THE HIGH COURT

COMMERCIAL

[2024] IEHC 4

[2017/6193 P]

BETWEEN

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

PLAINTIFFS

AND

DILDAR LIMITED, CIARAN DESMOND, COLM S. McGUIRE, 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 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 Denis McDonald delivered on 10th January 2024

Contents

Introduction

1. This judgment deals solely with the case made by the plaintiffs against the defendants. The second named defendant has joined a number of third parties to these proceedings but the claim for an indemnity made by him against those parties was not tried at the same time as the action between the plaintiffs and the defendants. The hearing of the claim against the third parties will take place later. This judgment is unusually long. This is because of the issues that have been raised by the defendants in relation to the credibility of the two principal witnesses called by the plaintiffs, the sheer number of other issues in dispute between the parties and because of the approach taken in relation to the admission of documents into evidence. The level of dispute between the parties is also evident from the exceptionally large number of

times the proceedings have been before the court at an interlocutory stage. In the period between 7th July 2017 (when the proceedings were commenced) and 4th April 2022, a total of 69 interlocutory orders were made (including two by the Court of Appeal).

2. The plaintiffs are the trustees of the Oaklands Property Trust (*"OPT"*) which holds the pensions funds of thirteen individual members of the Nolan family, namely Elizabeth Nolan, Ann Nolan, Patricia Nolan, John Nolan, Raymond Nolan, Seamus Nolan, Noel Nolan, Brendan Nolan, Richard Nolan, Kevin Nolan, Joan Nolan, Oliver Nolan and Sally Nolan. The Nolan family operate a transport and logistics company known as Nolan Transport. In these proceedings, the plaintiffs complain that monies entrusted by them to a United Arab Emirates company to the tune of €6,960,000 have been misappropriated. They seek the return of that sum. They also seek a declaration that they should be entitled to exercise a right of tracing in respect of part of their claim into certain property held in the name of the first named defendant (an Isle of Man company which I shall hereafter refer to as *"Dildar IOM"*), The property in question was previously owned by Nemo Rangers in Cork and, for convenience, I will refer to it as *"the Nemo Rangers property"*. The relevant folios comprised in the property are identified in para. 2 of the amended statement of claim and it is therefore unnecessary to identify them here.

3. In pursuing these claims, the plaintiffs seek to rely on a number of different causes of action including, in so far as some of the defendants are concerned, the tort of deceit. The plaintiffs' claim, as pleaded, has gone through a number of iterations. The first statement of claim was delivered on 12th February 2018. Subsequently, following the joinder of the eleventh defendant, an amended statement of claim was delivered on 19th July 2019. This is the amended statement of claim by reference to which I will describe the claims made by the plaintiffs in these proceedings. For the reasons described in more detail below, a further amended statement of claim was delivered in the course of the trial on 9th May 2022.

The case made against the second named defendant (*"Mr. Desmond"*) and the case formerly made against the third and fourth defendants

4. In order to understand the nature of the plaintiffs' claim, it is necessary to begin with a consideration of the claim which the plaintiffs made against the second defendant and the case previously made against the third and fourth named defendants. Those three defendants were, at one time, partners in the firm of McGuire Desmond Solicitors. However, the only basis on which it was alleged that the third and fourth defendants had any liability to the plaintiffs was that they were partners of the second named defendant, Mr. Desmond, and it was alleged that, by virtue of s. 10 of the Partnership Act 1890, they were liable for breach of duty on the part of Mr. Desmond. Each version of the statement of claim made clear that the plaintiffs did not allege that the third or fourth named defendants acted deceitfully or that they were knowingly involved in a misappropriation of funds, the subject matter of these proceedings.

5. At this point, it should be noted that on Day 1 of the hearing, I was informed that the case against the third and fourth named defendants had been resolved. The case against them was struck out with no order as to costs as between them and the plaintiffs. Subsequently, on Day 5 of the trial, the second named defendant consented to judgment in the sum of €6,900,000 and costs *"for negligence, breach of contract and breach of fiduciary duty in the context that he controlled CVSSA and that the plaintiffs' pension monies were in CVSSA"*. A stay of six months was put on that judgment but that stay has subsequently been extended. The reference to CVSSA will become clear presently.

6. Insofar as the case against the second named defendant, Mr. Desmond, is concerned, the case alleged against him was that he had, at all material times, been the plaintiffs' solicitor. It is alleged in para. 11 in the statement of claim that, in November 2012, Mr Desmond introduced the fifth named defendant, Mr Millett to certain of the plaintiffs and recommended him as a suitable pensions adviser who was both honest and trustworthy. It is alleged in para. 10 of the amended statement of claim that, in the period from October to November 2012, Mr

Desmond had advised the plaintiffs that their funds on deposit in Ireland were at risk and that, as a result of the prevailing banking and economic crisis affecting the country, he advised the plaintiffs to transfer their funds to be held on deposit overseas. At this point, it should be noted that the funds in question were not held at that time with any Irish bank. They were held in an account maintained at the Irish branch of Investec Bank (*"Investec"*) and no evidence was given at the trial to suggest that Investec was affected by the banking crisis affecting many of the domestic banks. It should also be noted that, as explained further below, a more expansive (and, at least, in one respect, significantly different) version of events was pleaded in the amended statement of claim delivered in the course of the trial.

7. I address below the changes which the plaintiffs have recently made to their case. Before doing so, it should be noted that, in para. 15 of the amended statement of claim (delivered on 19th July 2019), it was alleged that, on a number of dates between November 2012 and January 2013, Mr. Desmond and Mr. Millett met with the plaintiffs and that, in the course of these meetings and also in telephone conversations, Mr. Desmond represented that he could offer the plaintiffs safe investment of their funds in a deposit account in Switzerland through a company which he is alleged to have represented was under his control namely Clear Vision Solutions SA (*"CVSSA"*). It should be noted that CVSSA is a Panamanian company incorporated on 23rd August 2012. It was also alleged that Mr. Millett contemporaneously represented that he could offer the plaintiffs safe investment for the plaintiffs' funds in a deposit account in Dubai through a company which he was alleged to have represented was under his control namely Middle East Continental Development (*"MECD"*). According to para. 15 of the amended statement of claim, Mr. Desmond represented that the plaintiffs' funds would first be transferred to an account of MECD in Dubai and, thereafter, to the account of CVSSA in Switzerland with a Swiss bank namely EFG Bank (*"EFG"*) *"in the event they decided to avail of the Swiss deposit option"*. It was also alleged in para. 16 that Mr. Desmond represented that

he had full control over the bank account in the name of CVSSA with EFG in Zurich and that CVSSA would hold the funds on trust for the plaintiffs and that they would not be used for any purpose without the express consent of the plaintiffs and would not be incumbered without the consent of the plaintiffs. In addition, it was alleged that Mr. Desmond had represented that one or more of the plaintiffs would be added as a necessary signatory to authorise transactions on the CVSSA account and that, in due course, Richard Nolan's name had been so added. The plaintiffs also alleged that both Mr Desmond and Mr Millett had represented that CVSSA and MECD were both managed by Allied Finance Trust (*'AFT'*) which they allege was represented to be a reputable corporate services provider.

8. The alleged representation in respect of the risk to funds on deposit in Ireland was the subject of a request for particulars delivered on behalf of Mr Desmond. In para. 7 of the plaintiffs' response dated 10th April 2018, the plaintiffs said:-

> *"The Second Defendant's advices were delivered orally. The general context to the advice related to the banking risks and the uncertainty surrounding the banks operating in Ireland at the relevant time. At the relevant time Ireland was still a participant in the 'Troika bailout' programme, which caused significant uncertainty for the viability of all banks operating in Ireland at the time. The removal of the blanket government guarantee was reflective of the general unease and uncertainty for banking in the economy at the time. The banking environment was unstable, and*
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> *the Plaintiffs were advised by their trusted solicitor that their funds were at risk due to the general uncertainty surrounding the banks operating in Ireland at the relevant time. At this time the Plaintiffs' funds were on deposit in Investec Bank which was governed by the Financial Services Compensation Scheme which only guaranteed deposits to a limit of STG £85,000. In addition, the Troika body had approved a bailout for another EU and Eurozone nation, Cyprus, which involved a 10% levy applied on all deposits in*

Cypriot Banks. This proposal ultimately changed to involving capital controls for all deposits over €100,000.00. In light of this uncertainty, the Plaintiffs accepted the advice of their solicitor, Mr. Desmond, regarding the potential risks to the pension funds held on deposit in a bank based in Ireland and followed his advice to transfer the funds for safekeeping in Switzerland, under his control in a fiduciary capacity."

9. A very similar response was given by the plaintiffs to a request for particulars raised by the third and fourth named defendants. It is, therefore, unnecessary to replicate that response here. It should be noted that, with the exception of Mr. Desmond, each of the defendants pleads that they are strangers to the advice given by Mr. Desmond to the plaintiffs and they put the plaintiffs on proof of this allegation. Although judgment has already been given against Mr Desmond, the issues which arose between him and the plaintiffs are nonetheless relevant both for the purposes of the plaintiffs' surviving claim and for the purposes of assessing the credibility of that claim. Mr. Desmond contested the version of events put forward by the plaintiffs in the following terms in para. 11 of his amended defence delivered on 17th May 2021 (with the amendments underlined):-

"It is admitted that the second - fourth Defendants were at all material times the 1st – 6th Plaintiffs' solicitor. It is denied that the second Defendant advised the Plaintiffs that their funds on deposit in Ireland were at risk and / or that he accordingly advised the Plaintiffs to transfer their funds to be held on deposit overseas. The first – sixth Plaintiffs intended to use pension funds as a shelter against their creditors and indirectly address their banking debts. In circumstances where the genesis of the investment scheme the subject matter of these proceedings was to unlawfully facilitate the Plaintiffs clandestinely utilising their own pension funds to re-pay and / or purchase their personal bank debts, the Plaintiffs are precluded from maintaining the within cause of action and the second Defendant will rely on the doctrine of ex turpi causa.

The second Defendant did not give any advice in respect of utilisation of pension funds in this manner. Without prejudice to the foregoing denials, the second Defendant pleads that the services the second – fourth Defendants provided to the 1st – 6th Plaintiffs in the matters the subject matter of these proceedings were limited to;

a. An introduction to the fifth Defendant;

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."

10. The underlined passage in para. 11 of Mr. Desmond's defence is important. For reasons which I will explain in due course, I have come to the conclusion that the true reason the plaintiffs decided to entrust the funds of the OPT to MECD in the United Arab Emirates was that they were attempting to put in place a structure that would permit them to use the proceeds of such an investment in settlement of personal debts owed by the beneficiaries of the OPT (i.e. members of the Nolan family) to two Irish banks. Two further features of Mr. Desmond's defence should be noted. In the first place, in para. 12 of the amended defence, Mr. Desmond alleged that plaintiffs had an existing relationship with AFT since 2011. Mr. Desmond alleged that the plaintiffs were previously advised by AFT in the context of a complex international transaction known as the *"Cassandra Blue Structure"*. In addition, in para. 17 of the amended defence, Mr. Desmond addressed the nature of the investment structure as described in para. 15 of the amended statement of claim in the following terms: -

"Paragraph 15 of the Indorsement of Claim is denied. Without prejudice to the generality of the foregoing denial, it is pleaded that a structure was agreed between Middle East Continental Development Limited ("MECD") and Allied Finance Trust AG, the planned objective of which was to hold and make investments using the corporate entity Clear Vision Solutions SA in capital protected deposit funds and other

secure financial instruments under the guidance and direction of Allied Finance Trust AG. Allied Finance Trust AG was retained by Clear Vision Solutions SA 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. The first – sixth Plaintiff with the fifth Defendant and AFT agreed to place the seventh Plaintiff's funds in Abu Dhabi in an entity controlled by AFT which entity was called Middle East Continental Development Limited. MECD invited funds from investors including the seventh Plaintiff whose funds were transferred pursuant to provisions of a private placement information memorandum issued by AFT on behalf of MECD dated 15th August 2012. This information memorandum was prepared by AFT and the fifth Defendant. The fifth Defendant and AFT created Loan Instruments between MECD and Clear Vision Solutions SA on foot of which the investments were made by MECD into the account of Clear Vision Solutions SA in EFG Bank AG ("EFG") the fifth Third Party. The Loan Instruments between MECD and Clear Vision Solutions SA envisaged an annual return of 8% which required a complex leverage investment structure with capital guarantees to make this return."

11. In turn, these allegations on the part of Mr. Desmond were denied by the plaintiffs in an amended reply delivered on 10th June 2021. In para. 4 of their amended reply, the plaintiffs responded as follows to para. 11 of the amended defence:-

"By way of special reply to paragraph 11 of the Amended Defence, it is denied that the Plaintiffs intended use of pension funds was as alleged. Consequently, it is denied that the circumstances support a plea of ex turpi causa. Further, it is denied that any creditor had a specific claim over any funds transferred and the Plaintiffs have since compromised the bank debts referred to and there are no valid grounds for a plea of ex turpi causa. The scope of services pleaded by the Second Defendant is denied and, in

that regard, reliance will be placed upon the true scope of services as pleaded in the Amended Statement of Claim."

12. It should be noted that there were some further amendments made to the amended statement of claim and the amended reply which I describe further below. These amendments were signalled very close to the commencement of the trial and were ultimately the subject of orders made in the course of the trial (all as described further below).

The case made against the fifth, sixth and eighth named defendants (*"the Millett defendants"*)

13. As noted above, the plaintiffs allege that the fifth named defendant, Mr. Millett, was introduced to the plaintiffs on 16th November 2012 by Mr. Desmond who it is alleged recommended Mr. Millett as a suitable person to advise them on their pension affairs. It was further alleged in para. 4 of the amended statement of claim that Mr. Millett is a specialist provider of pension and financial advice and services and that he trades under the style and title of John Millett Independent Financial Advisors. It should be noted that John Millett Independent Financial Advisors Ltd is, in fact, a limited company and it is also the eighth defendant in the proceedings. In para. 7 of the amended statement of claim, it is alleged that the eighth defendant is the *"corporate vehicle through which the Fifth Defendant dispenses pension and financial services, including the Plaintiffs"*. Notwithstanding this plea, the plaintiffs contend that Mr. Millett has personal liability in respect of the case made by them in these proceedings and it is alleged that he is personally liable for fraudulent misrepresentation and deceit (as explained further below). It is alleged that both the eighth defendant and Mr Millett owed the plaintiffs fiduciary duties together with duties in contract and tort.

14. It is also alleged that Mr. Millett represented to the plaintiffs that the sixth defendant (*"Pinnacle"*) (of which Mr. Millett is a director) was a suitable and reliable entity to act as trustee of OPT. On that basis, and in reliance also upon the representations alleged to have been

made by Mr. Desmond, the plaintiffs say that they consented to Pinnacle becoming a trustee of OPT on 1st December 2012. Where appropriate, I will refer to Mr Millett, Pinnacle and the eighth defendant collectively as *"the Millett defendants".*

15. Insofar as the case against Mr. Millett and the eighth defendant is concerned, it is alleged in para. 17 of the amended statement of claim that they made a number of representations to the plaintiffs during the course of the meetings and communications in the period November 2012 to January 2013. These included an alleged representation that Mr. Millett had full control over and was the beneficial owner of MECD and was an authorised signatory on its accounts and that MECD was managed by AFT, a reputable corporate service provider known to both Mr. Desmond and Mr. Millett. It is also alleged by the plaintiffs that Mr. Millett and the eighth defendant had represented that any monies designated by the plaintiffs for transfer to MECD would either be transferred to an MECD account in Dubai or would be deposited in the CVSSA account in EFG Bank in Zurich and would *"simply rest in that account on trust for the plaintiffs"*. It is also alleged that Mr. Millett had represented that he was responsible for the actions of Pinnacle as trustee of OPT and that, as a fiduciary, the plaintiffs could rely on his skill and judgment. It is further alleged that he would ensure that any of the funds held in any account of MECD would be held on trust for the plaintiffs and that the funds would not be used for any purpose without the express consent of the plaintiffs.

Other aspects of the case made against Mr. Desmond and the Millett defendants

16. It was also alleged in para. 18 of the amended statement of claim, that there was an agreement between the plaintiffs and Mr. Desmond and/or Mr. Millett and/or Pinnacle and/or the eighth named defendant that:-

(a) Mr. Desmond had full control over CVSSA and the CVSSA account and that Mr. Millett had full control over MECD;

(b) The plaintiffs would transfer their funds to accounts nominated by Mr. Desmond and Mr. Millett pertaining to CVSSA and MECD;

(c) The funds would be held on trust for the plaintiffs;

(d) The funds would be held on deposit and would not be used for any other purpose without the express consent of the plaintiffs;

(e) The funds would not be disbursed from the CVSSA account without their knowledge or consent;

(f) The funds would not be pledged as collateral or moved without the plaintiffs' consent and would be returnable and/or refundable to them on demand.

17. On the basis of the alleged representations and the alleged agreement and in reliance on them, the plaintiffs alleged in para. 19 of the amended statement of claim that they authorised the transfer of the following sums from the account of the OPT with Investec Bank in Ireland to an account of MECD in Dubai and, *"ultimately"*, to CVSSA, namely:-

(a) €2,480,000.00 on 21st January 2013;

(b) €2,480,000.00 on 14th February 2013; and

(c) €2,000,000.00 on 28th May 2013.

18. In para. 23 of the amended statement of claim, it was alleged that, at a meeting in Zurich on 9th January 2013 both Mr. Desmond and Mr. Millett represented that one or more of the plaintiffs would be made a *"necessary signatory"* on the CVSSA account and that, subsequently, Mr. Desmond represented that this had been done. It was further alleged in para. 25 that, in the period between February 2013 and January 2015, both Mr. Desmond and/or Mr. Millett continued to *"falsely and/or dishonestly and recklessly"* represent to the plaintiffs that the funds remained intact and unencumbered in the CVSSA account and that they were in a position to return them to the plaintiffs on demand. However, in the particulars to that paragraph, the only specific allegation made against Mr. Millett was that, at a meeting in Zurich

on 22nd April 2013, he and Mr. Desmond had represented to the plaintiffs that *"their funds were intact and ... unencumbered".* That said, it was also alleged that Mr. Millett (in common with Mr. Desmond) did not at any stage disclose the true position to the plaintiffs. It was also alleged in para. 26 of the amended statement of claim that these representations were false and/or erroneous in that in March 2013, without the knowledge or consent of the plaintiffs, Mr. Desmond (with the knowledge of Mr. Millett, Pinnacle and/or the eighth defendant) had procured CVSSA to pledge the cash deposits as collateral for the purposes of obtaining finance to ostensibly purchase investment products to be issued by BNP Paribas Singapore (*"BNPP"*) and United Overseas Bank Singapore (*"UOB"*) or Deutsche Bank Singapore and that in or about September 2013 they had used the plaintiffs' funds to finance the purchase of the Nemo Rangers property in the name of Dildar IOM. The pledge was alleged to have been put in place on 18th March 2013. This predated the final transfer of €2 million from the OPT to MECD on 28th May 2013 and it was alleged in para. 29 of the amended statement of claim that, in June 2013, Mr. Millett *"wrongfully and unlawfully and in breach of agreement and/or fiduciary duty and/or fraudulently"* procured the transfer by MECD of €2m to the CVSSA account and further procured the plaintiffs' consent to that transfer. It was alleged that this was done for the purposes of providing collateral to EFG in respect of a loan secured by the alleged pledge and that this transfer also became encumbered by that pledge. For reasons which will become clear in due course, the existence of this alleged pledge formed an important aspect of the case sought to be advanced by the plaintiffs not only against Mr. Desmond and the Millett defendants but also as against the remaining defendants. This is particularly so in the context of the tracing claim advanced in respect of the Nemo Rangers property.

19. A case was made in paras. 33 and 34 of the amended statement of claim that Mr. Millett represented to Mann Made Corporate Services (*"Mann Made"*) in the Isle of Man that Dildar IOM would be a special purpose vehicle for the acquisition of the Nemo Rangers property and

that it would be beneficially owned by the thirteen individual members of the Nolan family. The plaintiffs also alleged that Mr. Millett identified the OPT as the origin of the necessary purchase monies and that the personal data of the Nolan family members was supplied to Mann Made in this context. At a later point in paras. 55 and 56 of the amended statement of claim, the plaintiffs claimed that the supply of this personal data (comprising home addresses and other personal material) constitutes a misuse of their personal data and they have claimed damages on that basis. While this claim is advanced as though all the members of the Nolan family are plaintiffs, the only members of the family who are named as plaintiffs are those who act as trustees of the OPT.

20. In para. 30 of the amended statement of claim, it was alleged that, in June 2013, Mr. Desmond (with the knowledge of Mr. Millett) wrongfully procured the sale by CVSSA of some or all of the funds held in the euro account in EFG into U.S. dollars and the transfer of the proceeds of that sale into a U.S. dollar account of CVSSA. In addition, it was alleged in para. 40 that Mr. Desmond, Mr. Millett and the eighth defendant "*falsely and knowingly dishonestly and/or recklessly as to the truth thereof"* repeatedly assured and represented to the plaintiffs that the OPT funds were secure and under the control of Mr. Desmond or remained "*lodged securely in a bank deposit account in Switzerland…."*. No particulars of this allegation are provided in para. 40 but reference is made to the earlier paragraphs of the statement of claim in which specific allegations had been made. I therefore do not believe that para. 40 adds anything of substance to the previous allegations made. Furthermore, when the Millett defendants sought particulars of the allegations made in para. 40, the plaintiffs' response appears to me to do no more than repeat allegations made in the statement of claim.

21. The plaintiffs also alleged in para. 41 of the statement of claim that the Millett defendants have failed to satisfactorily or truthfully confirm to the plaintiffs the whereabouts of the funds transferred to CVSSA or to return them to the plaintiffs. Furthermore, the plaintiffs

alleged that the Millett defendants (together with Dildar IOM) have wrongfully converted the plaintiffs' funds to their own use. Subsequently, in para. 44 of the amended statement of claim, it was alleged that Mr. Desmond and/or Mr. Millett and/or Pinnacle and/or the eighth defendant falsely and fraudulently misrepresented the matters pleaded at paras. 11, 12, 15-18, 23-25 and 27 of the statement of claim and that these defendants acted knowingly deliberately and/or recklessly in doing so. In circumstances where Mr. Desmond has not consented to judgment in respect of that element of the plaintiffs' claim, that claim is now pursued solely against the Millett defendants. It is further alleged in para. 45 of the amended statement of claim that the same defendants acted in breach of the alleged agreement pleaded in para. 18 of the statement of claim or alternatively that they acted in breach of fiduciary duty. It should be noted that Mr. Desmond and Mr. Millett were also alleged to have conspired together to injure the plaintiffs. However, as explained further below, that claim was subsequently dropped in a further amended statement of claim delivered in the course of the trial.

The defence of the Millett defendants

22. A defence and counterclaim was delivered on behalf of Mr. Millett, Pinnacle and the eighth defendant. In that defence, it was alleged that representations were made on behalf of those defendants that, should the plaintiffs wish to restructure their pension affairs, the eighth named defendant would carry out the required administrative functions and Pinnacle would act as a pensioneer trustee. It was specifically alleged that there was never any discussion of or agreement that Mr. Millett would act in his personal capacity. It is also alleged that advice given by the eighth defendant was limited to the administration of the scheme, asset protection and fee structures relating to the restructuring of the trust into an exempt unit trust with thirteen individual schemes for each member. It was further alleged that Mr. Millett never controlled nor had any interest beneficial or otherwise in MECD and it is alleged that the plaintiffs were at all times aware and understood that MECD were offering a *"high-risk, unregulated*

investment product for sophisticated investors". It was further alleged that Mr. Millett had represented to the plaintiffs that MECD was established by AFT as a *"conduit to protect client assets"* in the UAE and was solely managed and controlled by AFT. It was also alleged that Mr. Millett represented to the plaintiffs that, on the instructions of Mr. Desmond and AFT, the eighth defendant drew up a private placement investment memorandum (discussed further below). In that context, it was alleged that Mr. Millett represented that the eighth defendant would act as a placing agent to facilitate the transfers of assets from the OPT to MECD and that, in return, the OPT was to receive a loan note from MECD. It was alleged that this memorandum was provided to Ms. Ann Nolan and Mr. Richard Nolan in December 2012.

23. It should be noted that para. 17 of the defence and counterclaim contains a number of important admissions. In that paragraph, the Millett defendants admitted that a total of €10,060,000 was transferred to MECD by OPT between January and June 2013. Each of the individual transfers making up that aggregate amount are also admitted including two transfers which are not the subject of the plaintiffs' claim and which were not addressed by the plaintiffs until a very late stage in these proceedings. These are (i) a transfer of €620,000, (the proceeds of which were ultimately remitted to Serene Consultancy Limited (*"Serene"*), an Isle of Man entity which appears to have been controlled by the Nolan siblings or their late father) and (ii) a later transfer of €2,480,000 the proceeds of which were also remitted to Serene. These transfers to Serene will be described in more detail later. The proceeds transferred to Serene were subsequently used to part fund a settlement of a claim by Bank of Ireland against the individual members of the Nolan family.

24. In the counterclaim, the eighth defendant claimed outstanding professional fees of €368,271.63. In addition, Pinnacle claimed that its removal as corporate trustee in April 2015 was invalid, and damages were sought for breach of trust and/or breach of contract. In the alternative, Pinnacle sought compensation on a quantum meruit basis. However, Pinnacle and

the eighth defendant are no longer in a position to pursue their counterclaim. They are no longer represented in the proceedings. An order was made on 28 April 2023 under O.7, R.S.C., giving leave to the solicitors then acting on behalf of the Millett defendants to come off record. Given that both Pinnacle and the eighth defendant are limited companies, that order created immediate problems in terms of representation. It is clear from the decision of the Supreme Court in *Allied Irish Banks plc v Aqua Fresh Fish Limited* [2012] 1 I.R. 517 that, save in exceptional circumstances, a limited company cannot be represented by a non-lawyer. That decision also makes clear (a) that the fact that a company may lack funds to procure legal representation or (b) that it has a good arguable defence or (c) that it seeks to be represented by its principal shareholder and director do not constitute (whether taken separately or in combination) exceptional circumstances for that purpose. This was made clear to Mr. Millett on the hearing of that application. Thereafter, Mr. Millett acted in person in these proceedings. He is obviously fully entitled to defend the proceedings in person. As the Supreme Court decision in *Aqua Fresh* indicates, this may have an incidental benefit for Pinnacle and the eighth defendant in terms of defending the plaintiffs' claim. But there is no basis on which the counterclaim can be maintained by companies who are not entitled to act save through legal representatives. In the circumstances, it must follow that the counterclaim described above cannot be pursued in these proceedings. I will therefore make an order dismissing the counterclaim of Pinnacle and the eighth defendant.

The claim made by the plaintiffs against the *"Kenny defendants"*

25. The plaintiffs' case against the Kenny defendants is centred on the acquisition of the Nemo Rangers property. In very broad terms, the case made in the amended statement of claim delivered on 19th July 2019 was that the monies used for the purchase of the Nemo Rangers property emanated from the funds held in the CVSSA account (which the plaintiffs claimed were their property) rather than from any funds of the Kenny family. However, the way in

which the claim was pleaded in the amended statement of claim is quite convoluted and is not especially clear. The case in relation to the Kenny defendants begins at para. 33 of the amended statement of claim where the plaintiffs alleged that Mr. Millett gave instructions to Mann Made to incorporate Dildar IOM as a special purpose vehicle for the purposes of acquiring the Nemo Rangers property. At an earlier point, in para. 21 of the amended statement of claim, the plaintiffs alleged that, in May 2013, Mr. Millett had drawn up a transfer instruction for the transfer of the final tranche of OPT funds in the sum of €2 million and had inserted the reference *"MECD (Dildar)"* on this instruction without explaining it in any way to the plaintiffs.

26. The plaintiffs alleged that Mr. Millett informed Mann Made that the OPT was the origin of the necessary funds for this purpose and that the beneficial owners would be the thirteen members of the Nolan family. They also alleged that, in May 2013, Mr. Millett furnished Mann Made with a source of funds flow chart evidencing OPT as the investor, MECD as the investment vehicle, CVSSA as the investment manager's sub-vehicle and Dildar IOM as the ultimate purchaser. In addition, it was alleged that Mr. Millett furnished certified copies of the Nolan family members identification and address documents to Mann Made. Thereafter in September 2013, Mr. Desmond and/or Mr. Millett and/or the eighth defendant are alleged to have caused the sum of €2,828,192.79 to be paid out of monies of the plaintiffs held in the CVSSA account for the purposes of financing the purchase of the Nemo Rangers property by Dildar IOM. The plaintiffs contend that all of this was done without their knowledge or consent. As noted above, they then made the case in para. 42 that Dildar IOM had converted the plaintiffs' funds to its own use. In para. 43 they alleged that the seventh defendant, Dildar Ireland had, by lodging an application for planning permission, wrongfully held itself out as owner of the Nemo Rangers property in disregard of *"the lawful rights and interests of the plaintiffs"* and, at para. 47, it was alleged that, as a consequence, the seventh defendant was guilty of misrepresentation. The next relevant allegation is in para. 50 where a number of very

serious allegations were made against the eleventh defendant, Mr. Paul Kenny. These are identified in para. 27 below. In brief, the plaintiffs alleged that the eleventh defendant had acted in concert with Mr. Millett to effectively rewrite the history of the ownership of Dildar IOM such as to give the impression that it was owned by the Kenny defendants and, as alleged in para. 52, to prevent the plaintiffs from asserting title to Dildar IOM. The case was also made in para. 51 that the eleventh defendant was aware that the plaintiffs were clients of Mr. Millett and of the existence of an alleged fiduciary relationship between Mr. Millett and the plaintiffs. The eleventh defendant was also alleged to have been party to the breach of the plaintiffs' privacy rights and personal data rights by Mr. Millett and it was alleged that the eleventh defendant's conduct was so egregious as to entitle the plaintiffs to exemplary damages. Later, in para. 70, it was alleged that the plaintiffs' funds were *"substantially used to acquire the primary asset of Dildar IOM"* which appears to be a reference to the Nemo Rangers property. When it came to the relief sought, a claim was made that Dildar holds its interest in the property on trust for the plaintiffs. A claim was also made that the money withdrawn from the CVSSA account to complete the purchase of the property was held on a constructive trust for the plaintiffs. A declaration was also sought that the plaintiffs are the beneficial owners of Dildar IOM but that claim was not pursued at trial.

27. As explained in more detail in para. 67 below, much of the case made against the eleventh defendant was subsequently dropped after Day 6 of the trial. Nonetheless, I believe it is important that I should record the nature of the case which the plaintiffs had, up to that point, been prepared to advance as against the eleventh defendant. The plaintiffs had been prepared to make very serious allegations in the pleadings which they subsequently were unable to substantiate. As set out in para. 50 of the amended statement of claim, the plaintiffs contended that the eleventh defendant acted in concert with Mr. Millet in a number of respects: -

(a) Endeavouring to misrepresent the ownership position concerning Dildar IOM to its directors and its corporate service provider, Mann Made;

(b) Endeavouring to retrospectively change the ownership record of Dildar IOM so as to disguise the fact that the plaintiffs had been recorded as its beneficial owners;

(c) Endeavouring to retrospectively change the ownership record of Dildar IOM so as disguise the fact that the plaintiffs' funds had been used to acquire property on its behalf;

(d) Endeavouring to retrospectively change and/or procure the alteration of Dildar IOM's archival records as held by Mann Made;

(e) Procuring the submission of back-dated correspondence – purportedly dated 7th June 2013 – with the intent of misrepresenting the historical account which had been provided to Mann Made regarding the ownership of Dildar IOM;

(f) Asserting a different beneficial ownership claim to Dildar IOM and the Nemo Rangers property contrary to that now advanced by the ninth and tenth named defendants in these proceedings;

(g) Providing a false account to Mann Made concerning the ownership of Dildar IOM during the course of meetings on 18th September 2015, 27th September 2016 and ensuing correspondence at which time Mr. Millett ostensibly acted as the eleventh named defendant's agent;

(h) Expressly and/or impliedly endorsing Mr. Millett's allegedly false account to Mann Made provided during the course of meetings on 18th September 2015, 27th September 2016 and ensuing correspondence at which time Mr. Millett ostensibly acted as the eleventh named defendant's agent;

(i) Assisting Mr. Millett's breach of his fiduciary duties and duties in tort and/or contract to the plaintiffs; and

(j) Continuing to conceal the true position as regards the above events in circumstances where, to his knowledge, his son and nephew (the ninth and tenth defendants) are making claims allegedly inconsistent with those events.

28. It is next necessary to say something more about Dildar IOM. It is an Isle of Man company. It is the registered owner of the Nemo Rangers lands. In November 2017, the plaintiffs instituted proceedings before the courts of the Isle of Man seeking declarations that the shares in Dildar IOM were beneficially owned by them. In a counterclaim delivered on 21st November 2018 in the Isle of Man proceedings, the ninth and tenth defendants counter claimed that they were the beneficial owners of the shares in Dildar IOM. Subsequently, in January 2019, the courts of the Isle of Man stayed the proceedings in that jurisdiction in circumstances where these proceedings were pending before this Court. In the amended statement of claim, the plaintiffs claimed that it was expedient that the dispute as to the beneficial ownership of Dildar IOM should be resolved in these proceedings. In the meantime, in October 2018, the ninth and tenth defendants were added, on their own application, as defendants to these proceedings by order made by the Court of Appeal. That application was made on the basis that the administrator of Dildar IOM, a director of Mann Made, had made it known that he would take a neutral position in these proceedings in relation to the ownership question. In those circumstances, the ninth and tenth named defendants contended that it was necessary that they should be joined as defendants to these proceedings. Their case was succinctly summarised by Peart J. in the judgment of the Court of Appeal in *Nolan v. Dildar Limited* [2018] IECA 345 at paras. 8 – 10 as follows: -

"8. The appellants seek to be joined as defendants because the administrator of Dildar Limited in the Isle of Man has made it known that he will be taking a

neutral position in the proceedings in relation to the ownership question (the company itself having previously supported the claim of beneficial ownership made by the Kennys). The Kennys anticipate therefore that the Nolans will be facing what they describe as "an open goal" when making their claim for a declaration that they are the beneficial owners of Dildar Limited, as there will be no party before the court to make the case that they are not. They consider that they are now the only appropriate 'legitimi contradictores', and ought to be joined so that they can defend the plaintiffs' claim to a declaration, and also seek their own declaration as to ownership by way of a counterclaim.

9. *This change of position on the part of the administrator of Dildar Limited is put forward by the appellants as an exceptional circumstance justifying their being joined as defendants so that (a) they can defend the plaintiffs' claim to beneficial ownership, and (b) so that they can assert by way of counterclaim their own claim to beneficial ownership. The appellants contend that their joinder will ensure that the necessary parties are before the court so that all necessary issues can be properly and fairly determined by the court. They submit that their interests are directly affected by the determination of the plaintiff's claim to ownership, and that they must be allowed to defend their interests, now that the administrator of Dildar Limited has indicated that he will be adopting a neutral position in the matter.*

10. *In their application to be joined as defendants Darren and Dillon Kenny claim that the funds used by Dildar Limited to purchase the Nemo lands came from Kenny family funds, and that it was they who procured the incorporation of*

Dildar Limited for the purchase of the lands. They refer to the fact that even the name of the company consists of the first three letters of the first names of Dillon and Darren Kenny."

29. The application to join the ninth and tenth defendants was opposed by the plaintiffs on the grounds (*inter alia*) that, before the court could countenance their joinder, they would have to address an alleged contradiction between the case made by the ninth and tenth defendants and statements alleged to have been made by Mr. Paul Kenny on a previous occasion. I should explain that Mr. Kenny is the father and uncle respectively of Dylan Kenny and Darren Kenny. The plaintiffs relied in this regard on notes of meetings which allegedly took place in the Isle of Man in September 2015 with Mann Made. However, this ground of opposition was rejected by the Court of Appeal which took the view that any such contradictions were a matter for the trial.

30. Mr. Paul Kenny, the eleventh defendant, was not joined as a defendant to the proceedings until an order was made on 15th July 2019 on the application of the plaintiffs. By the same order, the plaintiffs were given liberty to amend the plenary summons and to deliver the amended statement of claim of 19th July 2019. This is the document by reference to which I have, as set out above, described the claims made by the plaintiffs.

31. For convenience, I will refer to the first, seventh, ninth, tenth and eleventh defendants collectively as *"the Kenny defendants"*. In this context, I should explain that, although the seventh defendant, Dildar Ireland, shares a similar corporate name to Dildar IOM, they are two separate entities. While Dildar IOM is incorporated in the Isle of Man, the seventh defendant is incorporated in the State. It makes no claim to the ownership of the Nemo Rangers property but it has admitted in para. 20 of its defence that, in a planning application lodged in respect of that property, it was *"inadvertently and inaccurately identified as the owner of that Property"*.

32. As noted above, Dildar IOM (acting through its administrator) had previously adopted a neutral position in respect of the claims made by the plaintiffs in these proceedings. However, in the course of the trial, the plaintiffs confirmed that they were no longer making a claim to ownership of the shares in Dildar IOM. The claim previously made to ownership of Dildar IOM was deleted in the further amended statement of claim delivered in the course of the trial. However, the plaintiffs continued to maintain a claim that Dildar IOM holds its interest in the Nemo Rangers property on trust for the plaintiffs. In those circumstances, the solicitors acting on behalf of the other Kenny defendants sought leave to deliver a defence on behalf of Dildar IOM. Such a defence was subsequently delivered, in the course of the trial, on 9th June 2022.

The defence of the Kenny defendants

33. Although separate defences had previously been delivered on behalf of the seventh defendant, and on behalf of the ninth and tenth defendants, a single amended defence of the Kenny defendants (but not, at that time, including Dildar IOM) together with a counterclaim on the part of the ninth and tenth defendants was delivered on 31st July 2019. In the defence, the Kenny defendants pleaded that they are strangers to what may have been represented by Mr. Millett to Mann Made as to the origin of any funds for the acquisition of the Nemo Rangers property. Furthermore, regardless of whatever might have been said by Mr. Millett to Mann Made, the Kenny defendants denied that any funds for the purchase of the Nemo Rangers property came from OPT or from the Nolan family. In addition, the eleventh defendant denied all of the allegations made against him. The ninth and tenth defendants sought a declaration that they are the beneficial owners of the entire share capital of Dildar IOM and that the Nemo Rangers lands are beneficially owned by Dildar IOM or in the alternative by them. It should also be noted that the Kenny defendants made the case in para. 12 of their amended defence of 31st July 2019 that the plaintiffs' account of their dealings involving the funds of OPT, MECD and CVSSA was "*incomplete"* in circumstances where the true amount of the funds of OPT

transferred to MECD in the period January to June 2013 was €10,059,300 rather than the sum of €6,960,000 as alleged by the plaintiffs in their statement of claim. This is similar to the case made in the defence of the Millett defendants described above. In the same paragraph, it is alleged that, of the larger sum of €10,059,300, a sum of €3,096,000 was transferred by or at the direction of the plaintiffs in January and February 2013 to Serene (i.e. the Isle of Man company mentioned in para. 23 above) "*an entity to which the Kenny defendants are strangers"*.

34. Subsequently, following the confirmation (described in para. 32 above) that the plaintiffs were no longer pursuing a claim to ownership of the shares in Dildar IOM, a defence was delivered on behalf of Dildar IOM. In that defence, Dildar IOM denied that any of the plaintiffs' funds were used to finance the purchase of the Nemo Rangers property in whole or in part. But it was admitted that, on 3rd September 2013, a sum of €2,828,192.79 was paid from the CVSSA account to the vendor's solicitors for the purposes of financing the purchase of the Nemo Rangers property by Dildar IOM. It was claimed that this sum was paid out of the euro account of CVSSA at EFG which account held €243,925.75 prior to the transfer such that, as a consequence of the transfer, the account became overdrawn to the extent of €2,584,267. It was also alleged that there was no money of the plaintiffs in the said account on 3rd September 2013. On the contrary, it was alleged that the monies used in the purchase of the Nemo Rangers property were owned by the Kenny defendants.

The further amendments made to the statement of claim in the course of the trial

35. A further amended statement of claim was delivered in the course of the trial. In order to explain the circumstances in which that occurred, it is necessary to describe the backdrop to this amendment. As noted above, the plaintiffs maintained, both in their amended statement of claim and in their amended reply, that the advice given to them by Mr. Desmond to transfer their funds out of Investec Bank was based on the suggestion that, as a result of the prevailing

banking and economic crisis affecting Ireland, their funds on deposit in Ireland were at risk. As further noted above, the Kenny defendants had made the case in para. 12 of their amended defence and counterclaim that the plaintiffs account of their dealings involving the funds of OPT, MECD and CVSSA was incomplete in circumstances where they alleged that a total of €10,059,300 of the funds of OPT was transferred to MECD in the period from January to June 2013, of which €3,096,000 was transferred by or at the direction of the plaintiffs in January and February 2013 to Serene. As also noted above, a similar plea had been made in para. 17 of the defence and counterclaim delivered on behalf of the Millett defendants. In response, the plaintiffs pleaded in para. 6 of their reply (delivered in September 2019) to the defence of the Kenny defendants that the additional sum of €3,096,000 (which they did not admit) was not material to the issues in the proceedings.

36. In the meantime, the plaintiffs were directed to make discovery of documents and account statements relating to the sums transferred to Serene. The Kenny defendants were not satisfied with the discovery made by the plaintiffs in respect of this category of documents. They raised issues in relation to the adequacy of such discovery in their solicitor's letter of 9th June 2020. In response, on 4th August 2020, the plaintiffs' solicitors proffered three redacted bank statements for Serene dated respectively 31st January 2013, 28th February 2013 and 29th June 2015. However, subsequently, in 2021, an application was made on behalf of Mr. Desmond for an order against the plaintiffs requiring the production of unredacted versions of the bank statements in question. That application was argued before Twomey J., and he delivered a written judgment in respect of the application on 8th November 2021 (neutral citation [2021] IEHC 697). At the time of the hearing before Twomey J., the witness statement of Richard Nolan was already available in which he made reference to certain transfers from CVSSA to Serene which he described as a *"Nolan Family associated company"*. Twomey J. concluded that the bank statements of Serene were in the possession or power of the plaintiffs

and he directed that unredacted bank statements should be discovered. Subsequently, the plaintiffs say that they encountered difficulties in obtaining unredacted bank statements from Serene. These were addressed in affidavits sworn by Ms. Patricia Nolan and by Mr. Richard Nolan. In her affidavit sworn on 13th December 2021, Ms. Patricia Nolan swore that the only OPT monies ever transferred to Serene were the monies documented in the redacted bank statements. According to Ms. Nolan, Serene returned these monies with interest to the OPT immediately when the pension trustees requested them to do so a number of years later. In addition, in para. 28, Ms. Nolan acknowledged that the monies transferred to Serene were used in the context of a settlement which the Nolan family members negotiated with Bank of Ireland in respect of their personal indebtedness to that bank. This was the first time that the plaintiffs acknowledged that any of the proceeds of the transfers from Investec to MECD were used for the purposes of a settlement with creditors. According to Ms. Nolan, the "… *pension trustees subsequently objected to this use of pension funds, and the monies were restored".*

37. The trial of the proceedings was fixed to commence on 3rd May 2022. Prior to the commencement of the trial, the proceedings were listed for a number of purposes on Monday 25th April 2022. On that occasion, counsel for the plaintiffs indicated that the plaintiffs proposed to deliver a further witness statement of Mr. Richard Nolan and also a witness statement from a Swiss lawyer. At that point, however, neither of the proposed witness statements had been provided to the defendants. In those circumstances, the matter was put back to 28th April 2022 (which was also the date fixed for the hearing of the application by the solicitors acting on behalf of the Millett defendants seeking an order under O.7 RSC discharging them as solicitors for those defendants). In the intervening period, the proposed supplemental witness statement of Mr. Nolan was served on the defendants. In that witness statement, Mr. Nolan, for the first time, sought to expand the case previously put forward by the plaintiffs as to the advice allegedly given to them by Mr. Desmond to move the OPT monies

from Investec Bank. In his supplemental witness statement, Mr. Nolan confirmed the position set out by his sister, Patricia Nolan in her affidavit sworn on 13th December 2021in response to the order of Twomey J. In particular, he confirmed that the money transferred to Serene (which had been mentioned briefly in his original witness statement) amounting to approximately €3.1 million had been used in the settlement of legal proceedings brought by Bank of Ireland against several members of the Nolan family. He also made the entirely new point about the ambit of the advice alleged to have been given by Mr. Desmond to the plaintiff. In para. 3 of a supplemental witness statement he said: -

> *"At the very beginning of this entire episode, Mr. Desmond advised us that monies placed with him could subsequently be used to settle debts. Mr. Desmond also advised on the Bank of Ireland case. Mr. Desmond was at the time a trusted advisor to my family and I* (sic)*."*

38. In addition, Mr. Nolan accepted that the evidence in relation to use of the monies to settle the Bank of Ireland proceedings was contrary to evidence previously given by him before the Solicitors Disciplinary Tribunal but he sought to explain this discrepancy on the basis that, at the time he gave evidence to the Disciplinary Tribunal, he was unaware that the monies which had been transferred to Serene were subsequently used for the purposes of a settlement with Bank of Ireland. Mr. Nolan also accepted that his existing witness statement in these proceedings was *"incomplete".* He stated in para. 4 of the supplemental witness statement: *"I very much regret those omissions…"*. Furthermore, in para. 6 of the supplemental witness statement, Mr. Nolan stated that he accepted that *"in addition to the concerns that we had as to the position of the Banks, we were under significant financial pressure from a number of financial institutions in 2012/2013"*. He expanded on this in para. 7 of his witness statement where he said: -

"At the time, as with many businesses in Ireland, we were looking at all available and lawful means in order to assist pay off these financial institutions…"

39. In the course of the hearing of the application on 28th April 2022, both Mr. Millett and counsel for each of the remaining defendants drew attention to the inconsistency between the evidence proposed to be given in the supplemental witness statement of Mr. Nolan and that set out in the previous witness statement furnished in August 2021. It was also suggested by counsel for the Kenny defendants that it would make more sense that any application for leave to deliver the supplemental witness statement should be addressed after the opening of the case by counsel for the plaintiffs. Counsel for the Kenny defendants suggested that, in the course of the opening, counsel for the plaintiffs should seek to explain to the court the case now made by the plaintiffs, the extent to which it could be found in the existing pleadings, and whether the case was consistent with answers previously given by the plaintiffs to interrogatories raised by certain of the defendants.

40. I agreed with the suggestion made by counsel for the Kenny defendants. I also directed the plaintiffs to consider what amendments might be necessary to the pleadings as a result of the new evidence sought to be advanced. The trial subsequently commenced on 3rd May 2022. The opening of the case took up the first three days. On Day 3 of the trial, counsel for the plaintiffs again addressed the supplemental witness statement. However, after hearing argument from all parties then before the court, I directed that, before giving leave for delivery of the amended witness statement, the amendments to Mr. Nolan's original witness statement should be clearly identified. This was subsequently done by the plaintiffs. I also directed that consideration needed to be given immediately to whether the existing pleadings needed to be amended.

41. The proposed amendments to the pleadings were then presented to the court on Day 4 of the trial. The first proposed amendment was to para. 10 of the amended statement of claim.

It should be recalled that, in all previous versions of the statement of claim, para. 10 alleged that the advice given by Mr. Desmond to the plaintiffs was that their funds on deposit in Ireland were at risk and that, as a result of the *"prevailing banking and economic crisis affecting the country he advised the Plaintiffs to transfer their funds to be held on deposit overseas"*. In the further amended statement of claim, the following was added to the end of para. 10: -

> *"The Second Defendant further advised that pension monies placed with him could lawfully be used to settle debts owed by the Nolan family. These advises were given orally by the Second Defendant inter alia at meetings held at the offices of Nolan Transport in New Ross, Co. Wexford on for 18 October 2012 and/or 9 November 2012, which said meetings were attended by the Second Defendant and members of the Nolan family including the First to Fifth Plaintiffs, and at a meeting in Zurich on or about 9 January 2015 attended by the Second and Fifth Defendants and the First and Fourth Plaintiffs. The Second Defendant represented at*
>
> *those meetings:*
>
> 1. *The pension monies transferred from Oaklands Property Trust could be used to settle debts owed by the Nolan family;*
> 2. *That in order to use the said monies for that purpose, the monies should be transferred in the manner pleaded at paragraph 15 hereof; and*
> 3. *That the use of the said monies for the said purpose in the said manner was lawful."*

42. The next amendment was to para. 15 of the amended statement of claim. That paragraph has already been addressed in para. 7 above. In the further amended statement of claim, the following was added to the end of para. 15:-

"The Second and Fifth Defendants further jointly and severally represented that if the Plaintiffs complied with the advices provided to them by those Defendants the funds in question would be lawfully used to settle debts owed by the Nolan family. The said representations made on the part of the Second Defendant have been particularised a paragraph 10 above. In relation to the Fifth Defendant the said representations were made by him at the said meeting in Zurich on or about 9 January 2013."

43. In addition, a further representation was added to the end of para. 16 in the following terms:-

"Pension monies transferred by the Plaintiffs to the Clear Vision account could lawfully be used to settle debts owed by the Nolan family."

44. An amendment was also made to para. 4 of the plaintiffs' reply of the defence of Mr. Desmond such that para. 4 now reads as follows:-

"By way of special reply to paragraph 11 of the Amended Defence it is admitted that the Plaintiffs' intended use of pension funds was inter alia to address their banking debts. It is denied that the said intended use of the Plaintiffs' funds was unlawful. Further, or in the alternative, the Plaintiffs expressly plead that the Second Defendant advised that the said use of their pension funds was lawful and that the Plaintiffs relied on that advice."

45. Consequential amendments were also proposed to the responses given by the plaintiffs to a request for particulars served by Mr. Desmond and to a similar request served on behalf of the Millett defendants.

46. Counsel for the plaintiffs sought to explain the late amendments to the plaintiffs' case. Counsel said that he was instructed by the plaintiffs that they characterised the amendments as a decision by them to admit facts that had been alleged against them by the defendants. He said that the plaintiffs acknowledged that this decision was made late in the day but that it was one

which narrowed the issues in the case, rather than adding additional issues. Counsel also said, on Day 3, that it is *"essentially, a decision on the part of the Nolans to come clean on this issue"*. In the course of Day 4, counsel for Mr. Desmond submitted that the amendments lacked specificity and that they failed, for example, to explain who was present at the meetings when this advice was alleged to have been given. There was a general reference to the Nolan family. In response, I took the view that the amendments needed to be precise before the evidence commenced. After a short adjournment of the hearing on Day 4, counsel returned to confirm that, in lieu of referring to unspecified members of the Nolan in para. 10 of the proposed further amended statement of claim, the names of the Nolan family who it is alleged attended meetings with Mr. Desmond were Ms. Elizabeth Nolan, Ms. Ann Nolan, Ms. Patricia Nolan, Mr. Raymond Nolan, Mr. Seamus Nolan, Mr. Noel Nolan, Mr. Brendan Nolan, Mr. Richard Nolan, Mr. Kevin Nolan, Mr. Oliver Nolan, Ms. Joan Nolan and Mr. Mark Piggott.

47. After hearing counsel, I gave a ruling on Day 4 permitting the amendments proposed but deleting the words *"inter alia"* in the proposed amendment to para. 10 of the amended statement of claim and substituting the names of the individual members of the Nolan family for the words *"and members of the Nolan family…"* in the same paragraph of the proposed further amended statement of claim.

The opening of the case

48. As noted above, the opening of the case took place over a period of three days. In the course of that opening, extensive reference was made to documents to which Mr. Desmond was either a signatory or a party. It appears that this was done on the assumption that Mr. Desmond would be participating in the hearing and would, if he wished to defend the allegations against him, be required to give evidence, in which case the documents in question could all have been put to him for the purposes of proof. However, after Mr. Desmond, in the course of Day 5, consented to judgment, it became clear that the plaintiffs did not intend to call

Mr. Desmond as a witness. This gave rise to an obvious difficulty insofar as proof of documents used in the opening is concerned. While the Kenny defendants agreed to admit documents authored by them on a *Bula/Fyffes* basis, they had not admitted documents authored by others. This had the consequence that the plaintiffs were left in a position where they had to prove any such documents (should they wish to rely upon them) and where they would also have to prove the truth of their contents. As will become clear from the events described below, it appears that the plaintiffs, in advance of the trial, had not given a great deal of consideration to how documents might be proved in the event that the defendants (in particular, Mr. Desmond) did not give evidence. It is true that they served interrogatories but these did not address all of the documents on which the plaintiffs might need to rely. There was no systematic attempt to compel the admission of documents through interrogatories of the type envisaged in *Mercantile Credit Company of Ireland Ltd. v. Heelan* [1994] 2 I.R. 105. Nor was any application made in advance of the trial under Chapter 3 of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 (described further below).

49. In light of the fact that much of the opening had focused on matters that the plaintiffs were ultimately unable to prove in evidence, I do not propose in this judgment to describe the opening in any detail. It may nonetheless be helpful to provide a brief outline of the case which the plaintiffs sought to make at that stage of the trial. But this outline should be read subject to the very important caveat that much of the matters outlined by counsel in the opening were not the subject of admissible evidence and therefore have not been proved. It should also be noted that the plaintiffs' case was subsequently recast in the terms of the framework document described in para. 61 below.

50. In opening the case, counsel for the plaintiffs reiterated the case made in the pleadings that the plaintiffs had entrusted the OPT funds to the scheme devised by Mr. Desmond on the basis that they would sit in a euro deposit account of CVSSA in EFG Bank in Switzerland.

Counsel said that, unknown to the plaintiffs, Mr. Desmond in concert with others, had been involved in pledging the funds deposited by the OPT as security for a loan of US$100 million from EFG to CVSSA as part of a complex scheme which counsel referred to as *"the Kiwi structure".* Counsel referred in this context to a chart prepared by Mr. Harding, the accounting expert retained on behalf of Mr. Desmond which purported to show the main features of this structure. But it should be noted that Mr. Harding was not subsequently called to give evidence and neither his chart nor the purported elements of the structure described in it were proved in evidence.

51. Counsel said that, again unknown to the plaintiffs, Mr. Desmond and others stood to make a significant profit from this transaction. According to counsel, the Kiwi structure involved the borrowing by CVSSA of US$100 million from EFG, the onward lending by CVSSA of that loan to a related company in Hong Kong on the basis that the latter would buy capital protected loan notes issued by BNPP and UOB Bank in Singapore which would be held by CVSSA for safe keeping. Counsel suggested that these notes were to carry a higher rate of interest than the interest payable to EFG in respect of the US$100 million loan, the intention being that this would generate a profit which would then be shared by various parties (including Mr. Desmond). In addition to the pledge over the money held in CVSSA's account with EFG, counsel for the plaintiffs suggested that further security for the loan was provided in the form of standby letters of credit issued by branches of BNPP and UOB banks in Singapore in the sums of US$41.4 million and US$49.68 million respectively. The aggregate of these sums did not equate to the full extent of the EFG loan and counsel suggested that this was why EFG required a pledge over funds held by CVSSA in a US dollar account. Counsel said EFG required that a minimum of US$15 million should be held subject to the pledge and that the monies advanced by the OPT had been transferred into this dollar account without the plaintiffs' knowledge or authorisation.

52. According to counsel for the plaintiffs, the EFG loan was drawn down in two tranches, US$46 million being drawn down on 18th April 2013 following the putting in place of the BNPP standby letter of credit and the balance of US$54 million being drawn down on 13th June 2013 following the putting in place of the UOB letter of credit. Counsel also said that the plaintiffs were induced to make the final transfer of €2 million in June 2013 in order to ensure that CVSSA would have US$15 million in the US dollar account to enable the second drawdown of the loan to take place. He said that all of this was concealed from the plaintiffs. In addition, he suggested that this sum of €2 million subsequently made up part of the purchase monies for the Nemo Rangers property, the acquisition of which was completed following the transfer of a total of €2.82 million to the vendors' solicitors in September 2013.

53. Counsel for the plaintiffs outlined that it subsequently transpired in the course of 2014 that the notes issued by BNPP and UOB held by CVSSA were worthless. They did not pay the interest which had been expected. In turn, CVSSA was unable to pay the interest due to EFG on the US$100 million loan. This resulted in EFG calling in the standby letters of credit and enforcing the pledge given by CVSSA with the result that none of the monies *"deposited"* by the OPT were repaid.

54. As mentioned in para. 32 above, counsel for the plaintiffs accepted in the course of the opening that the plaintiffs no longer made any case that they are the beneficial owners of Dildar IOM. In those circumstances, at the conclusion of the opening, counsel for the Kenny defendants submitted that this element of the plaintiffs' claim should be dismissed. An order to that effect was duly made by me, leaving over any question of costs to the conclusion of the proceedings. However, counsel for the plaintiffs made clear that the plaintiffs continued to make a claim to a beneficial interest in the Nemo Rangers property. He said that this claim was advanced on two bases. In the first place, he sought to argue, in the course of the opening that it is clear that €2 million of the purchase money emanated from the last tranche of OPT money

transferred to MECD under the instruction bearing the reference *"MECD (Dildar)".* Counsel for the plaintiffs characterised this as a *"kind of earmarking argument"*. On that basis, he argued that the plaintiffs are able to trace that money into the Nemo Rangers property giving them a proportionate interest in that property. However, that case is not made in any version of the amended statement of claim and the Kenny defendants have objected that this argument is not open to the plaintiffs. I agree. No application was made to further amend the statement of claim to include such a claim and, therefore, the plaintiffs are not entitled to pursue this argument. This was very properly conceded by counsel for the plaintiffs in their closing submissions to the court on Day 20 and Day 22 (albeit that, on Day 20, counsel suggested that the claim had been *"loosely pleaded"* in the amended statement of claim). The alternative argument advanced by the plaintiffs is that the money used to acquire that property came from a mixed fund comprised partly of OPT funds and partly of the funds of the Kenny defendants and that, as a consequence of the alleged breach of fiduciary duty by Mr. Desmond and/or the Millett defendants, that mixed fund was impressed with a constructive trust in the plaintiffs' favour thereby entitling them to assert a tracing claim against the property purchased with the proceeds of that mixed fund. Depending on the findings of fact ultimately made by me, it may be necessary to examine the relevant legal principles in some detail. At this point, it might be noted that, in their written submissions delivered in advance of the trial, the Kenny defendants argued that the plaintiffs' tracing claims are without foundation in circumstances where they contended that, at the time the relevant transfer was made to close the purchase of the property, there was enough money remaining in the CVSSA US dollar account to pay the plaintiffs the full amount of their claim. On that basis, the Kenny defendants contended that the plaintiffs cannot say that there was a misappropriation of the money, the subject of their claim, at that time. In turn, the Kenny defendants argued that the plaintiffs cannot assert any right to follow the money used to complete the purchase of the Nemo Rangers property. However, the

plaintiffs claimed that the alleged existence of the pledge in favour of EFG meant that their money was in fact misappropriated. This underlines why it was of such importance to the plaintiffs' case that they prove the existence of the pledge albeit that they also relied on an alternative argument to ground their tracing claim – namely that there had allegedly been a breach of fiduciary duty on the part of Mr. Desmond and Mr. Millett at the time the payment of the closing money was made.

55. Following the opening, the plaintiffs went into evidence on Day 4 of the hearing. Their first witness was Mr. Richard Nolan. His evidence is described in some detail below. His direct evidence continued throughout Day 4 and spilled into Day 5. In the course of Day 5, I was informed that counsel for Mr. Desmond were in discussion with counsel for the plaintiffs. In the course of the morning, the court rose to facilitate these discussions but, at 2.00 p.m., I was informed that there was nothing to report to the court and Mr. Nolan resumed his direct evidence. However, his evidence was interrupted at 2.50 p.m. when counsel for Mr. Desmond interjected to inform me that Mr. Desmond was consenting to judgment in the amount of €6.9 million and costs *"for negligence, breach of contract and breach of fiduciary duty in the context that he controlled CVSSA and that the plaintiffs' pension monies were in CVSSA".* That was the extent of what the court was told. No specific details were given of the acts of negligence, breach of contract or breach of fiduciary duty to which Mr. Desmond was confessing. Nor was anything said as to the dates when any such breaches or other wrongdoing occurred.

56. Not long after this interruption, Mr. Richard Nolan concluded his direct evidence. At that point, counsel for the Kenny defendants intervened to say that, before he commenced his cross-examination of Mr. Nolan, he needed to know the precise nature of the case which remained in being against his clients. In addition, counsel for the Kenny defendants raised an issue as to the impact of the settlement with Mr. Desmond. Counsel for the Kenny defendants

said that it was essential that the terms of settlement with Mr. Desmond should be disclosed and he suggested that the settlement likely involved the release of many of the claims advanced by the plaintiffs. He also queried whether there was any longer a basis for the tracing claim advanced as against his clients. On the same day, Mr. Millett indicated an intention to bring an application to dismiss the plaintiffs' claim as against him.

57. Counsel for the plaintiffs did not, at that point, respond to the submissions made on behalf of the Kenny defendants but he clarified that: *"there is no settlement agreement. There is a consent to judgment in the terms that were announced by* (sic) *the court … So, … there is no settlement agreement and we were careful to phrase it in that way."* That brought the hearing on Day 5 to a close. I believe it is fair to say that there was an expectation that, on the following day, applications would be made both by Mr. Millett and the Kenny defendants to dismiss the claims against them.

58. That is not what transpired. Instead, on Day 6 of the trial, counsel for the Kenny defendants made detailed submissions in relation to the case as pleaded, the potential effect of the settlement with Mr. Desmond on the claims made in the proceedings and the impact of the absence of Mr. Desmond as a witness insofar as the proof of documents is concerned. He also questioned the evidential status of the documents that had been opened to the court in the course of the opening and he submitted that, in the absence of Mr. Harding as a witness, the plaintiffs could not rely on the report of Mr. Harding and the attached chart (which had been extensively used by counsel for the plaintiffs in the course of the opening of the case). Counsel for the Kenny defendants also maintained that the plaintiffs had not pleaded that the transfer of €2 million from the OPT to MECD in June 2013 had been done for the purpose of buying the Nemo Rangers property. He also highlighted that the plaintiffs no longer proposed to call a witness from Mann Made and he submitted that this meant that the plaintiffs could not seek to prove that the Kenny defendants did not act innocently. However, counsel for the Kenny

defendants did not move an application to dismiss the proceedings as against his clients. On the same day, Mr. Millett had a motion before the court seeking to dismiss the claim against him on the basis that it disclosed no reasonable cause of action or, in the alternative, seeking orders that the settlement with Mr. Millett constituted a release of the claims against him. But, ultimately, Mr. Millett did not proceed with that application at that point although he did make some submissions as to the legal effect of the events on Day 5. In response to the submissions made on behalf of the defendants, counsel for the plaintiffs suggested that the best way to proceed would be for the plaintiffs to deliver a written document setting out the *"basis upon which we say these events … affect the ongoing litigation of the case …".*

59. Having heard submissions from counsel for the Kenny defendants, Mr. Millett and counsel for the plaintiffs, I directed that, in light of the matters raised by the remaining defendants and the likely absence of Mr. Desmond as a witness, the plaintiffs should prepare a written document or position paper outlining what elements of the pleaded case remain, the impact (if any) of the judgment against Mr. Desmond and the evidence the plaintiffs now proposed to rely upon in support of their case. On that basis, the hearing was adjourned to 24th May 2022.

The framework document delivered on behalf of the plaintiffs

60. In accordance with directions given by me at the conclusion of Day 6, the plaintiffs delivered a framework document on 13th May 2022 outlining what elements of their case remained following the consent to judgment by Mr. Desmond and also setting out the impact of that judgment on the evidence on which they proposed to rely as against the remaining defendants.

61. In that framework document, the plaintiffs first outlined the basis for their continuing claim as against Dildar IOM. The plaintiffs highlighted that, in the prayer for relief in the further amended statement of claim, they continued to seek a declaration that Dildar IOM holds

its interest in the Nemo Rangers lands on trust for them. They advanced a two-fold basis for this claim, namely:-

(a) That monies belonging to the OPT pension fund were identified and used for the purchase of those lands (this is the argument which, as noted in para. 54 above, was not ultimately pursued), and

(b) Alternatively, that the monies used to purchase those lands came from a mixed fund which included monies belonging to the OPT pension fund which, it is alleged, were the subject of a constructive trust arising from the admitted breach of fiduciary duty on the part of Mr. Desmond and/or on the basis of a breach of fiduciary duty alleged against Mr. Millett.

62. The plaintiffs maintained that the fact that judgment had been obtained against Mr. Desmond does not preclude them from pursuing the tracing remedy against the Nemo Rangers lands. In support of their claim against Dildar IOM, the plaintiffs provided a booklet confined to those documents that the plaintiffs expected to be in a position to prove at the trial. Documents that the plaintiffs did not expect to be in a position to prove (and which had been referred to in the three-day opening) were removed from this booklet. The plaintiffs signalled that they did not envisage calling Mr. Desmond as a witness but would rely on the evidence of Richard Nolan, Patricia Nolan, Deirdre Carwood, Peter Feighan and a Swiss lawyer, namely Anath Guggenheim. It should be noted that Mr. Feighan was not subsequently called to give evidence.

63. In addition, the plaintiffs indicated that, in support of their case, they would rely on the sworn answers given by Mr. Millett and Mr. Paul Kenny, the eleventh named defendant, in response to interrogatories delivered on behalf of the plaintiffs. They also indicated that they would seek to rely on the agreed position of the accounting experts contained in a joint report dated 20th April 2022. They signalled that, in particular, they proposed to rely on the statement

made by Mr. Linehan (the expert accountant retained by the Kenny defendants) on p. 6 of the joint report to the effect that he did not dispute the factual content of the report of Mr. Harding (the expert accountant retained by Mr. Desmond) save for *"Matter 1"* as recorded in s. 3.2 of the joint report. It should be noted that, in the section of the joint report dealing with *"Matter 1",* the experts agreed a number of transactions that took place on the CVSSA accounts held in EFG but were unable to agree on them all. The plaintiffs also said that they intended to rely on the factual content of the report of Mr. Harding and, in particular, on the reference therein to the loan facility with EFG and the manner in which the *"scheme"* operated as depicted in the chart attached to Mr. Harding's report (which had been relied upon by counsel for the plaintiffs in opening the case on Days 1 to 3). However, the plaintiffs did not explain the legal basis on which they proposed to rely on a report of an expert who was not called as a witness. In so far as they relied on the agreement reached by the experts, they appear to have overlooked the provisions of O. 63A, r. 6(1) which makes clear that any agreement reached between experts is not binding on the parties. As *Dowling* explains in *The Commercial Court,* (2nd. Ed., 2012) at para. 8-42, the stipulation in O.63A, r. 6(1) that the outcome of a joint meeting shall not be in any way binding upon the parties is: *"recognition of the fact that the expert is not an agent of the party who has the authority to make concessions or admissions on that party's behalf."* While it might be difficult in practice for a party to disown an agreement between experts in relation to a matter within their area of expertise, the same cannot be said for an agreement reached between them in relation to facts. Moreover, an expert is not an agent of the party by whom he or she is retained. I therefore can see no basis on which the plaintiffs can seek to rely on any agreement reached between the accountants as to the underlying facts. If the plaintiffs wished to secure agreement as to any facts, they could have used any of the usual methods available for this purpose including the service of a notice to admit facts or the delivery of interrogatories.

64. In addition to their attempted reliance on the agreement reached between the accounting experts, the plaintiffs also signalled that, in seeking to prove the pledge to EFG over the CVSSA accounts, they would rely on the provisions of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 (*"the 2020 Act"*). In this context, the relevant documents on which the plaintiffs sought to rely were appended to the report of a Swiss law expert, Ms. Anath Guggenheim engaged by the plaintiffs. Furthermore, the plaintiffs stated that they would rely on the expected testimony of Mr. Millett (who confirmed at that point that he would be giving evidence) and that of the Kenny defendants' witnesses including Mr. Carlos Bryden, who had provided a witness statement.

65. With regard to their claim against Mr. Millett and the other Millett defendants, the plaintiffs emphasised that a number of matters pleaded against them are specific to those defendants and were independent of the case they made against Mr. Desmond. They indicated that they relied on representations made by Mr. Millett as alleged in para. 15 of the further amended statement of claim and they highlighted that he drew up and executed the transfer instruction bearing the reference *"MECD (Dildar)"* (referred to in para. 21 of the further amended statement of claim). The plaintiffs also highlighted that they pleaded that Mr. Millett acted in breach of their privacy and property rights in the misuse of their personal data. They said that they would rely on the documents contained in a slimmed down version of the booklet used in the opening of the case, on the evidence of their remaining witnesses and on the sworn answers given by Mr. Millett to interrogatories.

66. Insofar as the claim against Dildar Ireland is concerned, the plaintiffs continued to rely on the fact that it held itself out in the planning application as the owner of the Nemo Rangers lands *"despite the plaintiffs' claim to a beneficial interest"*. With regard to their claim against the remaining Kenny defendants, the plaintiffs highlighted that the eleventh defendant, Mr. Paul Kenny, stated that he held his interest in the shares in Dildar IOM on trust for Darren

Kenny and Dillon Kenny through his ownership of the shareholding in Clear Vision Solutions Holdings Inc (*"CVSH"*), which is the company which holds shares in Brookmanor Ltd and Woodcroft Ltd which, in turn, hold the shares in Dildar IOM. Although the plaintiffs' claim to beneficial ownership of Dildar IOM was dismissed on Day 3 of the trial, the plaintiffs nonetheless contended that the claim:-

> *"is intimately bound up in the question of the beneficial ownership of the Nemo Lands. There is no evidence to indicate that Dildar IOM has any function other than to hold the Nemo Lands. It may be inferred that the Kenny Defendants' determination to establish beneficial ownership of Dildar IOM is intended to ensure control over the Nemo Lands, and that the matters pleaded by the Plaintiffs concerning efforts to hide the true ownership of the company through the use of their personal data was intended to have an effect on the actual or perceived ownership of the lands. In light of this, the Plaintiffs contend that the question of the ownership of Dildar IOM – i.e. whether Darren and Dillon are correct in their claim to beneficial ownership – cannot be entirely decoupled from the question of the beneficial ownership of the Nemo Lands. It remains a live issue in the case on the basis of the counterclaim, even though the Plaintiffs have acknowledged that they do not themselves have an interest in the shares of the company. And the evidence which relates to that issue – i.e. the evidence of efforts to hide the true ownership of the company – remains relevant to the determination which the court will have to make concerning the Nemo Lands."*

67. Notwithstanding the matters described in para. 66 above, the plaintiffs made clear that they have no claim against Darren Kenny or Dillon Kenny and they noted that they were joined to the proceedings on their own application. Insofar as their claim against the eleventh defendant, Mr. Paul Kenny, is concerned, the plaintiffs acknowledged that the allegations made in para. 50 of the further amended statement of claim no longer relate directly to a live cause

of action in the proceedings. These are the very serious allegations identified in para. 27 above. Notwithstanding this concession, the plaintiffs continued, nonetheless, to maintain that Mr. Kenny's *"involvement"* in those matters is relevant to the issues which remain for determination in the proceedings. In particular, the plaintiffs contended that they remained relevant to the contention made by the Kenny defendants to be *"innocent recipients"* of any OPT monies that may have been used to buy the Nemo Rangers lands. The plaintiffs indicated that they continued to make the case alleged in paras. 55 and 56 of the further amended statement of claim that Mr. Paul Kenny and Mr. Millett had acted together in the misuse of the plaintiffs' personal data and that they breached the plaintiffs' personal privacy and property rights. In this context, the plaintiffs indicated that they proposed to rely on information contained in Mr. Millett's witness statement concerning a meeting at which Mr. Desmond and Mr. Paul Kenny allegedly instructed him to use the identities of the biggest contributors to MECD, namely the Nolans, to establish Dildar IOM. They also referred, in this context, to the minutes of that meeting which had been discovered by Mr. Millett. The plaintiffs also highlighted that it was clear from the witness statements delivered on behalf of the Kenny defendants that the Kenny defendants relied heavily on the evidence of Mr. Paul Kenny. They referred, in this regard, to the concluding paragraph of Mr. Paul Kenny's witness statement which said:-

> *"... we are confident that we can prove beyond doubt that only funds belonging to myself and my brother were used in acquiring the Nemo site and that the site belongs to the entity known as Dildar Limited (IOM) which is rightfully beneficially owned by our sons Dillon and Darren using funds advanced by myself and my brother John to their company Dildar Limited."*

68. It should be noted that, ultimately, neither Mr. Millett nor Mr. Kenny gave evidence in the case. In the circumstances, neither of the witness statements identified in para. 67 above

were deployed in evidence. For that reason, I cannot have regard to them in making the findings necessary to determine the outcome of these proceedings.

69. The Kenny defendants delivered a response to the plaintiffs' framework document on 18th May 2022. In that response, they highlighted that, although the plaintiffs said that they would rely on the provisions of the 2020 Act, no notice had been served under s. 15 of that Act in respect of any documents. They also maintained that no case had been made in the plaintiffs' framework document as to the basis upon which any of the documents in question are admissible under the 2020 Act.

70. It should be noted that, at the time the Kenny defendants' response was delivered, Dildar IOM was unrepresented in the proceedings. This was because Mann Made, the administrator of that company in the Isle of Man had decided to take a neutral position, having regard to the conflicting claims made in the proceedings and having regard to the claim made by the plaintiffs in the proceedings in the Isle of Man. Against that backdrop, the Kenny defendants expressed surprise that the plaintiffs should contend that Dillon Kenny and Darren Kenny were not entitled to act on behalf of Dildar IOM in defence of the claim made by the plaintiffs that they have an equitable interest in the Nemo Rangers lands. The Kenny defendants contended that the plaintiffs were not entitled to stymie the defence of the proceedings by Dildar IOM, particularly in circumstances where they were no longer making a claim to ownership of that company. The Kenny defendants maintained that, in the circumstances, the court should rule that the plaintiffs have no standing to interfere in any way with Dildar IOM. At p. 10 of their submissions, the Kenny defendants stated that they were reserving the right to seek to have the plaintiffs' claim dismissed at the conclusion of the plaintiffs' evidence.

71. The Kenny defendants also maintained that the plaintiffs were not entitled to rely on the evidence on Mr. Millett as against them unless they proposed to call Mr. Millett as a witness. Likewise, they argued that, insofar as Mr. Millett may have given answers to

interrogatories furnished to him, his answers are not admissible against the Kenny defendants. Insofar as the interrogatories delivered to Mr. Paul Kenny are concerned, the Kenny defendants accepted that those answers are admissible as against them, but they submitted that the plaintiffs would need to identify the answers on which they proposed to rely.

72. With regard to the effect of the judgment against Mr. Desmond, the Kenny defendants contended that the plaintiffs have released their claim against Mr. Desmond for:-

(a) Money had and received (as set out in para. 7 of the prayer for relief);

(b) Restitution (as claimed in para. 8 of the prayer);

(c) Conversion (as claimed in para. 9 of the prayer);

(d) Deceit (as claimed in para. 10 of the prayer);

(e) Breach of warranty of authority (as claimed in para. 12 of the prayer);

(f) Misrepresentation (as claimed in para. 14 of the prayer);

(g) Conspiracy (as claimed in para. 15 of the prayer); and

(h) Aggravated damages (as claimed in para. 16 of the prayer).

73. In conclusion, the Kenny defendants submitted that, in light of the dismissal of the plaintiffs' claim to ownership of the shares in Dildar IOM, the court should direct that there should be no inquiry into the beneficial ownership of that company. This submission was made on the basis that the plaintiffs could not be said to have any standing to pursue such a claim.

74. Mr. Millett also delivered submissions on 18th May 2022 in response to the plaintiffs' framework document. He argued that, in light of the judgment against Mr. Desmond, the plaintiffs could not be said to have suffered any loss. He also provided a detailed commentary in response to each of the allegations made against the Millett defendants and he reiterated his claim that he never acted in any personal capacity for the purposes of the provision of pension or financial advice to the plaintiffs and never held himself out as a pension advisor to the plaintiffs.

75. On 20th May 2022, the plaintiffs delivered a written reply to the contentions of the Kenny defendants. In that reply, the plaintiffs made the case that, by virtue of the rule in *Foss v. Harbottle*, the Kenny defendants cannot purport to represent Dildar IOM. They also highlighted that the counterclaim advanced by Darren Kenny and Dillon Kenny is not confined to a claim to beneficial ownership of the shares in Dildar IOM but it also extends, in the alternative, to a counterclaim that they are the beneficial owners themselves of the Nemo Rangers lands. Insofar as Dillon Kenny and Darren Kenny proposed to continue with their counterclaim, the plaintiffs made the point that they are entitled to defend the counterclaim, including the claim made in relation to beneficial ownership of the shares in Dildar IOM. The plaintiffs submitted that the Kenny defendants should confirm the basis upon which they say they can overcome the rule in *Foss v. Harbottle* and also whether they intended to maintain the counterclaim.

76. With regard to the admissibility of the chart prepared by Mr. Harding, the plaintiffs submitted that they were entitled to rely on the substantial level of agreement reached between the experts as to the factual content of that report. They highlighted, in this context, the fact that Mr. Eoghan Linehan (the accounting expert retained by the Kenny defendants) did not dispute the factual content of Mr. Harding's report, save to a limited extent. For the reasons previously outlined, I believe that the plaintiffs are not entitled to treat any agreement by the experts on the underlying facts as binding upon the parties.

77. With regard to the 2020 Act, the plaintiffs submitted that there was no need to serve a notice under s. 15 in circumstances where the relevant documents had previously been included in the discovery made by the plaintiffs to the defendants. They also submitted that the documents were admissible under ss. 13 and 14 of the 2020 Act. As described in more detail below, the plaintiffs, at a later point in the trial, made two applications under the 2020 Act in respect of a narrow category of copy documents but those applications were rejected by me.

78. In para. 5.1 of their submissions, the plaintiffs contended that they were under no obligation *"at this time"* to set out the answers to the interrogatories on which they might seek to rely. Nonetheless, the plaintiffs listed the answers to the interrogatories furnished to Mr. Paul Kenny on which *"as matters stand the plaintiffs will be relying…"*. In particular, the plaintiffs stated that they would rely on the following answers to interrogatories namely 2-3, 10,12,16,17,22,33-34,36-38,41,42,66,71-73,76,78,81,85,91,93,99-103,105-106,109,113-114,116,118-119,121-123,132-134,140-143,145-151 and 154.

The resumption of the hearing on Day 7

79. The hearing subsequently resumed on 24th May 2022, namely Day 7. On that occasion, there was further debate between the parties in relation to the issues canvassed in the framework document and submissions. Mr. Millett's application to dismiss the proceedings was also listed on that day. It is unnecessary to address the detail of the discussions and submissions which took place on Day 7. The upshot of that hearing was that the Kenny defendants reserved the right to seek to dismiss the plaintiffs claim at the conclusion of the evidence. Mr. Millett ultimately took the same course. It was, therefore, not necessary to proceed with the hearing of his application. I also indicated to the parties that I would need to hear submissions in relation to the admissibility of documents under the 2020 Act and I would also need to be addressed in relation to the evidential status of the agreement reached between the experts. At that point, I had not reached a view on its status. It was agreed that those were matters that could be addressed at a later point in the hearing. I also indicated that the plaintiffs would need to identify, in advance of any application by the defendants at the conclusion of the plaintiffs' evidence, the relevant answers to interrogatories on which they proposed to rely in support of their case.

The evidence given on behalf of the plaintiffs

80. The only evidence given at the hearing was that given by the witnesses for the plaintiffs. As explained in more detail below, counsel for the Kenny defendants intimated, at the close of the plaintiffs' case that his clients did not intend to tender evidence. Mr. Millett also confirmed at that point that he would not tender evidence. The facts of the case therefore fall to be assessed solely by reference to the evidence given by the plaintiffs. However, that does not mean that the defendants or the court are bound to accept the evidence of the plaintiffs. At the conclusion of the plaintiffs' case, it was made clear that the defendants were not seeking what lawyers call a *"non-suit"*. As the decisions of the Supreme Court in *Hetherington v. Ultra Tyre Service Ltd.* [1993] 2 I.R. 535 and *O'Toole v. Heavy* [1993] 2 I.R. 544 make clear, the approach to be taken in the event of an application for a non-suit is different to that which should be followed where defendants opt not to call any evidence in their defence. The court is quite constrained in the approach to be taken where a non-suit is sought by a defendant who intimates an intention to call evidence in the event that the application is refused. For present purposes, it is unnecessary to outline the approach to be taken in such cases. It is sufficient to note that the court, on an application of that kind, is limited in the degree of scrutiny to which it can apply to the evidence given by a plaintiff. In contrast, it is clear from the decision of Clarke J. (as he then was) in *Moorview Developments Ltd. v. First Active plc* [2009] IEHC 214, at para. 5.19, that, where a defendant decides not to tender evidence, the approach of the court to the plaintiffs' evidence is not so limited. As Finlay C. J. explained in *O'Toole v. Heavy*, at pp. 546-547, the task of a judge in such a case is to consider, having regard to the judge's view of the evidence, whether the plaintiff has established, as a matter of probability, the facts necessary to support a verdict in the plaintiff's favour. Unless the judge is so satisfied, the case must be dismissed.

81. Thus, even though the defendants here have not given evidence, that does not mean that the court is bound to accept the plaintiffs' evidence as true. I have had the benefit of observing the witnesses for the plaintiffs. In particular, I had an extensive opportunity to observe the evidence of the two principal witnesses for the plaintiffs namely Mr. Richard Nolan and Ms. Patricia Nolan. They both gave evidence over the course of a number of days. In Mr. Nolan's case, his direct oral evidence took up virtually the whole of Day 4 and an hour on Day 5. He was cross-examined by Mr. Millett for the entire of Day 8 and almost half of Day 9. He was then cross-examined by counsel for the Kenny defendants for half of Day 9, the whole of Day 10 and 90 minutes on Day 12. He was also briefly re-examined by counsel for the plaintiffs. Ms. Nolan's direct oral evidence took up an hour on Day 12. She was then cross-examined by Mr. Millett for the balance of Day 12 and for 90 minutes on Day 13. She was also cross-examined by counsel for the Kenny defendants for the balance of Day 13 and for 90 minutes on Day 14. There was also some further cross-examination by Mr. Millett on Day 14 and Ms. Nolan was briefly re-examined by counsel for the plaintiffs on the same day.

82. The cross-examination of both Mr. Nolan and Ms. Nolan raised significant issues about the credibility of their evidence. I must carefully review that evidence in conjunction with the other admissible evidence before the court including certain facts which are admitted by the remaining defendants. I must form my own view as to the credibility and reliability of the plaintiffs' evidence. Counsel for the plaintiffs were therefore correct to concede, in the course of their closing submissions, that they did not make the case that the court cannot subject the plaintiffs' evidence to a sufficient degree of scrutiny. Bearing all of this in mind, I now turn to the evidence given on behalf of the plaintiffs.

The evidence of Mr. Richard Nolan

83. Mr. Richard Nolan was the first witness to give evidence on behalf of the plaintiffs. As previously noted, he commenced his direct evidence on Day 4 of the trial. At that point, Mr.

Desmond was still contesting all of the claims against him and he was very much the main focus of Mr. Nolan's direct evidence. Mr. Nolan explained that his role within the Nolan Transport business was in relation to sales. He also explained that he was one of the trustees of the OPT. He further explained that, since about 2008, Mr. Desmond became a legal advisor and tax advisor to the Nolan Transport business. He said that he had first engaged Mr. Desmond in relation to pension matters. Mr. Nolan's evidence was that, in October 2012, he had been present in Mr. Desmond's office when Mr. Desmond brought up the question of the pension funds. He said that Mr. Nolan did so in circumstances where:-

> *"the banks were not stable, it wasn't a good time and he brought it up in that context. That was how he brought it up to me, in terms of a pension protection plan to do with the insolvency of the banks in Ireland."*

84. According to Mr. Nolan, within a few days of that meeting, Allied Irish Banks plc made demands for payment of outstanding debts and, accordingly, a subsequent meeting was arranged with Mr. Desmond a short time later. This meeting took place in the office of Nolan Transport in New Ross. Mr. Nolan described this as a *"crisis meeting"*. He said that there were ten or eleven Nolan family members at the meeting and they were very concerned about the impact of the demands on the business. Mr. Nolan said that, towards the end of that meeting, Mr. Desmond brought up the question of moving the pension fund to *"somewhere safe"*. Switzerland was mentioned and it was also stated that Ireland was not *"a good place for the banks at that moment"*.

85. At an early point in his direct evidence, Mr. Nolan addressed the issue that had been absent from his witness statement delivered in August 2021 and which had not been prefigured in the pleadings until the amendments made in the course of the trial. Mr. Nolan described how, at the meeting in relation to the letters of demand from Allied Irish Banks, his brother,

Raymond, asked Mr. Desmond whether the pension funds could be used to *"solve, to pay the banks"*. His evidence was:-

> *"And he asked Mr. Desmond. Mr. Desmond said yes, you could, but you had to move it out of Ireland first. I asked Mr. Desmond was that legal? He said yes, but it has to be done a certain way. We talked about this a good while. We talked about -- he talked about going to Switzerland - we weren't familiar with Switzerland. We talked about the Isle of Man, he said no, Switzerland was safer, banks were better. And that went back and forth for a while, but that was it.*
>
> *But he was absolutely certain that certain things had to be put in place, but yes, we could do that, but we needed to move it first, because if you didn't, you mightn't be able to with the instability of the banks at that time."*

86. Mr. Nolan gave evidence that there were a number of further meetings attended by him and by Mr. Desmond. He explained that it was necessary to put new banking facilities in place with Danske Bank (which I understand related to the business of Nolan Transport rather than to the OPT). In the course of one of the meetings dealing with such arrangements, Mr. Desmond spoke again about the prospect of moving the pension funds and about *"the instability of the banks"* and he mentioned a *"pensioner trustee called John Millett"*. According to Mr. Nolan, this was the first time he heard of Mr. Millett.

87. Mr. Nolan said there was a subsequent meeting in November 2012 in New Ross. Mr. Nolan thought that this meeting took place on or about 10th November 2012, but he was not sure of the date. He said there was a similar attendance to the earlier meeting in New Ross. According to his evidence on Day 4:-

> *"We talked about the legal affairs, but the big discussion at that meeting was the*

pension and the use of the pension, moving the pension. It was much more detailed in that meeting. And he talked about the pension had to move to Switzerland, Switzerland was the best place. We wanted him to put it to the Isle of Man, because we had some experience of that, but we had no experience of Switzerland. And he wasn't supportive of that, he said no, Switzerland was better.

Then he talked about that it would have to go a certain way, it would have to go via Middle East, Dubai and then go from there to a company he had in Switzerland called CVS SA, which had a bank account, and he could hold those funds there in a deposit account on trust for us…

I asked, why can't we go direct, why can we not just go -- we wanted to go directly to the Isle of Man, because we had some experience there. Mr. Desmond said no, Switzerland was better. Then the route had to go via Middle East, Dubai. He said this was the route, it had to go this way.

He talked also about John Millett, that he would go talk to him. He said he had structures or a company in Switzerland called CVS SA and they also had this Middle East company in Dubai, they were using the same finance agent company called Allied Finance, it was the same company, that this was the route it had to go."

88. According to Mr. Nolan, Mr. Desmond mentioned that Mr. Millett had a company in Dubai called Middle East Continental (i.e. MECD). He also said that Mr. Desmond told them that CVSSA could hold the pension funds in Switzerland *"in a deposit account on trust for us"* and *"in a fiduciary capacity"*. He was asked by counsel for the plaintiffs whether Mr. Desmond gave any reason as to why it had to go through this route. Mr. Nolan answered:-

"He said it had to go that route. We asked him why, why can't it go -- because -- he didn't really expand on it, but it had to go this route. I think if we wanted to use it later on... I don't, to be honest, I can't remember."

89. At the same meeting, Mr. Nolan said that Mr. Desmond also indicated that Mr. Millett should be the pension trustee to move the pension funds in place of the existing corporate trustee. In his evidence on Day 4, Mr. Nolan said that he first met Mr. Millett on 22nd November 2012 in New Ross. That meeting was also attended by Joan Nolan. Mr. Desmond also participated by telephone. According to Mr. Nolan, Mr. Millett said that the choice of moving to Switzerland was a good one and that he recommended it. In para. 24 of his witness statement, Mr. Nolan also said that Mr. Millett specifically advised him and his sister Joan that their pension assets would be better protected if they were held in a Swiss deposit account rather than in a bank within Ireland. According to Mr. Nolan, Mr. Millett also spoke about the MECD structure. In para. 25 of his witness statement. Mr. Nolan said that Mr. Millett explained that the pension moneys would first be transferred to an account of MECD in Dubai and *"then onto an account of … CVS SA with EFG bank … Mr. Millett advised MECD was part of their structure used by Mr. Desmond and him for transferring funds into CVS SA in EFG …".*

90. In para. 41 of his witness statement, Mr. Nolan said that there were *"various meetings"* and telephone calls with Mr. Millett during which Mr. Millett told him that he *"fully controlled and was the owner of MECD",* that MECD was managed by *"an established corporate service provider"* namely AFT, that any moneys *"designated for MECD would be transferred to an account in Dubai or would be deposited in the CVS SA account in EFD and would simply rest in that account on trust for us",* that MECD and Mr. Millett would hold any funds on trust for them and that OTP's funds would not be used for any purpose without our express consent.

91. Counsel asked him, in the course of his direct evidence, whether he put any question to Mr. Millett as to why the MECD structure was necessary. Mr. Nolan responded:-

"No, because he said this was the way -- this was exactly what Mr. Desmond had told us two meetings earlier. So this was the way the funds had to move. He was familiar with this. It seemed like he had done it before. I think he said he had done it before actually. And at the end of the meeting he called Mr. Desmond on a speaker phone and myself and Joan and John Millett in New Ross and Mr. Desmond was there, he talked through moving the funds to MECD Dubai…

And then moving the funds to a deposit account in CVS SA in Switzerland. Everybody knew that that's exactly what we were doing…

Whereby our lawyer, our solicitor, would be holding them on trust for us in a deposit account…

In a simple deposit account in Switzerland."

92. At this point in his evidence, counsel for the plaintiffs put a document to Mr. Nolan, namely the MECD Private Placement Information Memorandum dated 15th August 2012. Counsel indicated that, in his witness statement, Mr. Millett had said that he had given this document to Mr. Nolan. Mr. Nolan said that he had never seen this document until it came up in the course of the proceedings before the Law Society Disciplinary Tribunal in relation to the complaints made to the Law Society by the plaintiffs against Mr. Desmond. For completeness, it should be noted that the placement memorandum contained a number of statements which suggested that any investment made through MECD would be of an illiquid nature. For example, on p. 9 of the memorandum, it was stated in bold print that:-

"It is important you are aware that the company considers this to fall within the category ... of close companies, illiquid securities and potentially where deemed

appropriate by the asset managers, geared investment structures and as such this has to be regarded as a high risk investment and therefore it will not be suitable for many investors."

93. The address of MECD was given on the placement memorandum as an office building in Ras Al Khaimah in the United Arab Emirates. It was also stated on p. 11 of the memorandum that MECD's investment offer *"is an unregulated investment vehicle and is structured as an open ended investment run by, operated and controlled through the appointed investment manager, the investment is managed by Allied Finance Trust… a limited liability company having its registered office at Bahnhofstrasse 14, 8001 Zurich, Switzerland…"*. On the same page, it was stated that:-

"The investment is an inherently high risk and illiquid investment and only those who can afford a loss of their entire investment should consider investing in the offer. The investment is not guaranteed or insured against any loss and no assurance can be given that an investor will receive back the principal invested or any specific interest payments."

94. Mr. Nolan was asked by counsel for the plaintiff whether, in the course of the discussions with Mr. Desmond and Mr. Millett, there was any discussion about risk to the pension funds. His answer was:-

"we didn't want anything to do with anything that had anything to do with a risk. Mr. Desmond had put it to us that there was a risk by leaving the funds in Ireland and that we needed to move the monies because of the -- the reason was because of the bank situation in Ireland in 2012. It turns out he was actually right. But that was the reason."

95. He was then asked whether he put any question to Mr. Desmond as to whether there was a risk in transferring the money to Zurich *"in the manner he was suggesting"*. Mr. Nolan's immediate response was *"Well, I was concerned"*. But he then added: *"But this was going into*

a simple deposit account." He then went on to say that, according to Mr. Desmond, the only risk involved was in the event that one of the Swiss banks went bankrupt and that was not going to happen. Mr. Nolan maintained that there was no discussion about using the funds as security for any borrowing. Nor was there any discussion about purchasing foreign currency. While he accepted that he was told that there might be other people's money in the CVSSA account, he stressed that it was to be a deposit account and that all of the funds would be held in trust.

96. Nonetheless, even on the plaintiffs' own case, Mr. Nolan must have had some concern about the structure of the proposed transaction in that, as he explained in his direct evidence, he first organised what he described as a test transaction involving the transfer of €620,000 from OPT (representing one-thirteenth of €8 million of the funds held by OPT). This *"test"* transfer of funds was the subject of two letters of instruction to Investec Ireland, namely a letter dated 3rd January 2013 from Pinnacle as the corporate trustee (signed by Mr. Millett) directing Investec to transfer €620,000 to the account of MECD. A similar letter was also signed by Ann Nolan and Joan Nolan in their capacity as trustees. Both letters concluded with the words: *"This is part of a proposed stream of* ***investments for long term income****"* (emphasis added). Both letters also identified *"MECD (R. Nolan)"* as a reference. Mr. Nolan confirmed that this was a reference to him. He was asked what was the significance of his name being mentioned in this way. His response was:-

> *"Well, because I didn't want to risk anyone else's funds, so I said I would prefer if mine went first."*

97. Mr. Nolan explained that he subsequently travelled to Switzerland in connection with the *"test transaction"* on 9th January 2013 together with his sister, Ms. Ann Nolan, Mr. Desmond and Mr. Millett. Mr. Nolan said that the purpose of this visit was to meet *"Mr. Desmond's people"* and to be certain that everything worked out as Mr. Desmond had described. Mr. Nolan said that, at this point, the funds transferred were still with MECD and

had not yet arrived with CVSSA. The meeting took place at the offices of AFT in Zurich and, according to Mr. Nolan, it was attended by himself, his sister Ann Nolan, Mr. Desmond, Mr. Millett, Mr. Bernhard Lampert, Mr. William Garcia, Mr. Michael Siegenthaler, a lady called Jacqui and a banker called Urs Oberhansli who was from EFG Bank. In para. 21 of the defence of the Millett defendants, it is admitted that Mr. Millett attended the meeting.

98. Mr. Nolan said that he made clear at the outset of the meeting that the funds were held on trust. But, he also said that *"even though Mr. Desmond was holding our funds on trust in Switzerland, we still wanted controls".* In his oral evidence, he explained that he had brought with him a template declaration of trust. The template was not produced in evidence. Oddly, despite his earlier evidence about Mr. Desmond's role as the plaintiffs' solicitor and advisor, this declaration of trust was not drafted by Mr. Desmond. Mr. Nolan was unsure who prepared the draft but he thought it was a template declaration that had been procured by one of his sisters, Sally Nolan or Joan Nolan. He confirmed that they had not taken any legal advice on the document and that they did not even tell Mr. Desmond about it until they went into the meeting in Zurich. Counsel for the plaintiffs asked him to explain why they had proceeded in that way but Mr. Nolan's only response was to say: *"No reason. We just had a list of things we wanted to go through … There was nothing, we'd nothing … No reason for it".* I have to say that I find it very puzzling that the plaintiffs would have arrived at the meeting with a home-made draft declaration of trust without first discussing this with their solicitor. This is even more puzzling in light of (a) the earlier evidence given by Mr. Nolan that the plaintiffs were previously advised both by Mr. Desmond and Mr. Millett that the moneys would be held on trust for them and (b) the case made by the plaintiffs that they relied on this representation in agreeing to proceed with the MECD/CVSSA structure. One would think, in those circumstances, that the plaintiffs would first have asked Mr. Desmond, their solicitor, to

prepare any necessary declaration of trust to reflect what had been allegedly represented to them and agreed.

99. It is also odd that, in so far as I can see, Mr. Nolan made no mention of the declaration of trust in his revised witness statement. Mr. Nolan dealt, in some detail, with the meeting in para. 50 of that witness statement. Consistent with his oral testimony, he said that he made clear to everyone at the meeting that the OPT funds were to be held on trust by CVSSA for OPT and that they were to *"sit on deposit"*. He did not refer, in para. 50, to a declaration of trust but said instead that he *"specifically asked for a power of attorney over our funds".* It may be, however, that Mr. Nolan was confused as to the nature of the document that he produced at the meeting because, at one point in his evidence on Day 4, he referred to the plaintiffs' desire to have a *"Declaration of Trust, power of attorney on funds…"* in place until he was asked by his counsel to clarify what he meant. That said, I am not sure how Mr. Nolan could have been confused given the emphasis placed by him in his evidence on the representations alleged to have been made both by Mr. Desmond and Mr. Millett that the CVSSA funds would be held on trust for the OPT. If representations to that effect were instrumental in the plaintiffs' decision to proceed with the MECD/CVSSA structure, it would follow that the plaintiffs must have understood the legal significance of a declaration of trust.

100. According to Mr. Nolan's oral evidence on Day 4, a discussion took place between Mr. Desmond and Mr. Lampert after he produced the template declaration at the meeting. But the upshot of that discussion was that they said it was not possible to proceed with it because there were other people's funds in the account and because of *"AML and KYC reasons"*. In para. 50 of his revised witness statement, he said that this was the answer given by Mr. Desmond when he asked for a power of attorney over what he described as *"our funds".* As I understand it, KYC is a reference to *"know your customer"* requirements, while AML is a reference to *"anti-money laundering"* requirements. On Day 4, Mr. Nolan said that, in place

of the declaration of trust, Mr. Desmond and Mr. Lampert suggested instead something which they described as a *"power of insight"*. This was a document drawn up on CVSSA paper which clearly stated that it was incorporated in Panama and had its registered office in Panama city. The document stated that Ann Nolan and Richard Nolan were authorised persons on CVSSA's behalf to monitor and to view the business of the company related to the assets deposited by OPT. It purported to give power to them to view business contracts *"regarding the core business of* [CVSSA]*"* related to the operation of OPT funds, to ask or request any information related to OPT funds and to *"oversee the administration related to the OPT funds"*. The document also stated that they could not exercise *"any powers that would cause OPT liabilities to exceed the value of the assets of* [CVSSA] *held on its behalf".* In para. 50 of his revised witness statement, Mr. Nolan also confirmed that, at this meeting, they were given a copy of CVSSA's certificate of incorporation which confirmed that it was a Panamanian company incorporated in August 2012.

101. Mr. Nolan said that he asked Mr. Desmond what was wrong with the declaration of trust but that Mr. Desmond responded to say that: *"… this is much better, this is the way to go … we didn't need a Declaration of Trust, a Power of Insight was better".* However, Mr. Nolan's account of Mr. Desmond's description of the effect of the power does not suggest that it was a better option for the plaintiffs than a declaration of trust. According to Mr. Nolan, Mr. Desmond informed him that the power of insight would allow him to see the money in the CVSSA account. That falls far short of the effect of a declaration of trust. Mr. Nolan also said, with regard to the power of insight, that *"even though it didn't say signatory rights …I didn't pick that up at the time."* That would suggest that Mr. Nolan thought, at the time that the power of insight gave the plaintiffs signatory rights but, as explained further below, he later gave evidence that he brought up the issue of signatory rights at the meeting. The issue of signatory rights appears to have been raised as an additional item to the declaration of trust.

102. Mr. Nolan was asked by counsel for the plaintiffs about his understanding of the way in which the power of insight was intended to work in practice. His answer was quite vague but he said that the document was created by Mr. Desmond as solicitor to the OPT and that *"we trusted him"*. Mr. Nolan confirmed that he did not have any discussion with Mr. Oberhansli about the power of insight or the way in which it would operate. He confirmed that his discussions in relation to it were with Mr. Desmond. Although Mr. Millett attended this meeting, Mr. Nolan did not suggest that he took any part in the discussions in relation to the draft declaration of trust or the so-called power of insight.

103. As noted above, in addition to the power of insight, Mr. Nolan said that, in the course of the meeting, they also discussed signatory rights. They were told by Mr. Desmond that this could be done after the meeting and Mr. Nolan thought that Mr. Garcia agreed with this. Mr Nolan also said that *"nobody in the room had a difficulty with that request".* In circumstances where they did not then have signatory rights, Mr. Nolan said that they wanted to remit the *"test transfer"* to Serene which he described as an Isle of Man company that was associated with his father. He said that the idea to transfer the money to Serene came from one of his sisters, Elizabeth or Joan Nolan. It should be noted in this context that Patricia Nolan subsequently gave evidence that suggested that Elizabeth and Joan Nolan had greater knowledge in respect of Serene than either Richard Nolan or Patricia Nolan herself. Mr. Nolan also said that the intention was that the monies would be held by Serene in the same way that the funds were being held in CVSSA, i.e. on deposit for the OPT. He added:-

"So in terms of the Irish bank situation at the time… it was out of there."

104. In order to progress the transfer of funds to Serene, a letter was executed on behalf of CVSSA in the course of the meeting which was addressed to Mr. Oberhansli of EFG Bank and which requested him to transfer €619,000 to Serene's bank account with Royal Bank of Scotland in the Isle of Man. The shortfall between the initial transfer from OPT of €620,000

and this subsequent transfer of €619,000 was not explained by Mr. Nolan. The instruction to Mr. Oberhansli was signed by each of Mr. Desmond, Mr. Garcia and Mr. Siegenthaler. The letter was also stated to be approved by Ms. Ann Nolan and, in the course of his evidence, Mr. Nolan confirmed that her signature appears on the document. That letter is consistent with the idea that the proceeds of the *"test transaction"* would be transferred to Serene in the Isle of Man. However, curiously, on the same day, similar letters of instruction were also executed by the same parties (approved in the same way by Ann Nolan) in respect of further transfers to Serene of €800,000, €690,000 and €791,000. In each case, the letter was addressed to Mr. Oberhansli of EFG Bank. It was signed by each of Mr. Desmond, Mr. Garcia and Mr. Siegenthaler on behalf of AFT and approved by Ms. Ann Nolan. In each case, it gave instructions to transfer a specified amount from the euro account of CVSSA to the bank account of Serene in the Isle of Man. Those letters are not consistent with the idea that there would be a *"test transaction"* involving an initial amount of €620,000. On the contrary, they suggest that the intention was that Serene would receive payments totalling €2.9 million through the MECD/CVSSA structure. Mr. Nolan claimed that these additional instructions had not even been requested at this stage:-

> *"… because we hadn't sent funds out at that juncture. We had sent one transfer and we wanted to see that that got to safety and that was it. So this was, it was like they were pre-clearing it, if you like."*

105. Nonetheless, Mr. Nolan confirmed that he agreed with his sister that each of these letters of instruction should be signed. He said that this was *"like a pre-clearing, or a pre-signing"*. He was then asked whether any of these particular transfers to Serene ever took place. He confirmed that they did not take place, but he added that:-

> *"…what I did get from the four of these documents that were signed is that it gave us comfort that our signatures were required."*

106. Mr. Nolan said that the meeting concluded with further discussion about signatory rights on the account, but the upshot of the meeting was that the issue of such rights was deferred to a later time. In addition, he suggested that Mr. Desmond had indicated that the funds would stay on deposit for a period of time. While he said that Mr. Desmond was *"always a bit vague about this"*, Mr. Nolan himself thought it would be five or six months *"because we needed to see -- we didn't know what the situation was in the Irish banking situation at that moment, but that would, you know, we would see soon what that would be or wouldn't be, that was the thinking"*.

107. Subsequently, in February 2013, Mr. Nolan said that he received a form in relation to signatory rights for EFG Bank and he was asked to provide an electricity bill and identification. He subsequently signed a signature card for EFG Bank on 7th February 2013, together with Mr. Desmond. This card stated that the bank would rely on the specimen signatures for the purposes of the provisions of the general conditions and custody account regulations concerning signatures and identification. The signature card contained no other information. In particular, it did not say anything about any rights that a signatory might exercise. Nor did it specify any particular account. At a later time, the document held on EFG's files was altered in a manner that suggested that the signature card was crossed out in December 2013 and the words *"replaced 05/12/13"* were endorsed on the document. However, Mr. Nolan said that he only became aware of this when he attended at the offices of AFT in Zurich in January 2015.

108. Mr. Nolan was also asked about an email sent by Mr. Desmond to Mr. Garcia on 4th February 2013 and copied to Mr. Nolan at his private gmail address. Mr. Nolan said that, before Mr. Desmond sent the email, he had first been asked by Mr. Desmond *"for a different email address, not my work one, he wanted a different one"*. In that email, Mr. Desmond referred to two intended transfers, the first being for €2.4 million which *"moves tomorrow"*. This chimes with the transfer (described below) of €2.48 million on 6th February 2013 which was the subject

of instructions given by Ann Nolan and Patricia Nolan on 4th February 2013. On foot of those instructions, Investec made a transfer of OPT funds of that amount to MECD. However, as further explained below, MECD did not make an equivalent transfer to CVSSA. On this occasion, MECD paid €2,277,700 direct to Serene. Later, that money (together with the earlier transfer to Serene of €619,000) was used in June 2013 in a settlement with Bank of Ireland of indebtedness owed by Nolan family members.

109. In the email of 4th February 2013, Mr. Desmond spoke about the need to ensure total safety of funds. He also stated that Mr. Nolan *"will more than likely agree with me"* that the funds be left *"for a considerable period of time"*. He asked that Mr. Nolan should be added as a *"signature* (sic) *to the account for the movement of euro funds"* but he went on to say, in the context of leaving the funds in the account for a considerable period of time, that: *"It will be then at my discretion to say yes to the final recommendation in consultation with family members."* That would suggest that Mr. Desmond was to have the final say as to when money would be withdrawn. Mr. Nolan was asked about this by counsel for the plaintiffs. He maintained that, before receipt of the email, there had been no discussion with Mr. Desmond about the funds being left for a considerable period of time. Remarkably, Mr. Nolan also said that there was no discussion about it afterwards. The fact that Mr. Nolan did not raise any issue about this element of the email is striking in circumstances where Mr. Nolan also gave evidence that the intention was to hold the funds on deposit for a period of months. It is even more striking that Mr. Nolan did not say that he raised an issue with Mr. Desmond about the reference to the latter having the discretion to say yes. Having a discretion to say yes plainly implies that one can also say no. Mr. Nolan was asked what he understood by this element of the email. His response was: *"Well, because he was the trustee. So he would have to sign it – or he would have to approve it, I thought. That was it."*

110. Mr. Desmond's email concluded with a confirmation that *"Richard Nolan has no beneficial interest in these funds"*. Mr. Nolan was asked whether he recalled seeing the reference to the lack of beneficial interest. He responded that he did not understand it at the time but he telephoned Mr. Desmond who explained to him that he had no beneficial interest in the funds. Mr. Nolan added that: *"I don't know why he said it or why he put it there, but when he told me that my funds were the 620 that had moved through CVS SA to Serene, I went ah, yeah, okay that's how – I understood it then."* I find that explanation very difficult to reconcile with Mr. Nolan's evidence that, before proceeding with any further transfers of OPT funds, there should first be a test transfer which involved routing his €620,000 share of the OPT pension fund through MECD and CVSSA for onward transmission to Serene (albeit that only €619,000 went to Serene). If that was his intention at the outset, it is very difficult to understand why he would need Mr. Desmond to explain to him that his fund had been the subject of a transfer from CVSSA to Serene.

111. Following the *"test transfer"* of €620,000 (of which €619,000 went to Serene), a further transfer of €2,480,000 was made in January 2013 to MECD out of the OPT funds held with Investec. The relevant instructions were signed by Ann Nolan and Elizabeth Nolan on 11th January 2013 and separately by Mr. Millett on behalf of Pinnacle on 21st January 2013. The transfer was made by Investec on 23rd January 2013. Subsequently, on 30th January 2013, an amount of €2,450,000 was credited to the account of CVSSA in EFG Bank. Again, the shortfall between €2,480,000 and €2,450,000 was not explained. Mr. Nolan did not go into detail in relation to this transfer in his direct evidence. It is significant that this transfer was effected before Mr. Nolan had received a form in relation to signatory rights or provided a specimen signature. There is an inherent contradiction in Mr. Nolan's evidence in this regard. On the one hand, Mr. Nolan said that the lack of signatory rights at the time of the *"test transfer"* was instrumental in the transfer to Serene of €619,000. On the other hand, a much larger transfer of

€2,450,000 was made to the CVSSA account in EFG in January 2013 notwithstanding that no signatory rights were in place (or understood to be in place) at the time. The fact that this transaction was effected in January 2013 is also difficult to reconcile with the next aspect of Mr. Nolan's evidence when he was asked to explain why a further transfer was made from OPT to MECD which did not result in any proceeds being paid to CVSSA. This originated with a transfer of €2,480,000 from Investec to MECD on 6th February 2013 on foot of instructions signed by Ann Nolan and Patricia Nolan on 4th February 2013. As noted previously, this did not result in a payment to the CVSSA account in EFG Bank but instead resulted in a payment of €2,477,700 from MECD to Serene on 14th February 2013. According to Mr. Nolan, this was done in circumstances where the signatory rights *"still hadn't come through"*. This makes no sense in light of the fact that, as described above, a significant lodgement of proceeds to the tune of €2,450,000 had already been made into the CVSSA account in January 2013 before Mr. Nolan understood that the so-called signatory rights were in place.

112. It should be recalled that, earlier, Mr. Nolan had said that, on 7th February 2013, he signed the joint signature form and, according to him, Ann Nolan sent it to Mr. Garcia who confirmed by telephone on 21st February 2013 that the signature form had been submitted to EFG Bank. According to para. 74 of Mr. Nolan's amended witness statement, he believed, at this point (i.e. on 21st February 2013), that his signature *"was in place on the EFG Bank account"*. However, in the intervening period, on 14th February 2013, a further instruction was given by Ann Nolan and Elizabeth Nolan to Investec Bank to transfer a further amount of €2,480,000 to MECD. This is confirmed at para. 60 of Mr. Nolan's amended witness statement. A similar instruction was given by Pinnacle. These funds were debited on 19th February 2013 and arrived in MECD's bank account on 20th February 2013. Thereafter, on 21st February 2013, €2,477,900 was debited from MECD's account and remitted to the account of CVSSA with EFG Bank where it arrived on 25th February 2013. While the arrival of the funds in the CVSSA

account occurred after the date when Mr. Nolan contended that he understood that the signatory rights were in place, there is nothing to suggest that the plaintiffs had given any instruction to MECD that the proceeds of this transfer were not to be remitted to CVSSA until after confirmation of the signatory rights.

113. Subsequently, in April 2013, there was a further meeting in Zurich. According to Mr. Nolan, this was attended by himself, Ms. Ann Nolan, Mr. Millett, Mr. Desmond, Mr. Garcia and Mr. Siegenthaler. Mr. Nolan said that the purpose of this meeting was:-

> *"…it was really just to check in. We saw -- they gave us bank statements, bank transfers, exactly as we had expected. Everything was exactly as it had planned to be. I got great comfort from that. And around that time I could see that the banking situation Mr. Desmond had warned us about was actually happening, it happened at around about that time in Cyprus. So, you know, the man knew what he was talking about."*

114. Mr. Nolan said that this was a very brief meeting. He described the atmosphere as very good. He said that he believed that the money was safe and that they could do one of two things with the money: They could *"once things settle down"* send the funds *"back to the pension"* or, alternatively, *"if it arose, we could use those funds, to settle debts with creditors…"*. As the extract quoted in para. 113 above illustrates, Mr. Nolan referred to the banking situation in Cyprus. Mr. Nolan did not expand on what he had in mind in so far as the situation in Cyprus is concerned but I cannot see the relevance of any banking crisis in Cyprus. It must be kept in mind that the well-known problems with Irish banks had emerged long before this meeting in April 2013. The extent of the peril facing Irish banks is well illustrated by the enactment of the Credit Institutions (Stabilisation) Act 2010 which recorded in stark terms in its recitals that *"there is a continuing serious threat to the stability of certain credit institutions in the State and to the financial system generally"* such that it was necessary *"in the public interest to*

maintain the stability of those credit institutions …". While I would not expect lay people such as Mr. Nolan to know the detail of emergency legislation of that nature, the enactment of the legislation illustrates the fact that the Irish banking system was in crisis long before 2013. As all of us who lived through those years will recall, the crisis was a matter that was front and centre of the daily news cycle in Ireland for a considerable period of time from 2009 onwards.

115. After the meeting in Zurich in April 2013, a further transfer of €2 million was made from the OPT account in Investec Bank to MECD. A written instruction was given for that purpose, which was drawn up by Mr. Millett and executed on 28th May 2013 by Ann Nolan, Patricia Nolan, Elizabeth Nolan and Joan Nolan. As noted previously, the first paragraph of the instruction contains a reference for the outgoing transaction as *"MECD (Dildar)"*. Richard Nolan, in the course of his evidence, said that the name Dildar meant nothing to him as of that date. In addition, as described further below, Patricia Nolan, one of the signatories of the instruction, gave evidence that she did not notice the reference to Dildar. A similar instruction containing a similar reference was given by Pinnacle on 6th June 2013 and signed by Mr. Millett. The transfer was subsequently made on 8th June 2013 and, later, an equivalent sum arrived in the account of CVSSA at EFG Bank on 12th June 2013.

116. Having outlined the matters described above, Mr. Nolan was then asked by the plaintiffs' counsel about the moneys transferred to Serene in the Isle of Man. His evidence was that, in 2013, these moneys were used to settle a dispute between the Nolans and Bank of Ireland in relation to a property loan. His evidence was that the settlement occurred in 2013 but that he did not know at the time that the money had been used in this way and only became aware of it in 2018. He indicated that he understood it was his father who had decided to use the money in that way, although his father was not a party to the proceedings between Bank of Ireland and the plaintiffs. Mr. Nolan accepted that he had given incorrect evidence in relation to this issue in the course of the proceedings before the Law Society Disciplinary Tribunal

against Mr. Desmond, but he maintained that he did not know the position at that time. Mr. Nolan also accepted that he was incorrect in the first version of his witness statement delivered in August 2021 insofar as he said in para. 53 that Serene had held the funds on trust for OPT until 30th June 2015 when they were returned to OPT with interest. That witness statement was obviously prepared after the date when Mr. Nolan said that he first knew that the money transferred to Serene had been used to part fund the settlement with Bank of Ireland. His first witness statement was therefore misleading. While Mr. Nolan corrected the position when he came to give his sworn evidence, it seems to me to be probable that he did so because of the application brought by Mr. Desmond for unredacted versions of the Serene bank statements. I reject the suggestion that the correction was made by an unprompted desire to *"come clean".*

117. Mr. Nolan explained that, with the exception of a telephone call to Mr. Garcia in June 2013 and a subsequent telephone conversation with Mr. Desmond in the same month, he had no further dealings in relation to the monies transferred by OPT until 2014. In the meantime, he said the matter was looked after by his sisters, Joan Nolan and Sally Nolan, neither of whom gave evidence. He did not become involved again himself until November 2014. At that time, a meeting took place in the offices of Mr. Desmond in Cork. This was attended by Mr. Nolan and his sister, Patricia. During the course of that meeting, Mr. Desmond spoke on a conference call with a number of people. Mr. Nolan said that he recognised the voice of Mr. Garcia and he thinks one of the other participants was Mr. Oberhansli. While the call went on for 20 or 25 minutes, Mr. Nolan said that he did not understand the purpose of the conference call. There was reference to the pension fund coming back under control. Mr. Nolan had a subsequent meeting with Mr. Desmond in Bewley's Hotel in Ballsbridge. There were also a number of telephone calls. There was a further meeting on 9th December 2014, attended by Mr. Nolan, Ms. Patricia Nolan and Mr. Desmond at his offices in Cork. According to Mr. Nolan, Mr.

Desmond agreed at that meeting to give an undertaking to return the funds to OPT. The provision of this letter is addressed further below.

118. Later, on the morning of 18th December 2014, Mr. Nolan said that he and his sister, Sally Nolan, called to Mr. Millett's offices in Dublin 2. According to Mr. Nolan, there was no one there at the time they called. He then telephoned Mr. Millett and left a message to the effect that he and his sister were outside his offices and wanted to meet him. On 19th December 2014, Mr. Nolan emailed Mr. Desmond and asked him to fully account for the whereabouts of the OPT pension fund. In that email, Mr. Nolan said:-

> *"We have given no consent or authority whatsoever for you to use these monies in anyway whatsoever except that the monies were to be held safely and securely in an EFG bank deposit account in Zurich. You have no agreement from us for anything else. Given what we have heard from you in the past week we are now gravely concerned that you have done something very wrong with our pensions monies."*

119. Mr. Nolan also emailed Mr. Millett on 24th December 2014 in the following terms:-

> *"You are holding monies to value of $9.2M US Dollar in trust for our pension Nolan's have given no consent or authority for these monies to be used in any way. The monies were to be held safely and securely in EFG deposit account in Zurich. No agreement for anything else was given. We are concerned something has happened to our monies, we want the following answered:*
>
> *When was our monies paid out of EFG bank*
>
> *Where did they go*
>
> *Who did they go to*
>
> *Bank statements evidencing it*
>
> *Who authorised it*

Who in Allied Finance provided instructions to EFG bank

Why have you refused to answer these questions?"

120. Mr. Millett replied claiming that he had not confirmed that he held monies to the value of USD$9.2 million and that any monies transferred into investments on behalf of the pension fund were done with the plaintiffs' consent and at their direction.

121. A further meeting with Mr. Desmond took place at the offices of Nolan Transport on 3rd January 2015. It was attended by most of the plaintiffs together with Mr. Mark Piggott. However, Sally Nolan and Joan Nolan were not present. In the course of that meeting, several of the plaintiffs accused Mr. Desmond of stealing the funds. During the course of that meeting, Mr. Nolan said that Mr. Desmond willingly handed over his mobile telephone (an iPhone) to Patricia Nolan, saying that he had nothing to hide, and provided her with the PIN code to allow her to examine the texts on the telephone. For completeness, it should be noted that it appears from the witness statement which Mr. Desmond had delivered in advance of the trial that he proposed to contest what was said by the plaintiffs in relation to this meeting on 3rd January 2015. However, in circumstances where Mr. Desmond did not subsequently give evidence, it would be inappropriate for me to refer to any of the material in his proposed witness statement. It should also be noted that all of Mr. Nolan's evidence in relation to what was said by Mr. Desmond at any of these meetings is hearsay in so far as the remaining defendants are concerned but I record it here in circumstances where the account given by Mr. Nolan and his sister, Patricia Nolan, is relevant to the issue as to the credibility of their evidence.

122. On Day 5 of the hearing, Mr. Nolan gave evidence that he and his sister, Patricia, went to Zurich on 12th January 2015. They attended the offices of AFT and asked to speak to Mr. Garcia. His evidence was that they were given a file of papers by Mr. Garcia to read. It was on this occasion that he saw the signatory card which had ostensibly been cancelled. Mr. Nolan and his sister returned to the AFT offices on the following day and were handed a document

which purported to revoke the power of insight described above. Mr. Nolan then telephoned Mr. Desmond. According to Mr. Nolan, Mr. Desmond said that he did not know that the power of insight had been revoked.

123. Following the abortive visit to the offices of AFT, Mr. Nolan and his sister went to EFG Bank and asked to speak to Mr. Oberhansli. According to Mr. Nolan, the upshot of that meeting was that it was represented to them that they had never been signatories on the EFG Bank account. Mr. Nolan and his sister then flew back to Ireland. They met Mr. Desmond again on 16th January 2015 in his offices in Cork. According to Mr. Nolan, a number of significant admissions were made by Mr. Desmond on that occasion. However, in circumstances where Mr. Desmond did not give evidence, I do not believe that those admissions can be said to be admissible in evidence as against the remaining defendants. In those circumstances, I will not address this element of Mr. Nolan's evidence in this judgment.

124. According to Mr. Nolan, he and his sister, Patricia Nolan, subsequently called to Mr. Millett's office in Donnybrook on 29th January 2015. In his witness statement, Mr. Nolan stated that Mr. Millett answered. He was just back from holidays in the United States. Mr. Nolan contended that Mr. Millett was very aggressive and that he walked past them, all the time talking on his mobile telephone. Mr. Nolan said that Mr. Millett then returned and invited them into the building where his new office was situated. Mr. Nolan stated that:-

> *"He confessed to us that he had invested the OPT pension funds for his own purposes, together with Mr Desmond and others. He told us the funds were gone from March/July 2013. We were horrified at this revelation. He said he had agreed to the use of our funds because he believed that our OPT pension funds would be repaid very quickly. He further claimed that when he realised there were problems, he had sought a solution with Mr Desmond. He also said that he had not wanted to tell us about the investment of the pension funds, so as not to upset us. He referred to letters that Mr Desmond had*

sent to the banks in Singapore in July 2014. By e-mail of the same day, I also asked Mr Millett to send me a copy of these letters, together with a copy of his professional indemnity insurance."

125. Mr. Nolan also said in his witness statement that he received a telephone call from Mr. Millett on 20th January 2015 to say that he could collect a copy of the OPT file. However, later that evening, as Mr. Nolan was driving home, Mr. Millett called to say that the file would not be ready and that he would instead see Mr. Nolan in the course of a meeting that was due to take place in Zurich on 22nd January 2015. Mr. Nolan's evidence was that this meeting took place at the Hotel Glockenhof in Zurich and that it was attended by Mr. Desmond, Mr. Millett, Mr. Lampert, Mr. Garcia and legal counsel for AFT, Mr. Ralph Baumann. However, Mr. Nolan and his sister insisted that Mr. Oberhansli should also be present. Mr. Oberhansli subsequently arrived. In his witness statement, Mr. Nolan recounted a number of statements which he said were made by others at the meeting. Given that none of those persons were called to give evidence, I do not believe that I can have regard to Mr. Nolan's hearsay evidence. However, Mr. Nolan's evidence as to what was said to him by Mr. Millett is admissible as a statement against interest by a party to the proceedings. In that context, Mr. Nolan said that, after he and his sister had left the meeting, Mr. Millett came down to the hotel foyer where Mr. Nolan and his sister were sitting. According to Mr. Nolan, this was a very short meeting. He told Mr. Millett to *"Go back up to your friends and go get us out funds and good-bye"*. At that point, Mr. Nolan said it had become apparent that *"Our money had been squandered without our authorisation and without our knowledge on some financial gamble of some sort"*. Subsequently, steps were taken by the plaintiffs to dismiss Pinnacle as a trustee of the OPT and Quest Capital Trustees Ltd (*"Quest"*) was appointed in its place. It is now the seventh plaintiff in these proceedings.

126. The direct examination of Mr. Nolan concluded by the plaintiffs' counsel taking him through a number of contentions made by Mr. Desmond in the latter's witness statement. It was first put to him that Mr. Desmond said that the objective of the plaintiffs was to protect their pension funds from creditors and to indirectly use the pension funds to settle Irish bank debts. Mr. Nolan rejected that and contended that the plaintiffs were protecting the pension funds from the *"instability of the banks"*. He accepted, however, that the plaintiffs regarded themselves as having the option to use the funds to settle Irish bank debt at a later time but he insisted that the plaintiffs were not attempting to protect themselves from creditors.

127. Mr. Nolan also rejected the suggestion made in Mr. Desmond's witness statement that they asked him to find a suitable pensioneer trustee. Instead, Mr. Nolan said that it was Mr. Desmond's idea to have a new trustee put in place. Mr. Nolan likewise rejected the suggestion made in Mr. Desmond's witness statement that the transfers were effected in accordance with the private placement memorandum issued by MECD. Mr. Nolan reiterated the evidence previously given by him that the plaintiffs did not receive that document. Mr. Nolan also stated in forceful terms that the plaintiffs were not *"investing in anything"*. According to him, the plaintiffs *"were simply placing funds in a deposit account in Switzerland"*.

128. It was also put to Mr. Nolan that a third element of the structure was that the funds to be transferred from MECD to CVSSA's account in EFG Bank were documented by a loan note instrument between MECD and CVSSA. Mr. Nolan said that he was unaware of any such instrument or of any loan note certificates. He also said that it was never explained to him that there was a loan agreement in place between CVSSA and EFG Bank. He likewise rejected the suggestion made in Mr. Desmond's witness statement that the monies deposited in the CVSSA account in EFG were to be replaced by *"capital protected notes"* or that the money on deposit would be used to part repay a much larger loan. He further rejected the suggestion made that, after a period of seven years, MECD would seek repayment from CVSSA of the loan effected

by the loan instrument in order to repay the plaintiffs. Mr. Nolan contended that the only discussion of timeframe that had taken place was of the order of four to six months.

129. Counsel for the plaintiffs also put a number of matters contained in Mr. Millett's witness statement to Mr. Nolan. In that witness statement, Mr. Millett contended that the arrangement was always by way of an investment and was not a deposit account. This was rejected by Mr. Nolan who said:-

> *"Everybody knew, Mr. Millett knew, Mr. Desmond knew, we knew that these funds were going into a deposit account in Switzerland. There was no investment. There was no return. We were not looking to invest funds for anything or for anybody. These funds were put there. There was a pension protection plan, it was protecting the pension from the instability of the banks and then it gave us an option to use those funds to pay creditors if we chose to."*

130. Mr. Nolan was cross-examined by Mr. Millett on Days 8 and 9 of the trial. On Day 8, Mr. Nolan confirmed that the plaintiffs never received any written advice from either Pinnacle or John Millett Financial Advisers Limited in relation to investments. Mr. Millett also put it to Mr. Nolan that, prior to the transfers in issue in these proceedings, the OPT monies were not held in any Irish bank. Mr. Nolan responded to say that the funds were *"in banks in Ireland in that moment"*. When it was put to him that this is not the same thing as an Irish bank, Mr. Nolan answered:-

> *"That may have cleared itself up after or around that time, I'm not sure. But banks in Ireland, we hadn't made the distinction. The distinction you are making wasn't made at that time. So, Mr. Desmond didn't make it to us, Mr. Millett didn't make it to us. That's it."*

131. I cannot accept that evidence. I have already highlighted that the situation in relation to the instability of Irish banks was well known at this time. In contrast, there is no evidence at

all to suggest that Investec Bank was seen as unstable and I cannot believe that the plaintiffs made no distinction between the financial position of that bank and that of Irish banks who were known to have suffered very significant losses. It is also wholly incredible that experienced business people such as the plaintiffs could have been dependent on Mr. Desmond or Mr. Millett to point out the difference between Investec Bank, on the one hand, and the Irish banks, on the other.

132. Mr. Nolan denied that he was informed by Mr. Desmond that the structure of the proposed investment of the OPT funds at that time was an unregulated structure. He also denied that he received the MECD placement memorandum, the loan note instruments or the application form for the MECD investment at a meeting which took place in Dublin on 28th December 2012. He further rejected the suggestion that Mr. Millett informed him at that meeting to take independent legal and financial advice in relation to those documents. Mr. Nolan accepted that his sister, Ann Nolan, a qualified solicitor, was present at that meeting but he rejected the suggestion that Ms. Nolan was acting as a solicitor at that meeting and he made the point that she had been subject to a number of medical conditions in the years prior to then.

133. Mr. Millett cross-examined Mr. Nolan in relation to the meeting which took place in Zurich on 9th January 2013 and in particular in relation to the three written instructions executed in the course of that meeting in respect of proposed transfers to Serene. These are the transfers discussed in para. 104 above in the context of Mr. Nolan's direct evidence. These documents were signed by Mr Nolan's sister in his presence. In his response, Mr. Nolan said that the amounts mentioned in those documents did not make sense to him. At that point, I interjected to note that Mr. Nolan had witnessed his sister sign those documents in his presence and I queried why anyone would sign those documents if they did know what they were for. Mr. Nolan responded as follows:-

"I knew they were transfers but I also knew that the funds had not left Ireland at that point. One transfer had. Which is not one of these three. It's a 620 one. That had. And that had been transferred from CVS to Serene. We still didn't have signatory rights in place. And when we put these down we still didn't have signatory rights in place. But the amounts were confusing to me. I didn't really understand the amounts. But they were there until we had the controls that we wanted in place in place. That was the thinking behind them."

In my view, that answer does not assist in understanding why Mr. Nolan would stand by while his sister signed documents which he did not understand. This is all the more so in circumstances where, at other points in his evidence, Mr. Nolan was at pains to say that his sister, Ann, had health issues which effectively prevented her from continuing to work as a solicitor. By their terms, the documents authorised the transfer of substantial sums of money (amounting in the aggregate to more than €2 million euro) to Serene. I cannot accept that Mr. Nolan did not understand why these documents were executed at the time. It seems to me to be probable that these documents were executed with a view to moving sums to Serene for the purposes of settling the Bank of Ireland claim against the Nolan family. According to an affidavit sworn by Patricia Nolan on 21st September 2021 (quoted in para. 200 below), Mr. Desmond had advised the family to route funds through Serene to achieve a debt settlement with Bank of Ireland. That is precisely what happened to the funds transferred to Serene in June 2013.

134. Mr. Millett put it to Mr. Nolan that, initially, he and his co-trustees wanted to transfer the whole of the cash balance then standing to the benefit of the retirement scheme (a sum of the order of €13 million) to MECD and then onwards to CVSSA and that he (Mr. Millett) had objected to all the funds being transferred. Mr Nolan responded to say that he remembered that and that Mr. Millett had objected very strongly to doing that. Mr. Millett then asked him if he

recalled the reasoning behind that. Mr. Nolan responded to say that Mr. Millett had spoken about *"concentration"*. Mr. Millett then clarified that the reason was that it would have led to an overconcentration of assets in an investment scheme and it left no room for liquidity in respect of claims on a retirement. Mr. Nolan did not dispute this and confirmed that Mr. Millett had mentioned liquidity.

135. Mr Millett also cross-examined Mr. Nolan in relation to a document described as the MECD *"Investment Application Form".* These were forms which Ms. Patricia Nolan and certain other members of the Nolan family signed in blank leaving it to Mr. Millett to fill in the blanks later. However, although the forms, when signed, contained blanks, they also contained a number of pre-printed statements which are potentially relevant. The circumstances in which the forms were executed are addressed in greater detail below in the context of the evidence given by Ms. Patricia Nolan. The forms were signed in June 2013 after the transfers from Investec to MECD had been made. The forms signed in blank in this way contained a number of pre-printed statements including the following:-

(a) On p.2 of the form, there was a statement to the following effect:-

> *"I/We the undersigned, request Middle East Continental Development's Limited* ***Investment offering*** *to draw against my/our bank account specified the once off debit order amount in terms of this application. All such withdrawals be treated as though they have signed by me/us personally and I/we request that bank to debit my/our account with those drawings."* (emphasis added)

This was followed immediately afterwards by the signature of Patricia Nolan and another member of the Nolan family.

(b) On the top of p.3 (again followed immediately by the signature of Patricia Nolan and by another member of the Nolan family), the form stated as follows:-

"Investment Details

"I/We hereby apply to invest in the investment structure in accordance with the provisions of the Private Placement Memorandum dated 15th August 2012, at the NAV price ruling on the date of the receipt of the funds, application form and relevant supporting documents, the Sum of (in words)."

(c) On the fourth page of the document, there was also a statement describing the transaction as an investment in the following terms (which again was followed several paragraphs later by signatures of Patricia Nolan and another member of the Nolan family next to the words *"signature of investor"*):-

"I confirm that I have adhered to the requirement to disclose to the Investor that the Investment structure is not governed under any Financial Services legislation, is not regulated by any Financial Services authority or covered by any compensation scheme and that furthermore I have not given or offered any covering advice in relation to the suitability of the investment and that where asked to I have referred the investor to seek the advices of a suitably qualified professional offering intermediary services or advice to Investors. I have fully explained the meaning and implications of non-related products to the investor and I am fully satisfied of the Investor's understanding of the impact this has on their participation in the Investment."

(d) There was also a client declaration on the final page of the document (and this page was also signed by Patricia Nolan and another member of the Nolan family) which contained, amongst others, the following statements (including one referring to risk):-

> *"I/We understand that this application read with the Private Placement Investment Memorandum, constitutes the entire agreement between the promotor, Middle East Continental Development Investment Limited and myself/ourselves…I/We confirm that I have received information on and details of the investment structure by request to the promoters, that I/We understand the risk profile of the investment have been directed to take financial and taxation advice from a suitably qualified independent person and that I/We understand that it is my/our obligation to familiarise myself/ourselves with and accept the risks associated with this Investment."*

136. As noted above, those documents were not signed until after all of the transfers from the OPT to MECD had taken place. However, it was put by Mr. Millett to Mr. Nolan that they were signed *"to give effect and legitimise the transfer; is that correct"* to which Mr Nolan answered *"yes"*. This is significant. These documents are inconsistent with the case made by the plaintiffs that they understood that they were simply transferring money to be held on deposit. The documents contain numerous references to investment and they also refer to the MECD placement memorandum. It should be noted that, subsequently, on Day 10 of the hearing, Mr. Nolan, in the course of cross-examination by counsel for the Kenny defendants, sought to suggest that he was unsure what document Mr. Millett had in mind when pursuing him in relation to this question. I do not understand how Mr. Nolan could have been under any misapprehension in this regard. In the first place, it is quite clear from the transcript that Mr. Millett posed his questions in relation to the application forms. It is true that Mr. Nolan asked Mr. Millett to show him the application form in question. Mr. Millett responded to say that they had already been shown to him in the course of his direct evidence. That was confirmed to Mr. Nolan both by me and by the plaintiffs' counsel who confirmed that the forms were

blank and that Mr. Nolan had, in the course of his direct evidence, said that he recognised the signatures of his sisters. At that point. counsel for the plaintiffs noted that there is an issue about the date when they were signed but that there was no issue that they had been signed. Immediately after this exchange had taken place, Mr. Nolan stated, quite clearly, that *"These are the blank application forms that Patricia signed, I think, that Mr. Millett is asking about"*. This confirms my view that Mr. Nolan understood the context of the questions put to him by Mr. Millett and understood that they were the documents which his sister signed in blank (as subsequently confirmed in the evidence of Ms. Patricia Nolan). Yet, on Day 10, Mr. Nolan complained that Mr. Millett had not shown him the document at the time and he observed that he should probably have asked Mr. Nolan to specifically identify the document. He then added that he had *"an issue with something that's come up in discovery in relation to that"*. Mr. Nolan was subsequently re-examined by counsel for the plaintiffs on Day 11. On that occasion, notwithstanding the exchange described above which had taken place on Day 8, counsel for the plaintiffs drew Mr. Nolan's attention to the instructions given by the OPT trustees to Investec Bank on 3rd January 2013 and asked Mr. Nolan whether *"when you spoke about a form being signed to legitimise the transfer was this is the document you were referring to?"*. This provoked the following response from Mr. Nolan:-

> *"A. You see I'm not sure, there's two forms. So this, as I understood it, was the transfer of the monies from the bank out to MECD.*
>
> *Q. Yes.*
>
> *A. But there's another form.*
>
> *Q. And is the other form you're referring to is the one that was signed by Patricia and is otherwise blank?*
>
> *A. It's the one I said I didn't sign."*

137. In my view, that exchange between Mr. Nolan and counsel in the course of the re-examination does not cast any doubt on the evidence given by Mr. Nolan on Day 8 in response to the question put to him by Mr. Millett. In my view, it is quite clear from the evidence given by Mr. Nolan on Day 8 that he was aware that he was being asked questions by Mr. Millett in respect of the application forms. The directions given by the OPT trustees to Investec Bank were plainly not what was being discussed in the course of this element of Mr. Nolan's cross-examination on Day 8. I cannot accept that the answer given by Mr. Nolan, in the course of his re-examination, establishes any doubt in relation to the issue.

138. I am further reinforced in this view in light of the subsequent exchange I had with Mr. Nolan on Day 8 in the course of his cross-examination by Mr. Millett. I asked Mr. Nolan why someone with his sister's business experience would sign a document of that kind in blank. His answer to my question is entirely consistent with the earlier answer given by him to Mr. Millett that the application forms had been signed to *"legitimise"* the transaction. Mr. Nolan said:-

> *"This was signed because the professional trustee wanted it signed. That was - I can't really answer beyond that. At this point, this is June or July '13 I think, at this point the transfers have happened, I've went back out to Zurich with both our solicitor and the pension trustee and ensured that everything was 100% and it is. So, it's not ideal, I grant you that, Judge, but as I understand it, Mr. Millett wanted this to correct his file or to put his file in order."*

139. On Day 9 of the hearing, counsel for the Kenny defendants commenced his cross-examination. Mr. Nolan was closely cross-examined about the original witness statement made by him in August 2021. It was put to him that, at that time, neither the witness statement nor the pleadings said anything about the use of OPT money to settle creditors' claims against the Nolans. It was also put to him that the plaintiffs had only *"come clean on the issue"* after Mr. Desmond brought the motion in relation to the Serene bank accounts. In response, Mr. Nolan

did not proffer any detailed explanation for the omission of this element of the case now made. Mr. Nolan was also closely cross-examined about the advice which he claimed Mr. Desmond had given about the risk to the OPT monies held in Investec Bank. In particular, it was put to him that, in his previous evidence, he had not made a distinction between banks in Ireland and Irish banks. Mr. Nolan agreed that this had been his evidence. He also maintained that he did not know the identity of the banks in which the OPT funds were held. However, he had to concede that the then trustees would have known where the monies were held and that they were held either in Investec Bank or in Barclays, neither of which are Irish. As will become clear when the evidence of Ms. Patricia Nolan is considered below, both of the plaintiffs' who gave evidence professed not to know the details of the bank accounts in which the OPT funds were held prior to the transfers to MECD. However, Ms. Patricia Nolan accepted that her sisters Elizabeth Nolan, Joan Nolan and Sally Nolan would have known these details. Ms. Nolan said that these were the family members who worked in the finance department of the family business and were familiar with financial details. Remarkably, the plaintiffs chose not to call them as witnesses even though they are also trustees and also named as plaintiffs.

140. I cannot accept that none of the plaintiffs knew that the funds of OPT were held with non-Irish banks. Indeed, the instructions addressed to Investec Bank (which several of the plaintiffs, including Ms. Patricia Nolan, signed) confirm that the trustees were well aware of where the funds were held. Thus, even if Mr. Richard Nolan could credibly suggest that he was personally unaware of where the funds were held, I do not accept that this alleged lack of awareness on his part could plausibly extend to the plaintiffs as a whole.

141. It was then put to Mr. Nolan by counsel for the Kenny defendants that, if the plaintiffs wished to hold the OPT funds in a Swiss bank account, it would have been a very simple proposition to transfer the funds directly from Investec Bank in Ireland to a bank in

Switzerland. On Day 9 of the hearing, the following exchange took place in this context between counsel for the Kenny defendants and Mr. Nolan:-

"443 Q. I see. So you chose not to put OPT money directly into, for instance EFG Bank, Credit Suisse, any of the Swiss banks, instead you decided to go through a scheme put together by Mr. Desmond and Mr. Millett. Is that what you are telling the court?

A. That is, yes.

444 Q. Now, the scheme that was put together by Mr. Desmond and Mr. Millett you say was to protect your pension assets, isn't that so?

A. Yes.

445 Q. In lieu of just sending them to Switzerland?

A. We asked.

446 Q. But it was in lieu of doing it. You knew you could just send it directly to Credit Suisse or to EFG or any other bank in Switzerland, you knew you could do that but you chose not to do that. You chose instead to engage in this scheme; isn't that right?

A. Mr. Desmond --

447 Q. Could you just say yes or no?

A. Sorry, can you ask the question again please?

448 Q. Instead of sending it directly, we'll say to Credit Suisse, just to not confuse things, to Credit Suisse in Switzerland directly, you chose to involve yourself in a scheme, you say, put to you by Mr. Desmond and Mr. Millett?

A. Yes. Mr. Desmond told us that this was the way it had to go. And we asked about [inaudible], we asked what you're asking me now, he said

no. Around that time I think Raymond asked him could we use this subsequently -- or sorry, could we use this to pay -- no, Ray was just straight with it, could we use these funds to pay bank debt. Mr. Desmond said yes, later. But we asked him, I asked him, it was me that asked him was that legal. He said yes, but you have to move it this way. And that's what he put to us.

449 Q. So you have to move it out of the OPT?

A. No, he actually said we had to go through MECD Dubai.

450 Q. Yes. Out of OPT through MECD Dubai to CVS SA, that was the scheme that was come up with; isn't that right?

A. That was his pension protection plan.

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

A. Yes."

142. In my view, this exchange shows very clearly that the plaintiffs understood that the structure proposed by Mr. Desmond did not involve merely the holding of the OPT funds on deposit in Switzerland. As counsel suggested, that could have been done, quite straightforwardly, by the OPT opening a bank account in Switzerland. It is clear from this exchange that Mr. Desmond advised them that this was not the approach that could be taken if they wished to generate a method by which the OPT funds could be leveraged to pay personal debts. Instead, a more complex structure was required to be put in place that would involve not only a Swiss bank account held by CVSSA but also an essential intermediate step involving MECD in Dubai.

143. Mr. Nolan was then cross-examined about the evidence that he had given in the course of the proceedings against Mr. Desmond before the Law Society Disciplinary Tribunal in

which he had expressly accepted that the OPT funds could not be used to pay debts owed by beneficiaries of the OPT and in which he had refuted the suggestion that any of the funds transferred to Serene had been used to settle the claim made by Bank of Ireland against the individual members of the Nolan family. In the course of his evidence to that Tribunal, the following exchange took place between counsel for the Law Society and Mr. Nolan:-

> *"Okay. Let's take that in steps. Do you accept that Your pension fund, the funds, could not be used in settlement of the cases taken by AIB and Bank of Ireland?*
>
> *A. Of course I accept that.*
>
> *Q. So therefore the only way of those funds being used in that settlement would be if they could be washed through structures, taken out of the pension funds, and made available to your family structures such as Serene and Larkhall*
>
> *A. The only person I ever heard talk about structures Since November, it's very confusing, November ' 14 was Mr. Ciarán Desmond. Anybody else talks about a company. Very simple. Not complicated. This washing thing you talk about, that is all over the exhibits that I have mentioned. What these guys were actually doing was taking peoples money, using it for their own benefit, and then putting the money back. But in this case it didn't work out that way."*

144. In the course of his evidence to the Law Society Tribunal, Mr. Nolan emphatically rejected the suggestion that the money transferred to Serene had been used in settling the Bank of Ireland claim. This is clear from the answer he gave to the following question from counsel for the Law Society :-

> *"And the level of irritation that is to be discerned from some of the language used from Mr. Millett is reflective of the fact that you had arranged to get 3.1 million out of these funds which were in MECD and you had used those funds to settle with the Bank of*

Ireland in February/March 2013 represented by a solicitor who is incidentally is in the Tribunal today.

A. Absolute supposition, fiction and make-believe."

145. In the course of Day 9, it was put to him by counsel for the Kenny defendants that this evidence that he had given to the Tribunal was utterly wrong. Mr. Nolan's response was that, at the time he gave this evidence to the Law Society Tribunal, he did not know that the sum of €3.1 million which had been transferred to Serene had in fact been used to settle with Bank of Ireland. His attention was then drawn to his answer to a further question posed by counsel for the Law Society who had asked where the money came from in order to settle with Bank of Ireland. Mr. Nolan stated in unqualified terms that the money came *"from our own resources"*. This cross-examination took place in 2017. Mr. Nolan claimed that he did not know that the Serene funds were used in this way until 2018. His evidence to the Law Society Disciplinary Tribunal was that the funds had never left Serene until they were repatriated to OPT at the direction of Quest (the trustee who was appointed after the Pinnacle was removed as a trustee).

146. In response to further questions posed by counsel for the Kenny defendants on Day 9, Mr. Nolan confirmed that the settlement with Bank of Ireland involved, in round terms, a payment of €6 million being made to purchase the debt owed by the Nolans to Bank of Ireland of which €3.1 million was paid by Serene. Mr. Nolan also confirmed that the monies transferred to Serene in early 2013 were paid out by September 2013. However, he continued to maintain that, at the time Quest replaced Pinnacle as corporate trustee in 2015, he understood that €3.1 million was still held on behalf of the OPT by Serene. Mr. Nolan confirmed that Quest required the return of the monies paid to Serene and that his father made arrangements for the return of the money with interest. Mr. Nolan was unable to say whether Quest was aware at that time that the OPT money had in fact been used to settle personal debt of the Nolans.

147. Although Mr. Nolan continued to maintain that he did not know, prior to 2018, that the monies transferred to Serene had been used to settle Bank of Ireland debt, he accepted that his sister, Sally Nolan, would have known and that possibly his sisters, Joan Nolan and Elizabeth Nolan, may also have been aware that the Serene monies had been used in this way. Thus, even if Mr. Nolan's evidence on this issue were to be accepted, it is plain that the plaintiffs as a whole cannot credibly say that they were all unaware until 2018 of the fact that the money transferred to Serene was used to settle the Bank of Ireland claim. That would make no sense. Someone had to give the instruction on behalf of the OPT to permit the use of the money transferred to Serene to be used in the settlement. I also have to say that I am unable to accept that Richard Nolan was unaware at the time of the settlement that the moneys were to be used in this way. It must be recalled in this context that the first transfer to Serene of €619,000 was of his own share of the pension fund. He made much of the fact that he had used his own share of the funds in the so-called *"test transfer"*. It is difficult to believe that he did not know what subsequently became of his own share of the fund after it was transferred to Serene. It is even more difficult to believe that the plaintiffs as a whole did not have knowledge of the affairs of Serene. Both Mr. Richard Nolan and Ms. Patricia Nolan were very vague in their evidence about Serene. Both suggested that it was controlled by their father and that they had no direct knowledge of its affairs. But it is impossible to accept that they would have transferred OPT funds to Serene if they had no insight into its affairs. This is especially so in circumstances where the first transfer to Serene was allegedly undertaken because the plaintiffs did not have signing rights over the CVSSA account at that time. Against that backdrop, it makes no sense that they would have made the transfers to Serene if they did not have control over the moneys transferred. In round terms, the plaintiffs transferred €3 million to Serene from the proceeds of the transfers to MECD. Given the way in which Ms. Ann Nolan, at the meeting on 9th January 2013, executed the four letters of instruction described in para. 104 above, it appears to me to

be probable that this was the plaintiffs' intention from the outset. Again, it makes no sense that the plaintiffs would have proceeded in that way if they were not confident that they would be able to exercise control over any moneys transferred to Serene.

148. In the course of his cross-examination by counsel for the Kenny defendants, Mr. Nolan accepted that a payment to a connected party would be treated as a pension in payment for taxation purposes. On Day 10, it was put to Mr. Nolan that the purpose of the pension plan put in place by Mr. Desmond in respect of the OPT monies transferred to CVSSA was to *"legitimise the use of the pension monies to pay debts"*. Mr. Nolan responded as follows:-

> *"A. That was what was put to us. That word was never used by Mr. Desmond, to be fair. It never was. He said this is the route, this is the way you have to go. We asked about going direct, Mr. Gardiner, we did…*
>
> *73. Q. And he said you can't go direct, you have to go this way to legitimatise the use of the funds so they don't lose Revenue approval, isn't that right?*
>
> *A. And he said more than that.*
>
> *74 Q. Well, what more did he say?*
>
> *A. That's when he introduced us to Mr. Millett…."*

149. At a slightly later point in the cross-examination on Day 10, it was again put to Mr. Nolan that the purpose of the *"plan"* was to enable the pension monies to be used to pay personal debt without losing Revenue approval for the plan. However, in response, Mr. Nolan said: *"That was never stated"*. It was then put to him that, under the scheme or plan, money would go from Investec to MECD. Mr. Nolan accepted that this was the first step in the plan. In relation to the first payment of €620,000 to MECD, Mr. Nolan also accepted that the proceeds of the payment were held by MECD at Abu Dhabi Commercial Bank for four days prior to the transfer of €619,000 to the account of CVSSA at EFG Bank where it remained for three days before being transferred from that account to Serene's account at the Royal Bank of

Scotland in the Isle of Man. In relation to the second transfer instruction given to Investec on 21st January 2013, €2.48 million was received by MECD on 23rd January 2013 and stayed in its account for a week before MECD made a transfer of €2,449,900 to the account of CVSSA in Switzerland on 30th January 2013. Mr. Nolan also accepted that the next transfer, the subject of instructions given on 4th February 2013, also stayed with MECD for a period of a week before MECD transferred a sum of €2,477,000 to Serene directly.

150. In the course of his cross-examination on Day 10, Mr. Nolan further accepted that, while instructions were given by the OPT trustees to Investec Bank to transfer monies to MECD, there was no equivalent instruction given by the OPT trustees to MECD or to the Abu Dhabi Commercial Bank to subsequently remit the monies from MECD's account to that of CVSSA at EFG Bank. Mr. Nolan's attention was also drawn to the way in which each of the instructions given by the OPT trustees to Investec Bank contained a reference to an *"investor number"*. Thus, in the case of the first transfer of €620,000, the reference is given *"OPT (R. Nolan) Investor number 25"*. Two written instructions were issued, one by Mr. Millett as director of Pinnacle and the other was signed by Ms. Ann Nolan and Ms. Joan Nolan as trustees. This instruction also stated that the transaction *"is part of a proposed stream of investments for long term income"*. However, this formula was not included in subsequent instructions given by the OPT trustees to Investec Bank although the subsequent instructions always referred to *"investor numbers"*. Thus, for example, in the transfer of €2,480,000 authorised by the trustees on 21st January 2013, there was reference to *"Investor numbers 26, 27, 28 & 29"*. Similarly, in respect of the subsequent transfer of €2,480,000 authorised by the trustees on 4th February 2013, there was reference to *"Investor numbers 30, 31, 32 & 33"*. Nonetheless, under cross-examination, Mr. Nolan rejected the characterisation of the transactions as investments and continued to maintain that the trustees *"were moving funds to a simple deposit account in Zurich"*.

151. It further emerged in the course of Day 10 that Mr. Nolan disputed what he had said in paras. 41 and 43 of his revised witness statement. It should be recalled that, at the outset of his evidence, he said that he stood over his witness statement and that it could be treated as part of his evidence to the court. In para. 41, he said that *"any monies designated for MECD would be transferred to an account in Dubai* ***or*** *would be deposited in a CVS SA account in EFG"* (emphasis added). In para. 43, he said that, relying on the representations which the plaintiffs maintain were made by Mr. Desmond and Mr. Millett, *"my family and I agreed to transfer funds from the OPT to CVS SA* ***and/or MECD****"* (emphasis added). Notwithstanding these very clear statements that the OPT funds could be held by MECD in Dubai or by CVSSA in EFG in Switzerland, Mr. Nolan maintained under cross-examination that the intention was always to move the funds on to CVSSA. He expressly disagreed with his own witness statement that the agreement was that the funds could be held in the CVSSA account in Switzerland or alternatively in an account in Dubai. He tried to make the case that counsel was splitting hairs with him but, in fact, all counsel did was to put to him the terms of his own witness statement. The impression I am left with is that Mr. Nolan does not appear to know what his case is on this point.

152. Mr. Nolan was also cross-examined about the way in which the statement of claim was originally amended in 2019. His attention was drawn to the fact that para. 10 of the amended statement of claim delivered at that time continued with the proposition that the reason for moving the monies from deposit with Investec Bank in Ireland was that they were at risk because of the prevailing economic crisis. It was put to Mr. Nolan by counsel for the Kenny defendants on Day 10 that, at the time the amended statement of claim was delivered, the plaintiffs were fully aware of the case now belatedly made that they had been advised by Mr. Desmond that the OPT monies could be used to settle with creditors. Mr. Nolan did not dispute

this, save that he reiterated the case made by the plaintiffs that the advice was that the monies could be used to settle with creditors if they chose to do so.

153. It was also put to Mr. Nolan by counsel for the Kenny defendants that a further opportunity was missed to correct the position when Mr. Nolan came to deliver his witness statement in August 2021. Mr. Nolan accepted that he failed to provide a complete picture in that witness statement delivered at that time. Subsequently, on Day 11 of the hearing, Mr. Nolan was taken to the affidavit sworn by his sister, Patricia Nolan, on 6th July 2017 grounding an application for an interim injunction restraining the use of the Nemo Rangers lands. Mr. Nolan's attention was drawn to the way in which Ms. Nolan, in her affidavit, said nothing about the advice now alleged to have been given by Mr. Desmond that the OPT funds could be used to settle with creditors. His attention was also drawn to the fact that the affidavit says nothing about the transfers that were made through MECD to Serene. It was put to Mr. Nolan that the omission to refer to those transfers was not inadvertent and that they were deliberately left out of the affidavit. Mr. Nolan responded to say that the affidavit was about the missing funds; it was not concerned with the Serene funds. I will return to the terms of this affidavit when I come to address the evidence of Ms. Patricia Nolan.

154. In the course of the cross-examination of Mr. Nolan on Day 11, counsel for the Kenny defendants asked Mr. Nolan to explain how it came to pass that his witness statement in August 2021 was incorrect. Mr. Nolan was unable to explain it. He merely answered :*"I don't really know, it was incorrect, which is why we corrected."* Counsel for the Kenny defendants then reminded Mr. Nolan that, on Day 9 of the hearing, he had asked Mr. Nolan if he had carefully prepared his witness statement and he had confirmed that he had. The following exchange then took place between counsel for the Kenny defendants and Mr. Nolan:-

> *"47 Q. You knew, because you have told us, all about the advices that you*

could use the pension monies to settle with creditors and you knew, when you put in your witness statement in 2021, all about the use made of the monies by Serene and yet your witness statement is materially inaccurate on both of those scores and can you explain to the Court how that came about?

A. It was inaccurate. In terms of the missing monies, it wasn't missing, and I keep going to that. But they weren't missing. It wasn't a difficulty, really. Whereas the missing monies is what this all has been about.

48 Q. You see, because you can't explain it, Mr. Nolan, the logical explanation appears to be you deliberately chose to keep it from the Court, is that fair?

A. No, I don't think that's fair. If that was the case we wouldn't have added a supplementary. I did read the transcript over the weekend and you brought up something about apologising to the Court, why did I apologise. It was just for manners, it wasn't really for anything other than that.

49 Q. You see, it's not credible, Mr. Nolan, that the advice about safety, the safety of the pension was given at all?

A. I disagree."

155. It was also put to Mr. Nolan in the course of his cross-examination on Day 11 that the scheme had nothing to do with protection from bank instability and that the real reason for moving the money in this way was to protect the assets from creditors and enable them to be used to settle creditors' claims. Mr. Nolan disagreed with this proposition. His evidence was:-

"So I disagree with pretty much everything you are saying there. You have asked two or three things at the same time. So the funds were moved because of the bank

instability, that was the case, that was the case in Ireland, and by the time all of this had moved, exactly that proposition happened in another European country. So for you to say to me that's ridiculous, I disagree with you and the facts disagree with that as well. In terms of us putting the money, we were putting the money in a simple deposit account, we wanted a declaration of trust of those funds. We couldn't get it so they gave us this power of insight. The funds were named at all times."

156. However, it was then put to Mr. Nolan that, in para. 25 of the written submissions delivered on behalf of the plaintiffs in advance of the hearing, it was expressly submitted as follows:-

"Mr. Desmond recommended to the Plaintiffs that they should entrust funds with him so as to afford protection from creditors."

157. Mr. Nolan was unable to explain how this came about and said that it did not *"look right to me"*. It was then put to him by counsel for the Kenny defendants that, in fact, this is entirely in keeping with how the facts ultimately unfolded *"facts which you kept from the court until… December 2021"*. Again, Mr. Nolan responded that it did not look right to him. It should be noted that this reference to protection from creditors is not an outlier. As noted further below, the plaintiffs' accounting expert, Ms. Deirdre Carwood, describes in para. 1.13 of her report the instructions received by her from the plaintiffs' solicitors as to the advice given to the plaintiffs by Mr. Desmond. She said that her instructions were that he had advised that the banking environment was more solid certain and safe in Switzerland than in Ireland and that "*it would also protect the deposits from creditors"*. It is difficult to credit that the solicitors who gave that instruction to Ms. Carwood or the counsel who drafted the written submissions would have made those statements without instructions to the same effect from someone within the plaintiffs. Notably, the case outlined in para. 25 of the submissions and recorded in para.

1.13 of Ms. Carwood's report is inconsistent with the evidence of Mr. Nolan who was unable to explain how these inconsistencies arose.

158. At the end of Mr. Nolan's re-examination on Day 11, I asked Mr. Nolan a number of questions. In the first place, I asked some questions in relation to the settlement with the Bank of Ireland. In particular, I asked Mr. Nolan why the settlement was structured as a novation of the debt. I suggested to Mr. Nolan that, in my experience, settlements with banks normally involved a payment in return for a release of the debt. To my surprise, Mr. Nolan professed to know very little about the settlement and he was unable to assist. In an attempt to understand the settlement, I therefore directed that the documents in relation to the settlement with Bank of Ireland should be produced to the court at some point in the hearing. Two documents were subsequently produced. The first was a settlement agreement dated 5th June 2013 executed by the bank and the individual members of the Nolan family including Mr. Richard Nolan, all of whom were named as defendants in proceedings issued by the bank in 2012. It provided that, within 14 days, a payment of €6 million would be made to the plaintiff bank either by the defendants or, at their option, an Irish registered company or individual who would enter into a novation agreement with the bank on terms that would see the underlying debt novated to that party. The second document was a novation agreement dated 19th June 2013 entered into between the bank and Mr. James Nolan, the father (and, in one case, the father in law) of the defendants named in the bank's proceedings. Under the novation agreement, the underlying debt was novated to Mr. James Nolan on payment of €6 million. None of the witnesses called by the plaintiffs was able to explain why the settlement was structured in that way. Nor was any evidence given which explains why the settlement involved the interposition of Mr. James Nolan notwithstanding that approximately 50% of the settlement payment was funded not by him but by the proceeds of funds advanced by the OPT through MECD and thence to Serene.

159. The other series of questions I put to Mr. Nolan related to his understanding of the involvement of MECD. In particular, I asked him why he agreed to route the OPT monies through MECD given his evidence that the plaintiffs believed that they were putting the funds on deposit in Switzerland. I suggested to him that he was not the sort of person who would agree to routing funds in that way without a full explanation as to why it was necessary to do so. Mr. Nolan said that he had asked Mr. Desmond for an explanation at the time. When I asked what kind of explanation he got from Mr. Desmond, his answer was:-

> *"A. Because this was the pension structure that he had in place with -- this was the route.*
>
> *355 Q. The pension structure he had in place, but why would that be relevant to investing money in a bank or, I beg your pardon, depositing money in a bank account in Switzerland?*
>
> *A. Judge, that was -- you're right, I'm not the sort of person that would just accept that sort of thing, I wouldn't. I asked him was it legal and he said, yes, but I have to do it this way. And the reason --*
>
> *356 Q. But what I am still puzzled about, and I haven't heard an answer from you yet, Mr. Nolan, is what explanation did you get from him for that arrangement? I mean, you hardly accepted him telling you that it had to be structured in that way, you must surely have asked him why?*
>
> *A. I actually did, I actually did.*
>
> *357 Q. Then what explanation did you get?*
>
> *A. The explanation was that it had to go through MECD to CVS SA. He said that both of them were controlled by -- Allied Finance were involved in both of them. He wouldn't have it that it went direct…"*

160. I sought to explore the matter further and, eventually, Mr. Nolan said that Mr. Desmond did not give him a good explanation. I then asked Mr. Nolan why he went ahead with the proposal in those circumstances. His response was:-

> *"We done it because he said, look, the instability of banks are such, we need to do this and by doing it this way you could use the funds, if you chose to, but you had to do it this way."*

161. Mr. Nolan said that Mr. Desmond did not give them a straight answer when the plaintiffs asked why it had to be done in this way. The following exchange then took place with Mr. Nolan:-

> *"362 Q. Why did you do it then? Why did you go that route, why not phone up the bank in Switzerland and ask can we transfer the money to you?*
>
> *A. Judge, we knew nobody in Switzerland.*
>
> *363 Q. Well, it's not that difficult surely to open a bank account anywhere?*
>
> *A. I wouldn't think it was.*
>
> *364 Q. No.*
>
> *A. He said he had this, it was already in place, he was there, he would act as, he would hold the funds in trust. It seemed to make sense. But he didn't give us a good explanation, Judge, he danced around it.*
>
> *365 Q. Well, if that's your evidence then I don't understand why you went ahead and did it given the amount of money that was at stake?*
>
> *A. Because I remember him saying it was like a solicitor's client account, the same as that, the same sort of thing and that's how he put it to us.*
>
> *366 Q. Well, now, Mr. Nolan, a solicitor's client account doesn't have an intermediary in Dubai, and we all know that?*

A. I didn't say it, Judge.

367 Q. No, but I mean you couldn't have accepted that as the explanation, that doesn't make any sense to me, Mr. Nolan?

A. Judge, that's what he said. He said -- and he had it already there, it was all ready, we could do this quickly. He didn't give me a good answer, Judge, with hindsight he didn't."

162. I have, accordingly, been given no plausible explanation by Mr. Nolan for the decision of the plaintiffs to proceed with a structure that involved funds being first sent to MECD in and paid into its bank account in Dubai. It is very difficult to reconcile the involvement of MECD in that way with the case made by the plaintiffs that they understood that their funds would simply be held on deposit in Switzerland in the account of CVSSA. If the intention of the transactions was to simply hold the funds on deposit, they could have been transferred directly to the CVSSA account. The international SWIFT code system (with which we are all familiar) allows funds to be transferred in a simple and straightforward way. Similarly, there is nothing to suggest that, if the plaintiffs' plan was to hold OPT funds on deposit in Switzerland, the plaintiffs could not have set up their own account in a Swiss bank of their choice. In my view, this further undermines the plaintiffs' case that the transfer of OPT funds was motivated by a concern to hold the money on deposit in a safer location than Ireland. Given the lack of any evidence of concerns about the stability of Investec Bank, that case is inherently implausible. But the evidence of Mr. Nolan and his inability to provide any reasonable explanation for the plaintiffs' agreement to the involvement of a Dubai based entity such as MECD also undermines their case that they intended and understood that the funds remitted by MECD to the account of CVSSA in EFG Bank would be treated as funds deposited by the OPT. There must have been a reason for the interposing of MECD in the structure which the plaintiffs agreed to put in place following their interactions with Mr. Desmond and Mr. Millett in the

later part of 2012. It seems to me that the real reason is that, as the plaintiffs have very belatedly acknowledged, they were advised by Mr. Desmond that they would need to put a structure of this kind in place if they wished to be in a position to utilise the proceeds of the pension fund to settle creditors' claims against the members of the Nolan family. What is clear from Mr. Nolan's evidence is that there was huge concern about creditors' claims. The autumn 2013 meetings with Mr. Desmond coincided with demands being made by Allied Irish Banks plc. As noted previously, one of the meetings between Mr. Desmond and the Nolan family was described by Mr. Nolan as a *"crisis meeting".* Against that backdrop, it is understandable that Mr. Desmond would be asked at that meeting whether the Nolans could use their pension fund to settle creditors' claims. But there was an obvious problem if pension funds were used to pay off a claim against a beneficiary. In all probability, that would be treated by the Revenue Commissioners as pension in payment to the beneficiary and that would put the Revenue approved status of the pension fund in jeopardy. It was therefore necessary to put a structure in place that would, in some way, create a distance between the OPT funds, on the one hand, and the funds used to pay off creditors, on the other. That seems to me to be the real reason for the structure that was put in place. It is the only plausible reason for proceeding in this way. The purported concerns about banking stability do not withstand scrutiny. For the plaintiffs to be able to deal with creditors while, at the same time, seeking to keep the approved status of the OPT, they needed to put a structure in place that would create a disconnect between the OPT and the payments to creditors. This very obviously accounts for the convoluted structure involving investments being made in the first instance in MECD followed by the remittances made by MECD sometime later into the account of CVSSA or Serene. Plainly, the hope was that any subsequent payments out of the latter would not be characterised as payments made by the OPT itself.

163. This makes it all the more concerning that the plaintiffs did not address the real reason for the structure until such a late stage in the proceedings. The advice in relation to the use of the funds to settle creditors' claims was not addressed in the statement of claim or in any amendments to it until the delivery of the further amended statement of claim in the course of the trial. It was not addressed in the reply to the amended defence of Mr. Desmond notwithstanding that Mr. Desmond, in his amended defence, had set out in some detail the nature of the advice which he alleged he had given to the plaintiffs. It was also absent from the witness statements of Mr. Richard Nolan and Ms. Patricia Nolan delivered in August 2021. Most concerning of all, it was absent from the affidavit sworn by Ms. Patricia Nolan on 6th July 2017 in support of an application made by the plaintiffs for an interim injunction restraining the use of the Nemo Rangers property. The deponent of an affidavit grounding an application for such relief is required to make full and frank disclosure of all facts that could reasonably be regarded as material. The affidavit addressed the advice alleged to be given by Mr. Desmond but made no mention of the advice in relation to the use of the pension fund in settlement of creditors' claims. As noted above, I will return to this issue in the context of the evidence given by Ms. Patricia Nolan. For now, it is sufficient to note that this is a matter of serious concern to me.

164. Mr. Nolan was also unable to explain why the plaintiffs left it until very close to the trial to disclose the advice given in relation to the use of the pension fund to settle creditors' claims. However, the sequence of events strongly suggests that counsel for the Kenny defendants was correct in his contention that the plaintiffs were forced to make the disclosure as a consequence of Mr. Desmond's application for an unredacted version of the Serene bank statements. As explained in para. 36 above, that application resulted in an affidavit being sworn by Ms. Patricia Nolan on 13th December 2021 in which she revealed for the first time that the payments made to Serene had been used in the context of the settlement with Bank of Ireland.

Thereafter, in April 2022, an application was made to deliver a supplemental witness statement from Mr. Richard Nolan in which the case was made for the first time that Mr. Desmond also gave advice in relation to the use of pension funds to settle creditors' claims against the Nolan family. Given the persistent and repeated failure of the plaintiffs to reveal this element of Mr. Desmond's advice over the lengthy period which elapsed between the swearing of Ms. Nolan's first affidavit in July 2017 and her affidavit sworn in December 2021, it seems to me that counsel for the Kenny defendants is correct. The most likely explanation for the change of heart on the part of the plaintiffs is the pursuit of unredacted versions of Serene's bank statements.

The evidence of Ms. Patricia Nolan

165. In advance of the commencement of her oral testimony on Day 12, an amended witness statement was delivered on behalf of Ms. Patricia Nolan. The amendments involved the deletion of more than 30 paragraphs from her original witness statement delivered in August 2021. Much of the material in these paragraphs had been concerned with interactions said to have taken place between the plaintiffs and Mr. Desmond.

166. Ms. Nolan explained that her role within Nolan Transport (where she has worked since leaving school more than 40 years ago) is to look after human resources and insurance issues. She explained that Nolan Transport now employs more than 700 people. It operates a fleet of 400 trucks, 1,200 trailers and is involved in deliveries to locations throughout Ireland, the United Kingdom and mainland Europe. She said that the company has to deal with a large number of claims ranging from road traffic accidents to equipment damage claims and goods in transit claims. They also have to deal with thefts and a range of emergencies and interruptions to normal activities. She also stressed that each member of the family has their own area of work within the business. Elizabeth Nolan is responsible for the finance team, Richard Nolan is in sales, Raymond Nolan is involved in operations at the Irish desk, Kevin

Nolan is involved in operations at the European desk, Joan Nolan is also involved in finance, John Nolan is involved in IT and Oliver Nolan is responsible for a transport company operating in the United Kingdom known as JRT. In addition, Sally Nolan is also involved in finance. Patricia Nolan said that they have no managing director. She also explained that Ann Nolan, a solicitor, had previously participated in the business but had retired following surgery.

167. According to para. 5 of her amended witness statement (which she adopted as part of her evidence), Ms. Nolan stated that she was present at a meeting on 18th October 2012 when Mr. Desmond met with the members of the family to discuss ongoing legal matters. Ms. Nolan said that, amongst other things, Mr. Desmond recommended moving the pension monies *"which were then deposited in Investec bank in Ireland, to protect them against the expiry of the State bank deposit guarantees"*. However, in her direct evidence on Day 12, Ms. Nolan went somewhat further in relation to the advice which she said was given by Mr. Desmond at this meeting. She said:-

> *"So he came to advise us that day. We had a lot going on. We had never been in this situation, owing such an amount of money ever before in our lives. So while we had discussed other things at the meeting, he actually brought up the -- he brought up the pension and his advice to us was, he said that the pension needed to be moved, it needed to be protected and safe and he said that he could hold it as a fiduciary in Switzerland. And he did talk about the instability of the banks in Ireland at the time as well.*
>
> *Richard, at that meeting Richard asked him what about going to the Isle of Man because our father was familiar there. And he said no, that Switzerland was better. Raymond asked him could we use the pension money to pay our debts if we needed to and he said, yes, we could."*

168. Ms. Nolan also gave evidence about a meeting with Mr. Millett on 29th November 2012 at which the existing pensioneer trustee was removed and a new trustee, namely Pinnacle was appointed. Ms. Nolan stated that all of the necessary papers (which she signed) had previously been prepared by Mr. Millett. She said that she did not generally have much contact with Mr. Millett thereafter and that the person who was mainly in contact with him was Mr. Richard Nolan. Ms. Nolan was also asked about the MECD placement memorandum described earlier in para. 92 above. She said that she did not see this document at the time of the transactions in issue and she maintained that neither Mr. Millett nor Mr. Desmond gave her any explanation of the material contained in that document. She was nonetheless aware of MECD. She was asked to confirm this by the plaintiffs' counsel. Her response was:-

> *"We were. Because the pension was always going through the pension structure. It was Mr. Desmond's and Mr. Millett's pension structure and it involved MECD and CVS SA."*

169. In her direct evidence, Ms. Nolan asserted that the pension monies were not to be invested. Like Mr. Richard Nolan, she said that they were to be held on deposit in Switzerland. She said:-

> *"No, our money was going -- at the meeting Ciaran had said -- or sorry, Mr. Desmond had said that he would hold our pension money -- he could hold our money in Switzerland as a fiduciary, so we always knew our money was going through their pension structure, it was going to Switzerland, it was going through MECD in Dubai into a deposit account in a company called CVS SA, that Ciaran said -- that Mr. Desmond said he controlled, and it was in EFG Bank in Zurich and their agents were Allied Finance."*

170. Ms. Nolan was also asked about the instructions given to Investec Bank on 4th February 2013 to transfer €2,480,000 to MECD. This was an instruction that was signed by her and by her sister, Ann Nolan. Ms. Nolan said:-

> *"So, I don't actually recall signing this document. So, this document would have been brought to me within my working day, when I would have been doing accidents or drivers or the mix-match meeting, whatever I would have been doing at the moment, somebody would have found me and they would have -- it would have been said that the pensioneer trustee wants a document signed and I would have had a glance at it, a quick look at it. I knew the money was going from the pension, I knew the money was going out of the pension. I knew it was going through MECD, that's what this says. It was for 2480. The money was going out. This computated* (sic) *to be 620 per person, that's how the computation was initially. And my name was printed on the bottom of it and I would have just signed it and I would have handed it back to whoever asked me and I would have just continued what I was actually doing.*
>
> *MR. JUSTICE McDONALD: You don't have any recollection of going through those steps?*
>
> *A. No. I don't have a recollection of signing it. But I do know that's my signature."*

171. Ms. Nolan was asked about the reference on this instruction to *"Trust Investor numbers 30, 31, 32 and 33"* immediately above her signature. Her evidence was that she did not notice the reference to *"Investor"* at this time and that she would not have read down that far on the form. However, this evidence is based on how Ms. Nolan says she would normally sign a document presented to her for signature. As the following exchange makes clear, Ms. Nolan had no recollection of signing the form:-

"I would have just signed that form, handed it back and got on with whatever I was doing in the moment.

MR. JUSTICE McDONALD: Yes. Although you don't have any direct recollection of any of those documents?

A. No, I don't. But that's how I would sign forms for everybody. People would come to me regularly to sign forms and if my name is printed on the bottom I would just sign it and pass it back."

172. In her evidence, Ms. Nolan appeared to make no distinction between any of the forms or documents that happen to be presented to her for her signature in the course of her working day. I cannot accept that she adopted such a stance in respect to the transfer €2.48 million of OPT pension funds. This is especially so in circumstances where this transfer did not include Ms. Nolan's own share of the OPT funds. She was executing a document that was instructing the transfer of very substantial pension assets to the bank account in Dubai of a United Arab Emirates entity. The first sentence of the letter refers to: *"MECD (J, R, Se and N Nolan)"* who I understand must refer to either Joan or John Nolan, Raymond, Seamus and Noel Nolan. Ms. Nolan's evidence about the casual manner she would have approached the signing of a document seems to me to be out of kilter with the evidence given by her brother Richard Nolan about the concern the family had to have protections in place such as the home-made declaration of trust. It is also difficult to imagine that a trustee of a pension fund would sign a document of this kind without reading it carefully.

173. Ms. Nolan was also asked to consider the subsequent instruction given by her (together with her sisters, Ann, Elizabeth and Joan Nolan) for the transfer of €2 million from Investec to MECD on 28th May 2013. This is the instruction that asks Investec to *"reference the outgoing*

transaction as MECD (Dildar)". Ms. Nolan confirmed her signature on the instructions. She suggested that her signature would have been procured in the same way *"somebody equally would have found me and this would have been signed in my working day… I knew two million was going out because Richard would have told me, so I didn't have a problem signing it"*. Ms. Nolan denied a suggestion made in Mr. Millett's witness statement (which was subsequently never put into evidence) that she had telephoned Mr. Millett on 25th May and informed him that this transfer was going to take place. Ms. Nolan said that she did not have Mr. Millett's telephone number.

174. Ms. Nolan was also asked about a letter sent by Mr. Millett to Mann Made which is undated but which is stamped *"received 13th June 2013"*. This letter is not in evidence against the Kenny defendants. Ms. Nolan was not in a position to prove the document and no witness was called from Mann Made in relation to it. However, to the extent that the letter is against the interest of the Millett defendants, the letter is admissible against them under a well-established exception to the rule against hearsay (which is addressed in more detail in a different context below). Insofar as the letter might be relevant to the case made by the plaintiffs against Mr. Millett, the letter stated as follows:-

> *"I refer to the above, please find enclosed the following,*
>
> *Certified copy in respect of the finalisation of the transfers in respect of the Dildar purchase. The signed client application form with my company acting as the client for the Dildar SPV purchase. In respect of the movement of funds I am happy to confirm the following,*
>
> *Origin of funds is from the Oaklands Property trust, Dildar Funds will come in to CVS Holdings from CVS SA and originating from the MECD as per the flow chart, we have*

yet to conduct the finalisation of the transfer of these particular funds, once we are in receipt of contracts we will transfer funds to cover the positions. The original transactions in respect of the funds coming into the structure occurred in January 2013 we are also moving funds in respect of finalising the amounts needed today. See the certified notices sent to Investec today for further details.

The details of the beneficial owners are…

I trust that this deals with all of your outstanding requirements. I can confirm that I have also requested updated proofs of addresses for everyone's files."

175. The letter contained details of each of the members of the Nolan family with their dates of birth, their home address and their PPS numbers. Ms. Nolan confirmed that these details were all correct. She explained that, when Mr. Millett *"came on board"*, they each gave him two forms of identity including their passports. However, Ms. Nolan stressed that she never gave permission to Mr. Millett to use the family members' personal information in the manner in which it was deployed in that letter.

176. Ms. Nolan was also asked to consider the MECD *"investment application form"* which she signed together with her sister, Ann Nolan, albeit that, at this stage, the document contained a large number of blank spaces which had yet to be completed. This is the document described in para. 135 above. Ms. Nolan was asked, in the course of her direct evidence, to explain the circumstances in which the document came to be executed by her. She said that the document was signed in June 2013 after all of the transfers had been made. She gave the following evidence:-

"A. … So, after I had signed out the two million, so that was the 28th May, about two weeks after that Mr. Millett called to the office in New Ross one day and he

said that he had a document he wanted signed. I met him in the meeting room. He said it was for his files and he asked me to sign it and just leave it blank and he would fill in the details later…

He didn't go through the document or explain it, he just needed it signed.

145 Q. Why did you sign a document just in blank like that?

A. I signed it because he asked me to sign it. I trusted Mr. Millett, he had come recommended from our solicitor, Ciaran Desmond. I trusted Ciaran Desmond. Ciaran Desmond was -- Ciaran Desmond had been our family and business solicitor for, I don't know, a number of years at that time so if it was to do with Ciaran Desmond and he had recommended him, I had no problem signing it. Because I trusted them."

177. Ms. Nolan said that nothing was explained to her about the document. She said that she was just asked to sign it and that she did sign it. She said the meeting was very brief; that it was *"just an in and an out"*. She was then asked whether Mr. Desmond or Mr. Millett explained to her the nature of the series of transactions which *"you were entering into"*. Her response was: *"No, because that was their pension structure"*. She also said that she was not told that they were investing in a high risk or an illiquid fund. Counsel for the plaintiffs specifically drew Ms. Nolan's attention to the section of the form immediately above her signature on one page of the document which states: *"I/we hereby apply to invest in the investment structure…"*. Ms. Nolan's response was:-

"Yes, I signed that document that day because he asked me to sign it. I didn't read it."

178. Ms. Nolan also gave evidence about a meeting which took place at the offices of Mr. Millett on 19th January 2015 in Donnybrook. She said this meeting lasted a number of hours.

According to Ms. Nolan, Mr. Millett told herself and her brother, Richard Nolan, that the OPT money had been *"gone since March to July of 2013"*. Ms. Nolan also briefly addressed the meeting which took place subsequently in Zurich on 22nd January 2015.

179. On Day 12, Ms. Nolan was cross-examined by Mr. Millett. In the course of cross-examination, she denied that she was the managing director of Nolan Transport. She also denied that she was *"at the helm"* of Nolan Transport during the relevant events in issue in the proceedings. At a later point in the cross-examination, Mr. Millett put to Ms. Nolan a transcript of the decision of the Supreme Court in *Nolan Transport v. Halligan* [1999] 1 I.R. 128 in which Murphy J., at p. 137, described the fact that Ms. Nolan had become the chief executive and company secretary of the plaintiff and that she had accountancy experience and that she was responsible for the accounts and management of the finances of the company. Notwithstanding that this was recorded in a decision of the Supreme Court, Ms. Nolan continued to maintain that *"we are a flat structure"* but she said that *"people do put labels on us in the business".* At a slightly later point on Day 12, Mr. Millett also drew her attention to the decision of the Court of Appeal in relation to another Nolan company namely Roadteam Logistic Solutions. In the judgment of the Court of Appeal in *DPP v. Roadteam Logistic Solutions* [2016] IECA 38, Sheehan J., at para. 29, described Ms. Nolan as the managing director of the defendant in those proceedings. Notwithstanding that this was a judgment of the Court of Appeal, Ms. Nolan maintained that this description of her was not correct. She reiterated that: *"We do have a flat structure. We have family meetings and there are 13 of us in it."* She also, again, maintained that she looked after HR and insurance matters. However, when Ms. Nolan returned to the witness box on the morning of Day 14 of the trial, while under cross-examination by counsel for the Kenny defendants, she said that she had been reading the transcripts and she said that the *"the judgments are correct and I accept them ….So, the 1998 one was a worker's claim; the 2016 one referred to a 2012 case which was to do with an accident in 2007. I was a director*

at that time and I resigned in 2013. That company does not trade anymore. I'm not a director of the trading company today, nolantransport.com, and I have never been."

180. Ms. Nolan was asked by Mr. Millett to give a brief understanding of the pension arrangements that were in force around October 2012 (i.e. before the Millett defendants' involvement). Her initial response was that she did not work in the finance department. Although she acknowledged that she was a trustee, she said that she was not *"a pensions person"* and that the plaintiffs hired professional people to help them in their business. When it was put to her that she did not seem to have a good grasp of this element of the plaintiffs' business, her response was:-

> *"I look after insurance and HR so I know all about those because I do them every day. But in relation to our pension, we hire professional pensioneer trustees to advise us on it."*

181. Ms. Nolan maintained this position notwithstanding that the pension arrangements were on the basis of a self-administered pension arrangement since 1998. She said that they always relied on the pensioneer trustee. She was then asked who interfaced on the part of the family with the pensioneer trustee. Her answer was that this would be the *"finance team"*, namely her sisters, Elizabeth, Joan and Sally Nolan, none of whom gave evidence. It should also be noted that, in para. 10 of her amended witness statement, Ms. Nolan said that the family left the implementation of the transfer of their pension funds from Investec to CVSSA primarily with her brother, Richard Nolan.

182. Mr. Millett asked Ms. Nolan about an email that he had sent to Richard Nolan, Joan Nolan and Sally Nolan on 19th November 2012 which was signed *"John Millett, John Millett Independent Financial Advisors"*. This email set out information in relation to the fee structure proposed by the eighth defendant, John Millett Independent Financial Advisors, and certain other matters. However, Ms. Nolan said that she had not been aware of the email and she

reiterated that *"I would be doing HR and insurance primarily"*. Mr. Millett put it to Ms. Nolan that the arrangement *"involved the engagement of the corporate bodies, Pinnacle and John Millett Independent Financial Advisors and the implementation of existing arrangements that had been set up… which was the Oakland Property Trust and the 13 individual arrangements; is that correct?"*. Ms. Nolan responded: *"Yeah, we done that on the 29th"*.

183. Mr. Millett also put it to Ms. Nolan that no written advice was ever given by John Millett Independent Financial Advisors or any of the Millett defendants and that the advice in relation to pension arrangements came from Mr. Desmond. Ms. Nolan confirmed that she did not think that there were any written advices from the Millett defendants. She was asked to confirm that the only advice received from those defendants was in relation to administration services. Her response was that she did not *"pass the invoice"* such that she was unable to confirm that.

184. Mr. Millett also cross-examined Ms. Nolan about her evidence as to the advice given to the plaintiffs at their meeting with Mr. Desmond in October 2012. Mr. Millett noted that, in her witness statement and in her direct evidence, Ms. Nolan had stated that there was a concern about the security of the Irish banks in the period in question. The following exchange took place between Mr. Millett and Ms. Nolan in this context:-

> *"277 Q. And in your witness statement and evidence you stated there was a concern about the security of the Irish banks in the period in question, October '12, which drove your decision making; is that correct?*
>
> *A. Well, while we were at that meeting in October 2012 it was Ciaran Desmond who brought that to our attention. He said that the pension monies should be moved. He said it needed to be secure and safe. He talked about the instability of the banks in Ireland and he said he could hold it as a fiduciary in Switzerland.*

278 Q. And at paragraph 5 you state that there was a concern about the Irish banks guarantee scheme. Can you confirm that the bulk of the cash assets were in fact, in fact almost all of them were held in Barclays, which was a UK bank, and in Investec Bank UK, which is a subsidiary of a South African bank?

A. Well, when Ciaran Desmond brought the matter of the pension to our attention at the meeting, he is the one who would have known where all of our funds in the pension would have been located at that time. So we were working with his advice on that day.

279 Q. But you were a member trustee of that scheme; isn't that correct?

A. Yes. But I don't work in the finance department. Although I was a trustee -- and as I said to you, you asked me why I was a trustee, it was probably because I'm one of the older Nolans. And I signed when we were -- I signed out monies here and there for whatever it is we were doing. But I wouldn't have been into the bank accounts, I wouldn't have been looking after the day-to-day bank accounts. It was Ciaran Desmond who brought the pension to our attention on that day and he spoke of the instabilities of the banks. Now he, being our solicitor and accountant, would have had all the details of where, of what banks our money would have been in at that time. So I can't comment any more than that."

185. For the reasons previously explained in the context of similar evidence given by Mr. Richard Nolan, I cannot accept that Ms. Nolan was unaware of the instability of Irish banks prior to the October 2012 meeting with Mr. Desmond. Nor can I accept that the instability of Irish banks could in any way explain why anyone would think it advisable to move funds from Investec Bank in Ireland to an account in Switzerland through the medium of a company in the

United Arab Emirates. The explanation put forward by both Richard Nolan and Patricia Nolan for the supposed need to move funds is not credible and I reject their evidence on that issue.

186. Mr. Millett pressed Ms. Nolan to explain who dealt with all of the banking relationships in Nolan Transport. Her response was to say it was done in the finance department where her sisters, Elizabeth, Joan and Sally Nolan all work. This was a consistent theme of Ms. Nolan's evidence. Again and again, she maintained that she could not provide details because she did not work in the finance department of the company. But, as I have highlighted elsewhere, each of Elizabeth, Joan and Sally Nolan are plaintiffs in these proceedings and, even if Patricia Nolan was personally unaware of the details of OPT's banking arrangements, it is inconceivable that her three sisters were in a similar position of ignorance. I should add that, in so far as Patricia Nolan is concerned, she must have been aware that the funds were held in Investec Bank since she was a signatory of instructions to that bank in respect of at least two of the transfers to MECD.

187. Mr. Millett also cross-examined Ms. Nolan about the execution of the MECD investment application form. Ms. Nolan reiterated the evidence previously given by her that she did not read any of the pages but that she just signed it where she was asked to sign it and she said that this was all that happened in New Ross when she was attended by Mr. Millett and by her sister, Ann (who also signed the document). In the questions posed by him, Mr. Millett did not seek to contest her evidence that he had not explained the form to her. For that reason, I accept her evidence that the forms were not explained to her. However, the fact that she and her sister, Ann Nolan, signed the form in a number of places next to pre-printed material referring to investments and investors cannot be overlooked. Nor can one overlook the reference in the pre-printed form to the MECD placement memorandum. It is also necessary to keep in mind the evidence given by Mr. Richard Nolan that the forms were signed in order to legitimise the transfers. In this context, it must be kept in mind that the transfers to MECD were

the first step in the structure which Mr. Desmond advised the plaintiffs to put in place in order to achieve their goal and it is unsurprising that the parties would wish to have that step recorded in some way.

188. Mr. Millett cross-examined Ms. Nolan about the fact that, although the plaintiffs have abandoned the claim in deceit against Mr. Desmond, they continue to maintain it against Mr. Millett and the other Millett defendants. Mr. Millett brought Ms. Nolan to the terms of the insurance policy in place for the corporate Millett defendants and the exclusions under that policy in respect of liability for deceit. Mr. Millett put it to Ms. Nolan that, by maintaining a claim in deceit, the plaintiffs knew that this was likely to invalidate any contract of professional indemnity insurance. Ms. Nolan responded that she would have no knowledge of a document of this kind and would rely on *"the professional people that we would use"* to explain it to her. Having regard to her earlier evidence about her responsibility for insurance matters within Nolan Transport, I intervened, at that point, to ask Ms. Nolan was she not aware from her many years dealing with insurance claims that dishonesty and fraud are not usually covered by insurance. Ms. Nolan responded that she did not have that experience. I also asked Ms. Nolan was it not common knowledge to people who deal with insurance that claims for dishonesty and fraud are not insured. Ms. Nolan responded that she did not have insurance qualifications. I made it clear that I was not talking about people with insurance qualifications. However, Ms. Nolan continued to maintain that she did not have such knowledge or experience. Mr. Millett put it to Ms. Nolan that by maintaining a claim in deceit, the plaintiffs had deprived the Millett defendants of legal representation and he suggested to her that this was done to make sure that they could not defend themselves. Ms. Nolan rejected this suggestion.

189. In the course of her cross-examination by Mr. Millett, Ms. Nolan was also asked about why the monies which were transferred to Serene were routed through MECD. Ms. Nolan responded to say that this was part of the pension structure. I then intervened to ask Ms. Nolan

why the money went through MECD in circumstances where the signatory rights were not in place and there was a concern on the part of the plaintiffs about the lack of such rights. I asked: *"Surely you would send it direct to Serene?"*, to which Ms. Nolan responded:-

> *"I don't know. That was Richard's decision at the time. But it was always to go through MECD, that was the pension structure, always."*

190. This confirms the view that the transfers to MECD were an inherent and necessary part of the structure of the arrangements which the plaintiffs were advised by Mr. Desmond to put in place in order to achieve their goal of releasing funds to pay creditors' claims. It is particularly significant that the transfers to Serene were routed through MECD. These transfers were later used to part fund the settlement with Bank of Ireland. The difficulty from the plaintiffs' perspective in using pension money to pay off the plaintiffs' debts was that such use would likely cause problems for the plaintiffs in so far as Revenue approval of the pension arrangements were concerned. A payment by a pension fund of a debt owed by a beneficiary of that fund would likely be treated as a payment to that beneficiary directly of part of the fund. The step of first transferring funds to MECD should be seen against that backdrop.

191. Ms. Nolan was also cross-examined by Mr. Millett in relation to Serene. She said that Serene is a company associated with her late father who she said had set up a trust in the Isle of Man many years ago. Ms. Nolan said that she did not know who the beneficiaries of the trust were. She was then asked whether Serene was dealt with in her father's will. Again, she answered that she did not know. I have to say that, in light of the fact that very large sums were transmitted by CVSSA and MECD to Serene at the plaintiffs' request, it is difficult to accept that Ms. Nolan had so little knowledge about Serene. Even if Ms. Nolan's personal knowledge of Serene was as sketchy as she suggested, it is inconceivable that all of the plaintiffs were in the same state of ignorance. In this context, it is significant that no evidence was given by any

of the plaintiffs who Ms. Nolan said were familiar with financial matters namely Elizabeth, Joan and Sally Nolan.

192. The cross-examination of Ms. Nolan by counsel for the Kenny defendants commenced on Day 13. She was first cross-examined about the meeting in October 2012 between the members of the Nolan family and Mr. Desmond at the offices of Nolan Transport in New Ross. In the course of that cross-examination, she was asked about a difference of recollection between herself and her brother, Richard Nolan, in relation to what was said at that meeting. In the course of his direct evidence on Day 4 of the hearing, Richard Nolan had said that, in the course of the meeting with Mr. Desmond, his brother, Raymond Nolan, had asked Mr. Demond whether the pension funds could be used to pay the banks. Ms. Nolan said that this was not her memory of it. Her memory was that her brother, Raymond, asked could the pension fund be used to pay *"our debts"*. She did not accept that the question focused on the bank debts of Nolan Transport notwithstanding that the meeting had been arranged against the backdrop of the significant level of indebtedness owed by Nolan Transport to its bankers. This appears to be the only point of disagreement between Richard Nolan and Patricia Nolan as to what transpired at this meeting.

193. Counsel for the Kenny defendants also asked Ms. Nolan about her recollection of the proceedings taken against her and other members of the Nolan family by Bank of Ireland in December 2012. She said that she could not recall that a summary summons was issued against her in December 2012. She also said that she could not recall that an application was brought in January 2013 to admit the proceedings into the Commercial List. She further maintained that she could not recall that a hearing date was fixed for those proceedings in June 2013 and that the settlement occurred at that time. In this context, it should be noted that the court was subsequently provided with a copy of the terms of settlement executed by the parties in those proceedings on 5th June 2013. Ms. Nolan insisted that she was not involved in those

proceedings, although she acknowledged that she knew that they had been settled. According to Ms. Nolan, it was her brother, Oliver Nolan, who looked after the Bank of Ireland proceedings. Oliver Nolan was not called as a witness by the plaintiffs. Ms. Nolan contended that she did not instruct the solicitors acting in those proceedings. Ms. Nolan said that she was not aware of the detail of the settlement but she was aware that the settlement involved a sale of the debt by Bank of Ireland to her father who used a company called Larkhall for this purpose. Ms. Nolan said that the debt was still owed by the family members to Larkhall. Notwithstanding Ms. Nolan's professed lack of knowledge of the settlement and the detail of the sale of the debt, her signature appears on the agreement dealing with the novation of the Bank of Ireland loan and her solicitor, Mr. McEvoy, signed the settlement agreement on her behalf, presumably acting on her instructions and with her authority.

194. Ms. Nolan was asked by counsel for the Kenny defendants to confirm that the OPT monies transferred through MECD to Serene were used to settle the Bank of Ireland proceedings. Ms. Nolan confirmed that this was so. She claimed that this was done on the advice of Mr. Desmond. Counsel for the Kenny defendants highlighted to Ms. Nolan that this evidence was inconsistent with the evidence that she had given on Day 12 in response to a question from Mr. Millett. He had asked Ms. Nolan to confirm that the money that went to Serene was used to purchase a debt. Her answer on that occasion was *"No"*. On Day 13, she was asked by counsel for the Kenny defendants to confirm that the answer given on the previous day was incorrect. After being asked the question a number of times, Ms. Nolan eventually responded:-

> *"No. He was talking about the time that the money went to Serene. So that was in 2013. So I didn't know that Serene money was used to pay Bank of Ireland debt until after the tribunal in 2018…*

I asked my sisters about it at the time and they told me, yes, it had been used to pay some of the settlement of the Bank of Ireland and when the monies were returned to the OPT, any transactions with Serene were then cancelled."

195. When it was put to Ms. Nolan that she was being asked a simple question by Mr. Millett as to whether, as a matter of fact, the monies transferred to Serene were used to purchase a debt, her answer was: *"It was never done to purchase a debt. It went to Serene because there was a problem with the signatory rights at the time."* This is not an answer to the question asked but is a repetition of the evidence given by her brother, Richard Nolan. I have already drawn attention to the inherent contradiction in the evidence of Mr. Nolan to that effect. It does not tally with the fact that, in January 2013, the plaintiffs organised a transfer of OPT funds to MECD which resulted in €2,450,000 being credited to the account of CVSSA with EFG in Zurich. This happened notwithstanding that, according to para. 74 of Mr. Nolan's witness statement, it was not until 21st February 2013, that he understood that his signature was *"in place on the EFG Bank account".* That plainly undermines the case made by both witnesses that funds were transferred to Serene because of the absence of signatory rights. That absence did not prevent substantial sums finding their way into the CVSSA account.

196. Ms. Nolan's evidence that the transfers to Serene were undertaken because of a lack of signatory rights is also difficult to reconcile with what she had previously said on oath in her affidavit sworn in these proceedings on 13th December 2021 in which (as described further below) she expressly stated that *"the Plaintiffs' funds transferred to Serene were concerned with a process on which Mr. Desmond was the Plaintiffs' chief legal advisor. The Plaintiffs negotiated a settlement of their bank debt with Bank of Ireland. On the advices of Mr. Desmond,* ***monies were routed through Serene to achieve this debt settlement"*** (emphasis added).

197. It was put to Ms. Nolan by counsel for the Kenny defendants that the meeting in October 2012 had taken place to discuss the bank debt. He highlighted that there was a discussion at

that meeting as to whether the OPT funds could be used to settle debts, proceedings were commenced not long afterwards by Bank of Ireland against the members of the Nolan family in respect of the Bank of Ireland debt, and the monies transferred to Serene were used to purchase the debt. He asked whether, notwithstanding all of these background facts, Ms. Nolan was still asking the court to accept that she did not know at the time that this is what was intended. However, Ms. Nolan stuck to her contention that she was unaware of this fact at the time. Ms. Nolan continued to maintain that she only learned about the use of the Serene funds in January 2018. She maintained that she would not have known about it at the time because she worked in HR and insurance. However, she conceded that three of the plaintiffs knew that the moneys transferred to Serene were used to settle the proceedings namely her sisters. Elizabeth, Joan and Sally Nolan. She said that they told her about it in 2018 after the hearing before the Law Society Disciplinary Tribunal.

198. Counsel for the Kenny defendants drew Ms. Nolan's attention to the fact that there is nothing in her witness statement to explain that the funds transferred to Serene were used to settle the Bank of Ireland debt. Although her witness statement and her amended witness statement were delivered long after she said she first became aware in 2018 of the use of the Serene funds in that way, her explanation for not mentioning the issue in her witness statements was that the plaintiffs are "*only looking for the 7 million that was missing".*

199. Ms. Nolan was also asked to confirm that, in 2015, following the appointment of Quest as a trustee of the OPT, the trustees were advised that the moneys paid to Serene would have to be reimbursed by Serene to OPT. She accepted that she was aware of that advice in 2015. It was then put to her that she must have understood that the reason why the money had to be repaid by Serene was because the advice given by Mr. Desmond (i.e. the advice that the moneys could be used to repay debt) was in fact incorrect. Her response was that she did not deal with

it. She again said that: *"I don't work in the finance department"* and she said that she did not deal with it. She also said that *"It was Richard's project and he was looking at it."*

200. Ms. Nolan was also cross-examined about the Serene bank statements which the plaintiffs were directed to provide in unredacted form. In particular, attention was drawn to an affidavit sworn by her on 13th September, 2021 dealing with the plaintiffs' efforts to comply with the court order. In para. 27 of her affidavit she said:-

> *"Finally, I briefly address the purpose, as I understand it, why Mr Desmond seeks these records. I do so solely for the purpose of helping to mitigate the consequences of our inability to comply, not with any intention of requesting the court to revisit its reasons for directing production. Mr. Desmond seeks access to these documents - as I understand it - to assist him in advancing a defence of ex turpi causa. This is surprising, as the Plaintiffs' funds transferred to Serene were concerned with a process on which Mr Desmond was the Plaintiffs' chief legal advisor. The Plaintiffs negotiated a settlement of their bank debt with Bank of Ireland. On the advices of Mr Desmond, monies were routed through Serene to achieve this debt settlement. These monies were ultimately transferred to McGuire Desmond's' client account, pursuant to the advice of Mr. Desmond in the context of a transaction on which McGuire Desmond advised my family. The pension trustees subsequently objected to this use of pension funds, and the monies were restored."*

201. As noted earlier, Ms. Nolan, in that affidavit, very plainly accepted that funds were routed through Serene on the advice of Mr. Desmond to achieve the settlement of the bank debt with Bank of Ireland. It was put to Ms. Nolan that this was the first occasion in these proceedings where an admission was made that the Serene funds were used to settle the Bank of Ireland debt. Ms. Nolan accepted that this was so. It was then put to Ms. Nolan that Quest had not objected to the transfer of the funds to Serene *per se* but to the specific use of those

funds to settle the Bank of Ireland debt. Ms. Nolan confirmed that this was so. Ms. Nolan was asked why, if it was the case that she did not know about the use of the monies in this way until 2018, the affidavit had not been sworn by one of her three sisters who had contemporaneous knowledge about the use of the fund. Her response was that: *"I have always been looking after the 7 million that's missing. Myself and Richard have always been looking after that"*. In my view, that is an unconvincing explanation. It is clear from Ms. Nolan's evidence that her sisters, Elizabeth, Sally and Joan Nolan (all of whom are plaintiffs themselves) would be in a position to answer questions in relation to Serene and the settlement of debts in respect of which Patricia Nolan and Richard Nolan professed ignorance. I find it troubling that none of them was called as a witness to answer questions which, in my view, the defendants were manifestly entitled to pursue on cross-examination.

202. Counsel for the Kenny defendants then asked Ms. Nolan why, having made the admission in her affidavit sworn in December 2021, she did not thereafter amend her witness statement which had made no reference to the use of the OPT funds in that way. She was unable to answer that question.

203. Ms. Nolan was also asked about evidence that she had given to the Law Society Disciplinary Tribunal in March 2017. In the course of her evidence before that Tribunal, she was asked whether she knew anything about Richard Nolan moving money to Serene from MECD. Her response was "*no".* It was put to her by counsel for the Kenny defendants that this answer was incorrect. Ms. Nolan's responses to this line of questioning by counsel for the Kenny defendants are telling. She began by saying: *"Well, I didn't know that the money was in Serene. It was only when Richard asked me to help him in 2014 and '15 that I knew that there was money belonging to the OPT in Serene".* It is possible that she did not have contemporaneous knowledge about the transfers to Serene when they were made in 2013. However, I find it difficult to accept that Ms. Nolan could have been unaware of the source of

the money used to part fund the settlement in June 2013 of the Bank of Ireland proceedings in which she was named as a defendant. This is especially so in light of her statement in her earlier affidavit that the plaintiffs had been advised by Mr. Desmond to route money through Serene for that very purpose. Even if one could accept what Ms. Nolan says about her state of knowledge in 2013, her suggestion that she was still unaware of the facts in 2017 (when she gave evidence to the Law Society Tribunal) is simply incredible. As she acknowledged in her evidence, she was involved in 2014 and 2015 in the investigation of what went wrong. It is inconceivable that she would not have become aware of the transfers to Serene at that time. The family knew by then that, in contrast to the transfers from MECD to CVSSA, the funds transferred to Serene were unaffected. I cannot believe that this piece of vital information was not shared with all of the family at that time. Crucially, Ms. Nolan's assistance to Richard Nolan in 2014 and 2015 predated her evidence to the Law Society Tribunal. Her involvement in that process strongly suggests that she was not forthcoming to the Law Society when she told them, under oath, that she did not know anything about her brother moving OPT moneys to Serene. When counsel for the Kenny defendants pointed this out to her, she responded: *"From Serene to MECD? Well this is monies to Serene from MECD. I just knew there was money in Serene, but I didn't know where it had come from".* When counsel pressed her further to confirm that she did know it had gone from OPT to MECD and then to Serene, she accepted that this was *"always the way it was supposed to go"* but, almost immediately afterwards, she sought to qualify that by saying that it was to go to MECD and then CVSSA and then Serene. But, having regard to her involvement in the investigation in 2014 and 2015, it is inconceivable that she did not know in 2017 that some OPT money had gone to Serene. Counsel put it to her that the honest answer to have given to the Law Society Tribunal would have been *"yes".* In response, Ms. Nolan sought to revert to her position that *"this says that the money came from MECD"* and that she did not know the details and that she "*just knew there was money in*

Serene". But, given that she knew that there was money in Serene, it is not credible to think that she did not know it represented the proceeds of the transfers to MECD (at least two of which she had personally authorised). In my view, it is very clear that the answer given by her under oath to the Law Society Tribunal was incorrect and that she well knew at the time she gave that evidence that a significant element of the proceeds of the OPT transfers had been moved to Serene.

204. In the course of her cross-examination by counsel for the Kenny defendants, Ms. Nolan was also asked about her answer to a further question posed in the course of proceedings before the Law Society Tribunal where she denied that the moneys held by Serene were transferred to enable the Nolans to settle the proceedings with Bank of Ireland. Ms. Nolan's response was that she did not know at the time she gave her evidence to the Law Society Tribunal that the money had been used in this way and she did not become aware of the facts until after the hearing before that Tribunal. Counsel for the Kenny defendants suggested to Ms. Nolan that, in the hiatus between her evidence in March 1997 before the Law Society Disciplinary Tribunal and the resumption of her evidence in November of the same year, she could have sought to clarify her evidence or make enquiries in relation to the use of the Serene monies. Her response was that she remained under cross-examination during that period and therefore could not discuss the matter with anyone. It was then put to her that, in the intervening period she had sworn an affidavit in these proceedings in July 2017 grounding the application brought by the plaintiffs for an interim injunction and had obviously engaged with solicitors for that purpose. However, she rejected the suggestion that she had engaged with solicitors. She said she did not prepare the affidavit. She said *"I was just asked to get it signed with the Commissioner for Oaths".* At that point, she was corrected by counsel for the Kenny defendants that an affidavit is required to be sworn before a Commissioner for Oaths. She accepted that this was so. Despite her initial response that she just signed it, she then said that she had read the affidavit to ensure

that it was accurate and that it was truthful. She accepted that there was an obligation to make full disclosure and that this was an important part of looking for an injunction on an *ex parte* basis. At a later point in her evidence on Day 13, in answer to a question from me, Ms. Nolan acknowledged that an affidavit must be prepared by the deponent and she confirmed that she knew that this is so.

205. Counsel for the Kenny defendants drew Ms. Nolan's attention to paras. 14 and 15 of the affidavit sworn by her in July 2017 in which she addressed the advice given to the Nolan family by Mr. Desmond. In those paragraphs, she said that the advice was that their funds on deposit with banks in Ireland *"were at risk as a result of the prevailing banking and economic crisis affecting the country and … the scheduled expiry of the State bank deposit guarantee".* Ms. Nolan's attention was drawn to the fact that nothing was said by her about the advice that the OPT monies could be used to settle debts. It was put to her that full disclosure had therefore not been made in the affidavit. Her initial response was that the affidavit was *"done in 2017, so I didn't know about that until 2018".* However, counsel made clear that the focus of his question was the advice given by Mr. Desmond at the meeting in October 2012 that she attended. Her response was that the affidavit *"was only about the 7 million pounds".* It was put to her that the purpose of transferring the €7 million to Switzerland was to allow the plaintiffs to settle with Allied Irish Banks in due course. Ms. Nolan rejected that suggestion. She said *"it was always only if we needed to".* However, counsel put to Ms. Nolan that there always a strong possibility that the Nolan family members were going to have to settle with Allied Irish Banks because they were indebted to the tune of approximately €25 million to that bank. Ms. Nolan confirmed that this was correct but she also continued to make the case that the *"money was always to be on deposit in Switzerland".*

206. It was put to her that the purpose was to settle with Allied Irish Banks at the right time. But she insisted that this was not correct and she reiterated that it was not used to settle with

Allied Irish Banks. Counsel acknowledged that it had not ultimately been used in that way but he put it to Ms. Nolan that it had been the plaintiffs' intention to use it for that purpose. He also put it to Ms. Nolan that this intention should have been disclosed in her affidavit. This was denied by Ms. Nolan. She maintained that, in seeking the injunction, the plaintiffs were concerned with the property acquired by Dildar IOM and she said that this was the issue that prompted the plaintiffs to seek an injunction. However, counsel for the Kenny defendants drew Ms. Nolan's attention to what was said by her in paragraph 22 of her affidavit sworn in July 2017 where she said that the plaintiffs *"made clear at all times that they simply wanted to protect their pension funds".* It was put to her that this was clearly not accurate. She maintained that it was because the injunction was about the missing funds approximating to €7 million. She also relied upon the use of the words "*inter alia"* in para. 24 of the affidavit where she referred to *"the transfer, inter alia"* of the three sums making up the amount now claimed in these proceedings.

207. Ms. Nolan was also cross examined in relation to the statement made in her affidavit that the plaintiffs simply wished to protect their pension funds. Counsel asked her whether she was making the case that the plaintiffs needed to protect the pension funds against the instability of the banks. She said that the monies were moved for security and safekeeping. I intervened to ask her to explain why the plaintiffs were concerned about security and safekeeping. Her response was that Mr. Desmond had brought it to the plaintiffs' attention that the money should be moved. Counsel then asked her what Mr. Desmond had brought to the plaintiffs' attention that made them think there was a threat to the pension fund. Her initial response was to say that Mr. Desmond was *"our advisor at the time"* but counsel pressed her to explain why the pension fund was thought to be in danger. Her response was as follows:

"We didn't know there was any threat. He was our advisor at the time. He said, he talked about the instability of the banks and Mr. Desmond was our trusted advisor, he was our family and business solicitor. And we worked with that man and we went with his advice."

208. At that point, I asked Ms. Nolan whether she knew nothing about the instability of the banks. Her response was that *"it was only coming, about that time".* For the reasons previously explained in para. 114 above, I cannot accept that the well flagged instability of Irish banks was not known to the plaintiffs by the autumn of 2012. Nor can I accept that the plaintiffs (as a whole) did not know that the OPT funds were held with Investec Bank which was unaffected by the instability facing Irish banks. I make the same observations about Ms. Nolan herself. It was justifiably put to her by counsel for the Kenny defendants that she was a very capable business woman involved in running a very large company with significant banking needs with 700 employees running an international freight business and with a turnover at one point of approximately €60 million. She acknowledged that this was so but she maintained that she knew nothing about opening a business bank account. She said that she did not do banking every day. She yet again said that she did not work in the finance department. And she maintained that it is very difficult to open a bank account for anybody or any company at the moment. I find this explanation to be wholly unconvincing. None of it is directed towards the subject of the question put to her about her knowledge of the instability of Irish banks in autumn 2012. It appears to me to be an attempt to avoid answering the question. I cannot believe that a business person of Ms. Nolan's experience could conceivably have been unaware of the instability of the Irish banks and to have been dependent on Mr. Desmond to advise her of the issue. I therefore reject this evidence. It is simply not credible.

209. Ms. Nolan was then asked about her reference to the imminent expiry of the bank guarantee. She was asked did she know *"what guarantee that was"*. Her response was again

to say that she did not do banking every day and that she does not work in the finance department. The repeated retreat to this stonewalling response raises a significant issue in relation to Ms. Nolan's credibility as a witness. She was asked whether it referred to the guarantee of deposits up to a ceiling of €100,000. Her response was that she did not know. Given her evidence that she did not know, she was then asked whether she sought an explanation from Mr Desmond as to what he was talking about. Her response was that Mr. Desmond was the *"professional person giving us the advice"*. I cannot accept that the plaintiffs as a whole – or Ms. Nolan in particular – could be so supine or dependent in their interactions with Mr. Desmond that they simply relied on what he said without question. I had an opportunity to consider Ms. Nolan in the witness box over the course of several days. Ms. Nolan came across as a very confident and forceful person. Moreover, this element of her evidence is inconsistent with the plaintiffs' own actions. For example, if they were so reliant on Mr. Desmond, it makes no sense that they would have drafted their own declaration of trust without reference to him and produced it at the first meeting in Zurich. Indeed, the fact that they thought they needed a declaration of trust suggests that they were giving a lot of independent thought to what they considered needed to be put in place.

210. Ms. Nolan was then cross-examined about a draft statement of affairs attached to an email sent by her sister, Joan Nolan, to another sister, Sally Nolan, on 2nd November 2012. The draft statement of affairs made no reference to any interest in the OPT although it did address, with reference to *"unencumbered assets including pension funds"*, other pension assets. She was asked why there was no reference in the draft statement of affairs to her interest in the OPT. Her response was that this was a draft document. She also said she did not know the document and that she had never seen it before and that it was never signed. She was asked whether she had any idea as to why these statements of affairs were prepared in late 2012 both for her and for the other members of the family. Her response was that she did not know why

they were prepared. She was asked was it possible that they were prepared while the plaintiffs were negotiating with Bank of Ireland. Her response was that she did not know. Ms. Nolan's lack of knowledge on this issue is striking and leads me to question why Ms. Nolan was called as a witness rather than her sister, Joan Nolan. In this context, it is clear from an email sent by Joan Nolan to Mr. Desmond on 2 November 2012 that she had a role in relation to the draft statements of affairs. In the email (which forms part of the evidence as between the plaintiffs and the Kenny defendants on a *Bula/Fyffes* basis), Joan Nolan asked Mr. Desmond to call her to discuss draft statements of affairs attached to an earlier email in the same chain. The attachments are described in the heading of the email as *"BOI – Statement of Affairs _ Template"* followed by the first names of each of the members of the Nolan family. None of the attachments contain any mention of the funds held by the OPT.

211. Ms. Nolan was next asked about proceedings which the members of the Nolan family commenced against Allied Irish Banks in October 2012 in which the bank counterclaimed for payment of an amount of approximately €25 million. Ms. Nolan said that she did not know the exact figures but she confirmed that there was a claim by the bank. Her attention was drawn to the fact that these proceedings were commenced on 17th October 2012 and admitted into the Commercial List on 12th November 2012. Her attention was also drawn to the fact that all of this happened at a point in time very close to the meeting with Mr. Desmond in October 2012. It was suggested to her that, at the time of that meeting, there was a strong possibility that the plaintiffs would need to reach an accommodation with Allied Irish Banks in circumstances where the bank had a claim against them for such a significant sum as €25 million. She was reminded that the proceedings went to a hearing which started on 2nd December 2014 and ran for thirty-one days. Ms Nolan said that she was not aware of what was going on in court and that she was not involved in the hearing because *"at that time I was trying to figure out where*

was our £7m". It was pointed out to Ms Nolan that she was a plaintiff in the proceedings against the bank and that it was a *"big affair"*. She acknowledged that this was so.

212. On Day 14 of the hearing, counsel for the Kenny defendants put it to Ms Nolan that the reason why she spent so much time travelling to Mr. Desmond's office in Cork in December 2014 was precisely because the hearing of the proceedings against Allied Irish Banks had commenced on 2nd December 2014 and it was urgent to get money at that time in order to deal with the counterclaim of the bank. Ms Nolan rejected that suggestion. She acknowledged, however, that she visited Mr Desmond's office in Cork on 19th November 2014, on 1st December 2014, on 5th December 2014, on 9th December 2014, on 10th December 2014, on 15th December 2014, on 16th December 2014, on 17th December 2014, on 18th December 2014, on 19th December 2014 and 22nd December 2014. Thus, nine of these visits occurred during the currency of the hearing of the proceedings against Allied Irish Banks while the other two took place shortly before the commencement of that hearing. Ms. Nolan also acknowledged that these visits to Mr. Desmond's office involved a journey between New Ross and Cork of approximately 160 km in each direction and that it took five hours of driving each day. Nonetheless, she continued to maintain that the frequency of these visits was unconnected with the hearing of the proceedings involving Allied Irish Banks. She maintained that they simply wanted the return of their money. Counsel put it to Ms Nolan that it is not credible that the plaintiffs would have entered into an elaborate scheme to extract money from the OPT to settle bank debts and, notwithstanding this backdrop and the fact that the OPT funds had been used in the settlement with Bank of Ireland, that the plaintiffs were not attempting to obtain the monies in 2014 to settle the counterclaim of Allied Irish Bank. Ms Nolan rejected this suggestion. However, her position is untenable. The sheer number and intensity of the visits to Mr. Desmond's office in the course of the trial of the proceedings against Allied Irish Banks in December 2014 tell a different story. Ms. Nolan was plainly laying siege to Mr. Desmond in

the hope that this would somehow secure the release of funds to assist in settling the bank's claim. Any suggestion to the contrary is demonstrably implausible.

213. Counsel for the Kenny defendants next drew Ms. Nolan's attention to the MECD Investment Application Forms which she had signed in blank in June 2013 but which nonetheless contained the pre-printed statements described in para. 135 above. It was put to her that, when she signed the document in multiple places, she knew that there was some significance attaching to it. Ms Nolan rejected this. She said that Mr Millett asked her to sign it, telling her that he would fill in the details later and that she *"did what the man asked me on the day"*. She said that she did not know why Mr Millett asked her to sign the document but, because he was *"our pensioneer trustee"*, she signed the form. She stressed that the form was not explained to her. However, she acknowledged that she had signed some of the instructions to Investec Bank to transfer funds to MECD. It was then put to her by counsel for the Kenny defendants that she knew that the money was *"being taken out of the pension"* to which she responded: *"Yes"*. It was also put to her that she knew it was *"going through MECD"* and, again, she responded *"Yes"*. It was put to her that all of this was part of the *"scheme"* to which she responded: *"It was the pension structure"*. It was then suggested to her that it was part of a scheme put in place so that the OPT monies could be used to settle the debts of the Nolan family. This was rejected by Ms Nolan. She was then asked by counsel for the Kenny defendants whether she was making the case that the investment in MECD was simply a sham which had no real effect. Ms Nolan's response was to say that it was always pension money; that everyone knew it was pension money and it was always to go on deposit in EFG Bank in Zurich. Yet, when counsel asked her to confirm that she understood that she could not use the pension funds to settle debts unless it went through a certain scheme, she responded *"that was the advice from Ciaran Desmond"*. Thus, notwithstanding the plaintiffs' case that they understood that the OPT funds were to be held on trust for them in the CVSSA account in

Zurich, it is clear that they cannot have understood that the arrangement was equivalent to simply placing OPT funds on deposit in Switzerland. At minimum, they understood that arrangements had to be put in place that would ensure that any payments to be made to settle debts could not be characterised as payments from the OPT.

214. Ms. Nolan was also cross-examined about the determination made by the Law Society Disciplinary Tribunal in respect of a complaint of professional misconduct made against Mr. Desmond by one or more of the Nolan family. The complaint centred on a letter written by Mr. Desmond on 10th December 2014 addressed to Ms. Nolan which it was alleged was untrue. It was put to Ms. Nolan that the Tribunal had determined that the plaintiffs had known that the letter was untrue. The letter in question was handwritten by Mr Desmond on 10th December 2014 on the notepaper of McGuire Desmond and it stated: *"Dear Patricia, I hereby confirm that we are holding €6,927,500 in trust for and on behalf of the Family Nolan Pension Trust."* At the time the letter was written, the monies were not held in Mr. Desmond's client account. The Tribunal found: -

> *"This is a case involving very unusual circumstances. It is admitted by the Respondent solicitor that the letter was untrue. However, it is also noted that the clients in this case knew that the contents of the letter to be untrue. There are a number of mitigating factors in this case, including the considerable pressure from clients brought to bear on the Respondent solicitor. There was no evidence of premeditation on the part of the Respondent solicitor."*

215. Ms. Nolan stated that she did not agree with the finding that she knew, at the time the letter was written, that Mr. Desmond's firm was not holding the money in trust on behalf of the OPT. I do not accept that evidence. Ms. Nolan provided no explanation that could, in any way, provide a basis to think that, in December 2014, the plaintiffs could reasonably have believed that the money now claimed in these proceedings was then held by McGuire

Desmond. While it is clear that the plaintiffs (and Ms. Nolan in particular) were seeking to place considerable pressure on Mr. Desmond at this time to recover the OPT funds which they had transferred to MECD, there is nothing to support the suggestion that they believed that the proceeds were held by Mr. Desmond or his firm at that time. Only nine days later, Mr. Richard Nolan emailed Mr. Millett (as described in para. 118 above) on 19th December 2014 asking him to fully account for the whereabouts of the OPT pension fund. Not long after, on 24th December 2014 Mr. Nolan emailed Mr. Millett again in the terms set out in para. 119 above asking a series of questions which show that the plaintiffs knew that something had happened to the funds held in EFG bank. The terms of these emails are inconsistent with any belief on the part of the plaintiffs that the funds were, at that time, held by Mr. Desmond or his firm.

216. Ms. Nolan was also cross-examined about the undertaking as to damages offered by her in para. 70 of her affidavit sworn on 6th July 2017 and recorded in the subsequent order made by Gilligan J. on 26th July 2017. Ms Nolan insisted on seeing a copy of the order before answering any questions in relation to the undertaking. She was then cross-examined about the funds held by the OPT as at the time the order was made. The relevant bank statement from Rabo Direct was provided to her which confirmed that, as of the date the order was made, there was a balance of approximately €9.3m held in the account. However, within two days after the order was made, there was a withdrawal of €723,000 and over the next number of weeks, withdrawals were made on a regular basis such that, as of 31st August 2017, there was a zero balance in the account. All of that happened within four weeks from the date when the order was made. Ms Nolan was asked did she know why this was done. She said she did not know. She was asked did she know where the money went. She said she did not know. It was put to her that she is a trustee of the OPT and that she was a trustee at the time and she was also the deponent of the affidavit grounding the injunction application in which the undertaking as to damages was offered. Counsel asked her: *"But you don't know why all of this money was taken*

out of one of the bank accounts of the OPT?" to which she answered *"no".* With some justification, counsel put it to Ms Nolan, at that point, that her evidence was incomplete. She responded that it was true and correct. It was also suggested to her that she had given untruthful evidence when she denied that she knew, prior to the hearings in the Law Society, that the Bank of Ireland proceedings were settled using money that came out of the OPT and went through Serene. She disagreed. It was also put to her that she failed to tell the truth to the Law Society Disciplinary Tribunal. Again, she disagreed. It was also put to her that she did not tell the truth about why the plaintiffs were seeking repayment from Mr. Desmond in December 2014 and again this was denied by Ms. Nolan.

217. On Day 14, Mr. Millett was given liberty to resume his cross-examination of Ms. Nolan in order to deal with a number of versions of the MECD Investment Application Form. It should be recalled that Ms. Nolan had previously given evidence that she had signed this form in blank without any of the details being filled in. That said, it is clear that these forms also contained a number of pre-printed statements as previously described in para. 135 above. As the transcript of Day 14 shows, it transpires that Ms. Nolan signed a number of versions of these forms in June 2012. On Day 14, these documents were marked numbers 1 to 4 respectively by me. Ms Nolan was first asked about document No. 1 which, in contrast to the MECD application form about which she had previously given evidence, contained the name of the OPT written in by hand. There are also a number of other details on this version including the bank account details of the bank account held with Investec Bank and the *"investment amount"* of €2,480,000. The document also bears a date namely 29 January 2013. A number of signatures appear on the document at the third, fourth and fifth pages of the document.

218. Ms. Nolan confirmed that her signature appeared on the third page of the document. However, she said that the date beside it (namely 29th January, 2013) was not correct. She also confirmed that her signature appeared on the fourth page of the document next to the words

"*Signature of Investor"* and also on the fifth page of the document again next to the words *"signature of Investor".* While Ms. Nolan accepted that these were her signatures, she repeated that they were not signed on 29th January 2013 which is the date which appears on the form. She said that the forms were signed in June 2013 and that there was no date written on the document at that time. Mr. Millett confirmed that he was not disputing when the documents were signed but he suggested that the dates corresponded to *"when the transactions were agreed to make these investments".* Ms. Nolan disputed that they constituted investments and when I intervened to ask her whether the dates corresponded to the dates of the transfers from OPT, she said that she did not know. At the end of the day, I do not believe that anything turns on the date inserted on the forms. It is clear that the documents were not signed until June 2013.

219. Mr. Millett then asked Ms. Nolan to consider document No. 2 which is in similar form but had a date of 6th June, 2013 next to the relevant signatures on pages 3, 4 and 5 and related to a sum of €2 million. Ms. Nolan said that this was the transfer that *"Dildar was written on the matching withdrawal".* Ms. Nolan confirmed that her signature appeared on the document but that she did not sign it on 6th June, 2013. She said that, when she signed it, the details had not been filled in and that she signed it at some point between the middle and end of June 2013 when Mr. Millett came to New Ross. Ms. Nolan gave similar evidence in relation to her signature on the remaining pages of the document.

220. Mr. Millett then took Ms. Nolan through document No. 3. This is in similar form to document No. 1 and document No. 2 save that, on this occasion, the date of 14th February, 2013 had been filled in as had the reference to the sum of €2,480,000. Ms. Nolan gave similar evidence confirming that the signatures were hers but that the details had not been filled in on the document at the time she signed them. She again said that she signed in mid to late June 2013. Mr. Millett then took Ms. Nolan through document No. 4 which again took a similar form to documents 1 to 3 above save that, on this occasion, there is a date of 21st January, 2013

inserted next to the various signatures which appear on it. This relates to a transfer of €2,480,000. Again Ms. Nolan confirmed that her signature appears in three places on the document which she clarified was signed in late June 2013 at a time when the various blanks in the document had yet to be completed. Ms. Nolan made the point that at the time these documents were signed, Mr. Millett knew *"all of her money was in CVSSA bank account"* in Zurich and that there was *"no money in MECD".*

221. Arising out of Mr. Millett's cross examination of Ms. Nolan in relation to the documents just described, counsel for the Kenny defendants also asked a number of additional questions. Counsel asked Ms. Nolan to confirm that there were at least four application forms signed by her in blank. Counsel put it to Ms. Nolan that this was inconsistent with the evidence she had given earlier when she said that she thought she had only signed one application form. Ms. Nolan confirmed that this was correct but she explained that this was a miscalculation because she had signed the documents in blank. It was subsequently established in re-examination that document No. 3 coincides with the blank form signed by Ms. Nolan which had been addressed by her in her direct evidence. Document No. 3 is the same form but with the details now completed. This means that there were four application forms completed by Ms. Nolan in blank. This was explicitly accepted by counsel for the plaintiffs on Day 17. Counsel informed the court on that day that the plaintiffs acknowledged that they had copies of each of the four applications which had been signed in blank. This was later addressed in a supplemental affidavit of discovery sworn by Ms. Nolan on 21st June 2022 in which she said that, while she thought she had signed one form, she could now confirm that, having looked again at the documents held by the plaintiffs, they, in fact, held four separate MECD application forms.

222. In the course of re-examination, Ms. Nolan was asked by counsel for the plaintiffs whether, at the time the documents were signed by her in June 2013, any explanation was given

to her by Mr. Millett about any EFG bank loan or about any pledge. Ms. Nolan reiterated her evidence given previously that, when she signed the document in June 2013, Mr. Millett had told her that they were *"for his file and he would fill in the rest of the details later. He didn't explain anything".*

223. It is nonetheless clear from documents 1 to 4 above that Ms. Nolan and her sister Ann Nolan signed their names in fourteen places on the MECD investment application forms. On form No. 1 they signed their names immediately under the heading *"Investment details".* They also signed their names on the following page of the same form immediately next to the words *"signature of Investor"* and again on the following page next to the same words namely "*Signature of Investor".* In the case of form number 2 they signed their names on the second page immediately next to the words "*Signature of Investor".* They also signed their names on the following page next to the words "*Signature of bank account holder(s) or beneficial owner of account".* But these words appeared just eight lines beneath the heading "*INVESTMENT AMOUNT".* They also signed their names on the following page under the heading "*INVESTMENT DETAILS"* and again on the next page of the same document under the heading *"Signature of Investor*". For completeness, the reference on the form to *"bank account holder"* and *"beneficial owner of account"* relate not to an account into which the investment is to be paid but to the account of the investor from which the amount of the investment is to be withdrawn.

224. In the case of form No. 3, Ms. Nolan and her sister, Ann, signed their names on the second page next to the words *"Signature of Investor".* They also signed their name on the following page under the heading of *"INVESTMENT DETAILS"* and again on the third page of the same document next to the words "*Signature of bank account holder(s) or beneficial owner of account"* which, again, was eight lines beneath the heading *"INVESTMENT AMOUNT".* They also signed their name on the following page of that form next to the words

"Signature of Investor". In the case of form No. 4, they then signed their names next to the words *"Signature of bank account holder(s) or beneficial owner of account"* but again this appeared just eight lines beneath the heading *"INVESTMENT AMOUNT".* On the following page they signed their names under the heading *"INVESTMENT DETAILS".* On the next page they signed their names next to the words *"Signature of Investor"* and they also signed their names on the following page immediately next to the same words.

225. While Ms. Patricia Nolan claimed not to have read the documents or to have noticed the use of the words *"Investor"* or *"Investment",* it is difficult to see how someone signing forms in fourteen places in close proximity to those words would not notice the use of those words on the form. It is also significant that Ms. Ann Nolan was not called as a witness. Both Richard Nolan and Patricia Nolan sought to suggest that Ann Nolan had retired from her former practice as a solicitor on health grounds. No medical evidence was offered but Patricia Nolan, in the course of her direct evidence, said that Ann Nolan suffered from a neurological condition and that she had surgery in order to give her a better quality of life. According to Patricia Nolan, Ann Nolan gave up her work as a solicitor at some point around 2005. Thereafter, she was given an office in the Nolan transport offices in New Ross. The fact remains that there is no evidence before the court to suggest that Ms. Ann Nolan was incapable of giving evidence or incapable of understanding documents that she was asked to sign. Clearly, the plaintiffs considered her to be an appropriate person to sign documents on their behalf. Otherwise, they would not have permitted her to sign the MECD application forms in combination with her sister Patricia Nolan or to travel to Zurich in January 2013 to attend the meeting where she signed the instructions to transfer funds to Serene.

The evidence of Mr. Richard Nolan and Ms. Patricia Nolan is unreliable in a number of respects

226. For the reasons discussed above, I have come to the conclusion that the evidence of Mr. Richard Nolan and Ms. Patricia Nolan is unreliable in a number of important respects. In the first place, the original version of events given by them about the reasons for transferring the OPT funds is utterly implausible and cannot be accepted. Concerns about the instability of the Irish banks were well known by the last quarter of 2012 but the OPT funds were not held in any such bank. They were held in Investec Bank and there is no evidence to suggest that there were any concerns about its stability. I cannot accept that the plaintiffs were unaware (as Ms. Patricia Nolan at times sought to suggest) that the funds were held in Investec Bank. This is demonstrably untrue in circumstances where she signed instructions to that bank and she therefore knew in advance of the transfers that the OPT funds were held there. I also cannot accept that someone with Ms. Nolan's experience of business would not have carefully read the instruction signed by her on 4th February 2013 directing Investec Bank to make a transfer of €2,480,000 of pension funds to MECD in the United Arab Emirates. Her repeated refrain that she would sign anything that was put in front of her is impossible to reconcile either with her long business experience or, indeed, the forceful way in which she gave her evidence. She does not present as someone who would readily or meekly sign what was put in front of her.

227. It is equally impossible to accept the suggestions made by Mr. Nolan that they made no distinction between the position of Investec Bank, on the one hand, and that of Irish banks, on the other. As noted in para. 131 above, it is implausible to think that the plaintiffs could have been dependent on Mr. Desmond or Mr. Millett to point out the difference between Investec and the Irish banks. In light of the very well-known problems with Irish banks at that time, that evidence simply does not ring true.

228. The evidence of both witnesses must also be rejected in so far as both of them have sought to make the case that they were advised and always understood that the OPT funds were simply being placed on deposit on the plaintiffs' behalf in the account of CVSSA in EFG Bank in Zurich. That element of their case is completely unbelievable. As outlined in para. 162 above, their evidence is contradicted by the complex structure utilised by the plaintiffs in respect of the transfers and in particular by the existence within that structure of MECD. As outlined in paras. 159 to 161 above, I gave Mr. Nolan an opportunity to explain why the plaintiffs agreed to route funds through MECD if they believed that they were putting funds on deposit in Switzerland. I also asked him what kind of explanation they were given by Mr. Desmond for the involvement of MECD. I did not receive a satisfactory response to either of those questions. If the plaintiffs wished to place OPT funds on deposit in Switzerland, that could readily have been achieved without first transferring the funds to an entity based in the United Arab Emirates. As noted in para. 162 above, there must have been a reason for interposing MECD in this way and I cannot accept that the plaintiffs agreed to its involvement without knowing why, in the first instance, they were entrusting the Nolan family pension funds to such an entity. While Ms. Patricia Nolan accepted that MECD was part of the structure which she said had been recommended by Mr. Desmond, she, too, sought to convey the impression that she did not really understand the necessity for its involvement. I reject that evidence. It is very clear that the whole structure put in place in late 2012 and early 2013 was intentionally designed with a view to permitting the plaintiffs to utilise the proceeds of the OPT pension fund in settling the personal debts of the Nolan family members. I am of the view that, by the time the transfers to MECD were instructed by them, the plaintiffs well knew that the OPT could not pay the personal debts directly for fear that any such use would be treated by the Revenue Commissioners as pension in payment to the relevant beneficiaries. As outlined in para. 162 above, the plaintiffs needed to put a structure in place that would create a disconnect

between the OPT and the payments to be made to creditors of the beneficiaries. In other words, for the plaintiffs' plan to work, the OPT funds would have to lose their character as OPT funds and be replaced by something that did not have that character. I am convinced that the plaintiffs well knew that was the reason why this unusual and elaborate structure was put in place. The exchange between Mr. Nolan and counsel for the Kenny defendants on Day 9 (which I have quoted in para. 141 above confirms that Mr. Desmond advised them that they would need to *"move money* ***out of the pension****"* (emphasis added) if they were to proceed with their plan. It is the only rational explanation for their participation in a structure that would see OPT funds transferred first to MECD in the United Arab Emirates. It is also the only plausible explanation for the failure of the plaintiffs to come clean, until a very short time before the trial, about the real reason for the transfers both in their pleadings and in their witness statements. It also explains why the plaintiffs invented the unbelievable story about the need to move the OPT funds due to the instability of the Irish banks. The plaintiffs plainly did not want to reveal the true reason because of their concern (which I believe dates back to late 2012) that the use of the OPT funds in settlement of claims against beneficiaries would be treated by the Revenue Commissioners as pension in payment to those beneficiaries with all of the taxation consequences that flow from that.

229. I am reinforced in my view by the way in which Mr. Richard Nolan was unable to explain why the plaintiffs left it to so close before the trial to reveal the true reason for the structure. This is addressed in more detail in para. 154 above. When pressed by counsel for the Kenny defendants, Mr. Nolan offered no plausible evidence to explain why this occurred. As set out in para. 163 above, I am very concerned by the fact that both Mr. Nolan and Ms. Nolan chose to deliver witness statements in August 2021 and to put forward pleadings (for which the plaintiffs as a whole must take responsibility) which failed, until the amended statement of claim was delivered in the course of the trial, to disclose the true reason for the complex

arrangements put in place by them in late 2012 and early 2013 in relation to the OPT funds. As outlined in para. 164 above, it is likely that this would not have been revealed but for Mr. Desmond's application for an unredacted version of the Serene Bank accounts. Even after it was revealed, these witnesses persisted with their implausible and incredible story that they had been advised by Mr. Desmond to move the OPT funds because of the instability in the Irish banks and in their equally unreliable story that they believed that the OPT funds had not been invested in the MECD structure but were simply held on deposit in Switzerland. For this reason, I must also reject the argument made by counsel for the plaintiffs in closing submissions on Day 22 that the plaintiffs should, in some way, be given credit for the fact that they had applied to amend their statement of claim during the trial *"to explain the position and explain it fully"*. The reality is that, notwithstanding the amendment of their statement of claim, they continued, in their sworn testimony, with their untrue story that the instability of the Irish Banks was a significant motivating factor underlying their scheme and they continued to make the case that they were putting the OPT funds on deposit in Switzerland. Moreover, were it not for the persistence of Mr. Desmond in pursuing the unredacted version of the Serene bank statements, I believe it is very doubtful that the plaintiffs would ever have sought to amend their story either in their evidence or in their pleadings. It is particularly striking that, up to that time, the plaintiffs had doubled down in their pleadings and in their evidence on the alleged advice as to the OPT funds being at risk in Ireland. Thus, as discussed further below, Ms. Patricia Nolan swore an affidavit in July 2017 in which she chose to say nothing about the real reason for the scheme. In so far as the pleadings are concerned, each of Mr. Desmond, McGuire Desmond and Dildar Limited raised particulars of the allegation made by the plaintiffs in para. 8 of the statement of claim that Mr. Desmond had advised them that the OPT money on deposit in Ireland was *"at risk"*. In each of the responses given to those defendants, the plaintiffs chose to confine themselves to the original case made in the statement of claim. They chose to say

nothing about the real reason for the structure or the advice given to them by Mr. Desmond in that regard. They again chose to say nothing when it came to delivering a reply to Mr. Desmond's defence (in which he had explicitly alleged the terms of the advice which he contended he had given to them). Furthermore, when the statement of claim was amended in 2019, they chose to continue with the same allegation and to say nothing about the real reason for moving the OPT funds from Investec. They then chose to say nothing about it in the witness statements which they delivered in August 2021. Such witness statements are required by O. 63A, r. 22(1) to outline the essential elements of the evidence to be given. Yet, both Mr. Nolan and Ms. Nolan chose to stick to the untrue case which had been pleaded since the statement of claim was delivered in February 2018. On the occasion each of these individual steps were taken, the failure to tell the true story involved a deliberate decision on the part of the plaintiffs.

230. I also reject the evidence of Mr. Nolan and Ms. Nolan about the purpose of the transfers to Serene and the purpose of the repeated visits by Ms. Nolan to Mr. Desmond's office in November and December 2014. For the reasons discussed in para. 111 above, I do not accept that the transfers to Serene were undertaken because of the fact that the so called *"signatory rights"* had not been put in place. That explanation is unconvincing and implausible. Very significant transfers to MECD were made in the period before Mr. Nolan understood that such rights were in place. Moreover, at the meeting in Zurich on 9th January 2013, written instructions were given by the plaintiffs to make three further transfers to Serene which, in conjunction with the so called *"test transfer"* of €619,000, suggest that it was envisaged, from the outset that something of the order of €2.9 million would be transferred to Serene. As it happens, this equates, in round terms to the sums actually transferred to Serene (namely the aggregate of the so called test transfer of €619,000 and the sum of €2,477,700 transferred by MECD to Serene in February 2013). Mr. Nolan was wholly unable to explain why those instructions were given at that time. In my view, the reason is obvious. The transfers to Serene

were plainly undertaken with a view to settling with the Bank of Ireland. That was the whole purpose of putting the MECD structure in place. The timing also supports this view. The Bank of Ireland proceedings were pending and the settlement was subsequently executed in early June 2013. In giving their evidence to the contrary, both Mr. Nolan and Ms. Nolan appear to have forgotten that Ms. Nolan had previously in September 2021 (albeit at a very late stage of the proceedings) sworn that money had been routed through Serene, on Mr. Desmond's advice, in order to achieve a settlement with Bank of Ireland.

231. Similarly, I reject as untrue the evidence given by Ms. Nolan denying that her visits to Mr. Desmond in November and December 2014 were motivated by an attempt to recover the proceeds of the transfer for the purposes of settling the personal indebtedness of the Nolan family members to Allied Irish Banks. Her evidence is completely at odds with the underlying objective facts. This is addressed in detail in paras. 211 to 212 above. In short, the hearing of the Allied Irish Banks proceedings commenced on 2nd December 2014 and ran for 31 days. In those proceedings, the bank had a counterclaim against the members of the Nolan family for €25 million. During the period 19th November 2014 to 22nd December 2014, Ms. Nolan visited Mr. Desmond's office on no fewer than eleven occasions, each visit involving a 160 km stretch in each direction. That was no coincidence. Manifestly, this was done with a view to trying to recover funds to assist in dealing with the Allied Irish Banks' claim.

232. The affidavit sworn by Ms. Patricia Nolan in July 2017 provides further evidence that Ms. Nolan has been less than frank with the court. As explained in para. 205 above, Ms. Nolan, in that affidavit, said nothing at all about the true reason for the structure that was put in place and, instead, continued to promote the untrue story that the reason for moving the OPT funds from Ireland was concern that the OPT funds had been at risk due to the *"prevailing banking and economic crisis affecting the country …".* She also swore in para. 22 of the same affidavit that *"the plaintiffs made it clear at all times that they simply wanted to protect their pension*

funds". That evidence on oath was wrong. It was also misleading. As anyone who has ever sworn an affidavit must know, the deponent of the affidavit is required to tell the truth. That is fundamental. But, in an affidavit grounding an *ex parte* application for an injunction, there is a heightened obligation on the part of the deponent to make full disclosure of all material facts to the court. In my view, it is very clear that, in putting forward the false narrative described above, Ms. Nolan did not comply with that obligation. As recorded in para. 204 above, Ms. Nolan admitted that she was aware of that obligation.

233. Ms. Nolan's evidence about the manner of swearing of her July 2017 affidavit is also very concerning. As noted in para. 204 above, Ms. Nolan said that she did not prepare the affidavit sworn by her and that all she was asked to do was to have it *"signed with the Commissioner for Oaths".* I am left with the very strong impression that Ms. Nolan does not have any proper regard for the obligations that apply to the giving of evidence in court proceedings.

234. Similar issues arise in respect of both Mr. Nolan and Ms. Nolan with regard to the evidence given by them to the Law Society Disciplinary Tribunal. In the case of Ms. Nolan, it is clear, for the reasons outlined in para. 203 above, that she gave untrue evidence to the Tribunal in relation to her knowledge of the transfers to Serene. It is also clear that Mr. Nolan gave untrue evidence to the Tribunal in so far as he denied any knowledge that the money transferred to Serene had been used in part settlement of the Bank of Ireland claim and in so far as he maintained in the course of his evidence to the Tribunal that the settlement money came from *"our own resources"*. The relevant evidence given by him to the Tribunal is addressed in paras. 143 to 147 above. In response to the questions posed to him on cross-examination at the trial, Mr. Nolan insisted that he did not know until 2018 (i.e. after the hearing before the Tribunal) that the Serene money had been used in settlement of the Bank of Ireland claim against the Nolan family members. In the course of his evidence to the Tribunal, he went

so far as to characterise the suggestion that the money had been intended to be used in that way as *"absolute supposition, fiction and make-believe"*. In my view, it was Mr. Nolan who was engaged in make-believe. I cannot accept that Mr. Nolan was unaware in 2017 that the transfers to Serene were used in the settlement of the Bank of Ireland debt. I have already held that the transfers to Serene were for the purpose of settling the Bank of Ireland claim. Mr. Nolan was instrumental in arranging these transfers. Part of the money transferred to Serene was Mr. Nolan's own share of the OPT funds. He was personally a party to the Bank of Ireland proceedings. Against that backdrop, it is not credible to suggest that Mr. Nolan was unaware until 2018 that the Serene money was to be used in the settlement. Furthermore, given that approximately 50% of the settlement money came from Serene, Mr. Nolan was manifestly not telling the truth when he claimed that it had come from *"our own resources"*. At least 50% of the settlement money did not come from the personal resources of the Nolan family members. It came from the proceeds of the transfers from the OPT pension fund. There can be no doubt that this element of his evidence to the Tribunal was untrue. In my view, the approach taken by Mr. Nolan and his sister in their evidence to the Tribunal is a further example of the attempts by them to conceal the true nature of the arrangements put in place in late 2012 and early 2013 designed to wash the OPT funds through the MECD/CVSSA structure and make the proceeds available to service significant personal debt of the beneficiaries.

235. I am also deeply unimpressed by the way in which both Mr. Nolan and Ms. Nolan repeatedly suggested that they did not know much about Serene or the details of either the Bank of Ireland or Allied Irish Banks proceedings. In circumstances where the plaintiffs mandated the transfers to Serene and where each of them was personally a party to both sets of bank proceedings in which very significant debts were in issue, I cannot accept that either of these witnesses were as ignorant of those matters as they suggested in the course of their evidence. I

am also unimpressed by the extent to which they both professed ignorance of a whole range of other matters.

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

237. The judgment of Hardiman J. in the Supreme Court in *Shelly-Morris v. Bus Átha Cliath* [2003] 1 I.R. 232 provides valuable guidance in this context. He made clear that, where a plaintiff engages in deliberate falsehoods, this will undermine the overall credibility of the evidence of that plaintiff. At p. 258, Hardiman J. explained the consequences for a plaintiff who has engaged in deliberate falsehood in the following terms:

> *"... it appears to me that a plaintiff who is found to have engaged in deliberate falsehood must face the fact that a number of corollaries arise from such a finding:*
>
> *(a) the plaintiff's credibility in general, and not simply on a particular issue, is undermined to a greater or lesser degree;*
>
> *(b) in a case, or an aspect of a case, heavily dependant on the plaintiff's own account, the combined effect of the falsehoods and the consequent diminution in credibility mean that the plaintiff may have failed to discharge the onus on him or her either generally or in relation to a particular aspect of the case;*
>
> *(c) if this occurs, it is not appropriate for a court to engage in speculation or benevolent guess work in an attempt to rescue the claim, or a particular*

aspect of it, from the unsatisfactory state in which the plaintiff's falsehoods have left it."

238. Accordingly, this is the approach which I must take in making any further findings of facts in the present case. But before making those findings, I must first address the other evidence in the case. There are some aspects of the facts that depend on the evidence of other witnesses who are untainted by the findings as to unreliability made above. There are also some facts which have been agreed by both sides (principally in relation to the movements of money into and out of the CVSSA accounts at EFG Bank in Zurich).

The other evidence before the court

239. On Day 15 of the hearing, Ms. Anath Guggenheim gave evidence on behalf of the plaintiff. Ms. Guggenheim is a Swiss lawyer and she provided a report and gave evidence in relation to Swiss law with reference to a number of copy documents namely:-

(a) A copy document described as a loan agreement between EFG Bank and CVSSA. This document appears to bear the signatures of Urs Oberhansli and Monika Neumeister on 28th February, 2013 and have subsequently been signed in March 2013 by Mr. Desmond and by some other persons on behalf of CVSSA;

(b) A copy document which is described as an application to open an account by CVSSA with EFG Bank to which was annexed a document described as a *"pledge and assignment"* dated 5th September 2012 in favour of EFG Bank;

(c) A copy of an extract from the Handels Registeramt of Zurich;

(d) A copy of a letter dated 19th December 2013 from EFG Bank to CVSSA;

(e) A copy of a letter dated 7th May 2014 from EFG Bank to CVSSA; and

(f) A copy of a document described as a mandate and power of attorney dated 5th September 2019 from CVSSA to AFT under which AFT accepted the power to administer CVSSA.

240. Ms. Guggenheim dealt with these copy documents in her evidence in advance of the application subsequently made by the plaintiffs under chapter 3 of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 ("*the 2020 Act")* which is addressed further below. The Kenny defendants agreed that her evidence could be given on the basis that the admissibility of the copy documents addressed by her would be considered in the application to be made under the 2020 Act and that, if the ruling under the 2020 Act went against the plaintiffs, her evidence in relation to those documents would be disregarded.

241. Ms. Guggenheim also gave evidence that she had met with the Swiss law experts appointed by the Kenny defendants namely Mr. Arpagaus and Ms. Jecklin of Bratschi AG. Again, this evidence was given on the same basis and was subject to the ruling to be made on the admissibility of the underlying documents under the 2020 Act. In the course of her evidence, Ms. Guggenheim drew attention to the terms of agreement reached by the Swiss law experts following that meeting as follows:-

> *"As set out in the Bratschi Report, Mr Arpagaus and Ms Jecklin concur with the conclusion in the Guggenheim Report that (i) the Pledge and Assignment constitutes a valid security interest under Swiss law in favour of EFG Bank over all cash held on CVSSA's accounts with EFG, securing claims of EFG against CVSSA, including claims under the Loan Agreement and (ii) no other/additional pledge agreement or other instrument was necessary to establish such pledge. Likewise, Ms Guggenheim agrees with the statements set forth in the Bratschi Report, including for the avoidance of doubt (i) the statements regarding the 'non-availability' of the pledged cash and the release of the pledge with regard to the Transferred Amount by EFG subject to the specification under Section 3.2, as well as (ii) the non-existence of the concept of (constructive) trusts under Swiss substantive law (cf. Note 15 of the Bratschi Report)."*

242. The reference by Ms. Guggenheim to the statement in the Bratschi report with which she agrees should be read in conjunction with the report given by Mr. Arpagaus and Ms. Jecklin of Bratschi in which they said in para. 12: -

"*… We concur with the Guggenheim Report that, following the drawdown of the loan by CVSSA, which triggered the arising of secured obligations of EFG and thus the existence of the right of pledge of EFG, the funds booked to CVSSA's account with EFG were no longer freely available to CVSSA anymore. However, one should have added that, from this moment in time, the "availability" for CVSSA of any of the funds pledged in favour of EFG, was contingent upon EFG's consent, such consent being in EFG's discretion*".

243. They added in para. 13: -

"*The "non-availability" for CVSSA of the balance pledged to EFG only meant that CVSSA's claims towards EFG were constrained by EFG's right of pledge and that CVSAA, as long as such right of pledge was in existence, was unable to withdraw any cash booked to its account with EFG without EFG's consent. EFG, for its part, could at any time and in its unrestricted discretion decide, and appears to have done so (cf. annex D to the Guggenheim Report and the payment of the Transferred Amount), to waive its right of pledge over all or part of the cash booked to CVSSA's account, thus allowing CVSSA to freely dispose thereof".*

244. As noted by Ms. Guggenheim, the joint report also refers to the non-existence of the concept of a constructive trust in Swiss law. In that context, Mr. Arpagaus and Ms. Jecklin said in para. 15 of their joint report that: -

"*Whereas Switzerland is a party to the Hague Trusts Convention of 1 July 1985 since 2007 , Swiss law does not (yet8) have its own trust law, and it is – as of today – not possible to create a trust under Swiss substantive laws. 9 Accordingly, a Swiss court*

when considering potential claims of OPT towards Dildar IOM under Swiss substantive laws, could not and would not resort to the concept of a constructive trust which is unknown to Swiss substantive law".

The application under Chapter 3 of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020

245. After Ms. Guggenheim had given her evidence (which was not contested by counsel for the Kenny defendants) the plaintiffs made an application under the 2020 Act to admit into evidence the copy documents annexed to Ms. Guggenheim's report (namely the documents listed in para. 239 above). The argument in relation to that issue took up most of Day 15 of the hearing. I subsequently gave a ruling in relation to that application on Day 16. In that ruling, I drew attention to the fact that, prior to the enactment of the 2020 Act, the relevant rules in relation to the admissibility of documents in evidence in civil proceedings were as stated by Edwards J. in *Leopardstown Club Ltd. v. Templeville Developments Ltd*. [2010] IEHC 152. The approach taken by Edwards J. in that case was subsequently approved by the Supreme Court in *RAS Medical Ltd. v. RCSI* [2019] 1 I.R. 63 at p. 87. In broad terms, as the decision in the *Leopardstown* case shows, there are two separate requirements in relation to documentary evidence. First, a document must be receivable in evidence. In the absence of an admission by the opposing party, this requires that the authenticity of the document must be proved. Secondly, unless the document is admitted by the opposing party, a party seeking to rely on the contents of a document must be in a position to establish that the contents of the document are true. In practice, those requirements are frequently overcome by agreement of the parties to use what has become known as the *Bula / Fyffes* model which is particularly appropriate in respect of documents discovered by a party. Under that model, parties agree that documents should be admitted in evidence as *prima facie* evidence of the truth of their contents as against the party who created the original of the document. That was the course taken by the Kenny defendants

in these proceedings in respect of their own documents. The application by the plaintiff under the 2020 Act related to documents created by other parties, none of whom is a party to the main action between the plaintiffs and the defendants, albeit that some of the documents might well have been capable of being proved by Mr. Desmond, had he been called as a witness by the plaintiffs.

246. In my ruling on Day 16, I drew attention to the fact that, absent an order under the 2020 Act, the onus lay on the plaintiffs to prove both the receivability and admissibility of any document on which the plaintiffs needed to rely. It was in that context that the plaintiff sought to rely on the 2020 Act which provides a new basis for the admission of business records and other documents in civil proceedings. For this purpose, s. 12 of the 2020 Act defines *"business"* in very broad terms as including: -

> ". . . . *any trade, profession or other occupation carried on, whether for profit or otherwise, either within or outside the State*…"

247. In turn, s. 13 provides that: -

> "*Subject to Chapter 3 …, in civil proceedings any record in document form compiled in the ordinary course of business shall be presumed to be admissible as evidence of the truth of the fact or facts asserted in such a document where such a document complies with the requirements of this Chapter*".

248. Section 14 of the 2020 Act contains a number of conditions for the admissibility of business records. Section 14 provides as follows: -

> "(*1) Subject to this Chapter, information contained in a document shall be admissible in any civil proceedings as evidence of any fact in the document of which direct oral evidence would be admissible if the information—*
>
> *(a) was compiled in the ordinary course of a business,*

(b) was supplied by a person (whether or not he or she so compiled it and is identifiable) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with, and

(c) in the case of information in non-legible form that has been reproduced in permanent legible form, was reproduced in the course of the normal operation of the reproduction system concerned".

249. Section 14(2) makes clear that s. 14(1) shall apply whether the information was supplied directly or indirectly, but it adds the qualification that, if the information was supplied indirectly, s. 14(1) shall apply: - "*only if each person (whether or not he or she is identifiable) through whom it was supplied received it in the ordinary course of a business".*

250. There are a number of specific exceptions to the applicability of s. 14(1) but most of them are not relevant for present purposes. However, s. 14(5) is potentially relevant in that it deals with information which is not intelligible to the average person without explanation. In such circumstances, it provides that an explanation of the information is also admissible in evidence if either: -

"*(a) it is given orally by a person who is competent to do so, or*

(b) it is contained in a document and the document purports to be signed by such a person".

251. Section 14 (6) is also relevant insofar as it makes clear that Chapter 3 of the 2020 Act applies to business records in document form that originate from outside the State and it explicitly makes clear that they are admissible notwithstanding that any person who may act on behalf of such a business is not compellable to give evidence in a court in the State. Thus chapter 3 is capable of applying to the documents in issue here notwithstanding that they originate from outside the State. Furthermore, insofar as it was suggested that AFT has ceased

to exist, s. 14(7) of the 2020 Act is relevant in that it provides that "*Records of a business that has ceased to exist shall be admissible in accordance with this section*".

252. There was some debate on Day 15 about the applicability of s. 15 of the 2020 Act. The defendants argued that the plaintiffs had failed to comply with its requirements, such that they lost the ability to rely on chapter 3. In my view, that argument is misconceived. S. 15(1) provides that: -

> "*Information in a document shall not, without the leave of the court, be admissible in evidence by virtue of section 14 at a civil trial unless—*
>
> *(a) a copy of the document has been served on the other party or parties, or*
>
> *(b) not later than 21 days before the commencement of the civil trial, a notice of intention so to give the information in evidence, together with a copy of the document, is served by or on behalf of the party proposing to give it in evidence on each of the other parties to the proceedings".*

253. It was argued on behalf of the Kenny defendants that the requirements of s. 15(1) had not been met in this case in circumstances where no notice had been provided by the plaintiffs not later than 21 days before the commencement of the trial. However, that ignores the fact that the documents had been provided as part of the discovery. On that basis, the requirements of s. 15(1)(a) have been satisfied. This is confirmed by the authors of *McGrath On Evidence* (3rd Ed. 2020) who express the view that the requirements of s. 15 can be readily satisfied in cases where documents have been provided by way of discovery. According to the authors at para. 5-228: -

> "*It is important to note that notice of an intention to adduce evidence of business records is only required in advance of a hearing if copies of the documents have not already been provided. As a result, in most civil cases, no such notice will in fact be necessary. In applications and actions heard on affidavit, the business records on which*

a party seeks to rely will have been provided by way of exhibits to affidavits and, in plenary actions, they will generally have been provided by way of discovery. Therefore, it will generally only be in plenary actions in which discovery has not been made or a party seeks to rely on documents which fall outside of the categories of discovery that a specific notice under section 15(1) will be required".

254. In my view, the authors of *McGrath* are correct. In my ruling on Day 16, I therefore rejected the argument based on s. 15(1). There was further debate between the parties as to the potential application of s. 15(2) of the 2020 Act. Under s. 15(2): -"*A party to the proceedings on whom a notice has been served pursuant to subsection (1) shall not, without the leave of the court, object to the admissibility in evidence"* of the relevant document unless that party has served a notice not later that seven days before the commencement of the trial objecting to its admissibility. The plaintiffs sought to rely on the fact that no such notice of objection was served by the defendants. However, since the plaintiffs did not serve any notice under s. 15 (1)(b), it follows that s. 15(2) has no application.

255. There was also debate in the course of the hearing on Day 15 as to the import of s. 16 of the 2020 Act under which the court has given an overriding discretion to exclude material otherwise admissible in evidence pursuant to s. 14 "*if the court is of the opinion that in the interests of justice the information . . . ought not to be admitted*". As it transpired, it was not necessary for me to have regard to s. 16 in the ruling given by me on Day 16. As described below, I was able to reach a conclusion in relation to the application made on Day 15 without regard to s. 16. However, as explained further below, I subsequently had to rule on the s. 16 arguments at a later point in the hearing following a further application by the plaintiffs under the 2020 Act.

256. In fact, it was unnecessary for me to go beyond the terms of s. 18 of the 2020 Act in order to determine the application made by the plaintiffs on Day 15. Section 18 deals with the

admissibility of copies of business records. In this case, the documents which the plaintiffs sought to adduce in evidence were copies. The originals were never produced. In those circumstances, s. 18 was potentially applicable. Section 18 provides as follows: -

> "*18 (1) Where, in accordance with this Chapter, information contained in a business record in document form is admissible in evidence in civil proceedings, the information may be given in evidence, whether or not the document is still in existence, by producing a copy of the document, or of the material part of it, authenticated in such manner as the court may approve, including as to its reliability.*
>
> *(2) It is immaterial for the purposes of subsection (1) how many removes there are between the copy and the original, or by what means (which may include transmission by means of electronic communication) the copy produced or any intermediate copy was made*".

257. Having regard to the provisions of s. 18 of the 2020 Act, in order for a copy document to be admissible, two conditions must be satisfied: -

> (a) in the first place, the original of the document must be admissible under ss. 13 to 15 of the Act; and
>
> (b) it is clear from the language of s. 18(1) that the copy document must be "*authenticated in such manner as the court may approve, including as to its reliability"*.

258. There is no guidance given in s. 18 as to what form of authentication should be regarded as sufficient. The matter is left to the discretion of the court. However, I took the view that the express terms of s. 18 plainly contemplate some form of authentication. There is no power given to the court to wholly dispense with this requirement. At the time my ruling was given on Day 16, there was no case law under the 2020 Act which provided any guidance to me on what might be sufficient for the purposes of authentication of a copy document. However, I was referred to a number of cases decided under the somewhat similar provisions of s. 30 of

the Criminal Evidence Act 1992 (*"the 1992 Act"*) which, subject to certain conditions, permit the admission of copy documents into evidence and is not confined to business records. Save for the fact that it is not confined to business records, the terms of s. 30 of the 1992 Act are very similar to the terms of s. 18 of the 2020 Act. In particular, s. 30(1) of the 1992 Act provides as follows: -

> "*Where information contained in a document is admissible in evidence in criminal proceedings, the information may be given in evidence, whether or not the document is still in existence, by producing a copy of the document, or of the material part of it, authenticated in such manner as the court may approve*".

259. Section 30 of the 1992 Act has been addressed in a number of cases. For example, in *DPP v. McGrath* [2019] IEHC 236, the original statement signed by the defendant under s. 13 of the Road Traffic Act 2010 had been lost. But, evidence was given in the District Court by two members of An Garda Síochána that the original statement had been duly executed by the defendant and that the copy produced in court was a photocopy of it. The District Court judge held that the photocopy was admissible in those circumstances under s. 30 of the 1992 Act. However, a case was stated to the High Court. In the High Court, Simons J. held that s.30 plainly applied in such circumstances. The decision of Simons J. in that case was upheld on appeal (see [2020] IECA 103). A similar approach was taken in Northern Ireland in *Public Prosecution Service v. Duddy* [2009] NI 19. In that case, the respondent was charged with driving with excess alcohol. On the day of the hearing, it became apparent that the certificate of analysis from a breath test had been lost. Prosecuting counsel sought to adduce in evidence a photocopy of the original document. The magistrate refused to admit the document into evidence notwithstanding that the station sergeant testified that it was a copy of the original. Under Article 36 of the Criminal Justice (Evidence) (Northern Ireland) Order 2004, a copy of a document could be admitted into evidence where it was "*authenticated in whatever way the*

court may approve". In the Northern Ireland Court of Appeal, Kerr LCJ (as he then was) stated, at p. 27, that there was "*no sensible reason that evidence from the police officer that the document was an exact copy of that which he had completed should not be sufficient to authenticate it".*

260. It is clear that, both in *Duddy* and in *DPP v. McGrath*, there was evidence of authentication before the court in the form of oral testimony from a police officer who was able to confirm that the copy was a true copy of the original. It is unsurprising that the courts held that the statutory provision applied. In contrast, nothing was proffered by way of authentication here. However, counsel for the plaintiffs sought to rely on a decision of Kearns J. (as he then was) in *Carey v. Hussey* [2000] 2 ILRM 401. In that case, the applicant was charged with having contravened a safety order which he knew to be in force contrary to s. 1 of the Domestic Violence Act, 1996. At the trial before Kilmainham District Court, a copy of the relevant safety order made by a different judge of the District Court was proffered in evidence. Counsel for the applicant asked to inspect the document. Having noted that it was a photocopy only of the original safety order, counsel submitted that it was not admissible in evidence in photocopy form and that the only admissible evidence of the making of such an order was the production of either the original order or a duly certified copy of it. The prosecuting solicitor argued that the document spoke for itself and required no further proof. The district judge indicated that she would accept the document but further indicated that, if counsel for the applicant was unhappy and insisted upon a certified copy of the document, she would then adjourn the case to allow a certified case to be obtained. Counsel objected to the adjournment on the basis that the evidence had commenced and contended that the prosecution proofs were not in order. He applied to dismiss the complaint. However, the district judge adjourned the matter to a later date. Judicial review proceedings were commenced in the High Court in which the applicant argued that the district judge acted in excess of jurisdiction in adjourning the hearing of the

complaint in order to allow the prosecution to cure a defect in its proofs. In the course of his judgment in that case, Kearns J. rejected the suggestion that the district judge was not entitled to rely on s. 30 of the 1992 Act. Kearns J. said:

> *"It is quite apparent that modern technology has completely superseded methods of replication and authentication which were appropriate to the last century. The Criminal Evidence, 1992, seems to me to confer on a judge a very wide discretion to accept copies, be they photocopies or facsimile copies as admissible evidence in criminal proceedings.*
>
> *This section, it seems to me, confers jurisdiction on a District judge to determine the manner in which he or she shall deem a copy of a document to be duly authenticated, and in the instant case it is clear that the District judge did indicate that she was prepared to accept a photocopy as being adequate and for that reason alone the Applicant's seems to me incorrectly founded."*

261. Counsel for the plaintiffs argued, by analogy, that the copy documents mentioned by Ms. Guggenheim should similarly be treated as being duly authenticated in circumstances where there is nothing to suggest that the copies were incomplete or fabricated. He also highlighted the commentary on s. 18 by the authors of *McGrath on Evidence* who say at para. 12-51:

> *"This provision … confers a very wide discretion on a judge to accept copies, be they photocopies or otherwise, as admissible evidence. It is a matter for the judge to determine the manner in which he or she will deem a copy of a document to be duly authenticated".*

262. However, in my ruling on Day 16, I took the view that *Carey v. Hussey* must be seen by reference to its particular facts. The document in issue in that case was a court order. In my view, it is entirely understandable that a judge might be prepared to accept a photocopy of such

a document as sufficient authentication of the original. The form of such orders would be well familiar to a judge of the District Court who would undoubtedly be able to identify anything in its form or content that would raise an issue as to the authenticity of the photocopy.

263. In my ruling on Day 16, I accepted that, in the absence of any restriction imposed by statute, the court has a wide discretion. However, as I mentioned earlier, s. 18(1) clearly envisages some method of authentication. The reference to the copy document being authenticated in such manner as the court may approve cannot be treated as mere surplusage. The plain words of the statutory provision require that there must be authentication of the copy document albeit that the court is given a wide discretion as to the form of authentication that might be acceptable. As previously noted, the court is not empowered to dispense with the requirement. Counsel for the plaintiffs urged that I was at large as to what might be accepted by way of authentication. Counsel may well be correct in that submission. However, as I stressed to the parties in the course of the hearing of the application on Day 15, the court relies on counsel to assist it in reaching a determination as to what might be acceptable in any particular case. The only suggestion made by the plaintiffs was that Mr. Desmond might be called to prove the documents but subject to an express stipulation that he could not be cross-examined in relation to wider issues in the proceedings. Counsel for the plaintiffs had argued that the opposition by the defendants to the admission of the documents was purely tactical in order to bring about a situation where the plaintiffs would be constrained to call Mr. Desmond as a witness who would then be subjected to extensive cross-examination by the defendants on other wholly unrelated issues.

264. The contrary argument made by the defendants was that the plaintiffs were seeking to rely on s. 18 in order to avoid calling Mr. Desmond and thereby to deprive them of the opportunity to cross-examine him. Given his central role in the events in issue, Mr. Desmond would be in a position to address many of the gaps in the evidence before the court. The

defendants also submitted that the onus of proof was on the plaintiffs and that the problem of proof was therefore squarely the plaintiffs' own problem which they could have surmounted at an earlier stage of these proceedings by using an alternative method of proving the documents.

265. In my ruling on Day 16, I accepted that there may well be tactical considerations behind the positions adopted on all sides in respect of the application under the 2020 Act. I took the view that it would be wrong to place any limit in advance on the extent of cross-examination of Mr. Desmond should the plaintiffs decide to call him as a witness to authenticate the copy documents or otherwise to prove documents. I took that view in circumstances where the plaintiffs have made very serious allegations against Mr. Millett in these proceedings notwithstanding that they have chosen to abandon such claims against Mr. Desmond and in circumstances where a significant issue arises in the context of the Civil Liability Act, 1961 insofar as the abandonment of the claims against Mr. Desmond are concerned. Furthermore, as noted in para. 264 above, Mr. Desmond would be in a position to fill many of the gaps in the evidence before the court.

266. Ultimately, I took the view that, at this point, there was nothing before the court by way of authentication. Accordingly, I concluded that one of the express statutory requirements for the admission of copy documents had not been satisfied. I also made clear that any authentication of the copy documents in issue would have to address, as s.18(1) makes clear, the question of reliability. In that context, I indicated that, for example, there should be some evidence that the documents described as the account opening documents (as annexed in Ms. Guggenheim's report) are a complete copy of all the account opening documents that were put in place.

267. While that was sufficient to dispose of the application, I also made a number of obiter comments. Insofar as documents executed by EFG Bank are concerned, I indicated that I would be prepared to accept that they have been executed in the course of the business of bank. While

I have no direct evidence of the business carried on by EFG Bank, no one has seriously suggested that the bank does not exist and that it is not a licensed bank in Switzerland. In contrast, I indicated that, as far as documents have been executed or purported to have been executed by CVSSA, I have no direct evidence at all about its business and I had not, as of that time, been provided with any tangible basis upon which I could conclude that the statutory requirement that the information contained in documents executed by it was compiled in the ordinary course of business. I suggested that, in those circumstances, a significant issue arises in relation to whether it could be said that any documents executed solely by CVSSA could be said to be executed in the course of its business. I also observed that, in the case of the extract from the Handels Registeramt mentioned in para. 239(c) above, no indication has been given as to the origin of that document and I therefore could not be satisfied that the requirement set out in s. 14(1)(b) of the 2020 Act had been satisfied. Finally, I indicated that, in the case of the letters of 19th December, 2013 and 7th May, 2014, those documents were not intelligible on their own terms on their face. Accordingly, I suggested that, if the plaintiffs wished to rely on them, it would be necessary to utilise the provisions of s. 14(5) in order to provide further information in order to make the letters intelligible including copies of the other correspondence referred to in those letters and an explanation of the technical terms and abbreviations used in them.

The second application under the 2020 Act

268. A further application under the 2020 Act was made in the course of Day 18 of the hearing. This application was limited to two copy documents. For the purposes of this application, counsel for the plaintiffs sought to rely on additional material for the purposes of authentication of the alleged EFG loan agreement and pledge. In the first place, counsel referred to a letter written by Hayes Solicitors who are on record for EFG Bank in the third party proceedings brought by Mr. Desmond. In their letter of 22nd June, 2022, Hayes Solicitors

enclosed a letter from their client confirming that the copy loan agreement and the copy pledge and assignment appended to the Guggenheim report are true copies of the original documents which it holds on file. The letter was signed by Jason Otto who was described as head of litigations and investigations. It was also signed by David Hambrick who was described as senior litigation counsel. Attached to the letter were two documents in similar form to the first two copy documents appended to the report of Ms. Guggenheim. The first was the document described as a loan agreement on the paper of EFG Bank and the other was the pledge of assignment which, although in EFG Bank's format, was a document which purported to be issued by CVSSA. Counsel submitted that the letter ought to be sufficient to satisfy the court that the copy documents on which the plaintiffs seek to rely are true copies and that they had been appropriately authenticated. Counsel submitted that the court should have no concerns about the reliability of the documents given the terms of the letter which had been forwarded by Hayes Solicitors who are officers of the court.

269. By way of what he described as *"back-up"*, counsel for the plaintiff also sought to rely on a number of answers given by Mr. Desmond under oath to interrogatories delivered by the plaintiff and on certain references made to documents in affidavits and in the pleadings. For this purpose, counsel had prepared a document of his own in which he set out extracts from the answers given by Mr. Desmond to certain interrogatories and also extracts from the pleadings. While counsel accepted that the answers given by Mr. Desmond to the interrogatories are not evidence in the trial against the remaining defendants, he nonetheless submitted that they could be used for the purposes of authentication. Counsel relied in particular on an extract from Mr. Desmond's answer to Q.202 of the interrogatories where he was asked whether he signed a loan agreement in or about 13th March, 2013. In the document which counsel had prepared, it was recorded that Mr. Desmond had answered *"yes"* to that question. Counsel also referred to the answer given by Mr. Desmond to Q.207 where Mr. Desmond was asked whether he

executed the EFT loan agreement on or about 18th March 2013. The answer given by Mr. Desmond to that question was *"yes".* Counsel also referred to extracts from Mr. Desmond answers to Q. 208 and 210. At Q. 208, Mr. Desmond was asked whether the EFT loan agreement executed in March 2013 provided that the cash deposits of CVSSA would be pledged as collateral. In the document prepared by counsel, it was recorded that Mr. Desmond answered *"yes"* to that question. At Q. 210, Mr. Desmond was asked whether the loan agreement provided for the cash holdings of CVSSA to be pledged as part collateral for the EFT loan. Again, in the document prepared by counsel, it was recorded that Mr. Desmond had also answered *"yes"* to that question.

270. In addition to the answers to the interrogatories, counsel highlighted that, in an affidavit sworn 23rd January 2018 by Mr. Desmond grounding his application to join third parties, he stated at para. 29 that a loan sanction in the amount of US $100 million issued from EFT Bank to CVSSA in or about February 2013. Counsel also referred to the statement made in para. 36 of the third party statement of claim delivered by Mr. Desmond in November 2013 in which reference was made to the loan. In addition, counsel for the plaintiff relied on the terms of the defence delivered by EFT Bank to the third party statement of claim in which reliance was placed on the loan agreement and on its acceptance by CVSSA. Finally, counsel for the plaintiff also sought to rely on para. 53 of the witness statement of Mr. Millett (which was never put in evidence) in which Mr. Millett referred to a meeting in Zurich in January 2015 at the Glockenhof Hotel in Zurich where Mr. Millett stated that Mr. Desmond had shown him a PDF on his iPad which showed the "*pledge documents regarding the transactions… and the EFT loan agreements concerning the transactions…".* Counsel also referred to Mr. Millett's answer to question 319 of interrogatories delivered by the plaintiffs to Mr. Millett in which Mr. Millett was asked whether he, at any time prior to December 2014, explained to the plaintiffs that

monies held in the CVSSA account were pledged to EFT Bank. Mr. Millett answered: *"No, I did not know they were pledged until 23 January, 2015".*

271. It should be noted that Q. 319 of the interrogatories addressed to Mr. Millett was not among the interrogatories identified by the plaintiffs on Day 16 of the hearing when (as described further below) counsel for the plaintiffs identified the particular answers to interrogatories on which the plaintiffs proposed to rely as part of the their case for the purposes of any application the defendants might make at the conclusion of the plaintiffs' evidence.

272. Counsel for the plaintiffs submitted that all of this material provides the court with an ample basis to satisfy itself that the copy loan agreement and copy pledge were authentic and reliable copies of the originals. Counsel submitted that there was an "*air of unreality*" to the suggestion that there is no loan agreement or no pledge. While counsel acknowledged that the plaintiffs have an evidential burden to overcome, he submitted that it would be unjust to preclude the plaintiffs from relying on the copy loan agreement and pledge annexed to Ms. Guggenheim's report.

273. It should be noted that, when counsel for the plaintiffs commenced his submissions on this issue, the correspondence from Hayes solicitors and from EFG Bank had not been exhibited to any affidavit. However, over the course of the day, a short affidavit was sworn by Mr. Bernard McEvoy, the solicitor for the plaintiffs, in which he exhibited the letters in question. Mr. McEvoy's affidavit simply confirmed the receipt of the material from Hayes, solicitors at 12:49 on 22nd June 2022. It provided no narrative of any kind. Counsel for the plaintiffs indicated that the plaintiffs had sought an affidavit from an officer of EFG Bank but he said that they were told that there were *"some complications under Swiss law in swearing an affidavit for use in other proceedings".*

274. The plaintiffs' application on Day 18 was opposed by counsel for the Kenny defendants and by Mr. Millett. Counsel for the Kenny defendants commenced his submission by

highlighting the importance of these documents from the perspective of the plaintiffs. Counsel highlighted in particular that the plaintiffs rely on the documents to establish a breach of fiduciary duty by Mr. Desmond to the plaintiffs and to establish that this breach arose on 18th March 2013. Counsel also stressed that the existence of the alleged pledge as of March 2013 is relied upon by the plaintiffs for the purposes of contending that, as of 4th September 2013, the monies in the US Dollar account could not be said to be available to the plaintiffs. The significance of 4th September 2013 is that, as explained in more detail below (in the context of the evidence given by Ms. Deirdre Carwood), the main part of the purchase money for the Nemo Rangers property was paid out of the CVSSA account on 3rd September 2013. Notwithstanding that transfer, there was, as Ms. Carwood confirmed in her evidence, a sum of US$11,306,399.51 standing to the credit of CVSSA's US dollar account at EFG Bank on 5th September 2013. In other words, there was sufficient money standing in that account as of that date to cover the plaintiffs' claim. Thus, in order for the plaintiffs to show that they had suffered a loss as a consequence of the transfer of the purchase money, they wished to establish that the money in the CVSSA account was pledged to EFG Bank and was, therefore, not available to them.

275. Counsel for the Kenny defendants submitted that, accordingly, the documents in issue are extremely important and that the plaintiffs were well aware of this before the case started. Against that backdrop, counsel submitted that the letters relied upon by the plaintiffs were not sufficient evidence of authentication. Counsel submitted that first hand sworn evidence was required. Counsel made clear that, if the signatories of the letter from EFG Bank were to give evidence to authenticate the documents, the Kenny defendants would accept that. However, he also emphasised that, if the signatories came to give evidence, they would be subject to all the usual procedures in relation to the giving of evidence including cross-examination by the opposing parties. Counsel also submitted that the court should not be blind to the fact that the

plaintiffs have alleged through the evidence of Mr. Richard Nolan that, when he attended the meeting in Zurich in early 2013, attended by a representative of EFG Bank, everyone knew that the money was simply to be held on deposit and on trust for the OPT. Counsel highlighted that this is the evidence that Mr. Nolan wishes the court to accept and yet, on the other hand, he is asking the court to rely, for the purposes of authentication, on a letter from the very bank which he suggests was not entitled to assert a pledge while, at the same time, "*seeking not to have that bank give evidence, for very obvious reasons".*

276. Insofar as the plaintiffs sought to rely on answers given by Mr. Desmond in response to the interrogatories, counsel for the Kenny defendants argued that those answers are not admissible as against the Kenny defendants. He also highlighted that, up to Day 5 of the hearing, the plaintiffs were alleging that they had been the victims of fraud on the part of Mr. Desmond and that his evidence was not to be believed. Counsel highlighed that, even after the case against Mr. Desmond had been resolved, both Richard and Patricia Nolan, in the course of their evidence, continued to make allegations of fraud against Mr. Desmond. Counsel further submitted that the plaintiffs were not entitled to rely on a part of Mr. Millett's witness statement (which he suggested was in any event inadmissible in circumstances where it had not gone into evidence) for the purposes of authenticating a document. Counsel made the case that a party cannot "*cherry pick bits of witness statements or interrogatories"* for the purpose of trying to prove a discrete fact of the case.

277. Counsel for the Kenny defendants also strongly argued that, given the importance which the plaintiffs were placing on these documents, they should have taken steps at a much earlier stage of the proceedings to get the necessary evidence from Switzerland. He suggested that the plaintiffs had only sought evidence from Switzerland on Day 17 of the trial. In addition, counsel argued that the plaintiffs had a readily available means of authenticating the document

available to them in Ireland in the person of Mr. Desmond and that it was open to them to call Mr. Desmond as a witness.

278. In the course of the argument, I pointed out to counsel for the Kenny defendants that there was nothing in the judgment of Simons J. in *DPP v. McGrath* or the judgment of the Court of Appeal in the same case to suggest that authentication had to be by means of sworn evidence. Counsel responded to say that, on the facts of that case, evidence was given in court by two members of An Garda Síochána such that the question of the nature of authentication did not arise.

279. Counsel for the Kenny defendants also argued that, even if the court was willing to hold that the documents had been duly authenticated for the purposes of s. 18, they should nonetheless be excluded under s. 16. He argued that it was not in the interests of justice that a key document in the case should be proven other than by the direct evidence of a witness who can speak to it, unless there was some very good reason to explain why a relevant witness could not be called to give evidence. For example, if it had been the case that Mr. Desmond was no longer in the country and could not be located, or if EFG Bank had been dissolved and all its employees had scattered, those were matters that might weigh in the balance under s. 16. Counsel argued that the plaintiffs had left the matter to the very last moment. He said: -

> "*This is a case where the proofs, if I may respectfully say so, are all over the place from the Plaintiff's perspective and they can't be given an endless indulgence in trying to plug gaps as they go along in their proofs, particularly in a Commercial Court case where there have been witness statements. This should have been proofed by a witness statement from EFG in August 2021, then we wouldn't have any of this headache"*.

280. In response, counsel for the plaintiffs suggested that there were many reasons why it would not be palatable for the plaintiffs to have to call Mr. Desmond as a witness. He suggested that this was a reasonable position for the plaintiffs to adopt. In response, I suggested to counsel

that Mr. Desmond was a witness who would be able to assist the court in relation to many aspects of the case about which Mr. Nolan and Ms. Nolan were unable to provide answers. Counsel acknowledged that this might be so, but he observed that it was open to any party to call Mr. Desmond. With regard to the argument made on behalf of the Kenny defendants that sworn evidence was required to authenticate the documents, counsel submitted that this was fundamentally at variance with the purpose of the 2020 Act and the mischief that the Act was intended to address. He emphasised the provisions of s. 14 and he said that the purpose of the section is to permit a party who satisfies the requirements of the Act to admit documents without oral evidence. He submitted that a requirement to call oral evidence to authenticate the document "*simply flies in the face of the purpose and intention of the legislation"*. When I pointed out that authentication had taken place by means of oral evidence in the *McGrath* case and in the *Duddy* case, counsel accepted that oral evidence was undoubtedly a means of authenticating documentation, but he submitted that it was not the sole means of doing so given the wide discretion given to the court under the Act.

281. I also asked counsel for the plaintiffs whether a distinction is to be made between the loan agreement and the pledge, in that the loan agreement is clearly something that is executed by EFG Bank, but the pledge appears to have been executed solely by Allied Middle East FZC. I asked how such a document could be admitted under s. 18 in circumstances where the court knew nothing about the business of Allied Middle East FZC or CVSSA. Counsel submitted that, for the purposes of authentication, there should be no distinction made between them because the bank says that the originals of the documents are held by them on their file.

282. Insofar as s. 16 is concerned, counsel for the plaintiffs argued that it was very much in the interests of justice that the documents should be admitted in evidence. Counsel drew attention to the provisions of s. 16(2) of the 2020 Act. He argued that the loan agreement emanated from EFG Bank and that there was nothing to suggest that it was unreliable. He also

argued that it was a reasonable inference that the document is authentic particularly in circumstances where the Swiss law experts commented on it without questioning its authenticity or reliability. Thirdly, he submitted that there was no evidence of unfairness. While he acknowledged that the application was made late in the day, all of the parties including the Kenny defendants have had the documents for a very long time and have had an opportunity to consider them such that there could be no question of any unfairness now if the documents were *"simply formally admitted in accordance with the legislation"*.

283. In circumstances where counsel for the plaintiffs had gone beyond merely responding to the submissions made on behalf of the Kenny defendants, counsel for those defendants made a further submission. This concentrated on the provisions of s. 16(2)(c) of the 2020 Act which is concerned with whether the admission or exclusion of a document "*will result in unfairness to any other party…"*. Counsel for the Kenny defendants submitted that there would be no risk of injustice if Mr. Desmond was required to give evidence. He argued that: -

> "*Actually the prince would attend the play. And if the Plaintiffs have to have or attempt to run a case with all the evidential gaps that they have and studiously avoid calling the person who put it altogether for them, who gave the advice, well that was not in the interest of justice that he be excluded at the election of the Plaintiffs"*.

284. I interjected at that point to reiterate what counsel for the plaintiffs had suggested earlier namely that the Kenny defendants or Mr. Millett could equally call Mr. Desmond. In response, counsel for the Kenny defendants submitted that, in contrast to the plaintiffs, the defendants do not bear any burden of proof in the case. He made the point that the plaintiffs are seeking a charge of up to €2.8 million on his clients' land. He argued that they have to prove their case and any evidential gaps in the plaintiffs' proofs are a matter for them.

285. On Day 19, I gave a ruling on the plaintiffs' application under the 2020 Act. In commencing that ruling, I made clear that I intended to deal with the matter in more detail in

this judgment and that the ruling should be taken as no more than a fairly broad outline of my reasons for the decision reached on foot of that application. I indicated that, as previously outlined in my ruling on Day 16, there are two conditions that must be met where s. 18 is invoked. The first is that the copy documents must be authenticated in a manner approved by the court and secondly, the information contained in the documents must be admissible in accordance with Chapter 3 of the 2020 Act. Insofar as the first of those requirements is concerned, I indicated that there is no doubt that the court is given a very wide discretion as to the manner of authentication that might be employed. I expressed the view that, in most cases, the court at trial would expect that authentication would be effected by the giving of some evidence by an appropriate witness to show that the document purporting to be a copy can reliably be treated as a true copy of the original. That is how authentication took place both in *DPP v. McGrath* and in *Duddy.* However, I did not exclude the possibility that there might be other ways of authenticating a copy document. Everything would depend on the circumstances. In cases where the document is of major importance in the proceedings, I believe that a court would be concerned to ensure that credible evidence is given that the copy document is a true copy of the original. On the other hand, I can readily see that, in the case of documents of secondary importance, a court might well be prepared to proceed on the basis of something less than oral evidence. In my ruling, I did not express any concluded view on that issue. It was unnecessary to do so in circumstances where I concluded that the documents should be excluded under s. 16 of the 2020 Act. However, I did indicate that the affidavit of Mr. McEvoy was, in my view, in altogether too terse terms to constitute appropriate authentication. I highlighted that the affidavit provided no explanation of the steps taken by the deponent to secure that the copy documents in question are in fact true copies of the originals. Nor were any details given about the underlying business of any of the parties to the documents in question.

286. In my ruling, I drew attention to the fact that the plaintiffs, notwithstanding their abandonment of a similar claim against Mr Desmond, have chosen to pursue a claim in fraud and deceit against Mr Millett which, on the scale of seriousness of claims that can be advanced in civil proceedings, is at the very apex of that scale. If successful, the claim is capable of exposing Mr Millett not only to a very serious monetary liability but also to the ruin of his career as a pension and financial adviser. The stakes in these proceedings are, accordingly, extraordinarily high. I also indicated that it must be borne in mind that the alleged agreement by CVSSA to pledge the monies held in its account with EFG Bank is a key element of the plaintiffs' claim. Both Mr Millett and the Kenny defendants have pleaded that they are strangers to the circumstances in which any pledging of funds took place. In my ruling, I indicated that, on the basis of the evidence heard by the court up to that point, it appeared to be the case that it was Mr Desmond who was responsible for the opening of the account of CVSSA with EFG Bank in Zurich and I highlighted that the plaintiffs have expressly made the case in their evidence that it was he who had the relevant connection with that bank in Switzerland.

287. I then proceeded to consider the provisions of s.16 of the 2020 Act. Section 16(1) provides as follows: -

> *"(1) In any civil proceedings, information or any part thereof that is admissible in evidence by virtue of section 14 shall not be admitted if the court is of the opinion that in the interests of justice the information or that part ought not to be admitted".*

288. Section 16(2) provides guidance as to the approach to be taken by the court in considering that issue. Insofar as relevant, s.16(2) provides as follows: -

> *"In considering whether in the interests of justice all or any part of such information ought not to be admitted in evidence the court shall have regard to all the circumstances, including –*
>
> *(a) …*

(b)…

(c) any risk, having regard in particular to whether it is likely to be possible to controvert the information where the person who supplied it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to any other party to the civil proceedings or, if there is more than one, to any of them".

289. In my ruling, I indicated that s.16(2)(c) identifies one circumstance in which there is a risk of unfairness namely where it is likely that it would not be possible for the opposing party to controvert the information where the person who supplied the document (in this case EFG Bank) does not attend the hearing. Given that the defendants' case is that they are strangers to the alleged agreement to pledge the funds held by CVSSA and given the evidence which the court had heard from the plaintiffs as to Mr Desmond's leading role in dealing with EFG Bank, the other defendants are not likely to be able to controvert the documents on which the plaintiffs seek to rely. As against that, I bore in mind that, given the nature of the documents, it might be said that this inability to controvert the documents is to be expected. On that basis, it could be argued that no prejudice or unfairness could be said to be suffered by the defendants. However, I reached the conclusion that there was a very real prejudice to the defendants (and to the Millett defendants in particular) if the copy documents were admitted in the manner proposed by the plaintiffs. In that context, I drew attention to the full terms of the answers given by Mr Desmond to the interrogatories on which the plaintiffs relied for the purposes of this application. In particular, I drew attention to the answers given by Mr Desmond to questions 195 and 210. At question 195, Mr Desmond was asked whether the facility letter issued by EFG Bank in or about 18th February 2013 indicated that the CVSSA deposits in EFG Bank would be used as part collateral for the EFG loan. In his response sworn on 6th August 2020, it is true that, as outlined in counsel's note, Mr Desmond commenced his answer with the word "*yes*". However,

crucially, the answer did not stop there. The balance of Mr Desmond's answer is potentially very important. This was not recorded in the document submitted by counsel for the plaintiff. The full answer given by Mr Desmond is as follows: - *"Yes, the facility was accepted by CVSSA on the basis that the deposits were not at risk".*

290. It should be noted that, although not mentioned in my ruling on Day 19, the answer given by Mr Desmond to interrogatory number 196 is in very similar terms. Question 196 had asked Mr Desmond whether EFG Bank had indicated since October 2012 that CVSSA would have to pledge $15m in cash to EFG to proceed with the EFG loans. Mr Desmond answered: *"Yes in circumstances in which the Second Defendant was assured by EFG that the deposit was not at risk".* It will be recalled that, in the note prepared by counsel for the plaintiffs, only the extract *"yes"* was included; the balance of the answer was not set out.

291. In my ruling on Day 19, I also referred to the answer given by Mr Desmond to question 210 of the interrogatories. By that question, Mr Desmond was asked whether the loan agreement provided for the cash holdings of CVSSA to be pledged as part collateral for the EFG Bank loans. In the extract from his answer contained in the document submitted by counsel for the plaintiffs, the answer commences with the word *"yes"*. However, the remainder of the answer was not given in that document. The full answer contains an important qualification. The full answer is as follows: *"Yes but funds were drawn on the basis that cash holdings in the account were not at risk".*

292. Having regard to those answers, I indicated in my ruling that, if an EFG Bank witness or a CVSSA witness or indeed Mr Desmond were called to prove the documents, the defendants would have the opportunity to explore that issue with them and in particular to probe whether, for example, the documents represent the whole of the agreement between EFG Bank and CVSSA or whether there was any conditionality to the pledge as suggested by Mr Desmond in response to the interrogatories discussed above.

293. In my ruling, I stressed that the issue of fairness could not be considered by reference to the position of one side alone. The position of both sides must be taken into account. It might be said, for example, that the defendants could equally call Mr. Desmond or an EFG Bank witness to address the question as to the completeness of the agreement between EFG Bank and CVSSA. However, in that context, I had to keep in mind that the burden of proof lies on the plaintiffs and I expressed the view that it would reverse that onus of proof were I to leave it to the defendants to call the relevant witnesses. To approach the matter in that way would unduly favour the position of the plaintiffs. I would add that, if the defendants were forced to call a witness from EFG Bank, they would face the same problem as the plaintiffs in trying to secure the evidence of such a witness. Even in the unlikely event that they were able to overcome that difficulty, the defendants, if they were to call a witness from EFG Bank, would lose the ability to probe the evidence of that witness through cross-examination. The defendants would also lose the ability to cross-examine Mr. Desmond were they to call him as a witness.

294. In those circumstances, it seemed to me that there would be an unfairness to the defendants and that the unfairness to the defendants would be greater than any unfairness that might be suffered by the plaintiffs. In expressing that view, I had regard to the fact that this is not a case where, for example, as counsel for the Kenny defendants had suggested on the previous day, Mr Desmond had died or emigrated to Brazil or could not be located or where EFG Bank had been dissolved or where, for some other reason, it was impossible for the plaintiffs to get any evidence from any of those parties under any of the normal methods by which evidence could be obtained from abroad. There are well established processes which can be followed in order to obtain evidence from a foreign witness who is unwilling to travel to Ireland for the purposes of giving evidence. What is very striking here is that the plaintiffs do not appear to have given any sufficient thought to the question of proof in advance of the trial. Remarkably, the only correspondence produced to the court dealing with proof of documents

dates from 19th April 2022 just two weeks prior to the commencement of the trial. Given that these proceedings were commenced as long ago as July 2017 and given that the plaintiffs' witness statements were furnished in August 2021, it is wholly unsatisfactory that the plaintiffs would leave it to the eleventh hour to pursue questions of proof of documents. Parties to proceedings in the Commercial List are expected to be pro-active in addressing issues of this kind. No explanation has been forthcoming in this case for the very lax way in which the plaintiffs approached the question of proof of documents.

295. Having ruled that the copy loan agreement and pledge are not admissible in evidence under the 2020 Act, the evidence of Ms. Guggenheim is largely irrelevant save to the extent that it makes clear that the concept of a constructive trust is not a concept that is known under Swiss law. I must exclude her evidence in relation to the loan agreement and the pledge as the plaintiffs have failed to prove those documents.

296. The evidence of a number of other witnesses remains to be considered and it is to that evidence that I now turn.

The evidence of Mr Keith Morris in relation to the extraction of text messages from what purported to be Mr. Desmond's iPhone

297. Mr Keith Morris was called as a witness by the plaintiffs on Day 16 of the hearing to prove text messages exchanged between Mr. Desmond and Mr. Millett which the plaintiffs say had been extracted from Mr. Desmond's iPhone. They say that Mr. Desmond voluntarily handed the iPhone over to them in the course of a meeting in January 2015. This was an issue of significant controversy between Mr. Millett and the plaintiffs. Mr. Millett vehemently opposed the admission of these texts in evidence. For that reason, it will be necessary to address this aspect of the case in some detail. As explained below, the circumstances surrounding this aspect of the case are not straightforward.

298. Mr. Morris is a security operations centre manager employed by Ward Solutions Limited (*"Ward Solutions"*). Mr. Morris has a number of qualifications within the field of forensic digital analysis. In that context, he is a certified information security manager, a certified information systems security professional and a Cisco certified network associate. Mr. Morris explained that Ward Solutions were engaged by Nolan Transport in May 2019 to extract message records from an iPhone device using Encase Mobile Investigator software. It should be noted that anyone reading his report or listening to his direct evidence would be under the impression that Mr. Morris had extracted the message records directly from Mr. Desmond's iPhone. Indeed, it became clear that this was Mr. Morris's understanding when he compiled his report in 2019. However, as explained in more detail below, it subsequently transpired that, in fact, the mobile device delivered to him was not the original iPhone held by Mr. Desmond but what the plaintiffs said was a copy of the iPhone they had made in January 2015. That only became clear at the conclusion of Mr Morris' evidence. I do not believe that Mr. Morris is personally to blame for this. At the conclusion of his evidence, it became clear that Ward Solutions only became aware on 15th June 2022 (i.e. two days before Mr. Morris gave evidence on Day 16) that the iPhone examined by them was not Mr Desmond's iPhone but a copy of it derived from a download made by Mr. John Nolan of the text messages stored on Mr. Desmond's phone. That information was not forthcoming as a consequence of any question posed by counsel for the plaintiffs but only emerged in response to a question asked by me at the conclusion of his evidence. I have to say that it is very concerning the evidence should unfold in that way. It is even more concerning that the position was not immediately corrected in response to a question asked by me in the course of the direct evidence of Mr. Morris. Following an issue raised by Mr. Millett, I interjected to say that I understood from the evidence previously given in the course of the trial, that the plaintiffs had copied Mr. Desmond's phone but they had given it back to him and I remarked that I had heard no evidence that the original

of Mr. Desmond's phone had subsequently been returned by him to allow the investigation by Mr. Morris to be carried out. In response to this interjection, counsel for the plaintiffs took Mr. Morris to the appendices to his report which contained photographs of an iPhone displaying Mr. Desmond's name. Counsel then took Mr. Morris to a further appendix to his report which outlined the chain of custody of the phone from the moment it was delivered to Ward Solutions in May 2019 by Richard Nolan to the moment it was handed to Mr. Morris. Nothing at all was said to suggest that the phone reviewed by Mr. Morris was not the original iPhone owned by Mr. Desmond. Thus, far from clarifying the true position, this compounded the impression that the phone provided to Ward Solutions was the original iPhone owned by Mr. Desmond.

299. A further issue of concern arises from the representation made by Mr. Richard Nolan to Ward Solutions in engaging their services to the effect that Nolan Transport was the owner of the intellectual property rights in the data contained on the phone delivered to Ward Solutions and that all data subjects had given their valid consent to the transfer of the data to Ward Solutions and to the processing of the data by Ward Solutions. That is manifestly not the case. The text messages in question plainly contain large amounts of personal data and there is nothing to suggest that all (or any) of the data subjects ever consented to the use of their data in that way. I should make clear that this is not an issue that emerged during the trial. It emerged in the course of my review of the detail contained in the report of Mr. Morris while preparing this judgment. At pp. 1347-1350 of the appendices to the report, Mr. Morris appends the terms of engagement of Ward Solutions which were agreed in writing with Mr. Richard Nolan on 24th May 2019. By those terms of engagement, Mr. Nolan confirmed in writing that he had read and understood the agreement. I find it very difficult to understand how Mr. Richard Nolan could have considered it to be appropriate to make baseless representations of that kind but, since this is not a matter that was put to Mr. Nolan in the course of the hearing, I do not believe that I can take these representations into account in my decision on the issues. But it is a matter

of concern that Ward Solutions were retained on what appears to be a manifestly false premise and I wish to make it clear that, in my view, it is important that, in cases where parties are legally represented, the retention of experts should be done through lawyers who should, in turn, ensure that the gathering of evidence is done in a proper and lawful way. I glean from the way in which the terms of engagement were executed by Mr. Nolan personally and from the way in which the evidence unfolded that Ward Solutions must have been retained directly by Nolan Transport rather than by the plaintiffs' solicitors.

300. In so far as his investigation is concerned, Mr Morris explained that he was personally involved in extracting the information from the phone provided to Ward Solutions by the plaintiffs. He also explained that his investigation was carried out in accordance with the principles adopted by the Association of Chief Police Officers (*"ACPO"*). He referred in particular to four of the ACPO principles. For present purposes, it is sufficient to note that, by reference to principle 3, an audit trail or other record of all processes used by an investigator must be created and preserved and, further, that an independent third party must be able to examine those processes and achieve the same result. Mr. Morris confirmed that he derived the information on the iPhone examined by him from the phone itself rather than from the SIM card. But he did rely on the SIM card to explain that, in his view, the material examined by him could not have been modified after the last update recorded on the SIM card which was 20th August 2014 at 8.05a.m.

301. In the report of his investigation, Mr. Morris said that he first set the iPhone in flight mode *"to avoid evidence tampering".* He then said that he used EnCase Mobile Investigator (version 8.08) software to extract the material from the phone and export it to Ward Solutions' computer. He explained that this software is the industry standard software that enables forensic acquisition and analysis of material of this kind. He also explained that, as part of the process, a Tableau Forensic Disc Duplicator TD1 is used to forensically copy hard drives by

creating a bit-level copy of the material. Mr. Morris said that the duplicator ensures that there is no tampering of the evidence in transit from the phone to Ward Solutions' work station/computer.

302. Mr. Morris stressed that this process ensures that a report can be generated that will produce *"check sums"* for both the original and the copied material. He explained that *"when you acquire evidence using this particular forensic disc duplicator, … it produces a number. So, once you actually acquire the evidence and you compare that with the original … that check sum will be the same as the original … so there will be no doubt that the integrity of the data has not been compromised in any way, shape or form."* In response to a question from me seeking further clarification, he added: *"So, if you acquire … evidence using a computer … you want to make sure that particular check sum remains the same on both systems. So, if that number changes in any way, shape or form, moving from one electronic device to another … that will mean that the data itself has changed in some way, shape or form. Although if it is the case that, when you have a particular check sum … assigned to a file that hasn't changed, that verifies the integrity of the data."* Mr. Morris emphasised that this method confirms the integrity of the data.

303. As noted above, Mr. Morris also identified a number of photographs of the phone in question including a photograph at p.1342 of his report which shows that the name of the phone is *"Cdesmond's iPhone"*. On the following page, there is a photograph of the *"iCloud"* page on the phone which again identifies Mr. Desmond. Mr. Morris explained that these photographs were taken by a colleague, Mr. Declan Timmons, when the device was produced to Ward Solutions by Mr. Richard Nolan. In turn, Mr. Morris suggested that Mr. Timmons had subsequently handed over the device to a different colleague Mr. Antonio Stano who then asked Mr. Morris to extract the data from the device. At this point, it became clear that Mr Morris was not in a position to give direct evidence of the steps taken either by Mr. Timmons or by

Mr. Stano. Mr. Millett objected that he was putting the plaintiff on proof of the chain of custody. I nonetheless permitted Mr. Morris to continue giving evidence but made clear that this was on a conditional basis and that the gaps in the evidence would need to be addressed. Mr. Morris then gave evidence of a number of iPhone messages or text messages which he had extracted from the copy iPhone examined by him. These are all set out extensively in his report. In each case, he also identified the mobile numbers of the senders of the text messages received by that phone. Mr. Morris gave evidence that the messages extracted by him could not have been tampered with. He expressed the view that the only way in which messages could be interfered with was by deleting the messages from the phone. For the reasons previously discussed, his reference to the phone could only be construed as a reference to the phone handed over to Ward Solutions. Mr. Morris also expressed the view that he was satisfied that the integrity of the information that was contained in that phone is accurately reflected in his report. He reiterated that evidence on re-examination saying *"It is very unlikely and not plausible … that … messages being sent from phone numbers to phone numbers, to be modified, based on the security controls* ***on an iPhone****"* (my emphasis). Again, that evidence can only be read as relevant to the phone examined by Ward Solutions and it can only be read in respect of data residing on an iPhone. Mr. Morris's evidence did not address the risk of tampering to material that is downloaded from an iPhone to a computer.

304. Under cross-examination by Mr. Millett, Mr. Morris explained that, at the time his report was prepared, he was unaware of the circumstances in which the plaintiffs came to have possession of the iPhone entrusted to Ward Solutions. He was not aware that Patricia Nolan had told the Law Society Disciplinary Tribunal that the phone had been taken from Mr Desmond in 2015 and had been returned to him. He was asked by Mr. Millett whether he was aware that there was a *"significant matter of contention"* between the plaintiffs and Mr. Desmond as to how the latter's phone was obtained by the plaintiffs. Mr. Morris answered that

he was *"made aware of this on 15th June 2022".* I then asked Mr. Morris what he had been told by the plaintiffs in relation to the phone. He answered *"We were simply, so as part of our engagement we were informed that there was a litigation case. I was provided no further details. We were provided with the phone and our job was to acquire that phone and then pull, extract the information from that phone. Other than that, where the phone came from or the background to that phone, that was not part of the engagement. I was not informed of that."*

305. Mr. Morris also confirmed that he had no information as to what happened to the phone examined by him from the time the iPhone was taken from Mr. Desmond in 2015 until Mr. Nolan produced an iPhone to Ward Solutions on 24th May 2019. Mr. Morris also acknowledged that his evidence that messages could not be tampered with was largely based on information in the public domain that intelligence agencies cannot break the security of iPhones. That may well be right in the context of material held on an iPhone but it does not address what happens where material has been downloaded from an iPhone to a computer.

306. To my surprise, when Mr. Morris was re-examined by counsel for the plaintiffs, he was not asked to address what he had been told on 15th June 2022. Noting that, in the course of his cross-examination, he had made several references to something that he had been told on 15th June, I then asked Mr. Morris, at the conclusion of his evidence, what he had been told on that day. He answered that he *"was informed that the phone itself was a copy of the original phone"* and he confirmed that this is all he was told. I have already expressed concern about the way in which this came to light. It will be necessary in due course to consider the implications of this. But, before doing so, I should first outline the application that was then made by the plaintiffs to call additional evidence and the nature of that evidence.

307. Somewhat later on Day 16, counsel for the plaintiffs indicated that, in light of the issues raised during the course of the evidence given by Mr. Morris, the plaintiffs had a concern in relation to the completeness of the evidence in relation to what counsel described as the chain

of custody. Counsel applied to call a number of additional witnesses. That is a very unusual application in the course of the hearing of a case in the Commercial List. Such cases are fixed for hearing on the basis that, well in advance of the trial, the parties will submit witness statements from all of the witnesses they propose to call in evidence. That is one of the founding principles of the Commercial List. It would completely undermine that principle if parties were at liberty to call additional evidence in the course of the trial. However, in this case, counsel for the plaintiffs submitted that the texts extracted from the iPhone by Mr. Morris are important to the plaintiffs' case. Counsel also argued that, although the report of Mr. Morris was delivered in August 2021, no party had challenged it prior to the hearing. That may well be so but that report did not reveal that the phone examined by Mr. Morris was not Mr. Desmond's original iPhone but what purports to be a copy of it. I also have to say that it is of serious concern that the plaintiffs chose to provide that report to the other parties and, subsequently, to put that report before the court without first revealing this very salient fact.

308. In making the application, counsel for the plaintiffs acknowledged that the onus of proof lay on his clients. Counsel identified that Patricia Nolan had already given evidence that she took the phone from Mr. Desmond and that he gave her the password. He indicated John Nolan would now be required to give evidence. At that point, counsel said that he was unsure of the precise role played by John Nolan, but he said that he understood it involved copying the iPhone. Counsel said that Richard Nolan would also be required to give some additional evidence and that it was necessary to call Mr. Antonio Stano and Mr. Declan Timmons who were both mentioned in Mr. Morris's report. Counsel acknowledged that witness statements would have to be provided in advance of any additional evidence being given. After hearing Mr. Millett, I came to the conclusion that, notwithstanding the way in which the evidence had unfolded, the plaintiffs should be permitted to call these additional witnesses to deal with proof of the various steps that were taken in relation to the chain of custody of the phone or copy

phone as the case might be. I directed that witness statements should be produced by the plaintiff by not later than 2 p.m. on the following Monday (i.e., by Monday 20th June 2022). In taking that approach, I did not think that the nature of the evidence that these witnesses would give would be such as to create any significant logistical problems for the defendants.

The chain of custody witnesses

309. On Day 17 of the hearing, Mr. John Nolan was called as a witness. He is one of the plaintiffs. He has a diploma in industrial electronics. He has also worked in a number of IT companies. He said that, in 1992, he set about developing the IT infrastructure for Nolan Transport. He also said that he is currently responsible for more than 500 mobile phones held by various employees of Nolan Transport. His evidence was that he is familiar with downloading and updating mobile phones. He confirmed that he was at the meeting with his sister Patricia Nolan and Mr. Desmond on 3rd January 2015. According to Mr. Nolan, Mr. Desmond, in the course of this meeting handed his mobile phone to Patricia Nolan. She then left the room. Some minutes later, Mr. Nolan left the meeting to see "*if I could assist her"*. He found Patricia Nolan in his own office. She then asked him to download a copy of Mr. Desmond's iPhone. However, at that point, she discovered she had forgotten the passcode given to her by Mr. Desmond. She therefore went back to the meeting room to get the passcode again. Mr. Nolan said that upon her return with the passcode, he successfully downloaded a copy of Mr. Desmond's iPhone using Apple iTunes software onto a computer that he used for this purpose. Mr. Nolan said that this was a relatively straightforward process which took approximately 30 minutes. However, in contrast to the evidence given by Mr. Morris, he gave no details of this process or any steps taken by him to verify the integrity of the material that he said that he had downloaded. Nor did he refer to any audit trail material or other contemporaneous record of the exercise conducted by him. Notwithstanding the emphasis placed by Mr. Morris on the importance of the use of check sums to verify the integrity of

material downloaded in this way, no evidence of that kind was given. That said, it emerged under cross-examination by Mr. Millett that a copy of the data downloaded to Mr. Nolan's computer was discovered by the plaintiffs although this was not put in evidence and Mr. Nolan suggested that it now existed solely in photocopy form.

310. Mr. Nolan said that, having downloaded the material to the computer, he then copied the downloaded data to an iPhone device model AI387 EMC2430 serial number DNRJX0LMDTC0. This is the same serial number of the device that was subsequently delivered to Ward Solutions on 24 May 2019. Later, at the conclusion of the meeting in January 2015, Mr. Nolan said that he handed the phone (on which he had downloaded the material from Mr. Desmond's iPhone) to his brother Richard Nolan. He also said that he gave Mr. Desmond's iPhone back to his sister Patricia who, he believed, had returned it to Mr. Desmond.

311. Mr. Nolan was cross-examined by Mr. Millett about the time at which the download occurred. Mr. Nolan confirmed that this was done on 3rd January 2015 at 3:35 p.m. Mr. Millett asked him whether he had any forensic certification in respect of downloading data similar to that held by Mr. Morris. Mr. Nolan accepted that he had not but he maintained that *"he would have followed the procedures that would be required in downloading and uploading it. At no time, when I downloaded that phone, was that data tampered with, for the simple reason it was immediately uploaded back into the replacement phone."* Mr. Millett asked Mr. Nolan why he had copied the material to another mobile phone costing €500 or €600 rather than to a floppy disc. Mr. Nolan's first response was to say that the *"phone was quite secure, why not? It's a secure place."* But, when he was pressed further on the point, he said that he did not have any floppy disc or similar material available to him at the time and he therefore used a phone. He said that he had a general supply of phones.

312. Mr. Richard Nolan was recalled to give evidence on the same day. His evidence was that, after a meeting with Mr. Desmond on 3rd January 2015, he went to the office of his brother,

John Nolan, in Nolan Transport. John Nolan gave him the iPhone device serial number DNRJX0LMDTC0. Mr. Nolan's evidence was that he then immediately placed this device in a safe for safekeeping in Nolan Transport in New Ross and that he is the only person who has access to this safe. He also said that the device remained in the safe until 24th May 2019 when it was provided to Ward Solutions. On that date, Mr. Nolan says that he removed the device from the safe and attended a meeting at Ward Solutions' premises in Citywest Business Campus where at 10:23 a.m. on that day he gave the device to Mr. Declan Timmons. He subsequently received the device back from Mr. Timmons on the same day at 3:20 p.m. Thereafter, he returned the iPhone to the safe in Nolan Transport to which only he had access. Under cross-examination by Mr. Millett, Mr. Nolan said that he simply gave the device to Ward Solutions. He did not provide any background information in relation to it or as to how it was acquired. Mr. Declan Timmons also gave evidence on Day 17. He confirmed that he received the device described above from Mr. Nolan at 10:23 a.m. on 24th May 2019 and that he handed it over to Mr. Stano at 11:00 a.m. on the same day. He also confirmed that he subsequently received the device back from Mr. Stano at 1:00 p.m. and gave it back to Mr. Richard Nolan at 3:20 p.m. on the same day. Under cross-examination by Mr. Millett on Day 18, Mr. Timmons confirmed that he was not informed by Mr. Richard Nolan that the material contained in the device had been copied from another phone. He said that he only became aware of this on Monday 20th June 2022 when he spoke to Mr. Morris who had become aware of this from "*conversations with barristers in the case"*.

313. Mr. Stano also gave evidence on Day 18. Mr. Stano confirmed that he received the device from Mr. Timmons at 11:00 a.m. on 24th May 2019 in the forensics laboratory at Ward Solutions. At that point, he set the device in "*airplane mode"* and connected it to a FRED forensic workstation in "*read only"* mode and proceeded to perform a logical acquisition of the device using Encase digital forensic software. This provided a forensic image of the

contents of the telephone which was then used by Mr. Morris for the purposes of his analysis. Mr. Stano explained that the Encase software is used by many law enforcement agencies including An Garda Síochána.

314. Following the conclusion of the evidence in relation to the chain of custody, Mr. Millett made an application in relation to the admissibility of the text messages downloaded from Mr. Desmond's phone. In making his application, Mr. Millett submitted that the evidence was tarnished in circumstances where the evidence of Mr. Morris was based on the procurement of mobile phone data from Mr. Desmond who, in sworn testimony to the Law Society Disciplinary Tribunal stated that the phone had been taken from him without permission. He also submitted that there is nothing to verify that there was no interference with the data copied from Mr. Desmond's phone. Mr. Millett also made the point that no solicitor could willingly hand over a telephone which is likely to contain privileged information relating to the solicitor's clients and sensitive personal data relating to third parties.

315. Mr. Millett also drew attention to the significant gap in time between the extraction of the data by Mr. John Nolan in 2015 and the engagement of Ward Solutions four years later. He also highlighted that nothing was said to Ward Solutions that the device given to them was a copy of Mr. Desmond's phone. He suggested that, in those circumstances, the data was presented to the expert in a highly misleading manner and he also highlighted that, until Mr. Morris was questioned by me, the plaintiffs had failed to bring out in the evidence that Mr. Morris was not aware until a very short time before he came to give his evidence in court that he was dealing with a copy phone rather than the original.

316. In response, counsel for the plaintiffs argued that the evidence now before the court addressed the complete chain of custody in relation to the telephone. In the course of the response by counsel for the plaintiffs, I indicated to counsel that I did not have any evidence of a technical nature that establishes that the exercise carried out by Mr. John Nolan was

equivalent to that carried out by Mr. Morris. Counsel responded that the court has to decide the issue on the balance of probabilities, and he submitted that the evidence was sufficient for this purpose. Counsel argued that, if Mr. Millett wished to contend that the evidence was insufficient, the onus lay on him to place appropriate expert evidence before the court to contradict the evidence which had been given by John Nolan.

317. In the course of the submissions made by counsel for the plaintiffs, I also raised the failure of the plaintiffs to reveal the fact that Ward Solutions were dealing with a copy phone rather than the original. I have to say that I did not get a satisfactory response to that question. Counsel merely sought to rely upon the additional evidence given in the course of Days 17 and 18 in relation to the chain of custody. However, that additional evidence does not explain how the evidence of Mr. Morris was allowed to unfold in a manner that suggested that the investigation carried out by Ward Solutions had been of Mr. Desmond's iPhone. If anything, the subsequent evidence given by Mr. John Nolan and Mr. Richard Nolan starkly underlines the glaring failure to put the full picture before the court in the first instance.

318. Having heard the submissions of Mr. Millett and counsel for the plaintiffs, I indicated that I was unable, at that point, to reach a view as to whether Mr. Millett's objection should be upheld. I indicated that I could only come to a view in relation to the matter when I came to consider the evidence as a whole in preparing this judgment. However, I did indicate that, if Mr. Millett wished to rely on the contention that the phone had not been voluntarily given to the plaintiffs by Mr. Desmond, he would need to call evidence to that effect. I also indicated that it was a matter of very serious concern to me that the plaintiffs had not brought out in the evidence of Mr. Morris on Day 16 that the device which the plaintiffs had provided to Ward Solutions was not Mr. Desmond's phone but a copy of it. I indicated that I was taken aback that a party would proceed in that way and I made very clear that this should not have happened.

Are the text messages extracted by Mr. Morris receivable and admissible in evidence?

319. While the matter was not argued on this basis, it seems to me that the first question I have to consider is whether the text messages are receivable in evidence. In my view, the texts in question require to be treated in the same way as any other documents. It follows that, before they can be admitted in evidence, it must be shown that they are both receivable and admissible in evidence. As Edwards J. explained in *Leopardstown Club v. Templeville Developments*, these are two separate and cumulative requirements. In so far as receivability is concerned, Edwards J. also explained, at para. 5.19, that, before a document can be received in evidence, its authenticity must be proved. As Edwards J. further explained, this is generally done by calling the author of the document to prove that it is a document authored by that person. In that way, its authenticity can be established. Here, the plaintiffs have not taken that course. Instead, they claim that the investigation carried out by Mr. Morris establishes that the texts came from the mobile phone of Mr. Desmond and that they include text messages received by Mr. Desmond from the mobile phone of Mr. Millett. If the plaintiffs succeed on that point, it will then be necessary to consider whether the texts are admissible in evidence. In this context, it is clear that the plaintiffs are not seeking to rely solely on the existence of the texts. They are, in fact, seeking to rely on the contents of the texts to prove what they contend was the state of knowledge of Mr. Millett at particular points in time. However, as Edwards J. further explained in the *Leopardstown Club* case, in the absence of a witness to prove the veracity of the contents of a document, the contents will constitute hearsay evidence which will not be admissible unless one of the exceptions to the hearsay rule applies. The plaintiffs have not addressed this issue in their submissions but an obvious exception to the hearsay rule that might potentially apply is where the text of a document can be said to contain an admission against the interests of its author. Thus, a telephone text established to be an authentic text from Mr. Millett could

potentially be admissible against him if its contents are inconsistent with the case made by him in these proceedings.

320. Having regard to the principles just discussed, I must first consider whether it can be said that the texts on which the plaintiffs seek to rely are authentic. As a first step, that requires me to consider whether the plaintiffs have established, on the balance of probabilities, that the text messages extracted by Mr. Morris from the copy phone delivered to Ward Solutions in May 2019 are text messages which originally resided in Mr. Desmond's iPhone. In this context, it seems to me that, leaving aside any questions that may arise about the unlawful processing of personal data, I have no evidence that Mr. Desmond did not consent to the downloading of data from his phone. I accept that, as Mr. Millett has argued, it is inherently unlikely that a solicitor would voluntarily hand over his mobile phone to third parties. A mobile phone used by a solicitor for professional purposes is likely to contain highly confidential material relating to the private affairs of clients much of which may also be legally privileged. Furthermore, for the reasons which I have already explained, I did not find Ms. Patricia Nolan to be a reliable witness. Her evidence that Mr. Desmond freely handed over his iPhone must therefore be treated with some caution. However, the fact that John and Patricia Nolan were able to use a passcode which unlocked the iPhone strongly suggests that Mr. Desmond co-operated in the extraction of the material. There is no admissible evidence before the court to establish the contrary. It is true that Mr. Millett sought to rely on Mr. Desmond's witness statement in these proceedings that suggests that the taking and copying of his phone was not done voluntarily. However, that statement was never given in evidence in the proceedings and I therefore cannot take it into consideration.

321. Therefore, proceeding on the basis that there was a voluntary handover of the iPhone by Mr. Desmond in January 2015, the most relevant subsequent steps that intervened before the compilation of Mr. Morris's report were the downloading of the material from the iPhone

by Mr. John Nolan onto a computer in Nolan Transport (*"Step 1"*), the subsequent transfer of that material to a different phone by Mr. Nolan (*"Step 2"*), the retention of the copy phone in a safe in Nolan Transport from January 2015 to May 2019 (*"Step 3"*), the subsequent delivery of the copy phone to Ward Solutions in May 2019 (*"Step 4")* and the downloading of the data from that copy phone by Mr. Morris (*"Step 5"*). Notwithstanding my earlier finding that Richard Nolan was an unreliable witness in respect of the evidence given by him on Days 4-5 and 8-11, there is no reason to doubt his evidence that the copy phone was held in the safe in Nolan Transport (i.e. Step 3). Nothing was put to Richard Nolan on cross-examination that undermines his evidence on this issue. Nor is there any reason to doubt the delivery of that phone to Ward Solutions or the chain of custody within that company. That has been confirmed by the witnesses from Ward Solutions. What is really striking, however, is the difference in the quality and detail of the evidence in respect of Step 1, on the one hand, and Step 5, on the other. Both involved the extraction of data from an iPhone and its transfer to a computer or work station. The plaintiffs presented elaborate and detailed evidence to the court in respect of Step 5 but equivalent evidence is wholly lacking in respect of Step 1 which was obviously a crucial initial step. While Mr. Morris provided extensive detail in his report and in his evidence in respect of the equipment used by him and the steps taken by him, this is absent from the witness statement and the evidence provided by Mr. John Nolan who merely said that he had used Apple iTunes software to download the material. No details were given as to how this software operates or as to its reliability or as to its ability to ensure that the download is tamper proof. Likewise, Mr. Nolan provided no detail about any steps taken by him (such as the use of check sums) to establish the integrity of the data extracted by him. Furthermore, while much was made of the inability to interfere with iPhone messages, no equivalent evidence was given to suggest that there could be no tampering with material that, with the benefit of the owner's passcode, has been extracted from an iPhone and downloaded on to a computer.

322. In addition to the differences in the quality and detail of the evidence, there is also the troubling issue that it was plainly not originally intended by the plaintiffs to call Mr. John Nolan as a witness at all or to address Steps 1, 2 or 3. As outlined above, a decision was only made on Day 16 of the trial to call him and only after Mr. Morris had given his evidence. Up to the conclusion of the evidence of Mr. Morris, the only evidence which the plaintiffs were proposing to put before the court in relation to the process of extraction of the texts was the evidence of Mr. Morris. As I have previously described, both his report and his direct evidence gave the impression that he had extracted the texts from Mr. Desmond's iPhone. There was nothing in his report to suggest that the phone that he had examined was not the original phone owned by Mr. Desmond. Indeed, it is clear from the answer given by Mr. Morris to my question at the conclusion of his evidence that his report had been prepared on the basis that he had understood that he had carried out an examination of the original iPhone. This is starkly confirmed by the fact that he was not aware of the existence of the copy phone until two days before he gave his evidence. That very plainly suggests that the plaintiffs had been intending to put evidence before the court that would give the court a misleading impression that the phone examined by Mr. Morris was the original. That would also explain why the plaintiffs took the rather curious course of transferring the material downloaded from Mr. Desmond's iPhone to a new iPhone rather than holding it on a computer or on a disc. It makes no sense that the plaintiffs took that course to simply store the contents of Mr. Desmond's iPhone. That material could have been securely stored on a computer or in any of the other ways in which downloaded material can be stored such as a memory stick or a USB flash drive.

323. For the reasons outlined above, I have very serious concerns about the manner in which the plaintiffs' evidence in relation to the extraction of the text messages was placed before the court. I also have significant concern about the quality of the evidence in respect of Step 1 which, as I have explained, is lacking in basic details about the methodology used by Mr. John

Nolan to download the material. His evidence is also unsatisfactory and incomplete in so far as he gave no evidence to verify the integrity of the process used by him to ensure that there could be no tampering with the data. On the other hand, I must bear in mind that nothing emerged in the course of Mr. John Nolan's evidence to suggest that he had intentionally tampered with the texts. I must also bear in mind that Mr. Morris managed to extract a large number of texts from the data reviewed by him which seem to emanate from Mr. Millett's mobile number. In this context, at least two of those texts have been admitted by Mr. Millett. In this context, the plaintiffs relied, in their closing submissions, on Mr. Millett's response to interrogatories 247 and 248 (addressed in para. 324 below). For completeness, it should be noted that the plaintiffs, in the interrogatories addressed to Mr. Millett, he was also asked to confirm that he sent a number of other texts but Mr. Millett responded to say that he could not confirm these texts as he did not have access to his phone records. In the course of submissions, counsel for the plaintiffs explained that, in the course of the proceedings, Mr. Millett claimed that he had been the victim of a cyber-attack and that he had lost telephone records as a result.

324. Notwithstanding the alleged cyber-attack, Mr. Millett made admissions in respect of two texts. In interrogatory 247, Mr. Millett was asked to confirm that he sent Mr. Desmond a text message on Friday 30th August 2013 stating, "*It shows up the folly in our approach in trying to cajole EFG over the line".* Mr. Millett answered "*Yes"* to this question. He also gave the same answer to interrogatory 248 where he was asked to confirm that he had sent a text message to Mr. Desmond on the same day stating: -

> "*I suggest therefore you start finding out to be frank have any of you any idea how much trouble we are all in in. In the paraphrased words of some other Bard, 'if this goes south on Monday, we are all f***ed'".*

325. In my view, it is significant that that both of these texts are replicated in Mr. Morris's report where he sets out the language of the individual texts extracted by him from the copy

phone delivered to Ward Solutions in 2019. The *"folly in our approach"* text is replicated at p. 762 of the report while the *"other Bard"* text is replicated at p. 763. The fact that they appear in Mr. Morris's report demonstrates that, notwithstanding the paucity of detail in the evidence given by John Nolan, at least these two texts must have successfully passed through each of Steps 1 to 4 (including the steps in which Mr. John Nolan was involved) to enable Mr. Morris to extract them (as part of Step 5) from the copy iPhone delivered to Ward Solutions. In both cases, the telephone number of the sender of the texts is given and this is identified as Mr. Millett's telephone number. Given that Mr. Millett has accepted that these two texts were sent by him on 30th August 2013, it is reasonable to proceed on the basis that Mr. Morris is correct in identifying the number in question as that of Mr. Millett.

326. It follows from Mr. Millett's acceptance that he sent them, that both of these texts of 30th August 2013 are authentic and are receivable in evidence. Furthermore, to the extent that these texts are inconsistent with the case made by Mr. Millett, it seems to me that they are admissible in evidence against the Millett defendants. It also seems to me to follow that, if these two texts are authentic texts sent by Mr. Millett, the probability is that, in the absence of evidence of tampering or interference, the other texts extracted from the copy phone by Mr. Morris which he has identified as originating from the same telephone number (i.e. Mr. Millett's number) were likewise sent by Mr. Millett and should be treated as authentic and receivable in evidence. However, in light of the lack of detail in John Nolan's evidence, it seems to me that each of the individual texts on which the plaintiffs seek to rely will need to be examined by me to assess, in each individual case, whether there is anything about the texts which would suggest that they are not genuine or that they had been tampered with. That is the course that I propose to adopt.

327. While I continue to have serious concerns about the way the evidence has unfolded and about the way the plaintiffs appear to have been prepared to put incomplete and misleading

evidence before the court, I do not believe that I can, on that ground, exclude any element of the plaintiffs' evidence on this aspect of the case. The fact remains that, following the question posed by me to Mr. Morris at the conclusion of his evidence, the plaintiffs, however belatedly, corrected the position and revealed the nature of Steps 1 to 3. I am inclined to think that they only did so because they were caught out (so to speak) by the frankness of Mr. Morris but, ultimately, I must decide the issues on the basis of all of the evidence I have heard. I found Mr. Morris to be a credible and thoughtful witness and his report is very thorough.

328. I also have concerns that the extraction of the material from Mr. Desmond's phone may give rise to significant issues in respect of data protection (in particular personal data) but I have not been addressed in sufficient detail in relation to that issue. For that reason, I believe that I should refrain from expressing any final view on the issue – save to reiterate the point made earlier that I cannot see any basis for the representations made by Richard Nolan to Ward Solutions that Nolan Transport is the owner of the intellectual property in the data and that all data subjects had given their valid consent to the processing of their personal data by Ward Solutions. Both of those representations are demonstrably untrue.

329. Insofar as the texts themselves are concerned, the plaintiffs sought to rely in their closing submissions on the following texts as extracted by Mr. Morris from the copy phone delivered by the plaintiffs to Ward Solutions in May 2019:-

(a) According to p. 719 of Mr. Morris's report, on 8th June 2013, at 12:48, Mr. Millett sent a text message to Mr Desmond stating that he had instructed *"William"* (who the plaintiffs suggest is a reference to Mr. Garcia) to move a total of €2.45m from MECD to the account of CVSSA at EFG Bank. This also refers to *"top up to required amount"* from Caroma / Rachel Rose. It then refers to *"N=€2m SM=€0.45m, PK=€0.55m"*. There is nothing to suggest that this is not an authentic text from Mr. Millett or that its terms have been tampered with.

On the subject of tampering, I should explain that the version of the data extracted by Mr. Morris was unable to replicate the euro symbol. However, this discrepancy was explained by Mr. Morris who said that this arises from the fact that iPhone uses an ISO standard for character sets stored on the phone namely ISO 8859-1. This has the result that some characters will appear in a different format when they are extracted from the phone. In light of this evidence, I do not believe that the apparent discrepancy suggests tampering and there is no other evidence of tampering. I therefore believe that this text is receivable in evidence. For what it is worth, it also seems to me that this material is admissible against the Millett defendants on the basis that it shows that Mr. Millett was able to give instructions to move money from MECD to CVSSA and, to the extent that this is relevant, that he was referring to the specific amounts mentioned in the text and the need for a top-up from Caroma/Rachel Rose ;

(b) On the same page of Mr. Morris's report, it is suggested that, later at 13:02 on the same day, Mr Millett further texted referring to a total breakdown of MECD funds in CVSSA being N=€4.96m JK=GBP £1.545m SM=€0.45m N=€2m. Again, it seems to me that there is nothing to suggest that this text was tampered with. I believe it can be treated as authentic. It is therefore receivable in evidence. I also believe that it is admissible against the Millett defendants on the basis that it records Mr. Millett's understanding of the extent of the funds held in CVSSA as of 8th June 2013 which emanated from MECD and their division between N (presumably the Nolans), JK (presumably Mr. John Kenny) and another party namely SM. The plaintiffs also relied on a text from Mr. Millett of 10th June 2013 (i.e. after the final transfer from the OPT to MECD) in which Mr. Millett refers to the movement of €2 million from Investec to

MECD and informs Mr. Desmond that he can contact *"Urs"* to give the latter the green light to proceed. This text appears to be genuine. It also seems to me to be admissible against the Millett defendants as a declaration against interest. The plaintiffs argued in closing their case that this shows that Mr. Millett was in control of moving the money through MECD and that the text is important in the context of all of the other texts on which the plaintiffs rely. It will, of course, be necessary to look at all of the admissible texts together but, on the face of it, this text is not inconsistent with the answers given by Mr. Millett in response to interrogatory 23, that the eighth defendant was an agent relaying messages and the requirements of clients;

(c) On p. 722 of the report, it is suggested that, on 18th June 2013, Mr Millett sent a text message to Mr. Desmond stating that *"William… is concerned we will not be able to release the EFG funds as soon as we had hoped …*". The plaintiffs suggest that this is a reference to Mr. Garcia. Again there is nothing to suggest that this text has been tampered with. There is no evidence to suggest that it is not genuine and I therefore believe that it is receivable in evidence. To the extent that it suggests that Mr. Millett believed that there could be a delay in the release of EFG funds, the text also seems to me to be admissible in evidence albeit that it is in very general terms and does not seem to me to provide much by way of concrete evidence to support the plaintiffs' case against the Millett defendants. However, the plaintiffs argue that it is reasonable to infer from this text that Mr. Millett must have been aware that there was some blockage which prevented EFG from releasing funds. They also submit that the date is relevant, being only eight days before the contract for the purchase of the Nemo Rangers property was signed. The plaintiffs argue accordingly that this provides evidence of a

pledge in favour of EFG Bank. I am not persuaded that this is so. The text merely suggests that there could be a delay in releasing funds in CVSSA. It also appears likely that the text was referring to the funds held on behalf of the Kenny defendants (and not the plaintiffs) since they were the party who both sides accepted had paid the deposit on the execution of the contract. Besides, even if it could be said to refer to the money held in the CVSSA account more generally, there could be a variety of reasons why there might be a delay in releasing funds in a bank account including, for example, the need to give a fixed period of notice. I cannot therefore be satisfied, on the balance of probabilities, that this text provides evidence of the existence of a pledge or of Mr. Millett's knowledge of it as of that date. Counsel for the plaintiffs also make one further point in relation to this text. They argue that it shows that Mr. Millett was giving directions about the operation of the CVSSA account. However, I cannot see how the text could be said to show that Mr. Millett was going that far. It merely shows that he had a conversation with Mr. Garcia about the account; it does not show that he was attempting to give directions to him in relation to it;

(d) On p. 724, it is suggested that, on 18th July 2013, Mr. Millett sent a text message to Mr. Desmond stating that he had spoken to William Garcia. In this text, reference is made to the "*UOB situation*" which the plaintiffs suggest is a reference to United Overseas Bank which they say was a party to the Kiwi structure. However, the fundamental difficulty facing the plaintiffs in relation to the Kiwi structure is that they have not established anything about it in the evidence which they have led and I cannot see how this reference to the *"UOB situation"* explains itself. On that basis, I doubt that this text adds anything of

value to the case which the plaintiffs seek to make. The mere reference to the *"UOB situation"* does not provide any detail about the alleged Kiwi structure or the nature of the role played by UOB or even who UOB might be. The same applies to a further text sent by Mr. Millett on the same day in response to a text from Mr. Desmond to the effect that it was *"all sorted".* Mr. Millett responded in the following trenchant terms (and there is nothing to suggest that the text is not genuine): *"My arse it is I have spent 20 mins talking to William the UOB situation has not even been addressed at the rate these two are dealing with it we won't see value this side of October".* Counsel for the plaintiffs sought to argue that this also refers to the Kiwi structure but, again, in the absence of any evidence about that structure or the role played by UOB, I can see no basis for drawing any inference to that effect. The text merely evidences frustration on the part of Mr. Millett in respect of what he perceived to be delay (presumably in relation to the release of funds discussed in the earlier texts);

(e) On p. 725, it is suggested that, on 23rd July 2013, Mr. Millett texted Mr. Desmond saying *"I am about to press the nuclear button on this as I have totally lost faith in the whole structure. This will involve me send* (sic) *an email in the next 15 mins (discoverable) to instigate proceedings for recovery of my clients funds."* There is nothing to suggest that this text is not genuine. In so far as admissibility is concerned it is admissible as a statement against interest. The language used by Mr, Millett is very stark but that must be seen in the context of the earlier emails expressing concern about delay in the release of funds and the impending purchase of the Nemo Rangers property. As will become clear when some of the later texts are addressed below, this series of texts appears to have been authored by Mr. Millett at a time when Mr. Millett was under

considerable pressure from Mr. Paul Kenny, the eleventh defendant to progress the purchase of the Nemo Rangers property. Mr. Millett's concern is also evident in the terms of his text to Mr. Desmond sent a little later on the same day. The terms of the text are set out on p.726 as follows: *"You have through no fault of yours put me in a position where my business is now on the line. Swearing at me does not solve our problems. We are facing a catastrophe here if we are seen to do nothing. We lost a full week since we were in Dublin and I told on foot of William's emails that this was not sorted and until we receive official confirmation from EFG it will remain so. To my knowledge UOB has not even been started its only at prelim stage. I have to perform on a contract in 11 working days and looking at the history this will not prove positive…".* In closing submissions, counsel for the plaintiffs submitted that this constitutes evidence of a pledge. However, I am not persuaded that this is so. Consistent with the earlier texts, a more obvious inference to draw from this text is that Mr. Millett was again concerned about delay in releasing the funds to allow the purchase contract to be completed on time. As observed at sub-para. (c) above, there could be a variety of reasons why there might be a delay in releasing funds from a bank account. Concern about delay seems to me to be the more likely inference than that which the plaintiffs ask the court to draw. However, that is not the only text in the relevant chain between Mr. Millett and Mr. Desmond. The plaintiffs also rely on what is said on p. 727 of Mr. Morris's report in which it is suggested that, on 25th July 2013, Mr Millett and Mr Desmond had the following exchange of texts commencing with Mr. Desmond saying: "*I now have a BIG problem. Nolan settled with aib. They have asked me to release the €7m. I am sick here this morning. Ciaran*" to which Mr. Millett answered: "*How*

the hell did that happen this was supposed to be months away." The difficulty from the plaintiffs' perspective is that, even if the text exchange is authentic, the text from Mr. Desmond constitutes hearsay evidence such that it is not admissible against Mr. Millett. While it may have been admissible against Mr. Desmond as an admission against his interest, that is of no avail to the plaintiffs in their case against Mr. Millett since he is not the author of the statement made in Mr. Desmond's text. Without Mr. Desmond's text, it becomes more difficult to interpret Mr. Millett's response. Even if the text from Mr. Desmond was admissible against the Millett defendants, I do not believe that it necessarily points to the probable existence of a pledge or other security over the money held in the CVSSA account. But I accept that it does suggest that Mr. Desmond is very concerned that he is not in a position to release €7 million at that point and that both he and Mr. Millett understood that the money would not require to be released until several months later. Such an understanding is not inconsistent with Mr. Richard Nolan's evidence that the money held in EFG would be held for four to six months. Given that substantial sums were transferred to MECD by the OPT in April and June 2013, the relevant four to six month period had not expired at this point. It is also not inconsistent with the terms of the email of 4th February 2013 from Mr. Desmond to Mr. Garcia that was copied to Mr. Richard Nolan (addressed in paras. 109 to 110 above) in which Mr. Desmond spoke of the funds being left in the CVSSA account *"for a considerable period of time".* Thus, this exchange of texts could well be prompted by concern that the Nolans were unexpectedly seeking early payment out of funds. That said, the tone of the exchange suggests that Mr. Desmond had a level of concern at this point which was shared to some extent by Mr. Millett.

Even if Mr. Desmond's text is excluded as hearsay, Mr. Miller's response might be said to exhibit a level of concern about the availability of funds at that point. The plaintiffs argue that Mr. Millett and Mr. Desmond should have made contact with the plaintiffs at this point to explain the position. It will be necessary to consider this element of the plaintiffs' case in more detail when I come to make findings of fact and to address the plaintiffs' argument that this text (both on its own and in conjunction with the other texts on which the plaintiffs seek to rely) demonstrates deceit on Mr. Millett's part. They argued that he ought to have made contact with them at this point and revealed that there was a problem with *"their money"* and that, had he *"come clean"* at that point, they could have taken steps to deal with the situation. They also emphasise that the transfer of funds to purchase the Nemo Rangers property did not occur until later – namely 3rd September 2013;

(f) Next, the plaintiffs seek to rely on an exchange of texts addressed on pp. 728 to 729 of the report where it is suggested that, on 30th July 2013, Mr. Desmond texted: "*User name and password now with Richard"* to which Mr. Millett replied: *"How is that going to work in advance of the monies returning*". There is nothing to suggest that the text from Mr. Millett is not authentic. It follows that it is receivable in evidence against the Millett defendants and admissible against them. However, for the same reasons as those outlined at (e) above, it seems to me that, even if it is authentic, the text from Mr. Desmond is not admissible in evidence against Mr. Millett. While I believe that makes the meaning of the response from Mr. Millett difficult to determine, it nonetheless seems to me that the reference to *"in advance of the monies returning"* is something on which the plaintiffs can seek to rely against the Millett defendants.

That said, the reference is in very general terms. In addition, as noted at (e) above, the reference is not inconsistent with Mr. Nolan's evidence that his understanding was that the money held at EFG would be held for four to six months and the words *"monies returning"* can be read in that light. But the plaintiffs suggest that this exchange refers to the power of insight that was discussed at the meeting in Zurich in January 2013 and that Mr. Millett's response suggests concern on his part that, once Mr. Nolan could exercise that power, he would see that (as discussed in para. 426 below), the money lodged to the CVSSA euro account had been withdrawn from that account and had, instead, been moved to the CVSSA dollar account on 14th June 2013;

(g) The plaintiffs also seek to rely on pp. 732-734 of the report which suggests that, between 10th and 12th August 2013, Mr Millett had an exchange of text messages with Mr Desmond in which they discussed warrants and there is reference to UOB. I do not think that it is necessary to replicate these texts here. For similar reasons to those discussed at (e) above, the texts from Mr. Desmond are inadmissible. I accept that there is nothing to suggest that the texts from Mr. Millett are not authentic. Thus, they are receivable in evidence. The references in those texts to warrants and to UOB are also arguably admissible in evidence against the Millett defendants on the same basis as the others discussed above but, given the generality of these references and the lack of any evidence as to what was going on in the background, I question the value of this evidence to the case which the plaintiffs seek to make against the Millett defendants;

(h) According to p. 738 of the report, on 13th August 2013, Mr Desmond sent Mr Millett copies of his text exchange with Kevin (who the plaintiffs believe to be the third named Third Party) which record that Mr. Desmond said: "… *you can*

appreciate livelihoods are at stake, money was given to facilitate and time lines were never envisaged to reach this length of time. The fact unfortunately is the K [Kenny] and N [Nolan] funds are the responsibility of John M [Millett] and hence the enormous worry for him. …" In my view, for the reasons previously discussed at (e) above, this text, even if is receivable, is not admissible in evidence against the Millett defendants. It is not authored by Mr. Millett and Mr. Millett was not involved in the exchange. It is hearsay evidence which the plaintiffs have not proven for the purposes of their case against the Millett defendants. The same applies to the text from *"Kevin"* to Mr. Desmond;

(i) However, pp. 738-739 of the report suggest that, later the same day, the following text message was sent to Mr. Desmond from Mr. Millett's phone (although it seems likely that this is a copy of a text that Mr. Millett had sent to someone else): "*You no doubt have reviewed the tape of the conversation Ciaran had with K today. I hope you finally appreciate the position I have been put in regarding my obligations. You will note that we did not disclose the real reason for the delay to K nor could we. Ciaran has managed to placate him for now but as you have been now made aware I have to have €3m in Eugene F. Collins account Monday that means I should have had funds released to me today. While I am reading that considerable efforts are being applied to resolve this that is simply not borne out by the facts. We need Net Asset Value applied to the UOB text something everyone has been aware of since 25th July why is this outstanding …"* Again, there is no evidence to suggest that this text has been tampered with. It appears to be a genuine text sent by Mr. Millett to someone and then copied to Mr. Desmond. That appears to follow from the fact that it refers to *"Ciaran"* rather than addressing Mr. Desmond in the second

person singular. As a genuine text, it is receivable in evidence. I also believe that it is admissible against the Millett defendants as constituting a statement contrary to their interests. That said, it is limited in its terms to the necessity to have monies released to allow a payment of €3 million to be made to the solicitors for the vendor of the Nemo Rangers property. Furthermore, the reference to *"K"* is, in all probability, a reference to Kenny and the text therefore supports the view that the Nemo Rangers property was intended to be purchased by the Kennys. There is nothing to suggest that it relates in any way to the proceeds of the transfers made by the plaintiffs to MECD standing to the credit of the CVSSA accounts with EFG Bank. However, the plaintiffs also seek to rely on the next text in the sequence namely a text dated 14th August 2013 (recorded on p. 740 of the report) from Mr. Millett to Mr. Desmond in which Mr. Millett said: *"You need to get on to Barry Leddin Stephen Murphy and John Lynch to move this over the line. Based on the latest info the only blockage now is Kevin releasing the warrants."* Counsel for the plaintiffs submitted that the reference to *"blockage"* is important and he suggested that this *"could only be on the basis of some form of contractual blockage which I say is something the Court can infer is a pledge".* That seems to me to involve quite a large leap. There is no evidence as to the nature of the blockage involved. Moreover, it seems to be clear that, when this series of texts are read as a whole, the blockage related to the closure of the purchase by the Kenny interests of the Nemo Rangers property. Thus, for example, there are two texts one after the other on the following day (namely 15th August 2013) from Mr. Millett saying: *"Make sure you push it through no ambiguity about the process or timeline"* followed by *"Now coming under severe pressure from Eugene F. Collins to confirm*

appointment for closure on Monday. I can't confirm unless I know I have funds";

(j) Counsel for the plaintiffs also drew attention to a number of further text exchanges which occurred over the remainder of August 2013. These include a text dated 19th August 2013 (addressed on p. 743 of the report) where Mr. Millett said: *"Absolutely essential that we close this out overnight. I cannot afford to get a call from him in the morning because then we are in disclosure territory if we have any issues with delivery. Kevin needs to be acutely aware of this tonight. Basically, if we do not get the right wording overnight and I get a call in the morning the game is up".* There is nothing to suggest that the text is not genuine and therefore receivable and admissible against Mr. Millett but, again, it seems to me to be likely to refer to the closure of the purchase by the Kennys of the Nemo Rangers property. The plaintiffs also sought to rely on Mr. Desmond's text of 20th August 2013 to Mr. Millett (addressed on p. 744 of the report) in which he said: *"PK on the war path. I told him you met Dildar today. Told him EFC now ready to close but that funds can only now flow from CVS to Dildar to do closing. We are all now fired when transaction over".* As this is Mr. Desmond's text, it is inadmissible hearsay against the remaining defendants but, if I am wrong in that regard, it would further reinforce the view that this series of texts is concerned with some form of impediment or blockage which was standing in the way of the purchase by the Kenny interests of the Nemo Rangers property. The reference to *"PK"* plainly relates to Mr. Paul Kenny, the eleventh defendant. There is nothing in the terms of this text which suggests that it has any application to the plaintiffs. But the plaintiffs also seek to rely on Mr. Millett's response on the same day (which appears to be genuine) in which he

said: *"Without trying to be too sarcastic, how exactly does he think that is going to work"*. I cannot see that this text adds anything. The plaintiffs also rely on a subsequent text from Mr. Millett (addressed on p. 749 of the report) to *"Kevin"* which was copied to Mr. Desmond on 21st August 2013. The text is in the following terms: "*Kevin it is now after 9.00 in Zurich and I have no confirmation of anything received in respect of the UOB valuation or the updated BNPP valuation. PK is on his way to Dublin and expects to see me at 10.00. I have nothing to tell him and nothing to show him. I facilitated you getting this off the ground. I now find myself out on a limb locked out of my clients' funds with no place to go*. …" The reference to *"PK"* appears to be a reference to Mr. Paul Kenny, the eleventh defendant. There is no evidence that this text has been tampered with or that it is not genuine. It follows that it is receivable in evidence against the Millett defendants. I also believe that it is admissible against them. However, while I appreciate that it refers to UOB and BNPP (which the plaintiffs say are acronyms for United Overseas Bank and BNP Paribas), the acronyms do not explain themselves. Moreover, the text provides no detail in respect of the roles played by those entities and it is far too large a leap to suggest that it constitutes evidence of a pledge in favour of EFG Bank over money standing to the credit of the CVSSA accounts. Furthermore, the thrust of the text is concerned with the position of Mr. Kenny. The text does not address the position of the plaintiffs at all and I accordingly believe it does not further the plaintiffs' case to any appreciable extent;

(k) Although not a text, the plaintiffs also seek to rely at this point on an email dated 27th August 2013 from Mr. Garcia to Mr. Millett in which the former said: "*As per Ciaran's und (sic) your request, I asked EFG already about pledging the*

Nemo Rangers property as a part of the CVSSA deal, with the aim of having EUR 3M released. Mr Oberhänsli told me that it is possible for the bank to accept property as collateral of the transaction. ... Once all documentation and valuations have been provided, EFG can decide the lending value given to the property, which shall remain as collateral in the CVSSA portfolio until Ciaran decides to replace it with other collateral or funds. …" Receipt of this email has been admitted by Mr Millett in his response to interrogatory No. 114. That seems to me to make the email receivable in evidence against the Millett defendants. While there is no evidence to suggest that the Nemo Lands were ever in fact provided as security for the EFG Loan, the plaintiffs argue that the email demonstrates that Mr Millett was aware in August 2013 of a loan agreement and the need to supply collateral to satisfy EFG Bank. In the course of closing submissions, counsel for the plaintiffs argued that it can be inferred from the email that attempts were being made to obtain other collateral. Counsel submitted that this shows that Mr. Millett knew that the accounts were pledged. I have to say that I am not persuaded that this necessarily follows. In the first place, the natural reading of the email suggests that it is concerned with the Nemo Rangers property. While it refers to the *"CVSSA deal",* there is insufficient detail to infer that a similar arrangement applies to all of the funds held in the CVSSA accounts. While the funds of the Kenny defendants and the proceeds of the OPT investments were mixed in the CVSSA accounts, I have no evidence at all of the terms on which the Kenny defendants were held and it quite a jump to suggest (without evidence to that effect) that the terms applicable to both the Kenny funds and the OPT investments were the same. Secondly, in so far as I can see, Mr. Millett was not asked in the interrogatories whether he

accepted the truth of the contents of the email. I again refer to the decision of Edwards J. in *Leopardstown Club Ltd. v. Templeville Developments*, at para. 5.15, from which it is clear that the contents of an email (which is treated as a document for this purpose) are not admissible in evidence unless the truth of the contents are proved or unless the email comes within one of the recognised exceptions to the hearsay rule. The plaintiffs have neither proved the truth of the contents of the email nor shown that any of the exceptions to the hearsay rule applies. For all of these reasons, it seems to me that I should not have regard to the contents of the email from Mr. Garcia. If I am wrong in that view, the email seems to me to relate to the Nemo Rangers property. It manifestly does not go further and address the CVSSA accounts. It should be seen in the context of the exchange of texts above which appear to contemplate the completion of the purchase of the Nemo Rangers property by the Kennys. The terms of the arrangement between the Kennys and CVSSA have not been proved. For all I know, there could well have been some arrangement between the Kennys and CVSSA in relation to the provision of collateral to EFG bank but that does not prove that collateral was given in respect of the proceeds of the OPT investments in MECD which were transferred to the CVSSA account. The plaintiffs are again asking me to raise an inference that is most favourable to their case. I do not believe that it would be appropriate to do so unless I can be satisfied that it is right to do so on the balance of probabilities. I will return to this issue when I come to make findings of fact;

(l) The plaintiffs also rely on a text dated 29th August 2013 from Mr. Millett to *"Bernhard"* (who the plaintiffs suggest must be Bernhard Lampert) which seems to have been copied to Mr. Desmond on the same day. It is addressed on

pp. 760-761 of the report. There is nothing to suggest that the text is not genuine and I therefore believe that it is both receivable and admissible against the Millett defendants. In it, Mr Millett is recorded as saying: *"Hi Bernhard I had hoped I would have been able to speak with you on this matter by now. From what I have seen of Urs responses he seems entrenched in his position and I would be of an opinion that he may not have disclosed the position to his superiors he set out in respect of the commitment to release the $3.8m on completion of the BNPP section. I suspect that he does not want to return to credit without his desired UOB proofs. Unfortunately we now have to insist on the bank performing on Urs commitment. If they choose not to honour that we will have to take whatever means are necessary to protect our positions and recover any losses. I suggest that tomorrow you call Urs and put our position to him and if you are getting nowhere go straight to a higher authority in EFG give them all details and insist on EFG honouring Urs commitment of May 23."* This text suggests that there was a problem with Mr. Urs Oberhansli in EFG Bank but the problem appears to relate to the release of $3.8 million. That may well relate to the money that was ultimately released from CVSSA's US dollar account on 5th September 2013 (as described in more detail at a later point in this judgment) for the purposes of refunding EFG Bank in respect of the money paid out of CVSSA's euro account on 3rd September 2013 in order to close the purchase of the Nemo Rangers property. That would seem likely given the sequence of the texts as a whole. But there is a real difficulty in trying to fill in the gaps in the detail. In this context, the plaintiffs also seek to rely on a text dated 29th August 2013 to Mr. Millett from Mr. Desmond (which is addressed on pp. 711-712 of the report) in which the latter is recorded as saying: *"The soft*

approach to Bernhard how are you, I have watched emails and texts float around today. I am a practical guy. I have committed yesterday to replacing the â,¬2.8m cash which we must get tomorrow from EFG with a higher land value when we close on Monday. Let's just do that tomorrow and therefore Let's get that money transferred tomorrow. When all then calms down everyone will see that EFG do have warrants worth $95m plus 2 SBLC worth same amount. They cannot write back to UOB and say but otherwise. Even BNPP have come in today with further good news. Their portfolio value has gone up by over $500k in one month. This thing does work and we should all be celebrating. If Urs releases the said funds tomorrow we can all then sit around a table and sort in the next few weeks since nothing else is being immediately released albeit it should be. In other words the release of the cash tomorrow does not worsen the EFG situation at all. They need to realise this . Ciaran". This seems to me to fall into the same category as Mr. Desmond's text of 25th July 2013 discussed at (e) above. This is not a document authored by Mr. Millett. It is Mr. Desmond's text and, therefore, hearsay. If the plaintiffs wished to rely on it as admissible evidence, they should have called Mr. Desmond as a witness. Thus, even if it is receivable in evidence, it is not admissible against either the Millett or the Kenny defendants. The plaintiffs have not identified any relevant exception to the rule against hearsay under which it would be admissible. In those circumstances, I cannot have regard to it in considering the case against the Millett defendants or the Kenny defendants. Even if I am wrong in that view, I am left with too many questions as to what the text means. While the text refers to very large sums of money and to a number of different entities, there is no detail as to what is involved and the plaintiffs are again asking the court to make

a very large leap in inferring that this is evidence of a pledge over the proceeds of their investments in CVSSA's accounts. Even leaving aside the consequences that flow from the giving of untruthful evidence by Mr. Nolan and Ms. Nolan, I do not believe that there is a sufficient basis to raise an inference of that kind. Furthermore, in so far as the text refers to a release of funds by *"Urs"* (i.e. Mr. Oberhansli of EFG Bank), this, again, appears to arise in the context of the Nemo Rangers transaction. The reference to a figure of 2.8 million supports that view. As explained in more detail below in the context of Ms. Carwood's evidence, that figure equates, in round terms, to the sum paid to Eugene F. Collins on 3rd September 2013 to close the purchase of the Nemo Rangers property. But the fundamental problem from the plaintiffs' perspective is that, without evidence as to the details and facts underlying what is said in the text, the court is being asked to guess what the text relates to and to fill in the blanks in a way that best suits the plaintiffs' case. That is against the backdrop where, following the settlement with Mr. Desmond, the plaintiffs could have called Mr. Desmond as a witness to prove the details underlying the text such that the court could have reached a sufficiently informed view. For their own reasons, the plaintiffs chose not to take that course and it is not for the court to fill in the gaps in their evidence;

(m) The plaintiffs also seek to rely on an exchange of text messages between Mr. Millett and Mr. Desmond on 30th August 2013 (addressed on pp. 762 to 763 of the report beginning with a text from Mr Millett who said: "*I am deeply concerned not to mention dissatisfied at the outcome of today's proceedings. While I cannot say I am surprised I believe it shows the folly in our approach in trying to cajole EFG over the line. You need to consider issuing summary*

proceedings for performance Monday morning regardless of what transpires in the interim." This appears to have provoked the following response from Mr. Desmond: "*Where in Switzerland or in Singapore. Summary proceedings!!!!"* to which Mr Millett replied: "*Issue them in Switzerland you after all are the lawyer they committed to releasing funds they're evidentially in breach per the bank officers declaration dated May 23*." In turn, Mr Desmond responded: "*I do not know the system*" to which Mr Millett replied: *"I suggest therefore you start finding out to be frank have any of you any idea how much trouble we are all in. In the paraphrased words of some or other Bard 'if this goes south on Monday we are all f***ed'"*. As noted in para. 324 above, Mr. Millett has already admitted the last of these texts. In my view, there is nothing to suggest that Mr. Millett's texts are not genuine and I therefore believe them to be receivable. They are also admissible against the Millett defendants as statements that go against their interest. However, the plaintiffs have not demonstrated that the corresponding texts from Mr. Desmond fall within one of the exceptions to the rule against hearsay evidence and accordingly they are not admissible in evidence against the Millett defendants. In so far as Mr. Millett's texts are concerned, it will be necessary, when I come to make findings of fact, to consider all of Mr. Millett's texts in order to determine whether they support the plaintiffs' case that, at this point (if not before), there was deceit on the part of Mr. Millett in failing to disclose the existence of a problem in respect of the release of money from the CVSSA accounts. They appear to me to show that Mr. Millett had a serious concern in August 2023 that EFG Bank was refusing to release funds but they also suggest that Mr. Millett believed that EFG Bank was not entitled to act in that way and that proceedings should be instituted

against the bank in those circumstances. It will also be necessary to consider whether the texts are solely concerned with the perceived need to release funds to allow the purchase of the Nemo Rangers property to be closed or whether they have a wider meaning;

(n) The plaintiffs also rely on a text sent by Mr. Millett to Mr. Desmond on 5th September 2013 (which, as appears from the evidence of Ms. Carwood was after money had been released from EFG Bank to close the purchase of the Nemo Rangers property). The text is addressed on p. 769 of Mr. Morris's report. In that text, Mr. Millett said: *"Thinking over your stroke of genius. We need to ensure credibility and no links with companies that might appear connected with anything they were doing in the immediate past. You can presume that someone somewhere along the line will start looking closely at this. I think I can resolve this but it will take a little bit of work."* There is nothing to suggest that this text is not genuine or that it has been tampered with. In the circumstances, it is receivable in evidence against the Millett defendants. Notwithstanding the rule against hearsay evidence, it is also admissible against them as a statement against interest. But I find it difficult to understand what it means. The text does not identify the subject matter in any meaningful way but it does suggest that Mr. Millett was concerned about how something might appear to be untoward in the event that it came to light. But what that was is another matter. That said, this text will have to be considered as part of the sequence when I come to make any findings arising from the texts;

(o) The plaintiffs also refer to a text message (addressed on p. 778 of the report) which was sent by Mr. Desmond to Mr. Millett on 3rd February 2014 in which he said: "*Important you call. EFG may release tomorrow and I am working out*

numbers. My plan is simple. Put pension funds in a separate bank account away from EFG but still with AF and then you do what you want with the funds. Is it 2 figures you want. Sm and n." The plaintiffs suggest that the reference to *"n"* is a reference to the Nolans. That may well be correct but, even if the text is receivable in evidence, it is not admissible in circumstances where the plaintiffs have not identified any applicable exception to the hearsay rule entitling them to rely on its contents in evidence against the Millett defendants. Even if it were admissible, it does no more than show that EFG Bank might release what are described as the pension funds the following day. It seems probable that the reference to pension funds is a reference to the proceeds of the OPT transfers to MECD but it does not provide any sufficient detail to enable a court to infer that the proceeds were subject to a lien in favour of EFG Bank. Nonetheless, the text is to be borne in mind when making findings arising from a consideration of these texts, as a whole.

The other material on which the plaintiffs seek to rely as against the Millett defendants

330. At this point, it may be helpful to refer to the other material on which the plaintiffs seek to rely as against the Millett defendants over and above the texts extracted from Mr. Desmond's iPhone. In their closing submissions, the plaintiffs argued that the text messages and certain other evidence before the court establish that Mr. Millett was aware of and involved in the so-called *"Kiwi"* and *"Start"* structures and the EFG loan agreement and that he was also aware that the funds in the CVSSA account had been "*blocked"* by EFT. In that context, the plaintiffs highlighted a number of matters. In the first place, they referred to Mr. Millett's response to interrogatory 263 by which he was asked whether he had discussions in 2013-2014 regarding the Kiwi Structure/the EFG investment with representatives of EFG. He answered "*yes"* to that question. This

was one of several interrogatories which refer to the *"Kiwi"* and *"Start"* structures. It appears that both the plaintiffs and Mr. Millett know what the Kiwi and Start structures constitute but the problem, from the plaintiffs' perspective, is that there is no admissible evidence before the court which establishes anything about what was involved in these structures. In those circumstances, both the question posed in interrogatory 263 and the import of the answer given by Mr. Millett are not intelligible to me and cannot form the basis for a finding against Mr. Millett. In this context, it should be noted that the plaintiffs did not pursue an application under the 2020 Act in relation to any documents that might be said to evidence what was involved in the Kiwi or Start structures. The application which was pursued was centred on the alleged existence of a lien in favour of EFG Bank.

331. In addition, the plaintiffs rely on Mr. Millett's response to interrogatory 121. By that interrogatory, Mr. Millett was asked whether, between May and September 2013, he had discussions with Mr. Desmond in relation to the terms on which CVSSA's funds would be released to complete the purchase of the Nemo Rangers property. He answered "*yes"* to that question. Of itself, that does not advance matters very much in so far as the plaintiffs' case is concerned. It is clear from Mr. Millett's texts discussed in para. 329 above that he was pressing Mr. Desmond to secure the release of the closing money for that purchase and that he believed that EFG Bank was not entitled to refuse to do so.

332. In their closing submissions, the plaintiffs also sought to rely on a fax dated 25th May 2013 (which had been cited by Ms. Carwood in her evidence) from Mr. Millett to Mr. Garcia which the plaintiffs submitted provides evidence of a discussion relating to the covenants applicable to the CVSSA account, the balances held at EFG bank and referring to the amount necessary to fulfil the alleged US$15 million loan. However, this fax has not been proven to be receivable in evidence (which, as the decision in the *Leopardstown* case demonstrates, is

the first step that must be taken before the question of admissibility arises). Nor have I been referred to any agreement between the plaintiffs and the Millett defendants (equivalent to that in place with the Kenny defendants) that documents authored by the Millett defendants can be admitted by reference to *Bula/Fyffes* principles. Remarkably, neither this fax nor any of the other Millett defendant documents were the subject of any application under the 2020 Act. It would obviously have been very difficult for the Millett defendants to have resisted such an application in respect of their own documents. However, rather than preparing for all eventualities, the plaintiffs appear to have proceeded on the assumption that the defendants would give evidence and their documents could be put to them when they came to give their evidence. That was a decidedly risky strategy to pursue. While it is true that Ms. Carwood referred to the fax in the course of her evidence and Mr. Millett did not object at the time, I have to bear in mind that Mr. Millett is a lay litigant. Moreover, it is for the plaintiff to prove its case and I do not think that the failure to object by a lay litigant can be relied upon as confirmation that the lay litigant has agreed to admit a document of this kind. Moreover, non-objection to a reference by a witness to a document would not make the document admissible even if Mr. Millett had been legally represented at the trial. The failure by a legal representative of a defendant to object to the admissibility of a document during the course of a plaintiff's evidence does not automatically make that document admissible. Parties often opt not to interject with an objection on the basis that the plaintiff may be in a position, at some subsequent point in the trial, to prove the document in question. However, that does not prevent the defendant from subsequently objecting to the admissibility of the document if it transpires that the plaintiff later fails to prove the document. In *RAS Medical,* Clarke C. J., at p. 82, accepted that, in a case tried without a jury, it is possible for a party to defer an objection to the admissibility of a document until closing submissions (albeit that he also expressed the view that it is preferable to raise the objection at the time the evidence is first proffered). In

circumstances where the plaintiffs have not demonstrated that the fax is receivable in evidence, I do not believe that the plaintiffs can rely on it. Even if it were receivable in evidence (which it is not), the terms of the fax do not seem to me to provide evidence of the kind suggested by the plaintiffs. The fax does not address the position of the plaintiffs in any way. It is true that it refers to a *"€15 million EFG covenant"* but this is stated to be a covenant in respect of Rachel Rose and *"Caroma"*. As appears from the discussion of Ms. Carwood's evidence below, it is accepted on the plaintiffs' side that Rachel Rose is an entity connected with the Kenny defendants while there is no evidence that the plaintiffs have any connection with Caroma. Mr. Millett's response to interrogatory 296 is also relevant in this context. This is addressed in detail in para. 335 below. It appears from Mr. Millett's response to that interrogatory that the trustees of the John Kenny trust expressly confirmed their participation in the so called Kiwi and Start structures. While I know nothing about those structures, if it is the case that they involved some form of covenant being given to EFG Bank, it would therefore be unsurprising that documents relating to the Kenny defendants would refer to that covenant. Thus, even if the fax were admissible, I do not believe that, of itself, it would provide any evidence of a similar covenant in respect of the plaintiffs.

333. The plaintiffs also rely on the evidence given by Mr. Richard Nolan to the effect that Mr Millett admitted to him and Patricia Nolan on 19th January 2015 that, in March or July 2013, the OPT monies had been *"... invested into something we didn't know about, without our knowledge ..."*. The full terms of this aspect of Mr. Nolan's evidence is set out in para. 124 above. As recorded in para. 178 above, somewhat similar evidence was also given by Ms. Patricia Nolan. The plaintiffs also rely on the evidence given by Mr. Nolan, while under cross-examination by Mr Millett, that Mr Millett told him in January 2015 that the OPT money was *"gone in 2013"*.

334. In addition, the plaintiffs, in their closing submissions, rely on two further answers given by Mr. Millett to interrogatories. In the first place, they rely on his response to interrogatory 286. That question asked Mr. Millett whether EFG made demand for repayment of the EFG loan in or about May or June 2014. His response was: "*Yes, I was informed by [Mr. Desmond] and also [AFT]".* That undoubtedly confirms that Mr. Millett was aware in May or June 2014 of a demand by EFG Bank for repayment of a loan but it does not establish the terms of the loan and it does not establish that Mr. Millett was aware of the existence of any such loan at the time of any of the transfers by the OPT to MECD.

335. The plaintiffs also seek to rely on Mr. Millett's response to interrogatory 296 where he was asked whether he confirmed to Mr. Desmond in or about 9th December 2014 that the trustees and the legal owners of the John Kenny Trust confirmed their investment and participation through CVSSA in the *"Kiwi"* and "*Start"* structures. Mr. Millett's response was: "*yes*". Again, the difficulty that arises is that there is no admissible evidence before the court that explains what was involved in these structures and, accordingly, both the interrogatory and the answer are unintelligible to me. Notably, while there are numerous references to the structures in the questions posed in the interrogatories, the plaintiffs never raised any interrogatories in relation to what was involved in those structures. It was, of course, open to the plaintiffs to do so. By raising appropriate interrogatories in relation to each step in the structures, the plaintiffs could have sought to secure admissions which could then have been relied upon in evidence as against those parties to whom the interrogatories were delivered. However, they did not proceed in that way.

336. In addition, the plaintiffs seek to rely on Mr. Millett's email and letter to Mann Made dated 24th May 2013. The email was admitted by Mr. Millett in his answer to interrogatory 87. It is therefore receivable in evidence as against the Millett defendants. It is also admissible on the basis that it constitutes a statement against interest. This was the email to Mann Made in

which Mr. Millett described the OPT as the origin of funds for the purchase of the Nemo Rangers property and he listed the members of the Nolan family as the beneficial owners of the OPT. However, the plaintiffs have also sought to rely on a further letter from Mr. Millett to Mann Made which was not proved in evidence. While this letter was referred to by Patricia Nolan in the course of her direct evidence it has not been proved.

337. The plaintiffs further seek to rely on Mr. Millett's answer to interrogatory no. 186 where he was asked if he discussed with Mr. Paul Kenny a strategy to "*describe a third party as the beneficial owner of Dildar IOM to obscure the Kenny family's involvement"*, to which Mr. Millett answered "*Yes*". In light of Mr. Millett's answer to the interrogatory, this material is plainly admissible in evidence against the Millett defendants. However, for the same reasons as those discussed in respect of the email of 24th May 2013, the admission made by Mr. Millett in his answer to this interrogatory is of no avail to the plaintiffs in respect of the case they make against the Kenny defendants.

338. The plaintiffs claim that Mr. Millett is manifestly in breach of his fiduciary duty by facilitating the use of the OPT funds in connection with the EFG loan, in "*diverting"* OPT monies for use in the Nemo Rangers purchase and in allegedly failing to disclose to the plaintiffs that the OPT funds had been "*blocked"* by EFG and would not be available to them on demand "*as agreed or understood"*. They also claim that, by his silence in failing to notify them that the monies had been charged to EFG, he was guilty of deceit notwithstanding that he allegedly knew for at least 18 months that the money had been charged to EFG. These are matters that I will consider when I come to make findings. Before doing so, I should identify the other evidence in the case.

The evidence of Ms. Deirdre Carwood

339. Ms. Deirdre Carwood gave evidence about the flow of funds in the CVSSA accounts. Ms. Carwood is a partner in charge of the forensic practice of Deloitte Ireland LLP. She is a

chartered accountant with 20 years' experience. She gave evidence on Days 17 and 18 of the hearing. In her direct evidence, Ms. Carwood adopted her report of August 2021 as part of her evidence. She also referred to the joint report of the accountants retained respectively by the plaintiffs, the Kenny defendants and Mr. Desmond. In section 1 of her report, Ms. Carwood recorded the instructions given to her by the plaintiff. It should be noted that, consistent with para. 25 of the pre-hearing written submissions of the plaintiffs (described earlier), Ms. Carwood recorded in para. 1.13 of her report that she was instructed by the plaintiff solicitors that during the discussions with Mr. Desmond in November 2012, Mr. Desmond advised that the OPT funds could be safeguarded in Switzerland: -

> "*I am further instructed by Philip Lee that during these discussions Ciaran Desmond advised that the Nolan's funds could be safeguarded in Switzerland, where he had banking relationships, stating the banking environment there was more solid, certain, and safe than that in Ireland* ***and it would also protect the deposits from creditors****. I have not seen any contemporaneous correspondence or meeting notes to confirm these details*". (emphasis added)

340. Before turning to the detail of Ms. Carwood's evidence, I should explain the basis on which she gave evidence in relation to the CVSSA bank accounts. In an exchange of correspondence during April 2022, the plaintiffs and the Kenny defendants, agreement was reached that the bank statements and documents evidencing the various transfers of money were admitted in evidence on a *Bula/Fyffes* basis. In that way, Ms. Carwood and the Kenny defendants' accounting expert, Mr. Linehan, were able to rely on the statements and other documents evidencing the transfers in order to deal with the flows of funds. On the same basis, the Kenny defendants also agreed to admit the loan agreement executed by Dildar Limited together with the documents relating to the incorporation of that company in the Isle of Man. However, in their letter dated 22nd April 2022, the solicitors for the Kenny defendants made

clear that they did not agree to admit documents authored by others purporting to explain payments into and out of the CVSSA accounts. But they offered to consider the admission of such documents on an individual basis provided that the documents were furnished in good time. That offer was not taken up by the plaintiffs' solicitors.

341. In her report, Ms. Carwood confined herself to the three transfers of OPT funds totalling €6,927,800 which are the subject matter of the plaintiffs' claim in these proceedings. She did not address the transfers of funds which resulted in payments to Serene or the use of those funds to purchase the Bank of Ireland debt in settlement of the Bank of Ireland claim against the Nolan family members. In section 3 of her report, Ms. Carwood undertook an analysis of the movement of funds in respect of the three transfers from Investec Bank to the account of MECD at Abu Dhabi Commercial Bank in Dubai and the subsequent transfers from the account of MECD at the latter bank to the account of CVSSA at EFG Bank. She identified that, prior to the first transfer, the amount standing to the credit of the CVSSA euro account with EFG Bank in Zurich was €416,125.79 which was comprised of three separate inward transfers of funds which had occurred in November 2012. As the joint statement of the accounting experts confirms, this is an agreed fact. Neither the plaintiffs nor the Kenny defendants claim that they made any contribution to that sum of €416,125.79.

342. The first transfer addressed by Ms. Carwood in her report (which she describes as "*transaction one"*) is the transfer of €2,480,000 in January 2013. However, it is clear from the subsequent joint statement of the accounting experts that it is agreed that, in fact, the first transfer of funds from the OPT to MECD is the transfer on 8th January 2013 of €620,000 which Mr. Richard Nolan had described in his evidence as the "*test transfer"*. In their joint statement, the experts describe this as an investment of €619,860 but I do not believe that the difference of €140 is significant. It is clear from the joint statement that the experts agree that this transfer to MECD ultimately generated a receipt of €619,000 into the account of CVSSA at EFG Bank

on 12th January 2013. The table to the joint accounting statement suggests that the outgoing payment from CVSSA to Serene of €619,024.21 was "*not agreed"* but it is clear from the evidence before the court that this transfer took place following the first meeting attended by Mr. Richard Nolan and Ms. Ann Nolan in Zurich. No one has contested that fact at the trial. In the joint accounting statement, the date of the transfer to Serene is given as 16th January 2013.

343. In para. 3.4 of her report, Ms. Carwood addressed *"transaction one" (*namely the transfer of €2,480,000) in some detail. This transfer was the subject of a letter of instruction from Pinnacle signed by Mr. Millett and dated 21st January 2013 and the letter of instruction of the same date signed by Ms. Elizabeth Nolan and Ms. Ann Nolan. Ms. Carwood expressly made reference to the fact that the instruction signed by Elizabeth Nolan and Ann Nolan identified the receiver as: - "*OPT Investor numbers 26, 27, 28 and 29"*. Under cross-examination, Ms. Carwood agreed that the appropriate way to characterise the transfers to MECD is that, in the first place, OPT invested the money in MECD and that, for that purpose it was sent to the MECD bank account in Abu Dhabi for the purposes of investment in accordance with the terms of the MECD Placement Memorandum previously discussed. She also agreed that, following this investment (which she accepted had rested in the MECD bank account at Abu Dhabi for a number of days), MECD then sent money of its own to CVSSA's euro bank account at EFG Bank in Switzerland and that the latter transfer was done in return for loan notes that CVSSA issued to MECD. However, it should be noted that, subsequently, on re-examination, Ms. Carwood confirmed that she was not aware that Mr. Richard Nolan and Ms. Patricia Nolan had given evidence that they had never seen the Placement Memorandum or loan notes and that they were unaware of their existence. She also confirmed, on re-examination, that she was not aware that Ms. Patricia Nolan had given evidence that the MECD application forms were signed in blank after each of the transfers in issue had been made.

344. In para. 3.5 of her report, Ms. Carwood identified that, following the transfer of €2,480,000 from Investec to MECD, the sum of €2,450,000 was transferred from the MECD bank account on 30th January 2013 which resulted in the receipt on the same day in the CVSSA bank account of €2,449,900. In the course of her cross-examination, Ms. Carwood was brought to a document described as a loan note certificate issued by CVSSA on 7th February 2013 in favour of MECD recording that MECD was the holder of loan notes to the value of €2,477,000. Ms. Carwood confirmed that her understanding was that the loan notes constituted a certificate by CVSSA that MECD was owed sums of money that had been transferred by MECD to the Euro bank account of CVSSA. While that is Ms. Carwood's understanding, it is clear from the evidence given by Mr. Richard Nolan and Ms. Patricia Nolan that they maintain that they were unaware of the existence of any loan notes until they began to investigate what had happened to the proceeds of the transfers to MECD. The loan notes in question have never been proved and I therefore do not believe that I can have regard to this aspect of Ms. Carwood's evidence.

345. In her report, Ms. Carwood did not address the next transfer of OPT funds to MECD namely the transfer of €2,479,860 to MECD on 7th February 2013. But this is addressed in the joint statement of the accounting experts. On p. 8 of that joint statement, Ms. Carwood and Mr. Eoghan Linehan, the accounting expert retained by the Kenny defendants, agreed that, on 7th February 2013, OPT invested a sum of €2,479,860 in MECD and that on 14th February 2013, MECD transferred the sum of €2,477,000 to Serene in redemption of that investment. As noted previously, this transfer of funds from the OPT to MECD did not result in any payment being made into the CVSSA bank account in Zurich. Instead, MECD made the transfer directly to Serene.

346. In para. 3.8 of her report, Ms. Carwood addressed what she describes as "*transaction two"* namely the second of the transfers that are now the subject of these proceedings (albeit the fourth of the transfers made by the OPT to MECD). She noted that, on 14th February 2013,

€2,480,000 was transferred from the OPT account with Investec Bank to MECD's bank account in Abu Dhabi in accordance with Pinnacle's letter of instruction signed by Mr. Millett on 14th February 2013 and a second letter of instruction to Investec signed by Ann Nolan and Elizabeth Nolan on the same day. In the same paragraph, Ms. Carwood noted that this resulted in the receipt of €2,479,860 in MECD's bank account on 20th February 2013. She also recorded in para. 3.9 of her report that, on 21st February 2013, there was a transfer of €2,477,900 from MECD's bank account to CVSSA which resulted in a receipt by the latter of €2,477,900 on 25th February 2013. Ms. Carwood further noted that, following this transfer, the balance standing to the credit of the CVSSA euro bank account in EFG Bank was €5,343,325.79 made up of the opening balance of €416,125.79 together with the two payments received from MECD on 30th January 2013 and 25th February 2013 respectively (namely Ms. Carwood's transactions one and two).

347. Ms. Carwood dealt with what she described as "*transaction three"* in paras. 3.11 to 3.14 of her report. This is the last of the three transfers the subject matter of these proceedings (albeit also the fifth of the total number of transfers to MECD from the OPT). In para. 3.11, she recorded that this final transfer was the subject of a letter of instruction dated 28th May 2013 addressed to Investec Bank and signed by Ann Nolan, Patricia Nolan, Elizabeth Nolan and Joan Nolan. This letter instructed Investec to transfer €2,000,000 to the MECD bank account. As previously noted, this is the letter of instruction that made reference to "*MECD (Dildar)*". A similar letter of instruction was issued by Pinnacle on 6th June 2013. In para. 3.12 of her report, Ms. Carwood noted that, on 7th June 2013, Investec Bank, acting on these instructions, transferred €2,000,000 to the bank account of MECD. Subsequently, on 12th June 2013, a transfer was made from MECD to the euro account of CVSSA in EFG Bank. The joint statement of the accounting experts records that this resulted in a receipt in a similar amount on 12th June 2013 in the euro bank account of CVSSA with EFG Bank. Following this receipt,

the balance of the CVSSA euro bank account was €8,243,925.79. This sum was made up of the opening balance of €416,125.79 together with the transfer of €2,449,900 received from MECD on 30th January 2013, the sum of €2,477,900 received from MECD on 25th February 2013, the sum of €900,000 received from Rachel Rose Assets SA (*"Rachel Rose"*) on 10th June 2013 ("*the Rachel Rose transfer"*) and the receipt of €2,000,000 from MECD on 12th June 2013. It was agreed between the accounting experts that the origin of the funds of €900,000 received under the Rachel Rose transfer was the Kenny family.

348. In paragraph 3.20 of her report Ms. Carwood noted that Rachel Rose is a Panamanian registered company. She also noted the terms of a trust agreement entered into by Rachel Rose and a company called CVS Holding Inc. as trustee with an effective date of 10th June, 2013 outlining that an amount not exceeding €900,000 (but not being less than €828,136) be transferred to Eugene F. Collins Solicitors. The trust agreement also confirmed that the beneficial owner of Rachel Rose is Mr. Paul Kenny (the eleventh named defendant). At para. 3.21 of her report, Ms. Carwood noted that if one adds the transfer of €2 million received into the CVSSA account on 12th June, 2013 and the sum of €828,136 mentioned in the trust agreement, this equates to €2,828,136 which she says *"is exactly the same amount which Ciaran Desmond would, on 2 September2013, instruct EFG Bank to transfer from the CVS SA Euro bank account to Eugene F. Collins Client Account in respect of the Nemo Property transaction."* This is an issue to which she returned in para. 5.21 of her report (addressed further below). For completeness, it should be noted that the precise sum transferred to Eugene F. Collins was slightly different. The correct figure is €2,828,192.79

349. Ms. Carwood analysed the movement of funds between the CVSSA euro account and the CVSSA US dollar account. It should be recalled in this context that the plaintiffs maintain that they were unaware of the existence of the US dollar account. However, it was accepted by all parties at the trial that there were transfers between the three CVSSA accounts at EFG Bank

namely the euro account, the US dollar account and a sterling account. In para. 4.3 of her report, Ms. Carwood noted that, on 12th June 2013, a sum of €8 million standing to the credit of the euro bank account was sold and exchanged for US dollars with the result that a sum of $10,628,000 was purchased and credited to the US dollar bank account held by CVSSA with EFG Bank. In her direct evidence, Ms. Carwood confirmed that Mr Linehan had agreed on behalf of the Kenny defendants that this transfer into US dollars had occurred. This was not contested by the Kenny defendants. Based on that information, Ms. Carwood expressed the view at para. 4.4 of her report that at least €6,683,874.21 of OPT funds were included in the transfer of €8 million to the US dollar account (i.e. €8 million less the opening balance of €416,125.79 and also less the Rachel Rose transfer of €900,000) although she also said that it was possible that the entire of the sum of €6,927,800 making up the plaintiffs' claim could have been included in transfer. Following the conversion and transfer of €8 million from the CVSSA euro bank account, Ms. Carwood confirmed in para. 4.5 of her report that this left a balance held in the euro account of €243,925.79.

350. Ms. Carwood considered the US dollar bank account in more detail in paras. 4.10 to 4.18 of her report. She explained that, prior to the transfer of the US dollar equivalent of €8 million from the CVSSA euro bank account, there was significant *"co-mingling"* of funds within the US dollar account. In paras. 4.6 to 4.9 of her report, she noted that, in addition to the transfer of the US dollar equivalent of €8 million from the CVSSA euro bank account on 12th June 2013, there was also a transfer on the same day of the US dollar equivalent of £1,606,000 from a separate sterling account held by CVSSA at EFG Bank. That generated a receipt of US$2,489,300 in the US dollar account. In para. 4.7 of her report, she noted that the balance held in the sterling account prior to that outward transfer was £1,606,599.11 which she said was comprised primarily of two separate inward transfers of funds both of which occurred in November 2012 namely an inward transfer of £63,586.07 on 15th November, 2012 by order of

McGuire Desmond Solicitors and a subsequent more significant transfer of £1,589,985 on 28th November, 2012 by order of MECD. In para. 4.8 of her report she acknowledged that the latter transfer appears to have been funded by monies contributed by the eleventh defendant, Mr. John Kenny by way of a transfer from Child & Child Solicitors to MECD. Ms. Carwood was unable to identify the source of the smaller transfer of £63,586.07 on 15th November 2012.

351. In para. 4.18 of her report, Ms. Carwood noted that the balance of the CVSSA US dollar account after the transfers from the euro bank account and the sterling bank account amounted to US $15,036,710.89. In the course of her direct evidence, Ms. Carwood was asked whether she could say anything about the significance of that figure. Her response was that she understood that US$15 million was the required balance that needed to remain in the US dollar bank account in order for the conditions of the EFG Bank loan to be met by CVSSA. However, counsel for the Kenny defendants objected to this evidence in relation to the loan agreement in circumstances where the agreement had not been proved. As previously noted, the application under the 2020 Act failed such that neither the existence nor the terms of any such loan agreement have been proved. This element of Ms. Carwood's evidence must, accordingly, be rejected.

352. Subsequently, in paras. 4.22 and 4.23 of her report, Ms. Carwood purported to reach conclusions in relation to whether there was a misappropriation of the OPT funds. Objection was taken by counsel for the Kenny defendants to this conclusion. Counsel made the point that these conclusions were a matter for the court rather than an expert witness. Counsel for the plaintiffs did not dispute that contention. Moreover, some of Ms. Carwood's conclusions are based on matters that have not been proved – such as the existence of the alleged EFG loan and pledge. Her view was also predicated on the basis that the movement of money from the euro account to the US dollar account had taken place without the knowledge or consent of the

plaintiffs. Those matters are plainly not issues for the application of any expertise by an expert. They are purely issues of fact for the court to decide.

353. In s. 5 of her report, Ms. Carwood addressed the provenance of the funds transferred for the purpose of the Nemo Rangers property transaction. In para. 5.8 of her report, she referred to the first payment made in relation to the property in question. This was a cheque in the sum of €50,000 representing the booking deposit. There is no longer any dispute between the plaintiffs and the Kenny defendants that this payment was funded by the latter. It is recorded on p. 7 of the joint statement of the accounting experts that Ms. Carwood and Mr. Linehan agree that the Kenny family funded the booking deposit which was funded as to €47,750 from a transfer on 17 May, 2013 from Park It Here Ltd to McGuire Desmond Solicitors' client account. Ms. Carwood and Mr. Linehan agreed that Part It Here Ltd was and is an entity owned by the Kenny family. In para. 5.7 of her report, Ms. Carwood also referred to a letter from Savills, estate agents, to Mr. Desmond dated 16 May, 2013 in which Savills confirmed that their client will sell the property to CVS Holdings Inc. and requesting a booking deposit of €50,000. Ms. Carwood also referred in para. 5.8 of her report to a letter of 20th May, 2013 from McGuire Desmond to Savills advising them that they were attaching a cheque in that amount in respect of the booking deposit. Insofar as I can see, those letters were not submitted in evidence but no objection was taken by the Kenny defendants to Ms. Carwood's reliance on the letters either at the time she gave her evidence or in the course of closing submissions.

354. The next element of the purchase of the Nemo Rangers property was the contract deposit of €251,700. The contract dated 10th July, 2013 provided for a purchase price of €3,017,000 and a deposit of €301,700. When credit is given for the booking deposit of €50,000, that left €251,700 to be paid as a deposit in respect of the contract. It should be noted that the relevant contract and the subsequent conveyance have been admitted in evidence as between the plaintiffs and Kenny defendants. That was the subject of correspondence between the

solicitors for those parties in the course of April 2022. The contract was entered into between George Maloney and Bruce Alexander MacKay as joint receivers of certain aspects of John J. Fleming, as vendor, and Clear Vision Solutions Holding Inc. as purchasers.

355. On p. 7 of the joint statement of the accounting experts, it is recorded that Ms. Carwood and Mr. Linehan agree that the Kenny family appear to have funded the contract deposit of €251,700 as evidenced by the following: -

(a) On 10 June, 2013, the Kenny family transferred €302,000 to CVS Holdings Inc. At that time, CVS Holdings Inc. had no other funds;

(b) On 28 June, 2013, CVS Holdings Inc. transferred €255,000 to McGuire Desmond Solicitors client account;

(c) On 3 July, 2013 McGuire Desmond made a payment of €251,700 to the vendors solicitors Messrs Eugene F. Collins.

(d) Both the receipts of €255,000 and the payment of €251,700 are accounted for by McGuire Desmond Solicitors in their client ledger statement for CVS Holdings. Ms. Carwood also accepted in para. 5.13 of her report that it does not appear that any OPT funds were used to fund the deposit.

356. It is clear from the contract for the purchase of the Nemo Rangers property that, in addition to the deposit, a payment of €2,715,300 was required in order to complete the purchase. In the joint statement of the accounting experts, it is recorded on p. 8 that Ms. Carwood and Mr. Linehan agreed that the closing funds required for the purchase of the property were funded by a payment of €2,828,136 made by CVSSA directly to the vendor's solicitors Eugene F. Collins on 3rd September, 2013. The contents of para. 5.14 of Ms. Carwood's report should also be kept in mind in this context. There, she described how CVSSA issued a letter of instruction to EFG Bank on 2nd September 2013 instructing the bank to transfer €2,828,136 from CVSSA's euro account to Eugene F. Collins. Although there were insufficient

funds standing to the credit of the euro account on 3rd September 2013 to honour that instruction, the statement of account nonetheless shows that EFG Bank followed the instruction and made the transfer to Eugene F. Collins on that day. The statement of account shows a debit of €2,828,192.79 in respect of an outgoing transfer on 3rd September 2013. The statement also shows that, immediately following that transfer, the euro account was overdrawn to the extent of €2,584,267. The account remained overdrawn for two days. The fact that the euro account was overdrawn in this way is potentially very relevant to the tracing claim asserted by the plaintiffs in respect of the Nemo Rangers property. The Kenny defendants argue that it is not possible to trace through an overdrawn account.

357. The next entry on the euro account is for 5th September 2013 recording a *"CURRENCY SALE USD/EUR"* and the receipt of €2,828,136 on that day leaving the account in credit to the tune of €243,869. There is a corresponding transaction on the US dollar account on 5th September 2013. The US dollar statement of account records a debit of US$3,730,311.38 on that day in respect of a *"CURRENCY PURCHASE USD/EUR".* This entry also gives the same FX entry number for this purchase as is recorded in the euro account statement in respect of the currency sale. This is clearly the same foreign exchange transaction but the Kenny defendants maintain that the statements of account clearly demonstrate that EFG Bank funded the transfer to Eugene F. Collins on 3rd September 2013 for a period of two days and that EFG Bank was not refunded until 5th September. They maintain that the plaintiffs have placed no evidence before the court to prove that the accounts were linked or to support the view offered by Ms. Carwood in para. 5.15 of her report that the money *"used to fund the transfer … to the Eugene F. Collins Client account* ***originated*** *from the CVS SA USD bank account."* (my emphasis). Given the gap in time between the withdrawal and transfer from the euro account on 3rd September 2013 and the subsequent reimbursement from the US dollar account on 5th September 2013, it is difficult to see how it could plausibly be suggested that the money used

to fund the transfer to Eugene F. Collins originated from the US dollar account. Thus, the position taken by the Kenny defendants is supported both by the bank statements and the gap in time between the date of drawdown from the euro account and the subsequent sale, two days later, of US dollars from the US dollar account to fund a transfer to the euro account.

358. On p. 8 of the joint accounting statement, it is noted that Ms. Carwood and Mr. Linehan agreed "*that it is reasonable to assume that the payment of €2,828,136 made by CVS SA should have represented the monies held by CVS SA on behalf of the Kenny Family, given that both the Booking Deposit and Contract Deposit for the purchase of the Nemo Property appear to have been funded by the Kenny Family."* One can immediately see the logic of that proposition. However, in her direct evidence on Day 17, Ms. Carwood sought to clarify this by emphasising the words *"should have"* and adding that *"You would assume that it's reasonable that if a booking deposit and a contract deposit was paid by a particular party that the closing funds would also be paid by that party. However, in this case there is material uncertainty … in relation to the source of those closing funds due to the co-mingling of funds in the US dollar account."*

359. Given that the plaintiffs bear the burden of proving their claimed entitlement to trace their claim into the Nemo Rangers property, the *"material uncertainty"* identified by Ms. Carwood has implications for the case which the plaintiffs seek to make in respect of that property. In her report, Ms. Carwood acknowledged that the task of attributing the transfer of €2,828,192.79 to the OPT funds is "*complicated by the co-mingling of funds both within the CVS SA Euro bank account and the CVS SA USD bank account"*. As noted above, she suggested that, at least €6,683,874.21 of OPT funds were included in the transfer of €8 million to the CVSSA US Dollar bank account on 12th June 2013. In para. 5.18 of her report she highlighted that, prior to the transfer of funds from the euro to the dollar bank accounts, the balance on the dollar bank account was US$4,408,710.89 which she converted to euro using

the same exchange rate of 1.319 used in September 2013 to convert the amount transferred to Eugene F. Collins. This equates to €3,342,464.66.

360. In her direct evidence, Ms. Carwood sought to rely on a fax message from AFT to Mr. Millett dated 1st November 2013 which, by its terms, suggested that the amount transferred to Eugene F. Collins consisted of €2,000,000 that had been transferred to CVSSA from MECD in June 2013 and €900,000 that was transferred to CVSSA from Rachel Rose. However, this fax message was never proved by the plaintiffs in the course of the hearing. In para. 5.21 of her report, Ms. Carwood reiterated the suggestion that the sum of €2,000,000 mentioned in the fax coincided with the last payment of €2,000,000 by the OPT to MECD in June 2013. She nonetheless suggested in para. 5.22 of her report that it was possible that the full amount transferred to the Eugene F. Collins account was funded solely by the OPT. This was on the basis that documentation reviewed by her (which was not proved in evidence) suggested a number of different potential purposes for the Rachel Rose transfer. Given that neither the fax dated 1st November 2013 nor the other documentation (to which she referred) were proved in evidence, there is no basis to support this aspect of Ms. Carwood's evidence that the full amount transferred to Eugene F, Collins was funded by the OPT either solely or to the extent of €2,000,000.

361. In her direct evidence on Day 17, Ms. Carwood also suggested that potentially the entire of the investment of €6.9 million originating from the OPT could have been included in the €8,000,000 which ended up in the US Dollar account in June 2013 such that "*conceivably the full amount of €2.8 million could have been OPT funds, because it was available"*. She nonetheless agreed, as part of her direct evidence, that it was possible that the €900,000 Rachel Rose transfer could have been included in that €2.8 million "*as too could be whatever element of John Kenny's 1.5 or 1.6 million could also be included in that 2.8 million"*. She maintained that it was impossible for any accountant to identify the source of the funds. The effect of this

concession is that, while Ms. Carwood has contended that it is possible that all or a substantial part of the final tranche of purchase money came from the proceeds of the OPT transfers to MECD, she cannot say that this is more probable than not. Similarly, in the course of her cross-examination by counsel for the Kenny defendants, Ms. Carwood confirmed that she could not go further than saying that the OPT funds could potentially have been the source of the money transferred to Eugene F. Collins, She conceded that, equally, the source of the money could have been the Kenny family funds. Given that the plaintiffs bear the burden of proving their case, this is a significant concession on Ms. Carwood's part.

362. While still in the course of her direct evidence on Day 17, Ms. Carwood referred, for the first time, to a document prepared by her three weeks earlier described as a "*reconciliation of the value of 'Kenny' funds in CVSSA accounts on 3 September 2013"*. Objection was taken by counsel for the Kenny defendants who observed that it was highly unsatisfactory that a document of this kind would be produced without any prior notice and that it was particularly unsatisfactory that it should be produced in that way given that it had been prepared three weeks previously. I expressed considerable concern about the fairness of proceeding in this way given that Ms. Carwood was due to be cross-examined that day. I indicated that, in those circumstances, it might ultimately transpire that the Kenny defendant's expert, Mr. Linehan, might have to give evidence that had not been the subject of cross-examination because there was insufficient time for counsel for the Kenny defendants to digest this additional document and discuss it with Mr. Linehan. That was accepted by counsel for the plaintiffs.

363. Ms. Carwood then gave evidence by reference to the "*reconciliation"* which she had prepared. She suggested that there were insufficient Kenny funds in the CVSSA accounts on 3rd September 2013 to equate to the sum transferred to Eugene F. Collins to close the purchase of the Nemo Rangers property namely €2,828,192.79 Her reconciliation recorded that the original value of the Kenny family investments in issue was €2,769,041.03 being the aggregate

of (a) the transfer of STG£1,589,985 (which she converted to €1,869,041.03) and (b) the Rachel Rose transfer of €900,000. Although €2,769,041.03 would not have been sufficient to meet the entire of the transfer to Eugene F. Collins of €2,828,192.79, it would have been enough to fund the balance of the purchase price of the Nemo Rangers property (namely €2,715,300). However, according to Ms. Carwood's reconciliation, the redemption values of the Kenny family investments were less than their original value. The reconciliation suggested that the proceeds of the redemption of the €900,000 transfer by Rachel Rose amounted to €828,136 while the proceeds of the redemption of the investment of STG£1,589,985 transferred by Child & Child amounted to STG£1,543,000 which equated to €1,822,048.45 (at a rate of exchange which she said was applicable as at that date). When one adds the sum of €828,136 to €1,822,048.45, this makes a total of €2,650,184.45. However that would leave a shortfall of €178,008.34 between the value of the Kenny monies and the amount actually transferred to Eugene F. Collins. Ms. Carwood also suggested that the shortfall may have been as much as €286,393.55 (which I think should read €286,450.34) when account is taken of a refund of €108,442 sought by CVSSA which is mentioned in Mr. Linehan's report. This is a reference to s. 7.5 of Mr. Linehan's report where he had suggested that, following the transfer to Eugene F. Collins on 3rd September 2013, CVSSA had written to MECD stating that it had made an overpayment to MECD of €108,442 on 3rd September and seeking its return. Neither Mr. Linehan's report nor the CVSSA letter are in evidence but it is necessary to refer to them to explain the reliance sought to be placed on them by Ms. Carwood.

364. In view of the belated sharing of Ms. Carwood's reconciliation schedule, her cross-examination in respect of this element of her evidence was deferred to Day 18 of the hearing. In the course of that cross-examination, Ms. Carwood suggested that the redemption values used by her were taken from Mr. Linehan's report. However, she was corrected by counsel for the Kenny defendants who drew her attention to the fact that, although Mr. Linehan had

recorded the redemption value of the Kenny investment in MECD as STG£1,543,000, he had not suggested a redemption value of €828,136 in respect of the Rachel Rose transfer. On the contrary, when dealing with the transfer of funds to Eugene F. Collins in September 2013, Mr. Linehan, in s.7.4 of his report, proceeded on the basis that, while the Kenny investment in MECD had a redemption value of STG£1,543,000, the repayment of the Rachel Rose transfer of €900,000 was not subject to any redemption value. Thus, while the plaintiffs and the Kenny defendants are agreed that the redemption of the Kenny investment in MECD was subject to a redemption value at less than the original amount of the investment, there is no agreement that the repayment of the Rachel Rose transfer was subject to any equivalent reduction. In the absence of such an agreement, there is no evidence before the court to support Ms. Carwood's suggestion that the repayment of the Rachel Rose transfer was subject to a redemption value of €828,136. Under cross-examination on Day 18, Ms. Carwood confirmed that, if one takes the figure of €900,000 in place of the figure of €828,136, that adds €72,000 in round terms to the redemption value shown in her reconciliation schedule. More accurately, it adds a total of €71,864. The redemption figure she had shown was €2,650,184.45. If one adds €71,864 to that, it would, by my calculation, bring the total repayment/redemption to €2,722,184.45. It appears from a calculation made by Mr. Linehan (as put to Ms. Carwood) that he arrived at a slightly smaller figure of €2,719,686 and it was this figure which was put to Ms. Carwood in the course of cross-examination. In response, she acknowledged that, while this was not enough to cover the entire of the transfer to Eugene F. Collins on 3rd September 2013, it was more than sufficient to pay the closing balance of €2,715,300 due in respect of the purchase price for the Nemo Rangers property.

365. Ms. Carwood was also cross-examined on Day 18 by reference to documents relating to the repayment of €108,442 sought by CVSSA from MECD. However, those documents were never proved and, in those circumstances, I do not believe that I should have regard to that

element of the cross-examination in this judgment. Nevertheless, it is clear on the evidence that, at the time of the transfer to Eugene F. Collins, the only element of the purchase price of the Nemo Rangers property that was unpaid was the completion sum of €2,715,300. It therefore necessarily follows that there was an element of overpayment in the transfer of €2,828,192.79.

366. As noted in para. 356 above, the statement of the CVSSA euro account shows that it became overdrawn following the transfer to Eugene F. Collins on 3rd September 2013 and that it remained overdrawn until 5th September. This issue was raised with Ms. Carwood by counsel for the Kenny defendants on Day 17. Ms. Carwood acknowledged that, following the transfer of €2,828,192.79 from the euro account to Eugene F. Collins on 3rd September 2013, the euro account was overdrawn to the tune of €2,584,267. Initially, Ms. Carwood accepted the proposition put to her by counsel for the Kenny defendants that this overdrawn amount was funded by EFG Bank for the period between 3rd and 5th September 2013. But, a short time later, she sought to maintain that the three accounts were *"linked"* which she suggested was not unusual. However, there is nothing to substantiate that supposition on her part. There was no evidence that there was any contractual provision or Swiss bank practice that permitted EFG Bank to treat the accounts as linked. Ms. Carwood acknowledged that the euro account remained overdrawn to the same extent on 4th September 2013. It was not until 5th September 2013 that a credit of €2,828,136 was received from the currency exchange transaction on the US Dollar account (resulting in a debit on that account of US$3,730,311.38). At a slightly later point on Day 17 (at p. 119), she again accepted that the provenance of the funds used to close the purchase of the Nemo Rangers property was the overdrawn euro account. She also accepted this in the course of her further cross-examination on Day 18 at p. 38.

367. On Day 17, counsel for the Kenny defendants also took Ms. Carwood through the sterling bank account. Ms. Carwood acknowledged that it had STG£63,000 in credit on 15th November 2012. This increased to STG£1,653,571.07 on 28th November 2012 following the

transfer of STG£1,589,985 from Child & Child solicitors on behalf of John Kenny. Ms. Carwood also agreed that, on 12th June 2013, STG£1,606,000 was converted into US dollars and transferred to the US dollar account in the amount of US$2,489,300. She acknowledged that, as a consequence of that receipt together with the subsequent receipt on 14th June 2013 of US$10,628,000 (as a result of the sale of €8 million standing to the credit of the euro account) the balance standing to the credit of the US dollar account went up to a figure of just over US$15 million. Ms. Carwood also acknowledged that the vast majority of the amount transferred from the sterling account represented Kenny family money. The only element of that sum that emanated from a different source was the original balance of STG£63,586.07.

368. Under further cross-examination by counsel for the Kenny defendants, Ms. Carwood also accepted that there were sufficient monies left in the US dollar account following the transfer to Eugene F. Collins to discharge the plaintiffs in full. Following the transfer to Eugene F. Collins, there remained a sum of US$11,306,399.51 standing to the credit of that account. Ms. Carwood accepted that "*from a mathematical question"* that was 100% accurate. Her reason for confining her acceptance to mathematics was that she understood that the funds standing to the credit of the US dollar account were subject to the pledge which the plaintiffs allege existed but which they have failed to prove. Ms. Carwood acknowledged that her statement in para. 4.1 of her report that CVSSA was required to hold US$15 million on deposit as collateral for an investment structure was based on instructions given to her by the plaintiffs' solicitors. She accepted that she was not in a position to prove the existence of any pledge.

369. Ms. Carwood was re-examined by counsel for the plaintiffs on Day 18. In the course of that re-examination, Ms Carwood referred again to the email from Mr Millett to Mr Garcia of AFT of 2nd September 2013 which refers to the amount of €2,828,136 as representing the *"closing balances, return of booking deposit and stamp duties"* to be forwarded directly to the account of Eugene F Collins. This email was admitted by Mr Millett in response to

interrogatory number 127. It is therefore admissible against the Millett defendants. However, it is not admissible as against the Kenny defendants. Mr. Millett is not an agent of the Kenny defendants. Thus, if the plaintiffs wished to deploy his evidence against the Kenny defendants, they should have called Mr. Millett as a witness and taken him through his answers to the interrogatories. Had that occurred, the Kenny defendants would then have had an opportunity to test Mr. Millett's evidence by to cross-examining him. None of that happened. Thus, none of Mr. Millett's answers to the interrogatories are admissible against the Kenny defendants.

370. There is a further aspect of Ms. Carwood's evidence, on re-examination, which is relevant. In the course of her re-examination on Day 18, the following exchange took place between counsel for the plaintiffs and Ms Carwood: -

> *"80 Q. If it is the case that the Kenny monies were sufficient to pay the first of those items, the closing balance, would you have any comment in relation to the source of the other aspects of the monies that were included in the payment, stamp duties, return of booking deposit?*
>
> *A. Well, the source of those, Mr. Gardiner is right in that it came from the CVS SA euro account. But the provenance of those funds, the original owner of those funds is still unknown. What I would say is that there was sufficient, as I've just walked through my assessment and Mr. Linehan's assessment and that shows is that there was sufficient funding, but in the CVS SA combined accounts regardless of where the money was in the Kenny funds to make that full payment of 2.828 million.*
>
> *Yes.*
>
> *81 Q. So taking Mr. Gardiner's analysis and assuming there was sufficient in the Kenny funds to pay the closing balance, can you say, having analysed the accounts, which monies went to pay which of these aspects of what went to Eugene F. Collins? Is it possible to say that?*

A. No. It's not"

371. It should be noted that counsel for the Kenny defendants, in the course of closing submissions on Day 22, identified this exchange as confirming an *"evidential hole"* for the plaintiffs in terms of their case that their monies were used for the purposes of the purchase of the Nemo Rangers land. He argued that this first of all establishes that Ms Carwood accepted that there were sufficient Kenny funds in the combined accounts at the time of the transfer to Eugene F Collins on 3rd September 2013 to cover the entire of the payment. Secondly, counsel stressed that this is a further occasion on which Ms Carwood accepted that it was simply not possible to say whose monies were used in the acquisition of the property. Counsel suggested that this means that the plaintiffs have failed to prove that their monies were so used.

The application by the plaintiffs to withdraw their reliance on the answers to certain of the interrogatories

372. As mentioned previously, counsel for the plaintiffs, on Day 16 of the hearing, identified the answers given to the interrogatories on which the plaintiffs would seek to rely for the purposes of any application that might subsequently be made by the defendants at the end of the plaintiffs' evidence to dismiss the case. On Day 16, counsel for the plaintiffs produced two lists to the court. The first addressed the answers given by Mr. Millett to certain interrogatories. The second related to the answers given by Mr. Paul Kenny to certain interrogatories aimed at the Kenny defendants. Each of the lists also contained a note that the plaintiffs would continue to rely on all answers to interrogatories for the purposes of any cross examination that might take place of Mr. Millett or Mr. Kenny. In the case of Mr. Millett, the answers to interrogatories identified on that list were 1-5, 17-21, 23, 29, 30, 34-36, 39-50, 53-55, 60, 65, 67, 69-73, 75-76, 81, 83-88, 91-97, 99-100, 103-104, 107, 114, 121, 127, 129, 132, 137-138, 141-142, 146, 148-150, 152-161, 166-169, 172, 174, 176-179, 184-193, 197, 199-202, 204, 207, 208, 210-212, 214-219. In the case of Mr. Paul Kenny, the answers identified on the list were to

interrogatories 1-15, 17, 20-24, 26-30, 32-43, 49, 66, 70-74, 76, 78-82, 85, 91-93, 106-108, 111, 114-123, 132-151, 154, 157, 158, 160, 161.

373. However, after Ms. Carwood was cross-examined by counsel for the Kenny defendants on Day 17, the plaintiffs sought to withdraw their reliance on certain of the answers. The solicitor for the plaintiffs wrote to the defendants on Day 18 in the following terms:-

"We refer to the above proceedings. We refer to the list of interrogatories furnished to the Court on Friday 17th June.

It has now become apparent that the Kenny Defendants are using … the answers to some of the interrogatories as acceptance by the Plaintiffs of the truth of the answers given. The Defendants must know that this was not the intention of the Plaintiffs. The Plaintiffs would not have openly accepted the evidence of Mr. Paul Kenny when it is clearly against the pleaded case of the Plaintiffs and evidence given by witnesses to date.

To make sure that there is no further ambiguity on this, an amended list is now furnished. This matter will be raised with the Court when the matter resumes."

374. The letter referred to two revised lists of answers to interrogatories on which the plaintiff proposed to rely. In the case of Mr. Millett, the list was now confined to 5, 17, 18, 29, 30, 34, 35, 36, 45, 60, 87, 88, 92f, 93f, 95f, 95g, 95h, 99, 114, 121, 127, 132, 138, 146, 150, 153, 154, 155, 156, 157, 158, 159, 166, 167, 168, 169, 176, 177, 178, 179, 184, 185, 186, 199, 200, 208, 230, 231, 232, 243, 244, 247, 248, 249, 261, 262, 263, 273, 274, 281, 286, 296, 311. This list was headed with the words *"For the avoidance of doubt the positive admissions that are relied on are set out below…".*

375. In the case of Mr. Paul Kenny, the revised list of answers to interrogatories was very considerably reduced. It solely comprised nos. 1, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 23, 27, 28, 39, 40, 41, 66, 115, 148, 149. In the case of Mr. Kenny's answers, the list was headed with the words:-

"*It appears to be a misunderstanding of the nature of the admissions made.*

For the avoidance of doubt the positive admissions that are relied on are set out below…"

376. It should also be noted that this list is very considerably smaller than the list of answers to interrogatories which were identified in para. 5.1 of the plaintiffs' response to the submissions of the Kenny defendants which was furnished in advance of the resumption of hearing on Day 7. On that occasion, in para. 5.1 of their submissions, the plaintiffs indicated that:

"Regarding the interrogatories that the Plaintiff intend to rely on, it appears to be accepted by the Kenny Defendants that the Plaintiffs are under no obligation at this time to set out which of the interrogatories that the Plaintiff seeks to rely on. Absent an application to dismiss the case, the Plaintiff would not normally call in aid the interrogatories that it seeks to rely on until the cross examination of witnesses and the closing of the case. However, as matters stand the Plaintiffs will be relying on the answers given by Paul Kenny to the following interrogatories:

2,3,10,12,16,17,22,33,34,36,37,38,41,42,66,71,72,73,76,78,81,85,91,93,99,100,101,103,105,106,109,113.114,116,118,119,121,122,123,132,133,134,140,141,142,143,145, 146-149,150,151 and 154

The Plaintiffs reserve the right to supplement and or reduce this list which is only provisional."

377. Counsel for the plaintiffs submitted on Day 18 that the lists of answers to interrogatories submitted on Day 16 were not intended to suggest that the plaintiffs were admitting facts contrary to their pleaded case. Counsel also said that the documents handed into court on Day 16 had been prepared by counsel and that counsel did not have instructions from the plaintiffs to make admissions contrary to their case. I interjected at that point to note that the purpose of

identifying the answers to interrogatories on which the plaintiffs relied was that, before the plaintiffs closed their case, the defendants would know the case which the plaintiffs now make and the evidence on which the plaintiffs rely. In response, counsel submitted that a mistake had been made and that the purpose of the lists of answers to interrogatories was *"to bring to the attention of the court the matters… which are relevant to the issues that had to be determined rather than admission. I would never have accepted the truth of what, for example, Mr. Kenny and Mr. Millett said".*

378. After hearing from counsel for the Kenny defendants and after hearing further from counsel for the plaintiffs, I indicated that it would be necessary for the plaintiffs to make a formal application and that all relevant authority should be brought to the court's attention. Subsequently, on Day 19 of the hearing, a motion was brought by the plaintiffs seeking an order pursuant to the inherent jurisdiction of the court granting the plaintiffs leave to withdraw the documents handed into court on Day 16 and to withdraw the plaintiffs' reliance on them. In the alternative, an order was sought pursuant to O.32 r.4 or pursuant to the inherent jurisdiction of the court granting the plaintiffs leave to withdraw *"any admission made by virtue of having tendered the documents … and/or by virtue of having relied or purported to rely on the interrogatories…".* The application was grounded on an affidavit of Mr. Bernard McEvoy, the solicitor for the plaintiffs, in which the following averments were made:

> *"3. Prior to the handing in of the documents into Court the Plaintiffs were not asked for instruction to make any admissions, contrary to the pleaded case or the case that they have made out to date in the oral evidence that was given. Although I was aware that the documents were being prepared, I was not aware that the documents would or could amount to admissions by the Plaintiff. If they are considered to be admissions, they were not discussed or agreed to by the Plaintiffs.*

4. *I have discussed the matter with Counsel, and it appears that he was also not under the impression (perhaps mistakenly) that the furnishing of the document could be viewed as an admission. In the event that the Court comes to the view that the certain of answers to the interrogatories can be viewed as admissions it was clearly a bona fide mistake made.*

5. *On Tuesday 21 st June 2022, during the cross-examination of the Plaintiffs' witness Ms Deirdre Carwood, it became apparent that the Kenny Defendants have taken the view that documents tendered to the court represent the evidence that the Plaintiff has led in the case. That is not accepted as a correct characterisation of the documents and legal submissions to that effect will be made at the hearing.*

6. *The following line of cross examination was led by the Kenny Defendants:*

a. *At Question 384 counsel for the Kenny Defendants indicated to Ms Carwood on that date that the Plaintiffs had led evidence that the acquisition of the Nemo Property was originally to be pursued through Clear Vision Solutions Holdings Inc. However that is not at all the Plaintiffs' position, it is not evidence which the Plaintiffs have sought to introduce. It is a position which the Plaintiffs' do not accept.*

b. *At Questions 385 and 388 counsel for the Kenny Defendants further put it to Ms Carwood that the Plaintiffs led evidence that John and Paul Kenny own Clear Vision Solutions Holdings Inc. Again that is not at all the Plaintiffs' position, it is not evidence which the Plaintiffs have sought to introduce.*

c. *At Question 507 counsel for the Kenny Defendants put it to Ms Carwood that the Plaintiffs led evidence that a letter dated 6th June 2013 was prepared by Mr. Millett for Paul Kenny's signature, in connection with the purchase by Paul Kenny if issued shares in CVS Holdings Inc., but the purchase did not proceed.*

Again that is not at all the Plaintiffs' position, it is not evidence which the Plaintiffs have sought to introduce. It is a position which the Plaintiffs' do not accept.

d. *At Question 512 counsel for the Kenny Defendants put it to Ms Carwood that the Plaintiffs led evidence that the reference to "MECD (Dildar)" in the payment instruction under consideration was a typographical error. Again that is not at all the Plaintiffs' position, it is not evidence which the Plaintiffs have sought to introduce. It is a position which the Plaintiffs' do not accept.*

e. *At Questions 519-522 counsel for the Kenny Defendants put it to Ms Carwood that the Plaintiffs led evidence that a contemporaneous instruction to pay money was made by Paul Kenny and John Kenny. Again that is not at all the Plaintiffs' position, it is not evidence which the Plaintiffs have sought to introduce. It is a position which the Plaintiffs' do not accept.*

f. *At Question 523 counsel for the Kenny Defendants put it to Ms Carwood that the Plaintiffs' evidence was that the sum of €900,000 allegedly paid from*

Rachel Rosa SA on Paul Kenny's behalf was used for the purchase of the Nemo property, and not the purchase of shares in Clear Vision Solutions Holdings Inc. Again that is not at all the Plaintiffs' position, it is not evidence which the Plaintiffs have sought to introduce. It is a position which the Plaintiffs' do not accept."

379. Mr. McEvoy, in his affidavit exhibited the revised lists of answers to interrogatories which had been the subject of the letter sent on Day 18. He confirmed in para. 8 of his affidavit that the plaintiffs do not rely on Mr. Millett's reply to interrogatory 165 but do rely upon his reply to interrogatory 296. He then concluded his affidavit by saying:-

"*9. In so far as the Court forms the view that certain admissions were made on 17 th June, the Plaintiffs wish to withdraw these admissions as:*

a. they clearly do not represent the case that the Plaintiffs wish to make,

b. all of the Defendants must be aware that this is so having regard to the manner in which the case has proceeded,

c. it is clearly in the interest of justice that the evidence that the Plaintiffs wish to rely upon is relied on, not evidence that does not support the case,

d. the consequences for the Plaintiffs case is very serious should the Defendants be allowed to rely on the document in the manner suggested,

e. the Defendants are not in any way prejudiced by the withdrawal of the admissions (if so characterised by the Court), and

f. any potential injustice to the Kenny Defendants can be ameliorated by the recalling of Deidre Carwood if at all required."

380. On Day 19 of the hearing, counsel for the plaintiffs submitted that it was important to consider the context in which the lists of answers to interrogatories had been submitted to the court on Day 16. He stressed that, in light of Ms. Carwood's unavailability to give evidence on Day 16, the submission of the list of answers was done at an earlier stage of the hearing than had been intended. Counsel made the point that, if the plaintiffs had been able to proceed with Ms. Carwood's evidence on Day 16, submission of the answers to the interrogatories would have taken place at the conclusion of the plaintiffs' evidence. Had that happened, the answers would never have been deployed in the course of the cross-examination of Ms. Carwood by counsel for the Kenny defendants. Counsel for the plaintiffs submitted that it was not correct to suggest that the effect of handing in the list of interrogatories was that the answers became the evidence of the plaintiffs. I intervened at that point to ask counsel whether reliance on an answer to an interrogatory is any different from putting the deponent of the answer into the witness box and asking the deponent the question posed in the interrogatory. Counsel continued to maintain there was a material difference but I have to say that I do not believe that a clear

answer was given to my question. Nor was any authority cited for the proposition that the answers submitted did not form part of the plaintiffs' evidence.

381. Counsel for the plaintiff also argued that, having regard to the nature of the dispute between the parties, the defendants must have known that, in submitting the lists of answers to interrogatories, it was never the intention of the plaintiffs to make admissions to be used against them which were contrary to the case made by them in their pleadings. Counsel further submitted that, to the extent that the plaintiffs could be said to have deployed the answers to the interrogatories in question as part of their case (notwithstanding their inconsistency with the case made in their pleadings) such a deployment should be considered to constitute an admission of facts. Counsel drew attention to the way in which an admission of fact can be withdrawn. Counsel referred, in this context, to O.32 r.4 which expressly envisages that the court may permit a party to withdraw an admission made in response to a notice to admit facts. The relevant part of that rule provides in very broad terms that the court *"may at any time allow any party to amend or withdraw any admission so may on such terms as the Court considers just".* Counsel also referred to a decision of the Court of Appeal of England and Wales in *Gale v. Superdrug Stores* [1996] 3 All ER 468. In that case, an admission of liability had been made by the defendant's insurers in respect of a workplace accident suffered by the plaintiff. However, when the plaintiff subsequently issued court proceedings against the defendant, the defendant filed a defence in which liability was denied. Although it was concerned with an admission of liability rather than an admission of fact, the court dealt with the matter as though it arose under O.27 of the rules then in force in England and Wales (which was in very similar terms to O.32 in the Irish rules). The court accepted that the test to be applied was that laid down by Ralph Gibson L.J. in *Bird v. Birds Eye Walls Ltd* [1987] CA Transcript 766 where he said that:

"when a defendant has made an admission the court should relieve him of it and permit him to withdraw it or amend it if in all the circumstances it is just to do so having regard to the interests of both sides and to the extent to which either side may be injured by the change in front".

382. Counsel for the plaintiffs also drew my attention to a more recent decision of the English courts namely the decision of Sumner J. in *Braybrook v. Basildon & Thurrock University NHS Trust* [2004] EWHC 3352 (QB). That case was decided under the Civil Procedure Rules (*"CPR"*) introduced in 1998. In that case, a very late application was made by the defendant to withdraw an admission made in correspondence. In that case, the plaintiff's husband had been admitted to the defendant's hospital suffering from meningitis. There was a delay in diagnosing his condition with the result that treatment was delayed. This led to his death six months later. Proceedings were commenced in April 2003. In their defence, the defendants admitted liability. Subsequently, the defendants also made a further admission in correspondence that, if intravenous antibiotics had been administered earlier, the plaintiff's husband would probably have made a full recovery. They later sought to withdraw this admission very close to the date fixed for the trial. Like the previous version of the Rules, CPR 14.15 expressly permitted the court to allow a party to amend or withdraw an admission. This was subject to the overriding objective set out in CPR of enabling the court to deal with cases justly and ensuring that cases are dealt with expeditiously and fairly. Having discussed the decision of the Court of Appeal in *Gale v. Superdrug Stores* and a number of more recent decisions, Sumner J., at para. 45 of the judgment, drew the following principles from the case law and from the provisions of the CPR: -

" *(1) In exercising its discretion the court will consider all the circumstances of the case and seek to give effect to the overriding objective.*

(2) Amongst the matters to be considered will be:

(a) the reasons and justification for the application which must be made in good faith;

(b) the balance of prejudice to the parties;

(c) whether any party has been the author of any prejudice they may suffer; (d) the prospects of success of any issue arising from the withdrawal of an admission; (e) the public interest, in avoiding where possible satellite litigation, disproportionate use of court resources and the impact of any strategic manoeuvring.

(3) The nearer any application is to a final hearing the less chance of success it will have even if the party making the application can establish clear prejudice. This may be decisive if the application is shortly before the hearing".

383. The application by the defendants to withdraw the admission was refused. One of the principal grounds on which Sumner J. refused to allow the withdrawal was that it would involve a postponement of the trial which would be a significant prejudice to the plaintiff. He held that an adjournment of the proceedings should only be permitted where there was a strong and justifiable reason and he held that no such reason had been identified in that case.

384. Counsel for the plaintiffs argued that, in contrast to the position in *Braybrook*, the plaintiffs satisfied each of the limbs of the test described by Sumner J. He drew attention to the fact that the "*admissions"* were made on a Friday and withdrawn the following Wednesday. Unlike *Braybrook*, there was no delay on the part of the plaintiffs in making the application to withdraw them. Counsel for the plaintiffs also submitted that, if the court did not allow the "*admissions"* to be withdrawn, the court would decide the case based on circumstances where the court is aware that the "*admissions"* had been made by reason of a mistake. Counsel for the plaintiff also rejected the suggestion that the Kenny defendants would be prejudiced as a consequence of the exclusion of the answers to interrogatories in question arising from the reliance on them by counsel for the Kenny defendants in his cross-examination of Ms. Carwood. Counsel for the plaintiff submitted that there was no prejudice. He submitted that

counsel for the Kenny defendants could equally have put to Ms. Carwood what Mr. Kenny would say in evidence. He submitted that the cross-examination would have continued in precisely the same way, albeit relying on what Mr. Kenny would say in evidence rather than on the answers to the interrogatories. However, I do not believe that this is so. Counsel for the Kenny defendants was in a better position on cross-examination to refer Ms. Carwood to evidence on which the plaintiffs themselves relied rather than on evidence to be given by an opposing party which she may have understood was disputed by the plaintiffs.

385. In response to the plaintiffs' application to withdraw the answers to the interrogatories, counsel for the Kenny defendants argued that the application was misconceived. He argued that it conflated admissions as to facts, on the one hand, and the leading of evidence, on the other hand. Counsel submitted that O. 32 was entirely irrelevant. There had been no admission made in writing here. What had occurred was in accordance with what is contemplated by O. 31, r. 24 which provides as follows: -

> "*Any party may, at the trial of a cause, matter, or issue, use in evidence any one or more of the answers or any part of an answer of the opposite party to interrogatories without putting in the others or the whole of such answer….*".

386. Counsel for the Kenny defendants submitted that, accordingly, the interrogatories in question have become evidence in the case. For completeness, counsel for the Kenny defendants also drew my attention to the proviso to O. 31, r. 24 which provides that, whenever reliance is placed on an answer to an interrogatory, the court is not confined to a consideration of that interrogatory alone but may also consider any interconnected answers. That rule is in the following terms: -

> "*…provided always that in such case the Court may look at the whole of the answers, and if it shall be of opinion that any others of them are so connected with those put in*

that the last-mentioned answers ought not to be used without them, it may direct them to be put in".

387. Counsel for the Kenny defendants characterised the plaintiffs' application as one to exclude evidence that has already been given. He submitted that no authority had been cited by the plaintiffs for the proposition that evidence which has been tendered can be withdrawn. He also emphasised that the evidence that had been put before the court by the plaintiffs in that way had subsequently been used in the course of cross-examination of Ms. Carwood. He said that all of this is included in the "*body of evidence"* before the court. He submitted that the application by the plaintiffs was analogous to an application by a party to withdraw unhelpful evidence given by one of their witnesses who had been called to give evidence orally. Counsel made the point that it is clearly not open to a party to proceed in that way.

388. In making his submissions, counsel for the Kenny defendants was particularly critical of the way in which Mr. McEvoy, in para. 7 of his grounding affidavit suggested that the answers to interrogatories were being relied upon by the defendants for an "*incorrect purpose"* as a consequence of a mistake made by the plaintiffs' legal advisors. Counsel argued that the Kenny defendants had done nothing that was incorrect in that regard. They had quite appropriately in adversarial litigation, looked at the evidence that the plaintiffs had led and deployed it in cross-examination as they would be entitled to do in respect of any other evidence that might have been led by the plaintiffs. With some considerable justification, counsel for the Kenny defendants also submitted that: -

"*….it has to be borne in mind that, since these proceedings commenced, the Plaintiffs have been permitted to introduce the witness statement from the Swiss law expert, after the case had commenced, in order to deal with an issue that that they faced in proving Swiss law. Secondly, they have been permitted to recast two of their witness statements, very considerably. Thirdly, they have abandoned witnesses without explanation; they*

abandoned Mr. Feighan and they abandoned Ms. Ashcroft. No explanation was ever offered to the court as to why they were taking that course, and, in truth, I think no explanation could be demanded because it is entirely within the Plaintiffs' gift what evidence they choose to lead. Nevertheless, it puts the Defendants in Commercial Court proceedings to considerable expense and effort to have to proof the defence of a case when the Plaintiff submits its witness statements on the understanding that that is the evidence that's going to be led against the Defendants".

389. Counsel for the Kenny defendants also drew attention to the fact that the plaintiffs had been permitted, at a late point in the trial, to lead evidence from four additional witnesses in order to prove the chain of custody of the copy the plaintiffs had made of Mr. Desmond's iPhone. At the conclusion of his submissions on this issue, I asked counsel for the Kenny defendants to address me on the issue of mistake on the part of the plaintiffs' legal advisors. In response, counsel emphasised that this was not an application under O. 32, and he reiterated that the effect of what had been done was to put the answers to the interrogatories into evidence. I then asked counsel whether, to the extent that there is a conflict of evidence between the evidence of Mr. Richard Nolan, on the one hand, and the evidence given in answers to interrogatories on the other, I was entitled to have regard to the fact that the plaintiffs did not appear to have intended to put this material before the court. In response, counsel submitted that the court would have to assess a conflict of evidence in the usual way.

390. In reply, counsel for the plaintiffs referred to the observation made by Millett L.J. in *Gale v. Superdrug Stores* at p. 477 that the administration of justice is *"... a human activity and accordingly cannot be made immune from error. When a litigant or his adviser makes a mistake, justice requires that he be allowed to put it right, even if this causes delay and expense, provided that it can be done without injustice to the other party*". Counsel submitted that the court "*has an obligation to the parties"* where a mistake is made to exclude that from the

court's consideration. He submitted that, otherwise, the court would decide the case on the basis of "*something which the court is aware of was a mistaken admission made or mistaken evidence that was given"*.

391. Having heard the submissions of counsel, I indicated that I would reserve judgment on the issue and that I hoped to give judgment in the following week. However, I was concerned to try to identify whether there was any direct authority on the question of withdrawal of an answer to an interrogatory by a party who had deployed the answer. On checking the authorities myself, on the evening of Day 19, I identified that the pre-CPR edition of the *Supreme Court Practice* (known as *"The White Book"*) and *Matthews & Malek on Disclosure* both cited a decision in *Endeavour Wines v. Martin* [1948] W.N. 338 (also reported at [1948] 92 S.J. 574) as authority for the proposition that answers to interrogatories, once put before the court, form part of the general body of evidence in the case albeit that the party who puts them in evidence is not bound to accept their truthfulness but may call other evidence which contradicts them. The report of that decision was not available to me and I therefore asked the Registrar to write to the parties indicating that I proposed that the parties should address this decision and any further submissions they wished to make in their closing submissions following which I would rule on the issue in this judgment. I was subsequently provided with copies of both reports of the judgment of Birkett J. in *Endeavour Wines.* Both reports are very brief. They record that the plaintiffs had sued the defendants claiming that the latter had arrived at a corrupt agreement with an employee of the plaintiff under which the employee was to receive a secret commission. Interrogatories were delivered to the defendant who provided answers which were consistent with its case that there was no corrupt agreement. At the close of his opening of the case to the court, counsel for the plaintiff put in all of the answers as evidence. However, oral evidence was then called in support of the plaintiffs' case that contradicted those answers. Counsel for the defendants contended that, by putting in the answers, the plaintiffs made them part of their

case and that they were accordingly prevented from relying on the evidence of their witnesses to contradict the answers given by the defendants to the interrogatories. The reports do not replicate the entire of the judgment of Birkett J. They simply record that Birkett J. agreed that, by putting in the answers, the plaintiffs had made them part of their case. However, he also held that this did not mean that the court was bound to disregard the rest of the plaintiffs' evidence. By putting in the answers, the plaintiffs did no more than place sworn facts before the court and it was up to the court to consider those sworn facts in conjunction with all of the other evidence in the case.

392. In their written closing submissions, counsel for the plaintiffs argued that the decision in *Endeavour Wines* does not significantly advance the issue which the court, in this case is required to decide, namely whether it is open to a plaintiff to withdraw reliance on the answers to interrogatories. Counsel for the plaintiffs drew attention to the fact that no such application appears to have been made in *Endeavour Wines.* They argued accordingly that the judgment is not authority for the proposition that reliance on the answers to interrogatories cannot be withdrawn. They nonetheless accepted that, on the basis of the judgment in *Endeavour Wines,* it appears that the answers do *"strictly speaking form part of the plaintiffs' evidence"* but they submitted that it would be *"entirely artificial"* to treat that evidence in the same manner as evidence tendered orally by a witness which they accept could not be withdrawn. Without elaborating further, the plaintiffs argued that, under the inherent jurisdiction of the court, the court has the power to protect the interests of the plaintiffs where a position has been *"adopted in error".* In contrast, the Kenny defendants made the case that the decision in *Endeavour Wines* supports their submission that, by identifying those answers on which the plaintiffs relied, the plaintiffs put those answers into evidence and now form part of the entire body of evidence before the court such that the defendants are entitled to rely on them.

393. I have considered the arguments of both sides on this issue. I have also considered the case law. I am very conscious that, as Millett L.J. explained in *Gale v. Superdrug Stores* at p. 477, justice generally requires that, where a litigant or an advisor makes a mistake, the party should be allowed to put it right provided that this can be done without injustice to the other parties. In his judgment in that case Millett L.J. referred to the principles which govern the court's approach to an application to amend pleadings which date back to the judgment of the Court of Appeal of England and Wales in *Cropper v. Smith* (1884) 26 Ch D 700 at 710-711 where Bowen L.J. said: -

> *"It is a well established principle that the object of the Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights … I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such an amendment as a matter of favour or grace … It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right."*

394. I am also very conscious that, in *Aer Rianta International v. Walsh Western International Ltd* [1997] 2 ILRM 45, Murphy J., in the Supreme Court, also approved the same passage from the judgment of Bowen L.J. in *Cropper v. Smith.* In *Walsh Western*, the defendants were permitted by the Supreme Court to amend their defence to remove an admission of a contractual relationship between the plaintiff and the defendant. In permitting the amendment in that case, Murphy J. accepted both the principle identified by Bowen L.J. in

Cropper v. Smith and also the approach taken by the House of Lords in *Ketteman v. Hansel Properties Ltd* [1987] AC 189 where Lord Keith at p.203 explained that the only form of prejudice that would prevent an amendment of that kind being made is where the opponent would be left in a worse position in terms of presentation of its case. If the same case, Lord Keith explained that it is not a relevant type of prejudice that allowance of the amendment *"will or may deprive* [the other party] *of a success which he would achieve if the amendment were not to be allowed".*

395. While *Walsh Western* was concerned with amendment to pleadings, it does illustrate the extent to which the court will be prepared to relieve a party of a mistake save in circumstances where the opposing party will be left in a worse position from the point of view of presentation of his or her case. Subsequently, in *Woori Bank v. KDB Ireland Ltd* [2006] IEHC 156, Clarke J. (as he then was) explained that, in the context of the amendment of pleadings, prejudice to the opposing party could arise in two ways: (a) where the opposing party could satisfy the court that, by virtue of the absence of the amended plea, steps had been taken which made it impossible or significantly more difficult to deal with the case in the event that the amendment should be allowed and (b) logistical prejudice which might occur where the amendment was sought at a late stage and could have the effect of significantly disrupting the trial of the proceedings.

396. While those cases were concerned with amendments of pleadings, the observations of both Murphy J. and Clarke J. are consistent with the approach taken, in the context of the withdrawal of an admission, by the courts of England and Wales in *Gale v. Superdrug Stores* and subsequently, following the introduction of the CPR, in the judgment of Sumner J. in *Braybrook v. Basildon & Thurrock University NHS Trust.* Accordingly, if, what occurred in this case, was the making of an admission by the plaintiffs, I believe that there would be a strong inclination on the part of the court to relieve the plaintiffs of the mistake which the

plaintiffs' legal advisors say was made by them. This is so notwithstanding the litany of other changes of position on the part of the plaintiffs which have occurred in the course of these proceedings and in particular in the course of the trial (many of which were identified by counsel for the Kenny defendants in the course of his submissions on this issue).

397. For the reasons discussed above, it seems to me that, if the approach taken in the English case law applies here, there would be a significant basis for the court to intervene to correct the mistake that has been made. However, I do not believe that the case law on which the plaintiffs seek to rely is relevant. That case law is concerned with the withdrawal of an admission which was not made under oath. The case law is not concerned with an attempt to withdraw evidence that has been tendered. In fact, no authority was cited for the proposition that evidence which has been tendered can be withdrawn with leave of the court. This is best illustrated by hypothetical example. Suppose that counsel, in a personal injury case concerned with a road traffic accident, decides, on the spur of the moment in the course of a trial, to call a witness to the accident who happens to be observing events in the back of the courtroom. Suppose also that counsel does so without first checking with his or her instructing solicitor that it was in order to do so with the result that counsel's client has no opportunity to give a contrary instruction. The witness is called but the evidence which emerges from the witness turns out to be unhelpful. There would be no basis in those circumstances to seek to withdraw that evidence even where counsel had taken that step without instructions. It seems to me that the same principle must apply where lawyers decide to rely on answers given by the opposing party to certain of the interrogatories delivered to that party. As the decision in *Endeavour Wines* demonstrates, once this step has been taken, the answers to the interrogatories form part of the evidence in the case. While the report of the decision in *Endeavour Wines* lacks detail, the decision is entirely consistent with my previous understanding that, once answers to interrogatories have been deployed, they form part of the evidence in the case. It is also

significant that it is cited as relevant authority in both *The White Book* and in *Matthews & Malek*. While the plaintiffs have argued that *Endeavour Wines* does not deal with an application to withdraw reliance on answers to interrogatories, it seems to me to follow from the decision that the evidence cannot be withdrawn. This is for the simple reason that evidence, once tendered, form part of the evidence in the case and the party who tendered that evidence is not at liberty to pick and choose which elements of the evidence should ultimately be taken into account by the court. Such a situation is, of course, to be distinguished from circumstances where evidence is excluded on the application of the opposing party on any of the established grounds on which evidence can be excluded.

398. It must also be borne in mind that the fact that the answers to the interrogatories in issue now form part of the evidence in the case is not, in principle, devastating to the plaintiffs' case. It is clear from the approach taken by Birkett J. in *Endeavour Wines* that the court simply has to consider them in conjunction with the all of the other evidence of the case. To the extent that they are inconsistent with any part of the evidence given by the witnesses called by the plaintiffs, the answers to the interrogatories do not automatically displace the evidence given by the plaintiffs' witnesses in the witness box. To the extent that there is a conflict between the answers in question and the evidence given by those witnesses, I may have to consider what weight (if any) should be given to the answers in question as against the oral testimony of the witnesses called by the plaintiffs. As a matter of principle, a court is much better placed to assess the credibility of witnesses who have given evidence orally and who have been cross examined by the opposing party. A court is not in the same position to assess the credibility of answers given to interrogatories. That is not to say that the answers to the interrogatories might not assume greater importance in the event that the court came to the conclusion that the oral evidence tendered by a party was simply not credible.

399. It must further be kept in mind that it is not unusual at trial to find that there are inconsistencies between the evidence given by witnesses called by the same party. In all of these cases (as in this case) the court has to consider all of the evidence and reach conclusions as to where the truth lies. The present case is no different. It should also be noted that, even if the plaintiffs were successful in excluding the answers to the interrogatories in question, that would not necessarily be the end of the matter. As the proviso to O.31 r.24 makes clear, once a party has sought to rely on any interrogatories, the court is always entitled to look not only at the answers relied upon but also at any others that are "*so connected to those put in that the last-mentioned answers ought not be used without them".*

400. Bearing the above principles in mind, I have come to the conclusion that the application by the plaintiffs to withdraw reliance on the interrogatories in issue should be refused. The answers to the interrogatories form part of the evidence in the case. To the extent that conflicts exist between the answers in question and the evidence of the plaintiffs' witnesses (and to the extent that such conflicts are relevant to the ultimate determination of these proceedings), I will, in making any findings of fact, try to resolve such conflicts in the usual way.

The decision of the defendants not to call evidence

401. At the conclusion of the argument on Day 19 in relation to the interrogatories, I was informed by counsel for the plaintiffs that the plaintiffs had been unable to secure the attendance of a witness from EFG Bank to prove the alleged loan and that, in those circumstances, the plaintiffs had no further evidence to give. The plaintiffs therefore closed their case. In response, counsel for the Kenny defendants indicated that neither Dildar IOM nor Dildar Ireland were offering any evidence in the case. He also indicated that Mr. Paul Kenny was offering no evidence. With regard to Dillon Kenny and Darren Kenny, counsel indicated that the plaintiffs had made no claim against them and that, in any event, they were not proposing to give evidence. He made clear that the Kenny defendants were not seeking a *"non-*

suit" but were, instead offering no evidence in response to the plaintiffs' claim. In other words, the Kenny defendants took the position that, on the basis of the evidence tendered by the plaintiffs, the plaintiffs had failed to prove their case on the balance of probabilities. I have already noted in paras. 80 to 81 above that a different test is applied where a defendant seeks a *"non-suit"* at the conclusion of the evidence given on behalf of a plaintiff while reserving the right to call evidence in the event that the application for a *"non-suit"* is refused. In short, in such a case, the court, on the application to dismiss the case is concerned solely with the question whether a plaintiff has made out a *prima facie* case. In contrast, the effect of the position taken by the Kenny defendants is that the court is being asked to determine whether, on the basis of the evidence tendered, the plaintiffs have established, on the balance of probabilities, the facts necessary to support a verdict in the plaintiffs' favour. As Finlay C.J. made clear in *O'Toole v. Heavey*, at pp 546-547, unless the court is so satisfied, the plaintiffs' case must be dismissed.

402. After counsel for the Kenny defendants had indicated their position as outlined above, Mr. Millett also indicated that he did not propose to call any witnesses or to give evidence himself. Mr. Millett said that he proposed to take the same approach as the Kenny defendants. On that basis, the trial was adjourned to 29th June 2023 for closing submissions. Written closing submissions were delivered by all sides prior to that date. The oral closing submissions of the parties took up three days namely Days 20 to 22.

Findings of fact and conclusions

403. In light of my consideration of the evidence, I will now proceed to make the necessary findings of fact. For the reasons discussed in paras. 226 to 238 above, I have found that some of the evidence put before the court by the plaintiffs is unreliable and untrue. That raises significant issues about the credibility of other aspects of the evidence of Mr. Richard Nolan and Ms. Patricia Nolan. Given that they were prepared to give untrue evidence to the court in

respect of the matters discussed in paras. 226 to 238, how can I be satisfied, as a matter of probability, that the remainder of their evidence is truthful and reliable? For that reason, it will be necessary, when making findings of fact, to keep in mind the guidance given by Hardiman J. in *Shelly-Morris v. Bus Átha Cliath* (quoted in para. 237 above).

404. Notwithstanding my concern about the credibility of Mr. Nolan and Ms. Nolan, there are some aspects of their evidence which I believe are uncontroversial and can be accepted. For example there is no doubt that, in autumn 2012, the members of the Nolan family were very concerned about their personal exposure to Allied Irish Banks and Bank of Ireland. Against that backdrop, I have no difficulty in accepting Mr. Richard Nolan's evidence that a crisis meeting was held attended by many of the family members and by their legal advisor, Mr. Desmond. For the same reason, I can accept that the family wished to know whether they could lawfully use any part of their pension money to settle the very large claims advanced or to be advanced by the banks. It is clear that they were advised by Mr. Desmond that this could not be done directly as to do so would risk adverse tax consequences. For that reason, a different approach had to be taken. This involved the elaborate structure which I have described earlier involving transfers of pension funds to MECD and onwards transactions between MECD and CVSSA. That much is clear. However, for the reasons previously discussed in paras. 228-229 above, I cannot accept that the plaintiffs understood that they were simply placing the OPT funds on deposit in Switzerland or that they were advised either by Mr. Desmond or by any of the Millett defendants that this was the nature of the arrangement. Their evidence as to the advice they say was given to the plaintiffs by Mr. Desmond and by the Millett defendants is plainly untrue. The structure that was put in place had nothing to do with risk to the funds held in Investec Bank or with the instability of Irish banks. That untrue story was promoted by the plaintiffs in order to mask their true intention which was to seek to use the proceeds of the OPT pension fund in settlement of personal debts of the beneficiaries of that fund. That untruthful

account of the advice alleged to have been given to them by Mr. Desmond and by the Millett defendants calls into question the balance of the evidence they gave in relation to the advice which they claim was given or the representations which they claim were made either by Mr. Desmond or Mr. Millett. Since they have been prepared to give untruthful evidence in relation to one element of the alleged advice, how am I to believe them, on the balance of probabilities, in relation to the other elements of the advice or representations which they allege were made to them by Mr. Desmond, Mr. Millett or by the eighth defendant, John Millett Independent Financial Advisors Limited? If they have given false evidence in respect of one element, how can I be satisfied that it is more probable than not that they have been truthful in respect of the balance?

Findings in relation to the nature of the relationship between the plaintiffs and the Millett defendants and in relation to representations relevant to the nature of that relationship

405. I accept that Mr. Millett and the other Millett defendants were, in all likelihood, introduced to the plaintiffs by Mr. Desmond. That is not controversial. But, given the untruthful evidence placed before the court, I do not believe that I can safely take the same course in respect of the other representations alleged to have been made by Mr. Millett and his company, the eighth defendant, unless there is some other objective or persuasive evidence which supports the case made by the plaintiffs. The alleged representations are identified in para. 41 of Mr. Richard Nolan's witness statement and they are also set out in para. 90 above. The first relevant one is that a representation was made that Mr. Millett fully controlled and was the owner of MECD. Secondly, it is alleged that a representation was made that MECD was managed by AFT which it was represented was *"an established corporate service provider known to Mr. Millett and Mr. Desmond for many years."* The latter representation is admitted to some extent in the defence of the Millett defendants. In para. 15(a) of that defence, it is admitted that the eighth defendant represented to the plaintiffs that MECD was managed by

AFT and that AFT was a reputable corporate service provider known to the eighth defendant and to Mr. Millett. While that admission is confined to the eighth defendant, it is logical to conclude that the representation must also have been made by Mr. Millett himself since he was the only person who dealt with the plaintiffs on behalf of the eighth defendant. If that representation were false and if the plaintiffs could demonstrate that they relied upon it to their detriment, Mr. Millett could be exposed to personal liability in respect of it even where he was acting on his company's behalf. However, the plaintiffs have not provided any sufficient evidence to establish that the admitted representation was false. While AFT was mentioned in the course of the evidence, there was no detail given in respect of it. I therefore cannot make a finding that the representation was false.

406. There is no admission and no supporting or objective evidence available to confirm that it was represented to the plaintiffs that Mr. Millett owned or controlled MECD. The only evidence that has been put forward is that of the two witnesses who have shown that they are prepared to place false evidence before the court. Ironically, those witnesses (who have themselves given untrue evidence to the court) and their co-plaintiffs are seeking to make the case not only that these alleged representations were made but that they were made by Mr. Millett and the eighth defendant knowing them to be untrue. That is an extremely serious allegation to make. While the standard of proof in an action in deceit is the usual civil standard, it has been made clear, in a number of cases, that the standard of proof will be applied more rigorously where a very serious allegation is advanced. The authors of *McGrath on Evidence* (3rd. ed., 2020, at para. 2.154) cite in this context the observations of Feeney J. in *Ahern v. Bus Éireann* [2006] IEHC 2017 at p. 12 (subsequently approved by the Court of Appeal in *Platt v. OBH Luxury Accommodation* [2017] 2 I.R. 382 at p. 404) where he said: *"... even though a civil standard of probability applies rather than a criminal standard, regard must be had to the seriousness of the matter ... alleged, the gravity of the issue and the consequences in*

considering the evidence necessary to discharge the onus of proof." I must keep this principle in mind in examining the evidence before the court.

407. As noted in para. 405 above, I will also consider whether there is any other evidence available to support the case made. In this context, the plaintiffs seek to rely on a number of Mr. Millett's answers to the plaintiffs' interrogatories**.** However, the answers to the interrogatories (on which the plaintiffs rely) do not provide any support for the allegation that Mr. Millett had made a representation that he fully controlled and owned MECD. In his answers to interrogatories 19 and 20, Mr. Millett denied that he had any role in the incorporation or formation of MECD. In response to interrogatory 23, he denied that AFT customarily acted on his instructions or directions in relation to the affairs of MECD and he stated that the eighth defendant was merely an agent relaying the messages and requirements of its clients. Similarly, in response to questions 41 to 44, Mr. Millett denied that he had any involvement in giving directions to MECD in relation to its bank account with Abu Dhabi Commercial Bank (in Dubai) into which the OPT funds were received. That evidence does not provide support for the plaintiffs' case that this representation was made either by Mr. Millett or by the eighth defendant. The only evidence that exists is that given by two witnesses who have shown themselves to be untruthful in respect of other aspects of the alleged representations and, for the reasons previously given (including the seriousness of the allegation of fraudulent misrepresentation) I do not believe that it would be safe to make a finding on this basis alone. The plaintiffs have therefore failed to satisfy me, on the balance of probabilities, that such a representation was made.

408. The next representation that is alleged to have been made is that any money designated for MECD would be transferred to an account in Dubai or would be deposited in the CVSSA account in EFG Bank and *"would simply rest in that account on trust for us".* There are several problems with this element of the plaintiffs' case. In the first place, I have already held that the

plaintiffs' case that they were simply placing the OPT funds on deposit in the CVSSA account in Zurich to be unbelievable. Secondly, Mr. Richard Nolan disowned the first part of this alleged representation in the course of his cross-examination. As outlined in para. 151 above, Mr. Nolan maintained that it was always the case that the money was to be moved to CVSSA. He expressly disagreed with what he said in his own witness statement that it would be transferred to an account in Dubai **or** moved on to CVSSA. Thirdly, I cannot accept the evidence that any representation was made that the money would be held on trust for them. I have already addressed this issue in paras. 98 to 103 above in which I described the evidence given by Mr. Nolan on Day 4 that he arrived at the meeting in Zurich on 9th January 2013 with a home-made declaration of trust which he said that the plaintiffs wanted to have put in place. This makes no sense in the context of the representation alleged. If a representation of that kind had previously been made, why would the plaintiffs themselves prepare a declaration of trust and bring it to the meeting without first discussing it with their own solicitor and *"trusted advisor"* (to use Ms. Nolan's description of Mr. Desmond in the course of her evidence on Day 13)? If the alleged representation had been made, one would expect that the plaintiffs would ask their own solicitor (who, along with Mr. Millett, is alleged to have made this representation) to prepare the necessary legal document to give effect to it. It is also curious that Mr. Nolan made no reference to the declaration of trust in his witness statement notwithstanding that it featured strongly in his direct evidence. Thirdly, when it was suggested by Mr. Desmond at the Zurich meeting that a declaration of trust would not be possible, Mr. Nolan did not appear to take any issue with the so-called *"power of insight"* that was offered instead. Demonstrably, that fell far short of a declaration of trust and Mr. Nolan was unable to explain how he thought that power would operate in practice. Notably, he did not suggest that he thought it was the equivalent of a declaration of trust. All it purported to do was to allow him to see the money in the CVSSA account. It is also relevant that he did not raise any objection or protest when he

was told at the meeting that a declaration of trust would not be put in place. Had the plaintiffs been relying on a representation that the CVSSA funds would be held on trust for them, they would surely have protested at the failure to put the necessary legal documents in place. Their lack of protest at that time is telling.

409. There is a further problem with the plaintiffs' case that representations were made to them that the money in Zurich would be held *"on trust for us"*. In this context, I am not sure whether the word *"us"* is intended to refer to the plaintiffs as the trustees of the OPT or to the members of the Nolan family. But, in both cases, the concept of a trust would be very problematic. If the money were to be held on trust for the plaintiffs as trustees of the OPT, that would defeat the very purpose of the elaborate structure that had been put in place namely the removal of the funds from the pension trust by investing them and the use of the proceeds of the investment to pay off personal debts of the beneficiaries. It would mean that the whole structure was nothing more than a charade to hide its true nature from the Revenue Commissioners. On the other hand, if the proceeds of the investment were to be held on trust for the family members, it would mean that the proceeds would be beneficially owned by them. If the proceeds were, in fact, beneficially owned by them, this would run the obvious risk that it could be treated by the Revenue Commissioners as pension in payment with significant tax consequences for the Nolan family members. It is therefore inherently unlikely that a representation could have been made that the proceeds of the transfers to either MECD or CVSSA would be held on trust for the plaintiffs. Thus, even apart from the unreliability of the evidence of Mr. Nolan and Ms. Nolan, there are a number of additional factors that make it unlikely that such a representation was made. In all the circumstances, the plaintiffs have failed to prove, on the balance of probabilities, the representation alleged. For similar reasons, I reach the same conclusion in respect of the next representation addressed in para. 41 of Mr. Nolan's witness statement namely that *"MECD and/Mr. Millett would hold any funds on trust for us".*

Similar considerations, *mutatis mutandis*, apply to it and it is unnecessary to address it separately.

410. The next representation alleged to have been made by Mr. Millett and the eighth defendant is that the OPT funds *"would not be used for any purpose without our express consent".* This allegation is inconsistent with the arrangement which was put in place and which the plaintiffs knew would have to be put in place if they were to attempt to avoid the problem in using OPT pension funds to discharge personal debts of the OPT beneficiaries. As I have previously sought to explain, that arrangement could only work if the fund lost its character as the OPT pension fund and was replaced by something else of a different character. This is why the plaintiffs' case that they were not involved in making an investment in MECD must be rejected. If the OPT fund were simply held on deposit to the order of the plaintiffs, the fund would not lose its character as a pension fund with the result that any payment out to or to the order of the Nolan family members would be liable to be treated as pension in payment. It is therefore inherently unlikely that a representation of this kind could have been made. For that reason, even if Mr. Nolan and Ms. Nolan had not given untrue evidence about other aspects of the representations alleged to have been made, I believe that the plaintiffs would be in difficulty in satisfying the court, on the balance of probabilities, that such a representation had been made.

411. For completeness, I should make clear that I reject Ms. Nolan's evidence that she was unaware of the frequent references to *"investor"* or *"investment"* in the MECD application forms signed by her at some point in June 2013. It is not credible that someone could sign their name time and again on those forms and not notice those references, some of which were placed in very close proximity to the points where her signature was required. The signing of these forms by Ms. Nolan and her sister Ann is addressed in paras. 187 and 217-225 above. The purpose of signing the forms is discussed in paras. 135 to 138 above. It is clear that the purpose

of doing so was to give effect to and to legitimise the transactions. This was accepted by Mr. Nolan in the course of his cross-examination by Mr. Millett. Although the forms were not executed until after the transfers had been instructed, the signing of them was plainly considered to be necessary by both Mr. Millett and by the plaintiffs. I cannot accept that both Ms. Nolan and her sister Ann (both of whom signed the forms) did not see the many references that were made to the making of an investment. Crucially, neither of them raised any issue in relation to the characterisation of the transactions in that way. If they truly believed that they had simply placed the OPT funds on deposit, I believe that they would have queried the references to investments with Mr. Millett at the time. Furthermore, the forms were not the only documents that made reference to *"investor"* or cognate descriptions. The letters of instruction to Investec Bank signed by Ms. Patricia Nolan and some of the other plaintiffs also used similar language. For example, the instruction dated 3rd January 2013 signed by Ann Nolan and Joan Nolan (both of whom are plaintiffs although neither gave evidence) concluded with the words *"This is part of a proposed stream of* ***investments for long term*** *income"* (emphasis added). The instruction dated 21st January 2013 (which was signed by two of the plaintiffs, Ann Nolan and Elizabeth Nolan, neither of whom gave evidence) specifically referred to *"Oaklands Property Trust* ***Investor*** *numbers, 26, 27. 28 & 29"* (emphasis added). Those words appeared just two lines above the signatures of those plaintiffs. Similarly, in the instruction dated 28th May 2013 (signed by no fewer than four of the plaintiffs including Ms. Patricia Nolan), reference was made (again just two lines above the signatures) to *"Oaklands Property Trust* ***Investor*** *number 40"* (emphasis added).

412. This aspect of the plaintiffs' case is further undermined by the failure of Mr. Nolan to protest to Mr. Desmond about the content of Mr. Desmond's email to Mr. Garcia of 4th February 2013. This email is addressed in paras. 108 to 110 above. While that email has not been formally proved, it was put to Mr. Nolan by counsel for the plaintiffs in the course of his

direct examination and no one has subsequently objected to its admission. This email was copied by Mr. Desmond to Mr. Nolan at his private email address rather than his usual work email address. In that email, Mr. Desmond asked that Mr. Nolan should be added as a signatory on the account for the movement of euro funds but also made clear that Mr. Desmond himself would have the final say in relation to it. The email also suggested that the funds in the CVSSA account would be held for a considerable period of time. Although the email was copied to Mr. Nolan, he did not protest about either of these features of the email notwithstanding that they are inconsistent with the alleged representation in issue. Had a representation of the kind alleged been truly made, it is highly likely that Mr, Nolan would have taken issue with these aspects of the email.

413. In his closing submissions on Day 22, counsel for the plaintiffs sought to rely on some of the text messages exchanged between Mr. Millett and Mr. Desmond in the summer of 2013 which he suggested provided corroboration for the case made by the plaintiffs based on misrepresentation. Counsel submitted that the texts showed that Mr. Millett was giving directions and instructions in relation to the movement and payment out of money in a manner that was *"entirely at odds with the suggestion that he had no oversight or control over what was going on with these monies."* However, I do not believe that this assists in relation to whether the alleged representations addressed in para. 41 of the witness statement were ever made. In due course, it will be necessary to return to the texts in the context of a different element of the plaintiffs' case based on representations that are alleged to have been made at a later point in the relationship between the parties. At this point, I am concerned solely with the formation of that relationship and the initial period of its existence.

414. Logically, the next element of the plaintiffs' claim that requires consideration is the nature of the contractual relationship between the plaintiffs and the Millett defendants. In para. 18 of the amended statement of claim delivered in the course of the trial, the case is made that

there was a contract between the plaintiffs and the Millett defendants on very similar terms to the alleged representations which I have addressed above. For similar reasons to those which I have given in relation to the alleged representations, I have come to the conclusion that the plaintiffs have failed to establish, on the balance of probabilities, that there was a contract between these parties on these terms.

415. It might be thought that there must have been some contract between the parties such that the court should strive to establish its terms. However, the guidance of Hardiman J. in *Shelly-Morris* is very relevant here. Where untruthful evidence has been given such that a party has failed to establish its case on the balance of probabilities, Hardiman J. cautioned that it is not appropriate for a court to *"engage in speculation or benevolent guess work in an attempt to rescue the claim, or a particular aspect of it, from the unsatisfactory state in which the plaintiffs' falsehoods have left it".* This is the consequence that flows from giving untrue evidence. The plaintiffs have only themselves to blame for failing to be honest and upfront with the court in all of the most material aspects of their evidence.

416. What is clear is that the plaintiffs placed their money by way of investment with – or in – MECD. Once that occurred, a further arrangement took place between MECD and CVSSA but the plaintiffs have failed to prove the precise nature of that arrangement. That said, it is clear from the above discussion in relation to Ms. Carwood's evidence, that all parties accepted that the proceeds of four of the investments placed by the plaintiffs with MECD found their way in some fashion into the accounts of CVSSA in EFG Bank in Zurich.

417. As noted in para. 187 above, I am prepared to accept, notwithstanding my belief that Ms. Nolan was an unreliable witness in other respects, that Mr. Millett did not explain the MECD application forms that she signed in June 2013. Although given an opportunity to do so, Mr. Millett did not challenge this aspect of her evidence in the course of his cross-examination of Ms. Nolan. Furthermore, I do not believe that there is any basis on which I

could hold that the terms of the MECD placement memorandum were provided to the plaintiffs or otherwise brought to their attention. Mr. Millett chose not to give evidence and, as a result, there is no evidence before the court that the memorandum was handed over to the plaintiffs at any stage. While there is express reference to that memorandum in the forms signed by Ms. Nolan and her sister, Ann, in June 2013, the reference to it would be a lot easier to miss than the references to investment or cognate concepts. I am not therefore satisfied, on the balance of probabilities, that it has been established by any of the defendants that the OPT investment was on the terms of that memorandum. Moreover, those forms were signed after the investments in MECD were made. It is therefore difficult to see how the belated reference to the placement memorandum could make the investments subject to its terms. On the other hand, for the reasons previously explained, the frequent references in the application forms to *"investor"* and *"investment"* are significant. If the signatories on behalf of the plaintiffs (namely Ms. Nolan and her sister, Ann) genuinely thought that the transfers to MECD did not involve an investment, I believe that it is probable that they would have raised that issue with Mr. Millett at that time. The fact that the forms were executed after the transfers had taken place does not alter that conclusion. While the late execution of the forms may not have been capable of affecting the legal nature of the transfers to MECD, the terms of the forms provide useful material in assessing the credibility of this element of the plaintiffs' case. It is also necessary to keep in mind that, although the forms were not signed until after the transfers to MECD had taken place, the parties clearly considered it important that they would be executed. As Mr. Richard Nolan conceded, the forms were signed in order to legitimise the transactions. As noted in para. 187 above, the transfers to MECD were the first step in the structure which Mr. Desmond advised the plaintiffs to put in place and it is unsurprising, in those circumstances, that the parties would wish to have that step appropriately documented. The execution of the forms by the OPT trustees was therefore no empty formality.

418. In so far as the terms of any contract between the plaintiffs and the Millett defendants is concerned, there is no evidence to suggest that the plaintiffs ever entered into a contract with Mr. Millett in his personal capacity. In this context, as noted in para. 182 above, Mr. Millett put his email of 19th November 2012 to Ms. Nolan in the course of his cross-examination of her. That email was addressed to Joan, Sally and Richard Nolan and set out the terms on which the eighth named defendant proposed to provide services to the plaintiffs. Based on the material included in the Core Book of documents prepared by the plaintiffs, there are also a number of subsequent emails in which the services of both Pinnacle and the eighth defendant were outlined. However, as Mr. Millett opted not to give evidence, those emails do not form part of the evidence in the case. They have not been proven and I therefore do not believe that I can have regard to them. As recorded in para. 182 above, it was also put by Mr. Millett to Ms. Nolan on Day 12 that the arrangement with the plaintiffs involved the engagement of the corporate bodies, Pinnacle and the eighth defendant. Ms. Nolan confirmed that this was done on 29th November 2012. That is an acknowledgement that the contractual relationship was with the two companies. I can see no basis on which to hold that the plaintiffs also had a contractual relationship with Mr. Millett personally. That is not to say that Mr. Millett might not have a personal exposure on foot of any representations that he may have made. As noted earlier, the representations alleged by the plaintiffs are not confined to the period immediately preceding the retention of the two companies. They extend beyond that and I address the additional allegations in para. 433 and following paragraphs below.

419. Although I am satisfied that the relevant contractual relationship was between the plaintiffs, on the one side, and Pinnacle and the eighth defendant, on the other, I am unable to reach a conclusion as to the terms of that contract. For the reasons previously outlined, I do not accept that the contract was on the terms alleged by the plaintiffs. By reason of his decision not to give evidence, I cannot find that the terms were as set out in the emails of November 2012

sent by Mr. Millett on behalf of the eighth defendant. The most that can be said is that, as I have sought to explain, the contract envisaged that the OPT would place investments in or with MECD and that the two Millett companies assisted in making the necessary arrangements for that purpose. It is also admitted in para. 15(a) of the Millett defendants' defence that the plaintiffs were given *"structural advice regarding the protection of their pension assets"* but it is denied that investment advice was ever given. The meaning of *"structural advice"* does not appear to have been pursued by the plaintiffs by way of requests for further particulars and, because Mr. Millett did not give evidence, it has not been explained. I am therefore unable to make any determination as to its ambit. However, on the evidence before the court, I am not satisfied as a matter of probability that either of the Millett companies were retained to provide investment advice to the plaintiffs. Under cross-examination by Mr. Millett, Mr. Nolan was unable to point to any invoice issued by either of the Millett companies that suggested that advice had been given by either of them in relation to investments. In contrast, Mr. Nolan acknowledged that Mr. Desmond had raised an invoice in respect of pension and financial advice. That is consistent with the central role which Mr. Desmond appears to have played in devising the structure which the Nolan family proposed to use in an attempt to allow the proceeds of OPT's investments to be used in the settlement of debt claims against the family members.

420. For completeness, it should be noted that, on Day 4 of the hearing, Mr. Nolan gave evidence that, at a dinner in Zurich on 8th January 2013, Mr. Millett confirmed Mr. Desmond's advice that the OPT money could be used to settle bank debts if the plaintiffs chose to use them in that way *"but the proper paperwork needs to be in place."* This allegation did not form part of the case pleaded previously but there is now an allegation made in para. 15 of the amended statement of claim (delivered in the course of the hearing) that, at the meeting in Zurich on 9th January 2013, Mr. Millett represented that, if the plaintiffs complied with the advice provided

to them by Mr. Desmond and Mr. Millett, the funds could be lawfully used to settle the debts owed by the Nolan family. However, although it is alleged in para. 44 of that version of the statement of claim that the representations alleged in (inter alia) para. 15 were false and untrue, the plaintiffs did not make the case at the hearing that such advice was wrong. On the contrary, counsel for the plaintiffs stressed, in their closing written submissions, the acknowledgement by counsel for the Kenny defendants that such use of pension funds is not unlawful (albeit that the written submissions also, quite properly, concede that such use may have *"taxation implications"*). In these circumstances, it is unnecessary to consider this allegation against Mr. Millett any further. Even if it were the case that Mr. Nolan could safely be believed on this issue, it is clear that the plaintiffs are not seeking to suggest that any such advice or representation was false or should never have been given. Nor do they seek to make the case that they should have been advised against such a course. The failure to make such a case is startling. That would seem to be the obvious case to have made against both Mr. Desmond and the Millett defendants. But, of course, that case could not be made in circumstances where the plaintiffs, until the thirteenth hour, decided to conceal the true reason for the arrangement and instead to invent the story that they had been advised to move the fund to Switzerland because of the instability of the Irish banks.

421. In circumstances where it is not possible for me to reach any conclusion as to the terms of the contract between the plaintiffs and the Millett defendants, there is no basis on which I can hold that either of the Millett companies is in breach of its contract with the plaintiffs. Remarkably, save in two respects, the nature of any alleged contract between the plaintiffs and any of the Millett defendants was not addressed either in the written or oral closing submissions of counsel for the plaintiffs. Counsel did submit that it was part of the contract that the money was simply to be held on deposit in the euro account of CVSSA in EFG Bank. For the reasons discussed previously, I have rejected that case. Counsel also submitted that the MECD

application forms (executed subsequent to the transfers to MECD) and the MECD placement memorandum were not part of the contract between the parties. For the reasons set out earlier, I accept that submission. However, the application forms are nonetheless relevant in relation to the nature of the structure intended to be put in place, and in particular, in relation to the first step being in the nature of an investment in MECD. Save in respect of the two elements discussed above, the nature of the contractual relationship was not addressed in the plaintiffs' closing submissions and it is not for me to make the plaintiffs' case for them.

Findings in relation to the individual investments made by the OPT with MECD

422. It is next necessary to make findings in relation to the individual investments made by the OPT with MECD. In contrast to the uncertainty in relation to the terms of the contract between the plaintiffs and Pinnacle and the eighth defendant, there is very little dispute in relation to the transfers that were made by the plaintiffs to MECD. It is clear that, following the decision of the plaintiffs to invest the OPT pension funds in the structure devised by Mr. Desmond, the plaintiffs made the following transfers of OPT funds to MECD:

(a) on 8th January 2013, they transferred €620,000 to MECD. This investment ultimately generated a receipt of €619,000 into the euro account of CVSSA in EFG Bank on 12th January 2013. That sum was subsequently withdrawn from that account and transferred to Serene on 16th January 2013. For the reasons previously discussed in para. 230 above, I find that the purpose of that transfer to Serene was not because of any lack of signatory rights on the CVSSA account. The true purpose was to assist in settling the personal debts of the OPT beneficiaries to Bank of Ireland;

(b) on 23rd January 2013, they transferred €2,480,000 to MECD. That investment generated a receipt of €2,449,900 into the euro account of CVSSA in EFG Bank on 30th January 2013. At the date of that receipt, the euro account had an opening balance of €416,125.79. The precise provenance of the opening balance is unknown but it

represents the result of three inward transfers which occurred on 13th November 2012 by order of McGuire Desmond;

(c) on 7th February 2013, they transferred €2,480,000 to MECD. As noted in para. 245 above, Ms. Carwood and Mr. Linehan refer to this as a transfer of €2,479,860 but I do not think anything turns on this. Subsequently, this investment resulted in a transfer of €2,477,000 on 14th February 2013 directly from MECD to Serene. For the reasons discussed in paras. 111 and 230 above, I hold that the true purpose of this transfer to Serene was to facilitate an intended settlement of personal debts owed by beneficiaries of the OPT pension fund to Bank of Ireland;

(d) on 14th February 2013, they transferred €2,480,000 to MECD. This investment resulted in the receipt of €2,479,860 in MECD's bank account on 20th February 2013. In turn, that investment generated a receipt of €2,477,900 into the euro account of CVSSA in EFG Bank. Following that receipt, the balance standing to the euro account was €5,343,325.79 made up of the opening balance of €416,125.79 together with the two receipts from MECD addressed in this sub-para. and in sub-para. (b) above;

(e) on 7th June 2013, they transferred €2 million to MECD. This investment resulted in the receipt of a similar amount into the euro account of CVSSA in EFG Bank on 12th June 2013 following which the balance stood at €8,243,925.79. This represented the aggregate of (i) the opening balance of €416,125.79, (ii) the three receipts generated from the proceeds of the OPT investments in MECD and (iii) the Rachel Rose receipt of €900,000 on 10th June 2013 which both sides agree represented funds advanced by the Kenny family.

423. In addition to the euro account, CVSSA also had a sterling account and a US dollar account with EFG Bank. As of 12th June 2013, there was a sum of £1,606,599.11 standing to the credit of the sterling account. This was made up of (i) an inward transfer of £63,586.07 on

15th November 2012 by order of McGuire Desmond (the provenance of which is unknown) and (ii) an inward transfer of £1,589,985 on 15th November 2012 from MECD which the parties are agreed represents the proceeds of an investment made by Mr. John Kenny, through Child & Child, solicitors.

424. The position in respect of the US dollar account is less straightforward. During the course of April and June 2013, there were two significant debits of US$46,000,086.50 and US$54,000,086.60 which are largely cancelled out by two significant credits of US$46,000,000 and US$54,000,000 respectively. Ms. Carwood surmised that these relate to the alleged loan but I have no evidence in relation to the loan and it would be inappropriate for me to make any finding in relation to it in the absence of appropriate evidence. Given that these credits largely cancel out the debits, it is clear from the statement of the US dollar account (which has been admitted by the Kenny defendants) that there was a balance of US$1,919,497.19 standing to the credit of the account immediately prior to 12th June 2013. According to Ms. Carwood (and this was not disputed by the defendants), this represented the proceeds of three inwards transfers made in November 2012 at the order of McGuire Desmond, the provenance of which is unknown.

425. On 12th June 2013, a number of significant transactions occurred on the sterling and US dollar accounts. In the case of the sterling account, £1,606,000 was used to purchase US$2,489,300 which was then transferred to the US dollar account bringing the balance on the latter account to US$4,408,797.49. This left a small balance on the sterling account of £599.11. That was followed on the following day by the debit of US$54,000,086.60 and the credit of US$54 million which resulted in a slight adjustment to the balance which then stood at US$4,408,710.89 which represented the aggregate of the November 2012 transfers at the order of McGuire Desmond and the proceeds of the sale of £1,606,000.00 from the sterling account.

426. On 14th June 2013, there was a significant transaction on the euro account which, in turn, led to a large receipt in the US dollar account. The euro account statement shows that, on that day, €8 million was used for the purchase of US dollars, leaving a balance of €243,925.79 in the euro account. That resulted in the purchase of US$10,628,000 which was credited to the US dollar account bringing the balance in that account to US$15,036,710.89. The plaintiffs complain that they never authorised the transfer of money from the euro account to the dollar account. However, this complaint is advanced on the basis of the evidence given by Mr. Nolan and Ms. Nolan and, given the untrue and unreliable evidence given by them in relation to other aspects of the arrangement, I cannot be satisfied, on the balance of probabilities, that this element of their evidence happens to be true. Moreover, for the reasons which I have previously sought to explain, I do not accept their case that they were merely placing the OPT funds on deposit and that they were not involved in making an investment. The terms of that investment have not been proved and, therefore, even if the issue of credibility did not arise as starkly as it does here, I could not make a finding that the transfer from the euro account to the dollar account represented a breach of the investment terms. What is clear is that the effect of the transfer of funds from the euro account to the US dollar account was either (a) that all of the proceeds of the OPT investments and the Kenny investments were now in the dollar account or (b) that all, save the balances of €243,925.79 (in the euro account) and £599.11 (in the sterling account) were now in the dollar account. In addition, the dollar account now held the funds transferred at the order of McGuire Desmond, the provenance of which is unknown (subject to a similar qualification in respect of the small balances remaining in the euro and sterling accounts).

427. The next relevant fact is that, on 3rd September 2013, a sum of €2,828,136 was debited to the euro account and sent by SWIFT transfer to Eugene F. Collins, the solicitors for the vendors of the Nemo Rangers property. As the statement of the euro account shows, that left

the account overdrawn to the extent of €2,584,267. That remained the position until 5th September 2013 when the proceeds of a sale of US dollars (from the US dollar account) into euro resulted in a lodgment of €2,828,136 to the euro account. On the basis of the admitted bank statements, this transfer was funded in the first instance by EFG Bank pending reimbursement on 5th September 2013. While Ms. Carwood suggested that all three CVSSA accounts were linked (such that the three accounts should, in effect, be treated as one), there is no evidence that this was the case. Nor is there any evidence as to any relevant banking custom or practice in Switzerland. Moreover, the bank statements themselves show a contrary intention. They clearly show the overdrawn status of the euro account on 3rd September 2013 (a Tuesday) which was not rectified until 5th September 2013 (a Thursday). They also show that there is no corresponding debit to the US dollar account until 5th September. In these circumstances, I find that the payment of €2,828,192.79 sent by SWIFT transfer to Eugene F. Collins on 3rd September 2013 was borne by EFG Bank which was subsequently reimbursed two days later on 5th September 2013. It follows that the transfer to Eugene F. Collins on 3rd September cannot be treated as the equivalent of a payment on that day from the US dollar account.

428. According to Ms. Carwood, the rate of exchange used for the purpose of the purchase of euro on 5th September 2013 was 1.319 dollars to the euro. The resulting lodgment to the euro account brought the euro account back into credit with a balance on the account of €243,267. As noted above, there is a corresponding entry in the US dollar account for the same day. The dollar account shows that, on 5th September 2013, a currency purchase of euro took place on the US dollar account which resulted in a debit of US$3,730,311.38. That left a balance of US$11,306,369.51 in the dollar account on that day. There are two important points to note about that balance. In the first place, the balance is significantly less than US$15 million. It will be recalled that, as noted in para. 51 above, the case made by the plaintiffs was

that there was a pledge in favour of EFG Bank which required that a minimum of US$15 million would be held in the dollar account. If that were truly the case, it is difficult to fathom that the bank would have permitted the payment to Eugene F. Collins which was subsequently reimbursed from the US dollar account. Secondly, if one assumes that all of the proceeds of the OPT investment were held in the US dollar account on 5th September 2013, that would represent US$9,136,581.10 (being the US dollar equivalent of €6,926,900 representing the aggregate of the proceeds of the three relevant investments of €2,449,900, €2,477,000 and €2,000,000 converted at the rate of 1.319 US dollars to the euro). There was accordingly enough money in the US dollar account to pay the proceeds of the OPT investments and also the persons beneficially entitled to the sum of US$1,919,497.19 which had been paid into that account in November 2012. Even if it were the case that the balance of €243,925.79 left standing to the credit of the euro account on 14th June 2013 represented part of the proceeds of the OPT investments, the position would substantially be the same by 5th September 2013 given that, as of that date, there was a balance of almost the equivalent amount standing to the credit of the euro account (namely €243,267 as mentioned above). Subject to what I say below in relation to the inferences (if any) to be drawn from other material (such as Mr. Millett's texts), the plaintiffs have not proved that the funds standing to the credit of the US dollar account or the euro account were subject to a pledge in favour of EFG Bank as of the date of the withdrawal of US$3,730,311.38 used to purchase the euro necessary to reimburse the bank in respect of its outlay on 3rd September 2013 in funding the transfer to Eugene F. Collins. It cannot therefore be said that, as of 3rd September 2013, the proceeds of the plaintiffs' investments were at risk or that the withdrawal of funds to reimburse EFG Bank in respect of the transfer to Eugene f. Collins, of itself, caused any loss to the plaintiffs. That said, the plaintiffs also make an alternative case that, as of 3rd September 2013, there was a breach of fiduciary duty by Mr. Desmond or by Mr. Millett or the Millett defendants such as to give them

a right to trace or follow their claim into the Nemo Rangers Property. I deal with this element of their claim at a later point in this judgment. In that context, an obvious question arises as whether, on the basis of the admissible evidence heard by the court, there could be a breach of any such alleged duty at this point in the chronology (when there was still enough money in the accounts to pay the plaintiffs the full amount of their claim). On the basis of the bank statements, there is certainly no evidence of any breach of that nature. On the contrary, the bank statements suggest that, as noted above, no loss was suffered by the plaintiffs in September 2013 and, furthermore, that there cannot have been a covenant in place requiring that a balance of US$15 million be maintained in the US dollar account,

429. The transfer to Eugene F. Collins was used to complete the purchase of the Nemo Rangers property. As noted in para. 356 above, that is agreed by Ms. Carwood and Mr. Linehan. Furthermore, as outlined in para.354 above, the contract for the purchase of that property dated 10th July 2013 (which has been admitted by the plaintiffs) shows that the total purchase price was €3,017,000 and that a deposit of €301,700 had previously been paid. This meant that the balance due to complete the purchase was €2,715,300. Ms. Carwood and Mr. Linehan agreed that the Kenny family were the likely source of the money used to pay the deposit. This is addressed in more detail in para. 355 above and it is unnecessary to repeat that detail here. The accountants also agreed that it is reasonable to assume that, where the Kenny defendants funded the deposit, the closing funds would also be paid by that party. This strongly supports the view that, when it came to reimbursing EFG Bank on 5th September 2013 in respect of the money advanced by it on 3rd September 2013, the Bank and CVSSA would have looked to the proceeds of the Kenny defendants' investments before any others. However, before reaching any final conclusion on this issue, it will be necessary to consider the plaintiffs' tracing claim (addressed below).

430. Ms. Carwood frankly acknowledged that, while she maintained that it was possible that some or all of the closing funds came from the proceeds of the plaintiffs' investment, she could not say that this was so as a matter of probability. That creates obvious problems for the plaintiffs in circumstances where the burden of proof lies on them. However, as explained in para. 363 above, Ms. Carwood, at a very late point in the proceedings, sought to suggest that there were insufficient proceeds of the Kenny defendants' investment held in the CVSSA accounts in early September 2013 to cover the entire of the amount transferred to Eugene F. Collins. I accept that this is so but I do not believe that it makes any difference. The fact remains that, as counsel for the Kenny defendants established in cross-examination of Ms. Carwood on Day 18 of the hearing, the proceeds of the Kenny defendants' investments were more than sufficient to pay the outstanding element of the purchase price namely €2,715,300. Given that fact and given also that there were also sufficient funds held in the CVSSA accounts to discharge the entire of the plaintiffs' claim, it does not seem to me to be significant that the Kenny funds may not have been sufficient to cover the entire of the payment made to Eugene F. Collins.

431. The findings made above in paras. 422 to 430 do not necessarily dispose of the plaintiffs' claim in respect of the Nemo Rangers property. In the first place, as noted in para. 428 above, the plaintiffs make a case that, even though they were unable to prove the alleged loan agreement between EFG Bank and CVSSA, the existence of a pledge can nonetheless be inferred from other material on which they rely (including Mr. Millett's texts). Secondly, as also noted in para. 428 above, they also rely, in support of their tracing claim, on alleged breaches of fiduciary duty by Mr. Desmond or by Mr. Millett which they contend had occurred prior to the date of the transfer to Eugene F. Collins on 3rd September 2013. It will therefore be necessary to consider that material and the allegations of breach of fiduciary duty made against Mr. Millett. But the plaintiffs are in difficulty in so far as they seek to rely on any alleged

breach of fiduciary duty by Mr. Desmond. While the plaintiffs have sought to rely on his admission (through his counsel) on Day 5 of the trial, that admission is not binding in any way on the remaining defendants. Any breach by Mr. Desmond would have to be proved against those defendants. Moreover, the nature of the breach admitted by Mr. Desmond was never spelt out. It was merely stated that he had consented to judgment in respect of negligence, breach of contract and breach of fiduciary duty in the context that he was the controller of CVSSA. Critically, no details were given as to when any such alleged breach of fiduciary duty is said to have occurred and it is not possible to infer from the terms of the admission that the breach occurred prior to 3rd September 2013.

432. In light of the additional elements of the plaintiffs' case identified in para. 431 above, I believe that, logically, I should next make findings in relation to the balance of the plaintiffs' case against the Millett defendants. As part of that exercise, I will review the material on which the plaintiffs rely in support of their contention that the court can infer the existence of a pledge over the CVSSA accounts at EFG Bank. They also rely on the same material in support of their case that Mr. Millett was in breach of a fiduciary duty which they contend was owed to them and in support of their case that he is guilty of deceit. For reasons which I hope will become clear, these allegations against Mr. Millett are also relevant in the context of the tracing claim that the plaintiffs seek to make against the Kenny defendants in respect of the Nemo Rangers property. However, there is one aspect of the claims against Mr. Millett which I will leave over to a later part of this judgment, namely the claim against him in relation to the alleged misuse of personal data. In large part, that claim relates to the content of his letter to Mann Made, the text of which is set out in para. 174 above. In that letter, Mr. Millett disclosed the names, home addresses, and PPS numbers of the Nolan family members together with their respective dates of birth. That is very much a discrete claim which is best addressed separately.

Findings in respect of the balance of the plaintiffs' case against the Millett defendants (other than the claim against Mr. Millett in relation to the alleged misuse of personal data)

433. As noted in paras. 18 to 21 above, the plaintiffs have alleged in their amended statement of claim that, in addition to the alleged misrepresentations discussed in paras. 405 to 421 above, Mr. Millett and, to a lesser extent, the other Millett defendants were also guilty of further wrongdoing at later points in time. In para. 23, it is alleged that, at the meeting in Zurich on 9th January 2013, Mr. Desmond and Mr. Millett represented that one or more of the plaintiffs would be given signatory rights on the CVSSA account. But, in so far as Mr. Millett is concerned, any such case is based solely on the evidence of Mr. Richard Nolan. Given the findings I have made about the unreliability of other aspects of his evidence, I cannot be satisfied, on the balance of probabilities, that he is telling the truth in relation to this aspect of the plaintiffs' case and I reject this element of their case accordingly. In circumstances where he has told untruths on oath, I cannot find that his evidence on this issue is probably true. That is the difficulty that the plaintiffs have created for themselves by putting untruthful evidence before the court.

434. In para. 25 of the amended statement of claim, it is alleged that, in the period running from February 2013 to January 2015, both Mr. Desmond and Mr. Millett falsely, dishonestly and/or recklessly represented to the plaintiffs that the *"Funds"* remained intact and unencumbered in the CVSSA account or that they had control over the funds *"qua fiduciaries"* and that they were in a position to return them on demand. While that allegation is advanced against both Mr. Desmond and Mr. Millett, the majority of the particulars of representations are advanced solely against Mr. Desmond. The only particulars relevant to Mr. Millett are (i) that, in the course of a meeting in Zurich on 22nd April 2013, Mr. Desmond or Mr. Millett assured Mr. Richard Nolan and Ms. Ann Nolan that their funds were intact and unencumbered and (ii) that Mr. Desmond and Mr. Millett, at no stage, disclosed the true position to the

plaintiffs. It is then alleged in para. 26, that the representations were false or erroneous because of the execution in March 2013 of a pledge over the CVSSA accounts and it is also alleged that in September 2013 Mr. Desmond and/or the Millett defendants had used the plaintiffs' money to finance the purchase of the Nemo Rangers property in whole or in part. To the extent that the plaintiffs rely on Mr. Nolan's evidence in support of the allegation at (i) above, the same difficulty arises as that discussed at para. 433 above. As Mr. Nolan has shown himself to be prepared to give untruthful evidence on oath, it would be unsafe to rely on his evidence alone in respect of this issue. Furthermore, even if that difficulty did not arise, the fact remains that the plaintiffs have been unable to prove the existence of a pledge over the money lodged in the CVSSA accounts and, unless it is appropriate to infer the existence of a pledge from the other evidence (discussed below), there could be no misrepresentation as of April 2013. At that point, the proceeds of the investments made up to that date by the plaintiffs were still intact in the CVSSA euro account.

435. In contrast, the allegation that Mr. Millett had failed, at any stage, to inform the plaintiffs of the true position is a matter that requires consideration. This allegation is not confined in time to April 2013. For that purpose, it will be necessary to review the texts and other material discussed in paras. 329 to 338 above. In so far as the Millett defendants are concerned, that allegation was a central feature of the closing submissions of counsel for the plaintiffs. That material is also relevant to a number of other allegations in the amended statement of claim. These include the allegations made in paras. 44 and 45 where it is alleged that Mr. Desmond and/or the Millett defendants knowingly and in breach of their fiduciary duties, caused the plaintiffs funds to be encumbered without the plaintiffs' knowledge or consent. In this context, it is important to note that it is not alleged that Mr. Millett or the other Millett defendants were involved in the putting in place of the alleged pledge. Paragraph 28 of the amended statement of claim makes clear that this allegation was advanced solely against

Mr. Desmond. The heart of the case against Mr. Millett is that he allegedly knew about the creation of the alleged pledge and that he failed to inform the plaintiffs of its existence. In closing submissions, counsel for the plaintiffs submitted that, where there is a duty to speak, silence will amount to a representation. They argued that the plaintiffs had transferred money to *"Zurich … on the basis of representations from Mr. Millett … that the monies would be held for the OPT on trust in a deposit account. Mr. Millett did not … advise them about any risk involved in the transactions"* and that *"on the basis of Mr. Millett's representations, the Plaintiffs reasonably believed that the OPT monies would be held safely on deposit in Zurich and would be repayable on demand."* They further submitted that *"he knowingly failed to notify them for at least eighteen months when he became aware that the money had been charged to EFG Bank or that it was unavailable for release on demand as agreed or understood."* They maintained that Mr. Millett was under a duty to inform the plaintiffs of the true position and that, by staying silent, in those circumstances, he was guilty of deceit. While I have already rejected the plaintiffs' case based on the allegation that the money held in the CVSSA accounts would be held on trust, I need to consider the other aspects of these alleged representations.

436. The materials discussed in paras. 329 to 338 may also be of some relevance to other aspects of the plaintiffs' case such as the allegation in para. 29 that, in June 2013, Mr. Millett, fraudulently and in breach of his fiduciary duty, procured the final OPT transfer of €2 million for the purposes of meeting the collateral requirements of EFG Bank.

437. It is therefore necessary to return to the materials discussed in paras. 329 to 338 above and to make findings. Before doing so, it is important to record that I have to approach this task solely on the basis of the admissible evidence in the case. I have to put out of my mind everything that I was told in the course of the opening that the plaintiffs have failed to prove. I therefore have to approach this task as though I had never heard anything about the so-called

"Kiwi" structure or the alleged pledge (both of which featured prominently in the opening). Those matters have not been proved. Of course, the plaintiffs ask me to raise inferences from the materials in issue but my concern is that the plaintiffs are approaching this task as though it involved a search for material that would confirm the case made in the opening. They see everything through the prism of the case they sought to make in the opening and work backwards from there. They start from the proposition that the Kiwi structure and the pledge exist and that any references that may arguably corroborate their existence should give rise to inferences in the plaintiffs' favour. But I must start the task with an entirely clean slate and without any foreknowledge of the existence of anything of that sort. I must look at these materials with a virgin mind (so to speak) and consider them objectively with a view to assessing what inferences can reasonably be drawn from them. I must also keep in mind that the plaintiffs bear the burden of proof and that, in accordance with the principle laid down in *Ahern v. Bus Éireann* (quoted in para. 406 above), the court should have regard to the serious nature of the allegations levelled by the plaintiffs against the Millett defendants. As the authors of *McGrath on Evidence* observe (also addressed in para. 406 above), the civil standard of proof will be applied with some rigour where a very serious allegation (such as deceit) is alleged. Furthermore, to the extent that the evidence of Richard Nolan or Patricia Nolan is relevant in the context of the review of these materials, I must also bear in mind the observations of Hardiman J., in *Shelly-Morris,* that it is not appropriate, in such circumstances, for a court to engage in speculation or benevolent guess work in an attempt to rescue the claim.

438. On the other hand, the plaintiffs submit that the court should take into account the decision of the Millett defendants not to tender evidence. On Day 20, counsel for the defendants submitted that, had he given evidence, Mr. Millett could have explained what was said in his texts and that the court can and should draw adverse inferences against him arising from his decision to refrain from giving evidence to explain them. In this context, counsel referred to

the judgment of Lord Sumption in the U.K. Supreme Court in *Prest v. Petrodel Resources Ltd.* [2013] 2 AC 415 at p. 492 where Lord Sumption discussed the earlier decisions of the House of Lords in *Herrington v. British Railways Board* [1972] AC 877 and *R. v. Inland Revenue Commrs., ex p. TC Coombs & Co.* [1991] 2 AC 283. While Lord Sumption expressed some reservations about the *"fiercer parts"* of what was said by Lord Diplock in *Herrington,* he expressly approved the principle as described by Lord Lowry in *Coombs* (subject to one reservation peculiar to family law cases which is not relevant here). In *Coombs*, Lord Lowry, at p. 300, had expressed the principle in the following terms: *"In our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence … can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party, may be either reduced or nullified."*

439. I have no difficulty in accepting that principle. However, it is important to note that it applies where there is sufficient evidence from one party to give rise to an expectation that the opposing party will go into evidence in response. In this case, the application of the principle is therefore very much dependent on whether there is a sufficient basis laid out in the plaintiffs' evidence to give rise to an expectation that Mr. Millett would tender evidence in response. It also has to be said that, as argued by counsel for the Kenny defendants, it is somewhat surprising that the principle is invoked by the plaintiffs given the very obvious gaps in their own evidence. It is particularly striking that the plaintiffs chose not to call Joan Nolan or any of the other plaintiffs who worked in the finance department of Nolan Transport. It will be recalled that, in the course of her evidence, Ms. Patricia Nolan regularly suggested that she did

not know the answers to questions put to her on the basis that she did not work in the finance department. Both Richard Nolan and Patricia Nolan suggested that Joan Nolan had greater knowledge than them in relation to Serene and the use of the funds transferred to Serene in the settlement of the Bank of Ireland claim. Counsel for the Kenny defendants also highlighted, with some considerable justification, the fact that the plaintiffs had refrained from calling Mr. Desmond notwithstanding that he had a central role in relation to the structure and, as noted earlier, had admitted on Day 5 that he controlled CVSSA. He was therefore in a position to provide first hand evidence of virtually all of the facts that the plaintiffs are now asking the court to infer. Moreover, the plaintiffs would not have had to call him *"on the blind".* As the author of countless emails and texts, the plaintiffs had the benefit of knowing much of what he would say. They also had the benefit of his answers to interrogatories. In consenting to judgment, he had also admitted negligence, breach of contract and breach of fiduciary duty. In calling him as a witness, the plaintiffs could therefore be confident that they could rely on those admissions. Against that backdrop, it seems to me that the principle described by Lord Lowry in *Coombs* is of some relevance, by analogy, to the decision of the plaintiffs not to call the one witness with the most extensive knowledge of the facts.

440. An issue also arises in relation to how the *Coombs* principle is to be applied where a party who seeks to rely on it has placed untruthful evidence before the court. In this context, the observations of Hardiman J. in *Shelly-Morris* suggest that the court should not take a benevolent approach to a party who has chosen to proceed in that way.

441. Bearing all of these factors in mind, I now return to the material discussed in paras. 329 to 338 above in order to consider what findings can be made on foot of them. In the course of my commentary on the texts in para. 329, I have already observed that a significant number of the texts appear to arise in the context of a perceived delay in the release of funds in respect of the impending purchase of the Nemo Rangers property on the instructions of Mr. Paul Kenny,

the eleventh defendant. The cause of the delay is not specifically identified in the terms of any of these texts. As noted in para. 329(c) above, there could be a variety of reasons why there might be a delay in releasing funds from a bank account including, for example, the need to give a fixed period of notice. This is especially so in the context of an investment. For the reasons which I have previously outlined, I do not accept that the proceeds of the investments made by the OPT with MECD were merely to be held on deposit in the CVSSA accounts to the order of the OPT. Experience shows that, in the case of an investment, it is not unusual to find that it may take some time for an investment to be realised. Even in the case of a bank account, experience shows that a higher rate of return can be obtained where funds are placed on a fixed term deposit or where a fixed period of notice must be given before a withdrawal can be made. The fact that a delay arises in the context of the release of funds or the realisation of an investment does not automatically point to the existence of a pledge or security. Crucially, while such a delay represents an impediment to the immediate release of funds, it does not mean that the funds are in any way at risk.

442. It seems to me that, when read together, each of the texts discussed in para. 329(c), (d), (h), (i), (j), (l) and (m) fall into the category discussed in para. 441 above (albeit that, for the reasons outlined in sub-para. (h), I do not believe that Mr. Desmond's text of 13th August 2013 is admissible against the Millett defendants). The email dated 27th August 2013 from Mr. Garcia to Mr. Millett (described in para. 329(k) above) also falls into the same category (albeit that I do not believe that email to be admissible in evidence in circumstances where the truth of its contents has not been accepted by the Millett defendants and where the plaintiffs have not identified any relevant exception to the hearsay rule). I appreciate that, in common with those discussed in para. 329(e), (g) and (l), the texts discussed in para. 329(d) and (j) also refer to UOB and/or BNPP but those references are not self-explanatory. As I have previously emphasised, I have to put out of my mind what I was told in the opening about the Kiwi

structure and the role alleged to have been played by banks that may be known by these acronyms. None of that had been proven. Moreover, as noted in para. 329(j), the texts provide no detail in relation to the roles that may have been played by those entities and it is, in my view, far too large a leap to suggest that it is reasonable to infer the existence of a pledge or other security from the references in the texts to these acronyms.

443. I also appreciate that there is reference in the texts discussed in para. 329(l) to a commitment by Mr. Oberhansli to release $3.8 million *"on completion of the BNPP section"* and to Mr. Oberhansli not wanting to *"return to credit without his desired UOB proofs"*. However, as I previously noted, this text appears to have been written in the specific context of the purchase of the Nemo Rangers property on behalf of Mr. Paul Kenny. There is nothing in its terms which suggests that it applies also to the proceeds of the OPT investments. Furthermore, as noted in para. 442 above, there is insufficient detail in the text to infer the existence of a pledge. With regard to Mr. Desmond's text discussed in the same sub-para., I cannot see how that is admissible against the Millett defendants. No relevant exception to the hearsay rule has been identified. Moreover, it seems to me that the principle described in *Coombs* is of some relevance here. Following the settlement with him, it was open to the plaintiffs to call Mr. Desmond as a witness to prove the details underlying the text such that the court could reach a sufficiently informed view as to what the text means. Without evidence as to the details and facts underlying what is said in the text, the court is effectively being asked to guess what the text relates to and to fill in the blanks in a way that best suits the plaintiffs' case. That is to approach the interpretation of the text in a manner that unduly favours the plaintiffs. That seems to me to be particularly inappropriate in circumstances where the plaintiffs are alleging deceit on Mr. Millett's part. Thus, even if the text were otherwise admissible in evidence, I do not believe that the plaintiffs are entitled to proceed in that way.

444. With regard to the texts of 30th August 2013 discussed in para. 329(m), these are written in very strong terms by Mr. Millett but, again, they appear to me to arise in the specific context of the imminent closure of the purchase of the Nemo Rangers property. They do not appear to relate in any way to the proceeds of the OPT investments. Moreover, they must be read in context. While the terms of these texts exhibit a very high level of concern by Mr. Millett about what appears to be the continued failure of EFG Bank to release funds to allow the purchase to close, they also suggest that Mr. Millett believed that EFG Bank was not entitled to delay any further and that proceedings should be taken against the Bank to secure the release of the funds. Crucially, the funds in question were released within days after this exchange. As outlined earlier, the necessary funds to complete the purchase were released on 3rd September 2013. If anything, that demonstrates that Mr. Millett was correct in the view, implicit in what is said in the texts, that the Bank was not entitled to withhold the release of the funds in question. Furthermore, as outlined in para. 428 above, the bank statements show that, after the transfer from the US dollar account to the euro account on 5th September 2013, the remaining balance was significantly lower than US$15 million which is plainly inconsistent with the case which the plaintiffs seek to make.

445. For the reasons outlined in paras. 441 to 444 above, I do not believe that there is any sufficient basis in the materials discussed in para. 329(c), (d), (h), (i), (j), (l) and (m) to infer the existence of a pledge over the proceeds of the OPT investments. With regard to the balance of the texts, my views are as follows:

(a) I do not see anything in the text of 8th June 2013 discussed in para. 329(a) to support the drawing of an inference in favour of the plaintiffs. While the text appears to refer to some of the proceeds of the plaintiffs' investment, the reference to the *"top up to required amount"* appears to relate solely to Caroma/Rachel Rose. Notably, within days after this email, Rachel Rose transferred €900,000 to the euro account of CVSSA

on 10th June 2013. Given the sequence of events that followed in respect of the purchase of the Nemo Rangers property, it seems to me that it is more probable that the reference to the *"top up amount"* in the text related to that purchase rather than to any alleged need to keep a specified amount in the CVSSA account. There is no sufficient detail available in this text (or in the sequence of texts as a whole) to support an inference that the latter is more probable;

(b) Nor can I see anything in the texts discussed in para. 329(b) to support the plaintiffs' case. The first text merely identifies the breakdown of MECD funds in MECD while the second effectively does no more than to notify Mr. Desmond that a further investment of €2 million had been received;

(c) With regard to the texts discussed in para. 329(e), it seems to me that both of Mr. Millett's texts of 23rd July 2013 form part of the same sequence as that discussed in paras. 441 to 444 above. They are expressions of serious concern by Mr. Millett about the delay in releasing funds to allow the purchase of the Nemo Rangers property to proceed. The reference in the second text to Mr. Millett having *"to perform on a contract in 11 working days"* appears to confirm this. On the other hand, the exchange of texts between Mr. Desmond and Mr. Millett on 25th July 2013, if admissible in evidence, is plainly concerned with the proceeds of the OPT investments. The plaintiffs place considerable emphasis on this exchange and submit that, at this point (if not before) Mr. Millett and Mr. Desmond should have come clean to the plaintiffs. The problem from the plaintiffs' perspective is that, in the absence of any applicable exception to the hearsay rule, the text from Mr. Desmond to Mr. Millett is not admissible in evidence against the Millett defendants and, without it, the meaning of Mr. Millett's response is unclear. Even if Mr. Desmond's text were admissible, his expression of concern about the request to release €7 million to settle with AIB does

not necessarily point to the probable existence of a pledge over the proceeds. While the exchange suggests significant concern on Mr. Desmond's part and surprise on Mr. Millett's part, the response from Mr. Millett that *"this was supposed to be months away"* suggests that the concern was in respect of the timing of the request for the return of the investment. In this context, even on the basis of the plaintiffs' own case, the funds were to be held at CVSSA for a period of time. According to Mr. Nolan, the funds were to be held in the CVSSA accounts for four to six months. Given that substantial sums were transferred by the OPT to MECD as late as April and June 2013, the relevant four to six month period would not yet have expired and Mr. Millett's response that *"this was supposed to be months away"* makes sense in that context. The fact that it was intended to keep the funds in the account for a period of time is also consistent with the terms of Mr. Desmond's email of 4th February 2013 (copied to Mr. Nolan) which spoke of them being held in the CVSSA account *"for a considerable period of time".* Thus, on one view, the exchange of texts of 25th August 2013 (if admissible in evidence) is explicable on the basis that the request for repayment or realisation had come unexpectedly early. However, the language of the exchange must also be considered – in particular, Mr. Desmond's suggestion that *"I am sick here this morning"* and the opening words of Mr. Millett's response: *"How the hell did that happen".* Does that exchange suggest that something more sinister was afoot? That is a question that I will return to after I consider some of the other material addressed below;

(d) If admissible, the exchange of texts between Mr. Desmond and Mr. Millett on 30th July 2013, discussed in para. 329(f), is in a similar category to the exchange on 25th July 2013. The same problem arises with respect to the admissibility of Mr. Desmond's text saying *"Username and password now with Richard"* without which

Mr. Millett's response *"How is that going to work in advance of the monies returning"* is difficult to decipher. The plaintiffs argue that this refers to the power of insight and shows concern on the part of Mr. Millett that Mr. Nolan will be able to use the power to view the euro account of CVSSA and will see that, as of 14th June 2013, the bulk of the funds in that account had been used to purchase US dollars. This seems to me to be something that I should also consider more fully after I have addressed the other material on which the plaintiffs rely (discussed in paras. 446 to 451 below;

(e) With regard to the exchange of texts discussed in para. 329(g), I can see nothing in this exchange (if admissible in evidence) that adds anything of value to the plaintiffs' case. The references to warrants and to UOB are so lacking in detail that, in the absence of any evidence as to what was going on in the background, I am unable to infer anything from them;

(f) In my view, the texts described in para. 329(h) are hearsay and, in circumstances where the plaintiffs have failed to identify any relevant exception to the hearsay rule, the texts are inadmissible against the Millett defendants. I therefore do not believe that I can make any findings on the basis of anything said in them;

(g) A similar issue arises in relation to the admissibility of Mr. Garcia's email of 27th August 2013 (discussed in para. 329(k) above). The plaintiffs have failed to identify any exception to the hearsay rule that would make the contents of the email admissible against the Millett defendants. Even if it were admissible, I believe that, by its own terms, the email is concerned with the Kenny defendants' funds and I have no evidence that the proceeds of the OPT investments were held on the same terms as the Kenny defendants' funds. The plaintiffs are effectively asking me to make assumptions to assist them in repairing the holes in the evidence in their case.

However, I must adopt a neutral approach. I must also keep in mind the seriousness of the case they seek to make against the Millett defendants and the fact that the burden of proof lies on the plaintiffs.

(h) The next relevant text is that discussed in para. 329(n) above namely Mr. Millett's text to Mr. Desmond dated 5th September 2013. While that text was sent after the release of funds to complete the purchase of the Nemo Rangers property, it appears to relate to events which have occurred at some point before the date of the text. While the text is written in Delphic terms, it suggests that Mr. Millett was concerned that something untoward (or which might appear to be untoward) might emerge in the event that *"someone somewhere along the line will start looking closely at this".* While it is difficult to identify what the text means, I believe that, in common with the texts discussed in sub-paras. (c) and (d) above, this text requires further consideration after I have addressed the additional materials on which the plaintiffs rely (discussed in paras. 446 to 451 below).

446. In paras. 330 to 331, I have already discussed the answers given by Mr. Millett to interrogatories 263 and 121 on which the plaintiffs rely in further support of their case against the Millett defendants. For the reasons advanced in para. 330, I do not believe that the answer to interrogatory 263 is intelligible to me. The question posed by the plaintiffs has been pitched at too high a level without any detail as to what is alleged to have been involved in either of the structures mentioned in the question. In the absence of that detail, I cannot divine what was involved. In the case of interrogatory 121, the answer given by Mr. Millett does not advance matters beyond what the texts discussed in paras. 441 to 444 suggest. In his answer to the interrogatory, Mr. Millett admitted that, in the period from May to September 2013, he had discussions with Mr. Desmond in relation to the terms on which CVSSA's funds would be released to complete the purchase of the Nemo Rangers property. The fact that such discussions

took place is evident from Mr. Millett's texts to Mr. Desmond during that period. However, for the reasons discussed in paras. 441 to 444, I do not believe that the content of these discussions is sufficient to give rise to an inference that a pledge must have existed over the proceeds of the investments made by the OPT. The discussions suggest that there was a delay in the release of the balance of the purchase money but, for the reasons already discussed, it does not seem to me that the existence of such a delay necessarily gives rise to an inference that the money held in CVSSA's accounts was at risk. Given my earlier finding that the OPT funds were intended to be invested rather than simply placed on deposit, it seems to me that the more likely explanation for the delay was that the investments had to be held for a particular period of time or that a period of notice had to be given before they could be released. The fact that the completion money was subsequently released on 3rd September 2013 adds support to that conclusion. There is nothing in the terms of the texts to suggest that the release of funds on that date was conditional on some form of collateral being given to EFG Bank in substitution for the funds released.

447. In addition to the answers to the interrogatories discussed above, the plaintiffs also highlight Mr. Millett's answers to interrogatories 286 and 296 (discussed in paras. 334 to 335 above) and on his answer to interrogatory 186 (discussed in para. 337 above). I do not believe that any of these answers assist the plaintiffs. It is true that, in answer to interrogatory 286, Mr. Millett accepted that he was informed by Mr. Desmond and AFT that EFG Bank made demand for repayment of the EFG loan in May or June 2014. However, as I indicated in para. 334 above, this confirms that Mr. Millett was aware of such a loan as of the middle of 2014. Crucially, it does not establish that he was aware of the existence of any such loan at any earlier date. While it seems to me that Mr. Millett or his companies would likely have a duty to have reported that demand to the plaintiffs as soon as they became aware of it, it has not been suggested that the plaintiffs could have taken any step at that point to protect their position.

Thus, any breach of duty by Mr. Millett or by any of the Millett defendants, as of May or June 2014, could not be said to be causative of the plaintiffs' claimed losses.

448. In the case of Mr. Millett's response to interrogatory 296, I have already explained in para. 335 above why I do not believe that this answer assists the court in the drawing of inferences and I have nothing more to add in relation to it. On the other hand, for the reasons explained in para. 337, I accept that the plaintiffs are entitled to rely on Mr. Millett's answer to interrogatory 186 as against the Millett defendants. In his answer, Mr. Millett accepted that he had discussed with Mr. Paul Kenny a strategy to describe a third party as the beneficial owner of Dildar IOM to *"obscure the Kenny family involvement".* But that plainly does not assist the plaintiffs in seeking to make the case that the court should infer the existence of a pledge in favour of EFG Bank. It has nothing to do with any alleged pledge. Nonetheless, it may have some relevance to the separate element of the plaintiffs' claim in respect of personal data (addressed further below). Similar issues arise in relation to the plaintiffs' reliance on Mr. Millett's email and letter to Mann Made on 24th May 2013 (addressed in para. 336 above). That material may well be relevant to the personal data claim but it is not relevant to the issue about the alleged existence of a pledge in favour of EFG Bank.

449. It might be thought that the material discussed in paras. 335 and 337 is also relevant to the case made against the Kenny defendants. However, an admission by one defendant is not binding on another defendant and, if the plaintiffs wished to pursue this element of their case against the Kenny defendants (or any of them), they would have to prove the relevant facts. For that purpose, they cannot rely on any admission made by Mr. Millett. As it happens, the plaintiffs have wholly failed to substantiate their claim that there was a conspiracy between the Millett defendants and Mr. Paul Kenny, the eleventh defendant.

450. For the reasons discussed in para. 332, I do not believe that the plaintiffs are entitled to rely on the fax dated 25th May 2013 from Mr. Millett to Mr. Garcia. Even if they had proved

that it is receivable in evidence, the focus of the fax is to insist that funds will be released by EFG Bank and that such release will not be *"blocked delayed or restricted"* and that *"we ... cannot allow anything to happen that will restrict access to the MECD funds".* Again, it seems to me that, even if this fax is receivable in evidence, the terms of the fax do not necessarily point to the existence of a pledge. While the fax refers to the existence of covenants and obligations on the EFG accounts, their nature is not spelt out and they could equally refer to a fixed deposit period or a fixed period of notice which would be broadly consistent with the evidence previously discussed that the investments would be held for *"a considerable period of time"* to quote Mr. Desmond's email of 4th February 2013 (addressed in paras. 109 to 110 above) or the period of four to six months mentioned by Mr. Nolan in his evidence. It is the case that the fax also refers to *"the $15 million EFG covenant"* but that is in the specific context of Rachel Rose and Caroma. Even if one ignores the reference to those entities (which have nothing to do with the plaintiffs), it is difficult to reconcile the reference to such a covenant with what actually occurred in September 2013. As noted in para. 428 above, the balance in the US dollar account of CVSSA fell quite significantly after the transfer to Eugene F. Collins on 3rd September 2013. When the funds standing to the credit of the US dollar account were subsequently debited on 5th September 2013 with an equivalent amount in US dollars, the balance fell to US$11,306,369.51. That strongly undermines the suggestion that such a covenant existed Thus, even if the plaintiffs had proved that the fax is receivable in evidence, it does not establish, as a matter of probability, that there was in fact a US$15 million covenant in place in favour of EFG Bank or that it had any application in respect of the OPT investments. Again, the plaintiffs are asking the court to fill in the gaps which they have left in the evidence that they have placed before the court and to draw an inference which is favourable to them and which would have very serious consequences for the Millett defendants. The plaintiffs could have called Mr. Desmond to plug all of those gaps but chose not to do so. As previously

noted, Mr. Desmond, in consenting to judgment, expressly admitted that he controlled CVSSA and he was the obvious person to call as a witness so that the court could be apprised of the entire details of the structure that was put in place including the precise arrangements between CVSSA and EFG Bank.

451. As noted in para. 333 above, the plaintiffs also seek to rely in this context on the evidence of Richard Nolan (quoted in para. 124 above) that Mr. Millett confessed at a meeting in January 2015 that in March or July 2013 the OPT money had been *"invested in something we* [i.e the plaintiffs] *didn't know about, without our knowledge…"*. Similar evidence was also given by Ms. Patricia Nolan. They also seek to rely on Mr. Nolan's evidence (while under cross-examination by Mr. Millett) that Mr. Millett told him in January 2013 that the OPT money was *"gone in 2013"*. However, in circumstances where I have already held that Mr. Nolan and Ms. Nolan have given untruthful evidence in relation to other important issues in these proceedings, I do not believe that I can treat this evidence as reliable unless there is some other objectively reliable evidence to substantiate it. I have not been able to identify anything sufficient to substantiate this element of the evidence and accordingly I reject it.

452. That leaves the material identified in para. 445(c), (d) and (h). In his closing submissions on Day 22 of the hearing, counsel for the plaintiffs placed particular emphasis on the text exchanges of 25th and 30th July 2013 described in para. 445(c) and (d) and he submitted that these evidence a breach of duty on Mr. Millett's part in so far as he failed to *"come clean"* to the plaintiffs at that point. As noted earlier, the plaintiffs also make the case that, by staying silent, Mr. Millett was guilty of deceit. Counsel also placed some emphasis on the fact that Mr. Millett opted not to give evidence and to provide an innocent explanation for these exchanges (if such an explanation was capable of being given).

453. I must therefore consider whether this material (either on its own or in conjunction with the other material discussed above) is sufficient to give rise, as a matter of probability, to an

inference that a pledge existed in favour of EFG Bank? Or is it sufficient to establish, as a matter of probability that there was a duty on Mr. Millett or the other Millett defendants to notify the plaintiffs that EFG Bank was causing difficulty in relation to the release of funds over the course of the summer of 2013? If so, does the failure of Mr. Millett or the other Millett defendants amount to deceit on their part or to a breach of fiduciary duty?

454. In considering these questions, I reiterate what I have said in paras 437 to 439 above. I must therefore keep in mind that the burden of proof lies on the plaintiffs, that the seriousness of the allegations made by the plaintiffs are also a relevant consideration, that the court should not engage in benevolent guess work in an attempt to rescue the plaintiffs' claim and that it may be appropriate to consider whether any adverse inferences can be drawn from either the failure of Mr. Millett to tender evidence or the failure of the plaintiff to call Mr. Desmond. I must also exclude from my mind anything which has not been appropriately proved or admitted.

455. In so far as the exchange of texts of 25th July 2013 is concerned, I have already indicated my view that the text from Mr. Desmond to Mr. Millett is hearsay and is therefore not admissible in evidence. If the plaintiffs wished to rely on the words of the text, they should have called Mr. Desmond or sought to have the text admitted under the 2020 Act (if that Act is capable of being invoked in respect of these texts). They took neither of these courses and it is not for the court to repair the gap they have left in their proofs. Without Mr. Desmond's text, the response from Mr. Millett is unclear. It merely expresses annoyance and disbelief at whatever is said in the incoming text and goes on to express the view that whatever is said in the incoming text was supposed to be months away. In those circumstances, I cannot see any basis on which I could draw any such inference. That is sufficient to dispose of the attempt to rely on the exchange and I do not need to go further. Even if I am wrong in my view that Mr. Desmond's text is inadmissible, I do not believe that the exchange necessarily gives rise to an

inference that the funds were at risk or that they were subject to a pledge or that something had occurred which required that the plaintiffs be notified. In para. 445(c), I have already drawn attention to fact that the intention always appears to have been that the money in the CVSSA accounts would be held for, at least, four to six months. I have previously rejected the plaintiffs' case that it was simply held on deposit to the order of OPT and repayable on demand. On that basis, the exchange of texts is explicable and does not suggest that anything untoward had occurred. The only aspect of the exchange that might suggest a different meaning is Mr. Desmond's statement that *"I now have a BIG problem"* and that he was *"sick here this morning"* and Mr. Millett's use of the words *"how the hell did that happen".* Is that language sufficient to allow a finding to be made that an unfavourable inference should be raised against the Millett defendants? Does Mr. Millett's decision not to tender an explanation in evidence support such a finding? I have come to the conclusion that, even if Mr. Desmond's text is admissible in evidence, the exchange is not sufficient to permit the court to draw an unfavourable inference against the Millett defendants. In the first place, I have to bear in mind that the plaintiffs are asking the court to draw such an inference in circumstances where they contend that the alleged failure to bring matters to their attention is not merely a breach of duty but also renders the Millett defendants guilty of deceit. It is difficult to conceive of a more serious charge to level against a party in civil proceedings. I believe that the court has to approach the drawing of adverse inferences in such circumstances with considerable caution. Secondly, having regard to the fact that the money in the CVSSA account represented an investment, there is an obvious innocent explanation of the exchange (which I have already outlined above). Thirdly, while Mr. Desmond's reference to being sick and to his having a big problem suggests a level of serious concern on his part in relation to his own position, I have to bear in mind that this is Mr. Desmond's language; these are not Mr. Millett's words. Moreover, the existence of a pledge or covenant is not the only conceivable reason why Mr.

Desmond may have thought that there was a problem. Mr. Desmond may simply have been concerned that any relevant notice period or expiry of a fixed term period may have meant that the mooted settlement with Allied Irish Banks could not be finalised. The settlement may have occurred very unexpectedly and taken Mr. Desmond by surprise. Mr. Desmond may also have been concerned that, in his dealings with Mr. Nolan in respect of the period of the investment, he had left things a little loose. It should be recalled, for example, that in his email of 4th February 2013, he had spoken in terms of the funds being held for *"a considerable period of time".* Fourthly, Mr. Desmond is speaking in the first person singular; he does not say that *"**we** have a BIG problem"* (emphasis added). It is true that Mr. Millett responded with the words *"how the hell did that happen"* but those words can be used in ordinary conversation to express surprise or puzzlement; they do not automatically mean that the speaker is worried or concerned or even disappointed. Those words do not approach anything like the same level of concern as the significantly more dramatic language used by Mr. Millett in his texts dealing with the delay in releasing funds to allow the Nemo Rangers sale to be completed. The words used by Mr. Millett do not therefore justify the drawing of an adverse inference against him. This is particularly so when an alternative and plausible inference is available. In all of these circumstances, even if no issue as to admissibility arose in respect of Mr. Desmond's text, I do not believe that it would be appropriate to draw any of the inferences suggested by the plaintiffs.

456. A similar issue in relation to the admissibility of Mr. Desmond's text arises in respect of the exchange of texts on 30th July 2013. Without Mr. Desmond's text, the response from Mr. Millett is meaningless. It would therefore be impossible to draw any inference from it. That is sufficient to dispose of the plaintiffs' attempted reliance on this exchange and I do not need to go further. Even if I am wrong in my view that Mr. Desmond's text is inadmissible, I do not believe that the exchange of texts is of assistance to the plaintiffs. They submit that I should

infer from this text that Mr. Millett was concerned that the power of insight (which they suggest is the subject of Mr. Desmond's incoming text) would allow Mr. Nolan to see that money had been moved to the US dollar account. However, in contrast to the level of concern evident in his dramatically worded texts dealing with the closing of the purchase of the Nemo Rangers property, the words used by Mr. Millett on this occasion are quite phlegmatic. They do not seem to me to exhibit any concern on Mr. Millett's part that Mr. Nolan may be on the warpath when he sees what has happened. Unlike the texts dealing with his concerns about Mr. Kenny's reaction to the delays in the closing of the Nemo Rangers deal, there is no reference to *"catastrophe"* or *"my business is now on the line"* or *"the game is up"* or *"we are all fired".* In contrast, the language used by Mr. Nolan contains no hint of alarm or concern about the consequences of Mr. Nolan using the password and user name to view the account. In those circumstances, how can I raise an adverse inference against Mr. Millett arising from the question he posed in straightforward terms to Mr. Desmond? In so far as I can see from Mr. Morris's report, there was no responding text or call from Mr. Desmond. The next text sent by Mr. Millett to Mr. Desmond on the following day addressed a different subject. That does not suggest that there was any level of concern on Mr. Millett's part in the event that Mr. Nolan was to view the accounts. Furthermore, it is important to see this text in the context of the other available evidence in the case. While the terms of the power of insight are not confined to a particular account (it refers to business contracts and funds generally), there appears to have been an understanding (at least at an early stage of the relationship), that the signatory rights would be on the euro account. Again, the signature card is not specific to that account but, as recorded in para. 109 above, the terms of Mr. Desmond's email of 4th February 2013 to Mr. Garcia spoke of adding Mr. Nolan as a signatory to the euro account. Thus, there may have been an understanding that the password would only work on the euro account and would not work to show that the money was now held in the dollar account. If one looked only at the euro

account, one could well get the impression that €8 million had been spent on purchasing dollars and had disappeared. One would need to also have access to the dollar account in order to see that the relevant funds were still held in a CVSSA account with EFG Bank. It may be suggested by the plaintiffs that this is a speculative view but the reality is that it is the plaintiffs who, in the absence of evidence, are asking the court to speculate in their favour and I am simply pointing out that there are other scenarios which seem to me to be more likely on the evidence, as a whole. The plaintiffs' approach involves asking the court to speculate in a manner that best suits them and which excludes consideration of all other possible scenarios. Given that the plaintiffs are alleging deceit, I do not believe that this is an appropriate approach. In all of these circumstances, even if Mr. Desmond's text of 30th July 2013 is admissible, I can see no proper basis on which to draw an adverse inference against the Millett defendants arising from this exchange of texts.

457. That leaves Mr. Millett's text of 5th September 2013 discussed in para. 329(n) above. In terms of timing, this text was sent in the immediate aftermath of the transfer to Eugene F. Collins in connection with the closing of the purchase of the Nemo Rangers property. That is the only fact that arguably creates a potential connection between what is said in the text and the events in issue in these proceedings. But, in my view, in the absence of something in the language of the text that connects the text in some way to the plaintiffs, the timing is not sufficient in itself. This is especially so in circumstances where the events which preceded the text related to the acquisition of the Nemo Rangers property which Mr. Millett plainly understood and intended was to be acquired on behalf of Mr. Paul Kenny. That understanding and intention is evident from the series of texts discussed in paras. 441 to 444 above. The text of 5th September 2013 is expressed in language that arguably suggests a malign intention on Mr. Millett's part. The terms of the text suggest that Mr. Millett was concerned that something might come to light on investigation that would not reflect well on either Mr. Desmond or Mr.

Millett himself. However, the terms do not make any express or, in so far as I can see, any implicit reference to the plaintiffs or the Nolan family more generally. I simply do not know what Mr. Millett was talking about. Notwithstanding the somewhat underhand impression created by the language used in the text, I cannot identify any sufficient basis to connect the text to the plaintiffs. In this context, counsel for the plaintiffs, in the course of his submissions on Day 20, merely asserted that the text was important because it *"shows the level of his involvement. He knows that he was involved in something that was not proper* ***and it was a wrong against my clients****"* (emphasis added). However, counsel did not identify any basis for drawing the conclusion that the *"something that was not proper"* was the alleged *"wrong"* against the plaintiffs. Having regard to the Delphic terms of the text, that seems to me to involve too much of a leap. Counsel did not explain the basis for his assertion. While I appreciate that Mr. Millett could have been required to explain the text had he opted to give evidence, there is, in my view, no sufficient basis to draw an inference that the text necessarily relates to the plaintiffs or to any alleged wrong against them. It might be different if the terms of the text showed some connection with the plaintiffs. In such circumstances, and in light of the unfavourable impression created by the text, there might well have been a need for him to explain it (if it was capable of innocent explanation). However, in the absence of such a connection, I can see no sufficient basis to draw an adverse inference against Mr. Millett by reason of his decision not to tender evidence.

458. I confirm that, having examined the texts individually, I have also considered them as a whole. But this does not alter my conclusions in relation to them. While counsel for the plaintiffs stressed that the texts should be read as a whole, they did not articulate what they contend flows from doing so or otherwise provide any atlas or guide that assists in drawing any overall pattern or in knitting the jigsaw together. There is, however, one further issue that requires consideration arising from the series of texts relevant to the closing of the Nemo

Rangers transaction (discussed in para. 441 to 444 above). Could it be said that, in light of the problems that arose in obtaining the release of funds to close the transaction, it behoved Mr. Millett to apprise the plaintiffs of those problems? The first thing to be said in answer to that question is that there is no evidence that the terms of the investments held on behalf of the plaintiffs were the same as the terms applicable to the Kenny defendants. Secondly, it is clear from the language used by Mr. Millett in the texts (including, for example, his exhortation to Mr. Desmond to sue EFG Bank) that he was very much of the view that EFG Bank was not entitled to withhold the release of the funds necessary to close the purchase. Thirdly, the problems were in fact overcome. The proof of the pudding is that the necessary funds were released. Fourthly, this occurred notwithstanding that the release subsequently had the effect of reducing the total balance held in the US dollar account to a figure which was significantly less than US$15 million. Furthermore, as noted earlier, I have to keep in mind that the plaintiffs are not here simply alleging a breach of duty; they maintain that, by staying silent, the Millett defendants were guilty of deceit. I cannot therefore hold that there was a failure to apprise the plaintiffs unless there is a convincing basis to conclude that this is so, on the balance of probabilities. Given the four factors outlined above, I do not believe that there is a sufficiently convincing basis to reach such a conclusion. It might possibly have been different if the Bank had not ultimately agreed to release the funds to complete the purchase but, given that the release happened, that is a hypothetical scenario and it is unnecessary to consider it further.

459. For all of these reasons, the plaintiffs have failed to persuade me that they have a case against the Millett defendants based on deceit, misrepresentation or breach of duty of the kind alleged. As noted previously, the plaintiffs have not made or argued any case that the Millett defendants should have advised them against proceeding with the structure advised by Mr. Desmond. While there may have been a duty on the part of one or more of the Millett defendants to have brought the EFG Bank demands of 2014 to their attention, no case has been

argued that the failure to do so has led to the losses now claimed and I therefore do not believe that it is necessary to consider this further.

The tracing claim in relation to the Nemo Rangers property

460. As noted in para. 54 above, it was very properly conceded by counsel for the plaintiffs that the tracing claim advanced by the plaintiffs is confined to a claim based on equitable principles. The plaintiffs do not make a proprietary claim. Nor could they in circumstances where, as noted in para. 361 above, Ms. Carwood has frankly and correctly conceded that she could not say, as a matter of probability that the OPT was the origin of the funds used to close the purchase the Nemo Rangers property. The tracing claim is therefore advanced on the basis that the money used to close the transaction came from a mixed fund comprised partly of funds which have their origin in the OPT and partly of funds which have their origin in the Kenny defendants (or some of them). For completeness, it should be noted that there are also funds of unidentified origin potentially in the mix but that is not something that needs to be addressed at this point. The plaintiffs claim that, as a consequence of a breach of fiduciary duty by Mr. Desmond or Mr. Millett (or both), that the mixed fund used to close the acquisition of the property was impressed with a constructive trust in the plaintiffs' favour giving them an equitable right to trace their claim into the property acquired with that mixed fund.

461. There are a number of problems facing the plaintiffs in pursuing this claim. In circumstances where the plaintiffs have been unable to satisfy me, on the basis of the materials discussed above, that the Millett defendants were guilty of any breach of fiduciary duty prior to 3rd September 2013, the case based on breach of fiduciary duty by those defendants falls away. Even if the plaintiffs had succeeded, on the basis of those materials, in satisfying me that there had been such a breach by one or more of the Millett defendants, the plaintiffs would still face the problem that those materials are not in evidence as against the Kenny defendants. While the plaintiffs, once they had proved that Mr. Millett's texts and emails are receivable in

evidence, would be entitled to rely on those materials as against the Millett defendants as statements against interest, that is so only as against the Millett defendants. It is not so as against the Kenny defendants. As against the latter, the documents remain hearsay and there is no relevant exception to the rule against hearsay that would permit them to be deployed as against the Kenny defendants. The Kenny defendants have agreed to the admission of their own documents on a *Bula/Fyffes* basis but they have not agreed to the admission of the Millett defendants' documents. That a party can proceed in this way was acknowledged by Clarke C.J. in *RAS Medical* at p. 84: *"A party may be very happy, for understandable reasons, to stand over its own documentation, but might be far from happy for entirely legitimate reasons, to allow documentation emanating from a co-defendant with whom it did not have a common interest to be admitted as evidence against it. This is not a mere technicality. If documents of one co-defendant were to be admitted as evidence, without proof, against another co-defendant, then that second co-defendant might be deprived of the opportunity of cross-examining what would otherwise be vital witnesses to the events which might come to be described in the documentation concerned. If a party is happy to make such a concession, then that is the end of the matter. But, there may well be circumstances where it would not be at all reasonable to expect such a concession to be forthcoming."*

462. In the circumstances, even if it were appropriate to infer a breach of fiduciary duty on the part of one or more of the Millett defendants on the basis of the material discussed above, that finding would not be binding on the Kenny defendants. Similarly, the concession by Mr. Desmond that he is in breach of his fiduciary duty to the plaintiffs is not binding on the Kenny defendants. If the plaintiffs wished to rely on any breach of such fiduciary duty by Mr. Desmond, they would have to prove it in the usual way as against the Kenny defendants and to prove that it occurred prior to the transfer of funds on 3rd September 2013 and the completion of the purchase of the Nemo Rangers property. The plaintiffs have not proved that Mr.

Desmond was guilty of a breach of fiduciary duty before that date. In this context, it is important to recall that I have already found against the plaintiffs in so far as they sought to make the case that the proceeds of the investment in or with MECD would simply be held in euro on deposit on their behalf and on trust for them. The plaintiffs have also failed to prove the existence of a pledge over the proceeds held in the CVSSA accounts. They have not therefore proved that the steps taken by Mr. Desmond in relation to the manner in which the proceeds were held by CVSSA amounts to a breach of duty on his part. While Mr. Nolan and Ms. Nolan made many assertions in the course of their evidence that Mr. Desmond was guilty of fraud and deception, they never went beyond the realm of assertion and they left the proof of what happened to the investments to Ms. Carwood. For the reasons discussed in para. 428 above, I have formed the view, on the basis of the agreed bank statements and on the basis of Ms. Carwood's evidence that there was still sufficient money in the CVSSA accounts after the closing money was paid to Eugene F. Collins to discharge the plaintiffs' claim in full. It follows that the plaintiffs have failed to prove that, as of September 2013, there was any breach of fiduciary duty by Mr. Desmond.

463. In light of the fact that a relevant breach of fiduciary duty has not been shown to have occurred prior the transfer of funds on 3rd September 2013, there is plainly no basis on which the plaintiffs can advance their tracing case as against the Kenny defendants and in particular as against the registered owner of the Nemo Rangers property namely Dildar IOM. It is therefore unnecessary to address the detailed and elaborate arguments made on both sides in relation to that element of the plaintiffs' claim. In the absence of proof of a relevant breach of fiduciary duty, the first limb of the tracing claim falls away. There were significant issues between the plaintiffs and the Kenny defendants in respect of each the remaining limbs of the tracing claim but, in light of the plaintiffs' failure to prove a breach of fiduciary duty by the relevant date, the arguments on both sides are now academic. But I believe it is important to

record that the fact that a tracing claim was being advanced by the plaintiffs did not mean that the registered owner of the Nemo Rangers property, Dildar IOM, or any of the other Kenny defendants were party to any alleged breach of duty by any other party. Notwithstanding the case alleged in the amended statement of claim, the plaintiffs have not gone on to prove the necessary facts to establish anything of the kind. Furthermore, on the evidence before the court, the Kenny defendants advanced sufficient funds to cover the entire of the purchase price of the Nemo Rangers property and, at the time EFG Bank was reimbursed from the US dollar account of CVSSA on 5th September 2013 in respect of the final tranche of the purchase money, there was, on the evidence before the court, sufficient money in that account to discharge the amount of the plaintiffs' claim in full.

The impact of the release of claims against Mr. Desmond

464. It seems to follow from the terms of the judgment given by consent against Mr. Desmond – and from the fact that the plaintiffs did not thereafter pursue the balance of their claims against him – that the plaintiffs have released him from liability in respect of the latter claims. Both Mr. Millett and the Kenny defendants have raised significant issues about the legal effect of that release. However, in light of my findings that the plaintiffs have failed to establish their claims against the Millett and the Kenny defendants, it seems to me that these issues are no longer live and I do not propose to make any findings in relation to them. It is true that, as set out below, I have found that Mr. Millett is liable in respect of the personal data claim but that is a discrete claim against Mr. Millett and the release of the claims against Mr. Desmond does not affect it in any way.

The personal data claim

465. As noted in para. 19 above, the plaintiffs claim that Mr. Millett supplied the personal data of the plaintiffs to Mann Made. It is alleged in para. 56 of the amended statement of claim

that Mr. Millett acted in breach of the plaintiffs' *"personal, privacy and property rights and/or in breach of the Plaintiffs' rights with respect to their personal data under the Data Protection Acts … as a consequence of which the Plaintiffs have suffered loss and damage."* It was also alleged that Mr Paul Kenny, the eleventh defendant, was party to the alleged breach of the plaintiffs' rights but no evidence has been advanced in support of the claim against him.

466. In so far as Mr. Millett is concerned, the case revolves around his correspondence with Mann Made and in particular his undated letter (stamped *"received 13th June 2013)* described in para. 174 above in which he divulged to Mann Made the names, dates of birth, home addresses and PPS numbers of each of the members of the Nolan family. Although written on the headed paper of the eighth defendant, the letter was signed by Mr. Millett personally. He also provided copies of the plaintiffs' passports to Mann Made. This was done ostensibly in relation to Dildar IOM and was done without the knowledge or consent of the members of the Nolan family. The correspondence with Mann Made and the disclosure of the material to Mann Made was the subject of interrogatories 158 to 169. In his responses, Mr. Millett accepted that he had disclosed this material to Mann Made and that he did so without the plaintiffs' permission. It is therefore clear that this material is receivable in evidence against Mr. Millett. In addition, notwithstanding its hearsay nature, the letter is admissible against Mr. Millett as a declaration against interest.

467. In my view, the disclosure of the above details to Mann Made constituted the authorised disclosure of personal data within the meaning of the Data Protection Acts 1988 to 2003 (being the relevant legislation in force in 2013). It also seems to me that, although this was done under cover of a letter written on the headed paper of the eighth defendant, Mr. Millett as the human author of the letter cannot escape liability for the unauthorised disclosure. It is well settled that, where a company director procures the commission of a tort, the director will incur personal liability. The case made in the amended statement of claim is advanced as against Mr. Millett

personally. It is true that it was also advanced against the eleventh defendant but that part of the claim has not been proven.

468. I have not been addressed in detail in relation to this element of the plaintiffs' claim and have been given no assistance in relation to the remedies available. However, it seems to me that the unauthorised disclosure of personal data constitutes a tort which is remediable by an award of damages. There is a technical difficulty facing the plaintiffs in pursuing this claim in that, as para. 1 of the amended statement of claim makes clear, the plaintiffs have expressly stated that they *"bring this action in their representative capacity as trustees of ... pension funds…".* They do not expressly say that they also bring a claim in their personal capacity. However, paras. 55 and 56 of the amended statement of claim expressly refer to personal data and privacy issues and I believe that, when the statement of claim is read as a whole, it is sufficiently plain to see that the intention is to pursue a personal claim in respect of these issues. That said, it is only the personal plaintiffs who can do so and there is no basis on which a claim can be asserted on behalf of those members of the Nolan family who have not been named as plaintiffs.

469. In so far as measurement of damages is concerned, there is no evidence that the disclosure of data had any adverse consequences for the plaintiffs. No one has suggested that the data was disseminated more widely than Mann Made. There was no release of data to the wider world. There is no evidence of any actual damage suffered by any of the plaintiffs. It is true that, as admitted by Mr. Millett in response to interrogatory 186 (quoted in para. 337 above) that the details were provided to Mann Made in order to obscure the involvement of the Kenny family but there is no evidence that Mr. Millett benefitted personally from this. It therefore seems to me that the appropriate course to make is to an award of nominal damages to each of the personal plaintiffs to mark the fact that their rights have been infringed. This is not a case where the data has found its way onto the dark web or into the hands of criminals or

anything of that kind. Nor is there any evidence that the identities or passports of any of the personal plaintiffs have been cloned or otherwise misused. Given that there was no wider dissemination of the material, it seems to me that I should, as against Mr. Millett award a sum of €500 to each of the individual plaintiffs, Ann Nolan, Elizabeth Nolan, Richard Nolan, Patricia Nolan, Joan Nolan and Sally Nolan making €3,000 in total. I can see no basis on which to award more extensive damages.

The money paid into court subsequent to the trial

470. Subsequent to the trial, the plaintiffs brought an application to the court by notice of motion dated 13th June 2023 seeking orders in relation to certain sums remaining in the CVSSA accounts with EFG Bank and remaining within MECD. In the grounding affidavit sworn by their solicitor, Mr. Bernard McEvoy, it was explained that there was a credit balance of €1,147,223.75 held in the CVSSA account and a sum of €462,044.97 held in the name of MECD in its account with Abu Dhabi Commercial Bank in Dubai. A hearing subsequently took place on 27th July 2023. After hearing counsel for the plaintiffs, counsel for Mr. Desmond, Mr. Millett, counsel for the personal insolvency practitioner appointed by Mr. Desmond, counsel for EFG Bank and counsel for the Kenny defendants, I directed that those funds should be paid into court . I also made an order that, in circumstances where there might be some other claimants in relation to the funds in question, such funds should not be paid out of court without any interested parties being given an adequate opportunity to make any claim that they might be advised to make to any part of those funds. In this context, it will be recalled from Ms. Carwood's evidence that, in addition to the funds in the CVSSA accounts which had their origin in the OPT investments or in the investments made by the Kenny defendants, there were also a number of investment of unknown origin.

471. It seems to me that directions should now be made in relation to the funds in court so that the funds can be paid out to the plaintiffs and to any other party who establishes an

entitlement to any part of them. Having regard to Ms. Carwood's evidence, it would appear likely that the plaintiffs would be entitled to the largest share, proportionately, of the funds in court.

The orders to be made

472. I will hear the parties as to the orders to be made. Subject to any submissions which the parties may make, it would appear to me that the following orders require to be made:

(a) First, the order made in the course of the trial on 5th May 2022 dismissing the claim of the plaintiffs that they are beneficial owners of Dildar IOM;

(b) Second, the order made in the course of the trial on 6th May 2022 giving the plaintiffs leave to deliver a further amended statement of claim and an amended reply;

(c) Third, the order made in the course of the trial on 17th June 2022 refusing the plaintiffs' application to admit copy documents into evidence under chapter 3 of the 2020 Act;

(d) Fourth, the order made in the course of the trial on 23rd June 2022 refusing the plaintiffs' second application to admit copy documents into evidence under chapter 3 of the 2020 Act;

(e) Fifth, an order refusing the plaintiffs' application made on 23rd June 2022 to withdraw the plaintiffs' reliance on the answers to interrogatories;

(f) Sixth, an order dismissing the plaintiffs claim against the Millett defendants other than the claim in respect of the unauthorised disclosure of personal data;

(g) An order directing to Mr. Millett to pay to each of the personal plaintiffs the sum of €500 in respect of nominal damages for the unauthorised disclosure to Mann Made of personal data of those plaintiffs;

(h) An order dismissing all claims of the plaintiffs as against the Kenny defendants;

(i) In circumstances where neither Pinnacle nor the eighth defendants were represented at the trial, an order dismissing their counterclaim as against the plaintiffs;

(j) An order dealing with the counterclaim advanced by the ninth and tenth defendants;

(k) An order dealing with the order made by the court on 26th July 2017 restraining the Dildar IOM from taking any steps to dispose of the Nemo Rangers property. It would seem that such order should now be discharged;

(l) An order giving directions in relation to how the funds held in court should be dealt with.

473. It will also be necessary to hear the parties in relation to the costs of the proceedings (including the costs of the trial). I will list the matter for mention before me at 10.30 a.m. on Wednesday 24th January 2024. In the meantime, the parties should liaise with each other to see if they can reach agreement (without prejudice to any appeals they may intend to take) in respect of the orders to be made and in relation to costs and also in relation to whether there should be a stay on any order as to costs pending appeal.

The conduct of proceedings in the Commercial List

474. Before concluding this judgment, it is important to record that, in my experience, this has been a most unusual hearing. It is rare for parties in Commercial proceedings to adopt such a rigorous approach to the admission of documents into evidence as was taken in this case. In most hearings in the Commercial List, there is agreement in relation to the admission of documents. Hearings in the List (and judgments on foot of such hearings) would become unduly protracted if parties were to adopt a similar approach in all cases. However, I can understand that, in this case, there were particular reasons why the defendants considered that it was appropriate to adopt what some might regard as a purist approach. In the first place, the plaintiffs were advancing extremely serious and damaging allegations. Deceit was alleged against the Millett defendants and conspiracy was alleged against both Mr. Millett and against

the eleventh defendant, Mr. Paul Kenny. In addition, it is obvious that all of the defendants had serious concerns about the veracity of the evidence tendered by the plaintiffs. In such circumstances, I can see that this was a case where, to paraphrase Clarke C. J, in *RAS Medical* (quoted in para. 461 above) it was reasonable and legitimate for the defendants to adopt a rigorous approach. However, that is not to be taken as an exemplar of the approach to be taken in the vast majority of trials in the Commercial List where parties are expected to take a co-operative approach to the smooth and efficient running of trials.