

THE HIGH COURT**[2002 No. 13328 P.]****BETWEEN****JOHN O'CONNELL****PLAINTIFF****AND****BUILDING AND ALLIED TRADES UNION, EDWARD MORRIS, PATRICK O'SHAUGHNESSY, MICHAEL MCNAMARA,****AND****CONSTRUCTION INDUSTRY FEDERATION****DEFENDANTS****Judgment of Mr Justice Ryan delivered the 17th July, 2014**

1. The plaintiff is a litigant in person who pursued and conducted this lengthy and complex litigation with determination and resourcefulness. He alleges that the Building and Allied Trades Union ("BATU" or "the Union") and its officials firstly deprived him of membership and then sought to prevent him from working because he was not in the Union, conduct that together or separately he claims to have been unlawful or unconstitutional. The plaintiff says that his capacity to earn a living was severely diminished as a result and the situation has continued from 2000 to date.

2. The plaintiff issued his plenary summons in 2002 against the Union and three officials. He applied to join the Construction Industry Federation ("CIF") as another defendant at a very late stage in the litigation process, claiming that it conspired with the other defendants to keep him out of work, and succeeded on appeal to the Supreme Court in a decision of June, 2012. He now seeks injunctions and damages. The defendants have filed full defences denying the plaintiff's claims and the CIF relies on the Statute of Limitations.

3. Mr Karl Sweeney, Barrister, appeared for the BATU defendants; Mr Mark Connaughton S.C. and Ms Lorna Lynch BL acted for the CIF.

4. Mr John O'Connell was born in Canada of Irish parents and came to live in Limerick in or about 1978 when he was in his twenties. He qualified as a blocklayer through AnCO and worked on building sites in the Limerick area. He joined the Ancient Guild of Incorporated Brick and Stonelayers, which later amalgamated with another union to become the Building and Allied Trades Union, the first defendant in the case.

5. Prior to amalgamation, the local representative of the Union in Limerick was the late Mr Jim Kemmy, sometime T.D. and long time trade unionist. Times were hard for building tradesmen in the 1980s with work in short supply. Mr O'Connell had a good relationship with Mr Kemmy, whom he held in high regard. He sometimes worked as a direct employee and at other times as an independent contractor under the Revenue Commissioners' C2 scheme. Although these arrangements were not in accord with union policy, Mr Kemmy took an indulgent view of them, understanding how hard it was for his members to make a living.

6. During the 1990s the plaintiff had to go abroad to get work and his Union dues fell into arrears and his membership may have lapsed. On his return in or about 1997, he again took up building work either as a direct employee or as a C2 independent contractor.

7. On the plaintiff's homecoming, he found a changed working environment in Limerick. There were new Union officials who had an uncompromising attitude on Union rules and were determined to enforce them. Following the establishment of BATU, and perhaps even before that happened, the Union began to impose a strict and even militant policy as to Union membership on building sites. There was to be no more free movement between direct employment as a Union member and work as a C2 contractor. The Union actually wanted to enforce a regime on building sites of having directly employed craftsmen only, eliminating C2 contracting. Mr O'Connell encountered this new policy when he went to revive his Union membership or to join BATU, whichever is the appropriate description of the process.

8. The plaintiff claims that the personal defendants as officials of BATU would not let him join the Union. He claims that they imposed unreasonable conditions on membership and put up obstacles to his candidacy. Eventually, they did admit him to probationary membership but subject to unfair and even unlawful terms, specially tailored to his individual situation and not designed to suit him but rather to discomfit him. He did not graduate to full membership and further acrimony ensued.

9. Then, the plaintiff complains, the Union and its officials blacked him on building sites in and around Limerick and prevented him from getting work. He has been unable to overturn the BATU ban despite appeals to the Irish Congress of Trade Unions ("ICTU") and the Construction Industry Federation. He argues that the latter body, indeed, instead of upholding his rights, actually conspired with the other defendants in keeping him out of work.

Pleadings

10. In his plenary summons issued on the 16th October, 2002, Mr O'Connell firstly sought injunctions restraining BATU and the officials from:-

- (a) Intentionally or recklessly interfering with his trade, business or economic activities;
- (b) Interfering with his previous or potential future employers;
- (c) Inducing breaches of his contracts of employment;

- (d) Intimidating either Mr O'Connell or his employers;
- (e) Interfering with his constitutional right to work;
- (f) Interfering with his constitutional right to associate and dissociate;
- (g) Wrongfully excluding him from membership of BATU;
- (h) Watching and besetting Mr O'Connell; and
- (i) Conspiring with others to commit any of the above acts.

11. Secondly, he claimed declarations that BATU wrongfully and unlawfully excluded him from their organisation and had failed to consider his application for membership. Thirdly, he sought an injunction to compel BATU to treat any application made by him for membership in accordance with natural justice and with regard to his constitutional rights.

12. Finally, he claimed damages for loss, mental distress, upset and inconvenience suffered.

13. In his statement of claim delivered on the 19th February, 2004, the plaintiff pleaded that since 1997, each of the defendants and their servants and agents had wrongfully and unlawfully advised building contractors not to employ him unless he was a member of BATU and they tried to impose preconditions on his membership, extending to the tax regime and eligibility for certain contracts based on membership of the Union.

14. In 1997 Mr Edward Morris, BATU regional organiser for the south east, told the plaintiff that he could not work in Limerick as a bricklayer or mason until he complied with the directions imposed. It is the plaintiff's case that potential employers were threatened with industrial action and were disinclined to hire him as a result. He says that each of the defendants has interfered with his right to work, to earn a living and to retain employment and gave details of substantial past and continuing losses, pleading mental distress, damage to reputation and upset.

15. BATU's defence dated the 11th May, 2004, is a traverse of the plaintiff's allegations.

16. By notice of motion dated 7th February, 2011, the plaintiff applied to the Master for an order amending the plenary summons of the 16th October, 2002, to add the Construction Industry Federation as a defendant. In June, 2012 the Supreme Court allowed the plaintiff's appeal and granted leave to join the Construction Industry Federation as a co-defendant to the proceedings. (*O'Connell v. The Building and Allied Trades Union and Ors.* [2012] 2 I.R. 371)

17. The plaintiff delivered an amended statement of claim on the 8th August, 2012, in which he pleaded that on divers dates the co-defendants' officials orchestrated and/or arranged and/or purported to instruct their members to interfere with the plaintiff's right to employment over a period of time. Because of the interference, the plaintiff's relationships with his employers was damaged and resulted in his unlawful dismissal from a number of sites. The plaintiff had employment contracts with:

- (a) Stephen Finn Contractors
- (b) Cusack / O'Connor Contractors
- (c) Davin Builders
- (d) Frank McGrath Builders

18. The plaintiff alleged that BATU and the CIF did not ballot their members to decide whether recruitment on building sites should be confined to members of a trade union; the CIF acknowledged and made offers to Mr O'Connell to address the wrongful acts of the other defendants; BATU and the CIF conspired to threaten and break the plaintiff's employment contracts by unlawful means; and, in a variety of ways, unlawfully interfered with his right to work, right to associate/dissociate, conspired against him and deprived him of the opportunity to earn a living.

19. The CIF delivered a defence on the 22nd November, 2012, in which they first, predictably, pleaded the Statute of Limitations. They pleaded that they were strangers to the proceedings and denied they, or anyone associated to them, had interfered or conspired to interfere with the plaintiff's rights to earn a livelihood, retain employment, associate/dissociate, or that they in any way caused the plaintiff mental distress. The CIF denied that they ever used their position as members of a trade union society to obstruct, interfere, control or abuse their position of power. They also denied that they in any way interfered with the plaintiff's right to earn a living/obtain employment.

20. In particulars dated the 5th December, 2012, Mr O'Connell gave details of the locations of each site he claimed the CIF had interfered with his employment, all in Limerick, between October 1999 and July 2002 as follows;

- Monaleen (11th October, 1999)
- Eastway Industrial Estate (August 2000)
- Hanover Tyres (December / January 2001)
- Castleoaks Hotel (8th July, 2002)

21. Mr O'Connell also alleged that the most recent interference by the CIF with his employment rights was January, 2010. When requested by the CIF to specify the acts where they allegedly abused their power, Mr O'Connell alleged that the CIF had not held a ballot of members for the purpose of implementing lawful agreements. He said these CIF carried out the alleged acts between February 1997 to present (2012). Mr O'Connell also alleged that employees of the CIF (Mr Eddie Keenan, Mr Creedon and Ms Winters) had undertaken to him to address the wrongful actions of the first four defendants in; November 1998, 2000, January 2001, July 2002 and January 2004. The first three undertakings were made orally to him and the final one in 2004 was in writing.

Evidence

22. The evidence in the case was given by the plaintiff, the three BATU officials who are the named defendants, building employers who came to court under subpoena by the plaintiff, a senior official of ICTU and serving or retired personnel from the CIF. The case fell into two relatively discrete areas of inquiry, namely, the issue of union membership, which did not involve the CIF, and the alleged interference by the Union defendants with the plaintiff's employment. This did not mean that there was a sharp temporal divide because the evidence on the second area ranged over a time period from before the plaintiff's attempts to join BATU to his later experience following the process of application and probation. The background to the case and the important events appear from the following chronology.

23. While the plaintiff was working outside of Ireland in the early and middle 1990s changes were occurring in the relations between unions and employers in regard to the employment of blocklayers and associated trades in the Limerick region. It will be recalled from the introductory paragraphs that Mr O'Connell qualified as a blocklayer and he testified that he joined the Union, the Ancient Guild, in 1980. Mr O'Shaughnessy, now the general secretary of BATU, became assistant general secretary of the Ancient Guild of Incorporated Brick and Stonelayers in September, 1978.

24. In the mid-1990s, as Mr Joe O'Brien, then CIF Director for the southern region, recalled, bricklayers in Limerick who were members of BATU were there by choice; a lot were not members and it did not cause any great difficulty. When Mr Morris became involved in 1997, he set about very vigorously trying to get rid of subcontracting and ensuring that all bricklayers in Limerick were members of BATU.

25. In December, 1996 the CIF sent out a document to all of its members relating to a proposal for a revised agreement for sub-contractors. At a CIF Midwest branch meeting in 1996, Mr John Flynn, since deceased but who was the chairman of BATU in Limerick at the time, and Eddie Morris attended by arrangement and Jim Kemmy introduced the latter. Mr Morris proceeded to outline his philosophy and policy that he would enforce in the Limerick area in relation to bricklayers. He made it clear that C2s and C45s were illegal as far as he was concerned. Subcontracting was completely out and, from the 1st January, 1997, he would be strictly enforcing the BATU rule of union cards for every member of BATU and that employees would be unable to work in Limerick without having a current BATU card. That was not an agreement. That was a statement by Eddie Morris which did not go down well with all the CIF members.

26. In 1997 the CIF set up an association catering for bricklaying sub-contractors. Between 1997 and 1998, BATU's policy caused a lot of grief to members and to the CIF as an organisation, so much so that in 2001 they made a decision to employ a person virtually full time in Limerick to deal with industrial relations. Mr O'Brien had no direct evidence of Mr O'Connell, or other non-union members, being harassed or being run off sites. He heard stories from contractors but they were hearsay. He said that outside of Limerick the influence had not spread to the same degree but a contractor working on a high profile site in Limerick city centre made sure the bricklayers were members of BATU. If they were working somewhere else, in Clare for example, it did not really matter.

27. The plaintiff described how a problem arose in December, 1997 when he was offered work as a mason with an employer in Limerick. Mr Morris required tax information and his approval before a member could begin a job on a Union site. Mr O'Connell went to the tax office but did not give the documentation required. Mr Morris refused him membership of the Union and correspondence between the plaintiff and the Union began.

28. Mr O'Connell did not want to give his tax details to Mr Morris; he said that the Tax office told him he did not have to provide the information because it was private. He offered to give pay slips and a letter from a Commissioner for Oaths but his position was that the tax office informed him he should keep his revenue details private and that was what he was trying to do. He was also annoyed that he had to rejoin the Union – as a long serving member he did not see why that had to be the position and why he would need to provide private information to do so. Another issue, he said, was that Mr Morris wanted him to join in unofficial action and wanted members to go to sites where, if someone was not complying with his new conditions, they might be subject to pickets. Mr Morris was not renewing other bricklayers' cards as well and Mr O'Connell felt that he should instead be encouraging people to join the Union. Mr Morris refused him a union card and he was subsequently refused work, which continued until 1999 when he was on a site working for the builder Stephen Finn from Monaleen in Castletroy.

29. Mr Morris gave evidence that he became a full time paid Union official in November, 1996. Direct employment was an issue that he raised at sites he visited across Limerick. Mr O'Connell rang him in relation to taking a job and told Mr Morris he did not have C2, at which point Mr Morris said he would need to get a one-line letter from Revenue to say that. At no point did he ask for P60s or P45s. He said that the position was that if Mr O'Connell had a C2 he would have been ineligible to join the Union but could have given up his C2 and applied with no difficulty.

30. Mr Michael McNamara, the BATU branch secretary in Limerick, speaking of the Union policy, said that it was not a case that there were new conditions imposed after Jim Kemmy died, more a case that the existing conditions were finally being imposed.

31. In a letter of the 8th December, 1997, Mr O'Connell told Mr Morris that for social welfare purposes he needed a letter outlining why he had been refused membership of BATU. Mr Morris replied on the 10th December, 1997, rejecting the implied allegation of refusal, enclosing a union membership application form and outlining details of the local meetings and point of contact. In an immediate response Mr O'Connell referred to a telephone call of the previous day and said that John Flynn went over the application form with him and informed him that the tax letter requirement was "Ed Morris's new requirement" and admission to the Union would not be granted without it. The evidence is all the one way on that point.

32. Between December, 1997 and October, 1999 when a confrontation occurred outside Mr Morris's home in Kilkenny, there was protracted correspondence between the plaintiff and Union officials. Mr O'Shaughnessy became general secretary in 1998 and was based at the BATU headquarters in Dublin while Mr McNamara was the local official in Limerick.

33. The plaintiff in his letters made points including that he was already a member of the Union and should not have to re-apply; that he was being unfairly refused membership; that the demand for Revenue confirmation was unjustified; that he was not being furnished with the Union rules; and that John Flynn had told him not to bother applying for membership as he would be refused. Mr O'Connell also said he had been advised to seek legal advice. In correspondence with Mr O'Shaughnessy the plaintiff maintained, and the general secretary denied, that he had enclosed his union book with a cheque for dues.

34. Mr Edward Keenan of the CIF said that Mr O'Connell contacted him in relation to the issue he had with BATU, but while he had sympathy for Mr O'Connell and the fact that he could not get a union card, he was unable to help him because he was not a member of the CIF. He suggested Mr O'Connell go to ICTU.

35. Mr O'Connell testified that in October, 1999 he furnished a Revenue letter to BATU stating that he did not have a C2 certificate.

In that month, he lost his job on Stephen Finn Builder's site in Castletroy. There is a note dated 26th October, 1999, of Mr O'Connell's application for social welfare following his removal from the site in 1999, stating:-

"Remarks: Applicant attended the office not knowing whether his job was gone or not. On 11/10/99 the union visited the site he worked on and as he was not a union member the employers had to let him go. Applicant stated he has tried to join the union on two/three occasions but was not allowed. He appealed but got nowhere. I rang Stephen Finn and they confirmed this statement. P45 being issued to applicant. Applicant on DB for period 13/10/99 22/10/99. Hopes to return to work shortly as dispute with union sorted out. T Moynihan, 26/10/99".

36. On the allegation that he was forced to leave the site in Castletroy, we have the evidence of Mr O'Connell, Mr McNamara and Mr Morris.

37. The plaintiff's evidence is that he was on the site in Castletroy working for the builder Stephen Finn. A Union official, Mr McNamara, appeared on the site and told the rest of the masons to cease work until Mr O'Connell left or was evicted off the site. That continued from site to site. He tried contacting Mr Morris numerous times but his calls were never returned.

38. Mr McNamara said that he called to the Monaleen site because of a dispute involving another bricklayer. He did not know that Mr O'Connell was evicted off the Stephen Finn site later that day nor did he say to other bricklayers that he would fine them for working with Mr O'Connell.

39. Mr Morris said that Mr O'Connell left a message saying that Stephen Finn, his ex-employer, had told him to contact him as he had been let go and if Mr Morris was unable to sort it out, Mr O'Connell would have to call up to his house to try to resolve it.

40. That was the background to a confrontation that happened in Kilkenny on 13th October, 1999. The position at that time was that the plaintiff had not been admitted to membership of the Union. He had not provided the required letter that the Union demanded as a condition of entry. He had lost his job because of non-membership and his employer suggested that he contact Mr Morris, who had told employers of the new strict union card policy shortly after he was appointed.

41. Mr O'Connell said that he had been corresponding with Mr Morris and had previously met him. He called him numerous times at the business number, at his office but he never answered so he called to the address on the business card Mr Morris had given, which was in Kilkenny and which he believed was Mr Morris's office as well as his home. When Mr Morris would not talk to him, he said he was going to have a peaceful protest there, to show that he was putting somebody out of work.

42. While he was protesting with a placard that he had prepared in advance, he said that Mr Morris ran him over with his car.

43. Mr Morris's evidence of the events was that the plaintiff did not phone him and ask for a meeting and that when he came home for his lunch, Mr O'Connell was in his van parked outside the house. He had been there earlier.

44. Mr Morris felt that the plaintiff had interfered with his family. He explained to Mr O'Connell that his mother in law had just come home from hospital, recuperating from a serious illness and his wife also had problems at the time, but Mr O'Connell did not care about that. He asked Mr O'Connell to go back to Limerick and make his application there but he became sort of hostile. They went out to the van and the plaintiff produced a letter from Jim Kemmy but again Mr Morris insisted that he was not in a position to issue a union card and that he would have to apply in Limerick. When he was at his lunch, his wife noticed Mr O'Connell outside picketing up and down. When Mr Morris was reversing his car, the plaintiff came into his path and the car struck him. Mr Morris accepted he was at fault reversing out.

45. The plaintiff, he said, had put him and his family through hell and has been doing that since he first came in contact with him, writing to his house constantly.

46. The plaintiff said that immediately after the incident in Kilkenny, when he got back to Limerick, John Flynn phoned that night proposing a meeting to sort things out because they had gone too far. The meeting took place on the 1st November, 1999, and was attended by the plaintiff, Michael McNamara and John Flynn. The subject was Mr O'Connell's rejoining the Union. Mr O'Connell said that he was told he owed IR£400 in arrears, which he paid in cash. There was a further request for a joining fee for 1999 (£200 plus a further £156 which he paid using post-dated cheques) and he was required to sign a document that included a special condition applicable only to him. He asked for a copy of the document but Mr Flynn said it was going into a cabinet and no one would see it.

47. The special condition of the agreement stated:-

"I, the undersigned, do hereby agree to abide by the rules and regulations of the above trade union if granted membership and furthermore I agree to accept the conditions for membership as set out here. No. 1 then that all business that I will conduct with the said trade union shall be carried out with the Limerick branch and all payments and correspondence will be directed to Mechanics Institute Limerick. That I will refrain from making contact with branch regional organiser Mr Eddie Morris or his family home in Kilkenny in any manner or make contact by way of phone call by myself or any person acting on my behalf. I accept and acknowledge the rules governing re-entry to membership of the above trade union. I also accept that I will pay the sum of £200 rejoin fee, £156 subscription fee for the year 1999 and the sum of £400 arrears due by me since 1996 to date."

48. The document was signed by Mr McNamara and Mr O'Connell and was witnessed by John Flynn on the 1st November, 1999.

49. Mr O'Connell had an issue with the section referring to Kilkenny and felt that he was being told not to speak with the gardaí or anyone else about the incident. He had consulted with his solicitor previously and knew that Mr Morris was going to be getting a letter in relation to his claim for the medical expenses and fees so he told Mr Flynn at that point, which is why, he believes, he was then put on probation. Probation, he said, was something that happened when one initially joined the Union – new members received probation cards.

50. The plaintiff said that he noticed that something was wrong even during the probation period of eight weeks when the Union people started calling to his site and had not cashed his cheques. His employer did not want any trouble so Mr O'Connell left and took a job with a smaller builder, Cusack Construction, in Limerick. Mr O'Connell believes that after the incident in Kilkenny, Mr Morris only agreed to let him into the Union so as to gag or appease him. His belief in this is vindicated, he says, by the fact that he was put on probation only when he mentioned that a letter from his solicitor was being sent to Mr Morris.

51. By the 4th January, 2000, Mr O'Connell had not received his union book so he wrote to Mr O'Shaughnessy at his home address and said he would have to call to him, saying that this was as advised by ICTU. This was contrary to the agreement Mr O'Connell had signed with the Union.

52. At that point the Union, Mr O'Shaughnessy and Mr Morris, obtained an injunction restraining Mr O'Connell from calling to their homes. They claimed that he had deliberately intended on the injury to him in Kilkenny occurring to make a false claim against Mr Morris. Mr O'Connell did not defend the injunction application and it was made permanent in 2003. BATU were awarded costs. He did not appeal the granting of the injunction and did not even know that the permanent injunction hearing had taken place. Mr O'Connell wrote again on 18th January, 2000, to Mr O'Shaughnessy at his home address, which violated the injunction. On the 7th January and 3rd February, 2000, the solicitors for Mr O'Shaughnessy wrote to Mr O'Connell reiterating the terms of the injunction and encouraging him to deal directly with the Limerick and Dublin branches of BATU by post. Mr O'Connell said he only continued to correspond with the Union leaders at their home addresses because he was constantly being accused of breaking their rules.

53. The plaintiff gave evidence of working at the Cusack Builders site in March, 2000. He said that Mr McNamara started calling to that site and claiming that he was breaking Union rules. Mr O'Connell did not know what rules he was supposedly breaking as he was never told. Mr McNamara made allegations that he was working illegally, as a result of which Mr O'Connell was let go after nine or ten months. He got another job straight after with Davins Builders. At that stage BATU did not want him in the Union so he joined another union, the Union of Construction Allied Trades and Technicians ("UCATT"), while he was working for Cusack Construction.

54. Mr McNamara said that he called to the Kieran Cusack site on the Ballysimon Road around the end of March, 2000 looking for a Mr Trevor Vaughan who wanted to join the Limerick branch, and while there he encountered a bricklayer named Mike Fogarty. He said that Mr O'Connell interjected while he was trying to communicate with Mr Fogarty, saying that he would still like to resolve the issue with BATU if possible. Mr McNamara advised Mr O'Connell that because the issue had escalated (by that stage Mr O'Connell had written to the general secretary and BATU's solicitors had written to him) that there would not be anything that Mr McNamara could do locally but Mr O'Connell could contact the general secretary or the National Executive Committee if he wished to at that point. Mr McNamara also told him that if he had not been happy with the conditions of the agreement in the first place he could have appealed it.

55. Mr Cusack gave evidence that union officials often called to sites but he had never been pressurised by them to fire someone. He had no recollection of the specific allegations Mr O'Connell made about Mr McNamara calling to Cusack's site on two occasions.

56. In September, 2000 Mr O'Connell was working for Davins Builders. He said that on his first or second day, Paddy Gallagher, a director of the company, got a phone call from Mr McNamara who was threatening a lot of trouble. Mr O'Connell showed Mr Gallagher his union card (UCATT) and things were quiet for a couple of days. It seems that BATU were unhappy with the situation but Mr Gallagher stood up for Mr O'Connell, pointing out that UCATT were a good union and he failed to see the difference. BATU said they did not recognise UCATT and were calling Mr Gallagher every day to have Mr O'Connell removed from site. He worked with Davin Builders for two or three months until the section he was working on was complete. He believed he was on call for the company when his section finished. However, Davins let him go. His partner on the previous job was re-hired so Mr O'Connell took a claim for unfair dismissal at that point as Davins had assured him he was a good worker and they did not want him to leave. He believed that the problem with the Union was troubling for them. He lost and appealed the decision in 2002.

57. Mr Michael McNamara's evidence was that he called to Davins Builders' office on Mr Ger Fitzgerald's behalf on 22nd September, 2000. He met Paddy Gallagher who said he had a John O'Connell there, and Mr McNamara said "Well, he is not a member of our union, you know what the custom and practice is in relation to that". Paddy Gallagher asked "Well, what do you want me to do then? Do you want me to get rid of him?" and Mr McNamara said, "No, there's no point getting rid of him, you can keep him there and finish the job, it's nothing to do with me now anyway".

58. Mr Paddy Gallagher of Davins gave evidence that he has been a member of the building trade in Limerick since 1968 and a member of the CIF. He received a complaint from the Union about Mr O'Connell's employment with his firm about 13 or 14 years ago, in relation to the building job on the Ballysimon Road. Mr McNamara approached him and said Mr O'Connell was not in BATU and therefore could not be employed on the site. He knew Mr O'Connell was in a different union as he had produced a union card for that other union. Mr Gallagher said there were never any threats made to him by Mr McNamara and that he had a good working relationship with him. There was an agreement with BATU in relation to using their members on his sites but it was not a formal written agreement, more of a policy. He did not know whether Mr McNamara took exception to Mr O'Connell or whether he would have had an issue with anyone on the site who was not a member of BATU. He said Mr McNamara told him that Mr O'Connell could continue until the job was finished but not to hire him again as he was not a BATU member.

59. The plaintiff described how he was dismissed from another job when he was employed by a builder named Frank McGrath on the 9th July, 2002. His evidence was that about two or three days into his job, other bricklayers walked off the site. Gardaí came to escort him off the site and he was unable to resume work. He took a case against Mr McGrath and the Labour Court awarded him around €500.

60. Mr McNamara's evidence in relation to the Frank McGrath site was that he had called there to sort out union membership for a new apprentice bricklayer. He met Frank McGrath on the site and explained he was there to meet the "new guy" who was starting. It transpired that two new workers had started, one of whom was John O'Connell. Frank McGrath believed Mr O'Connell was a member of BATU but Mr McNamara laughed and explained that there had been difficulty in the past with Mr O'Connell in relation to joining the Union. Mr McGrath asked if he should call Mr O'Connell in to have a chat with him but Mr McNamara said he did not want to speak with him and left the site.

61. In cross examination, Mr McNamara said his understanding of the "walk off" by other masons on Mr McGrath's site was due to the fact that Mr O'Connell wanted them to be used as his witnesses as he was planning on pursuing a case.

62. Mr Conor O'Connell also gave evidence on the plaintiff's dismissal from Frank McGrath's site. As the CIF Union Representative, he dealt with the subsequent case on behalf of the builder/employer before the Rights Commissioner and Labour Court. His evidence was that the situation in Limerick city at the time was in favour of unions and it was common practice for all employers to ask about union membership. Frank McGrath Construction had a pre-requisite that their employees had to be members of the Union - other companies did not have this condition - and Mr O'Connell was not a member. He acknowledged that at that time, Frank McGrath was short of masons and he also agreed that industrial action had been threatened because of Mr O'Connell's employment with the company.

63. Mr Frank McGrath gave evidence that he could not recall Mr O'Connell coming to work for him but knew he had worked for him at some stage. He said that Mr O'Connell asked the site foreman for a job in Castleconnell, saying that he would produce his union card

in due course. Mr McNamara later visited the site to speak to some of the other blocklayers and he became aware that Mr O'Connell was on the site. He spoke to the foreman about it and the foreman told him that Mr O'Connell had a union card but Michael McNamara pointed out that he did not have a BATU card. The foreman approached Mr O'Connell and told him that he could not continue to work on the site because it had been a tradition in Limerick that only BATU members worked as blocklayers and that was a kind of a custom and practice that had been observed for many years and was always observed by Mr McGrath's company.

64. In his submission to the Labour Court, Mr McGrath had stated that he was happy with Mr O'Connell working for him until BATU became involved. In relation to the employment contract produced before the Labour Court, Mr McGrath said they were drawn up by either the contracts or commercial managers he employed from 2000 on. In the contract it states that a person must be a member of the "appropriate trade union". Mr McGrath said he did not know who decided what the appropriate trade union was and he could not recall ever balloting members to give exclusive rights to BATU in relation to this.

65. Mr O'Connell had initially told his company that he had a union card and the contract he was given was standard and not drawn up for him specifically. In relation to the "appropriate trade union", counsel said the interpretation was that meant a trade union appropriate to a particular trade so for bricklayers, that would be BATU. Mr McGrath explained that Mr McNamara did not call to the site seeking out Mr O'Connell, he had called to speak with other bricklayers on site and that Mr O'Connell saying he had the relevant union card when he did not was a breach of the contract of employment. He did not think Mr O'Connell lied, he just did not have the right union card and the fact that it was Mr McNamara who had informed him that Mr O'Connell was not a member of BATU was irrelevant as the result would have been the same regardless. The policy of the site was BATU membership; it was expressly written into the contract and applied equally to all employees.

66. Mr Peter Rigney, Secretary of the appeals board of ICTU, gave evidence that in December, 2004, he arranged for Fergus Whelan, former bricklayer and president of BATU, to meet with Mr O'Connell to try to broker a settlement which did not succeed. BATU officials did not attend because, as an internal procedure, it was voluntary. In a letter of 12th of April, 2005, to Mr O'Connell the appeals board stated:-

"The board did consider the plenary summons issued on your behalf on the 16th of October 2002 and the notice for trial dated the 20th of October 2004. The purpose of the appeals board is to function as an appeals mechanism within the trade union movement. It has always taken the view that union members have a right to pursue a complaint against a union either to the board or to the court. The latter right is enshrined in Bunreacht na hÉireann. Having regard to this the board took the view that the legal proceedings at present are extant between yourself and BATU constitutes an impediment to the board in hearing your case."

67. Mr Rigney said that the board did not form any view on the merits of the case, they were simply communicating to Mr O'Connell that they could not investigate his claim because, without BATU's involvement, it would have breached the natural rules and justice. That was the end of the 2005 case and a further case arose in 2008 and 2009.

68. Mr Patrick O'Shaughnessy gave evidence that it was March, 1998 when he first came into contact with Mr O'Connell. He said that the membership process for joining the Union is relatively informal and explained that the eight weeks probation was there, for instance, if an applicant had to pay dues, to allow him eight weeks to pay it and, if membership is refused to any proposed member, there is an appeals process. He stated that Mr O'Connell was not refused membership and that the reason his membership never matured past probation was because he had failed to follow up after the eight week probation period.

69. Mr McNamara was also of this opinion with regard to the onus being on Mr O'Connell to follow up after the eight week probation period. He said in evidence:-

"I didn't level any charges against you, Mr O'Connell. You failed to come back. The rules are you must come back within the eight weeks of the union - eight weeks of the probation card to take out your card. You failed to do that. That's a breach of the rules."

70. Between 2008 and 2010 the plaintiff continued to make representations to try to further his claim. He was in contact with the Department of Enterprise, Trade and Employment, which was then the Tánaiste's office, and correspondence passed between the Department and ICTU on Mr O'Connell's behalf. On the 14th September, 2010, Mr O'Connell wrote to the CIF informing them of his intention to join them to the proceedings.

Legal Submissions

Submissions of Mr O'Connell in relation to the CIF

71. The decision of the CIF to enter into an agreement with the Construction Groups of the Trade Unions of Congress in December, 1996 resulted in a situation that employees of contractors and sub-contractors had to be members of a trade union, and for BATU members particularly, that they had to be "fully paid up". This new agreement essentially meant that Mr O'Connell had to become a member of a certain union in order to work.

72. The agreement changed a custom and practice in relation to the dispute procedure between CIF employers and BATU. But for this new agreement, that dispute procedure would have been available to Mr O'Connell as a lapsed member or member in arrears of BATU. The agreement is essential the reason he was wrongfully dismissed without notice from the second, third and fourth defendants.

73. Because of the agreement a contractor lost the right to employ who they wished and it put an end to the situation whereby a member employed outside Limerick did not have to be a member of a trade union. It also created a closed shop because all employees had to become members of the appropriate union. This requirement breached Mr O'Connell's constitutional right to work because if he did not join, he could not work in the industry.

74. The CIF were negligent in making the agreement by not showing a duty of care that all workers must be members of an appropriate trade union. BATU had a monopoly which they were abusing, which affected their members. The CIF entered into the agreement without any regard for the harm which could be caused and without adequate safeguards or codes of practice. This breached Mr O'Connell's right to fair procedures and interfered with who Mr O'Connell could associate with or be employed with.

75. The agreement and the CIF's decisions prevented him from joining UCATT because the agreement's rules stipulated that UCATT was not an appropriate union. This decision denied Mr O'Connell union rights and the protection of his employment benefits including pension, sick pay and death benefit. The CIF's decision not to engage in a dispute resolution procedure at two sites was a breach of the agreement they had with Mr O'Connell, as set out in the Registered Employment Agreement, and a breach under s. 9(2) of the

Industrial Relations Act 1990. This was a breach of his constitutional right to fair procedures.

76. The CIF in their actions and decisions exceeded their power over their members by deciding that UCATT, an appropriate trade union holding a negotiation licence for workers employed in the industry and which Mr O'Connell joined, was not appropriate for CIF members to associate with. The CIF further made remarks at the Labour Court on the 17th September, 2003, to the effect that Mr O'Connell was not to be employed in the future because of industrial action that had occurred where he had been employed. Mr O'Connell says this was an attack on his character and had an effect on future opportunities for him within the industry.

77. The CIF was aware of BATU's resentment to sub-contractors, yet they failed Mr O'Connell by not putting in place safeguards to protect him from an unjustified attack. It was wrong of the CIF to recognise a licence with BATU which gave it and the CIF the right to obstruct Mr O'Connell from carrying out his trade with any potential contractors. The CIF failed to put in safeguards and lacked fair procedures. The CIF suggested all the wrongs which occurred were the fault of BATU but Mr O'Connell discovered the details of the Registered Employment Agreement in 1999.

Submissions of the CIF

78. The plaintiff's claim is statute barred. The proceedings commenced on 16th October, 2002, against BATU but the CIF was joined by an order of the Supreme Court on 27th July, 2012. The plaintiff is also guilty of inordinate, inexcusable and unconscionable delay in the prosecution of his proceedings against the CIF. His primary complaint is with BATU and their alleged failure to readmit him to the Union and the consequences that flowed from that decision and, insofar as he may have a cause of action, it is not against the CIF.

79. Mr O'Connell complains about the Registered Employment Agreement but although the CIF signed it on behalf of members, its enforcement was dealt with by the Labour Court under Part III of the Industrial Relations Act 1946. The CIF's role in relation to the operation of provisions of the REA was limited. The variation to the agreement permitting greater use of sub-contractors was challenged by BATU and the CIF only participated as a notice party. The CIF challenged BATU's position in terms of unlawful restrictions on employment of sub-contractors. Mr O'Connell did not suggest that he was prevented from working as a sub-contractor during the relevant period.

80. The REA does not provide for the creation of a pre-entry closed shop agreement with BATU or any union but only provided a facility whereby dues could be deducted by agreement and then remitted to the Union. That does not amount to a pre-entry closed shop agreement. The REA does not require employees of contractors or sub-contractors to be union members: Clause 10 specifically provides that such employees "should be free to engage approved contractors in any trade or activity in the industry".

81. Mr O'Connell submitted that there was a new agreement in relation to trade union membership based on minutes of a meeting of the 10th December, 1996, and a letter dated 11th December, 1996, from Mr Joe O'Brien to members of the CIF. Neither of these documents support Mr O'Connell's allegations. Mr O'Brien's evidence was that the correspondence was only akin to a circular, getting the information out to the members because the CIF had been told by BATU that enforcement of their rule on union card was going to begin from January, 1997.

82. Further, there is no evidence to support Mr O'Connell's claim that the CIF were party to an agreement which removed the custom and practice under which employers were free to select workers. The evidence submitted was that the custom and practice in Limerick was that blocklayers would be members of BATU. Equally, certain employers, such as Frank McGrath, had a contract of employment which required union membership. This was not a requirement imposed by the CIF and Conor O'Connell gave evidence that the CIF would not recommend such a condition and did not give any direction in relation to same.

83. Mr O'Connell submitted no evidence to prove that the CIF acted unlawfully or in any way that was contrary to Mr O'Connell's rights, prevented him from securing employment or caused him to be dismissed. Mr O'Connell brought legal proceedings against Davin Builders and Frank McGrath. The CIF were not party to those proceedings and both were dismissed, the former because it was out of time and the latter because the relevant contract of employment specified that the employees had to be union members. Therefore there is no basis for the contention that the CIF is vicariously liable for any alleged wrongdoings committed against the plaintiff by individual employers.

84. The allegation that the CIF failed to use dispute procedures pursuant to the REA is unfounded because there was no trade dispute involving Mr O'Connell.

85. Mr O'Connell alleges that the CIF made statements at the Labour Court hearing on 17th September, 2003, to the effect that he should not be employed in the future. Mr O'Connell said that this comment was an attack on his character and breached his constitutional right to work. The CIF submit that Mr Conor O'Connell dealt with this case and gave evidence confirming that Frank McGrath had informed him that industrial action was threatened during Mr O'Connell's employment because other masons refused to work with him. There was a serious threat of industrial action because it was a term of Frank McGrath's contract of employment that an employee had to be a member of an appropriate trade union.

86. The CIF went to great lengths to stand up for their members rights to use sub-contractors. The CIF did not collude with BATU to prevent him from working, neither did they induce breaches of Mr O'Connell's contracts with employers. It was submitted that no evidence has been adduced to support Mr O'Connell's claim that the CIF persuaded any of its member employers to breach contracts of employment with Mr O'Connell and further, this allegation is inconsistent with the CIF's clear position in relation to supporting sub-contractors in securing employment.

87. Mr O'Connell has not shown that his constitutional rights were interfered with by the CIF or that they were guilty of intimidation. The plaintiff did not adduce any evidence of a threat delivered by or on behalf of the CIF. In the few engagements Mr O'Connell had with the representatives of the CIF, he was encouraged to bring his dispute regarding union membership to the attention of the Irish Congress of Trade Unions. In those circumstances, the CIF cannot be accused of intimidation.

BATU Defendants' Submissions

88. The Industrial Relations Act 1946 provided a framework whereby employers and workers in a particular industry could come together with a view to agreeing on terms and conditions of employment for a particular industry. Such an agreement was made for the Construction Industry and was varied a number of times over the years.

89. In this case, it is submitted that BATU is a voluntary organisation and is entitled to establish its own rules for membership. The plaintiff was advised of the requirement to provide a letter from the Revenue, confirming he was not a sub-contractor, in order to join the Union. The Rules of the Union explicitly state that it is open to "workers". BATU say this is people who are employed on a PAYE basis as opposed to the self-employed paying tax under a different scheme.

90. The plaintiff did not comply with this requirement and began a campaign of harassment against union officials. Mr O'Connell, it transpired later, was a sub-contractor back in 1997 when he applied for membership/to re-join, but he did not have a valid reason at that time for refusing to supply the required letter. He did furnish the required letter in October, 1999 and was admitted as a member subject to certain conditions; the first being to desist from contacting Mr Morris and the second, to pay arrears and abide by Union rules. Mr O'Connell could have appealed this condition but did not do so. Pursuant to Rule 22(b) of the Union, re-admittance of a member was subject to terms and conditions on a case by case basis. Mr O'Connell was aware of the content of the document he was asked to sign when re-joining.

91. It is submitted that Mr O'Connell intended to "bully" his way into the Union, as evidenced by his behaviour outside Mr Morris's home. Following his re-admittance he was advised that it was subject to a probationary period until January, 2000 and yet he took no steps to advance his membership and submitted no evidence as to why he failed to do so. From January, 2000 Mr O'Connell engaged in abusive and threatening correspondence with Mr Morris and the Union, making threats that he would "visit" the home of the general secretary.

92. From 1st January, 2000, onwards the plaintiff claims that there was a conspiracy between BATU and the CIF to keep him from being employed on building sites in Limerick. The evidence adduced does not support this contention. The evidence suggests that there was tension between BATU and the CIF at the time because they were representing different interests.

93. The plaintiff's allegation that he was "put off sites" by BATU are made against Mr McNamara only. Mr McNamara denied all allegations as to harassing Mr O'Connell. Mr Kieran Cusack could not recall being forced to dismiss Mr O'Connell or saying that he did not wish to do so but "had no choice". His evidence was that blocklayers were employed on a needs basis and when they had completed their work, they would be let go and perhaps might be hired again if further work was secured. Mr Cusack's evidence was that Mr O'Connell was not forced to leave his site and that Mr McNamara, or any BATU official, had not called to the site to discuss Mr O'Connell and had no influence in Mr O'Connell's employment coming to an end.

94. In the case of the McGrath site, Mr Frank McGrath gave evidence that in the Contract of Employment for his firm, it was stated that an employee had to be a member of the appropriate trade union. Paragraph 14 of his standard contract of employment reflected the policy of his firm. Mr O'Connell had a union card but did not have the relevant union card. The position would have been the same for any other employee who was not in possession of the appropriate union card. Mr McGrath also stated that no one from BATU had ever contacted him specifically about Mr O'Connell.

95. The first defendant denies the plaintiff's allegation that it conspired with the CIF in an effort to prevent him from working. It is submitted that because the plaintiff adduced no evidence to support this allegation, it remains unfounded and must fail.

The Law

96. A collective agreement between employers' associations or employers and trade unions may be recognised and incorporated into an employee's contract of employment but there are certain restrictions. In *Joel v. Cammell Laird (Ship Repairers)* [1969] I.T.R. 206, it was held that before a collective agreement could be incorporated by way of implication there must (a) specific knowledge of the agreement; (b) employee conduct that shows he/she accepts the incorporation of the agreement; and (c) some indication of incorporation of the agreement into the contract.

97. Employees retain the right to dissociate from unions. In *Educational Co. of Ireland Ltd & Anor. v. Fitzpatrick & Ors. (No. 2)* [1961] I.R. 345, it was suggested that it is not unlawful to attach to the conditions of a job offer, a requirement to join a particular union or to strike in support of a closed shop. Kingsmill Moore J. at p. 397 stated that the:-

"claim to picket and the claim to strike....involve many different considerations. The right to dispose of one's labour and to withdraw it seem to me a fundamental personal right which, though not specifically mentioned in the Constitution as being guaranteed, is a right of a nature which I cannot conceive to have been adversely affected by anything within the intendment of the Constitution."

98. Referring to the issue as to hiring workers on the condition that they join a particular union, Kingsmill Moore J. sought to distinguish "coercion" from the exercise of "economic pressure", with which the law has "no concern....in general".

99. In *Becton Dickinson v. Lee* [1973] I.R.1, the defendants, members of union A, agreed to transfer to union N while working for the plaintiff. However, on taking up their employment, the defendants refused to relinquish their membership of union A and began picketing with the objective of forcing the plaintiff to recognise their union. Henchy J., dissenting, stated that if an argument is made to join one union with the consequence that you cannot be a member of another then freedom of association is not derogated, but exercised.

100. The Supreme Court deemed it unnecessary "to express any opinion upon the question of how far, or in what circumstances, a person can contract out of a constitutional right; or to what extent such an agreement would be enforced" (Walsh J at pp. 40 - 41). Walsh J. said that he had reached his decision based on the assumption that "the term in the contract of employment with regard to trade-union membership is not one which would be held to be void" under the Constitution.

101. *Abbott & Whelan v. Irish Transport & General Workers' Union* (Unreported, High Court, McWilliam J., 2nd December, 1980) involved a situation where an employer refused to negotiate with the union of which it was a member, and instead sought to recognise another union. McWilliam J. held that "...an employer is not prevented from exercising his legal rights merely because this may encourage a workman to join a particular union".

102. In *Murphy v. Stewart* [1973] I.R. 97, the plaintiff sought to change unions but was precluded from doing so without the consent of his existing union. The plaintiff claimed that this breached his constitutional right under Article 40.6.1°.iii. The Supreme Court held that Article 40.6.1°.iii did not guarantee citizens a right to join unions or association, merely a right to form them. Walsh J. made the following *obiter* observation at p. 117:-

"....among the unspecified personal right guaranteed by the Constitution is the right to work; I accept that proposition. The question of whether that right is being infringed or not must depend upon the particular circumstances of any given case; if the right to work was reserved exclusively to members of a trade union which held a monopoly in this field and the trade union was abusing the monopoly in such a way as to effectively prevent the exercise of a person's constitutional right to work, the question of compelling that union to accept the person concerned into membership (or, indeed, of breaking the monopoly) would fall to be considered for the purpose of vindicating the right to work."

103. In *Meskeil v. Coras Iompair Eireann* [1973] I.R. 121, which is relied on by the plaintiff, the Supreme Court held that an agreement between the defendant company and a trade union, under which the company only hired union members and tried to enforce this by dismissing all employees and offering them re-employment provided that they agreed to join the union, amounted to a conspiracy to deprive the plaintiff of his constitutional right to abstain from joining a particular association, which had been recognised in *Educational Co. of Ireland Ltd & Anor. v. Fitzpatrick & Ors. (No. 2)* [1961] I.R. 345 as correlative to his right of association. Walsh J. said at p. 135:-

"To exercise what may be loosely called a common-law right of dismissal as a method of compelling a person to abandon a constitutional right, or as a penalty for not doing so, must necessarily be regarded as an abuse of the common-law right because it is an infringement, and an abuse, of the Constitution which is superior to the common law and which must prevail, if there is a conflict between the two."

104. The issue as to closed shops is not provided for specifically under Irish law. There are two categories; pre and post entry. Pre-entry means that a person must undertake to join a specific union before they can obtain certain jobs. Post-entry is where existing employees are required to join a specific union after they have been employed (as per *Meskeil*). The decisions on the subject suggest that employees have a right to dissociate where a closed shop arrangement is introduced in the post-entry scenario.

105. In *Young & Ors. v. The United Kingdom* (1982) EHRR 38, the court found there was a violation of Article 11 of the ECHR in circumstances where the plaintiffs were dismissed from their employment for failing to join a union, a rule which was established post-entry to their employment. The court held at para. 54:-

"As a consequence of the agreement concluded in 1975 (see paragraph 29 above), the applicants were faced with the dilemma either of joining NUR (in the case of Mr James) or TSSA or NUR (in the cases of Mr Young and Mr Webster) or of losing jobs for which union membership had not been a requirement when they were first engaged and which two of them had held for several years."

106. More recently, closed shops have been held to be incompatible with the European Convention, notably in *Sorensen and Rasmussen v. Denmark* (2008) 46 EHRR 29. In *Sorensen*, the applicant's complaint was that, having agreed to accept temporary work on the condition that he would join a designated trade union, he was dismissed when he objected to the union's subscription being deducted from his salary. The court did not differentiate between pre and post-entry establishment of closed shops but said that exceptional circumstances could exist that renders the practice acceptable in some instances. The objection in *Sorensen* was that the applicant was subjected to "a form of such compulsion which....strikes at the very substance of the freedom of association guaranteed by Article 11" at para. 54.

107. While the Irish courts have not ruled definitively on the constitutionality of either pre or post-entry closed shops as applicable to new employees, it is likely that any judgment on the matter would refer to the *Sorensen* decision.

Discussion

108. By the late 1990s, the Union & its officials had achieved a large part of their ambitions for Limerick. Building contractors would only employ bricklayers who were members of BATU. A bricklayer could not move between employed status and working as an independent contractor. An employer could not refuse to take on direct labour at full union rates and benefits and cut down costs by using C2 tradesmen. This gave the Union great power, but with it came responsibility.

109. The plaintiff, Mr O'Connell, was a difficult person to deal with. He was insistent and quarrelsome. He professed loyalty to the former leader and claimed that he was already a member. The Union thought he might have been working as a C2 contractor in conflict with their policy. He would not get the Revenue letter that Mr Morris insisted was a condition of admission. He must have been a visible challenge to the Union when officials called to sites where he was working. In the circumstances, trouble was not long in coming.

110. The plaintiff however, was not actually opposed to union policy. He was willing, even keen, to be a member. He claimed privacy as a reason for not furnishing the form of confirmation of status the Union demanded but he did offer alternative proof. And eventually, in late 1999, he satisfied the conditions for membership. So it is not easy to know what problem the Union had with admitting him to membership.

111. It is clear from the evidence that the plaintiff was experiencing difficulty with the local union administration at the Mechanics Institute in Limerick. He was not getting into the Union, as he understood from Mr Flynn.

112. In October, 1999 Mr O'Connell lost his job with Stephen Finn as a result of Union pressure. That is confirmed by Mr Finn's advice that he "sort it out with Mr Morris" and the message left on the latter's phone. The plaintiff was unable to sort out the problem because he was being frustrated by being referred back to Limerick but failing to make any progress there. I accept his evidence in that regard.

113. The plaintiff drove to Kilkenny to see Mr Morris because he and Mr Finn perceived that the Union power resided there. Mr O'Connell was evidently not particularly sanguine about his prospects since he brought with him a prepared placard. Mr Morris worked from his home and his car so he did not have an office that Mr O'Connell could go to. The official bitterly resented being confronted at his home and it must indeed have been galling to be the subject of a picket.

114. But the plaintiff's position is that he had just recently lost his job because of Union pressure. Although he was willing to join and qualified to do so he could not gain admission to the Union. His frustration and determination are understandable. There was an unfortunate collision between Mr Morris's car and the plaintiff that caused injury.

115. The meeting of the 1st November, 1999, took place between the late Mr Flynn and Mr McNamara of BATU and Mr O'Connell. Agreement was reached, but Mr O'Connell says that an unreasonable and unlawful condition was introduced as to his membership of the Union, prohibiting him from communicating with anybody other than the Limerick officials. The plaintiff maintains that this condition was intended to prevent him from pursuing his complaint or claim against Mr Morris for the personal injuries that he sustained while picketing in Kilkenny. Mr O'Connell had at this time already consulted a solicitor and an originating letter was at the time of this meeting in preparation and soon afterwards went to Mr Morris. The claim was eventually heard some years later at Kilkenny Circuit Court when Mr O'Connell was successful and awarded around €12,000 but of course it was a personal injuries action arising out of a motor accident and there was no union background that was relevant to the injuries. It does seem however that the case was hard fought with liability fully in issue, but ultimately the plaintiff succeeded.

116. The next stage was the probationary period of eight weeks membership from the 1st November, 1999, when he had now been admitted or re-admitted to BATU. It is anomalous that he was admitted as a new member and thus subject to probation in circumstances where he was previously a member and was being visited with charges for arrears of subscription. However, the fact is that Mr O'Connell was now a probationary member of BATU and was presumably free to go and get work on building sites and without incurring any union displeasure.

117. The plaintiff did not become a full member of the Union but the Union witnesses did not provide any solid reason for that. Mr O'Connell never got his full union card during, or at the end, of the probationary period. The Union officials gave evidence that he did not come back to get his full union card but that makes no sense. It is frankly absurd in a situation so fraught with serious consequences for the plaintiff to propose that explanation as a reason for depriving an otherwise qualified applicant. Neither is it suggested that anybody informed the plaintiff of this simple step that would give him the membership he sought.

118. In my view the probationary period should have led to full membership unless something happened during the period that would have disintitiled the probationer from progressing. Mr O'Connell did not progress, but there is no evidence that he did anything to disqualify himself from doing so. He was therefore entitled on his case and on this assumption to full membership but the Union did not grant him that status and did not furnish any reason for that decision.

119. Then Mr O'Connell approached the general secretary, Mr O'Shaughnessy, looking for his Union card. Mr O'Connell has an unfortunate capacity to create problems for himself and on this occasion he seems to have muddled the waters by ascertaining Mr O'Shaughnessy's home address and writing to him there as well as at his office and saying that he would call around to Mr O'Shaughnessy's home to collect the card. The latter reacted indignantly to that threat as he saw it and the Union instituted proceedings to restrain Mr O'Connell from doing any such thing. Mr O'Connell did not defend the proceedings and so the orders were made by default and a permanent injunction was granted. In the result Mr O'Connell was enjoined from approaching Mr O'Shaughnessy. This episode had the capacity to confuse the issue as to why Mr O'Connell was not given full membership of BATU and the appropriate union card but the question remains why the Union did not give it to him.

120. BATU and the officials could have avoided the problem presented by the plaintiff by actually giving him what he wanted and what they agreed in evidence he was entitled to have, namely, membership of the Union and the documentation to go with it.

121. At this time in early 2000, the Union treated the plaintiff as an undesirable non-union person with whom its members would not co-operate and the Union also put pressure on employers not to employ him or to stop employing him if he was actually at work. This was a difficult time in Limerick with shortage of work and union militancy and with BATU trying to enforce a closed shop. The plaintiff was deprived of work, and actually put out of work, because he was not a member of BATU.

122. The evidence is clear and consistent that BATU sought to enforce a closed shop for blocklayers so that only their members were employed on building sites and, at the same time, excluded the plaintiff from membership. There is independent evidence that one builder was warned about employing Mr O'Connell after the particular job ended. It is a matter of inference from the evidence as a whole that the Union policy would have prevented him from getting work or of retaining it when the officials became aware that he was on a building site. The plaintiff's own testimony coheres with the known or admitted facts and his behaviour over the years since these events happened is consistent with his account.

123. First, there is the plaintiff's experience with Mr Stephen Finn. Second, his evidence is that he would have been re-employed by Cusack Builders if he had been in the Union. Third, the evidence as to McGrath Construction confirms the policy, power and attitude of the Union. Fourth, the evidence of Mr Paddy Gallagher illustrates the capacity of the Union officials to dictate whether and when a tradesman might be permitted to work.

124. In regard to the plaintiff's experience on building sites in the wake of his probationary period, I prefer the evidence of the plaintiff and the employers to that of Mr McNamara where there is conflict. The social welfare document is also as far as it goes some corroboration of Mr O'Connell's evidence of removal from site. It is too much of a coincidence that Mr McNamara came to be visiting the plaintiff's sites on other separate business and yet had nothing to do with what happened to the plaintiff. Besides, his recalled reticence is quite inconsistent with the policy that he and his colleagues had announced and were not just implementing but enforcing.

125. Mr O'Connell was entitled to a full Union card but he was treated as a pariah from early in the year 2000 and was prevented from working. In desperation, he joined UCATT so as to be a member of a union, some union, and thus not be open to the objection that he was a non-union blocklayer. However UCATT backed off when BATU made a complaint to Congress that it had given membership to a blocklayer, but that is merely a side issue and is not really relevant.

126. Mr O'Connell kept up a struggle in various ways to try to get himself freed from the blacking that BATU had imposed on him. He made a protest to ICTU and to the CIF and he also instituted proceedings. The CIF tried to be helpful and gave advice but was ultimately unable to do anything for Mr O'Connell. ICTU took the position that it would not intervene when there was litigation involved. Its position – which might possibly be considered a comfortable or convenient one, but which has a good deal of rationality behind it – was that a person could pursue remedies by way of litigation or alternatively by negotiation and compromise through the good offices of ICTU but it was not happy to engage when there was already litigation in existence. That door was accordingly closed to Mr O'Connell. Moreover, BATU refused to cooperate with an investigation by ICTU.

Conclusions

Building and Allied Trades Union

127. A person has a constitutional right to work: In *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 I.R. 321, where Hamilton C.J. held at p. 342:-

"It has been held in several cases in the High Court and in this Court that, among the unenumerated personal rights guaranteed by this Article, is the right to work and the right to earn a livelihood. (See *Murtagh Properties v. Cleary* [1972] I.R. 330 and *Murphy v. Stewart* [1973] I.R. 97.)"

128. A person has a constitutional right to associate and dissociate. A trade union or other association has similar rights. BATU was not obliged to admit Mr O'Connell as a member. However, its power was not unfettered.

129. The prescient comment made by Walsh J. in *Murphy v. Stewart* [1973] I.R. 97 at p. 117, which is quoted a little more fully above, is admittedly *obiter*, but coming from such a source is deserving of the highest respect and bears repetition:-

"if the right to work was reserved exclusively to members of a trade union which held a monopoly in this field and the trade union was abusing the monopoly in such a way as to effectively prevent the exercise of a person's constitutional right to work, the question of compelling that union to accept the person concerned into membership (or, indeed, of breaking the monopoly) would fall to be considered for the purpose of vindicating the right to work."

130. It is logical as well as just to condemn as unlawful the capricious abuse of power by an association when it achieves exclusivity for its members but excludes a qualified tradesman and then audaciously objects to his presence and prevents him from working or restricts his opportunities to provide for his family.

131. BATU was legally permitted to approach employers individually or collectively through the CIF to make it a condition of employment that blocklayers be members of the Union. The CIF was legally permitted to recommend to their members that they introduce such an employment term and builders were entitled to do that.

132. BATU was not entitled to stigmatise the plaintiff, to have him removed from a site where he was employed on the ground that he was not a member. The Union could not legally instruct or encourage its members to walk off unless Mr O'Connell was dismissed. Such wrongful conduct was in breach of the plaintiff's constitutional rights and he can sue the Union and its officers if they were involved. He can also sue in tort for intimidation.

133. It was and is wrongful under the Constitution as well as at common law for a union to operate a closed shop policy but refuse a qualified person membership, subject to some quite exceptional circumstances that do not arise in this case.

134. The fact that a candidate is, or appears to the Union, to be an awkward, difficult person or even unpleasant or troublesome cannot justify a policy by trade union and its officers of excluding the worker not only from the Union but from working at all.

135. This case is not about the entitlement of BATU to enforce a closed shop on building sites in Limerick at the material times. Neither is it concerned with a refusal by a worker to join a union in pursuance of a right not to associate. Mr O'Connell wanted to work as a blocklayer on building sites and was happy to be a member of the Union. He had previously been a member and contended that he continued to be one. The problem was that BATU insisted that blocklayers had to be members of the Union but would not admit him as a member. BATU was not entitled to insist on operating a closed shop restricted to their members and yet refuse Mr O'Connell membership and prevent him from working.

136. Mr O'Connell had a right to work while not a member of BATU. The Union, its officials and members were not entitled to prevent this and it was an unlawful conspiracy for BATU to instruct its members to walk off a site because Mr O'Connell was employed there.

137. The plaintiff may have been troublesome, unpleasant, demanding and aggressive in his relations with BATU officials but that did not justify the Union's conduct. BATU submitted that Mr O'Connell tried to bully his way into membership but my view is that just the reverse was the situation.

138. The plaintiff was wrongfully excluded from the Union which then put him out of work because he was not a member. In the result BATU and its officers breached the plaintiff's constitutional rights and engaged in a campaign against the plaintiff that constituted the torts of intimidation and conspiracy by excluding him from membership and threatening builders who employed him.

139. In the result the plaintiff's claim succeeds against BATU and its officials for breach of constitutional rights, conspiracy and intimidation. There will be a separate hearing to assess the plaintiff's damages taking into account the impact of the defendants' wrongs on the plaintiff's earning capacity and his rights. It does not follow from my findings that the plaintiff is entitled to be compensated for all the time from when the wrongs were first done to him. It will be for him to prove all the elements of loss actually sustained and properly recoverable, subject to any legally appropriate reductions. That hearing will also consider injunctive and ancillary reliefs.

The Construction Industry Federation

140. By contrast with the case against the other defendants, the claim against the CIF must fail; it is statute barred for a long time and there is no evidence of conspiracy or even agreement between the confederation and the Union or its officials.

141. The CIF was joined very late in the proceedings, many years after the plenary summons was issued and following a successful appeal by Mr O'Connell to the Supreme Court against a High Court order. The Supreme Court concentrated in its decision on the proper approach for a court of first instance to adopt in an application to join a defendant when the likelihood is that a proposed new defendant will plead the Statute of Limitations. Mac Menamin J. held that a court should be slow to inquire whether the claim may be statute barred on a motion merely to join a defendant. The court should engage in a limited inquiry as to whether the claim is manifestly statute barred and whether there are no circumstances in which the intended defendant would be debarred in law or equity from relying on the statute.

142. In the absence of an affidavit from the CIF, the Supreme Court was unable to conclude that joining the defendant would be futile and that a plea of the statute would be made and, if made, would be bound to succeed. In the circumstances, since the Statute of Limitations was a matter of defence that had to be specifically pleaded and it was not inevitable that the new defendant would plead the statute, the Court concluded that it was proper to join the CIF as a defendant. In the result the CIF was joined and did plead the statute the limitations as well as a series of other defences.

143. Since the matters that are in issue in the case arose out of events between 1997 and 2001 it is obvious that a party just recently joined in 2012 is entitled to the benefit of the Statute of Limitations if it pleads it. Although the plaintiff maintained in his application to join the CIF that there was more recent wrongful action by that party, the evidence fell hopelessly short of proving any such conduct. Therefore the CIF must win on the Statute of Limitations.

144. Additionally and more fundamental and central to the case, that defendant is also entitled to succeed on other grounds. There is simply no basis in the evidence on which the plaintiff can succeed against this defendant in conspiracy or other legal wrong. There is no evidence of conspiracy on the part of the CIF with BATU or the other defendants to deprive Mr O'Connell of work as a blocklayer in Limerick at any material time.

145. Although Mr O'Connell alleged that the CIF and BATU conspired together against him to keep him out of employment in his sector, Mr Joe O'Brien said that CIF would not conspire with BATU about anything as it would be of no interest to the CIF who is employed by member companies. Mr O'Brien said that at the time there was nothing in the registered employment agreement about employment of the trade union labour whatsoever. It was silent on the employment of trade union labour. The CIF was not involved or

concerned in recognition of UCATT.

146. I accept generally the submissions and reasoning of the CIF which are outlined above. I also reject the additional submissions put forward by the plaintiff, to which counsel for both parties properly objected as attempting to introduce new evidence, misrepresenting evidence given in the case and making arguments that did not arise out of pleadings.

147. The claim against the CIF accordingly fails and will be dismissed.

148. Obviously, the CIF will not be involved in the further hearing as to the relief to which the plaintiff is entitled.