Neutral Citation No: [2020] NICA 45 *Judgment: approved by the Court for handing down* *(subject to editorial corrections)**	*Ref:* **McC11325** *ICOS No:* **11/120672/A02** *Delivered:* **07/10/20**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM

THE HIGH COURT OF JUSTICE, CHANCERY DIVISION

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BETWEEN:

PAUL JAMES GILROY

Defendant/Appellant;

-and-

FRYLITE LIMITED

Plaintiff/Respondent.

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Before McCloskey LJ, Horner J and Keegan J

Representation

Appellant: In person

Respondent: Mr Brian Fee QC and Mr Michael Egan of counsel, instructed by Pinsent Masons Solicitors

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McCloskey LJ (delivering the judgment of the court)

Introduction

[1] This is the unanimous judgment of the court. Paul James Gilroy ("*the Appellant*"), who is self-representing, was the Defendant in the first instance

proceedings and is the Appellant before this court. Frylite Limited ("*the Respondent*") was his former employer and the Plaintiff at first instance. The Appellant appeals to this court against the decision and Order of Madam Justice McBride which upheld the Respondent's action based on breach of a specific contract, breach of a service agreement and breach of the Appellant's contract of employment and awarded damages of £40,855, plus interest, against the Appellant.

[2] The stand out feature of this appeal is that it entails, fundamentally, a challenge to the trial judge's findings of fact. This is identifiable in the opening two sentences of the Notice of Appeal (verbatim):

> "*I have went through Madam McBride's written judgment and found a number of the facts she has raised are incorrect. I have noted each fact as per her written judgment and added my points of dispute …*"

This theme is echoed throughout all that follows in this formal document.

The Appellate Court's Constraints

[3] Given the foregoing, the nature of the appeal which this court is required to determine engages certain well-established principles. The governing legal principles were rehearsed *Kerr v Jamison* [2019] NICA 48 at [35] – [36]:

> ***"Governing Principles***
>
> *Some basic dogma must be recognised at this juncture. This is not a court of first instance. It is rather an appellate court. The adjectives perverse, irrational and aberrant have a legal grounding, being traceable to a series of principles to be derived from the decided cases. The jurisdiction of the Court of Appeal to review findings of both fact and law is clear. See for example Ulster Chemists v Hemsborough [1957] NI 185 at [186] – [7]. Where invited to review findings of primary fact or inferences the appellate court will attribute weight to the consideration that the trial judge was able to hear and see a witness and was thus advantaged in matters such as assessment of demeanour, consistency and credibility: see for example Kitson v Black [1976] 1 NIJB at 5 – 7. The review of the appellate court is more extensive where findings are made at first instance on the basis of documentary and/or real evidence. However even where the primary facts are disputed the appellate court will not overturn the judge's findings and conclusions merely because it might have decided*

differently: White v DOE [1988] 5 NIJB 1. The deference of the appellate court will of course be less appropriate where it can be demonstrated that the first instance judge misunderstood or misapplied the facts. See generally Northern Ireland Railways v Tweed [1982] 15 NIJB at [10]–[11].

…

There is a valuable exposition of the role of this court in Heaney v McAvoy [2018] NICA 4 at [17]–[19]:

> *'[17] Generally an appeal is by way of rehearing. The rehearing is conducted by way of review of the trial, including any documentary evidence, and the trial testimony is not re-heard. In most appeals the hearing consists entirely of submissions by the parties and questions put to the parties by the judges. New evidence is not generally admissible unless it can be shown that it is relevant and that the evidence could not with reasonable diligence have been brought before the original trial.*
>
> *[18] The Court of Appeal is entitled to review findings of fact as well as of law but the burden of proof is on the appellant to show that the trial judge's decision of fact is wrong. On a review of findings made by a judge at first instance, the rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The first instance hearing on the merits should be the main event rather than a try-out on the road to an appeal.*
>
> *[19] Even where factual findings and the inferences drawn from them are made on the basis of affidavit evidence and contemporaneous documents without oral testimony, the first instance judgment provides a template and the assessment of the factual issues by an appellate court can be a very different exercise. Impressions formed by a judge approaching the matter for the first time may be more reliable than*

> *the concentration on the appellate challenge to factual findings. Reticence on the part of the appellate court, although perhaps not as strong where no oral evidence has been given, remains cogent (see DB v Chief Constable [2017] UKSC 7)'."*

The judgment continues at [20]:

> *"The foregoing principles are clearly of material significance in this case. The trial judge had the advantage of hearing the oral evidence of the appellants on the Tomlin Order issue. He considered the appellants to be both unreliable historians eager to mould the facts to their objective as opposed to telling the unvarnished truth. He gave examples in respect of the Order that they said the Court of Appeal had made and the alleged admission by their former solicitor that he was guilty of misrepresentation. There is no indication that the judge did not take all the circumstances surrounding the evidence into account, that he misapprehended the evidence or that he had drawn an inference which there was no evidence to support. In light of the judge's conclusions we see no basis upon which we could interfere with his refusal to set aside the Tomlin Order."*

[4] The foregoing approach was applied in a more recent decision of this court, *Herron v Bank of Scotland* [2018] NICA 11 at [24] and features consistently in this court's jurisprudence. This court's formulation of the correct approach in *Heaney v McAvoy* took cognisance of the guidance contained in *DB v Chief Constable of PSNI* [2014] NICA 56 at [78] – [80]. There Lord Kerr stated at [80]:

> *"The case for reticence on the part of the appellate court, while perhaps not as strong in a case where no oral evidence has been given, remains cogent."*

In *Re B (a Child)* [2013] 1 WLR 1911 Lord Wilson said at paragraph [53]:

> *"... where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was one (i) which there was no evidence to support; (ii) which was based on a misunderstanding of the evidence; or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it."*

[5] The principles outlined above are of notable pedigree and longevity. In *Kinloch v Young* [1911] SC (HL) 1, Lord Loreburn stated at p 4:

> *"Now, your Lordships have very frequently drawn attention to the exceptional value of the opinion of the Judge of first instance, where the decision rests upon oral evidence. It is absolutely necessary no doubt not to admit finality for any decision of a Judge of first instance, and it is impossible to define or even to outline the circumstances in which his opinion on such matters ought to be overruled, but there is such infinite variety of circumstances for consideration which must or may arise, and it may be that there has been misapprehension, or that there has been miscarriage at the trial. But this House and other Courts of appeal have always to remember that the Judge of first instance has had the opportunity of watching the demeanour of witnesses – that he observes, as we cannot observe, the drift and conduct of the case; and also that he has impressed upon him by hearing every word the scope and nature of the evidence in a way that is denied to any Court of appeal. Even the most minute study by a Court of appeal fails to produce the same vivid appreciation of what the witnesses say or what they omit to say."*
>
> ….

In *Onassis v Vergottis* [1968] 2 Lloyds Rep 403 Lord Pearce, delivering the leading speech of the House of Lords, having dilated on the trial judge's task of assessing credibility and demeanour in making findings of fact, continued at p 431:

> *"One thing is clear, not so much as a rule of law but rather as a working rule of common sense. A trial Judge has, except on rare occasions, a very great advantage over an appellate Court; evidence of a witness heard and seen has a very great advantage over a transcript of that evidence; and a Court of Appeal should not interfere unless it is satisfied both that the judgment ought not to stand and that the divergence of view between the trial Judge and the Court of Appeal has not been occasioned by any demeanour of the witnesses or truer atmosphere of the trial (which may have eluded an appellate Court) or by any other of those advantages which the trial Judge undoubtedly possesses."*

[6] Omrod LJ later made the following contribution to the issue of witness demeanour, in the context of discussing the system of oral trial:

> "*As a method of communication it is very complex involving not only what is actually said but how it is said. Inflexions in both questions and answers may be highly significant and demeanour, not only of the witness, but of others may be revealing.*"

[Judges and the Process of Judging, Jubilee Lectures 07 March 1980.]

Some six decades previously Lord Shaw had elaborated on this in these terms:

> "*Witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid left an impression upon the man who saw and heard them which can never be reproduced in the printed page.*"

(*Clarke v Edinburgh Tramways* [1919] SC (HL) 35 at page 36.)

The topic of the conduct, manner, bearing, behaviour, delivery and inflexion of a witness has two unifying themes in particular. First, none of these features is discernible in a transcript of what the witness actually said. Second, none of them is otherwise capable of replication before an appellate court.

[7] To paraphrase, reticence on the part of an appellate court will normally be at its most compelling in cases where the appeal is based to a material extent on first instance findings based on the oral evidence of parties and witnesses.

The case against the Appellant

[8] By the Statement of Claim, as amended, the Respondent made the case that the Appellant had acted in breach of three separate agreements executed between the parties, namely the "Business Sale Agreement" ("BSA"), the "Service Agreement" and his contract of employment. Within these agreements were restraint of trade clauses. The case against the Appellant was that he had acted in breach of these contractual provisions. The key averment is found in the following pleading:

> "*In or about November 2010, notwithstanding the terms of* [both agreements], *the* [Appellant] *established a business called Grease Co Limited which carried on business … in direct competition to the Plaintiff's business and diverted the Plaintiff's customers and business to Grease Co Limited from that*

> *date until the date of his dismissal and continued to operate and control Grease Co Limited until 28 October 2011 by order of the court* he was prohibited from doing so until the end of the restricted period on 25 March 2012."*

[*a reference to the initial interlocutory injunction made by this court]

The Respondent claimed to have sustained financial losses of some £500,000 in consequence.

[9] At a stage when the Appellant was legally represented a Defence and amended Defence were served on his behalf. These pleadings consisted of a series of denials, coupled with the assertion that a third party with whom both the Appellant and the Respondent had both had certain contractual business dealings had induced the Appellant by misrepresentations to enter into the first of a series of relevant agreements. The restrictive covenant forming the cornerstone of the Respondent's case against the Appellant was denied.

[10] As summarised in the Respondent's skeleton argument, the case against the Appellant was, fundamentally, based on breaches of:

(i) A restrictive covenant contained in clause 12(8) of a 2006 agreement assigned to the Respondent in 2010; and

(ii) Clause 5 of a separate agreement executed in tandem with the first agreement in 2006 which contained a similar restraint of trade covenant.

The period of the Appellant's breaches of these contractual obligations was said to be March 2010 to March 2012. The Appellant's employment with the Respondent having commenced on 26 March 2010 he was dismissed on 19 September 2011. This was the trigger for the commencement of these proceedings and an almost immediate interlocutory injunction made on 28 October 2011. With the exception of sporadic pleadings the proceedings were largely dormant thereafter until the substantive trial at first instance began on 08 April 2019, concluding on 08 January 2020 following some staggered hearing dates.

Trial and judgment

[11] The course of the trial is readily ascertained from the judgment of the trial judge, delivered on 02 April 2020. In brief compass:

(a) Evidence on behalf of the Respondent was given by a total of six witnesses, who included three of its employees.

(b) The Appellant was the sole witness on his own behalf.

(c) In addition to the agreements noted above the documentary evidence included certain email exchanges.

(d) There was also documentary evidence (letters *et al*) relating to the disciplinary proceedings initiated by the Respondent against the Appellant and the Respondent's dismissal. This evidence included a report compiled by a private investigator, one of the aforementioned six witnesses, in September 2011.

[12] The judge evaluated each of the Respondent's six witnesses in turn, in the following way, in summary:

(i) The judge declined to give significant weight to certain important parts of the evidence of Eamon McKay, while rejecting other parts outright.

(ii) The judge declined to attribute significant weight to the evidence of George McKay relating to the Appellant's alleged breaches of agreement. On the other hand, the judge accepted this witness's evidence that the Respondent was concerned about lost customers and reduced collections of the relevant materials arising from competition and that weekly sheets documenting the migration of customers from the Respondent to Grease Co were prepared and presented at weekly meetings.

(iii) The third of the Respondent's witnesses, Robert Behan, was assessed by the judge as "*very straightforward and credible*". Based on this evidence the judge made a series of specific findings which were adverse to the Appellant.

(iv) The judge accepted the evidence of James Arnold, a lorry driver employed by the Plaintiff, as true, simultaneously assessing that it qualified for no weight.

(v) The judge accepted the unchallenged evidence of the fifth witness, John Condon, author of the private investigator's report, giving rise to certain specific findings adverse to the Appellant.

(vi) The judge diagnosed a series of shortcomings in the evidence of the independent forensic accountant who testified on the

Respondent's behalf, based mainly on what were considered to be deficiencies in the instructions and materials provided to him by the Respondent.

[13] As noted the seventh and final witness who testified at the trial was the Appellant. In common with certain other witnesses he had sworn an anterior affidavit. The judge's assessment of the Appellant's evidence was, in summary, the following:

(a) It was "*vague, evasive, unclear and confusing in many respects*".

(b) In cross examination he made a series of "*significant concessions*".

(c) The explanation which he proffered for his receipt of an invoice from a competitor of the Respondent was "*incredible*".

(d) His evidence in relation to the use of a specified industrial unit was "*completely unconvincing … completely implausible*".

[14] In the context of the foregoing the judge made a series of specific findings, which we need not rehearse. These findings favoured the Respondent and were adverse to the Appellant. The judge then made a series of identifiable conclusions, which were, fundamentally:

(i) The aforementioned industrial unit was rented by the Appellant and used by the competitor GreaseCo, so that the Appellant "*… is therefore in breach of the restrictive covenant as he is the owner and operator of GreaseCo*".

(ii) "*… on the basis of his own admissions … the* [Appellant] *frequently and flagrantly breached the restrictive covenant and the covenants in the Service Agreement. In his evidence he admitted that he worked with Cork Oils and Arrow Oils and he stated that he was entitled to act in this way knowing that it was in breach of the restrictive covenant and in breach of the Service Agreement*".

(iii) "*I am therefore satisfied on the basis of the* [Appellant's] *own evidence that he was acting in breach of his contract of employment, in breach of the Service Agreement and in breach of the restrictive covenant*".

[15] Next the judge returned to, addressing and answering, five specific questions which she had posed for the court in an earlier passage in her judgment:

(i) At [85] the judge reiterated her conclusion relating to the Appellant's breaches of contract.

(ii) At [86] the judge resolved the issue of assignment of the restrictive covenant in favour of the Respondent.

(iii) At [87] – [88] the judge concluded that the restrictive covenant in the APA had not been superseded and that the relevant contractual provisions embodying the restrictive covenants had not been superseded, waived or released by virtue of a specified email exchange.

(iv) At [90] the judge concluded that the restrictive covenants were not an unreasonable restraint of trade.

(v) The final issue considered by the judge was that of the quantum of damages, which she assessed at £40,855.

Consideration and conclusions

[16] As noted briefly at the outset of this judgment, the central and recurring theme of the Appellant's grounds of appeal is an attack on a series of findings made by the judge. This challenge is developed by reference to the Appellant's assertions relating to a series of events dating from the beginning of the relevant period. These events include multiple conversations which the Appellant claims to have had with others. He further describes his subjective beliefs and understandings and purports to account for those of others. He refers to a variety of documents, in particular the relevant agreements and certain emails. He disagrees with the judge's account of certain aspects of the evidence given by witnesses at the trial.

[17] In summary, by his grounds of appeal the Appellant seeks to reopen a raft of issues bearing directly or indirectly on those which formed the subject matter of the trial at first instance and the judge's findings and conclusions. It is not clear to this court whether the exercise undertaken by the Appellant in his grounds of appeal extends to evidence, documentary and otherwise, not given at the trial and it is neither appropriate nor, indeed, possible for this court to undertake the forensic process which would be required to determine this matter.

[18] At the hearing before this court the Appellant accepted the court's invitation to develop his grounds of appeal and proceeded to make such further oral submissions as he chose. The court, having considered the skeleton argument on behalf of the Respondent of Mr Brian Fee QC and Mr Michael Egan of counsel, together with what was in effect a detailed appendix thereto, did not require any oral submissions.

[19] The decision of Madam Justice McBride is a paradigm illustration of how a judgment should be constructed in a commercial case of this nature. It begins by addressing the essential elements of the pleadings in order to ascertain the central issues between the parties; this is followed by an account of the key documentary evidence; next the judge, based on the foregoing, identifies the core issues in dispute between the parties; in the next section of the judgment one finds a summarised account of all of the oral evidence received at the trial; at appropriate stages the judge clearly articulates specific findings of fact of direct relevance to the issues; the judge succeeds in observing the important discipline of separating findings of fact from ensuing conclusions; and the key conclusions follow.

[20] The judgment of the trial judge also exhibits certain other features of relevance to our determination of this appeal. In particular: the judge subjected the evidence of both parties to detached and critical analysis; clear reasons were given for rejecting those parts of each witness's evidence which the judge declined to accept; by the same token, the judge's acceptance of the evidence of witnesses was similarly explained; the judge's findings were clearly formulated and reasoned; and the conclusions which followed were also appropriately reasoned.

[21] The fundamental task for this court is to apply the governing principles rehearsed in [3] – [8] above to the judgment of Madam Justice McBride in the context of the grounds of appeal. Giving effect to these principles and having regard to our analysis and assessments in the preceding paragraphs we can identify no flaw in the judgment of a kind which would justify intervention on the part of this appellate court. The challenge mounted by this appeal resolves to an attack on a series of clearly formulated and properly reasoned findings based on the judge's assessment of the sworn testimony of seven witnesses which occupied several days of court time. This challenge ranges from the hopeless to the desperate. Properly exposed it is an attempt to conduct a rehearing, an appeal on the merits. Such an exercise lies outwith the competence of this court in an appeal of this *genre*. This, in summary, is a classic case for the application of the restraint and deference which are the hallmarks of the principles engaged. We identify no merit in any of the grounds of appeal, whether singly or in combination.

[22] Finally it is not clear whether there is a freestanding challenge to the judge's assessment of the quantum of damages. As already noted, whereas the Respondent was advancing a claim of, in round figures, some £500,000 the judge subjected this to a detailed critique and concluded that the amount recoverable was the substantially lesser sum of £40,855 and interest at the rate of 3% from the date of issue of the Writ. If and insofar as this appeal encompasses a challenge to this aspect of the judgment also, we consider it

manifestly unsustainable. We would add for the record, that there is no cross-appeal.

[23] The judgment of Madam Justice McBride exhibits one further feature which requires to be acknowledged namely the care, professionalism and patience which are habitually invested by judges in this jurisdiction in cases involving unrepresented litigants.

Omnibus Conclusion

[24] For the reasons given this court dismisses the appeal and affirms the judgment and order of the court below.