or misappropriation of very substantial funds due to the alleged actions of their advisors and others and in circumstances where they maintain that their funds were taken from an account and used substantially to finance the purchase of the Nemo lands. Whether the plaintiffs are correct in any of this is a matter ultimately for trial. However, I cannot conclude on the basis of the assertions made by the Kenny defendants that the plaintiffs are not prosecuting the action in a bona fide manner.

278. Nor am I satisfied that there has been any unreasonable delay in the prosecution of the action since its commencement. The proceedings are extremely complex and have involved numerous stages so far, culminating in the various applications now before the court. The circumstances giving rise to the proceedings are also immensely complex and the number of parties involved in the main proceedings and in the third party proceedings is very substantial. While there may have been some slippage in complying with some of the directions made by the court, the proceedings have been actively case managed since their entry in the Commercial List. Such delays as there have been, have been contributed to by the joinder of numerous third parties and other parties (including the joinder of the ninth and tenth defendants on their own application) as well as the joinder of Paul Kenny.

279. I am not satisfied that there has been any unreasonable or inappropriate delay in the discovery process. Again, from what I have seen, the discovery process has been complex and difficult. That process is not yet complete with discovery yet to be made by Paul Kenny (and that issue is the subject of a separate judgment delivered by me today). It is also most unfortunate that the Kenny defendants did not fully articulate their claims as to the alleged non-prosecution of the action bona fide and the alleged unreasonable delay in the prosecution of the action in their various affidavits but chose to elaborate on those

claims in the course of the oral submissions. Had they done so on affidavit, I am satisfied that a detailed response would have been provided by the plaintiffs. In any event, on the basis of what has been said in the affidavits and in the written and oral submissions, I have concluded that the Kenny defendants have not established an entitlement to an order vacating the *lis pendens* under s. 123 of the 2009 Act. Therefore, I refuse that application.

Summary of Conclusions

280. In summary, for the reasons set out in this judgment, I have reached the following conclusions on these applications:-

(1) I refuse the Kenny defendants' application for a modular trial.

(2) I refuse the Kenny defendants' application for an order that the plaintiffs' claim in relation to Dildar IOM and the Nemo lands be confined to a monetary claim in the sum alleged or that the plaintiffs be directed to elect at this stage as to whether to pursue a proprietary claim or a monetary claim. However, I direct that the plaintiffs provide certain further particulars in relation to the maximum value of their claim in relation to Dildar IOM and the Nemo lands. Such further particulars should be provided within a period to be agreed or ordered by the court.

(3) I refuse the Kenny defendants' application for disclosure orders in relation to the plaintiffs' personal resources.

(4) I refuse most of the Kenny defendants' application in relation to further disclosure concerning the assets of the OPT. However, I direct the plaintiffs to furnish certain further information, details and clarifications on affidavit in relation to the information provided concerning the cash assets of the OPT referred to in the affidavit sworn by Mr. Kavanagh of Quest on 22nd August, 2019.

(5) I refuse the Kenny defendants' application for the plaintiffs to fortify their undertaking as to damages.

(6) I refuse the Kenny defendants' application for an order vacating the order made by the High Court (Gilligan J.) on 26th July, 2017 (and, insofar as they are relevant, the undertakings given by Dildar IOM and Dildar Ireland to the High Court (Gilligan J.) on 11th July, 2017).

(7) I refuse the Kenny defendants' application for an order vacating the *lis pendens* registered by the plaintiffs in relation to the Nemo lands on foot of the proceedings.

Concluding Comments

281. I conclude this lengthy judgment by strongly urging the parties to give consideration or, as the case may be, further consideration to mediation as a possible means of attempting to resolve the complex and protracted disputes between them and, in particular, the disputes in relation to Dildar IOM and the Nemo lands. Without in any way commenting on the merits of the underlying disputes between the parties, the Kenny defendants,

through their counsel, made what struck me as a constructive proposal in relation to dealing with the proprietary claims made concerning Dildar IOM and the Nemo lands. I would urge the parties to give further consideration to that proposal and, indeed, to a mediation with a view to resolving some or all of the very difficult and complex issues in dispute between them. Ultimately, however, it is the parties' decision as to whether they engage further in relation to the proposal or otherwise.

282. I wish to thank counsel on both sides for their extremely helpful written and oral submissions which have been of great assistance in the preparation of this judgment.

283. Finally, as this judgment is being delivered electronically, I would ask the parties to liase in relation to the precise terms of the order to be made including any order as to costs. If the parties cannot agree to the terms of the order in relation to costs, then the Kenny defendants, as the moving parties, should prepare a short written submission setting out the terms of the orders they propose within seven days of the date of delivery of this judgment. The plaintiffs should respond within four days of receipt of that submission. Both sets of submissions should be filed electronically in the Central Office of the High Court and sent by email to the Registrar. I will consider those submissions and decide at that stage whether it is necessary to have a further oral hearing before finalising the orders to be made. There is liberty to apply by email to extend these time limits.