Neutral Citation Number: 2005 IEHC 212

THE HIGH COURT

2003 No. 9589 P

BETWEEN

BULA LIMITED (IN RECEIVERSHIP), BULA HOLDINGS, RICHARD WOOD AND MICHAEL WYMES

PLAINTIFFS

AND

LAURENCE CROWLEY, KPMG (A FIRM), TARA MINES LIMITED, OUTOKUMPU OY, NORTHERN BANK FINANCE CORPORATION LIMITED, ULSTER INVESTMENT BANK LIMITED, ALLIED IRISH INVESTMENT BANK LIMITED AND NAVAN MINING PUBLIC LIMITED COMPANY

DEFENDANTS

Judgment of Mr. Justice Murphy dated 10th June, 2005.

1. Application and Pleadings

1.1 Notice of Motion

The fifth, sixth and seventh named defendants (the bank defendants) applied by way of separate motions dated 16th August, 2004, 19th October, 2004 and 28th October, 2004, for the following substantive reliefs:

(a) An order dismissing the within proceedings as constituting an abuse of the process of this Honourable Court.

(b) Further or alternatively, and order pursuant to O. 19, r. 28 of the Rules of the Superior Courts dismissing the within proceedings on the grounds that same are frivolous and vexatious and/or disclose no reasonable cause of action against the fifth, sixth and seventh named defendants.

(c) An order restraining the plaintiffs and each of them from instituting any further proceedings against the fifth, sixth and seventh named defendants without prior leave of this Honourable Court.

1.2 Plenary Summons

The plenary summons, dated 19th August, 2003 sought the following reliefs:

As against all the defendants:

(1) Damages for negligence

(2) Damages for unlawful interference with the economic interests of the plaintiffs and each of them.

As against the receiver, the first named defendant:

(3) Damages for breach of duty.

(4) Damages for misrepresentation and/or negligent misstatements.

(5) Damages for breach of contract.

(6) A declaration that the receiver, the first defendant, has purported to sell the property known as Bula Mine as Nevinstown, Navan, County Meath, in breach of duty.

(7) A declaration that the first defendant was and is prohibited from acting as receiver and manager.

(8) An injunction restraining the first named defendant from dealing with the proceeds of the purported sale pending the determination of these proceedings.

As against KPMG, the second defendant:

(9) Damages for breach of contract.

(10) Damages for misrepresentation and/or negligent misstatements.

As against the receiver and Tara Mines Limited:

(11) An order setting aside the contract dated 9th May, 2001, made between the receiver and Tara Mines Limited.

(12) An order setting aside any conveyance between the receiver and Tara Mines Limited pursuant to any purported completion of the contract dated 9th May, 2001.

(13) An order setting aside any conveyance pursuant to any purported completion of the contract.

As against Tara Mines:

(14) A declaration that Tara Mines has no good title to the property.

(15) An injunction restraining Tara Mines from exercising and/or asserting any rights as purchaser under the purported conveyance pending the determination of these proceedings.

(16) An injunction directing that Tara Mines refrain from entering onto, into or under, or extracting minerals from the property.

As against Outokumpu Oy, Northern Bank Finance Corporation Limited (NBFC) and Ulster Investment Bank Limited (UIB:

(17) Damages for breach of duty and negligence.

As against all defendants excepting Outokumpu Oy:

(18) Damages for unlawful interference with and obstruction of the course of justice.

As against Navan Mining plc (Navan):

(19) A declaration that Navan had an interest in the security, pursuant to which the receiver purported to sell the property to Tara Mines Limited.

(20) A declaration that Navan was an intended beneficiary pursuant to the contract between the receiver and Tara, dated 9th May, 2001.

(21) An order directing that all necessary accounts and enquiries be taken.

1.3 Statement of Claim
The statement of claim, extending to 52 pages, was delivered over a year later on 29th November, 2004. The reliefs claimed were extended to include a claim against all defendants for a declaration that certain judgments and orders of the Supreme Court and the High Court had been obtained in circumstances of concealment of information and/or fraud and ought to be set aside. The proceedings referred to were Supreme Court Appeal No. 185/02 and the High Court, 2002/108 COS In The Matter of Bula Limited (in Receivership) and In The Matter of the Companies Acts, 1963-2001 and In The Matter of an Application by Laurence Crowley, the Receiver of Bula Limited, and related proceedings.

The claims against Outokumpu Oy and NBFC and UIB were recast as against NBFC, UIB and allied Irish Investment Bank Limited (AIIB) only.

The claims for damages for unlawful interference and obstructions against all defendants excepting Outokumpu Oy were omitted. In their place the following relief was sought:

(xix)(a) A declaration that the judgments and orders of the Supreme Court and High Court in the proceedings entitled:

The High Court 1986/66 24 P, Bula Limited (In Receivership) Bula Holdings, Thomas C. Roche, Thomas J. Roche, Richard Wood and Michael Wymes. Plaintiffs.

and

Laurence Crowley, NBFC, UIB, AIIB, McKay and Schnellman Limited. Defendants.

Having been obtained in circumstances of concealment of information from the court and/or fraud ought to be set aside.

Further relief was sought against all the defendants in the following terms:

As against all defendants:

(xx)(a) Damages for wrongful interference with and obstruction of the just and proper prosecution of the proceedings described in the statement of claim herein as the Bank proceedings in the section 316(a) application;

(b) a declaration that all the defendants (excepting Outokumpu Oy) failed to make proper disclosure to the courts of facts and matters necessary to the justice and integrity of the hearing of the proceedings described in the statement of claim herein as the Bank proceedings in the section 316(a) application, thereby causing or bringing about wrongful interference and obstruction of the proper prosecution of the aforesaid proceedings.

The Bank proceedings appear to be those referred to above (The High Court, 1986, 6624 P) and the related appeal to the Supreme Court.

The claim against Navan for a declaration that it had an interest in the security on foot of which the receiver was appointed was extended to "an interest and/or involvement in the security". The claim for a declaration that the s. 316(a) proceedings (185/02) and the Bank proceedings (1986/6624 P) be set aside on the grounds of concealment of information and/or fraud would appear to be the substance of the proceedings which the present motion seeks to set aside.

2. Grounding affidavits
2.1 The grounding affidavit of Peter C. Hayes was sworn on 12th August, 2004 on behalf of NBFC, UIB and AIIB ("the Banks") referred to in the 1986 proceedings, the ruling of Barr J. on 18th June, 1997 and, in particular, the conditions imposed by Barr J. for the purpose of granting an adjournment as follows:

"The plaintiffs and each of them undertake that they will not mount further proceedings against the defendants in respect

> of any alleged wrongdoing of which they are presently aware or, in the opinion of the court, ought now to be aware."

Notwithstanding another plenary summons issued on 30th March, 1997, Carroll J., on 15th December, 2000, held that those proceedings constituted a breach of the plaintiffs' undertaking and the same were struck out and the *lis pendens* vacated.

Mr. Hayes referred to the Supreme Court dismissal of the plaintiffs' appeal in the *Tara* case, the main proceedings, on 15th January, 1999, with costs. A Statute of Limitations issue, excepted from that decision, was heard by Barr J. on 16th January, 2001, at a time when the plaintiffs sought to amend their pleadings and to seek discovery. Barr J. rejected the majority of the new claims and refused discovery, save in respect of one item. The State of Limitations issue continued at hearing from 21st February to 15th May, 2001. Judgment was delivered on 1st February, in which Barr J. held that the plaintiffs had failed to establish the issue relating to the Statute of Limitations and, accordingly, their claim failed *in toto*. Both decisions of Barr J. were appealed to the Supreme Court which dismissed the appeals with costs on 13th February, 2003.

Meanwhile, on 9th May, 2001, the receiver entered into a contract for the sale of the Bula ore body to Tara and subsequently applied to the High Court pursuant to s. 316(a) of the Companies Act, 1963. On 20th June, 2002 Murphy J. approved the sale. The plaintiff appealed to the Supreme Court and applied to Murphy J. for a stay which was refused and also appealed.

The sale of the ore body was completed by the receiver on 12th July, 2002. further proceedings issued on 23rd July, 2002 against the receiver in Tara and were refused by Murphy J. on 1st August, 2002 and appealed to the Supreme Court. A motion to amend the order of Murphy J. of 20th June, 2002 was moved on 5th November, 2002, was refused and appealed.

Mr. Hayes says there was then a total of seven appeals before the Supreme Court, three of which were dismissed with costs on 13th February, 2003. The further four appeals concerning the s. 316(a) application were the subject of a judgment delivered by the Supreme Court on 11th April, 2003, which dismissed the claims with costs. Denham J. was satisfied that it was inappropriate to apply to the court for a stay and was satisfied that the proceedings qualified as a technical abuse of process as the same questions had been disposed of previously.

Mr. Hayes concluded by referring to bankruptcy proceedings against Mr. Wymes and Mr. Wood by both Tara and UIB.

2.2 Francis E. Sowman on behalf of the receiver and KPMG, referred to the appointment of the receiver and confirmed that the receiver was on notice of and fully supported the application on behalf of the banks.

He referred to the 1986 proceedings (No. 10898 P) which he referred to as the Tara proceedings, and to 1986 No. 6624 as the Bank proceedings. He referred in particular to the judgment of Barr J. in relation to abuse of process where, at p. 7 of his judgment of 29th April, 1997 it was stated:

> "The concept of abuse of the process of the court applies irrespective of privity. When as issue has been finally determined by a court of competent jurisdiction, it is an abuse of the process of the court to seek to have it relitigated in new proceedings."

On the same page Barr J. stated:

> "The heart of the Bula case is now, and always has been, that the receiver's appointment by the banks was unlawful and that he has no right to sell the ore body."

In a further judgment delivered on 1st February, 2002, Barr J. noted that the receiver had been frustrated in his efforts by persistent, unsuccessful litigation by Mr. Wymes who had demonstrated that he was implacably opposed to the sale of the potential Bula mine in any circumstance and was determined to place every possible obstacle in the way of the banks obtaining the benefit of their securities through such a sale.

Mr. Sowman referred to other legal actions pending and to the order of Carroll J. on 15th December, 2000, which was not appealed. At p. 19 of that judgment it was stated:

> "Quite apart from the undertakings, significant portions of the amended statement of claim replicate claims in the bank action and is *res judicata*. If claims were not replicated in the bank action but could have been litigated in it, Bula is now precluded from doing so on the basis of estoppel by omission."

Later in that judgment, at p. 23, Carroll J. stated:

> "It seems to me that the intention of Barr J. was to draw a line under the protracted litigation stretching back to 1986. There was to be no more litigation in respect of any alleged wrongdoing which the plaintiffs were then aware of or in the opinion of the court ought to have been aware of in June, 1997."

Mr. Sowman detailed the efforts of the receiver to dispose of the lands and, in particular, to the judgment of this court in the s. 316 proceedings where the court rejected the general allegation of conflict of interest as an attempt to "clutch at straws".

In relation to further proceedings before this court and the judgment of 1st August, 2002, this court asked whether it had jurisdiction to overrule itself and to deny the rights that the receiver had and which were approved of by the court, particularly where the court had allowed a conveyance to take place.

The Supreme Court in its judgment dated 11th April, 2003, Denham J., at p. 44 of her judgment held:

> "To request this court to go behind the finding of the trial judge that the High Court properly reflected his intention in his judgment is an unstateable appeal and accordingly should be dismissed."

The Supreme Court referred to the right of access to the courts, not excluding the necessity of case management where court time and resources were limited.

The deponent believed that it would be unfair and oppressive for the receiver to be subjected to further litigation in the circumstance. He also stated that, while the receiver had been awarded costs in previous actions, he had not recovered any costs.

2.3 Mr. John Tully, solicitor on behalf of Tara Mines and Outokumpu Oy (the third and fourth defendants) referred to the present proceedings and his request for a statement of claim which, at the date of swearing, had not been delivered. Mr. Tully was a defendant in the 1986 No. 10898 P proceedings against Tara and Outokumpu Oy as he had been a director and secretary of Tara. He referred to the 277 days of hearing and to the judgment of Lynch J. on 6th February, 1997 which contained significant findings regarding the character and conduct of the plaintiffs, and in particular of Mr. Wymes. He also referred to proceedings against the banks, detailed in Mr. Hayes's affidavit, and to the s. 316(a) proceedings.

In the latter proceedings the plaintiffs sought to rely on "new evidence" on affidavit which they claimed were relevant to the issues in the s. 316(a) appeal to the effect that the receiver had a conflict of interest. Mr. Tully referred to these assertions as vague and speculative, based on rumour and hearsay and evidence of nothing. Furthermore, the material deposed to had been within the knowledge of the plaintiffs at the time of the s. 316 hearing. Objection had been taken to the admission of the affidavit and, ultimately, the plaintiffs indicated to the courts that they were no longer seeking to rely on the affidavit and it was withdrawn. He believed that the present proceedings were an attempt to re-litigate the s. 316 proceedings. He believed that the basis for these proceedings had already been set out in some detail in the affidavit of Mr. Wymes of 28th October, 2003 in the bankruptcy proceedings.

The assertion that the Bula ore body was sold at a "collusive undervalue" to Tara, facilitated by Outokumpu Oy. (??) Insofar as the present proceedings were concerned with the sale of the ore body by the receiver to Tara the issues raised are *res judicata* and/or are an abuse of the process of the court.

Mr. Tully believed that the plaintiffs should be restrained from instituting any further proceedings against Tara or Outokumpu Oy without prior leave of the court in the light of previous unsuccessful litigation. Absent such an order being made it was clear to him that further abusive and vexatious proceedings would inevitably be brought by the plaintiffs against his clients.

3. Replying affidavit of Michael J. Wymes
Mr. Wymes, a director of Bula Limited (In Receivership) and Bula Holdings replied on their behalf and on behalf of Richard Wood, the third named plaintiff, and referred to the separate notices of motion and the grounding affidavits of Mr. Hayes, Mr. Sowman and Mr. Tully.

Mr. Wymes summarises the present proceedings as relating to the contract of 9th May, 2001 between the receiver and Tara, the subsequent sale in July, 2002, the involvement of Navan with the banks in relation to Bula's loans and the security granted by Bula, pursuant to which security the sale took place, and the misleading of the courts.

In particular he lists the following five issues:

> a) Navan's involvement and interest on both sides of the said sale transaction contrary to public policy and the principle against self-dealing;
>
> b) the conflicts of interest and duty of (i) the receiver and (ii) his advisers, deriving from the involvement of Navan;
>
> c) the nature of the transaction as regards (i) collusive gross undervalue, and (ii) improvidence, the fact that the receiver obtained no independent valuations prior to the sale (contrary to his practice in the 1980s) of the Bula assets, whether as an independent mine, or as an adjunct to Tara, or of the extensive surface rights extending to some 350 acres abutting the town of Navan for commercial development exclusive of their value as a mine;
>
> d) of title the receiver's lack of title to sell and convey, consequent to Navan's interest and involvement in the security;
>
> e) the misleading of the courts, whereby previous litigation was conducted under false pretences.

He was advised that there was an onus and duty at law to show that the consideration for the Bula assets was adequate and fair, which onus and duty is over and above the requirements of the s. 316(a) proceedings to show that all reasonable steps had been taken to obtain the best price available at the time. He was advised that the sale at £27.5 million was not adequate or fair having regard to Bula ore body valuations (as an independent mine and as an adjunct to Tara and the value of the extensive strategic surface lands). He was advised that the practice of the courts was to give close scrutiny to a sale pursuant to security, where it was alleged that there had been collusive undervalue on both sides of the transaction and related conflicts of interest. In paras. 215 to 242 where the deponent says and is advised that none of the causes of action/issues had previously been the subject of evidence or argument heard, the subject of substantive decision of any court or any litigation and thus were not *res judicata* or an abuse of process. He was advised that the present proceedings were the first to afford an opportunity for a trial and judicial determination of the causes of action and issues which relate to the five matters referred to.

The hearing of the application for directions pursuant to s. 316(a) were not an adversarial trial by affidavit and did not include Outokumpu Oy, KPMG or Navan.

The grounds of opposition to s. 316(a) proceedings set out in Mr. Wymes' affidavit of 17th April, 2002 were:

> *Locus standi/sub judice*
>
> Conflicts of interest
>
> Involvement of Navan Mining with Bula's banks
>
> Gross undervalue
>
> Failure to pursue a co-operative development with Tara
>
> Flawed, non-transparent marketing and sales process/timing wrong
>
> Disadvantage of asset sale/no share sale

The receiver submitted that the grounds headed "conflicts of interest" and "involvement of Navan Mining with Bula's banks" were irrelevant to the application for directions and that the only issue of relevance was whether the receiver had taken all reasonable

steps to obtain the best price reasonably obtainable.

His evidence in paras. 146 to 167 of his affidavit dated 17th April, 2002 was based on hearsay evidence from non-compellable foreign witnesses and could not be proceeded with, argued or heard. The court disallowed it before the affidavit was opened to the court. Although the basis of the objection was not opened, argued or heard, the court stated:

> "It is clear that before considering that separate ground, the court should reject the general allegation of conflict of interest as an attempt to clutch at straws."

Mr. Wymes referred to the withdrawal by his solicitor and the without prejudice reservation of his rights in the light of the non-availability of discovery and without prejudice to his client's rights. Accordingly, the deponent's objection to conflict of interest and to the involvement of Navan was never before the s. 316 High Court hearing. They were not, in fact, argued, heard or adjudicated upon and were, in any event, irrelevant to the said application.

The deponent refers to a statement of claim having identified the issues therein and having been settled by counsel.

Mrs. Wymes, taking issue with the summary of the litigation in the grounding affidavits, gives the background to the litigation over the following 40 pages of the affidavit (paras. 23 to 193). The affidavit then turns to the general factual basis of the within proceedings referring to the hearsay evidence of Mr. Calver, Mr. Frizelle, Mr. Evans and Mr. Keatinge. He says that the proceedings were grounded on those facts which are within his own knowledge, in the public domain or based on discovery in previous litigation and information furnished to him by the receiver and the individuals referred to above.

He referred to Navan Resources plc set up by Mr. Conor Crowley, brother of the receiver, who died in September, 1999, and says that Mr. Conor Crowley and his family held shares and share options therein. After Conor Crowley's death in 1999 he referred to a scheme of arrangement which was finalised in July, 2000, where there was a substitution of a new company incorporated in England, called Navan Mining plc (Navan) for Navan Resources. KPMG were auditors, advisors and agents for Navan and were also engaged by the receiver to assist, advise and act for him in his conduct of the receivership.

Mr. Wymes then continues as follows:

> "194(h) At all material times, there had been in existence arrangement within Navan's aforesaid specified objects, and entered into between and involving entities, undertakings and subsidiary companies, associated with Navan and the banks in relation to Bula's loans, and consequent thereon, arrangements concerning rights under the security granted by Bula to the banks, and pursuant to which the receiver was appointed, whereby Navan had an interest and involvement in the said security."

No particulars were given; no references to the source of this averment which would appear to be the critical basis for the plaintiffs' case.

Reference was also made at 194(k) and (l) to Navan's involvement and interest in both sides of the planned sale transaction and to Outokumpu Oy confining such related and dependent transactions to a small coterie of companies acting in concert, i.e. Navan, Inmet and Arcon.

Mr. Wymes, at 194(r), says that the receivership was tainted by actual and potential conflicts of interest and the receiver was burdened in his conduct of the marketing in 1999 and thereafter. The receiver entered into the contract of sale without any specialist valuation or any valuation (u).

He believed that the Statute of Limitations claim in the Bank proceedings were on the basis that the claims by the banks were all legally and beneficially vested in the banks.

Paragraphs 195 to 214 set out the legal basis of the proceedings against each of the parties by way of expansion from the Statement of Claim and the matters deposed to above.

In relation to loss and damage, paras. 212 to 214 refer to the sacrifice sale of the property at £27.5 million where the full value is estimated at £200 million without reference to the considerable value of the lands for development exclusive of their value as a mine.

Mr. Wymes refers at paras. 243 to 255 to threats and to bankruptcy proceedings. The former related to the concerted attempt by Mr. Frizelle in 2001 to procure his acceptance of, and concurrence and goodwill towards, the substitution of the banks by Navan re Bula's debt/mortgages and the receivership, by way of a Navan arrangement independent of Bula (with the banks) and the non-entertainment shortly before the commencement of the receiver's application under s. 316(a) of (Bula's) application for discovery in relation to an arrangement/subrogation involving Navan and Bula's bankers on the Bula security. References were made to apprehension about the digging he was doing, dirty tricks and uncovering a smoking gun.

Some of these matters were, of course, referred to in the s. 316 proceedings.

Mr. Wymes exhibited correspondence and a memorandum of a telephone conversation with Mr. Frizelle of 6th June, 2002.

Mr. Wymes referred to a Coopers and Lybrand report commissioned by the Minister in 1984. References were made by Mr. Wymes to "huge, unaccounted for sums of money" being distributed by Tara to named political personages and to an application for discovery of the entire report which was refused on 22nd October, 1993.

4. Further affidavits

Mr. Sowman, on behalf of the receiver and KPMG, referred to Mr. Wymes' affidavit and belief that the issues of law which were raised were more appropriately dealt with by way of legal submission. He did not propose to address each and every statement of fact and confirm that the decision not to respond was now to be taken as an express or implied mission. He categorically rejected any express or implied allegation that the receiver had in any way misled the court and/or that the performance of his duties was in any way tainted or undermined by a conflict of interest or by any other factor whatsoever.

Mr. Tully's second affidavit averred that Mr. Wymes' affidavit was a blatant and scandalous attempt by him to rewrite the history of the litigation and was a renewed attempt to undermine and discredit the many judgments and findings of fact and law made against him and his co-plaintiffs by the High Court and the Supreme Court.

While not considering it necessary or appropriate to engage in detailed rebuttal of the matters deposed to by Mr. Wymes, he emphatically denied that Navan Mining plc had any involvement whatsoever in the purchase of the assets of Bula by Tara. Furthermore, Tara and Outokumpu Oy emphatically reject the suggestion that the transactions by which Tara purchased the said assets was either at an undervalue or improvident. He said that those issues had already been canvassed by the court and the Supreme Court and rejected. Insofar as Mr. Wymes was alleged that Tara or Outokumpu Oy were guilty of misleading the courts, this was an allegation which was untrue and without foundation and which he strenuously rejected. Otherwise, Tara and Outokumpu Oy were strangers to the allegations made.

Claims that there had been moves by the defendants to forestall the proceedings, including a threat to Mr. Wymes, were totally untrue and without foundation and were a deliberate and conscious attempt by Mr. Wymes to blacken the defendants in the eyes of the court with totally unsubstantiated claims. Tara and Outokumpu Oy never issued, authorised the issue of, nor conspired in the issuing of any such threats as were alleged by Mr. Wymes.

Mr. Tully referred to Mr. Wymes' claim that in May, 1986 a Coopers and Lybrand report into the affairs of Tara had referred to huge unaccounted sums of money being dispersed by Tara to certain politicians who had responsibility for mining policies. Mr. Tully averred that that allegation was untrue and was calculated to mislead the court. It failed to state that Mr. Justice Ronan Keane, then a High Court Judge, informed counsel for Bula at an interlocutory hearing on this matter in open court, that he had read the entire Coopers and Lybrand report and that there was no such allegation of wrongful payments as alleged by Mr. Wymes. Mr. Tully further says that this allegation was withdrawn by counsel for Mr. Wymes in open court in proceedings in 1986/10898 P and was expressly dealt with by Lynch J. in his subsequent judgment, who found as a matter of fact that the allegations were untrue.

The deponent says it is correct that a conditional settlement agreement was entered into by the parties but was not implemented by Mr. Wymes or the other plaintiffs. The proceedings proceeded to a determination that none of the complaints made by the plaintiffs had any substance.

Mr. Tully referred to Mr. Wymes' allegation that Navan's "planned involvement" (post the Tara purchase of Bula's assets) in the acquisition of the combined Tara/Bula. Having been personally involved in the acquisition by Tara from the receiver of Bula's assets, the question or consideration of any planned involvement by Navan in the acquisition of the "combined Tara/Bula assets" never formed any part of the discussions with the receiver leading up to the acquisition of the Bula assets. No reference was made by Mr. Wymes to any agreement between any of the parties but reliance is made on vague and unspecified "planned involvement" between parties, based on multiple hearsay evidence of an insubstantial character.

Tara and Outokumpu Oy deny alleged particulars of wrongdoing.

Both Mr. Wymes and Mr. Wood had neglected and/or refused to make any payment to Tara on foot of the various orders awarding costs and, in the circumstances, the bringing of bankruptcy proceedings by Tara was entirely appropriate. Any suggestion to the contrary was rejected. The present proceedings were, in Mr. Tully's view, designed solely to relitigate previous proceedings and an attempt to delay and frustrate Tara in the recovery of its tax costs due but unpaid by Mr. Wymes and Mr. Wood.

5. Second affidavit of Mr. Wymes
Much of the second affidavit of 55 paragraphs is already contained in the replying affidavit.

Mr. Wymes says that he is advised that it is not an abuse of process to institute proceedings when such cause of action or issues had not previously been the subject of evidence or argument heard by, nor had been the subject of substantive court decisions in any *inter partes* or any other litigation and would not have been relevant nor amenable to adjudication in the s. 316 application for directions. Where such claims related to the misleading of the courts they could not have formed part of any previous related litigation.

He submitted that it was of real significance and notable that the pleadings had not been put in dispute nor challenged or denied by averment, either by the banks or by the receiver. In this regard the court notes the second affidavit of Mr. Sowman and Mr. Tully to the contrary.

6. Submissions of the Liquidator.
Mr. Finlay, S.C., counsel for the liquidator, the moving party, submitted that vague and unparticularised grounds, already raised but not proceeded with in the s. 316 proceedings, would seem to be the basis of the present claim.

They were relevant to and were raised already in the High Court or Supreme Court proceedings.

The present claim seeks to re-open final judgments.

The approval of the Supreme Court was final. To say that conflicts of interest in relation to Navan were grounds of opposition contradicts the present claim that these were irrelevant to the s. 316 proceedings.

In order for the present proceedings to be stateable the judgment must have been obtained or procured by fraud. He referred to The Right Honourable the Lord Mayor, Aldermen and Burgesses of the *City of Dublin v. BATU et al* [1996] I.R. 468. The judgment must have been obtained by the fraudulent withholding of facts. Yet Mr. Wymes submits that he was advised that the conflicts of interest were not relevant to the s. 316 proceedings.

The claim was before the court. Facts were considered as hearsay. The decision was made by the court. It is an abuse of the court to relitigate matters that were before it. The parties should be in a position to sleep easily after the final judgment of the court. *Res judicata* applies to every point which was probably before the court (see *Henderson v. Hudson*) [1843] in relation to estoppel by omission). Fraud is claimed but not particularised. Accordingly, the proceedings were frivolous and vexatious.

New particulars of fraud cannot await oral evidence or discovery. Moreover it must be proved that there was a conscious and deliberate dishonesty and that a declaration was obtained by it.

7. Submissions on behalf of Tara.
Mr. Collins S.C. adopted Mr. Finlay S.C.'s submission and urged that it was imperative that proceedings be brought to an end. He referred to the 277-day case involving Tara before Lynch J.

The orders sought therein were far reaching. All the material before the court points to a clear and certain conclusion that the

proceedings are a serious and manifest abuse of the process. In the interests of justice between the parties before the court and justice generally it is not simply appropriate but imperative that the court should bring these proceedings to an end and prohibit the plaintiffs from bringing further proceedings save with the leave of court.

Allegations regarding theft or/and bribing of politicians were unsubstantiated. Without justification Mr. Wymes had wrongfully questioned the *bona fides* of all parties. Lynch J., in the case to which reference was made having heard Mr. Wymes for 146 days concluded that he was an unreliable witness. His valuations were extravagant. Allegations of perjury were unfounded.

Moreover, the complaints in relation to the bankruptcy proceedings against Bula occurred at a time when there was no extant proceedings.

The s. 316A application for directions was a proper exercise of the receiver's powers. It was a final determination not an advisory opinion from the court. The opportunity was given to all parties to advance arguments.

Mr. Wymes had 27 pages of averments in relation to conflict of interest between the affidavit in the s. 316A application, the affidavit in the Supreme Court Appeal and the affidavit in this motion.

Some allegations were based on speculation and hearsay. There was a failure to apply for an order of discovery or for an order of cross-examination of witnesses in a timeous manner. It was disingenuous to say they were not relevant to the s. 316 proceedings. A procedural application to adjourn to get discovery was not made. The issues were critically relevant to the s. 316 application. The fraud allegations were most serious. The purpose of these proceedings is to set aside the s. 316 application on the basis of collusive undervalue because of a fraudulent conflict of interest between Navan and Tara. Reference was made to *Edenfell Holdings Limited* [1999] 1 I.R. 443 at 464 per Keane J. in relation to the distinction between valuation and price. Here, as in *Edenfell Holdings Limited*, the High Court had dealt with the substantive issue of compliance with common law duties as well s. 316A duties of good faith. Subject to appeal the matter is final to all notice parties if not to the world.

No express reservation of rights would undermine the principle of *res judicata*. That would be an abuse of process.

Counsel referred to the statement of claim and to a vague, speculative and unreal allegation that a decision was procured by fraud. Fraud must be pleaded particularly. The plaintiffs could not stand up the vague allegations made. They should not be permitted to proceed to try again.

Mr. Collins submitted that the plaintiff was approbating and reprobating regarding the relevance of the "new evidence".

8. Submissions on behalf of the Banks.
Mr. Richard Nesbitt SC outlined the chronology to emphasise what he submitted was the abusive nature of the litigation.

Following the second proceedings against Tara which failed *in limine*, the first proceedings which were heard were those against the Banks.

The Statute of Limitations issue was the basis of the third set of proceedings.

The fourth set of proceedings involved the application for discovery which followed on the letter re classes of discovery of the 30th November 2000. Mr. Hayes, on behalf of the Banks, said the Banks had no dealings. (See Barr J. in his judgment of the 20th February 2001 at p. 32).

Counsel referred to *Galvin v. Grehan-Twomey* [1994] 2 I.L.R.M. 315 at 318 and submitted that an assertion was not evidence. The purpose of the procedural remedy of discovery is to aid a party in the process of litigation. It is not to be invoked so as to enable a person to plead a cause of action which he is not otherwise in a position to plead.

The statement of claim at 14.06 referred to the conflict being at all material times. Paragraph 14.2 referred to the death of Mr. Conor Crowley in 1999.

Moreover, an alleged conflict of interest "at all material times" as the central assertion required particulars. No such particulars were given. The material times must have been as early as April 1997 (see para. 15.02).

The Banks proceedings ended in 1999 at which time Mr. Wymes must have known of the conflict of interest of Navan and the security of Bula which was the central block of Mr. Wymes's claim.

The alleged conspiracy by Navan, unparticularised, did not make sense in relation to Tara's attempt to buy cheap and sell dear.

The pleadings relating to concerned parties, as outlined at para. 17.05 of the Statement of Claim did not include Tara.

In order for the plaintiffs' claim to have been sustainable, the alleged conspiracy must have existed in the last quarter of 2000 when Tara put in a sealed bid.

Mr. Wymes had declined to prosecute his case. He simply could not reserve claims and claim a right to relitigate.

Mr. Wymes believed Navan have control of the banks' security over Bula's assets and the beneficiary thereof and that, therefore , the receiver was not acting for the benefit of the banks which had appointed him.

In referring to Mr. Wymes affidavit sworn the 9th December 2004 counsel said that there was nothing new disclosed. They were assertions not facts. No facts in his own knowledge or belief nor reference to what others might have said. There was no factual basis for the assertion. Assertion was not knowledge. That issue had already been tried before Barr J.

By January 2001, at the latest, the plaintiffs had no evidence whatsoever to justify Navan's involvement with the Banks and the security at which time Mr. Hayes and Mr. Ryan had sworn that they had no such involvement.

Mr. Nesbitt concluded that Mr. Wymes had an opportunity to argue the matter before and he voluntary did not. He did nothing to prepare the case in a timely manner. Matters had been decided by the court and were *res judicata*. It was an abuse of process and to continue with abuse of litigation. In the circumstances he asked for an order filtering the plaintiffs' access to court to be made

before a named judge.

9. Submissions of the Respondents
9.1 Circumstances of application
Mr. Patrick Keane S.C., on behalf of the plaintiffs, pointed out that no application had been made by either KPMG or Navan in relation to the strike out application.

The motions were issued at the time of the plenary summons but before the statement of claim. In such an application the onus of proof should be on the applicants: *Clare County Council v. Mahon* [1995] 3 I.R. 193 at 202 applied. He also referred to *Jan v. Ossius* [1992] I.R. 425 and *Barry v. B* (Costello J. 308).

Relief should be only given in clear cases. Otherwise the plaintiff would be shut out without a hearing. It there was doubt, the benefit should be in favour of a case proceeding to trial.

Evidence of the plaintiffs' claims being based on counsel's advice could be used in interlocutory motions. He referred to *Bridgman v. Gilcock* 22nd January 1995.

In *Wymes v. Crindle* [1998] 4 I.R. 567 the fourth named plaintiff, Mr. Wymes, was referred to as "an honourable man and essentially a credible witness". Moreover, in (2000) 4 I.R. 42 the Supreme Court refused to set aside his then claim.

9.2 *Res judicata*
In relation to *res judicata*, argued by all three parties Mr. Keane submitted that there can be only one matter which has been adjudged. It was not possible to allege that a matter is res judicata in other proceedings such as injunction proceedings. There is a danger that the court would assume an abuse of process in a series of unsuccessful litigation. There is no such principle in law. *Res judicata* is defined in relation to estoppel where it is a final determination of the same issue with the same parties by a court of competent jurisdiction. He referred to *Clare County Council v. Mahon* at 205 where the decision of the District Court was not estoppel as there was no similarity of parties or contract debt.

Sweeney v. Bus Átha Cliath (15th June 2004) at p. 3 decided that the issue of estoppel required the same question as being final between the same parties. That was not the present situation.

Henderson at p. 4 distinguished between *litigated* and *adjudicated*. In the s. 316 application the issue as pleaded was argued and determined but was outside the scope of s. 316. The issue, to the extent that it was litigated, was not, accordingly, adjudicated. While the plaintiff believed that the Navan conflict was relevant it was outside the scope of the s. 316 application. Moreover, the plaintiff is entitled to change his mind and withdraw the conflict of interest point. The only issue of relevance before the court was the issue defined in s. 316A whether the receiver acted reasonably on obtaining the best price obtainable at the time of sale.

It is clear, counsel submitted, that the decision of the court re the conflict of interest which had been withdrawn was not a *ratio decidendi* but merely *obiter*. It was conceded that, notwithstanding being withdrawn, the matter was raised in the Supreme Court on affidavit in February 2003 but was again withdrawn.

Mr. Keane SC submitted that the plaintiffs' notice of appeal under the heading "conflict of interest" argued that the court had erred in law in not directing an affidavit of discovery. While it could be argued that the plaintiff ought not to have raised the issue of conflict of interest in the s. 316 proceedings this did not give jurisdiction to the court to deal with a matter which should not have been dealt with under that section. It was not open to the High Court to deal with hearsay. The receiver was in breach of his common-law duties but under s. 316 the function of the court was to see whether reasonable care was taken to obtain the best price. Valuation was not an issue nor was the conflict of interest with Navan.

The s. 316 application was entirely different to a trial by affidavit. The motion was for the consent of the court. It was not an adversarial trial by affidavit. There were no opposing parties. Accordingly, decisions were not *res judicata* whatever the parties may have thought or contended. The parameters of the application were set by the receiver. No claim or counterclaim could have been bought by Mr. Wymes or any of the plaintiffs.

The parties in the s. 316 proceedings were not the same as in the present proceedings which includes KPMG, NBSC and Navan. Mr. Wymes was precluded from attacking s. 31 proceedings from the inside but it entitled to attack the issue from outside.

The purchaser was not a purchaser of a value without notice insofar as Tara had notice.

The plaintiffs were entitled to vindicate their common-law rights. Reference was made to *Henderson v. Henderson* to litigation and adjudication by a court of competent jurisdiction where parties had brought the whole case.

If the plaintiffs had asked for all the reliefs that they now seek they could not have been given such declarations under the s. 316 application. Damages that were set aside of previous order would not have been contemplated. They could not have obtained such reliefs.

The limited purpose of the receiver's motion was to seek approval for a conditional contract of sale dated 9th May, 2001. That application could be supported or opposed. One could not in the receiver's motion, obtain any relief beyond the refusal of approval.

Mr. Keane agreed that Navan had been identified in the conversation with Mr. Frizelle on 6th June, 2002. The hearing was prior to the Frizelle conversation.

Counsel distinguished the present application from the *Edenfel* case where there were two s. 316 motions. There the receiver had sought an order directing completion of the contract. Mr. Barrett, a director and shareholder, had brought a separate motion seeking a direction that the contract be not completed. Mr. Keane referred to a significant part of that case on p. 454 where the court referred to the submissions by counsel that the appropriate remedy to be pursued by any person who was owed a duty of care by the receiver was an action for damages. Mr. Barrett had already instituted proceedings claiming a declaration that the contract was in breach of the receiver's duty of care to him and damages and claimed on the authority of *Houlihan v. Friends Provident* that the contract was not properly made and that completion of it should be constrained by injunction.

The trial judge in *Edenfel* Laffoy J. decided, at p. 457, to direct the receiver not to complete the contract.

In the present case the receiver was manager under all but the NBFC debenture and owed a duty to the company. In *Houlihan v. Friends Provident Society* [1966] I.R. at 20 Ó Dálaigh referred to *McHugh v. Northern Bank of Canada* wherein it was stated:

> "It is well settled law that it is a duty of the mortgagee when realising…(to act as, a reasonable man would behave in the realisation of his own property so that the mortgagor may receive credit for the fair value of the property sold."

Mr. Keane also referred to *McGowan and Others v. Gannon* [1983] I.L.R.M. 516 where it was held the receiver owed a duty of care to the guarantor of a company to get the best price available.

In that case reference was made to *Standard Chartered Bank v. Walker*. Counsel also referred to *Downside Nominees v. First City Corporation No. 14* [1993] A.C. 295 regarding the use of reasonable care in the exercise of the receiver's powers. *Metcorp v. Blake and Others* [2000] Court of Appeal 87 referred to the duties opposed by equity including, but were not necessarily confined to, a duty of good faith. The extent was scope of any duty additional to that good faith depended on the facts and circumstances.

Night v. Laws [1993] B.C.L.C. 215 held that the extent of the duty of care, whether an equity or at common law depended on all the circumstances.

Mr. Keane agreed that all of that was before the court in the s. 316 application and that there was no issue with regard to the law in that regard.

9.3 Interest and involvement of Navan
It was pleaded that at all material times there had been in existence arrangements entered into between and involving entities and/or undertakings in and associated with the Navan mining group and the Banks in relation to Bula's loans whereby Navan mining had an interest and involvement in the said security or securities. Full particulars in relation to that matter would await discovery later in the proceedings.

In these proceedings the statement of claim referred to the Bank and the Tara proceedings. It was conceded that, in those proceedings it was not disclosed to the court that Navan mining or any company or companies associated with it had any illegal or beneficial interest or entitlement to these securities. In August 1999 Padraig Monaghan of KPMG denied that the receiver had serious and potential conflicts of interest in relation to the matter.

The statement of claim further referred to the position of Navan, to the disadvantaged uncompetitive status of any other potential bidder and, to a planned purchaser being a small coterie of companies acting in consort. Navan had an involvement and an interest in both sides of the planned sale transaction of Bula ore body as part of a common design between the Tara defendants and Navan mining acting in partnership.

In January 2001 the receiver was advised by IMC, who had no in-house expertise in metal price forecasting, set €34.91m was a reasonable price for the Bula ore body at a time when the price of zinc was historically low in real terms. No advices were sought by the receiver as to the value of Bula to Tara. Bula had a report from SRK in 1998 in respect of the true and real value of the Bula ore body for the purpose of settlement negotiations. It was pleaded that Navan mining were also possessed of the said report.

The statement of claim also referred to the conditional contract of the 9th May 2001, to the security and guarantees. At that time the Banks held adequate security over the property of the guarantors and the consideration was sufficiently ample to repay or nearly repay the then claim of the Banks.

The receiver had failed to give confirmation that he had no conflict of interest in respect of the sale of the Bula assets and/or any other contemplated, related or dependant transaction.

Bankruptcy proceedings, in being for some time, were being pursued by Tara and by Ulster Investment Bank against Mr. Wood and Mr. Wymes but not against their joint guarantor, Thomas J. Roche.

9.4 Duties of the defendants
The statement of claim outlined the obligations and duties of the defendants towards the plaintiffs with regard to conflicts of interest and the requirement not to dispose of the assets of the company at an unfair, gross and collusive undervalue while the receiver was subject to conflict of interest and duty or to the perception of same.

Particulars were also given of obligations and duties of KPMG and of Tara and Outokumpu.

Having regard to the Banks being debenture holders over the assets of Bula and having appointed a receiver, the Banks were under a duty of care to keep themselves properly informed of the actions of the receiver and to ensure that he was not in breach of his duties, or that no wrongdoing or irregularity occurred, that he had no actual or potential or perceived conflict of interest. The Banks had a duty to inform themselves that no party was involved or interested in both sides of the sale of the assets of Bula, whereby there would be self-dealing or a perception thereof. The Banks had a duty to intervene and prevent the occurrence of any such wrongs or perceived wrongs and to inform the plaintiffs and the court of the involvement or interest in any form of a third party in respect of the mortgages; not to conceal or appear to conceal, or to combine with others in such concealment and a duty to inform the plaintiffs and the court in the context of the s. 316A application, of any release of the Roche parties from any of their obligations from or under their guarantees to the Banks.

Particulars were also given in relation of the obligations and duties of Navan mining.

9.5 Particulars of wrongdoing
The particulars of wrongdoing on the part of the Banks were detailed in para. 42 of the statement of claim (p. 40 – 43). It was pleaded that the Banks entered into arrangements in relation to Bula's loans with other parties in particular Navan mining whereby Navan became involved and beneficially interested in the securities given by the plaintiffs to the Banks and that the defendants had represented the interest of those parties and acted on their behalf.

The Banks knew of such breach and Navan's involvement. They knew of the nature of the transaction in respect to its unfairness and the gross and collusive undervalue, entered into without the benefit of specialist independent or any valuations whether for the ore body or the Surface Lands, as distinct from current market price for the properties that was previous standard practice of the receiver had been to obtain such independent expert valuation.

The Banks failed and neglected to intervene at any time to prevent such wrongdoing and to remove the receiver, to otherwise resolve the wrongdoing and the effect of the conflicts of interest on the receiver's behalf and to resolve the wrongdoing brought about by the self-dealing on the part of Navan mining.

The Banks permitted, acquiesced in, centred to and caused the receiver to act in breach of his duties, to act when subject to a actual or potential or perceived conflict of interest and to accept (a) an unfair gross and collusive undervalue for the assets of Bula without reference to any specialist valuation.

The Banks concealed the fact that persons with an interest in the mortgages and the receiver himself had a conflict of interest in respect of the sale.

The Banks held other securities to the value of at least IR£40m from the guarantors. Their interest, as debenture holders, would not have been unduly adversely affected in the sale of the assets at IR£27.5 whereas, to the full knowledge of the Banks, the interest of the plaintiffs would be devastated.

9.6 Obligation to disclose Banks' interest
The Banks should have disclosed that involvement and interest at the time of the s. 316A application which was predicated upon and argued under a false premise such as the High Court and Supreme Court were misled.

The Banks were in breach of their duties and were negligent and in breach of contract and unlawfully interfered with economic interests of the plaintiffs and each of them causing them loss and damage.

The applicants' claim, in addition to the reliefs claimed in the plenary summons was to set aside the Supreme Court and High Court judgments in the s. 316A and related proceedings and in the Bank proceedings (1986/6624P) as having been obtained in circumstances of concealment of information and/or fraud.

9.7 Court's discretion to strike out
If the court were mindful on exceeding to a strike out it must examine each of the constituent paths of the statement of claim. Counsel referred to *Dalton v. Flynn* where Laffoy J. at 18 allowed certain elements of the statement of claim to be struck out which went beyond the High Court Order in that case.

9.8 Allegation of abuse of process in the plaintiffs' raising of the amendments of their points of claim in the bank proceedings
The matter was dealt with in Mr. Wymes' second affidavit. The proposed amendment, which was refused by Barr J. in the bank's claim, was to assert that the banks, or some of them, had alienated part of their security to someone else. There was no mention of the Navan involvement at that stage. To that extent there was no evidence to back that allegation up then. Counsel submitted that the situation had now changed and the plaintiff had more specific evidence. Mr. Keane argued that *Henderson v. Henderson* regarding *res judicata* applied if a party did not bring forward his whole case. But that could not be said of the plaintiffs in these proceedings when they had tried to bring forward more of a case than they were allowed to bring. They were not allowed to bring it forward. They have not in those circumstances failed to bring it forward from "negligence, inadvertence, or even accident". If the court had allowed the amendments and decided against the plaintiffs then they would be barred from bringing the matter up again. The matter would be *res judicata*.

9.9 Inherent jurisdiction of the court and abuse of process
Counsel claimed that the court must allow for future amendments to a statement of claim. In *Chan v. Osseous*, McCarthy J. at p. 428 of the judgment differentiated between the considerable difference between an action as it appeared in a pleading stage and as it was presented at the at hearing:

> "Experience has shown that the trial of an action will identify a variety of circumstances perhaps not entirely contemplated at earlier stages in proceedings. Often times it may appear that the facts were clear and established, but the trial itself will disclose a different picture."

Reference was also made to *Flynn and O'Malley* where Ó Caoimh J. adopted *Johnson v. Gore Wood* [2002] 2 A.C. per Lord Bingham of Cornhill where it was stated:

> "It is, however, wrong to hold that because the matter could have been raised earlier… a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before ."

Mr. Keane submitted that there was no direct denial in the applicants' grounding affidavits of Navan's involvement.

Mr. Keane referred to Mr. Wymes' second affidavit and to Denham J.'s remark that the Roches supported the s. 316 application as guarantors at a time when they had been released. The court was not informed of such release.

Counsel admitted there was a certain vagueness regarding Mr. Wymes' knowledge of the Navan involvement but submitted that Mr. Wymes could read more into the issue than an outsider. What was important was what was intended to happen not what actually happened.

Counsel referred to Mr. Calver, the then managing director of Navan, whose remarks were admissible on their behalf. Counsel agreed that fraud was more difficult to prove but submitted that some allowance must be given by the court in the circumstances.

Counsel agreed that Mr. Hayes had said in his affidavit of the 13th December, 2000, "I say and believe and have been so instructed that no arrangement of the kind alleged by Mr. Wymes… such allegation to the contrary".

Mr. Keane agreed that the relevant crucial dates were April 2002 during the hearing of the 316 application. The plaintiffs had applied for discovery in relation to that matter before that date.

The court asked what the importance of the allegation would be if Navan Mining were the owner of all or part of the securities. Mr. Keane said that the receiver was not an agent for Navan and had no authority to sell on behalf of the banks. The original mortgagee could not instruct the receiver. Mr. Keane argued that the receiver had to take instructions and to know who was instructing him. If the party who appointed the receiver no longer owned the mortgage then the receiver had no powers insofar as he had been appointed by the mortgagee.

10. Receivers' reply
10.1 Mr. Ian Finlay SC submitted that the plaintiffs were asking the High Court to overrule itself. There was no claim under the slip rule but rather a claim in fraud as was clear from the claims at paras. 46.01(ix)(a) and 46.01(xix)(a).

He referred to authorities which established that nothing short of fraud pleaded with particularity and ultimately established on the balance of probabilities would be sufficient to ground fraud. Fraud had been defined as the conscious and deliberate dishonesty and a declaration must have been obtained by it. In his submissions the elements of this definition were not met by the statement of claim.

Counsel submitted that the plaintiffs were out of time in delivering the statement of claim which was filed the same date as the motion for directions. The motion was not premature given the filing of the statement of claim.

10.2 The pleadings constituted a cynical and calculated attempt to circumvent the previous orders of the court approving of the sale. He referred to the Tara proceedings and to the Bank proceedings and to the s. 316A application where the issue of conflict of interest arose. Three of the seven grounds of the objection related to the Navan involvement which was referred to in p. 9 and p. 12 of the judgment of Murphy J. of the 20th June 2002. The ruling regarding conflict of interest was not appealed, as was noted by Denham J. in the Supreme Court. Indeed, Mr. Wymes now maintained that the issue of conflict of interest was irrelevant to the s. 316 proceedings and that such issue did not properly belong there and could not be the subject to *res judicata*. Clearly, however, the conflict of interest issue was considered relevant by the High Court whose judgment was appealed. To say, as Mr. Wymes does in this submissions that the conflict of interest was "entirely irrelevant to the s. 316A proceedings" was incorrect.

10.3 The second ground of opposition to the s. 316A Order related to what was submitted was a gross "collusive undervalue" that is to say a connection on both sides of the sale whereby Navan and Tara were involved as vendor and purchaser.

Indeed the notice of Appeal date of the 2nd July 2002 raised the issue of conflict of interest at para. 20-21 and sought discovery in para. 25-28. The Supreme Court Notice of Appeal also raised conflict of interest and, under the heading of discovery, raised the Navan issue.

It is clear that the present proceedings also concern that Navan issue. This is the cornerstone to the present proceedings and it had been an issue in the s. 316A proceedings.

Mr. Wymes affidavit of the 12th February 2003 dealt with the arrangement with Navan at paras. 20, 21 and 25-28. He said that new evidence was relevant (paras. 30-35).

It was clear that the matter of an adjournment was to get discovery in relation to Navan which was relevant to the s. 316 application. Neither the High Court nor the Supreme Court decided that the matter of Navan's involvement was not relevant.

It was abuse to relitigate not only matters which were determined but issues which could have been determined (see Hardiman J. in *Carroll v. Medical Council*).

Moreover at para. 14.06 of the statement of claim referred to the same cornerstone of the appeal. The allegation in respect of Navan was not particularised. It was submitted that particulars awaited discovery. This was the position two and a half years beforehand when the plaintiff, in previous proceedings, also awaited the same discovery for the same purpose but did not apply for same until the hearing of those proceedings.

The statement of claim purported to define justification to re-litigate matters which were *res judicata* and in respect of which there was an estoppel by omission.

That read:

> "22.04 The objection of conflict of interest and duty was grounded on hearsay evidence and this objection could not be and was not proceeded with after the applicant, the first named defendant herein, refused to consent to the adducing of same. This evidence was then ruled in admissible and, accordingly, the issue underlying this objection and its basis could not be and was not proceeded with, argued, heard, or decided.
>
> 22.05 The separate and additional objection relating to the involvement of Navan Mining with Bula's banks and in the security was voluntarily withdrawn by the plaintiffs herein, following on and because of the refusal of an adjournment to permit a discovery application.
>
> 22.06 During the course of the said s. 316A application, the plaintiffs herein expressly reserved all of their rights in respect of the matter of the involvement of Navan Mining with Bula's banks and the security, and did so in the context of the withdrawal of a separate and additional objection relating to the involvement of Navan Mining with the banks and in the security."

The statement of claim at 17.05 and 30.2 referred to consort parties.

It was submitted that the plaintiff confused reasonable price from value (para. 30.01 et seq.) and the receiver's duties under s. 316A.

It was also submitted that in the Supreme Court all that was withdrawn was the new evidence. No ground of appeal was withdrawn though hearsay evidence was withdrawn. There was no reservation of rights in the Supreme Court though Mr. Peart, on behalf of the plaintiffs, did reserve this matter in the High Court.

The statement of claim at para. 39.12 pleaded that the s. 316A proceedings were predicated upon and argued under a false premise because of the failure to clarify the interest and involvement of Navan Mining. The High Court and the Supreme Court were misled and the said proceedings were conducted and decided upon a false premises and were liable to be set aside. It was submitted by Mr. Finlay that this was the most serious allegation in the 19 years of litigation and should also have been particularly pleaded.

11. Counsel for Tara and the Banks joined with the receivers reply and made further submissions

12. Decision of the Court
12.1 Reliefs sought
The applicants seek an order striking out the proceedings especially that found on the ground that same has not been pleaded as a

fact as required by the rules.

Order 19 rule 22 provides as follows:

> "Wherever it is material to allege malice, fraudulent intention, knowledge, or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred."

The applicants claims that the proceedings are frivolous and vexatious and are *res judicata.*

Order 19 rule 28 provides as follows:

> "The court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any other case or in case of an action or defence being shown by the pleadings to be frivolous or vexatious, the court may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."

The applicants also seeks an order requiring the plaintiff to apply to the court before commencing any further proceedings against the defendants or any one of them.

12.2 Mr. Keane referred to *Carney v. Ireland* as concerning an unrepresented litigant instituting proceedings in the matter which was *res judicata*. Reference was also made to *Kiely v. Creative Labs* per Denham J. in the Supreme Court which also involved an unrepresented litigant. In the present case the pleadings were settled by counsel and the respondents were ably represented by counsel at the hearing. In this light the court should consider the claim made by the respondents..

12.3 The statement of claim, in addition to the reliefs claimed in the plenary summons, include the following

> 46.01 (ix)(a): A declaration that the judgments and orders of the Supreme Court and the High Court in the s. 316A proceedings heard by this court (105/02 and 2002/108 COS).

and in related proceedings, having been obtained in circumstances of concealment of information and/or fraud, ought to be set aside.

That relief is sought against the receiver who is the first applicant therein.

Relief is sought against all the parties (other than Outokumpu) as follows:

> (xix)(a) A declaration that the judgments and orders of the Supreme Court and the High Court in the Bank proceedings (1986/6624P),

having been obtained in circumstances of concealment of information from the court and/or fraud ought also to be set aside.

I shall return to deal with the strict practice requirements relating to pleadings. Ground but should deal with the alleged factual basis of this allegation.

Mr. Wymes relies on what he was told by Mr. Brian Calver, the then managing director of Navan on 6th June, 2002 and what was told to him by Mr. Frizelle (para. 36 of Mr. Wymes' second affidavit sworn 14th January, 2005). This would appear to be the height of the proposed factual basis in relation to the unparticularised claim of fraud and concealment of information. The averments of Mr. Wymes do not go any further than the statement of claim. The statement of claim in turn do not appear to advance the matters canvassed, but not proceeded with, in the s. 316A proceedings.

It is unclear to what extent the evidence of Mr. Calver and Mr. Frizelle can substantiate the core allegation in relation to Navan. In his replying affidavit Mr. Wymes refers to the general factual basis of the present proceedings at para. 194, which appears to lead up to the allegation at 194(h) as follows:

> "At material times, there have been in existence arrangements with Navan's aforesaid specified objects, and entered into between and involving entities, undertakings and subsidiary companies, associated with Navan and the banks in relation to Bula's loans, and consequent thereon, arrangements concerning rights under the security granted by Bula to the banks, and pursuant to which the receiver was appointed, whereby Navan had an interest and involvement in the said security."

The subsequent sub-paragraphs under para. 194 (from (i) to (dd)) appear to follow from that pivotal assertion. The evidence of Mr. Tully's, a solicitor to and director and secretary of Tara, is relevant. He denies such arrangements.

Mr. Wymes' affidavit does not supplement the Statement of Claim in this regard. The allegation remains unparticularised, unsubstantiated and unclear. Even if this were not so, the relevance of the allegations is not spelt out. The logic of the allegation of Navan's involvement and interest on both sides leading to a conclusion that the ore body was almost unsaleable by the receiver except to Tara (194(l)) would appear to be a *non sequitur.*

Moreover, whatever about the reservation of unsubstantiated matters and matters of hearsay at the s. 316(a) proceedings, the saleability of the one body was a matter which was dealt with in those proceedings in relation to price.

Mr. Wymes acknowledges that his objection of conflict of interest was grounded on hearsay evidence imparted to him by persons who were outside the jurisdiction, being non-compellable foreign witnesses employed by the defendant, Navan (see para. 222 of his affidavit).

Whether or not the matter was properly before the court in the s. 316(a) proceedings, it is clear that it is not a proper basis for the present proceedings. The position has not changed with regard to the nature of the allegation – the claim still lacks a factual foundation.

12.4 The issue of the Coopers and Lybrand report referred to by Mr. Wymes at para. 92 is not central to the issue in this motion and not relevant to the claims made. However, it does show a certain carelessness in attributing to Coopers and Lybrand allegations that "huge unaccounted sums of money" were paid to certain named politicians who had responsibility for mining policies. Mr. Tully, at

para. 9 of his affidavit, refers to Keane J., then a High Court Judge, informing counsel for Bula, at an interlocutory hearing in open court, that, having read the entire C. & L. report there were no allegations of wrongful payments as alleged by Mr. Wymes. The fact that that allegation was withdrawn by counsel for Mr. Wymes in those proceedings (1986/10898 P), but repeated in the present replying affidavit, was infelicitous. I note Mr. Wymes' subsequent acknowledgement of the correctness Mr. Tully's averment in this regard.

12.5 Notwithstanding Mr. Sowman's averments that neither Mr. Crowley nor any person acting for or on his behalf had misled the court or that the performance of his duties was in any way tainted or undermined by a conflict of interest, Mr. Wymes, in para. 25 of his second affidavit says:

> "In all the circumstances, I am unable regrettably to accept Mr. Crowley's rejection (not on his own testimony but conveyed through Mr. Sowman …)."

The circumstances referred is that Mr. Wymes' statement of claims was not challenged or denied by averment and was not *res judicata* / or an abuse of process. In this regard Mr. Wymes averred as follows:

Para. 23(bis) "It is respectfully submitted that it is of real significance and notable that in the within applications, the content of the said pleadings have not been put in dispute or challenged or denied by averment, either by the banks or on their behalf, or the receiver or on his behalf. It would have been an obvious and simple matter for affidavits to have been sworn by responsible employees of the bank and by Mr. Crowley, denying the existence of the pleaded arrangements, if such were the case."

This ignores the very clear averments both of Mr. Sowman and Mr. Tully. In Mr. Sowman's second affidavit at para. 3 he avers that he did not propose to address each and every statement of fact made by Mr. Wymes and continued:

> "For the avoidance of doubt, I confirm that the decision of the first named defendant not to respond to each and every statement made in the said affidavit is not to be taken as an express or implied admission on his part that any such statement is true or accurate or that the first named defendant agrees in any way with any such statement.
>
> 4. Without prejudice to the foregoing, for the avoidance of doubt, I say and believe that the first named defendant categorically rejects any express or implied allegation that may be made in these proceedings that he has in any way misled this Honourable Court and/or that the performance of his duties was or is, in any way, tainted or undermined by a conflict of interest or of any other factor whatsoever."

In Mr. Tully's second affidavit, at para. 6, he considers a number of specific points and adds:

> "In doing so any failure on my part to refer to any specific allegation, statement or claim made in the Wymes affidavit should not be taken as an acceptance or acquiescence on the part of Tara or Outokumpu of any particular statement, claim or allegation made by Mr. Wymes in his affidavit."

12.6. The proceedings sought to be dismissed arise out of a lengthy series of the plaintiffs' litigation between the banks and Tara, culminating with a s. 316A order by this court, which order was upheld by the Supreme Court, confirming the sale of the Bula ore body to Tara.

What was referred to by the Bula parties as "the Navan Group arrangement" with the banks in respect of its security with Bula was stated by Mr. Wymes as being the cornerstone of these present proceedings. The net issue before the court is whether this is the same issue as in the 316A proceedings which was already decided by the High Court and on appeal by the Supreme Court.

The letter of 2nd February, 2003 from Mr. Wymes' solicitor stated that supplemental *evidence* (emphasis added) had come into existence subsequent to the High Court hearing (tab. 14 of pleadings). This letter was exhibited in the affidavit of Michael Wymes sworn on 12th February, 2003.

The purpose of that affidavit was to supplement the affidavit sworn in previous High Court proceedings. Paras. 20, 21 and 25 to 28 referred to the arrangement with Navan. Paras. 30 to 35 concluded: "I say and am advised that such new evidence is relevant". Para 34 referred to discovery (a) – (d).

The only additional matter is the reference to Navan's alleged involvement in the arrangement already referred to in previous affidavits. The court can find no new, supplemental or, indeed, any evidence or facts as required by Order 19, rule 22 in relation any arrangement whether with Navan or otherwise, referred to in that or, indeed, in any subsequent affidavit.

12.7 Mr. Wymes argued that evidence of Navan's involvement was withdrawn and, accordingly, was not heard, argued or properly before the High Court or the Supreme Court on 18th February, 2003 because the new evidence was based on hearsay.

In relation thereto, the transcript of the s. 316A proceedings in the High Court was referred to by Mr. Finlay S.C., counsel for the receiver, submitting as follows:

> "Mr. Peart specifically withdrew these matters" – this the involvement of Navan and the conflict of interest by the receiver, My Lord – "Mr. Peart specifically withdrew these matters and did not open the sections of the affidavits of Michael Wymes in respect thereof to the court, and he did so without prejudice to the rights of the plaintiffs herein to litigate those specific issues subsequently in a *lis inter partes*. His having done so is noted in the transcript of the s. 316(a) proceedings, as is the acknowledgment of Mr. Justice Murphy and of counsel for the receiver".

Counsel referred to the right which Mr. Peart was preserving was a plan to litigate those specific issues subsequently in a *lis inter partes*. Mr. Wymes could appeal the decision to rule out the hearsay evidence: he choose not to do so. He could have appealed the courts decision not to allow for a motion for discovery: he did not do that. He could not create for himself a right to now institute these proceedings in respect of the same issues against these defendants. The transcript continued:

> "Mr. Peart, solicitor on behalf of the opposing parties, agreed to the withdrawal of references to the involvement of another mining company, given that the court previously refused to give an adjournment for the purpose of discovery in relation to the documents".

If the reference to "the involvement of another mining company" were a reference to Navan then this could not be supplemental

evidence coming into existence subsequent to the High Court hearing.

It was, Mr. Finlay, S.C. submitted, an extraordinary proposition that all that was being withdrawn would voluntarily would be the subject of subsequent litigation. If this was Mr. Wymes vehement intention, it was a manipulation of litigation.

The judgment of the appeal in the Supreme Court *per* Denham J. (tab. 7) refers to paras. 4 to 7 of the appeal of the High Court judgment. Clearly the matter of the adjournment for the purposes of discovery and the appeal of that matter was relevant to the s. 316 application. Neither the High Court nor the Supreme Court decided that the matter of Navan's involvement was not relevant.

The purpose of s. 316A declaration was to allow the notice parties to raise objections. It was appropriate that these objections re Navan etc. should have been proceeded with. It was claimed that the effect of the "arrangements" had the result of depressing the price so that the price obtained, as is argued by the plaintiffs/respondents, was not the best price. Clearly this was relevant to the s. 316A proceedings.

The court finds that the issue was indeed, pleaded and had a relevance to the s. 316 proceedings.

In the Supreme Court, all that was withdrawn was what was termed "the new evidence". There was no ground of appeal withdrawn. Hearsay evidence was withdrawn before the Supreme Court but there was no reservation of litigating (or re-litigating) that matter subsequently. The withdrawing of claims did not confer rights to re-litigate.

This court finds that it was an abuse of process, or at least of full disclosure and/or frankness not to inform the Supreme Court accordingly. Moreover, no new evidence is now offered to ground the present attempt to re-litigate the issue which is an abuse of process.

The High Court, in purportedly acceding to the withdrawal of hearsay evidence and the reservation of rights, was not expressly informed either that the matter would be agitated in other proceedings.

If the claim, as distinct from the hearsay evidence, had been withdrawn, in the High Court the question arises as to why the matter was appealed to the Supreme Court?

There was not any distinction made, in the notice of appeal, that it had been inappropriate to raise the matter under s. 316.

The answer to the question was that the issue was not proceeded with because there was no evidence to support it. The issue cannot be re-litigated in these proceedings for three reasons.

> Firstly, it is an abuse to re-litigate not only matters which were determined but also issues which were and could have been determined. Mr. Justice Hardiman in *Carroll v. Medical Council* at 41 and 42 was satisfied that the proceedings, in that case, qualified as a technical abuse of process.
>
> Secondly, there is, already referred to at 12.4 above, no adequate nor proper factual basis for this issue to proceed. The claim still lacks factual foundation.
>
> Thirdly, the Supreme Court was not informed that the matter pleaded and not proceeded with, would be relitigated. It would appear that there was no reservation in the Supreme Court.

12.8. The allegations of fraud requires more detailed consideration. The issue of fraud is raised in the statement of claim against the receiver and against all parties (paragraph 46.01 (ix) (a)) of the statement, for example). In addition, it is claimed that there was:

> "Misleading of the High Court and Supreme Court;
>
> irregularity;
>
> wrongdoing;
>
> wrongful interference and obstruction of the proper prosecution of the banks in the s. 316 proceedings (46.01 (xx))."

However, these claims are also wholly unparticularised.

It is necessary, in addition to filing grounds of claim, to give particulars in relation to those claims. Order 19(5)(2) provides:

> "In all cases alleging misrepresentation, fraud, breach of trust, wilful deceit or undue influence and in all other cases in which particulars may be necessary, particulars (with dates and items if necessary) shall be set out in the pleadings. See also the English Supreme Court practice 18/12/6.

It is essential, when pleading fraud, to do so with particularity.

It was common case, of course, that, with the exception of the mention of the involvement of Navan, this was the matter which had been raised in the s. 316A proceedings. It forms the kernel of the plaintiff's present action and, indeed, the basis for the allegations of fraud. It is clear from a perusal of the statement of claim that there is an enormous detail of assertions made with regard to price, valuation, correspondence, litigation and arguments and to the duties and obligations of each of the defendants to the plaintiffs (including a duty not to conceal or appear to conceal the alleged involvement or interests of third parties) together with allegations of wrongdoing and, indeed, misleading of both the High Court and Supreme Court (where proceedings were allegedly conducted and decided under a false premise and were liable to be set aside (para. 39.12)). Despite this detail there is no allegation of fraud in the body of the statement of claim.

It is only in the prayer at para. 46.01 (pp. 49 and 51) that fraud is pleaded in terms of judgments having been obtained in circumstances of concealment of information and/or fraud. A declaration is sought in relation to each of the proceedings that the High Court, Supreme Court and related proceedings be set aside.

The parties are, of course, aware of the necessity of pleading fraud with particularity. The court has already been addressed on the implication of the first allegation of fraud as against the receiver and on submissions that there are no unchanged circumstances nor

indeed substance in relation to such an allegation being imputed to the receiver at this, or at any stage.

No attempt is made in the extensive allegations made of wrongdoing, concerted effort etc. to allege or particularise fraud in the body of the statement of claim.

The plaintiff had claimed against the receiver that the receiver was prejudiced in the conduct of his duties by a conflict of interest deriving from Navan's involvement in the security held by the banks. It was alleged in para. 39.09 of the statement of claim that the receiver had wrongfully and/or in breach of duty and/or negligently and/or in breach of contract concealed the fact that he, his advisors and Navan mining had conflicts of interest in respect of the sale of the assets of Bula and, at para. 39.12 that because of the failure to declare the interest and involvement of Navan mining the High Court and the Supreme Court were misled and the said proceedings were conducted and decided upon a false premises and liable to be set aside.

The allegations were framed in terms which were not particularised and which were vague and hint at the previous orders of the Superior Courts being obtained by fraud.

The court must weight unsubstantiated claims against the clear and detailed denials averred to by Mr. Sowman and Mr. Tully on behalf of the banks and on behalf of Tara and Outokumpu.

It is clear that there are very limited grounds upon which a decision, a final decision of the Superior Courts can be set aside, apart from appeal. Keane J., as he then was, in *Kenny v. T.C.D.* referred to *L.P. v. L.P.* [2002] 1 I.R. where he summed up the effect of the relevant judgments in relation to which a final order may be impugned. Apart from the slip rule the only ground upon which a final and conclusive decision of the High Court could be set aside is in separate proceedings on the grounds of fraud.

Murphy J. in *Tassan Din v. Banco Ambrossiano* [1991] I.R. 569 approved the dictum in *The Ampthill Peerage* [1977] A.C. 547 that:-

> "And once the final appellate court has pronounced its judgment the parties and those who claimed through them are concluded; and, if the judgment is as to the status of a person, it is called a judgment in rem and everyone must accept it. A line can thus be drawn closing the account between the contestants. Important though the issues may be, how extensive the evidence, whatever the eagerness for further fray, society says:
>
> > 'We have provided courts in which your rival contentions have been heard. We have provided a code of law by which they have been adjudged. Since judges and juries are fallible human beings, we have provided appellate courts which do their own fallible best to correct error. But in the end you must accept what has been decided. Enough is enough.'

Murphy J. concluded that:

> "Nothing short of fraud pleaded with particularity and ultimately established on the balance of probabilities would be sufficient grounds in the present case for upsetting the decision given by the Supreme Court'."

Mr. Keane referred to order 19, rule 22 in relation to allegations of malice, fraudulent intention, knowledge or other condition of the mind of any person where the rule stated that it should be sufficient to allege the same as a fact without setting out circumstances from which the same is to be inferred.

It does not appear to the court that there is an allegation of fraud as the fact in the pleadings, fraud for the purpose of setting aside a final decision is not some kind of equitable fraud or lack of frankness. It is conscious and deliberate dishonesty and a declaration must be obtained by it (see Lord Wilberforce in *Ampthill*, 571). The judgment continued:-

> "Authorities as to judgments make clear that anyone wishing to attack a judgment on the grounds of fraud must make his allegation with full particularity, must when he states it to be prepared to prove what he alleges and ultimately must strictly prove it."

The decision of the court on the 316A proceedings is the relevant declaration. There is no indication either in the extensive pleadings nor in Mr. Wymes affidavits as to how the alleged concealment of information and/or fraud led to the declaration granted by this court in the s. 316A proceedings.

If it is now submitted that the conflict of interest/Navan involvement was not relevant to the s. 316A proceedings, as originally claimed, the question arises whether the fraud allegation have any relevance to other proceedings.

What is being sought without proper factual foundation is the setting aside of

> (a) the decision of the High Court and Supreme Court in relation to the consent for the sale to Tara which consent is a declaration by the court that the receiver is entitled to sell or, at the very least, that the conditions allowing the sale pursuant to s. 316A have been complied with by the receiver, and the decision of the High Court and the Supreme Court in the Banks litigation.

It seems to this court that the first essential stage is to make the allegation with full particularity. This is not at all apparent from the pleadings. Moreover, there is no averment in Mr. Wymes' affidavit (which are not pleadings) which further the factual basis. It seems indeed, unfortunate that the two allegations of fraud seems to have been added as an afterthought in para. 46 of the prayer to the statement of claim. One would have expected details of the nature of interest in the security and how this gave rise to a conflict of interest. It would necessarily have to had been shown how the receiver acted fraudulently and that the impugned judgments were procured by such fraud. In the absence of such particulars the proceedings cannot proceed.

In a motion such as the present motion it is necessary, once a case to strike out had been made out by the applicants/defendants, to give some evidence that the claim is stateable.

12.9 The fourth named defendant, Outokumpu Oy, who subsequently took over Tara Mines Limited could have had no involvement. Its inclusion in the fraud claim may have been oversight. However, it is a serious abuse to plead fraud where it was not intended. There are, moreover, no particulars given in relation to that defendant.

The court finds that the evidence referred to in Mr. Wymes' affidavits relating to a conflict of interest/Navan involvement is, in any

event, not sufficient to ground any claim for fraud

The court is of the view that conflict of interest was relevant to the section 316A proceedings. Evidence on affidavit in relation thereto was largely conjecture and supposition. The court had heard that evidence and the submissions made in relation thereto and made a determination on the basis of all but the hearsay evidence.

The purpose of s. 316A proceedings is to enable title to be conveyed to a purchaser. Mr. Wymes' affidavit in the 316A proceedings raised issues of impropriety, conflict of interest, collusion, depressed price which were relevant to price. He withdrew evidence that had been deemed inadmissible even if he did attempt to reserve unspecified rights. The plaintiffs in these proceedings, notice parties to the s. 316A proceedings, must be deemed to have withdrawn their opposition to the extent of their withdrawal of evidence to support that opposition and cannot now attempt to relitigate and have the s. 316A decision set aside.

12.10 The concert parties referred to in 17.05 of Mr. Wymes' affidavit are Navan, Arcon and Imet. Tara is not included. It is difficult to understand why, in those circumstances, Tara is a defendant. The arrangement alleged between the "concert parties" was clearly denied by Mr. Hayes on behalf of the banks. Mr. Tully, the Company Secretary of Tara, emphatically denied that Navan had any involvement in the purchase of Bula. He denied that there had been any misleading of the court.

The court prefers their clear evidence as against the supposition of the respondents.

It is not clear what is meant by allegations are made in relation to self-dealing (para. 41.01 – 4 of the statement of claim) beyond the reference to "arrangements between the concert parties".

12.11 In an application such as this there is a distinction to be made between:

(a) pleadings with particulars with dates and items if necessary;

(b) reasonable prospect as evidenced by the replying affidavits, and

(c) distinct proof.

Many of the allegations are inappropriately pleaded; others are pleaded without particulars and the remainder lack any reasonable prospect. (see *Ampthill* at 571; Murphy J. in *Bruno Tassan Din and Kenny v. T.C.D.* (Murray J.) 20.6.03 at p. 5.

It is accepted that distinct proof is, of course, a matter for the trial. It is also recognised that pleadings may be amended. The court is mindful that full pleadings including the defence of the parties, require reply to particulars of defence and/or discovery.

The court finds that there is a requirement that particulars with dates and items is necessary as a factual basis for the claims made. There is not any new evidence to give a reasonable prospect to what appears to be mere allegations which date back to the bank case and the 316A application. There is a bare identification of Navan as the alleged principal in the arrangement. However, it is unclear what exactly is claimed in relation to Navan's interest in the security of the banks over the assets of Bula which would appear to be the central block of the plaintiff's claim.

12.12 The reference to "at all material times" at para. 14.06 of Mr. Wymes' affidavit is not particularised and appears vague. It would appear to be as early as April, 1997 (para 50). It is unclear the material times ended whether with the death of Conor Crowley in 1999 or extended to the scheme of arrangement in July 2000 (14.04 of the same affidavit). Given the comprehensive nature of the Bank proceedings which ended in 1995 (15.06-70) of Mr. Wymes affidavit any so-called arrangements should have been known to the plaintiff's prior to that date. In any event during the bank proceedings the court was informed of the agreement dated 9th April, 1999 on that day (see para. 16.01 of Mr. Wymes' affidavit). Certainly by the last quarter of 2000 when Tara put in a sealed bid (para. 18.01 of Mr. Wymes' affidavit) the arrangement/conspiracy must have existed to have had any effect on whatever price was then offered. The banks and Tara have denied any arrangement and, as already stated, the Bula parties allegations are unsubstantiated both in relation to detail and to time.

12.13 Emphasis was made on the absence of discovery. Discovery was refused in relation to this issue by Barr J.; and the High Court in the s. 316A proceedings refused an adjournment for the purpose of an application for discovery. There is no indication whether and to what extent the latter or, indeed any future application differed from the application which was refused. The court, at this stage, has to weigh up unparticularised and vague supposition on the one side with the averments of Mr. Hayes and Mr. Tully. The dates referred to in their affidavits would seem to be within the "material times" referred to by Mr. Wymes in para. 14.06.

12.14 The affidavit of Mr. Wymes of 9the December, 2004 at para. 194 headed "Factual Basis" gives as sources facts within his own knowledge and belief, facts in the public domain and facts to be disclosed on discovery. He refers to a number of other sources. The court has no way of discerning which facts are in his own knowledge or emanate from the public domain and/or the discovery already granted (or discovery contemplated in the future). There is no indication whether any of the assertions, or which of them, emanate from any of the other sources referred to. In relation to Mr. Frizelle, the source would seem to refer to a telephone conversation the text of which is exhibited. This goes no further than to say that Mr. Frizelle could try to get some detail in relation to the alleged conflict of interest. The court must distinguish a ground of claim and an indication on affidavit of another's attempt to get evidence to substantiate that claim. The matters referred to have already been before the court and have not advanced in character. They formed a specific ground for an appeal as it was. It is entirely inconsistent and irreconcilable to approbate and reprobate.

It is well settled that the purpose of the procedural remedy of discovery is to aid a party in the process of litigation. It is not to be invoked so as to enable a plaintiff to plead a cause of action which that plaintiff is not otherwise in a position to plead. Details of complaint must be pleaded with some particularity. A plaintiff cannot launch an action with a view to obtain by discovery as grounds for such an action or with a view to amend proceedings: *Gavin v. Graham-Twomey* [1994] 2 ILRM 315 at 320.

Paras. 226 – 249 of Mr. Wymes' replying affidavit was already contained in his affidavit sworn the 12th February 2003 before the Supreme Court. Paragraph 30 of that affidavit averred "I say and am advised that the above evidence is relevant to the issue of conflict of interest and discovery to the within application".

The motion for discovery in January 2001, which was refused by Barr J. in the bank proceedings, was made by the present plaintiffs where Mr. Wymes had no evidence of Navan's involvement. The identification, without name, of Navan does not add any further material fact to the claims made. Mr. Wymes's second affidavit sworn on the 14th January 2005 referred to the absence of an affidavit from the receiver regarding the issue of discovery and to the conflict of interest. This is not relevant to the requirements of

stating the plaintiff's claim with the appropriate particularity.

12.15 There are a number of further comments in relation to the affidavit of 9th December, 2004 and the supplemental affidavit sworn 14th January, 2005 which the court should make at this juncture.

The first is that it appears clear that the plaintiff's distinction between price and valuation is critical to the argument that they are entitled to pursue the present claim. This is a matter to which the court had dealt with extensively in the s. 316 decision. The issue for the receiver was price – objectively ascertainable price – and not subjective evaluation. The statutory provision and the case law was referred to in that decision.

The second matter relates to the hearsay evidence of Mr. Calver and Mr. Frizelle. There is no affidavit from either, nor, indeed, is there an affidavit from the deponent's son, Michael T. Wymes in relation to his alleged meeting with Mr. Calver in December, 2000, or January, 2001. It seems curious in view of the extensive affidavit of December, 2004 and that of January 19th, 2005, that these matters were not brought to sharper and more defined focus.

Thirdly, even allowing for the ever-increasing complexity of assertions and the extent to which they have been dealt with in previous litigation, it is unclear to what purpose the plaintiffs reiterate them in greater detail. Moreover, the assertions prior to the contract of sale of 9th May, 2001, were clearly known before the s. 316A application. Mr. Wymes says they related to discussions with him, that he was informed by Mr. Calver and Mr. Frizelle that Mr. Calver had told him he had spoken to an executive of Outokumpu and that both Mr. Calver and Mr. Frizelle informed him of the contemplated non-competitive "link ups" among other matters.

The three assertions relating to post contract on May 31st, June and August of 2001 seemingly confirmed what he already knew prior to the contract.

Fourthly, the court is uncertain what emphasis Mr. Wymes is placing on Navan's major financial problems, delisting and re-listing. It does not appear to have any relevance.

Fifthly, if the position of Navan, Inmet and Arcon were as mentioned it was unclear how this affected the receiver's rights to sell. The reference to their position is vague, lacks precision of pleading. It is unhelpful for Mr. Wymes to say that he could read more into what is vague and hearsay and that what was important was what was intended rather than what had actually happened is unhelpful.

In the interchange with counsel on behalf of the plaintiffs it was clear that the plaintiffs' case was that not alone did the receiver not have any independence but that the banks, having appointed him, had their hands tied with regard to any discussions they might wish to have with regard to the securities held by them. However, the plaintiff could not go this far other than by reference to possible deals involving a number of parties. Indeed, to the limited extent to which such reference was made there appears to be no *prima facie* case grounding conspiracy, concerted arrangements and certainly not fraud.

Indeed, the import of the plaintiffs' case appears to be that the assertions were, or could have been intended, rather than were contracted to be done or, indeed, subsequently happened is purely speculative. The unparticularised pleadings refer to hearsay, speculation and possible outcomes of the sale of a valuable unexploited ore body adjoining Tara in relation to which other mining interests might possibly becoming involved.

Meanwhile, for a period of upwards of 19 years, the plaintiffs have been involved in largely unsuccessful and costly litigation which has prevented the debenture holders from realising their security.

12.16 The court is conscious of new claims being smothered by reason of old claims having been rejected. This is all the more likely to happen where there have been numerous unsuccessful attempts at related litigation as has been the case here.

The court is, however, satisfied that even though not appropriately particularised all of the plaintiffs claims have already been dealt with by the courts and are *res judicata*.

What remains are indeed vague, unparticularised allegations without foundation. It is an abuse of process to say that the appropriate foundation and particulars should await discovery.

13. Accordingly the court will make the following orders:

1. An order dismissing the within proceedings as constituting an abuse of the process of this Honourable Court.

2. An order restraining the plaintiffs and each of them from instituting any further proceedings against all defendants without the prior leave of this Honourable Court.