



THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 214

Record Number: 2017/336

**Birmingham P.
Irvine J.
Costello J.**

BETWEEN/

DUBLIN WATERWORLD LIMITED

APPELLANT/

PLAINTIFF

- AND -

NATIONAL SPORTS CAMPUS DEVELOPMENT AUTHORITY

RESPONDENT/

DEFENDANT

JUDGMENT of Ms. Justice Irvine delivered on the 24th day of July 2019

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1. This is an appeal against the judgment and order of the High Court (Twomey J.) dated the 10th and 24th May, 2017 respectively whereby he dismissed the claim of Dublin Waterworld Limited ("DWW") against National Sports Campus Development Authority ("NSCDA") for, *inter alia*, damages for the tort of malicious abuse of the civil process in pursuing an action to recover VAT in respect of a lease dated the 30th April, 2003 to DWW of the National Aquatic Centre, Abbotstown, County Meath ("the Aquatic Centre").

The parties

2. NSCDA, the defendant to the within proceedings, is a statutory authority established pursuant to the National Sports Campus Development Authority Act 2006. It is the legal successor and transferee of all assets and liabilities of Campus and Stadium Ireland Development Limited ("CSID") which was, as a result of that legislation, dissolved and replaced by NSCDA. CSID had been a private limited company established by the Government in 2000 to develop a sports campus at Abbotstown, County Meath. At that time CSID was 50% owned by the Minister for Sports, Arts and Tourism, 25% owned by the Minister for Finance and 25% owned by the Taoiseach. All references in this judgment to CSID should be taken to include NSCDA, unless otherwise stated.

3. In 2001, DWW commenced negotiations with CSID with a view to entering into a lease in respect of the Aquatic Centre. On the 30th April, 2003 CSID granted a lease ("the lease") of the Aquatic Centre to DWW for a term of thirty years commencing the 30th April, 2003. Pursuant to Clause 4.30 of the said lease DWW covenanted to pay to CSID all VAT payable on the grant of the lease.

4. Following advices received as to whether or not VAT was chargeable in respect of the lease, on the 15th May 2003, CSID issued an invoice to DWW claiming a sum of €10,254,600 in respect of VAT, stating that the sum so claimed had been calculated in accordance with Regulation 19 of the VAT Regulations of 1979 (S.I. No. 63/79, as amended by S.I. 219/02). The invoice detailed the relevant calculation.

5. In circumstances where DWW considered that CSID was not entitled to claim VAT on the lease, it refused to discharge CSID's invoice with the result that in December 2003, CSID's solicitors, McCann Fitzgerald, issued a formal letter demanding payment of the said sum of €10,254,600 in respect of VAT.

6. Notwithstanding the said demand DWW continued to dispute the sum so claimed with the result that on the 26th April, 2005 CSID issued proceedings ("the primary litigation") in the High Court ([2006] IEHC 200) which included a claim for payment of the aforementioned sum in respect of VAT on the lease. Relevant in this regard is the fact that the claim for VAT was pursued in the context of proceedings brought by CSID to forfeit the lease due, *inter alia*, to the alleged failure on the part of DWW to comply with certain covenants in the lease including the assignment of the lessee's interest in the lease without the prior consent of CSID.

7. In its High Court proceedings CSID maintained that there were three methods of establishing whether VAT might be charged on the lease. It maintained that Regulation 19(1)(i), which sets out what is commonly referred to as the "rent formula method" of calculating the open market price of the lease, entitled it to pursue its claim in respect of VAT.

8. Following the issue of the proceedings, DWW brought a motion to have the VAT element of the dispute between the parties referred to arbitration in accordance with the arbitration clause in the lease. That application was successful and Kelly J. referred the dispute concerning CSID's claimed entitlement to VAT to arbitration ([2005] IEHC 201). Mr. Dermot O'Brien, chartered accountant, was appointed arbitrator. I will return shortly to provide somewhat greater detail concerning the outcome of the arbitration and CSID's further efforts to recover the VAT claimed on the lease. Suffice to say at this juncture that the arbitrator decided that CSID was entitled to charge VAT on the Lease and that decision was later upheld by the High Court on CSID's application to enforce the award of the arbitrator notwithstanding the challenge made by DWW to the lawfulness of that award. Ultimately that decision of the High Court was reversed by the Supreme Court which determined that the arbitrator had made a fundamental error in interpreting Regulation 19 of the VAT Regulations of 1979 (as amended) so as to find that CSID was entitled to claim VAT on the lease.

Relevant regulations

9. In order to understand the progress of CSID's claim to VAT on the lease it is necessary to consider the Regulations which, at the relevant time, determined a lessor's entitlement to impose such a charge. Furthermore, familiarity with these provisions is essential in order to fully understand and contextualise the evidence given over the course of the 20 days that the within proceedings, being the secondary litigation, were at hearing in the High Court. Indeed, absent an understanding of the relevant provisions, it would be impossible to determine whether or not the High Court judge acted lawfully and in accordance with the evidence in concluding, as he did, that CSID's primary litigation did not amount to a malicious abuse of the process of the Court.

10. In circumstances where the High Court judge considered the purpose and effect of Regulation 19 of the VAT Regulations of 1979 (as amended) and neither party takes issue with his analysis, I will gratefully adopt his summary of the said Regulation which appears at paras. 6-12 inclusive of his judgment:-

"6. The Value-Added Tax Act, 1972 (the 'VAT Act') provides that the granting of a lease is a taxable supply of immoveable goods for VAT purposes if the lease is a long lease, i.e. for a period of 10 years or more. In this case, the lease of the NAC was signed by DWW as lessee and by CSID as lessor on the 30th April, 2003, for a period of 30 years ('the Lease'). Thus, the Lease was one which was capable of being subject to VAT.

7. Section 10(9) of the VAT Act provides that the value of the leasehold interest for the purposes of calculating the VAT thereon, is the 'open market price of such interest'. For this reason, section 10(10) of the VAT Act is also relevant, since it states:-

"the open market price –

(a) in relation to the value of an interest in immovable goods which is not a freehold interest, means the price, excluding tax, which the right to receive an unencumbered rent in respect of those goods for the period of the interest would fetch on the open market at the time that the interest is disposed of."

8. On this basis, the open market price of the lease was the price or value attributable to the right to receive the unencumbered rent and s. 10 (1) of the VAT Act defined the "unencumbered rent" as the "rent at which an interest would be let, if that interest was let on the open market free of restrictive conditions."

9. Section 32(1)(t) of the VAT Act delegated authority to the Revenue Commissioners to make Regulations in relation to the valuation of leases for the purposes of the VAT Act. Pursuant to this section, the Revenue Commissioners drafted the Value-Added Tax Regulations, 1979, which were duly passed into law. Regulation 19 of those Regulations set out further provisions regarding the valuation of leases. Insofar as relevant, Regulation 19 states:-

"(1) Where –

(a) it is necessary to value an interest in immovable goods for the purposes of section 10 (9) of the Act [...]

the value of such rent to be included in the consideration for the purposes of ascertaining the open market price of the interest disposed of shall, in the absence of other evidence of the amount of that price, be –

(i) three quarters of the annual amount of the rent multiplied by the number of complete years for which the rent has been created, or

(ii) the annual amount of the rent multiplied by the fraction of which the numerator is 100 and the denominator is the rate of interest (before deduction of income tax, if any) on the security of the Government which was issued last before the date of the creation of the rent for subscription in the State, and which is redeemable not less than five years after the date of issue (allowance having been

made in calculating the interest for any profit or loss which will occur and the redemption of the security),

whichever is the lower.”

These two methods for the valuation of leases set out at (i) at (ii) above are known as the ‘Formula Method’ and the ‘Multiplier Method’, respectively.

10. Regulation 19 of the 1979 Regulations was amended by the Value-Added Tax (Amendment) (Property Transactions) Regulations, 2002, and the only change to the 1979 Regulations, which is of relevance to these proceedings, was the deletion of the words “*whichever is the lower*” and the insertion of the following wording in its place:-

“However, where the rent payable in respect of the interest so created is less than the unencumbered rent in respect of that interest, the value of the rent to be included in the consideration for the purpose of ascertaining the open market price of the interest disposed of shall be calculated using the unencumbered rent.”

It is this Regulation 19, as so amended, which is particularly relevant to the issue of whether the Lease was vatable in this case, in conjunction with s. 99 of the Finance Act, 2002, to which reference will now be made.

Anti Avoidance amendment of legislation regarding VAT on leases:

11. Section 99 of the Finance Act, 2002 amended the VAT Act and inserted a new provision, section 4(3A), into that Act. This was enacted as an anti-avoidance provision to ensure that leases were not subject to VAT where the value of the interest in the lease did not equal or exceed the cost of acquiring and developing the property being leased. For a long lease to be taxable after the date of enactment of s. 99 of the Finance Act, 2002, which was the 25th March, 2002, section 4(3A) required the value of the interest in the lease to be equal to, or greater than, the cost of acquiring or developing the property being leased. This test for determining whether leases were vatable is known as the Economic Value Test (‘the EVT’).

12. The general aim of this provision appears to have been to ensure that if a lessor developed a property then that lessor could not enter into an artificial lease solely for the purpose of his reclaiming VAT on the development costs of the property being leased. For example, if a lessor developed a property at a cost of say €10 million and wanted to reclaim the VAT on his development costs, then that lessor could not enter into an artificial lease which was entered solely for the purpose of his reclaiming VAT on the development costs by entering into a lease with a related lessee at an artificially low rent of say only €100 per annum. Prior to the enactment of the anti-avoidance legislation, this approach would have enabled the lessor to reclaim the VAT from the Revenue on the €10 million of costs incurred in developing the property. This would have meant that the Revenue would get little or no VAT from the lessee since the rent was only €100, yet the Revenue would have to repay hundreds of thousands of Euro in VAT to the lessor on the development costs incurred of €10 million. As noted by two experienced VAT advisers, Dermot O’Brien and Tom Corbett in a conference paper dated 2nd May, 2002, entitled *Section 99 of Finance Act 2002* and subsequently published in the Irish Tax Review:-

“The introduction of Section 4 (3A) into the VAT Act was designed as an anti-avoidance measure. Previously, while VAT was charged on the capitalised value of a lease, it was possible in certain circumstances that the value of the lease could be significantly less than the actual cost of development of a property. Therefore, a person who was not entitled to deduct VAT on expenditure could, by virtue of a lease and leaseback arrangement, incur VAT on a lower leasehold value than on the higher cost of construction, thereby effecting a significant VAT saving. These provisions are designed to counter this.”

11. As can be seen from the aforementioned provisions, key to whether or not VAT was chargeable on a long lease was the “open market price” of the leasehold interest and in particular Regulation 19 which provides two methods by which the open market price may be calculated “*in the absence of other evidence of the amount of that price*” [emphasis added]. It is this Regulation and in particular the words to which emphasis has been added that are core to the claim of DWW in the within proceedings. In this context it is important to record at this stage of the judgment that CSID had received a report from a Mr Liam Cahill of the Valuation Office on the 25th October 2002 (“the Valuation Office Report”) which stated that the estimated rental value was €3,376,048 and the estimated open market price of the lease for VAT purposes was, €35,054,725 i.e. circa €35m.

12. It is not in dispute that in order for a lessor to claim VAT on a long lease, it had to be in a position to establish that the value of its interest in the lease was equal to or greater than the cost of acquiring or developing the property the subject matter of the lease (see s. 4(3A) of the VAT Act 1972, as amended by s. 99 of the Finance Act, 2002). Thus, in the circumstances of the present case VAT could not have been charged unless CSID was in a position to show that the open market price of the lease was above €63m, that being the development cost.

13. The Valuation Office Report is of particular importance in the context of the present proceedings in that DWW maintains that the valuation of the lease in that report of €35m. was “other evidence” of the open market price within the meaning of Regulation 19. That being so, there was no lawful basis upon which CSID might claim VAT on the lease. Instead of relying upon the open market price of the lease set out in the Valuation Office Report, as it was obliged to do, CSID had impermissibly calculated the value of the lease by using the rent formula method. It had taken three quarters of the unencumbered rent *i.e.* €2,532,000 and multiplied it by the number of years of the lease *i.e.* thirty years, a calculation which resulted an open market price for the lease of €75,960,000. That figure being above the development cost, the lease was vatable at 13.5%.

14. In circumstances where DWW claims that CSID had actual knowledge of the fact that its claim for VAT was unlawful, being contrary to the clear wording of Regulation 19, it maintains that the primary litigation against DWW was commenced without reasonable or probable cause.

Key persons

15. For ease of reference, what appears below is a list containing the names of a number of individuals’ material to the decision of the High Court judge and the positions which they held at the relevant time:

Name	Position
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John Moriarty	Managing Director, Dublin Waterworld Limited
Terry O'Neill	Partner, KPMG
Keith Loughman	Director, KPMG
Donagh Morgan	Former Chief Executive of Campus Stadium Ireland Development Ireland ("CSID") and its statutory successor, National Sports Campus Development Authority ("NSCDA")
Sean Benton	Former Chief Executive and Director, CSID
John Mulcahy	Former Non-Executive Director, CSID
Michael Walsh	Former Non-Executive Director, CSID
Con Haugh	Former Non-Executive Director and Chairman CSID
David Conway	Former Director of Sport, Magahy & Company (member CSID's Executive Services Team) and current Director of NSCDA
Laura Magahy	Magahy & Company (member of CSID's Executive Services Team)
Colm Dunne	Magahy & Company (member of CSID's Executive Services Team)
Della O'Donoghue	Magahy & Company (member of CSID's Executive Services Team)
Fergal O'Rourke	Partner, PwC & Tax Relationship Partner for CSID
John Fay	Partner, PwC
Thomas O'Reilly	Manager/Senior Manager, PwC
Lonan McDowell	Consultant and Former Partner, McCann Fitzgerald

16. Several of the above individuals were members of what is referred to as the Executive Services Team ("EST") of CSID. Those individuals, namely David Conway, Laura Magahy, Colm Dunne and Della O'Donoghue, were employed by a company called Magahy & Company and were contracted to provide executive services to CSID, the board of which they reported to regularly. They were the core group dealing with the day-to-day operations of the Aquatic Centre, and were involved in the making of decisions regarding its establishment, including the decision, which was ultimately made by the Board, to pursue the primary litigation which included the claim for VAT on the lease. Throughout this judgment I shall for the purposes of convenience refer to these individuals as being "of CSID", however it should be noted that in strictness they are not employees of CSID but are simply contracted by CSID to act on the EST. Price Waterhouse Cooper ("PwC") has been described as being a part of the EST, although it may be more apt to say that they provided professional advice to the EST and to the Board of CSID, including tax advice in relation to the charging of VAT on the lease.

Procedural history

The primary litigation i.e. the forfeiture proceedings which included the claim for recovery of VAT on the Lease and the High Court proceedings seeking to enforce the Arbitrators Award

17. As already stated, shortly after CSID commenced its High Court proceedings and these had been transferred to the Commercial Court, DWW applied to stay that part of the litigation that claimed recovery of the sum allegedly due in respect of VAT on the lease so that it might be referred to arbitration. It would appear that it was in the course of the exchange of affidavits between the parties on this application that DWW became aware, for the first time, of Mr. Cahill's estimation of the market price of the lease as contained in the Valuation Office Report.

18. The questions posed by the Arbitrator for his determination were as follows:

1. If the valuer has given his opinion as to the market value of the interest to be disposed of, is CSID then entitled to rely on one of the other formula-based methods of capitalising the lease set out in Regulation 19?
2. Is CSID entitled to rely on the opinion of its appointed valuer or does it need to question his method of valuation?

19. In the course of the arbitration CSID argued that the VAT Regulations provided for three alternative methods of valuing the lease and that the conditions for VAT liability were fulfilled by the use of the rent formula method. It also argued that there was no clear or adequately established evidence of the open market value of the lease with the result that the Valuation Office Report, which had estimated the open market price as €35m., did not constitute "evidence" of an open market value for the purpose of Regulation 19.

20. DWW, on the other hand, contended that VAT was not properly chargeable. It refused to accept Mr Cahill's valuation either in respect of the unencumbered rent or his opinion as to the open market price in the sum of €35m. It had engaged the services of Osborne King, valuers and estate agents, who had given a substantially lower rental figure which if accepted and used on the same basis of calculation as that proposed by CSID would not yield a figure which would meet or exceed the economic value of €62 million.

21. On the 1st July, 2005, the Arbitrator published his Award which determined, *inter alia*, that VAT of €10,254,600 was due by DWW to CSID in respect of the lease. He concluded that the opinion of Mr Cahill of the Valuation Office was not "evidence of an open market value" for the purpose of Regulation 19 but was merely his estimate of the value of the lease. This was, he concluded, because the property under consideration was unique and had no close comparison in the State. That being so, CSID was entitled to apply the rent formula method determine whether VAT was chargeable. Thus it was that the Arbitrator decided that VAT had been correctly charged.

22. On the 14th July 2005, CSID issued further High Court proceedings seeking an order permitting it enforce the Arbitrator's Award (*Campus Stadium Ireland Development Ltd. v. Dublin Waterworld Ltd.* [2005] IEHC 334). In response, DWW applied under s. 38 of the Arbitration Act 1954, as amended, to have the Award set aside on the basis that the Arbitrator had misconducted himself. It was argued on behalf of DWW that if the Arbitrator was intent on discounting Mr Cahill's opinion as the opinion of a competent valuer for

the purposes of Regulation 19 because of the unique nature of the property, which would be a radical departure from the ordinary procedure, he should have flagged that issue at the hearing and allowed DWW the opportunity to address it. In so doing, it was argued that the Arbitrator failed to answer the very question he had posed for himself as to whether CSID was entitled to rely upon one of the formula methods if the valuer had given his opinion as to the open market value of the lease. It was further argued that the approach of the Arbitrator was inconsistent and unfair insofar as he accepted that it would be absurd for him to question the professional judgment of the valuer in producing the unencumbered rent of the property and yet proceeded to refuse to accept the evidence of the valuer as to the open market price of the lease. Finally, it was submitted on behalf of DWW that there was an error of law on the face of the award wherein the Arbitrator stated that the VAT system could not function effectively if a supplier's VAT charge was subject to review by his customer in circumstances whereas in fact a customer is entitled by law to question any charge in relation to VAT.

23. In the High Court, Gilligan J. concluded that the decision of the Arbitrator was one of the possible conclusions that he could have arrived at having regard to the issues before him. The High Court judge concluded that, contrary to the case advanced by DWW, CSID had argued before the Arbitrator that the opinion of Mr Cahill did not constitute "evidence" for the purposes of Regulation 19 and that the Arbitrator was entitled to come to the conclusion which he did. He so found notwithstanding his acceptance that the approach of the Arbitrator had brought about a situation whereby he had not decided the central issue which he had posed for his consideration, namely, whether in light of Mr Cahill's opinion as to the open market value of the interest being disposed of, CSID was entitled to rely upon one of the other formula-based methods of valuing the lease as provided for in Regulation 19. In circumstances where the Arbitrator had concluded that he did not have evidence of the open market price of the interest to be transferred before him, it was not, according to the High Court judge, necessary for him to determine that issue.

24. DWW appealed the decision of Gilligan J. to the Supreme Court (*Campus Stadium Ireland Development Ltd. v. Dublin Waterworld Ltd* [2010] IESC 25). A judgment was given on 30th April, 2010 wherein the Court unanimously overturned the High Court decision which had affirmed the Arbitrator's Award. Hardiman J. concluded that notwithstanding the Revenue's guidelines and the apparent Revenue approval for the position adopted by CSID in raising a claim to VAT on the lease, the absence of other evidence of open market value was a condition precedent to the use of either of the other formulae provided for valuing the lease in Regulation 19.

25. The Court also concluded that neither the Arbitrator nor the Revenue, in publishing their guidance on the issue, had paid sufficient attention to the presence in Regulation 19 of the phrase "in the absence of other evidence of the amount of that price". In this case there was not an "absence of other evidence". Mr Cahill's expert opinion as to the open market value of the lease, as contained in the Valuation Office Report, was evidence of the value of the lease for the purposes of Regulation 19. Thus, CSID was not entitled to use either of the other methods prescribed in Regulation 19 for the purposes of calculating the value of the interest to be transferred and thus determining whether the lease was chargeable in respect of VAT. Accordingly, the Court made an order remitting the dispute back to the arbitrator for his lawful determination. Not unsurprisingly in light of the Supreme Court's decision, DWW was awarded its costs of the hearing in both courts. Furthermore, CSID later agreed to pay DWW's costs in respect of the arbitration proceedings.

Proceedings for the tort of malicious abuse of the civil process

26. At the time it commenced the within proceedings, DWW maintained that the conduct of CSID in seeking (i) to recover VAT on the lease, (ii) to enforce the Arbitration Award and defend the challenge of DWW thereto and (iii) to defend DWW's appeal to the Supreme Court against the High Court decision to enforce the Award amounted to an abuse of the court's own processes. It claimed that CSID had at all stages acted maliciously, in bad faith and without probable cause in circumstances where it knew it was not entitled to charge VAT under the relevant VAT legislation and that the proceedings would result in severe financial and reputational damage to DWW. Hence the judgment of Twomey J. in the High Court deals with each of these claims in turn. However, by the time the proceedings were heard in this Court, DWW had confined its complaint to CSID's conduct in commencing its High Court proceedings to seek recovery of VAT on the lease. For this reason, this judgment will focus upon the decision of the High Court judge to the effect that DWW had failed to show that CSID lacked reasonable or probable cause to issue the proceedings which included a claim for VAT on the lease.

27. Without wishing to oversimplify matters, DWW maintains that it was clear from the evidence that at the time CSID issued its proceedings to recover VAT on the lease it well knew, from advices that it had received from PwC, that it was not lawfully entitled to make that claim. This is because it had "evidence" as to the open market price of the interest to be transferred, i.e. the €35m. valuation contained in the Valuation Office Report. Thus, CSID was precluded as a matter of law from using the mathematical formula on which it had relied when it issued its invoice claiming VAT and later commenced its proceedings to seek recovery of the sum so claimed, and had no reasonable or probable cause to rely on that approach.

28. It is not necessary in the course of this judgment to deal with the loss said to arise as a result of the alleged abuse of the court's process as the hearing in the High Court was confined to determining the issue of liability with the issue of quantum being postponed to the outcome of the court's determination on that issue.

29. Following a 20-day hearing in the High Court, the High Court judge delivered a lengthy and detailed judgment on the 10th May, 2017 which I will now endeavour to summarise.

Judgment of the High Court

30. The judgment of the High Court judge is one which is extremely detailed in terms of its engagement with the law regarding the tort of malicious abuse of the court's process, the primary litigation pursued by CSID, and the evidence heard by the court in the within proceedings.

31. What follows may well appear to be a somewhat overly detailed summary of that judgment and the criticism that it attracted on this appeal. However, in light of the extraordinarily broad canvas of the grounds of appeal a more skeletal approach would, in my view, be less than satisfactory.

32. It is clear that the High Court judge determined the proceedings in favour of CSID on two alternative bases. First, he concluded that the outcome of the proceedings before the Arbitrator and the decision of the High Court judge to uphold the Arbitrator's Award to the effect that VAT was chargeable on the lease was determinative of the issue in these proceedings, namely that CSID had reasonable and probable cause to issue the proceedings to recover VAT on the lease. Second, he concluded that the evidence "in the round" was sufficient to establish that CSID had reasonable or probable cause to commence those proceedings.

33. I will now briefly summarise, in turn, how the High Court judge reached the aforementioned conclusions. However, before doing so, I consider it important to record that it is apparent from his judgment (see para. 27) that the High Court judge was clear in his own mind that the issue which he had to determine, namely as to whether CSID had maliciously abused the process of the court in instituting proceedings to recover VAT on the lease, had to be decided based upon the knowledge of CSID when it instituted the

proceedings.

The effect of the first instance decisions of the Arbitrator and High Court (Gilligan J.)

34. Notwithstanding the recognition by the High Court judge that he was required to determine the central issue in the proceedings on the evidence and state of mind of CSID as it existed at the time it commenced the proceedings to recover VAT on the lease, at a very early stage of his judgment he identified what he stated he considered was a "key issue in the trial". He described that issue in the following way at para. 4 of his judgment:-

"A key issue in this trial, and one that does not appear to have been considered by the Irish courts to date, is whether a plaintiff, who wins his litigation initially before a lower court or tribunal before losing on appeal, can nonetheless be found by the courts to be someone who should never have litigated in the first place, such that he is guilty of malicious abuse of court process and therefore liable for the damage caused to the defendant, over and above the plaintiff's liability for the legal costs incurred by the defendant."

35. In addressing this issue the High Court judge referred to a number of authorities concerning the tort of malicious abuse of the court's process. In particular, he referred to the decision of Clarke J. in *Independent Newspapers (Ireland) Ltd. v. Murphy* [2006] 3 I.R. 566 and to his observation concerning the impossibility of a court finding a litigant guilty of malicious prosecution where the court had found, at the conclusion of the primary litigation, in their favour. This was because the court could not entertain a second set of proceedings which was predicated upon establishing that the original finding of the court was incorrect.

36. It was as against the backdrop of the decision of Clarke J. in *Independent Newspapers (Ireland) Ltd.* that the High Court judge then went on to consider the legal effect of the decisions made by the Arbitrator and the High Court on DWW's claim that the proceedings seeking to recover VAT on the lease had been brought without reasonable and probable cause. In so doing, he observed that whilst both decisions, which supported CSID's entitlement to claim VAT on the lease, were later established to be fundamentally flawed, this had only become obvious after the Supreme Court decision of the 30th April 2010.

37. Thus, it was that at para. 116 of his judgment the High Court judge raised the following question for his consideration:-

"In the current case, the application of these legal principles raises the question of whether a litigant could be said to have taken a case without reasonable or probable cause, where he was successful at first instance, but loses his case on appeal. No authorities were opened to the Court where a litigant was found to have been guilty of malicious abuse of court process where that litigant had been successful in this claim at first instance."

38. Commencing at para. 144 of his judgment the High Court judge carried out what he described as an "analysis of the three decisions in the primary litigation", i.e. the Arbitrator's Award, the decision of the High Court to enforce that Award, and the decision of the Supreme Court to set aside the Award as fundamentally flawed. In so doing he characterised the outcome of the arbitration and the High Court proceedings as "wins" for CSID which he could not ignore.

39. In considering the effect of the decision of the Arbitrator upon the claim that CSID had reasonable or probable cause to issue and maintain its proceedings to recover VAT, the High Court judge attached weight to the qualifications and expertise of the Arbitrator, a former president of the Irish Taxation Institute and a leading VAT practitioner. He was satisfied that his decision should be given the same status as a decision of a court when assessing the relevance of that decision in the context of DWW's claim that CSID had instituted proceedings to recover VAT on the lease without reasonable and probable cause.

40. As to the effect of the Arbitrator's decision on DWW's claim, the High Court judge concluded as follows at para. 156 of his judgment:-

"It is this Court's view that the fact that a court, or an arbitrator, found that the Lease was vatable must mean that there was reasonable or probable cause for a claim that the Lease was vatable. To put the matter another way, the very fact that on the 1st July, 2005, an independent and experienced arbitrator, with particular expertise in VAT, found that the Lease was vatable proves to this Court that there must always have been a reasonable chance of such a finding from the moment when CSID decided to issue the proceedings on 26th April 2005. This is because the very winning of the primary litigation at first instance, whether before the court or, as in this case, before an arbitrator, must prove that there was always a reasonable chance that the case would be won, and so establishes that there was reasonable or probable cause for the proceedings."

41. A similar view was taken by the High Court judge regarding the significance of the decision of the High Court to uphold the Arbitrator's Award, notwithstanding that said decision was not one on the merits of the case. In the view of the High Court judge, the fact that both decisions had upheld the entitlement of CSID to charge VAT on the lease proved that the proceedings instituted by CSID always had a reasonable chance of success.

42. Notwithstanding that the Supreme Court later made clear that Regulation 19 did not permit CSID to charge VAT on the lease having regard to the existence of the Valuation Office Report, the High Court judge went on to conclude that it was his view that "a determinative factor in deciding whether a litigant has reasonable or probable cause will, in most cases, be the existence of a first instance decision in favour of the litigant." Furthermore, he stated that it was difficult to conceive of a better factor for determining whether a litigant had reasonable or probable cause to litigate than a first instance decision in their favour. This was because the litigant was not required to establish that they were guaranteed to win the litigation proposed rather only that there was a reasonable chance they would be successful in their proceedings. In the Court's view, that reasonable chance of success was established by a win at first instance even though the litigant might later fail in their claim on the appeal.

43. Concerning the nature and effect of the Supreme Court decision on DWW's claim, the High Court judge observed that the Supreme Court had concluded that the legal error made by the Arbitrator concerning Regulation 19 was so fundamental that it warranted an order to set aside his findings. However, he went on to state that it was equally clear that Gilligan J. at first instance had not regarded this legal error as obvious or, if obvious, as being so fundamental as to justify it being set aside. In this respect, the decision of Gilligan J. had demonstrated the unpredictability of the outcome of litigation and why a court should not readily criticise a litigant, in the sense of finding him guilty of malicious abuse of court process, for failing to exhibit the wisdom of one court, in this case the Supreme Court, but not the wisdom of the court of first instance, at the time they decided to commence proceedings later challenged as amounting to an abuse of the court's process.

44. Thus it was that, based upon the decision of the Arbitrator and the High Court (Gilligan J.), the trial judge concluded that CSID had reasonable or probable cause for commencing its proceedings to recover VAT on the lease.

The evidence "in the round" established that CSID had reasonable or probable cause to commence the proceedings to recover VAT on the lease

45. Notwithstanding his conclusion as to the determinative effect of the decisions of the Arbitrator and the High Court (Gilligan J.) on the viability of DWW's claim of malicious abuse of court process, the High Court judge nonetheless proceeded to consider whether, regardless of those two decisions in its favour, CSID had reasonable or probable cause for the primary litigation. He stated that it was necessary for him to review in detail much of the evidence provided to the Court on behalf of CSID concerning its interpretation of Regulation 19 to the effect that it had a choice of three methods of valuing the lease, and also some of the evidence relied upon by DWW to support its claim that CSID did not have reasonable or probable cause to interpret Regulation 19 in that manner.

46. Thus it was that the High Court judge considered in great detail a significant number of documents relied upon by the parties in the course of the hearing. He carried out a like exercise in relation to certain aspects of the oral evidence. This evidence and the findings of fact made in relation thereto are recorded at paras. 26 to 99 of his judgment.

47. Having regard to his overall assessment of the evidence and in particular those aspects of the evidence highlighted in his judgment, the High Court judge concluded (see para. 184) that "viewed in the round" that evidence was sufficient to establish that CSID had reasonable or probable cause for issuing the proceedings.

48. For the sake of completeness, it is important at this stage of the judgment, particularly in light of the submissions made to this Court on behalf of DWW, to record that the High Court judge reached the aforementioned conclusion notwithstanding his finding of fact that CSID, both at board level and at EST level, had been advised and was aware of the distinction between the wording of the Regulation and Revenue practice. He was nonetheless satisfied as a matter of fact that CSID and its advisors PwC believed that the lessor had the choice of three methods of valuing the lease and that the intended claim for VAT on the lease was lawful. Furthermore, he was also satisfied that this had been the advice of CSID's professional advisers at the time, particularly PwC.

The evidence relied upon by the High Court judge to support his conclusion that CSID had reasonable and probable cause to issue the primary proceedings

49. I will now refer to some aspects of the evidence relied upon by the High Court judge to support his conclusion that CSID had reasonable and probable cause to commence proceedings against DWW to recover VAT on the lease.

50. The High Court judge identified a number of documents which he considered lent support to the claims of CSID and its professional advisers, PwC, that they believed the lessor had the choice of three methods of valuing the lease.

51. He first identified documentation which established that Revenue was of the opinion that the lessor had the choice of three methods of valuing the lease. Apart from other exchanges between PwC and Revenue evidencing Revenue's approval of CSID's intended imposition of VAT on the lease and to which I will later refer, the High Court judge relied upon a document issued by Revenue's VAT Policy and Legislation Branch on the 6th June 2002 entitled "*Notes for Guidance of Inspectors*" which includes the following statement concerning the relevant Regulations :-

"The Value-Added Tax (Amendment) (Property Transactions) Regulations 2002 provide that a taxable person may now use any of the three methods of valuation provided for even where an increase in the rent is due to take effect within five years of the date of the creation of the interest."

52. According to the High Court judge, this guidance established that Revenue, who had drafted the Regulations, believed that Regulation 19 should be interpreted as permitting the use of any of the three methods of valuation. Of particular importance in this regard is the fact that Revenue's interpretation of Regulation 19 as provided for in the *Notes for Guidance of Inspectors* was not only known and relied upon by PwC but was transmitted to CSID in emails dated 27th November 2002 and 19th June 2003.

53. The High Court judge next relied upon the fact that there was significant evidence to show that the professional view within the VAT community at the relevant time was that the lessor had a choice of the three methods of valuing the lease for the purpose of establishing whether or not VAT was chargeable. Whilst the documentation to which I am about to refer was not known to CSID when it made its decision to commence its VAT proceedings against DWW, it is evidence which the trial judge clearly relied upon to support his conclusion that the advice given by PwC was that CSID might lawfully claim VAT on the lease, regardless of the wording of Regulation 19.

54. Commencing at para. 29 of his judgment the High Court judge relied upon the following documents which may be summarised as follows: -

(i) Revenue booklet entitled "*VAT and Property Transactions*" dated October 2001, concerning the interpretation of Regulation 19 and how the "open market price" of a long lease might be ascertained.

(ii) The leading textbook *VAT on Property* (June 2006, Irish Taxation Institute), authored by Mr Fergus Gannon who gave evidence supporting the three-way choice of valuing a long lease for VAT purposes.

(iii) An article authored by Mr Fergus Gannon in the *Irish Tax Review* (May 1995).

(iv) An article by Mr Jim Somers published in May 1998 in the *Irish Tax Review*, which again stated that the landlord had the right to choose any of the three methods for calculating the "open market price".

(v) A joint seminar paper dated the 2nd May, 2002 authored by Mr Dermot O'Brien and Mr Tom Corbett, both experienced tax advisors, which opined that the changes to the VAT Regulations 1979 introduced in the Finance Act 2002 continued to permit a landlord to use any of the three methods earlier identified for the purposes of determining whether a lease was taxable.

55. The High Court judge also relied upon the fact that Mr Terry O'Neill, a partner in KPMG who gave evidence for and tax advice to DWW, accepted that the professional views identified in the aforementioned documents corresponded with Revenue's own interpretation of Regulation 19 to the effect that the lessor had a choice of three methods of valuing a lease for VAT purposes.

56. Likewise, the High Court judge considered it material that DWW's own tax advisors, Andersen, prior to their merger with KPMG in 2002, had advised DWW that there was a choice of three methods for valuing the lease. He referred to a draft report prepared by Mr Keith Loughman of Andersen which had been sent to Mr John Moriarty of DWW on the 1st July, 2002 and a subsequent memo dated the 6th August, 2002, both of which made clear his opinion that the lessor had a choice of three methods of valuing the lease.

57. Thus it was that the High Court judge concluded that CSID's interpretation of Regulation 19 was shared by DWW's own advisors at one stage, even if that had changed by June 2003.

58. The High Court judge also relied upon the fact that Mr O'Neill, when under cross examination, had not been prepared to state that in his view CSID had no reasonable basis for its view that the lease was vatable. While he had protested that he had not read all of the PwC advice and thus could not furnish an opinion on the question posed by counsel for CSID, the High Court judge was satisfied that on the basis of the documents which had been put to Mr O'Neill in the course of cross-examination, he should have been in a position to answer what was, in effect, a straightforward question. In the view of the High Court judge, Mr O'Neill had refused to state that CSID had no reasonable basis for its view that the lease was vatable at a time when as DWW's witness he would have expected him to have been able to support to DWW's claim in those terms.

59. The High Court judge next moved to consider the evidence which established that Revenue had confirmed that VAT was chargeable on the lease. He referred in this regard to the fact that Revenue had been furnished with a copy of the Valuation Office Report on the 27th November, 2002 which showed the open market price of the lease as €35m. and an unencumbered rent of €3.376m. The High Court judge considered the furnishing of this document to Revenue to be consistent with PwC's confident opinion that the lessor was entitled to choose any of the three methods for valuing the lease.

60. The High Court judge observed that the letter to Revenue enclosing the Valuation Office Report referred to CSID's intention to value the lease for VAT purposes by using the unencumbered rent as determined by the Valuation Office and by applying the formula set out in Regulation 19(1)(i) and had asked Revenue to "confirm that our understanding set out above is correct." He relied also upon the fact that, by fax dated the 1st May, 2003, Mr Michael Kelly of Revenue had confirmed to Mr John Fay of PwC that the methodology CSID proposed to use to value the lease was satisfactory, albeit that he commented that he was not aware that DWW had accepted the valuation of the unencumbered rent as determined by the Valuation Office.

61. The High Court judge also referred to a number of further documents to which CSID was privy, and which confirmed that it was the opinion of Revenue that the lease was vatable. The first was an email received by Mr Colm Dunne, a member of the EST on the 7th July, 2004, which referred to a meeting with a number of Revenue officials wherein it had been confirmed that the VAT due had been determined in accordance with the VAT legislation. A further confirmation by Revenue that the lease was vatable was, according to the High Court judge, contained in an email dated the 7th January, 2005 to Mr Fay of PwC. It had confirmed that, as per the earlier email of the 7th July, 2004, "the VAT due has been determined in accordance with the VAT legislation and any revision in VAT liability must also be carried out in accordance with the legislation".

62. The High Court judge also relied upon what he described as a fourth and final confirmation from Revenue that the lease was vatable. This was to be found in a letter dated the 26th September, 2011 from Revenue to Mr O'Rourke of PwC. Whilst postdating the Supreme Court judgment, it was, the High Court judge concluded, relevant to demonstrate that at the relevant time when CSID had sought to recover VAT on the lease it was the Revenue's view that Regulation 19 permitted a lessor to choose between the valuation methods outlined in that Regulation and that this was apparent from its published guidelines on VAT and Property Transactions.

63. Thus it was that the High Court judge concluded that, notwithstanding its knowledge of the existence of an open market price of €35m., Revenue had confirmed that CSID's interpretation of Regulation 19, and that of its tax advisor, PwC, was correct.

64. Commencing at para. 62 of his judgment, the High Court judge analysed a number of the documents relied upon by DWW in support of its contention that the primary proceedings were brought without reasonable or probable cause. He referred, *inter alia*, to three particular emails dated the 27th November, 2002, the 28th November, 2002 and the 17th June, 2003. I pause here to observe the use by the trial judge of the words "*inter alia*" in introducing this section of his judgment in circumstances where it is contended on the appeal that he excluded from his consideration two other emails dated 20th December, 2002 and 23rd December, 2002 to which I will later return.

65. The first email, of the 27th November 2002, was from Mr Fay of PwC to Mr Conway and Ms Magahy of CSID and Mr O'Rourke and Mr O'Reilly of PwC wherein he enclosed a copy of the letter he proposed to send to Mr Michael Kelly of Revenue concerning CSID's intended claim and calculation in respect of VAT on the lease. In the course of his email Mr Fay stated that "there are three valuation methods permitted under the VAT Regulations". He went on to advise that the Regulation provided that the mathematical methods of valuing the lease (including the method proposed by CSID) could only be used in the absence of other evidence and that CSID had other evidence, namely the €35m. value in the Valuation Office Report. However, he also advised that Revenue had stated in their *Notes for Guidance to Inspectors* that any of the three permitted methods might be used in practice. Nonetheless, he anticipated "some pushback from Michael Kelly" of Revenue because they intended to disregard the valuation of the open market price. He enclosed with his email the Valuation Office Report. In this regard it is relevant to note that one of the principal submissions advanced by DWW on this appeal was that no advice was ever later furnished to CSID which contradicted this clear statement regarding the lawfulness of the proposed claim for VAT. According to DWW, this email establishes that PwC knew and had advised CSID that it was not lawfully entitled to charge VAT on the lease.

66. The second email, dated the 28th November, 2002, was sent by Mr O'Rourke to Mr Fay and was copied to Mr Conway and Ms Magahy and Mr O'Reilly. In it, Mr O'Rourke states that he had agreed the text of the letter drafted by Mr Fay which was intended to be sent to Mr Kelly of Revenue. He also advised that the methodology proposed in the letter was "not 'perfect'" but that it should, nonetheless, prove acceptable. It is perhaps relevant to observe at this point that the letter to be forwarded to Mr Kelly, which included the Valuation Office Report containing the valuation of €35m., was also copied to three senior members of Revenue namely Ms Betty Collins, Ms Clodagh Ní Eidhin and Mr Oliver Curran. This, the High Court judge concluded, demonstrated confidence on the part of PwC that VAT might lawfully be charged on the lease.

67. The third email of the 17th June, 2003 was sent by Mr Tom O'Reilly, to Ms O'Donoghue and was copied to Ms Magahy, Mr Conway, Mr Fay and Mr O'Rourke. In his email which enclosed a draft reply to a letter received from Mr Moriarty of DWW of the 16th June, 2003, Mr O'Reilly stated as follows:-

"...You should note that use of any one of three methods is an extra statutory practice only. In strictness, CSID should use the valuation (circa €35M) determined by the Valuation Office."

68. Notwithstanding these advices, the enclosed draft letter addressed to Mr Moriarty contended that Regulation 19 provided three methods for valuing long leases and that, having applied the rent formula method, the capitalised value of the lease was €75,960,000. The letter also advised that Revenue had confirmed that the methodology used by CSID was satisfactory and he asked Mr Moriarty to note that "it has always been the practice that the lessor can choose whichever method he wishes and this is confirmed in the Revenue Commissioners 'VAT and Property Transactions' booklet published in October 2001".

69. In the course of his judgment, the High Court judge noted that Mr Conway had forwarded Mr O'Reilly's email of the 17th June, 2003 to Mr Lonan McDowell, solicitor with McCann Fitzgerald, who had stated that he was happy for the proposed letter to be sent but that a meeting might be advisable in light of Mr O'Reilly's views. Mr McDowell considered that a difficulty might arise as a result of differences between tax practice and legislation and that "the full tax and legal implications of this for CSID will have to be worked through and understood before steps are taken to enforce recovery of the VAT."

70. The High Court judge proceeded to place each of the aforementioned emails in the context of a raft of other documents to which he made reference (see para. 71 onwards). I will summarise these as follows:-

- Letter of the 6th January, 2003 sent by Mr Fay to Mr Conway and copied to Mr O'Rourke and Mr O'Reilly wherein he states his view that CSID was entitled to use the rent formula method of valuation.
- Email of the 31st January, 2003 from Mr Fay to Mr O'Rourke and Mr O'Reilly of PwC and copied to Mr Conway and Ms Magahy which states that the onus rested with CSID to put a value on the taxable supply of the property to DWW and that it had a basis for valuing the lease in such a way as to make it chargeable to VAT. He states "[a]s I see it, there is no basis for KPMG/Dublin Waterworld to contend that the lease is not subject to VAT".
- Email of the 19th February, 2003 sent by Mr Fay to Mr O'Reilly and copied to Mr O'Rourke and Mr Conway. With reference to a proposal by DWW that the issue as to whether VAT was chargeable on the lease be referred to an independent expert, Mr Fay expressed the view that he did not believe this would be of any benefit. Neither did he consider it would be appropriate "given that the matter has been referred to the Revenue Commissioners. If the Revenue holds that the lease is taxable, that is it and no matter what any other advisor may say CSID will have to charge VAT."
- Email of the 14th May, 2003 sent by Mr O'Rourke to Mr Conway, Mr Dunne and Ms Magahy of CSID and copied to Mr Fay and Mr O'Reilly wherein he states:-

"I think the Revenue are really out of the loop now as far as we are concerned. They agree that VAT should be charged and the methodology is as provided by law, so they really have no further role to play in this."

- Letter of advice of the 11th September, 2002 from PwC to Mr Sean Benton, acting CEO of CSID, referring to the fact that CSID could determine the open market value of the lease either "by reference to the formulae contained in the VAT Regulation or by a professional valuer".
- Letter of advice of the 19th June, 2003 sent by PwC to Mr Morgan, CEO of CSID, in response to Mr Moriarty's letter of the 16th June, 2003 which claimed that the VAT charge was incorrect and that the "rent formula" or "multiplier" methods could only be used in the absence of other evidence as to the value of the lease. In its letter of advice, signed by Mr O'Reilly, PwC advised CSID that the VAT charge outlined in its invoice dated the 15th May 2003 was correct.
- Draft report of the 30th April, 2003 sent by Mr O'Reilly to Mr Conway, Mr Dunne and Ms Magahy. The draft report was re-issued in June 2003 in substantially the same terms. That report refers to the valuation of the lease for VAT purposes. The three possible methods of calculating the capitalised value of the lease is set out. The report refers to the valuation received from the Valuation Officer which shows the capitalised value at €35,540,725 and given that that valuation did not pass the economic value test it is stated that PwC advised that the unencumbered rent of €3,376,048 be used in one of the mathematical valuations permitted by the VAT Regulations. Of relevance in the context of the submissions advanced on behalf of DWW is that it does not advise CSID that this method was only permissible "in the absence of other evidence" regarding the value of the lease.

71. The High Court judge then proceeded, commencing at para. 87 of his judgment, to consider the emails referred to earlier in this judgment at paras 64-66, in the context of the oral evidence heard by the Court. He referred to the evidence given by members of the EST and directors of CSID to the effect that it was their understanding of the advice received that VAT was chargeable. In particular, he referred to the unchallenged evidence of Mr Walsh and Mr Mulcahy that CSID had received highly competent professional advice from a tax expert and on foot of which the Board had acted. Furthermore, the High Court judge noted that the evidence of Mr Walsh and Mr Mulcahy was consistent with the evidence of Mr Conway of CSID who, notwithstanding that he accepted that he was made aware of the dichotomy between the Regulation and Revenue practice, was found by the High Court judge to have understood the advice of PwC to be that VAT could be lawfully charged and to have, as a non-expert, relied upon that advice.

72. The High Court judge also relied on the oral testimony of Mr O'Rourke which he clearly considered to be credible (see paras. 97 – 99) noting that he had said, *inter alia*, that CSID had been informed of the divergence between the language of the Regulation 19 and the Revenue practice. Thus, at para. 99 of his judgment the High Court judge found as a fact that CSID, both at board level and EST level, was aware that there was a dichotomy between the law and practice concerning Regulation 19. However, he went on to state that he also accepted as fact that "it was PwC's advice to both the board of directors and the EST that the Lease was vatable".

73. It is apparent from the judgment of the High Court judge that he considered that much of the aforementioned documentation established that PwC's view of its own advice was consistent with how that advice had been understood by CSID both at EST and board level.

74. Thus it was that the High Court judge was satisfied first, that when "viewed in the round" the evidence received by CSID from PwC was that whilst the claim for VAT on the lease could not be guaranteed, because of the dichotomy earlier referred to, it was nonetheless PwC's professional opinion that the lease was vatable. Second, he was satisfied that CSID had accepted PwC's advice in this regard. Third, CSID had also been advised by its solicitors, McCann Fitzgerald, that it was arguable that DWW was legally obliged to accept CSID's decision that the lease was vatable and, finally, that counsel had advised that the claim for VAT should be included in the forfeiture proceedings. All of these factors weighed in favour of concluding that CSID had reasonable or probable cause to issue the proceedings.

The appeal

75. In its notice of appeal dated 4th April 2018, DWW advanced to some sixteen grounds of appeal. As these were reduced to 6 by the time the appeal was heard in this court I will confine my summary to these more focused submissions.

DWW's submissions

76. In respect of the first basis upon which the High Court dismissed its claim, DWW submits that the High Court judge erred as a matter of law in concluding that CSID's success before the Arbitrator and before the High Court (Gilligan J.) was determinative in CSID's favour. In particular, he erred in concluding, as he did at para. 156 of his judgment, that "the very winning of the primary litigation at first instance... must prove that there was always a reasonable chance that the case would be won, and so establishes that there was a reasonable and probable cause for the proceedings." DWW disputes this statement of the law which it claims is both unsupported by legal authority and defies logic. If the proceedings were issued without reasonable and probable cause, the party that issued those proceedings could not later be absolved of that wrongdoing merely because of the happenstance that an Arbitrator or judge incorrectly decided some leg of their case in their favour, such as has happened here.

77. DWW also contends that the trial judge erred in his reliance upon the decision of the Arbitrator in favour of CSID to retrospectively attribute reasonableness to its earlier decision to bring proceedings. DWW maintains that there were a number of flaws with the High Court judge's analysis in this regard. It queries how could it be said that a decision at first instance, which was later found to be fundamentally flawed (and the Arbitrator's decision in this case was found to be so), could have the effect of retrospectively providing a party with reasonable and probable cause in law for initiating those proceedings. Either a party did or did not have reasonable or probable cause to issue the proceedings. This had to be assessed at the time that the proceedings are issued. A subsequent decision by a court of first instance, or an Arbitrator, cannot impact upon the assessment of whether there was or was not cause at that earlier time.

78. Counsel further submits that the High Court judge's decision was in any event, wrong as a matter of principle. In its proceedings to recover VAT, CSID contended that Regulation 19 allowed for three methods of valuing the lease. It did not succeed in that proposition either before the Arbitrator or before the High Court. In both instances the decision in CSID's favour was reached on the basis that the Valuation Office Report was not "other evidence" with the result that CSID had been found entitled to use the rent formula method to value the lease. The only determination as to the entitlement of CSID to claim VAT on the lease was that made by Hardiman J. in the Supreme Court when he concluded that the Arbitrator had gravely misled himself concerning Regulation 19. The Valuation Office Report was "other evidence" and that being so CSID was not permitted the option of using one of the alternative formulae therein provided.

79. Furthermore, DWW submits that as a matter of law the High Court judge was not entitled to determine the proceedings on the aforementioned basis as CSID had never advanced this point in the High Court. Neither in its oral or written submissions had CSID sought to argue that because it had succeeded before the Arbitrator and later before the High Court it followed that the proceedings could not have been an abuse of the court's process. DWW maintains that the decisive reliance by the trial judge on this point was a total surprise. If it had been forewarned as to the importance that this novel proposition of law was to have in deciding the case, it would have taken the opportunity to address it.

80. In respect of the alternative basis upon which the High Court judge had rejected DWW's claim, namely his conclusion at para. 184 of his judgment that when "viewed in the round" CSID had reasonable or probable cause to issue the proceedings, counsel for DWW submits that this conclusion was not supported by the evidence. It was based upon an incomplete and erroneous assessment of the evidence and in particular the documentary evidence.

81. First, counsel submits that the High Court judge made a fundamental error when, for the purposes of determining whether CSID had reasonable and probable cause to issue proceedings claiming VAT, he relied upon the documentation identified earlier at paras. 53-54 of this judgment. Whilst that documentation was available to what he described as the "VAT community" there was no evidence that CSID was aware of any such documentation or its contents. Thus, whether tax or VAT practitioners considered there was a choice of three valuation methods available under Regulation 19 at the time CSID issued its proceedings was irrelevant as it was not within the knowledge of CSID at the time it commenced the VAT proceedings. For the same reason that it could not have operated on the mind of CSID when it made its decision to initiate proceedings, DWW submits that it was impermissible for the High Court judge to rely upon, as he did, the advice which DWW's own tax experts had at one time provided which was to the effect that a lessor could choose between the three methods of valuation of the lease. By reason of these errors alone, counsel submits, the subsidiary basis upon which the High Court judge rejected DWW's claim is flawed with the result that a retrial is warranted.

82. Second, as to the High Court judge's conclusion that CSID had been advised by its tax advisers that the lease was vatable, that finding was not supported by the evidence. The evidence established that CSID had been apprised of the reality that the Regulations did not permit a free choice between the three methods of valuation where "other evidence" was available. And in this case CSID had other evidence of the open market valuation of the interest in the lease by virtue of the Valuation Office Report.

83. In particular, DWW relies upon the email of 27th November, 2002 wherein Mr Fay had advised CSID and the EST that there was a problem with CSID charging VAT on the lease because the Regulation only permitted the use of the mathematical methods of valuation "in the absence of other evidence" and wherein he went on to state that "we have other evidence (the valuation from the Valuation Office which gives a value of the open market price of €35m)."

84. DWW also laid emphasis upon an email sent in reply by Mr O'Rourke the following day, which was copied to the same two directors of CSID, and in which he concurred with the view earlier expressed by his colleague, Mr Fay, that the proposed methodology, i.e. the use of the multiplier method, was "technically... not perfect".

85. Particular reliance was also placed upon a third email sent by Mr O'Reilly on the 17th June, 2003 to Ms O'Donoghue and copied to Mr Conway and Ms Magahy as well as Mr Fay and Mr O'Rourke, wherein Mr O'Reilly stated as follows:

"You should note that use of any one of three methods is an extra statutory practice only. In strictness, CSID should use the valuation (circa €35M) determined by the Valuation Office."

86. DWW maintains that in these emails, quite apart from any others, PwC clearly expressed the view, confirmed as correct by the Supreme Court some years later, that the use by CSID of the mathematical formulae was not permitted by the Regulations, which advice must have been understood by the directors of CSID. Indeed, DWW submits that the High Court judge himself, having considered at length these emails, their context and the oral evidence offered in respect of them, found at para. 99 of his judgment that CSID was in fact "both at board level and at EST level, aware that there was a dichotomy between what Regulation 19 stated and the practice". Given this finding, DWW argues that it was not open to the trial judge to subsequently conclude that CSID had been advised or had actually believed that the lease was vatable. At most, according to DWW, CSID could have understood the advice to mean that the lease was vatable *in practice*. However, what was required was that it was vatable *in law*. In this respect his judgment was internally inconsistent. According to DWW, it could avail CSID nothing to rely on evidence that established that PwC had advised that their intended approach to the valuation of the lease was acceptable *in practice*, as this could provide no basis in law for the proceedings which they later initiated. Counsel for DWW stressed that the directors of CSID were very experienced

professionals who would have appreciated the distinction between law and practice and would have been aware that their choice to pursue a course of action which was extra statutory entailed forfeiting the protection of the law.

87. According to counsel, there was no evidence of any advice furnished by PwC that stated that the claim for VAT under the Regulation was in accordance with law. The only advice provided was that the Regulation did not permit the charging of VAT on the lease but that Revenue "would run with it". PwC had made clear that CSID had no case to make for VAT under the Regulation and its advice was unequivocal in this respect. Yet, CSID had commenced proceedings on the basis that it was entitled to make that claim. Accordingly, there was no basis upon which the High Court judge could have concluded that CSID had reasonable and probable cause to bring the VAT proceedings on foot of advice it had received from PwC.

88. Objectively assessed, counsel submits that the reasonable actor in the shoes of CSID at the time, and receiving the advice that it did, would have understood that there was a fatal problem with CSID claiming VAT on the lease due to the existence of the Valuation Office Report of the 25th October 2002 which rendered the approach proposed unlawful.

89. Counsel for DWW further submits that CSID was not entitled to rely upon the fact that its solicitors and counsel lent their support to the claim made in respect of VAT insofar as CSID had not sought any legal advice from McCann Fitzgerald or from counsel on its entitlement to claim VAT on the lease. It had taken its advice from PwC. Neither was there evidence to demonstrate that McCann Fitzgerald was privy to those advices which, counsel submits, were to the effect that the claim for VAT on the lease could not lawfully be made under Regulation 19.

90. Third, counsel for DWW submits that the High Court judge, in general, failed to engage with the evidence. In particular, he had ignored and failed to attach any weight to DWW's heavy reliance upon two emails dated the 20th December, 2002 and 23rd December, 2002.

91. In the first of these emails, Mr O'Reilly recommended that CSID postpone giving the Valuation Office Report to DWW/KPMG in advance of an upcoming meeting between the parties because it "shows a valuation of the lease of circa €35m. which does not suit our requirements". DWW submits that this email is evidence that CSID could not but have been aware that the Valuation Office Report made its claim in respect of VAT unlawful, yet it had been ignored by the High Court judge in his assessment of the evidence.

92. The second email, of the 23rd December, 2002, is relied upon as further proof that CSID did not actually believe it had reasonable or probable cause to bring the proceedings. Sent by Mr Fay to Mr Conway, the email sets out that the approach which was being adopted "while in accordance, we believe, with Revenue guidelines" was "not 'perfect' when read with the actual Regulations". It further expressed a need for CSID and their advisors to "stick to [their] guns re the method of valuation [they] had used". DWW argues that this email again demonstrates that while CSID may have viewed its approach as consistent with practice, Revenue or otherwise, it well understood that it was not in accordance with the actual law. As experienced professionals it is said that the executives privy to this correspondence would have understood that "guidance" or "practice" was not the same as law, even when issued by Revenue, and thus that they could not rely on it to bring their actions into line with the Regulations.

93. Once again DWW submits that the failure of the High Court judge to refer to this email in his judgment, and weigh its content in his assessment, is striking given the reliance that DWW placed on it for the purposes of proving that CSID did not actually believe it had a case in law when it commenced its proceedings to recover VAT on the lease. His omission was sufficient to undermine the validity of his conclusion on the issue of reasonable and probable cause because, in the submission of DWW, reasonable and probable cause cannot exist absent an actual belief in the validity of the proceedings.

94. Third, counsel submits that the clear inference to be drawn from the conduct of CSID in withholding the Valuation Office Report, was that it well knew that it was not entitled to claim VAT under the Regulation because the report contained a valuation of the lease at €35m., thus rendering its purported reliance upon the rent formula method to calculate the value of the lease as without foundation in law. Despite the fact that this was a key part of the case made by DWW, the trial judge had failed to address the adverse inferences which he had been asked to draw from this conduct. His failure to do so undermined the validity of his judgment that CSID had reasonable and probable cause to issue the VAT proceedings.

95. The only reasonable conclusion that the High Court judge could have drawn from the evidence was that the executives in CSID, and in particular the EST team, were fully aware that VAT was not chargeable in accordance with law and in accordance with Regulation 19, particularly in light of the advices received concerning the consequences of the Valuation Office Report, and thus they did not in fact believe that they had reasonable and probable cause to bring the proceedings.

96. Fourth, in its closing submissions in the High Court, DWW had asked the trial judge to draw adverse inferences from the fact that certain witnesses, who could have given direct evidence regarding critical issues, including the decision made by CSID to commence proceedings to recover VAT, had not been called to give evidence. These were Mr O'Reilly of PwC and Ms Magahy, Mr Dunne, and Ms O'Donoghue of the EST. DWW point to the fact that a great part of its submissions before the High Court focused on the argument that the Court should infer, having regard to the failure of CSID to call these witnesses, that they would not have been in a position to rebut assertions made by DWW in relation to the key events in which they were involved, which would go some way to proving that CSID did not have reasonable and probable cause to bring the proceedings that they did. The High Court judge did not address this issue in his judgment and this omission on his part was, according to counsel, sufficient to cast in doubt the validity of the decision and warrant a retrial. Counsel relied upon the decision of Laffoy J. in *Fyffes plc v. DCC* [2009] 2 I.R. 417.

97. Accordingly, whilst CSID had maintained that it was sufficient to present witnesses from each "category" (i.e. the Board, EST and PwC) to avoid such adverse inferences being drawn, DWW argues that in the absence of a finding by the trial judge it cannot be said he engaged with this crucial aspect of DWW's submissions with the unfortunate result that a retrial is warranted.

98. Fifth, counsel submits that the judgment of the High Court judge should be set aside as one which is inherently inconsistent. Having found that the dichotomy between Revenue practice and Regulation 19 had been explained to and understood by the executives of CSID, they must have known from the outset that they were not entitled to charge VAT. Once aware of the difference between the Regulation and Revenue practice there was no basis upon which the court could have concluded that CSID had reasonable and probable cause to issue the VAT proceedings particularly in circumstances where that claim was made pursuant to Regulation 19.

99. Without prejudice to its submissions that the evidence did not support the High Court judge's conclusion that CSID actually believed it had reasonable and probable cause to issue the VAT proceedings, DWW further submits that such a belief would in any case, objectively assessed, have been unreasonable. That is to say that the reasonable actor in the shoes of CSID would not have considered that they had reasonable and probable cause to bring the proceedings. It was obvious that VAT was not chargeable on

the lease. The Supreme Court decision in 2010 had merely confirmed the advice CSID had earlier received, which in turn reflected the plain words of the Regulations. It was readily apparent that CSID was not permitted to use the mathematical methods of valuation where they had "other evidence" of the value of the interest in the lease. CSID had been explicitly advised that it was acting outside of the Regulations. Further, insofar as the High Court judge concluded that CSID had in fact received advice that VAT was chargeable, DWW submits that the trial judge erred in finding that such advice was a complete defence – another proposition in law for which DWW say there is no foundation. Irrespective of any advice CSID received, it was unreasonable for it to have taken the view that it had reasonable cause in law to contend that VAT was chargeable on the lease.

CSID's submissions

100. CSID maintains that the High Court judge was entitled, having regard to the evidence, to find that it had reasonable and probable cause to initiate the VAT proceedings, in the objective sense required by *Dorene Ltd v. Suedes (Ireland) Ltd* [1981] I.R. 312. Whereas a good part of DWW's submissions are focused on the subjective belief in the proceedings which CSID is said to have lacked, CSID submit that such belief or a lack thereof is relevant only to the question of malice, and not to the question of reasonable and probable cause. Following *Dorene*, CSID argues that reasonable and probable cause is to be assessed objectively, based on the facts which operated on the party initiating litigation at the time. Thus, for the purposes of reasonable and probable cause, the question is not what CSID actually believed, but whether the reasonable actor, given the same information as CSID had, would have considered that there was a proper case to be laid before the courts.

101. CSID contends that the finding of the judge at para. 184 of his judgment, namely that CSID had been advised that the lease was vatable, provides a standalone basis for the conclusion he drew at the same paragraph that it had reasonable and probable cause to bring the proceedings. His finding regarding the nature of the advice was a finding of fact and, per the principles outlined in *Hay v. O'Grady* [1992] 1 I.R. 210, it should not be disturbed on appeal where it is supported by credible evidence.

102. Such evidence, CSID submits, is plentiful in the instant case. It accuses DWW, in its submissions to this Court, of attempting to take various snippets of communications out of their rightful context in order to portray them in a light favourable to their case, whereas the clear overall thrust of the advice and communications received from PwC was to the effect that CSID could proceed to use the rent formula method of valuation and thus could charge VAT on the lease.

103. CSID rejects as artificial the sharp distinction which DWW seeks to draw between law and practice. In reality, it argues that even in the emails on which DWW place reliance, it is at all times clear that the advice of PwC was that CSID was entitled to charge VAT on the lease.

104. In the email of the 27th November, 2002, Mr Fay says that he only raises the point about other evidence "for completeness" whereas he states clearly that "[t]here are three valuation methods under VAT Regulations" and that "Revenue have stated in their Notes for Guidance to Inspectors that any of the three permitted methods may be used in practice".

105. With respect to the email of the 28th November, 2002, CSID places reliance on the fact that, while Mr O'Rourke acknowledges that the methodology proposed is "not 'perfect'", he also states that "practically... should be acceptable to Revenue".

106. CSID maintains that, in his email of the 17th June, 2003, Mr O'Reilly endorsed the valuation method being used. Insofar as DWW seeks to argue that this advice was only to the effect that the valuation might be used in practice but does not advise that it was permitted by law, CSID contends that that distinction, if it can even be made out from the correspondence, would have been far from clear to CSID as the recipient of professional advice. Counsel for CSID points to the fact that Regulation 19, the interpretation of which is at the centre of this case, was promulgated by Revenue itself. Thus, the guidance it provided could easily be understood to carry significant weight. Certainly, the evidence was that CSID placed great weight upon the fact that Revenue was satisfied that its intended approach was fully in accordance with its lawful entitlement.

107. CSID maintains that it is easy for DWW to look back with the benefit of a detailed Supreme Court judgment and say that it was clear that the Regulations did not permit the choice between the three valuation methods, but this could not have been obvious to CSID from the advice it had received from PwC at the relevant time. In particular, CSID draws attention to a draft report which was prepared by PwC on the VAT issue for the benefit of CSID, one version of which was sent to CSID on the 30th April, 2003. Insofar as DWW contends that this report is merely a historic account of advice given, rather than a letter of advice itself, the report is, according to CSID, nonetheless proof of the unambiguous advice of PwC that VAT was chargeable on the lease. In relevant part it reads: "we advised that the unencumbered rent figure of €3,376,048 should be used in one of the mathematical valuation methods as permitted by VAT Regulations". The advice was not given on the basis of practice, but rather on the basis of the Regulations.

108. CSID further relies upon a letter of advice issued by PwC to CSID on the 19th June, 2003 (just two days after the email of Mr O'Reilly which described the choice between three methods as an "extra statutory practice"). This letter, in responding to the claim made by Mr Moriarty in his letter of the 16th June, 2003 that VAT was not chargeable on the lease, stated that the methodology adopted by CSID had "always been the practice" and had been confirmed by the Revenue Commissioners, and concluded with the unequivocal statement of advice that, contrary to the contention of Mr Moriarty, "the VAT charge outlined on your invoice dated 15th May 2003 is correct".

109. CSID submits that, *inter alia*, these unequivocal pieces of advice provide credible evidence from which the High Court judge was entitled to conclude, as he did at para. 184 of his judgment, that CSID was advised by PwC that VAT was chargeable on the lease, and that it had reasonable and probable cause to bring proceedings in support of that understanding.

110. The High Court judge was entitled, in the view of CSID, to conclude from the oral evidence given on behalf of the directors of CSID that the advice had been a key item operating on their minds at the time they made the decision to initiate proceedings. Applying the test in *Dorene v. Suedes*, CSID submits that, armed with the information they had been given, the actions of the relevant persons on the board of CSID and on the EST, in relying on professional advice received and initiating proceedings, were eminently reasonable. Counsel emphasises the trust which the directors of CSID placed in their professional advisors, especially in an area as complex and technical as VAT. In fact, CSID submits that it would have been extraordinary if they had departed from this advice and had decided not to charge VAT on the lease notwithstanding advice to the effect that they could do so. Consequently, CSID submits that the advice which it received from PwC provided a standalone basis for the High Court judge to conclude as he did at para. 184 of his judgment that CSID had reasonable and probable cause to bring the VAT proceedings, in the objective sense that the law requires. This finding should not, in CSID's submission, be disturbed on appeal.

111. With regard to the first basis on which the High Court judge made his decision, although CSID concedes that the conclusion regarding the effect of the decision of the Arbitrator was not based on a point which was canvassed at trial, it submits that the judge was nonetheless correct. It was not clear that counsel for CSID was willing to go as far as to defend the absolutist formulation

espoused by the trial judge that a favourable decision at first instance was necessarily dispositive of a claim in the tort of malicious prosecution, but certainly he contended that it was appropriate to consider it as a "powerful indicator" of the reasonableness of the belief of CSID in the proceedings it initiated. Notwithstanding that CSID did not know what the decision of the Arbitrator would be when it commenced the proceedings, CSID contend that the decision was nonetheless evidence not only that the case *could* be won, but that it had a reasonable chance of success. The fact that an independent third party, with expertise and all of the relevant information, decided in favour of CSID is, according to CSID, objective evidence that it had a stateable case.

112. Further, CSID rejects the submission on behalf of DWW that the Arbitrator decided the case on a different point. The key question in the VAT proceedings was whether CSID was bound to use the open market valuation of the lease in the Valuation Office Report or whether it was entitled to choose between the three methods of valuation provided for in Regulation 19. The Arbitrator decided that it was entitled to do the latter, having determined that the open market valuation was not "other evidence" for the purpose of Regulation 19. Thus the crux of the case was decided in favour of CSID, and this decision, notwithstanding that it was ultimately found to be flawed, was good evidence of the reasonableness of the belief of CSID in the prospects of its VAT litigation.

113. By a similar logic, CSID rejects the submission that the views of the VAT community and the initial view of DWW's tax advisors Andersen were irrelevant because they were not known to CSID at the time. Again CSID submits that these views are evidence of the reasonableness of the position it took that VAT was chargeable. The fact that there was significant confusion regarding the interpretation of the Regulations goes some way to showing that it had taken a reasonable approach at the time.

114. As aforementioned, CSID maintains that it need only demonstrate reasonable and probable cause in the objective sense, and that its subjective belief about whether it had such cause at the time is relevant only to the question of malice which does not arise in circumstances where the High Court judge decided the case on the question of reasonable and probable cause. Without prejudice to this approach, CSID argues that in any case it did in fact actually believe it had reasonable and probable cause to bring the proceedings. It submits that it was clear from the oral evidence provided by its directors that CSID understood the advice of PwC to mean that VAT was lawfully chargeable on the lease. CSID contends that this evidence, even taken by itself, is sufficient to support the trial judge's finding that the relevant persons in CSID held an actual belief that they had reasonable and probable cause to pursue the proceedings. That belief, CSID argues, was consonant with the trust which the directors of CSID placed in their professional advisors in the technical area of VAT, a dynamic which was brought out strongly in the oral evidence. Accordingly, CSID submits that the trial judge's finding that it had been advised by PwC that VAT was chargeable led inexorably to his conclusion that it genuinely believed that it had reasonable and probable cause. So long as this belief was reasonable, which of course CSID maintains it was, and which argument I have detailed above, this finding provides a sufficient standalone basis on which the trial judge was entitled to decide the case.

115. In respect of the email of the 23rd December 2002, in which Mr Fay acknowledges the assessment of his colleague Mr O'Rourke that the approach being taken was "not 'perfect' when read with the actual Regulations", CSID contends that this email could not possibly have sufficed to displace the finding of the trial judge that CSID had been advised that VAT was chargeable. This is especially so when it is read in the overall context of the advice provided by PwC to CSID, as outlined above. CSID accuses DWW of engaging in precisely the exercise which is condemned by MacMenamin J. in *Leopardstown v. Templeville Developments* [2017] IESC 50, that is of reducing an appeal to "a piece-by-piece analysis of the evidence, in an effort to show... that the trial judge might have laid more emphasis, or attached more weight, to the evidence of one witness, or a number of witnesses, or one document, or a number of documents, rather than others on which he or she relied". Taken at its highest, CSID submits that DWW is attempting to bring this Court on a selective tour of the documents which best highlights its preferred interpretation of events. CSID contends that parsing of this kind cannot fall within the remit of an appellate court which should only intervene with findings of fact where they could not in all reason be held to be supported by the evidence. DWW had the opportunity to put all of this evidence to witnesses at trial, and having done so the trial judge took a view on the evidence, holding clearly that CSID had been advised and believed that it had reasonable and probable cause for the proceedings. CSID thus argues that it is impermissible for DWW to, at this late stage, seek to frustrate the findings of the High Court judge by urging this Court to take its own view on the evidence, beyond a review of the findings already made.

116. CSID applies the same objections to DWW's submissions regarding the email of the 20th December 2002, and other evidence which is said to demonstrate that CSID executed a conspiracy to conceal the open market valuation provided by the Valuation Office from DWW. While CSID accepts that there was a reluctance on its part to provide DWW with the open market valuation, it strongly disputes the proposition that the clear inference to be drawn from this conduct is that it knew that it had no cause to charge VAT on the lease. Further, CSID contends that it should be clear that the trial judge was not willing to draw this inference from the evidence, all of which was before him. It is perfectly clear from his judgment that he accepted that CSID, at the material time, believed that it had reasonable and probable cause.

117. Moreover, the inference which DWW seeks to have drawn from the conduct of CSID is entirely inconsistent, in the submission of CSID, with the fact that CSID sent the Valuation Office Report to Revenue. It is of significance that the emails of the 27th and 28th November, 2002, upon which DWW places great reliance, and which discuss a letter which is to be sent to Mr Michael Kelly of Revenue, result in the Valuation Office Report being sent to Mr Kelly. This report included the open market valuation of the lease, which DWW accuse CSID of attempting to "bury". CSID further point out that the letter enclosing this report was copied to three senior Revenue officials. CSID argues that, if it truly was attempting to conceal the open market valuation and construct a valuation which it knew to be contrary to law, it would not have so candidly brought its proposed approach to the attention of four senior Revenue officials. Contrary to the submission of DWW, CSID contends that these were not the actions of a party who knew itself to be acting outside of the Regulations, and the trial judge was entirely correct to give no weight to the submissions of DWW in this regard. There can be no question but that CSID believed it had reasonable and probable cause, and the finding of the trial judge in that respect should not be disturbed.

118. In reply to DWW's complaint concerning its alleged failure to call certain individuals to give oral evidence, CSID maintains that its approach of calling witnesses "by category" was sufficient, notwithstanding the fact that not every witness that DWW would have liked it to call had been called. CSID submits that it is clear that the High Court judge had the opportunity to consider DWW's submissions on the subject, and by the absence of any reference to this point in his judgment this court can safely infer that he did not see fit to draw the adverse inferences requested. Again CSID makes the point that it is highly undesirable for DWW at this stage in proceedings to pick holes in the way in which the High Court judge expressed his decision, in circumstances where it is clear that it failed to convince him of the necessity of drawing adverse inferences. Moreover, CSID submits, it is plain from his judgment that the High Court judge found that CSID actually believed they had reasonable and probable cause; and to displace that finding on the basis that he did not specifically dismiss every argument made to attack it would be to seriously distort his clear intention.

Legal principles of relevance to the submissions made by the parties on the appeal

119. Before moving to discuss and determine the issues raised for the Court's consideration on the appeal I believe it would be helpful

to refer briefly to a number of the authorities relied upon by the parties insofar as they consider the tort of malicious abuse of the court's process. However, because there is little dispute regarding the test to be applied by the Court, I do not intend to consider these authorities in any real depth but will do so principally for the purposes of identifying the prevailing principles and where they are to be found.

Boundaries of the tort of malicious abuse of the court's process

120. The boundaries and component parts of the tort of malicious abuse of the court's process are best found in the what is perhaps the leading decision in this jurisdiction on the tort, namely that of Costello J. in *Dorene Ltd v. Suedes (Ireland) Ltd* [1981] I.R. 312. I will later return to the facts of this decision, but for the moment will confine my observations to the principles that emerge therefrom.

121. At p. 316 of his judgment, Costello J. describes the essential ingredients of the tort as follows:-

"The authorities, it seems to me, establish that a claim for damages at common law will lie for the institution or maintenance of a civil action if it can be shown that the action was instituted or maintained (a) without reasonable or probable cause (b) maliciously and (c) that the impugned action was one which the law presumes will have caused the claimant damage."

122. Concerning the test to be applied for the purpose of determining reasonable and probable cause, at p. 318 of his judgment Costello J. provides the following guidance:-

"As to reasonable and probable cause, it is now well established that the test to be applied by the court is an objective test and so when considering a claim for damages based on a civil action the court must itself examine the facts and consider the legal principles applicable to them and decide whether there were reasonable grounds for instituting or maintaining the action which it is claimed was wrongfully instituted or maintained".

123. That malice is an additional ingredient of the tort, as advised by Costello J. in *Dorene*, is clear also from the decision of Toulson L.J. in *Willers v. Joyce* [2016] UKSC 43. At para.. 55 of his judgment he states concerning malice:-

"Malice is an additional requirement... As applied to malicious prosecution, it requires the claimant to prove that the defendant deliberately misused the process of the court. The most obvious case is where the claimant can prove that the defendant brought the proceedings in the knowledge that they were without foundation... But the authorities show that there may be other instances of abuse. A person, for example, may be indifferent whether the allegation is supportable and may bring the proceedings, not for the bona fide purposes of trying that issue, but to secure some extraneous benefit to which he had no colour of a right. The critical feature which has to be proved is that the proceedings instituted by the defendant were not a bona fide use of the court's process."

124. For the purpose of defeating a claim for malicious abuse of the court's process it will suffice for the litigant concerned to establish that their claim was stateable. Thus, as was stated by Devlin L.J. in *Gliniski v. McIver* [1962] AC 726, in order to have reasonable and probable cause the defendant does not have to believe that the proceedings will succeed, it is enough that "there is a fit case to be tried". In *Bank of Ireland Finance v. McSorley & Macari* [1994] WJSC-HC2085 the test applied by Murphy J. was whether it was "by no means impossible" that the claim would succeed. Thus the plaintiff alleging and abuse of the court's process faces a heavy burden.

125. Concerning this statement of the law, which was relied upon in *Dorene*, Costello J. stated:-

"As to malice, it is to be borne in mind that even if it is shown that the proceedings had been instituted without reasonable or probable cause it is necessary to show in addition that they were instituted maliciously. Malice means the presence of some improper and wrongful motive."

126. Thus, it would appear that the test for reasonable and probable cause is one which is essentially objective in nature with the subjective belief of the defendant being of particular significance when the Court comes to consider the second element of the tort i.e. malice.

127. As to how the trial judge should approach his or her assessment of a claim for damages for malicious abuse of the court's process, although stated in the context of a claim for malicious prosecution of criminal proceedings, the following guidance of Denning L.J. in *Tempest v. Snowden* [1952] 1 K.B. 130 is of assistance:-

"In my opinion in order to determine the question of reasonable and probable cause, the judge must first find out what were the facts as known to the defendant, asking the jury to determine any dispute on that matter, and then the judge must ask himself whether those facts amounted to reasonable and probable cause. In *Herniman v. Smith* [1938] 1 All E.R. 9, Lord Atkin put it quite clearly:

"The facts upon which the prosecutor acted should be ascertained. In principle, other facts on which he did not act appear to be irrelevant. When the judge knows the facts operating on the prosecutor's mind, he must then decide whether they afford a reasonable or probable cause for prosecuting the accused."

If these facts do afford reasonable and probable cause, then the prosecution is justified, and it is not as a rule necessary for an inquiry to be made into the prosecutor's belief. *The state of his belief goes to malice, but not, as a rule, to reasonable and probable cause.* This view is supported by the observations of the Lord Goddard C.J., in *Tims v. John Lewis & Co., Ltd.*, where he said ([1951] 2 K.B. 472):

"The question whether there was a reasonable or probable cause is not, I think, to be determined subjectively, as has been suggested. It is a question which objectively the court has to decide on the evidence before it."

....Apart from exceptional cases....I think it right to say that, once the facts as known to the prosecutor are ascertained, the state of his belief goes only to malice and not to reasonable and probable cause." (Emphasis added).

128. As to the relevance or weight to be attached to any legal or other advice received by a party before they commenced the proceedings alleged to be an abuse of the court's process, the Court of Appeal of England and Wales in *Abbott v. Refuge Assurance Co.* [1962] 1 Q.B. 432 held that the fact that counsel in that case had advised that a prosecution lay was not conclusive on the

issue of reasonable and probable cause, and that the court itself should consider whether counsel's advice was correct.

129. In *Murphy v. Kirwin* [1993] 3 I.R. 501, Finlay C.J. at p. 508 of his judgment, when considering the elements of the tort, also reflected upon the weight that might be attached to any advice received by a party from their advisers prior to instituting the proceedings alleged to constitute an abuse of the court's process:-

"If the client stated the facts of the case correctly to his legal advisers and was advised not to proceed (as happened in *Dorene Ltd v. Suedes (Ireland) Ltd* [1981] I.R. 312) this would support an allegation of abuse of process. If the client stated the facts correctly and was advised to proceed this would tend to negative it. And if the client misstated the facts to his legal advisers this would strengthen a claim that the proceedings had been instituted for an improper purpose."

130. On the same issue, in *Dorene* Costello J. stated as follows:-

"Obviously where a Plaintiff has obtained legal advice before instituting or pending legal proceedings the nature of that advice could be a highly material factor in considering whether he was motivated by an indirect or improper motive, as it may assist in showing whether the Plaintiff was using the proceedings for some legally inappropriate purpose."

131. Finally, it is readily apparent from the authorities cited above that the circumstances which are material to the court's assessment when it comes to considering a claim that proceedings were issued in the absence of reasonable and probable cause are those that were known at the time that step was taken. And, if the claim extends to the maintenance as opposed to the commencement of proceedings, as was the case here and in *Dorene*, the circumstances which prevailed at the time any decision was taken to maintain the proceedings are those that are relevant.

Some general observations

132. Few would dispute the importance to society that the law should be available to all who wish to employ its process for the purpose of claiming what they believe to be their rights without their being subjected to any additional liability should they fail, over and above the costs of the proceedings, unless they can be shown to have acted maliciously and without reasonable or probable cause. In my view it would be extremely undesirable if a person who had a claim worthy of being decided by the courts were to find themselves faced with secondary litigation simply because their claim ultimately failed.

133. As was cautioned by Mance L.J., albeit in the context of his dissenting judgment in *Willers*, the tort of malicious abuse of the court's process is, in many ways, unattractive because it, inter alia, invites fresh litigation about prior litigation and a consideration of the soundness of the bases and motivations underlying those proceedings.

134. Nonetheless, many of the cases to which this court's attention was directed in the course of this appeal serve to demonstrate the good public policy reasons which underlie this particular tort given that it provides a means of deterring parties from instituting proceedings which are vexatious and brought for a malicious purpose. It is important to remember that even when a defendant succeeds in defending a claim made against them they will, in all probability, sustain some degree of financial loss, given that it is only in the rarest of cases that costs will be awarded against a plaintiff who fails in their claim otherwise than on a party and party basis. Further, even if the successful defendant should manage to obtain a costs order on a solicitor and own client or indemnity basis, the plaintiff may not be a mark for those costs or the defendant may have difficulty executing such an order. A good example of this type of prejudice is to be found in the facts of *Willers* where Mr Willers sought to recover the sum of £2m. sterling as damages, that sum representing the difference between the costs awarded in his favour when he succeeded in his primary litigation and his actual bill of costs.

135. Another matter worth noting is that in almost all of the claims which have proved successful it is easy to identify some obvious collateral objective or ulterior motive underlying the proceedings. For example, in *Dorene*, by issuing its proceedings Dorene was in a position to register a *lis pendens* over the property concerned thus rendering it unsaleable to anyone else and placing Dorene in a very favourable position to negotiate its cheap purchase.

136. Finally, I would observe that in a very significant number of the leading cases the claim for malicious abuse of the court's process was raised as a counterclaim in the proceedings alleged to be an abuse of the court's process. Perhaps this is unsurprising given that it is the circumstances which prevailed at the time the proceedings were issued that will determine liability. There are, of course, cases in which the claim not made prior to the secondary litigation, however this seems to occur in cases where it was not until after the primary proceedings were concluded that documentation or information came to hand which exposed the possibility that the proceedings had been pursued maliciously and without reasonable or probable cause.

Decision

A. The trial judge's conclusion that the decisions of the Arbitrator and the High Court (Gilligan J.) in favour of CSID were determinative of the claim

137. It goes without saying that all parties to litigation are entitled to a hearing that accords with the rules of natural justice and fair procedures. It follows that in the great majority of cases where it is established on appeal that in some material respect the first instance hearing was grossly unfair to the losing party, the appellate court has little option but to direct a retrial, regardless of the delay, cost and expense that will result.

138. Essential to a fair and just hearing is the right of both parties to be heard on all issues crucial to the court's ultimate determination. In the vast majority of cases it happens quite naturally that the judgment of the trial judge will follow closely the approach taken by the parties to the major issues canvassed in the course of the proceedings. This is particularly so in cases which involve complex issues of law and fact where, at the close of proceedings, the court will likely be guided by the parties' oral and/or written submissions as to the issues they consider need to be addressed in the court's judgment. This was one such case. At the close of the 20 day hearing the parties delivered extensive written submissions.

139. It is accepted by CSID that neither in its written nor oral submissions did it argue that its success before the Arbitrator, or before the High Court on its application to enforce the Arbitrator's Award, was fatal to DWW's claim that CSID did not have reasonable and probable cause to issue the VAT proceedings.

140. In these circumstances it is understandable that, when the trial judge determined that DWW's claim was to be rejected because CSID had succeeded in its claim before the Arbitrator and later before the High Court (Gilligan J.), DWW considered that it had not

been afforded a fair hearing.

141. The potential for injustice to one or other party should a judge decide a case on a point not advanced in the course of the hearing is obvious. There may be a perfect answer to the point that the trial judge considers unanswerable and had it been raised at the hearing the error in the trial judge's thinking would have been corrected. A similar injustice would arise if, after the conclusion of a hearing, the trial judge was to come across a legal authority not referred to in the course of the hearing and, believing it provided the answer to the claim, decided the case on that basis. However, had that authority been brought to the attention of the parties it might have been distinguished successfully.

142. It follows that if, when a trial judge comes to write his or her judgment, a point comes to mind or a legal authority is unearthed which was not canvassed in the course of the hearing and is one which they consider crucial to the determination of the claim, in order to do justice between the parties a further hearing will normally be required so that the parties may be afforded an opportunity to address the said issue or authority.

143. The importance of a such an approach is heightened due to the fact that an appellate court cannot, save in special circumstances, decide a point not argued in the court below. This is because constitutional justice requires that the unsuccessful party in High Court proceedings have an automatic right of appeal from every first instance decision. In other words, every litigant gets two chances to argue in favour of their stated position. However, where a trial judge decides a case on a point not argued at first instance, that error is not remedied by the fact that the party aggrieved by the decision has a right of appeal. This is because the appellate court will be hearing the parties for the first time on this particular issue as if it was a first instance court and there will be no automatic right of appeal from its decision.

144. It follows that I consider that there is merit in the submission of DWW that it did not get a fair hearing in circumstances where the High Court judge determined that its claim must fail by reason of the decision of the Arbitrator and/or the High Court judge on the application to enforce his Award. However, in circumstances where the High Court judge decided the proceedings on what I consider to have been a valid alternative basis, there is no need to reach any definitive conclusion as to the consequences that might otherwise result from the approach adopted by the trial judge.

145. In circumstances where I am satisfied that this appeal may safely be determined by addressing the alternative basis upon which the High Court judge rejected DWW's claim, it is unnecessary to engage to any real extent with the submissions of DWW concerning the relevance or otherwise of the decision of the Arbitrator and later the High Court judge upon CSID's application to enforce the Arbitrator's Award. I will nonetheless offer a number of brief observations concerning the determination of the High Court judge that, on the facts of this case, the success of CSID at first instance was determinative of the issue as to reasonable and probable cause.

146. It seems to me that there is merit in the general proposition, as contended for by counsel for DWW, that a plaintiff's claim based on the tort of malicious abuse of the court's process will not necessarily fail simply because the defendant was successful at some stage of the primary litigation. It would, I believe, be unjust if, having deliberately set out to damage their opponent by issuing proceedings which they knew were without foundation, the malicious litigant could be saved from their wrongdoing by the fact that a judge in the primary litigation had incorrectly found in the defendant's favour at first instance, even though the decision was later corrected on appeal. It is difficult to see why the happenstance of that error should deny a claimant the damages to which they would otherwise be entitled had the claim been correctly decided at first instance.

147. I am also satisfied that, as a matter of law, the court's decision as to whether a litigant did or did not have reasonable or probable cause to issue the proceedings is a decision which must be made based on the facts and circumstances that existed at the time the proceedings were issued and which were known to the litigant. Applying an objective test to the circumstances as they existed, there either was or was not reasonable and probable cause for CSID to issue the proceedings. As was stated by Denning L.J. in *Tempest v. Snowden and Atkin L.J. in Herniman v. Smith*, the role of the judge is to first find out what facts were known to the prosecutor and then decide whether these amounted to reasonable or probable cause. Facts upon which the prosecutor did not act were held to be irrelevant. It follows that in a civil claim for abuse of the court's process the court will seek to establish the facts known to the plaintiff at the time they issued their proceedings and then objectively determine whether they had reasonable or probable cause to issue the proceedings. Facts as later established or which were unknown to the litigant have no part to play unless there is a claim that by continuing to maintain the proceedings the plaintiff acted without reasonable and probable cause. And, that is what actually happened in the present case, an approach which, in my view, impacted significantly on the manner in which the High Court judge approached a number of the core issues.

148. The claim advanced by DWW (see para. 21 and following of statement of claim) not only maintained that the commencement of the claim for VAT on the lease constituted an abuse of the court's process, but it also claimed that CSID's (i) maintenance of those proceedings (ii) its maintenance of the Arbitration proceedings (iii) its commencement of the proceedings to enforce the Arbitrator's award and (iv) its defence of DWW's challenge to same, each amounted to malicious prosecution of DWW.

149. Whilst DWW on this appeal confines its challenge to the High Court decision insofar as it relates to CSID's conduct in issuing the forfeiture proceedings including a claim for VAT, that was not its approach in the court below and for this reason the High Court judge is not to be faulted for engaging with all of what happened in terms of litigation between the parties after those proceedings were issued. He was clearly drawn into an analysis of the facts as they were known to CSID at varying stages of the primary litigation. An examination of those facts would have been unnecessary had the claim for abuse of the court's process been confined to the issuing of the proceedings rather than their subsequent maintenance and the efforts later made to enforce the Arbitrator's award.

150. It is abundantly clear from para. 27 of the High Court judge's judgment that he well recognised that in deciding whether CSID did or did not have reasonable or probable cause to issue the proceedings he was obliged to confine his consideration to the circumstances as they existed at the time that that step was taken. Thus, much of the criticism directed to his consideration of circumstances which post-dated the issue of the proceedings, was, in my view unwarranted.

B. Subsidiary basis for the Court's decision that CSID had reasonable and probable cause to issue the VAT proceedings

(i) Revenue Guidance – Views of the VAT community – Advice received by DWW

151. DWW submits that the High Court judge made a number of legal and evidential errors in concluding that CSID had reasonable and probable cause to issue the VAT proceedings. DWW submits that in so deciding it was not open to him to rely upon the documentation containing the guidance of Revenue because PwC well knew and CSID had been advised that such guidance was out of kilter with the Regulation. Furthermore, the High Court judge had wrongly imputed to CSID knowledge of certain materials and publications circulating within the accountancy profession at the time concerning the proper interpretation of Regulation 19, despite

the fact that there was no evidence to show it was aware of those materials. Further, DWW submits that the High Court judge impermissibly relied upon the advice which DWW had received from its own expert concerning the vatability of the lease, when those advices were also unknown to CSID at the relevant time. Thus, DWW maintains that the conclusion of the High Court judge that CSID had reasonable and probable cause to issue the proceedings, which was influenced by this evidence, must be seen as fundamentally flawed.

152. I am not satisfied that there is any real validity to the aforementioned submission for reasons I will now summarise.

153. First, in its email of the 19th June 2003, PwC enclosed for CSID's attention Revenue's *Notes for Guidance of Inspectors* and its booklet on *VAT and Property Transactions* concerning Regulation 19. Accordingly, it cannot be said that the High Court judge wrongly imputed knowledge of Revenue's interpretation of Regulation 19 to CSID when he concluded that it believed that as lessor it could choose any one of the three methods of valuing the lease and thus had reasonable and probable cause to issue the proceedings to recover VAT on the lease.

154. Second, whilst the High Court judge stated that he intended to detail all of the documentation referred to at para. 151 above, which he observed had been provided by CSID in support of its belief that it had a choice of three methods of valuing the lease, he did not proceed on the basis that CSID had, with the exception of the Revenue documentation, itself actually seen these published materials or was aware of the advice initially received by DWW from its own tax advisors concerning Regulation 19.

155. The High Court judge explicitly stated that the aforementioned evidence had been put forward to demonstrate that it was reasonable for PwC to conclude that, regardless of the wording of Regulation 19 and the existence of the Valuation Office Report, the lessor could choose any one of the three methods of valuing the lease and to that extent it added valuable support to Mr O'Rourke's evidence that the content of its advice to CSID had been to the effect that the lease was vatable.

156. I am fully satisfied from what the High Court judge stated at paras. 29, 33, 34 and 35 of his judgment that he well understood that he was being asked to consider this particular evidence as strongly favouring a finding that it was the *bona fide* professional opinion of PwC that CSID was entitled to charge VAT on the lease, and furthermore that this was, as a matter of fact, the professional advice transmitted to CSID.

157. That this evidence was clearly relevant to the High Court judge's consideration of a number of disputed issues relevant to the issue of reasonable and probable cause, cannot be doubted. These included:

- (i) whether it was in fact PwC's professional opinion that CSID was entitled to claim VAT on the lease;
- (ii) the import of the professional advice furnished to CSID by PwC concerning its entitlement to claim VAT on the lease; and
- (iii) what CSID understood that advice to be.

158. The fact that Revenue and other leading tax experts at the time were agreed with the professional opinion of PwC that, regardless of the wording of Regulation 19, the lessor could choose any one of the three methods of valuing the lease, lent significant support to the position proposed by CSID on each of these issues.

159. It is to be remembered that Mr O'Rourke's evidence was (i) that he *bona fide* believed VAT might lawfully be claimed on the lease (ii) that he had so advised CSID and (iii) had made clear that PwC's advice was in accordance with Revenue's opinion concerning Regulation 19. DWW, on the other hand, had challenged PwC's opinion as to the lawfulness of charging VAT on the lease and had maintained that the actual advice given was that the claim for VAT was in conflict with the wording of the Regulation and was therefore unlawful. Understanding that to be PwC's advice, CSID could not have believed it had reasonable and probable cause to issue the proceedings.

160. In light of that contest the High Court judge was entitled to consider how likely it was that PwC's opinion or advice would have been inconsistent with the views of other leading tax professionals at the time or with Revenue's own view of the relevant Regulation.

161. If DWW had been in a position to establish that PwC's professional opinion had been out of line with Revenue guidance and practice and/or had been contrary to the prevailing views of leading experts in the VAT community at the time, that evidence would have weighed in favour of DWW's contention that PwC never believed that VAT might lawfully be claimed on the lease and would have added force to its contention that PwC had never advised CSID that VAT could be lawfully claimed on the lease. Once satisfied that the *bona fide* opinion of PwC at the time was that VAT was lawfully chargeable and that this advice had been communicated to CSID, it was for the judge then to decide the weight to attach to these facts when deciding what CSID understood the position to be when it decided to sue to claim the VAT on the lease.

162. Furthermore, the High Court judge's reliance upon the aforementioned evidence was entirely logical and appropriate in light of DWW's submission that Regulation 19 could never have been understood to mean that the lessor could choose between any of the three methods for the purposes of valuing the lease. As the High Court judge correctly noted, it was easy with the benefit of hindsight and the judgment of Hardiman J. to so contend. However, what the evidence recorded in this section of the High Court judge's judgment demonstrated was that there was very weighty professional opinion at that time, including that of Revenue who after all was responsible for the implementation of the Regulation, which took the alternative professional view.

163. Accordingly, I reject the submission that, insofar as the High Court judge may have been influenced by this evidence when he came to consider the issue of reasonable and probable cause, his judgment should be considered flawed. The prevailing views of tax advisors at the time, including DWW's own advisors, and Revenue guidance as to the meaning of Regulation 19 were relevant to the High Court judge's assessment as to whether CSID subjectively believed it was entitled to claim VAT on the lease and whether objectively assessed, it had reasonable and probable cause to issue the proceedings.

(ii) CSID's failure to call witnesses who DWW maintained well knew that VAT could not lawfully be claimed in light of the Valuation Office Report

164. DWW is of course correct when it submits that as a matter of law a court is entitled to draw an adverse inference from the failure of a party to call a witness who is available to give evidence in relation to a fact in issue. In the present case, DWW submits that the High Court judge failed to have regard to its submission that adverse inferences were to be drawn from the failure on the part of CSID to call as witnesses Mr Thomas O'Reilly of PwC and Ms Magahy, Mr Dunne and Ms O'Donoghue, all members of the EST.

165. However, before addressing the facts which DWW maintains mandated the calling of those witnesses in this case, it is necessary to identify the circumstances which have been considered sufficient to warrant the drawing of adverse inferences.

166. The principles by which a court should consider a submission that an adverse inference be drawn due to the failure of a party to call a certain witness or witnesses are set out with particular clarity by the Court of Appeal in *Wisniewski v. Central Manchester Health Authority* [1998] Lloyd's Rep. Med. 223 where Brooks L.J. summarised the position as follows:

"(1) In certain circumstances the court may be entitled to draw inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.

(2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.

(4) If the reasons for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

167. The aforementioned principles have since been approved of in this jurisdiction by Laffoy J. in *Fyffes plc v. DCC plc* [2005] IEHC 477, and more recently by the Supreme Court in *Whelan v. AIB* [2014] IESC 3.

168. In *Fyffes*, the plaintiff alleged that the defendant had engaged in insider dealing in its shares. It submitted that the Court should draw certain inferences from the failure of the defendants to call a number of witnesses, including a stockbroker whom it maintained was a critical witness in relation to the question of whether the defendant had dealt in the plaintiff's shares.

169. In rejecting that submission Laffoy J. cautioned against an overbroad application of the principles laid down in *Wisniewski*, stating at p. 510 of her judgment that:-

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

170. In so stating, Laffoy J. emphasised the fact that the onus of proof in respect of the "dealing issue" in that case was on the plaintiff who was aware of the fact that the stockbroker concerned was in a position to give material evidence. Accordingly, he could have been subpoenaed by the plaintiff to give evidence, an approach which, she noted, had not been pursued. She went on to state that whilst she considered the approach of the plaintiff in this regard to be a legitimate tactical decision the same was to be said of the defendant's decision not to call the stockbroker. This relatively restrictive approach to the drawing of adverse inferences was also adopted by Hogan J. in *Leopardstown Club Ltd v. Templeville Developments Ltd* [2015] IECA 164, who stated at para. 108 of his judgment that the "starting point is that a court should generally be reluctant to draw an inference from a failure to call a witness".

171. Whilst it would undoubtedly have been more satisfactory had the High Court judge addressed the submission made by DWW in the court below that adverse inferences should have been drawn from the failure on the part of CSID to call a number of witnesses, parties to litigation need to understand that they cannot expect trial judges to address every submission advanced, particularly in lengthy and complex litigation such as this, where a myriad of arguments are advanced by each of the parties in support of their respective positions. In some instances, a decision on one point necessarily precludes success on a separate point. In those circumstances it is not necessary for a judge to address each and every argument advanced. Judges in general, but particularly those who are charged with deciding cases of the type under consideration here, carry out their role in extraordinarily pressurised circumstances. Unlike in many other jurisdictions, for the most part they are expected to write extensive and learned judgments concerning cases recently heard at a time when they are invariably presiding over yet another equally complex case. Thus, as counsel for CSID observed in the course of his submissions, trial judges routinely find themselves confining their judgments to the issues of law and fact which they consider critical to their conclusions. They cannot be faulted for failing to engage with every submission made by the parties, who must be content to receive a judgment which explains to them, in terms, the principal reasons why they were or were not successful in their litigation, as is explained in the judgment of Clarke J. in *Doyle v. Banville* [2012] IESC 25 at p. 25.

172. Having considered the lengthy and detailed judgment of the High Court judge in this case, I think it only reasonable to infer that in light of his primary findings of fact he considered it unnecessary to address this submission.

173. Whilst it may be considered inappropriate for this Court to posit any view on how the High Court judge might have addressed this issue, had he chosen to engage with it, it can be stated nonetheless with some certainty that in accordance with the prevailing principles to be applied he would have been obliged to reject DWW's submissions for reasons which I will now identify.

174. The burden of proof in this case was on DWW to prove an absence of reasonable and probable cause. Critical in this regard was its contention that CSID had been advised by PwC that it could not lawfully claim VAT on the lease and that it understood this to be the position at the time it issued its proceedings. I will assume for present purposes that DWW had made out a *prima facie* case in this regard, although I note the submission of CSID that the claim of DWW in this regard was no more than an assertion of the type deprecated by O'Donnell J. in *Whelan*.

175. It is important to record that this is not a case in which CSID called no evidence to displace the *prima facie* case which DWW maintains it established in the course of its evidence. CSID called a significant number of witnesses to deal with the core issues in the case, which included the nature of the advice furnished by PwC to the EST and Board of CSID and what was understood to be the import of that advice. In this respect the circumstances of this case are to be contrasted with those cases in which the evidence on some particular issue was exclusively held by a particular witness who was not called to give evidence, thus leading to an inference that had they been called they would not have been in a position to disprove the *prima facie* case.

176. Concerning the advice given by PwC to the EST and the Board of CSID, Mr O'Rourke, who was at all relevant times intimately involved in the giving of that advice, was called to give evidence. He was, as a result, subjected to a rigorous cross-examination not only in respect of his own advice but also in respect of the advice and understanding of Mr O'Reilly, who according to DWW did not share his view of Regulation 19, concerning CSID's entitlement to claim VAT on the lease. Material also in this regard is the fact that,

in circumstances where all of the discovery documentation pertinent to this issue was admitted into evidence without the necessity for formal proof, DWW was not only in a position to itself to rely upon the opinion and views of Mr O'Reilly as expressed in his emails but also to cross-examine Mr O'Rourke as to his opinion and the advice tendered based on those documents.

177. Furthermore, as was the case in the *Fyffes*, DWW was aware, particularly from the discovery documentation, that Mr O'Reilly was one of a number of members of PwC involved in advising CSID in relation to Regulation 19 and its entitlement to claim VAT on the lease. Thus, it was open to DWW to subpoena Mr O'Reilly to give evidence, albeit that there possibly were sound tactical reasons why such an approach was eschewed. Also, as was observed by Laffoy J., it is an equally legitimate tactical approach for a defendant not to call every single witness in relation to any particular issue. A party should not be left open to the risk of adverse inferences being drawn just because they do not call all of the witnesses their opponent would like them to call, particularly in a case such as the present one, which was to be both lengthy and costly. If parties felt exposed to such a threat the result would be that litigation would become even more lengthy and expensive and the court's scarce resources would be intruded upon to no useful purpose.

178. It is not only understandable but reasonable that parties should be entitled to choose to call who they consider to be their stronger witnesses on any particular issue. In this regard, I accept as valid the argument made by counsel on behalf of CSID that it was reasonable for his client to call witnesses of its own choosing in relation to each of the issues in the proceedings. It called evidence to prove the state of knowledge and understanding of PwC, the EST and the Board in relation to the entitlement of CSID to claim VAT on the lease. Relevant in this regard is the fact that Mr Conway, a member of the EST, gave evidence in the course of the High Court proceedings and was thus available to be cross-examined as to the knowledge of members of the EST concerning the advice of PwC and the reasons underlying any decisions which it had made.

179. Furthermore, four members of the Board of CSID were called to give evidence and were thus available for cross-examination as to their knowledge and understanding of the advice of PwC and the basis upon which the Board decided to commence the proceedings. Whilst not directly addressed by the High Court judge in the course of his judgment, it was strongly argued in the closing oral submissions in the High Court that it was only knowledge that the Board possessed at the time it decided to issue the proceedings that could be relevant to the issue of reasonable and probable cause. The company could not fall foul of the tort of malicious abuse of the court's process by reason of the independently held knowledge or state of mind of one or more of its employees or advisors. It must be the state of mind of the person or body who decides to sue, in this case the Board, which is material.

180. For these reasons, I am quite satisfied that, even if it be the case that DWW had made out a *prima facie* case that at EST level and/or at Board level it was understood that the claim for VAT was not in accordance with Regulation 19, and I note CSID's challenge to this proposition, no adverse inference could reasonably have been drawn by the High Court judge for the failure on the part of CSID to call witnesses such as Ms Magahy, Mr Dunne or Ms O'Donoghue, all members of the EST, to speak to their understanding of PwC's advice or to cast more light than the other aforementioned witnesses in relation to why the Valuation Office Report was not furnished to KPMG, DWW's advisors, in January, 2003 and their understanding of the lawfulness of the proposed claim for VAT.

181. In this regard, it is perhaps also relevant to note that that DWW might have, but did not, challenge the statement of evidence provided by Mr John Mulcahy of CSID wherein he advised (i) that he was satisfied that the advice from PwC was that VAT was chargeable on the lease, (ii) that as a member of the Board he had taken great comfort from Revenue approval of CSID's proposed approach and (iii) that at a board meeting on the 6th April, 2005 the Board had been advised that the Department for the Arts, Sports and Tourism, on the explicit advice of the Attorney General, had instructed that the claim for the unpaid VAT be included in the forfeiture proceedings. Neither had DWW seen fit to challenge the evidence of Mr Michael Walsh that (i) he understood the advice of PwC to be that VAT was chargeable, (ii) that it had never been suggested that there was any issue with PwC's advice and (iii) that CSID might have been pursuing a course of action contrary to the advice it had received or one which was doubtful. Both statements had been accepted without challenge.

182. Thus, I am satisfied that this is not a case where no evidence was called as to the advices furnished by PwC which would have denied DWW the opportunity of converting through cross-examination its *prima facie* case to actual proof.

183. Accordingly, whilst it would have been preferable that the sought-after inferences pursued by DWW were rejected explicitly by the High Court judge, his failure to do so does not in any way cast in doubt the validity of his conclusion that CSID had reasonable and probable cause to issue the VAT proceedings. In the context of this litigation which was heard over a lengthy period and in which very many issues of law and fact had to be determined, I have no doubt that the High Court judge is to be excused of this omission, given the clear primary findings of fact which he made in respect of the issues which it is alleged that these witnesses might have been expected to address had they been called.

(iii) Failure to engage with two emails

184. DWW submits that it is not evident from his judgment that the High Court judge had at all considered the content of two emails dated the 20th and 23rd December 2002 which it had relied upon to support its contention that PwC did not itself believe and consequently had not advised CSID that the latter might lawfully claim VAT on the lease.

185. DWW does not, however, contest the fact that in the course of his judgment, the High Court judge considered in significant detail three of the emails which it had relied upon for the purpose of demonstrating that CSID had no basis for believing that the lease was vatable and could therefore not have had reasonable and probable cause to issue the proceedings. They are dated the 27th November, 2002, the 28th November, 2002 and the 17th June, 2003 respectively, and are referred to with some degree of particularity at paras. 64-69 of this judgment. The content of these three emails, which the High Court judge considered in detail, is relevant to DWW's submission concerning the weight it maintains that the High Court judge impermissibly failed to attach to the two emails of the 20th and 23rd December, 2002.

186. I have already referred to these emails in some detail at paras. 65-68 of this judgment. Accordingly, suffice at this stage to summarise their content. In the first email, Mr Fay made clear that he was live to the fact that Regulation 19 provided that the method of valuing the lease proposed by CSID could only be used in "the absence of other evidence" as to value and that CSID had other evidence, namely the €35m. valuation in the Valuation Office Report. Nonetheless he went on to advise that Revenue in practice permitted such an approach. In the second, Mr O'Rourke had advised that whilst the methodology proposed by CSID was "not perfect" it should nonetheless prove acceptable. In the third, Mr O'Reilly had advised that the approach proposed represented extra statutory practice only and that "in strictness" CSID should use the €35m. valuation in the Valuation Office Report.

187. Moving to the evidence in the other two emails, the first email of the of 20th December, 2002 was sent by Mr O'Reilly to Mr Conway of CSID and copied to his PwC colleagues, Mr Fay and Mr O'Rourke. It reads as follows:-

"Dear David,

John will be available for the meeting on 9 January.

Valuation:

The correspondence from the Valuation Office detailing the valuation should not be given to DWW/KPMG in advance of the meeting.

The valuation used for the purposes of the Form VAT4A is based on the unencumbered rent determined by the Valuation Office and the multiplier provided for in VAT regulations, resulting in a capitalised value of circa €65M. The correspondence from the Valuation Office also shows a valuation of the lease of circa €35M which does not suit our requirements (i.e. it is not in excess of the build cost).

These matters can be discussed on the day of the meeting.

Regards

Tom [O'Reilly]"

188. The email of the 23rd December, 2002 was sent by Mr Fay to Mr Conway and was copied to Mr O'Reilly and Mr O'Rourke. It reads as follows:-

"David; further to your email on Friday I will be able to attend the proposed meeting on 9th Jan.

As you know we have traded voicemails with Clodagh Ní Eidhin in Dublin Castle; we will try and get to speak to her before the meeting with DWW given that if she accepts that FA2002 rules do not apply the valuation issue is not as sensitive. However, if she insists that FA2002 rules do apply we need to stick to our guns re the method of valuation we have used and as Feargal would have explained previously (see email of 29 Nov) our approach while in accordance, we believe, with Revenue guidelines is not "perfect" when read with the actual regulations. Will touch base early in the New Year. In the meantime happy Christmas to you and the team and best wishes for 2003.

Kind regards

John"

189. Much of what I have earlier stated regarding the obligations of a trial judge to deal with submissions made by the parties in complex litigation applies with equal force to this submission on the part of DWW that the trial judge failed to direct his attention to these two emails in the course of his judgment so as to demonstrate that he allocated appropriate weight to them. In my view, this criticism as a ground of appeal is one which is without merit.

190. This submission, I believe, must be considered in the context of a 20-day hearing in the High Court and an appeal in which the Core Book of Documents runs to some 423 pages made up of 136 entries. More than 50 such entries were referred to in the course of the appeal alone. In cases such as this, it cannot be expected that every document relied upon by one or other party will be addressed in the court's judgment, particularly where there is nothing unique or exceptional about the document. As can be seen from the content of the two emails, they relate to the same issues as were discussed in the emails of the 27th November, 2002 and the 28th November, 2002, which emails received significant attention.

191. Obviously, there are cases in which the failure of a judge to address a particular document might sound in a successful appeal and a retrial. Take for example proceedings defended on the basis that the claim was statute barred or that there was no evidence to satisfy the Statute of Frauds. In either case a single document might hold the key to the success or failure of the defence and if not addressed by the court might provide a sound basis upon which the court's judgment might be set aside. This is not such a case.

192. Furthermore, it cannot be assumed that the High Court judge did not consider the emails simply because he did not refer to them individually. It is unnecessary for me to second-guess why he might not have done so but, insofar as I might, it seems far more likely that the High Court judge simply chose to focus upon what he considered to be the highlights of DWW's evidence to support its claim that CSID well knew and understood from the advices received from PwC that its claim for VAT was not in accordance with law, and for these purposes had focused upon the three emails earlier discussed.

193. What is important is that the High Court judge made clear at para. 184 of his judgment that he was deciding DWW's claim, which he stated, as is correctly claimed, had focused upon the three emails earlier referred to, having regard to the evidence "in the round" (my emphasis). It was this approach that led him to conclude that "the advice received by CSID was to the effect that while the recommended approach was not perfect, in the sense that it could not be guaranteed that the interpretation by PwC would be upheld by a court, it was nonetheless PwC's professional advice that the lease was vatable". CSID understanding this to be the position, as was his conclusion, the High Court judge was satisfied that it had reasonable and probable cause to issue the proceedings.

194. As is clear from this particular paragraph of his judgment, the High Court judge accepted as a matter of fact that CSID had been told that what was proposed amounted to "extra statutory practice", was "not perfect" and that the result "could not be guaranteed". Even when taken at their height from DWW's perspective, these two additional emails add nothing new to the advices furnished. They traverse much the same ground as the three emails highlighted in the judgment and are consistent with the trial judge's findings. Accordingly, insofar as these emails are relied upon to prove the nature of PwC's advice, they raise nothing new. They do not say that the proposed claim for VAT is unlawful and are equally consistent with the professed entitlement of CSID to use the unencumbered rent formula for the purposes of claiming VAT on the lease.

195. I nonetheless recognise that DWW lays particular emphasis on the advice contained in the emails of the 20th and 23rd December, 2002 respectively to the effect that "the correspondence from the Valuation Office should not be given to DW/KPMG in advance of the meeting" and "we need to stick to our guns", as relevant to the failure of the High Court judge to address the evidence and submissions made on by DWW concerning what it maintained was the concealment of that report and its consequences for the issue of reasonable and probable cause. That being so, I have addressed this aspect of DWW's submission in the next section of this judgment.

196. Also of relevance to this issue is the fact that when the High Court judge came to his conclusion he clearly took into account the reservations expressed by PwC in the three emails earlier referred to and to which the emails of the 20th and 23rd of December, 2002 in my view add nothing. In the course of his judgment, he is seen to weigh this evidence in the context of (i) the entirety of the written advice furnished by PwC, (ii) the oral evidence of Mr O'Rourke as to the nature of that advice, and (iii) the oral evidence of the witnesses called on behalf of CSID and the content of the uncontested statements of evidence of Mr Walsh and Mr Mulcahy as to their understanding of that advice. It is, I believe, worth commenting on one or two aspects of that evidence.

197. Much of the documentary evidence relied upon by the High Court judge post-dated the emails now referred to and this is clearly relevant insofar as the test to be applied by the High Court judge required him to take into account all of the circumstances as they were known at the time the VAT proceedings were commenced. There was, I would observe, a lot of water that went under the bridge, so to speak, in terms of tax advice between the date upon which these two emails were written in December 2002 and when the proceedings were actually issued in April 2005. One such example is the formal letter of advice sent by Mr O'Reilly of PwC to Mr Donagh Morgan of CSID on the 19th June, 2003. In his letter he referred to Regulation 19 and the method adopted by PwC to determine the capitalised value of the lease. He stated that Revenue had specifically confirmed that the methodology used by CSID was satisfactory. Mr O'Reilly also confirmed that it had always been the practice that the lessor was entitled to choose which method it wished to adopt for the purpose of valuing the lease, supporting his advice by reference to the Revenue's booklet "*VAT and Property Transactions*" and its "*Guidance Notes for Inspectors*".

198. Even more fundamental to this issue are the findings of primary fact made by the High Court judge concerning the nature of the professional advice furnished by PwC to CSID in the run-up to the decision made by the Board to institute the proceedings for VAT, and those concerning CSID's understanding of that advice, findings made based upon the oral testimony of witnesses including Mr O'Rourke, Mr Benton, Mr Conway, Mr Morgan and Mr Haugh. Those findings are of course protected by the principles advised by McCarthy J. in *Hay v. O'Grady* given that they were manifestly supported by credible evidence. As MacMenamin J. advised in *Leopardstown Club Limited v. Templeville Developments Limited* [2017] IESC 50, a decision which I will consider in greater detail later in this judgment, when primary findings of fact have been made, the fact that there was other evidence inconsistent with those findings cannot dislodge the decision if the primary findings were based on credible evidence. If the complaint is that there was non-engagement with evidence that was inconsistent with findings of primary fact, the appellant must be in a position to show that there was "something truly glaring" about the default. For the reasons stated, I am quite satisfied that the trial judge's omission to deal with the two emails relied upon by DWW cannot be so described.

199. Finally, in the context of this ground of appeal and indeed the approach of DWW to many other aspects of this appeal, I consider it would be remiss not to refer to the salient observations of MacMenamin J. in *Leopardstown*, regarding the role of the appellate court. In particular he stated that an appellate court was not to be used as a forum for permitting what he described as:-

"a piece by piece analysis of the evidence, in an effort to show, on appeal, that the trial judge might have laid more emphasis on, or attached more weight to the evidence of one witness, or a number of witnesses, or one document, or a number of documents, rather than others on which he or she relied."

That is what is attempted by DWW in this aspect of its appeal.

200. For the aforementioned reasons, and for those referred to in the next section of this judgement, I reject the arguments advanced based on the emails of the 20th and 23rd December, 2002.

(iv) Non-engagement with evidence regarding the alleged concealment of the Valuation Office Report

201. In the High Court, a considerable part of the submissions of DWW was concerned with the argument that CSID had conspired to conceal the Valuation Report, which of course contained the open market valuation of the lease, from DWW. DWW emphasised that, despite multiple requests by Mr Moriarty on behalf of DWW, CSID refused to hand over the report. The submission of DWW is that the inference to be drawn from this conduct is that CSID knew it was obliged to use the open market valuation of the lease, and that same would render no VAT chargeable on the lease and so they hid the valuation from DWW who, once they knew of its existence, would be in a position to insist on their legal entitlement to have it used. In this respect DWW relies upon the oral testimony of Mr Conway, Mr Benton and Mr Morgan of CSID to the effect that they understood themselves to have been advised by PwC that they should not hand over the report as it did not suit CSID's purposes. If this inference were to be drawn, DWW submits that it would demonstrate that CSID did not, at the relevant time, believe that VAT was properly chargeable on the lease, and thus did not actually believe it had reasonable and probable cause to initiate proceedings.

202. On appeal, DWW submits that this argument, notwithstanding the reliance placed on it by counsel in the High Court, was not addressed by the High Court judge in his judgment. Counsel for DWW argues that the assumption that this Court must draw from such omission is that the High Court judge simply did not consider the evidence in relation to it. It is argued that this evidence goes directly to the state of mind of CSID at the time of the decision to initiate proceedings, and thus to the question of whether it actually believed that it had reasonable and probable cause to take that decision. DWW submits that the failure of the trial judge to engage with this evidence renders his finding that CSID believed that VAT was chargeable on the lease, and thus that it had cause to bring proceedings, unsafe. In circumstances where it maintains that a central finding grounding the decision of the trial judge cannot stand, DWW submits that a retrial is warranted.

203. In response, CSID first submits that any question about the subjective belief which it held as to the viability of its proceedings is an issue which goes only to malice, and not to the absence of reasonable and probable cause. Given that the High Court judge decided the case in its favour on the basis of reasonable and probable cause, he was under no obligation to consider the issue of malice. Accordingly, any question regarding the belief of CSID about the prospects of its litigation did not fall for consideration and the High Court judge did not err in neglecting to advert to it in his judgment.

204. The essential argument of CSID is that the subjective belief of the alleged malicious prosecutor/claimant about their intended litigation forms no part of the test for reasonable and probable cause. The test is objective, based on the information which was before the party at the relevant time. As argued in CSID's written submissions to this Court:

"in order to establish a want of reasonable or probable cause, it is not enough to demonstrate that the defendant was aware (or keenly aware) that his case was problematic, or even seriously problematic: if a reasonable man faced with the same information as the defendant would have considered that there was a proper case to lay before the court, then reasonable and probable cause exists".

205. This interpretation of the law would appear to be consistent with the decision in *Dorene*, the leading Irish case on the issue. At p. 318 of his judgment in that case, Costello J. stated that the test for want of reasonable and probable cause was an objective one,

and in that respect he quoted from the judgment of Denning L.J. in *Tempest v. Snowden* [1952] 1 K.B. 130, p. 138-140, in the following terms:

"In my opinion in order to determine the question of reasonable and probable cause, the judge must first find out *what were the facts as known to the prosecutor*, asking the jury to determine any dispute on that matter and then the judge must ask himself *whether those facts amounted to reasonable and probable cause*. In *Herniman v. Smith* 9 [1938] A.C. 305, Lord Atkin put it quite clearly: 'The facts upon which the prosecutor acted should be ascertained; in principle, other facts on which he did not act appear to be irrelevant. When the judge knows the facts operating on the prosecutor's mind, he must then decide whether they afford a reasonable or probable cause for prosecuting the accused.'" (emphasis added).

206. Accordingly, it appears that the test for want of reasonable and probable cause proceeds in two steps. First, the court must ascertain the facts as known to the prosecutor/plaintiff; second, there must be an objective assessment as to whether those facts gave rise to grounds for reasonable and probable cause. This view is supported by the recent decision of the UK Supreme Court, *Willers v. Joyce* [2016] U.K.S.C. 43, wherein Toulson L.J. stated that, in order to defeat an allegation of want of reasonable and probable cause, "[i]t is enough that, on the material on which he acted, there was a proper case to lay before the court."

207. As a matter of logic, it seems to follow that in applying this test for want of reasonable and probable cause the High Court judge was justified in not considering the question of the subjective belief of CSID. He was entitled to consider the information that CSID had before it at the time it initiated proceedings, and assess objectively whether that gave rise to reasonable and probable cause. In other words, it was not necessary for the High Court judge to inquire as to what CSID in fact believed about whether it had cause to initiate proceedings, what was relevant was whether the facts as known to CSID would have led the reasonable man to the conclusion that they had such cause.

208. Indeed, continuing the quotation by Costello J. in *Dorene* of Denning L.J.'s judgment in *Tempest v. Snowden*, it becomes clear that this is the very conclusion that was reached:

"If these facts [operating on the mind of the prosecutor] do afford reasonable and probable cause, then the prosecution is justified, and it is not as a rule necessary for an inquiry to be made into the prosecutor's belief. The state of his belief goes to malice but not, as a rule, to reasonable and probable cause. This view is supported by the observations of the Lord Chief Justice in the recent case of *Tims v. John Lewis & Co.* 7 [1951] 2 K.B. 459. : 'The question whether there was a reasonable or probable cause is not, I think, to be determined subjectively, as has been suggested. It is a question which objectively the court has to decide on the evidence before it.' It is sometimes said that, in order to have reasonable and probable cause there must be an honest belief in the guilt of the accused. But I do not think that should be regarded as a universal proposition applicable to all cases. It depends on the particular case . . . I do not say, of course, that the prosecutor's belief can never come into the question of reasonable and probable cause. If the prosecutor believed that the man was innocent and preferred the charge simply as a means of inducing him to pay over money to him, there would be no reasonable and probable cause for the prosecution . . . Apart from exceptional cases . . . I think it right to say that, when once the facts as known to the prosecutor are ascertained, the state of his belief goes only to malice, and not to reasonable and probable cause."

209. Further, it seems to me that the exclusion of subjective belief from the test for want of reasonable and probable cause is consistent with the fact that malice is a separate ingredient to the tort. At the hearing before this Court, counsel for DWW advanced the proposition that the test for malice would be satisfied where the prosecutor/plaintiff could be shown not to have believed that he had reasonable and probable cause to bring the proceedings. At the same time, it seeks to maintain that a lack of actual belief will be fatal to the issue of reasonable and probable cause. However, if both of these propositions are true, then the subjective belief of the prosecutor would be decisive in two purportedly separate parts of the test. Therefore, a party could be guilty of the tort of malicious abuse of the court's process solely based on their subjective beliefs about the litigation, quite apart from its actual merits. In this understanding, a person with a perfectly good case to lay before the courts could be found to have committed the tort on the basis of their mistaken belief about the viability of the grounds. Such a result is starkly at odds with the fact that the test for reasonable and probable is described throughout the case law as an objective test. The approach which DWW take on this point comes close to requiring CSID to positively prove its subjective belief in the validity of the proceedings – if the test for want of reasonable and probable cause were understood in the manner for which it contends, in what way could it be considered an objective test?

210. Denning L.J. was alive to this contradiction at p. 5 of his judgment in *Tempest v. Snowden*, where he provided the following illustration, in a criminal context:

"Take a prosecutor, a fair-minded man, who... does not himself think the evidence is sufficient to justify a prosecution. His solicitor advises him that the evidence is sufficient. He may well say to himself: 'I do not myself believe there is sufficient evidence, but my solicitor says there is, so I feel justified in going on.' If the judge afterwards takes the same view as the solicitor, I should have thought that such a man would have reasonable and probable cause for instituting a prosecution, even though he did not himself affirmatively believe there were reasonable grounds for it."

211. It seems to me the correct view that a person should be entitled to bring litigation so long as there is reasonable and probable cause in the objective sense. Or, to put it another way, they should not be barred from bringing litigation which they personally do not believe in, so long as there are in fact reasonable and probable grounds for it. As it was put by Denning L.J. in *Tempest*:

"It has to be remembered that, even though a prosecutor is actuated by the most express malice, nevertheless he is not liable so long as there was reasonable and probable cause for the prosecution. If envy, hatred, malice and all other uncharitableness do not deprive him of this defence, I do not see why his state of belief should necessarily do so."

212. Admittedly, the picture is complicated somewhat by the decision of the House of Lords in *Glinski v. McIver* [1962] A.C. 726, to which both parties have made reference. In the leading judgment in that case, Viscount Simonds held that the question of want of honest belief was relevant to that of want of reasonable and probable cause. For my part, I find that pronouncement difficult to square with the professedly objective nature of the test. It is a contradiction in terms to say that a test that mandates an inquiry into the subjective beliefs of a party about the grounds for their litigation is an objective test. In this respect it is to be noted that, although in *Glinski* four detailed judgments were handed down on the subject of the tort of malicious prosecution, no reference was made to this case in the leading Irish case of *Dorene v. Suedes*.

213. Even if it were the case that *Glinski* is good law in this jurisdiction, I would observe that it could provide only limited assistance to DWW. First, it is notable that in his judgment Viscount Simonds saw fit to distinguish the case where a prosecutor believes the

facts and is advised that they amount to an offence but is not himself sure of the latter which is a question of law. In circumstances where the prosecutor at every step acted upon competent advice, the learned judge stated that he would find it difficult to hold that he had acted without reasonable and probable cause. Albeit in a civil context, were the circumstances in which CSID was found to have acted not the same? The High Court judge clearly found that CSID had been advised that VAT was chargeable on the lease. At its height the submission of DWW is that an inference should be drawn from the conduct of CSID to the effect that it did not itself believe in the proceedings. However, as I shall discuss further below, there was no real evidence that CSID actively believed that the proceedings were not viable, merely that it was unsure about the prospects of its claim such that it was unwilling to hand over the valuation the potential subject matter of dispute. In these circumstances I would think it open to the High Court judge to find that the advice CSID received was decisive as to the question of reasonable and probable cause. It is to be remembered that the burden of proof at all times remained with DWW to positively establish that CSID did not have reasonable and probable cause to commence the VAT proceedings. It is evident that it failed to convince the High Court judge that, notwithstanding the evidence regarding the advice of PwC, there was a question to be answered regarding the subjective belief of CSID.

214. Second, and in further support of the above, the judgment of Denning L.J. in *Gliniski* is to be noted insofar as he states that "the question and answer as to 'honest belief' should not be used in every case", consistent with the views he had earlier expressed in *Tempest v. Snowden*. Whilst he acknowledged that it might be possible to infer from the conduct of the prosecutor that he was conscious that he had no reasonable and probable cause for the prosecution, and that same would mean he that indeed he did not have such cause, he was anxious to caution at p. 762 of his judgment that such cases "must be carefully watched so as to see that there really is some evidence from his conduct that he knew it was a groundless charge". It must be questioned whether the evidence adduced by DWW could ever have proved that CSID knew, in the words of Denning L.J., that it had "no good ground" for the proceedings.

215. This standard is to be starkly distinguished from a standard which would require CSID to positively believe that the litigation would succeed. Stateability is the appropriate standard for reasonable and probable cause, in which respect counsel for CSID relied upon the Irish case of *Bank of Ireland Finance Ltd v. McSorley* [1994] WJSC-HC 2085. Even if the High Court judge had accepted the evidence tendered by DWW in respect of the alleged concealment of the Valuation Office Report, it is doubtful that this could have ever proved that CSID did not believe that it had a stateable case. Whilst the fact, if accepted, that it kept the open market valuation from DWW might go to show that it was not absolutely certain that VAT was chargeable on the lease, it could never have established that CSID knew it had no grounds to seek to enforce the charge. At its height, it demonstrates that CSID may not have been sure that it was entitled not to use the open market valuation and that in order to avoid that risk it decided to postpone as long as it could, handing over the Valuation Office Report to Mr Moriarty. However, crucially, it cannot be inferred from these actions that CSID knew the proposed litigation to claim VAT on the lease was groundless, which is the standard required. Further, given that at the time the Valuation Report was held back there was a dispute brewing in respect of the chargeability of VAT, it is perhaps not surprising that CSID was reluctant to hand over a valuation which would have weakened its case. Whilst some might view this conduct as a form of "sharp practice", it was nonetheless wholly insufficient for the purposes of establishing that CSID did not believe it had any case to lay before the courts, especially in circumstances where the High Court judge found that it had been advised that the lease was vatable.

216. It appears to me that in effect DWW is attempting, on this appeal, to bring subjective belief through the back door into the question of reasonable and probable cause. It was unable to persuade the High Court judge that CSID had been advised that it had no cause to enforce the VAT charge. Instead he found that CSID had been advised and had believed that it had reasonable and probable cause for commencing its proceedings to recover VAT on the lease. To defeat this, DWW relies upon email exchanges with Mr Moriarty, from which it has asked the Court to infer that CSID knew it had no reasonable and probable cause. However, the evidence does not go that far. At best it cast some doubt upon how certain CSID was that it would succeed in its claim for VAT on the lease. It is quite another thing to say that it showed that CSID knew it had no claim to make and it is rather speculative to suggest that the High Court judge should have concluded that from the evidence that was put before him.

217. Relevant in this regard is the fact that the burden was on DWW to prove want of reasonable and probable cause. It is apparent from the High Court judgment that DWW failed to persuade the trial judge of the key elements of its case. He reached clear conclusions as to the nature of the advice tendered by PwC to CSID and as to what CSID understood that advice to mean. It was open to DWW to make the case that CSID did not believe it had good grounds to commence its proceedings to recover VAT on the lease. However, it failed in its efforts to displace the assumption that CSID had reasonable and probable cause for that litigation. Even taking the authorities at their most favourable to DWW and accepting that subjective belief could be relevant to reasonable and probable cause in some cases (though Denning L.J. stresses that it does not come into play in all cases), nonetheless it was for DWW to convince the High Court judge that its submissions in respect of the Valuation Office Report should go to reasonable and probable cause. From the absence of this argument in the High Court judgment it can be inferred that the High Court judge was not convinced that said submissions had any purchase with respect to reasonable and probable cause.

218. In the preceding paragraphs I have proposed that a party's subjective belief as to the stateability of litigation is not relevant to the question of reasonable and probable cause, and that further or in the alternative the submissions highlighted by DWW could not prove that CSID believed that it did not have a stateable case. However, even if I am wrong about all of this, I am in any event satisfied that the finding that the High Court judge made regarding the subjective belief of CSID was a finding of fact which should not be disturbed on appeal.

219. The essence of DWW's argument on appeal is that the finding of fact made by the High Court judge that CSID actually believed it had reasonable and probable cause is endangered by the way in which he approached the evidence. In relation to this submission I intend first to detail some of the legal principles which I consider material to my conclusions and then to apply them to the circumstances of this case.

220. In *Delany and McGrath on Civil Procedure* (4th ed., Round Hall, 2018), the authors explain at p. 903 that, for the purposes of appellate jurisdiction, a special importance is to be attached to what are described as "findings of primary fact". These are, as defined by Henchy J. in *JM v. An Bord Uchtála* [1987] I.R. 510, 522-523, "determinations of fact depending on the assessment of the trial judge of the credibility and quality of the witnesses". Such findings are to be distinguished from findings of secondary or inferred facts, which do not follow directly from an assessment of the credibility of the witnesses or the weight to be attached to their evidence, but derive from the inferences which a judge draws from the facts found or admitted.

221. Consistent with the well-established notion that a trial judge is best placed to observe and assess oral evidence, the case-law demonstrates that an elevated level of deference is paid to findings of primary fact when reviewed by an appellate court. (See for example decision of Finlay C.J. in *Pernod Ricard & Comrie plc v. FFI Fyffes plc*) (Supreme Court, 11th November 1988.)

222. In the often-cited case of *Hay v. O'Grady* [1992] 1 I.R. 210, McCarthy J. summarised the principles applicable to a review of

evidence on appeal as follows:

"1. An appellate Court does not enjoy the opportunity of seeing and hearing the witnesses as does the trial Judge who hears the substance of the evidence but, also, observes the manner in which it is given and the demeanour of those giving it. The arid pages of a transcript seldom reflect the atmosphere of a trial.

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

3. Inferences of fact are drawn in most trials; it is said that an appellate Court is in as good a position as the trial Judge to draw inferences of fact... I do not accept that this is always necessarily so. It may be that the demeanour of a witness in giving evidence will, itself, lead to an appropriate inference which an appellate Court would not draw. In my judgment, an appellate Court should be slow to substitute its own inference of fact where such depends upon oral evidence of recollection of fact and a different inference has been drawn by the trial Judge. In the drawing of inferences from circumstantial evidence, an appellate tribunal is in as good a position as the trial Judge."

223. That is not to say that findings of fact are considered unassailable. In *Wright v. AIB Finance and Leasing Ltd.* [2013] IESC 55, Clarke J. made clear that findings of fact could be disturbed where there had been "a material and significant error in the assessment of the evidence or a failure to engage with a significant element of the evidence put forward". In *Doyle v. Banville* [2012] IESC 25, Clarke J. stated that a judgment must engage with the key elements of the case made by both sides and explain why one or other side has been preferred. In that case, a retrial was ordered in circumstances where the trial judge had accepted the evidence of two witnesses in full notwithstanding that they gave contradictory evidence on a matter of central importance. Likewise, a retrial was ordered in *Lynch v. Cooney* [2016] IECA 1 in circumstances where the trial judge was found to have failed to engage fully with the evidence. In the context of an unsuccessful claim by a victim of assault against the trustees of a rugby club which was the alleged site of the assault, Hogan J. held that the failure of the trial judge to analyse or explain how the assault occurred if not in the rugby club was itself an error of law justifying the intervention of the Court of Appeal to set aside the finding of fact that the assault had occurred outside the premises. In a similar vein, the Supreme Court in *Healy v. Ulster Bank* [2015] IESC 106 held that the failure of the trial judge to address the evidence of an important witness, which contradicted his finding on a key issue of fact, was a material and significant error.

224. Of course, in the above cases the errors of the respective trial judges in engaging with the evidence had grave consequences for the validity of their overall findings, and it should be clear that not every such error would be considered "material and significant". In *ICDL v. The European Computer Driving Licence Foundation Ltd.* [2012] IESC 55, it was pointed out on appeal that the trial judge had in his judgment mistakenly referred to the evidence of a witness who had furnished a witness statement but not actually been called to give evidence, and had stated that the witness statement of another witness who had given evidence had been withdrawn. Nonetheless, the Supreme Court refused to remit the case for a retrial in circumstances where it was satisfied that these errors had not led to a "substantial error" in the conclusion reached by the trial judge such as might warrant a new trial.

225. Useful guidance as to the circumstances in which errors in engagement with evidence will negate findings of fact was provided in a case which was the subject of a great part of the oral submissions of counsel for both parties in the instant case, that of *Leopardstown Club Ltd. v. Templeville Developments Ltd.* [2017] IESC 50. In that case, Denham C.J. in finding that the Court of Appeal had exceeded its jurisdiction in allowing an appeal against the order of the High Court, held that the principles in *Hay v. O'Grady* were properly understood as meaning that "an appellate court should not interfere with a primary finding of fact by a trial court which has heard oral evidence, unless it is so clearly against the weight of the evidence as to be unjust." Explaining the line to be drawn regarding the failure of a trial judge to engage with evidence, MacMenamin J. in his concurring judgment at paras. 7-8 stated as follows:

"Save where there is a clear non-engagement with essential parts of the evidence, therefore, an appeal court may not reverse the decision of a trial judge, by adverting to other evidence capable of being portrayed as inconsistent with the trial judge's primary findings of fact.

'Non-engagement' with evidence must mean that there was something truly glaring, which the trial judge simply did not deal with or advert to, and where what was omitted went to the very core, or the essential validity of his findings. There is, therefore, a high threshold. In effect, an appeal court must conclude that the judge's conclusion is so flawed, to the extent that it is not properly 'reasoned' at all. This would arise only in circumstances where findings of primary fact could not 'in all reason' be held to be supported by the evidence... 'Non-engagement' will not, therefore, be established by a process of identifying other parts of the evidence which might support a conclusion, other than that of the trial judge, when there are primary facts, such as here. Each of the principles in *Hay v. O'Grady* are to be applied."

226. As adverted to at the outset of this section, DWW's argument is that the alleged failure of the trial judge to engage with the evidence concerning the Valuation Office Report undermines the credibility of his finding that the relevant persons in CSID actually believed that VAT was chargeable on the lease and thus that they believed they had cause to initiate proceedings. The issue as to the state of mind of the directors of CSID with respect to the legality of the VAT charge was examined by the trial judge at paras. 90-96 of his judgment in a section entitled "Evidence by members of the EST and directors of CSID regarding advice received".

227. In this section, the trial judge first quoted from the oral evidence of Mr Michael Walsh, a non-executive director of CSID, who said that he "always understood PwC's advice to be that VAT was chargeable". The trial judge noted that this evidence was "not controverted by DWW". Next, the trial judge placed reliance on the likewise uncontroverted evidence of Mr Mulcahy of CSID that he did not have any reason to doubt that VAT was chargeable on the lease, as he understood the advice of PwC to mean. Finally, the trial judge considered the evidence of Mr Conway of CSID and concluded at para. 96 that "on Mr. Conway's own evidence he was aware of the dichotomy between the practice and the law, [and] he understood PwC's advice was that the Lease was nonetheless vatable."

228. From the foregoing it is clear that the trial judge was of the view that the directors of CSID understood the advice of PwC to mean that VAT was chargeable on the lease and believed that that advice was true. Thus, having considered the oral evidence of the directors, what emerges from a plain reading of the judgment is that the trial judge accepts their evidence that they believed that they had reasonable and probable cause to initiate proceedings to enforce the VAT charge on the lease.

229. Although the argument that CSID had deliberately concealed the open market valuation because it knew that it was obliged to use it did not receive mention in the High Court judgment, which is regrettable, it is implicit in the finding of the trial judge to the

effect that CSID believed that VAT was lawfully chargeable on the lease that he did not accept that argument. Quite clearly, given that he found that the relevant persons in CSID believed that VAT was chargeable, he could not have given any credence to the suggestion that they had hidden a valuation on foot of a belief that it legally precluded them from charging VAT. The trial judge had the opportunity to hear all of the evidence in relation to the alleged concealment of the open market valuation due to lack of belief in the VAT charge, in particular the exchanges between CSID and Mr Moriarty in respect of the disclosure of the Valuation Report, and in the end produced a conclusion that was fundamentally inconsistent with that version of events.

230. The question for this Court on appeal is really: to what extent did the failure to engage with this argument go to the essential validity of the finding that CSID actually believed in the lawfulness of the VAT charge?

231. In answering this question, the first thing to note is that, once it is understood that the trial judge accepted the evidence of CSID that it believed VAT was chargeable, it becomes rather easy to explain the nature of the exchanges between CSID and Mr Moriarty. It is worth remembering that the key contention of DWW is not merely that CSID deliberately withheld the open market valuation of the lease, as this argument alone would avail it nothing. The crux of its argument is that CSID withheld the valuation because it did not believe the VAT charge was valid. But of course, as the trial judge found it did believe in the VAT charge this places an entirely different colour on the highlighted correspondence.

232. In other words, the key dispute between the parties was and is not whether CSID in effect withheld the valuation from Mr Moriarty, but its *state of mind* when it did so. In particular, did it do it because it knew that it would be required to use that valuation and that this would in turn negate its ability to charge VAT? When the question is framed this way, it becomes clear that the trial judge has, in effect, already decided this question. He has clearly accepted that CSID's state of mind was not such that it did not believe in the validity of the VAT charge. That being so the exchanges with Mr Moriarty are much less significant than is contended for by DWW. If CSID genuinely believed it was entitled to charge VAT, any unwillingness to hand over the open market valuation would likely be understood as a reluctance to assist the company with whom it was trading in seeking to resist this charge. This is hardly an alien practice to anyone who has worked in business. CSID did not have to be certain that VAT was chargeable. It was enough that it reasonably believed that it was chargeable, and at that level of certainty it is understandable why it might not wish to give Mr Moriarty and DWW ammunition with which to fight the proposed imposition of VAT.

233. All this is said merely to demonstrate that, if the trial judge's finding regarding the state of mind of CSID remains valid, his failure to reach a conclusion as to why he considered the Report had been withheld cannot afford DWW an independent ground of appeal. So understood, the evidence regarding the withholding of the Report, and the non-engagement with same, is only useful to DWW insofar as it undermines the credibility of the trial judge's finding regarding the belief of CSID. The mere exclusion of an account of the otherwise motivations of CSID in withholding the report is alone not sufficient to undermine the essential validity of that finding – more narrowly, the question must be whether the failure of the trial judge to consider how the alleged concealment actually went to the state of mind of CSID renders his finding on that issue so flawed as to be unreasoned.

234. Before considering this question, it is worth pausing for a moment to consider the circumstances in which a failure to engage with evidence has been determined sufficiently fatal to the credibility of a finding of fact in the case-law. In *Doyle v. Banville*, the failure to engage with evidence which was identified by the Supreme Court was not a neglect to mention particular evidence as in this case. In *Doyle*, the trial judge had made a finding in the context of a road traffic accident that the defendant's car had not dragged the plaintiff as a result of the crash, which was a finding of great significance because the position of the plaintiff subsequent to the crash otherwise had the effect of absolving the defendant from blame. However, the trial judge had purported to accept in full the evidence of a witness which included evidence that the plaintiff had been dragged by the defendant's car, in direct contradiction to the trial judge's finding. Accordingly, it was found that the trial judge's finding regarding whether the plaintiff had been dragged a distance by the car was deemed the result of clearly flawed reasoning, and a retrial was ordered. In *Lynch v. Cooney*, as discussed above, the material error was the failure of the trial judge to consider how the assault might have occurred outside the rugby club if it did not occur inside it. In essence the finding on appeal was that whereas the trial judge had determined that the assault did not occur on the premises, he had not examined properly the evidence as to whether it happened outside, and thus the determination regarding location was incomplete. In *Healy v. Ulster Bank*, the trial judge found that the plaintiff's mother was present for discussions which were the subject of the key dispute and that she had heard the relevant bank official say that the plaintiff was "in the clear with Ulster Bank". However, the trial judge proceeded to reject the plaintiff's account of the meeting with no reference to the evidence that the bank official had in fact assured the plaintiff that he was in the clear. This was found by the Supreme Court to be a "material and significant error".

235. I am of the view that the error of the trial judge in the present case is not of the order described above. While it was undoubtedly undesirable that he did not explicitly consider the bearing that the exchanges with Mr Moriarty had on the state of mind of the CSID directors, it cannot be said that this omission renders his determination regarding their state of mind so flawed as to be unreasoned. In the above cases, the findings of fact interfered with were fatally undermined by the respective errors. In *Doyle*, the trial judge accepted evidence which was fundamentally contradictory to the finding. In *Lynch*, the trial judge failed to reason out the finding in relation to the location of the assault. In *Healy*, the trial judge made reference to the evidence of a witness who was present at the material time and undermined the bank's core case, but made no finding in relation to same.

236. In stark contrast, what remains in this case is a finding of fact in relation to the state of mind of the directors of CSID which is supported by a wealth of credible evidence. The core logic of the trial judge was that the advice of PwC was that VAT was lawfully chargeable, that CSID understood the advice as such, and that they therefore believed the VAT charge on the lease was valid. Thus, in essence, DWW's argument, in relation to the withholding of the report, even if correct, does not avail them on this appeal.

237. To what extent does the failure to engage with DWW's argument regarding the concealment of the open market valuation negate this core logic? Perhaps not as far as DWW has suggested. Its evidence in relation to concealment is one of several sources of evidence which go to the state of mind of CSID at the relevant time. As explained above, the evidence as to the exchanges with Mr Moriarty concerning the Valuation Office Report are not per se inconsistent with the trial judge's finding of actual belief. It is only the allegation that CSID was of a particular nefarious state of mind when engaging in this correspondence that is material. And insofar as that allegation is concerned, it clear that there was other evidence regarding the state of mind of CSID which was preferred by the trial judge. As I have discussed, the trial judge in his judgment examined the evidence of the CSID directors as to their beliefs regarding the legal validity of the VAT charge at the material time, and came to the conclusion that their evidence was credible.

238. Whilst it is true that CSID's efforts to withhold the Valuation Office Report from DWW suggests at least some lack of confidence in the validity of its claim for VAT on the lease and to that extent might be seen to be in conflict with the ultimate finding of the trial judge, these facts are not sufficient to dislodge his findings. It is required that failure to consider the contradictory evidence is material in the sense that it renders the finding *not properly reasoned*. So, in *Healy*, the issue was that it was not clear why the trial judge had come to the conclusion that the plaintiff's account of the meeting was not credible. In such circumstances the failure to

consider evidence from someone present at the meeting was material. In contrast, in this case, the train of logic employed by the trial judge is clear. He came to the conclusion that the directors of CSID genuinely believed the advice of PwC to the effect that VAT was chargeable on the lease, and *as a consequence of that* he does not consider that the exchanges with Mr Moriarty carry the inference of guilt that DWW says they do. Again, admittedly it is the case that the trial judge should have explicitly expressed his rejection of that desired inference. But, on appeal, the question for this Court is whether his neglect to do so is material in the sense that it renders his finding not properly reasoned. And to that question I would answer in the negative.

239. It is worth emphasising again that the trial judge had the benefit of observing in person all of the oral evidence, including the demeanour of the witnesses, in order to determine their credibility. It is clear to me, although perhaps imperfectly expressed in his judgment, that the trial judge preferred evidence to the effect that the directors of CSID believed that VAT was lawfully chargeable. Significant deference ought to be paid to this reasoned conclusion. I find myself in agreement with the comments of MacMenamin J. in *Leopardstown Club Ltd. v. Templeville Developments Ltd.*, where he held that the role of an appellate court was not to be:

"9. reduced to a piece-by-piece analysis of the evidence, in an effort to show, on appeal, that the trial judge might have laid more emphasis, or attached more weight, to the evidence of one witness, or a number of witnesses, or one document, or a number of documents, rather than others on which he or she relied.

10. The trial judge's major role is to determine facts. To that extent, the role must have a degree of autonomy. With experience in fulfilling that role, there comes expertise. As has been pointed out in other jurisdictions, duplication of the trial judge's assessments by an appeal court will very likely only contribute negligibly to the accuracy of fact determination, but at significant cost in the diversion of judicial resources. Parties to a case on appeal have already concentrated their energies and resources on persuading a trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. A trial on the merits should be 'the "main event" ... rather than a "tryout on the road.'" (See the judgment of White J., speaking for the Supreme Court of the United States, in *Anderson v. City of Bessemer*, 470 U.S. 564 [1985], page 574/575).

11. By virtue of sitting through the entire case the trial judge will be familiar with the evidence. The insight gained by a trial judge, who has lived with the case for several days, weeks or even months, may be far deeper than an appeal court, whose view of the case is much more limited and narrow, often being shaped simply by the issues which are placed before it. As the Supreme Court of Canada pointed out in *Housen v. Nikolaisen* [2002] 2 S.C.R. 235, at paragraph 14, appeals are necessarily 'telescopic'."

240. For this and all of the above reasons, the finding of the trial judge that CSID believed they had reasonable and probable cause for the proceedings should be upheld.

241. To summarise my findings on this issue, the evidence in relation to the alleged concealment of the Valuation Office Report was evidence regarding the subjective beliefs of CSID about the litigation, which is a question going only to malice and not to reasonable and probable cause, which is tested objectively, and so the High Court judge would have been justified in not considering it. In any case, the evidence proffered could never have proved that CSID did not even believe its litigation to be stateable. Finally, even if subjective belief is relevant to reasonable and probable cause, the High Court judge addressed that question in his judgment and arrived at a reasoned conclusion, which should not be disturbed on this appeal notwithstanding that he did not make mention of the highlighted argument in his judgment.

242. In coming to these conclusions, it does not escape my attention that much confusion on appeal could have been avoided had the High Court judge made explicit mention of the argument advanced by DWW in that Court. Notwithstanding my finding on appeal that the High Court judge was not obliged to examine the subjective beliefs of CSID about the litigation, it would have been to the benefit of both parties if this rationale had been made explicit in his judgment. Further, to the extent that he did go on to consider at least to some extent the subjective belief of CSID, it would have been preferable for him to have made mention of the argument in relation to alleged concealment, if only to reject it in favour of the other evidence on which he legitimately chose to place weight. As I have explained, the High Court judge's findings can be upheld based on the principles in *Hay v. O'Grady*, however it is far from ideal that this Court become engaged in disputes about the logic and reasoning employed by a judge in the court below, after the fact. Although I have clearly found that the neglect to make reference to this argument does not endanger the still reasoned conclusion of the High Court judge, it is further important that, within reason, the judgment in any case, but especially one where a great deal is at stake for the parties, serves to provide them with a relatively comprehensive explanation as to why the case was decided the way it was. And in this respect, I think it is to be regretted that this argument did not receive some discussion in the High Court judgment.

(v) Internal inconsistency in judgment - dichotomy between law and practice

243. DWW submits that there is an internal inconsistency in the High Court judge's judgment such that it casts in doubt the validity of his conclusion that CSID had reasonable and probable cause to maintain its claim for VAT on the lease.

244. To understand this submission, it is necessary to have regard to what was stated by the High Court judge at paras. 99 and 184 of his judgment:-

"99. It was clear therefore that CSID, both at board level and at EST level, was aware that there was a dichotomy between what Regulation 19 stated and the practice, but it is also clear that Mr. O'Rourke's evidence is that it was PwC's advice to both the board of directors and the EST that the Lease was vatable...

184. For the sake of completeness, this Court would add that if it had to determine that issue, it would conclude that when viewed in the round (i.e. not just the three emails which have been the focus of the plaintiff's case), the advice received by CSID was to the effect that while the recommended approach was not perfect, in the sense that it could not be guaranteed that the interpretation taken by PwC would be upheld by a court, it was nonetheless PwC's professional advice that the Lease was vatable. In addition, it received advice from McCann Fitzgerald that it was arguable that DWW was legally obliged to accept CSID's decision that the Lease was vatable and advice from Counsel that the claim for VAT should be included in the proceedings before the Commercial Court for the forfeiture of the Lease. While it is true that Mr. O'Reilly, a relatively junior employee in PwC referred in an email to reliance being placed on 'extra-statutory practice' which email was sent to Ms. Magahy and Mr. Conway, it is also the case that Mr. Fay, the partner in the firm who was advising on VAT, stated in another email to Ms. Magahy and Mr. Conway in the most unequivocal terms that 'there is no basis for KPMG/Dublin Waterworld to contend that the lease is not subject to VAT.' This, it should be noted, is a long way from a situation in which a client proceeds with his litigation, even though he is told in unequivocal terms that his claim 'would not succeed' as occurred in *Dorene v. Suedes*. Therefore, if the Court had to decide the case on this basis, which it does not have to, it would conclude that CSID had reasonable or probable cause for issuing the proceedings in this

case.”

245. It is submitted that on the one hand the High Court judge found as a fact that PwC’s advice to the EST and the Board of CSID was that the lease was vatable. Yet, he had also found that at EST and Board level there was an awareness of the dichotomy between Regulation 19 and Revenue practice. It followed from the latter finding, according to DWW, that the trial judge was bound to conclude that the advice of PwC had been understood to mean that the proposed claim was contrary to law. This is because the reference to Regulation 19 had to be understood to be a reference to the law and, when read as such, meant that the claim proposed, whilst one that might have met with Revenue approval, was in fact unlawful. Given that CSID was aware of this dichotomy, it could not have believed that the lease was vatable.

246. Accordingly, it is contended that the evidence did not support the trial judge’s finding that PwC had advised that the claim for VAT on the lease was in accordance with law. This finding was, according to counsel for DWW, the result of his “wholesale failure” to engage with the evidence. PwC had done no more than suggest that as a matter of practice such a claim would not be challenged by Revenue. Indeed, DWW goes so far as to submit that “the learned trial judge has himself confused the import of the PwC advice. There was no evidence PwC ever said the lease was vatable at law”.

247. The first matter of import in relation to this submission, in my view, is that it ignores that the trial judge’s finding that it was PwC’s advice to CSID that the lease was vatable, was a primary finding of fact. In so concluding the High Court judge had clearly relied upon the credibility of the evidence of Mr O’Rourke which, as he observed, was consistent with the opinion of other VAT professionals at the time. Mr O’Rourke, when under cross examination, as is referred to in para. 97 of his judgment, had stated as follows:-

“Our advice was that the taxpayer had the option – had the alternative of selecting any of the three options available to him. And that, certainly in my view, was consistent with the law, both the VAT Act itself and indeed the import of the anti- avoidance legislation that was brought in.”

248. Furthermore, there was a swathe of other documentary evidence which lent support to the High Court judge’s finding that Mr O’Rourke’s advice to CSID was that the claim for VAT under Regulation 19 was lawful. I will mention but a few:

(i) Letter of advice from PwC to CSID dated the 11th September, 2002, advices which pre-dated the Valuation Office Report.

(ii) Email of the 6th January, 2003 from Mr Fay to Mr Conway. This email post-dates the Valuation Office Report but states that PwC remains of the view that CSID may use the alternative basis proposed for valuing the lease.

(iii) Email of Mr Fay of the 31st January, 2003 to Mr O’Rourke and Mr Conway stating that there was no basis for DWW to contend that the lease was not subject to VAT.

(iv) Email dated the 30th April, 2003 from Mr Fay to Ms Magahy, Mr O’Rourke and Mr O’Reilly stating that they were purporting to value the lease using one of the three permissible methods under the Regulation. No distinction was drawn between the Regulation and Revenue practice for this purpose.

(v) Email dated the 14th May, 2003 from Mr O’Rourke to Mr Conway, Mr Dunne, Ms Magahy, Mr Fay and Mr O’Reilly. The email, which does not concern itself with Revenue guidelines or practice, queries, *inter alia*:-

“Have the lawyers advised as to *how* we can proceed with WW for the VAT due?”

I think the Revenue are really out of the loop now as far as we are concerned. They agreed that VAT should be charged and the methodology is as provided by law, so they really have no further role to play in this.” (my emphasis)

(vi) Formal VAT report of 13th June, 2003. This report maintains that the lessor has the option of the three methods for valuing the lease for the purposes of the Regulation.

249. It was not, in my view, inconsistent with his finding as to the nature of the advice given to CSID for the trial judge also to have found that CSID, at EST and Board level, was aware that “there was a dichotomy between what Regulation 19 stated and the practice”. That was, after all, the evidence. Indeed, the meeting proposed by Mr. Lonan McDowell of McCann FitzGerald in his email of the 17th June, 2003 arose precisely because of that dichotomy. Mr McDowell, in that email referred to that which had earlier been circulated by Mr O’Reilly and which had pointed to the possibility that a difficulty might arise as a result of difference between tax practice and the legislation which he considered, needed “to be worked through and understood before steps were taken to enforce recovery of the VAT”.

250. In my view, it does not follow from the High Court judge’s finding concerning CSID’s knowledge of the dichotomy between the wording of Regulation 19 and Revenue practice that he was bound to conclude that PwC had advised CSID that its claim was contrary to law or that CSID understood this to be the position. The High Court judge was entitled to accept Mr O’Rourke’s evidence that at the meeting of the 25th June, 2003 he had explained to those present the divergence between the language of the Regulation and Revenue practice but had nonetheless advised he was satisfied that the lease was vatable. In other words, he was content to accept Mr O’Rourke’s evidence that he had explained to CSID that while the success of the proposed claim could not be guaranteed, it was nonetheless one which he considered to be in accordance with law. Likewise, I am satisfied that he was entitled to conclude that regardless of the dichotomy between the wording of the Regulation and the practice of Revenue, as had been explained by Mr O’Rourke, CSID understood the advice of PwC to be that its proposed claim for VAT was lawful.

251. Whilst DWW contends that the trial judge’s finding as to CSID’s knowledge of the dichotomy between the Regulation and Revenue practice was only consistent with its understanding that the advice of PwC had been that the intended claim for VAT was unlawful, that submission is not supported by the evidence.

252. The unchallenged evidence of Mr. Mulcahy was that he was satisfied from the advice of PwC that VAT was chargeable. The statement of Mr Michael Walsh was also not challenged. He too understood that VAT was chargeable on the lease and he stated that the EST had confirmed that this approach was correct. As far as he was concerned, it had never been suggested that there was any

issue that CSID might be pursuing a course of action contrary to the advice it had received or that that advice was doubtful. Furthermore, Revenue had approved the methodology which, he was satisfied, meant the lease was subject to VAT.

253. Furthermore, Mr Benton, in his evidence, stated that Revenue had advised and confirmed that CSID was entitled to charge VAT and if it had advised otherwise that VAT would not have been charged. He also stated that he understood PwC's advice to be that, notwithstanding the Valuation Office Report, VAT was nonetheless chargeable.

254. DWW maintains that the trial judge ought to have found CSID guilty of the tort of malicious abuse of the court's process because, having been apprised of a difference between the wording of a complex tax regulation and the prevailing practice of the Revenue and other tax professionals at the time, it failed to appreciate that its proposed claim was unlawful and as a result jettison the advice of PwC that its proposed claim, which had at least been informally endorsed by its lawyers following the meeting of the 25th June, 2003, was lawful.

255. Whilst the advice of PwC and the practice of Revenue and other tax professionals at the time was ultimately established to be legally incorrect, the High Court judge was satisfied that that was not obvious at the time the proceedings were issued, as was apparent from the evidence of the wider VAT community which clearly considered that the Regulation permitted the approach advised by PwC. Clearly, the dichotomy should not have existed and Revenue should not have been operating outside of the Regulation. However, it is beyond doubt that PwC was led into error by Revenue practice and it was not on its own in this regard. Its professional opinion was mirrored in the approach of other tax experts at the time including those who had initially advised DWW.

256. Accordingly, it cannot in my view be successfully contended that just because the High Court judge concluded that CSID had been apprised, in what can only be described as pretty opaque terms, of a possible legal obstacle to its claim for VAT at the same time as it was being advised by PwC that it was entitled to claim VAT on the lease, he was bound to conclude that CSID knew, as Mr O'Moore S.C. submits, that the law didn't allow VAT to be imposed and that their claim was "going to hit that reef" but they had decided nonetheless to go ahead. If CSID understood its claim was going to "hit a reef and fail", why would it have decided to commence the claim for VAT? Whilst not crucial to the outcome of this appeal, I note that at no stage in the course of the High Court proceedings did DWW go so far as to even hint at the existence of a potential ulterior motive in an effort to explain why, as it maintained, CSID would have chosen to ignore what is claimed to have been the clear and explicit expert advice it had received to the effect that its claim for VAT on the lease would fail in light of the immense repercussions in terms of costs and professional reputation that such an approach would as matter of certainty follow such an approach.

257. I am accordingly satisfied that it was perfectly open for the trial judge to make each of the findings that he made at paras. 99 and 184 of his judgment and that these are not inconsistent with each other. There was nothing inconsistent with his conclusion that CSID knew of the dichotomy between the Regulation and Revenue practice but nonetheless reasonably understood the advice of PwC to be that it was entitled to claim VAT on the lease.

General concluding observations

258. It is easy, armed with the benefit of the judgment of Hardiman J. to say that Regulation 19 could never have been interpreted other than in the manner therein set forth. But if this was so obvious at the time the proceedings were commenced to recover VAT on the lease, why did DWW not apply to dismiss that claim as one which was bound to fail based upon what it now states is such a clear interpretation of the Regulation? Why did DWW instead apply to remit the claim to arbitration?

259. It is understandable perhaps that DWW did not seek to counter claim for malicious prosecution as was done in *Dorene v. Suedes*, once the proceedings issued, given that it maintains that it was not until it obtained disclosure of the advices received by CSID from PwC that it considered it had sufficient evidence to establish the tort of malicious abuse of the court's process, but it could have applied to dismiss that aspect of the claim as related to VAT on the lease as bound to fail. Neither did those representing DWW demand, as had been done in the *Dorene* case, that the claim be withdrawn on the grounds that it simply could not succeed. Instead, the claim was treated as one which was arguable and merited the determination of a tax expert, hardly the actions of a party who believed the claim to be without prospect of success.

260. Having reviewed in some detail the evidence put before the High Court and the submissions of the parties before that Court and this Court on the appeal, I am satisfied that the facts of the present case could hardly be further from those in *Dorene* where clear legal advice had been obtained that the claim was unstateable and where, in light of the *lis pendens* which had been registered, the High Court judge was content to conclude that the proceedings were being used for completely improper motive, namely to ensure that *Suedes* could not sell their premises and might, as a result, be forced to deal favourably with *Dorene*.

Conclusion

261. Whilst I am satisfied that the High Court judge erred in law when he concluded that DWW's claim must fail because of the decision of the Arbitrator and the High Court (Gilligan J.) in the primary litigation, I am nonetheless satisfied that his alternative basis for rejecting DWW's claim, namely that it had not established that CSID did not have reasonable and probable cause to issue the proceedings, cannot be faulted in any material respect.

262. In concluding, as he did, that DWW had not discharged the requisite burden of proof, the High Court judge did not, as alledged, reach his decision based on an incomplete and erroneous assessment of the evidence. In particular, he did not take an impermissible approach to documentation emanating from the Revenue Commissioners evidencing its interpretation and practice concerning Regulation 19. Neither did he do so in respect of the documentation and materials which highlighted the considered opinion of tax professionals at the time as to their understanding of Regulation 19.

263. As explained earlier, trial judges cannot be expected to address each and every issue or submission advanced by parties, particularly in the context of lengthy and complex litigation. Neither can they be expected to direct their judgment to each and every document relied upon by either party. Unless it can be shown that the failure of a trial judge to address his or her mind to an issue, submission or document gravely casts in doubt the validity of their findings and/or conclusions, the appellate court should not interfere with the judgment so delivered.

264. Thus, I am satisfied that the failure of the High Court judge to address with particularity DWW's submission that the deliberate withholding of the Valuation Office Report from DWW until after the commencement of the within proceedings does not cast in doubt the judgment of the High Court judge. The findings of fact made by the High Court judge that CSID had been advised by its tax advisors and furthermore believed when it issued its proceedings for VAT that its claim was lawful was supported by credible evidence. Furthermore, those findings were in large part made on foot of the trial judge's assessment of the credibility of the relevant witnesses or on the basis of unchallenged witness statements, and as such are protected by the principles that emerge from *Hay v. O'Grady*.

265. For similar reasons, I reject the claim of DWW that the conclusions of the High Court judge are fatally undermined by his failure to consider in detail the emails of the 20th and 23rd December, 2002 or by his failure to formally rule upon its submission that adverse inferences be drawn from the failure on the part of CSID to call a number of identified witness.

266. Neither is there merit in the claim that the High Court judge fell into some fatal error when, for the purpose of determining if CSID had reasonable and probable cause to issue the VAT proceedings, he attached weight to the fact that the claim had been supported by CSID's solicitors.

267. I also see no merit in DWW's submission that there was a fatal inconsistency in the trial judge's determination that CSID had reasonable and probable cause to issue the proceedings in light of his finding that both at EST level and board level, CSID was aware of the dichotomy between the Revenue practice and the strict wording of the Regulation.

268. Finally, I am fully satisfied that objectively assessed, as is the test to be applied when considering the issue of reasonable and probable cause, the evidence overwhelmingly favoured a conclusion that the reasonable actor in the shoes of CSID would have considered it had reasonable and probable cause to issue the VAT proceedings. It would in my view have been perverse had the trial judge, on the evidence and in particular having regard to his primary findings of fact, reached any other conclusion, regardless of CSID's knowledge of the dichotomy between the strict wording of the Regulation and Revenue practice and/or the possible consequences for its claim by reason of the valuation contained in the Valuation Office Report. As to the subjective belief of CSID in the lawfulness of its claim for VAT, that is an issue relevant only in my view to malice rather than reasonable and probable cause, although if I am wrong about that the trial judge's finding in respect of the belief of CSID is one based, *inter alia*, on primary findings of fact which are in any event protected by the *Hay v. O'Grady* principles.

269. For all of the reasons earlier identified in this judgment, I would dismiss the appeal.