

## THE HIGH COURT

[2003 No. 3268 P]

BETWEEN

FRANK MC BREARTY AND COMPANY LIMITED

PLAINTIFF

AND  
 THE COMMISSIONER OF AN GARDA SÍOCHÁNA  
 MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM  
 IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

**Judgment delivered by Mr. Justice Paul Gilligan on 25th day of October, 2007**

1. The plaintiff company was incorporated on 22nd day of April, 1988, with two directors and shareholders namely Mr. Frank McBrearty Senior and Mrs. Rosalind McBrearty. The principal activity of the plaintiff company was the selling of wines/spirits and the running of a nightclub "Frankies Nightclub" in the town of Raphoe, Co. Donegal.
2. Frank McBrearty Senior is the driving force behind the plaintiff company. He was born in Raphoe and left school at the age of twelve receiving little by way of further formal education. He initially carried out agricultural work which he didn't like and then joined the Irish army spending a tour of duty in Elizabethville in the Congo. Following his tour of duty he left the army and went to join other members of his family in Scotland. He carried out civil engineering works and in his words worked most days from dawn to dusk building up a successful business in contracting. He employed approximately 100 people and had an office manager, a civil engineer and a quantity surveyor together with premises. He built up sufficient funds to build a holiday home in Ireland beside where his mother and father had lived. He married in October, 1968 having met his wife Rosalind in Scotland and the couple had five children. In or about 1975, as he wanted to bring up his children in Ireland, he gave up his business in Scotland and settled in Ireland and in 1978 he purchased a small public house in Raphoe "The Corner House". Mr. McBrearty then began to expand the public house he had purchased and also purchased several adjoining properties. Following the incorporation of the plaintiff company Mr and Mrs McBrearty transferred their interest in the public house and nightclub to the company.
3. In the early 1990s the business of the nightclub was expanding with disco, country and western music and pop bands and acts were being brought to the premises from abroad. Mr. McBrearty describes the business as being very successful. In particular he had little or no trouble about the premises and got on very well with the Garda Síochána.
4. From 1993 onwards there was substantial expenditure incurred in an extension of the licensed premises/nightclub and the purchase of new equipment, furniture, fittings and disco lighting and between 1993 and 1997 the total expenditure was slightly in excess of a sum of €400,000.00, most of the work involved having been carried out and completed by the end of 1996.
5. Mr. McBrearty himself and his sons all of whom had experience in the building trade helped out with the works.
6. In 1994 the plaintiff company business had a turnover of €652,007.00 and a gross profit of €432,103.00 with a loss after expenses of €505. In 1995 the turnover was €682,138.00 with a gross profit of €481,494.00 and a profit after expenses of €25,070.00. In 1996 the plaintiff company had a turnover of €879,696.00 a gross profit of €622,746.00 and a profit after expenses of €103,512.00.
7. In the years 1988, 1989 and 1993 the company had undeclared sales of €174,227.00. Further, between the years 1987 and 1998, the plaintiff company had undeclared interest totalling €136,191.00. Mr. McBrearty has given evidence that in addition there were personal moneys intermingled with these undeclared sales and interest which sums were invested in policies and by July, 2000 these investments were worth €419,232.00 at which time Mr. Frank McBrearty Senior placed the moneys in an eleven year off-shore bond. He then, with the advise of his accountant, in August, 2004 availed of a settlement procedure with the Revenue Commissioners pursuant to the off shore bank account investigation, the result being that he was obliged to pay the Revenue a sum of €476,000.00 leaving a balance of the then value of the bonds of €367,482.00 which appears as an exceptional item in the plaintiff company's accounts for 2004. It would appear that as a minimum, had the sum of €174,227.00 been declared in the company's annual returns to the Revenue Commissioners as at year end 1993, the company would have had the benefit of an additional €94,000.00.
8. Mr. McBrearty had the ambition of building a restaurant and a hotel premises to compliment his bar and nightclub. In 1984 he first started thinking about a hotel and subsequently bought other properties to enlarge his site. His plan was to carry out an extensive refurbishment of the existing premises, build a restaurant with rooms overhead and finish the development off with a wraparound hotel. He also was interested in investing in other pubs, and he looked at lands and premises in Letterkenny, Derry and Strabane. The basis for the restaurant was to improve the facilities and attract a larger clientele to the bar and nightclub premises as there were people travelling from long distances especially to the Saturday night country and western music nights. Mr. McBrearty took the view that there was a very good market for good hotel rooms. It does appear from the professional evidence that following discussions, draft plans were drawn up in 1992 for a hotel premises and a costing was obtained for a sum in the region of £630,000.00 but the idea of a hotel went no further at this point in time and no application was ever made for planning permission. Subsequently Mr. McBrearty had discussions with his professional advisors as regards the possibility of a restaurant on the vacant site immediately adjacent to the bar and nightclub premises with the possibility of rooms overhead but again this proposed venture did not proceed ahead. By November 1996 Mr. McBrearty was in discussions with Peter Cullinane, an architect, as regards developing the adjacent site for a two storey restaurant and by May, 1997 full plans had been drawn up and would have been ready for an application for planning permission but no further steps were taken in the matter.
9. In 1996 the plaintiff company's business was being managed by Mr. McBrearty Senior and his two sons, Frank Junior and Andrew. Andrew was anxious to take a gap year out and he went to the United States in the earlier part of 1996.
10. Following the death of Richard Barron on 14th October, 1996, rumours abounded in the Raphoe area that the McBreartys and Mark McConnell, Mr. McBrearty's nephew had in some way been involved in his unfortunate death. Frank McBrearty Junior and Mark McConnell were arrested on 4th December, 1996, as were various other members of the extended McBrearty family and Frank McBrearty Senior was arrested on 5th December, 1996, and remained in custody and separately undergoing medical treatment under Garda supervision for a continuous period of some fourteen days. It is quite clear that everybody in the wider Raphoe area knew that the McBreartys had been arrested in connection with the "murder" of the late Mr. Richard Barron and there was intense media interest. Mr. McBrearty says that the business was very badly damaged and vile rumours began to circulate regarding the McBreartys. From an early stage in mid-October, 1996 there was intense Garda activity around the plaintiff's public house and nightclub premises, and his family, and when they went out they were verbally abused with people openly saying that they had "murdered" Richard

Barron.

11. In early 1997 Sergeant White arrived on the scene and throughout 1997 road blocks were set up effectively to deter patrons from visiting the plaintiff's premises. The Garda Síochána maintained an almost continuous presence on and about the premises by way of multiple and prolonged attendances. There were frequent bomb hoaxes which were dealt with by members of an Garda Síochána clearing out the plaintiff company's premises when no other adjacent premises were ever cleared out, and indeed people used to stand on the pavement opposite outside a chip shop watching the people being evacuated by the Gardai from the plaintiff's premises. On occasions innocent customers of the plaintiff's business were being arrested by members of an Garda Síochána and Mr. McBrearty says it was impossible to keep his business running. On one occasion Sergeant White indicated to Mr. McBrearty that while it may have taken Mr. McBrearty twenty years to build up the business he would see that it was closed down in six weeks.

12. The plaintiff company and its licensee Frank McBrearty Senior were prosecuted by the Garda Síochána by way of 50 summonses containing 157 charges, the dates of the offences ranging from early 1997 through to the end of 1998. The hearings of these summonses went on at Letterkenny District Court over a period of 60 days during 1998 and 1999 and the summonses were finally withdrawn in June 2000 on the direction of the Director of Public Prosecutions. There was considerable adverse publicity surrounding the prosecutions.

13. The plaintiff company's claim is that as a result of the events which occurred surrounding Mr. Barron's unfortunate death, the actions of members of An Garda Síochána and the manner in which the McBrearty family became indelibly entwined in the events through absolutely no fault on their part, their customer base fell away and without the numbers the business suffered very significant losses over the subsequent years and has never recovered.

14. In these proceedings the plaintiff company alleges that it was subjected to unlawful, wrongful and malicious prosecution, oppression and harassment by agents of the first named defendant and others acting at their behest, that from in or about January, 1997 the plaintiff was prosecuted by servants or agents of the first named defendant by way of summonses alleging breaches of the Liquor Licensing Acts, the Petty Sessions Ireland Act, 1851 and the Criminal Justice (Public Order) Act, 1994. The plaintiff alleges that these prosecutions were instituted maliciously and without reasonable and/or probable cause and were eventually discontinued by direction of the Director of Public Prosecutions.

15. Very extensive particulars are set out in the statement of claim.

16. The plaintiff alleges that prior to the events complained of the goodwill and business of the plaintiff company had grown into one of the most successful licensed premises and nightclubs in Donegal and had earned a good reputation. Prior to the events complained off it is alleged that the plaintiff company had at all times maintained a good working relationship with An Garda Síochána and that prior to 1997 the plaintiff company had only been prosecuted on approximately six occasions for minor breaches of the Liquor Licensing Acts. Due however to the campaign of malicious prosecutions, the visits of the Garda Síochána to the premises, the road blocks as set up, the searches as carried out with great frequency, the repeated stopping and questioning of patrons for no apparent reason in the vicinity of the plaintiff's premises and the fact that if patrons who did cause trouble were ejected members of An Garda Síochána would approach these people and encourage them to make complaints against members of the plaintiff's staff, traffic being diverted away from the plaintiff's premises by members of the Garda Síochána and Mr. McBrearty Senior being threatened by Sergeant White, the plaintiff alleges that it was necessary for the plaintiff company through Mr. McBrearty Senior to embark on four sets of judicial review proceedings two of which effectively did not get off the ground and one of which pursuant to a failed ex parte application in the High Court was appealed to the Supreme Court and was the subject matter of an ex tempore judgment. The fourth set of proceedings have been adjourned generally by agreement and are ongoing.

17. The plaintiff company alleges that its business, goodwill, reputation, licence and assets have been irreparably damaged and the plaintiff has suffered loss, damage and expense. Several of the key servants or agents of the plaintiff company have either resigned or were unable to continue their normal functions. It is alleged that a number of the servants or agents of the plaintiff were threatened, intimidated and assaulted and that a number of these persons have suffered severe consequences to their health, both physical and mental.

18. Against this background, the plaintiff company claims damages in respect of the damage to the plaintiff's business, the cost of the legal fees involved in defending the District Court prosecutions which were eventually discontinued, the costs involved in the four High Court judicial review proceedings, the costs involved in making some 60 complaints as regards individual members of An Garda Síochána to the Garda Complaints Board and further the plaintiff claims aggravated damages.

19. The plaintiff's claim initially was for €7,200,000.00 which was made up as to €3,472,605.00 in respect of loss of earnings from October 14th, 1996, through until 31st December, 2006, €800,000 in respect of the diminution in the capital value of the plaintiff's licensed premises, €2, million arising from lost opportunities, and €927,795 arising from a loss from an alleged forced sale of adjacent lands.

20. During the course of the hearing these figures were amended to a claim for €3.2 million in respect of loss of earnings to date, the claim for €927,795.00 loss arising from the alleged forced sale of adjacent lands was discontinued in these proceedings but is to be made in the personal claim as advanced by Frank McBrearty Senior and a claim for aggravated damages in these proceedings was discontinued, counsel indicating that Mr. McBrearty Senior would make such a claim in his own personal proceedings.

21. The defendants take the view that the total value of the loss of earnings claimed due to the impact of the incidents complained of on the company's performance is a figure of €688,077.00 and the defendants disallow any claim in respect of loss of capital value of the licensed premises and take a similar view in respect of the claim for loss arising from lost opportunities.

22. While the defendants initially filed a full defence, in a subsequent document as dated 20th day of April, 2007, the defendants accept that these proceedings are to proceed by way of an assessment of damages only and that the defendants are liable to compensate the plaintiff in respect of its provable and legally recoverable losses arising from the wrongful actions of members of An Garda Síochána as identified by the Morris Tribunal. The defendants further clarify that they are willing to compensate the plaintiff for such provable and legally recoverable pecuniary loss to the extent that same arises from any matters encompassed within the pleadings herein, thereby relieving the plaintiff of the burden of having to prove each and every cause of action or the factual basis therefore. The defendants specifically however deny that they have a liability to compensate the plaintiff in respect of the legal costs as claimed by way of special damages.

23. Mr. Liam Grant, an Accountant of Grant Sugrue and Co, Chartered Certified Accountants, gave evidence on the plaintiff's behalf and Mr. Ray Jackson, Chartered Accountant, of KPMG Chartered Accountants, gave evidence on the defendants' behalf. It is

unfortunate that these two independent and highly experienced experts in the field of forensic accounting could effectively find little or no basis for agreement in respect of any of the claims as made out on the plaintiff's behalf.

24. The first claim on the plaintiff's behalf relates to a claim for loss of profits from October, 1996 onwards.

25. The first issue that arises in this context is the extent of the base figure to be taken for the plaintiff company's profit as of year end 1996. The difficulty that arises in this regard is that in normal circumstances, in order to assess a base figure for profit, a valuer and a purchaser would be inclined to look at the turnover for three years and the profit as achieved for the same period and average them out. In the circumstances of this case in 1994 there was a turnover of €652,007.00 resulting in a loss of €505. In 1995 there was a turnover of €682,138.00 resulting in a profit of €25,070.00. In 1996 there was a significantly increased turnover of €879,686.00 resulting in a greatly enhanced profit of €103,512.00. Averaging the three years profits results in an average yearly profit of €42,692.00. Averaging the 1995/1996 profits results in an average yearly profit of €64,291.00.

26. Mr. Grant on behalf of the company takes the view that the 1996 profit of €103,512.00 should be taken on its own on the basis that between 1993 and the early part of 1997 over €400,000 had been spent in extending the licensed premises and purchasing new equipment, furniture, fittings and disco lighting and that this expenditure was carried out a time when €400,000 represented a very substantial amount of money and the main benefit of the expenditure would have accrued in 1996 with approximately €252,000 having been expended on the refurbishment prior to the 31st December, 1995.

27. Mr. Jackson on the defendant's behalf declines in anyway to alter his basic viewpoint that the three years, 1994 – 1996 inclusive, have to be taken together and have to be averaged out.

28. This aspect of the claim also poses a further issue to be decided which is that Mr. Grant takes the view that there should be an uplift of some €44,000.00 in turnover to be added to the 1996 figures which figure yields an additional profit of some €25,000. This uplift represents approximately 4% of turnover and is not necessarily all that significant but yields additional profit in excess of 20% which is significant in the overall context of the claim. Mr. Grant in evidence very fairly concedes that his figure is arbitrary. Mr. Jackson on the defendant's behalf when pressed declined to make any allowance for an uplift but indicated that if any bi monthly accounts for V.A.T. were made available he would reassess the situation. It was clarified that no actual bi monthly V.A.T. returns for the relevant periods are available and it also appears that at this remove, from the period 1994-1996 there are no actual broken down records available as to the relevant October, November, December periods.

29. Mr. Grant on the plaintiff's behalf argues strongly that on the basis of the factual situation which pertained immediately following the unfortunate death of Mr. Barron on 14th October, 1996, the plaintiff company's business was affected by a fall off in the numbers attending and due to the fact that Mr. Frank McBrearty Junior who was actively involved in running the business with his father was arrested on 4th December, 1996, in connection with a murder investigation arising from the death of Mr. Barron, as were several other family members and related members and as was Mr. Frank McBrearty Snr on the 5th December, 1996, when he was held for some fourteen days between actual custody and periods of time under Garda supervision in hospital.

30. It does appear that arrangements were already in place as regards the booking of bands and D.J.s for the Christmas period 1996 and Mr. McBrearty Snr. in evidence conceded that he had been allowed to make a number of telephone calls in connection with his business during the relevant fourteen day period from 5th December onwards. On the basis of Mr. McBrearty's evidence to the court I am satisfied as a matter of probability that the plaintiff company's business was affected and while I accept Mr. Grant's general evidence in this regard I do have to bear in mind that his figures are arbitrary. In essence Mr. Grant advances the view that the real profit before taxation of the plaintiff company at year end 1996 was €128,907.00 made up as to €103,512.00 actual profit and €25,395 being the uplifted profit to allow for a loss of turnover occasioned to the plaintiff company's business because of the events which occurred involving the McBrearty family from the 14th October, 1996, to 31st December, 1996. Mr. Jackson remains steadfast in his view that prior to year end 1996 the plaintiff company had an ability to generate pre-tax profits on a three year averaged basis in the order of €43,000 per annum.

31. There is no doubt that the figures involved present an unusual picture moving from a loss of €505 in 1994 to a profit to year end 1996 of €103,512.00 with the McBrearty family's troubles commencing in mid-October, 1996.

32. I accept the evidence of Mr. Jackson that the plaintiff company's history was clearly one of ups and downs as regards generating profit and the history of the plaintiff company's trading and the evidence of Mr. Morrissey, the defendants expert valuer, all tend to suggest that it does not necessarily follow in the licensed premises/nightclub business that because a significant profit is generated in one year the same or an enhanced profit will be generated in the following year.

33. I accept Mr. Grant's evidence that considerable deference has to be paid to the figures for 1996 both in respect of turnover and profit generated and I also take the view that there has to be some uplift for a reduction in the plaintiff company's customer base following the unfortunate death of Mr. Barron in mid-October, 1996. Taking all the circumstances into account, I come to the conclusion that the appropriate base figure to represent a reasonable figure for the profit that the plaintiff company was capable of generating on an averaged yearly basis as at year end 1996 is €75,000 per annum.

34. An issue arises as to the relevant period of time in respect of which the loss of profits are to be assessed. Mr. Grant commences the loss effectively in October, 1996 and continues through to year end 2006. He takes the view that the plaintiff company effectively never got back on its feet as a result of the death of Richard Barron but in bringing the claim to an end at the 31st December, 2006, he advances on behalf of the plaintiff company a claim of €800,000 in respect of loss of capital value of the business. Mr. Jackson takes the view that year end 2003 appeared to him to be the appropriate end point but on being pressed somewhat he would not greatly disagree with year end 2004 being taken as the end point of the claim but on the basis of the plaintiff company being paid compensation to this point in time he totally discounts any basis for a claim for monetary compensation in respect of an alleged loss of capital value.

35. I take the view that the claim for loss of profits should terminate as of the 31st December, 2004. This allows for a claim for eight years loss of profits and takes into account a fade factor against a background where Mr. McBrearty Junior and his cousin, Mark McConnell, were officially cleared of all allegations in November, 2004. I also take into account that the 50 summonses against the plaintiff company and Mr. McBrearty Snr. were all withdrawn on the direction of the Director of Public Prosecutions in June, 2000. Furthermore in 2004 the plaintiff company was in a position on a turnover of €791,820.00 to generate a profit of €21,728.00 after seven years of continuous losses totalling €613,000.00. Furthermore the smoking ban in licensed premises and nightclubs was introduced in March, 2004 and on the evidence adduced as a probability was likely to have had an impact on the plaintiff company's business and yet they were still in a position for the first time in seven years to generate a profit.

36. There is also the factor of the off shore account as held by way of a Bond in 2004 which had a value of some €800,000.00 and the entire moneys to pay off the Revenue Commissioners were borrowed by the plaintiff company with an exceptional item appearing in the accounts for 2004 being the balance of the value of the bond in the sum of €367,482.00. This in effect, while an asset of the plaintiff company, represents a notional situation as the entire proceeds of the bond could not be liquidated without significant penalties and thus the moneys remained in the bond, the moneys to pay the Revenue Commissioners were borrowed subject to an interest payment of some €25,000 per annum and a notional exceptional item was registered in the 2004 accounts. Mr. Jackson on the defendants behalf accepts that the initial undeclared sales do not give rise to any material impact on the plaintiff company's accounts leading into the year 1996 and had the relevant sums been declared properly the company would have had an additional €94,000 in its accounts but in the overall context of the claim Mr. Jackson was satisfied that this was not a factor to be taken into account. However he takes a different view of the settlement issue with the Revenue Commissioners because it was necessary for the company to borrow €476,031.00 and the company from late 2004 onwards was obliged to pay continuing interest. Furthermore, if the plaintiff had accepted the very significant penalty that would have arisen if the eleven year bond had been cashed in earlier, clearly there would have been no need for continuing interest payments.

37. I also bear in mind the evidence of Mr. Morrissey, the defendants valuer, that the four years up to and including the year 2000 should have been fairly good years in accordance with market information but the years 2000 to 2004 inclusive were not strong years and the years 2005/2006 were clearly difficult years. In coming to a conclusion as I do that the plaintiff's claim should run in effect from mid-October, 1996 to year end 2004 I am allowing, in accordance with market information, four good years up to and including 2000 and four more challenging years up to and including 2004. I take the view on the totality of the evidence that this is a fair and reasonable approach in respect of the period of time upon which the plaintiff's claim for loss of profits is to be calculated.

38. Mr. Grant on the plaintiff company's behalf has given extensive evidence and it can be summarised on the basis of his initial uplift of turnover for 1996 of €924,000.00 and a profit of €129,000.00 leading into projected increases in turnover up to and including 2004 of €1,341,000. This in turn leads to projected profits leading into a figure of €302,000 for the year ended 2004. This in turn leads to a net loss of profits to year end 2004 from 1996 of €1,881,000. The same exercise carried out on the basis of 1996 averaged profit of €75,000 running through to year end 2004 gives a loss of profit of €1,069,258.00 and allowing for the combined losses of €613,000 in the years 1997 to year end 2004 inclusive, these figures result in a value of €1,682,258.00, being attributable to the plaintiffs claim for loss of profits.

39. A very significant feature in the case has been the argument advanced by Mr. Jackson on the defendant's behalf that his analysis of the recurring expenses between 1997 and 2004 show that the costs for each trading year from 1997 to 2004 exceeded the costs incurred by the plaintiff company in 1996. He highlights the areas of insurance, directors' remuneration, depreciation salaries, repairs and maintenance, telephone, motor expenses, legal and professional fees, interest and accountancy. He makes the case that these costs appear to him to have no causal link with the incidents complained of and he would have expected the cost of expenses such as repairs, maintenance and salaries to decrease after 1996 as a result of the ensuing fall in sales. In essence he makes the case that he would have expected these identified costs to remain stable and to have been affected only by annual inflation. Mr. Jackson has prepared a graph which he has identified as graph 4.4 showing the actual increase in the cost of the relevant expenses as identified compared with anticipated increases based on inflation effect and that this demonstrates that these identified expenses were an average €65,000 more in the eight years following 1996 than they had been in 1996 after adjusting for inflation. He details the effect that these costs have had on the profitability of the company and comes to a conclusion that these costs have increased by a total of €524,197.00 greater than would have been anticipated. As there is no causal link between the incident and these increased costs, these additional costs over the costs that would have been anticipated allowing for inflation have to be in the view of Mr. Jackson, adjusted back into the figures.

40. Mr. Jackson was asked to carry out a valuation on the basis of a €75,000.00 base figure to allow for the overheads and administrative expenses which he has identified for the period 1997 to 2005 and his calculation would result in the plaintiff's claim having a value of €837,054.00 to include the company's recurring losses of €613,000.00. However making no adjustment for the overhead and administrative expenses as referred to by Mr. Jackson his calculation for loss of profits results in a total loss to include the recurring annual losses of €1,383,320.00.

41. Mr. Grant on the plaintiff's behalf takes exception to this approach by Mr. Jackson and makes the case that in computing the projected loss he has included all the increased overhead expenses and that accordingly they are fully taken into account in computing the loss of profits. Furthermore Mr. Grant argues that selling prices increased in each of the years 1997 to 2004 and therefore such increased selling prices contributed to increased overhead expenses. Mr. Grant argues that the increased wages for labour costs partly arose because the key management staff Mr. Frank McBrearty Snr and Mr. Frank McBrearty Jnr. were absent from the business for long periods. Further Mr. Andrew McBrearty who came home from the United States in 1997 to manage the business in the absence of his father and brother left the business in late 1998 because on his own evidence, which I accept, he was obliged to give up the management of the business due to continual harassment from members of An Garda Síochána. Mr. Jackson has indicated to the Court that this aspect was not a factor he was aware of when preparing his report. As regards the motor expenses Mr. Grant makes the point that they substantially increased because of the incidents that were taking place and because of the various proceedings and for example increases in insurance charges apply to all businesses post 1996.

42. The reality of the situation is that the various expenses as set out in the audited accounts for the relevant years were all incurred and Mr. Grant in preparing his calculations has taken account of the situation. In my view it would be a distortion of the figures if the increased cost of certain expenses were to be taken out to be added back to the plaintiff company's profits and in this regard I prefer the evidence of Mr. Grant.

43. A further difference of opinion between Mr. Jackson and Mr. Grant is that Mr. Jackson uses a rate of inflation which varies between 1.015 and 1.056 to calculate the increase in profits working off the base figure of €75,000 for 1996. Mr. Grant's comparable calculation works off the Central Statistics Office sales value index which index reflects both sales price increases/decreases and sales volume increases/decreases for bars/licensed premises during the relevant years. I accept that the CSO figures may not be accurately applicable to door receipts figures but I take the view that Mr. Grant's basis of calculation is a preferable indicator to be used as a guide.

44. I take the view however that Mr. Grant's calculation is not altogether accurate because in effect in his projections he worked from all the existing audited figures based on significantly reduced turnover figures as compared to his projected turnover figures and while he allowed 7% for additional labour costs/provisions and also allowed for an increase in projected advertising costs, bands and disc jockeys, the reality of the situation appears to be that his labour costs are lower than the industry norm not only in respect of the licensed premises but particularly in respect of the nightclub premises. As Mr. Morrissey indicated in his evidence it is important to differentiate between a seven day licensed premises and an entertainment premises which has a lot of ancillary costs. Mr. Morrissey refers to the additional security costs, lawyer's fees for extensions, to having an increase in insurance because you are into public

liability especially a premises with a capacity for 800 people, and also costs such as PPI and IMRO.

45. Having regard to the totality of the evidence on this aspect I am not satisfied that Mr. Grant in his calculation based on the CSO sales value index has sufficiently allowed for the projected expenses that will arise due to a significantly increased projected turnover.

46. An argument was advanced on the defendants behalf that in particular the nightclub/entertainment business is somewhat fickle and that in the particular circumstances of this case in 1999 a premises "Sister Sarah's" opened in Letterkenny and Mr. Morrissey has given evidence that since 1996 six nightclubs have opened in the Letterkenny district. The evidence adduced does not convince me on the balance of probabilities that the opening of "Sister Sarah's" had any material impact on the plaintiff company's business. The opening of six nightclubs since 1996, in the Letterkenny district appears to suggest that there has been a thriving demand for nightclubs but in any event the totality of the evidence in this regard does not convince me on the balance of probabilities that these events would have had any material impact on the plaintiff company's business.

47. There was some discussion during the course of the evidence as regards the situation that pertained in 1998 with a turnover of €864,292.00 being achieved and the loss to the company been reduced from €92,951 in 1997 to €5,904.00 in 1998. I take the view having reviewed the evidence that nothing untoward turns on the situation that prevails. Andrew McBrearty had come from the United States and in the absence of his brother Frank McBrearty Jnr and with very little assistance from his father he attempted to try to get the business back on a reasonable footing but in doing so he expended €66,810 on advertising compared to €40,571 in 1997 and €201,742 on bands and entertainment as compared with €136,625 in 1997. His own evidence is that he worked very long hours with a view to promoting the business but eventually in 1998 he left the business for reasons as already referred to herein. There was a suggestion made that perhaps a manager could have been retained but no material evidence was ever adduced. In this regard I accept the submissions as made on the plaintiffs behalf that with all that was going on, it is unlikely that anyone, would even have taken on the job. Other than that Andrew McBrearty did his very best to get the business back to profitability but failed due to ongoing harassment from the Garda Síochána I do not believe that anything material turns on the figures and events of 1998.

48. Mr. Burns on the defendants behalf has raised an issue with regard to public policy and that the plaintiff company should not be entitled to recover compensation in respect of any monies derived from "unlawful trading" following normal closing time on a Saturday night in the absence of an extension granted by the court.

49. I do not believe that a public policy issue arises and I will expand on this aspect later in my judgment. However for the sake of completeness at this juncture no evidence was tendered on behalf of the defendants in this regard, no figures were extrapolated to assist the Court as to the likely sales between normal closing time on Saturday evenings and the actual closing time and in my view, on the evidence adduced, it would in any event be impossible to calculate the amount involved. It also appears that for the relevant period of time involved, the plaintiff company made returns to the Revenue Commissioners and duly paid the appropriate tax.

50. The company expended very considerable sums by way of refurbishment on their premises in the years 1993-1996 and clearly an uplift in turnover and profit was to be anticipated and this is what occurred. This Court cannot overlook the fact that in 1995 the company achieved a profit of €25,070 which was a significant advance and in the year 1996 had a truly exceptional year achieving a profit of €103,512.00. From the end of 1996 the company quite simply was unable to achieve a profit and I am satisfied on the evidence that the major factor in this regard was the damaging events leading from the unfortunate death of Richard Barron on the 14th October, 1996. I take the view, as I have previously stated, that the relevant base figure upon which to work the calculations for an ongoing loss of profits is €75,000 and the appropriate period is to the year end 2004. Disregarding Mr. Jackson's argument that the costs the company incurred over and above the inflation adjusted 1996 costs should be added back into the equation, Mr. Jackson values the company's losses including the recurring loss of €613,000 between the years 1997 and 2004 at €1,279,685.00. Mr. Grant using a different basis of calculation but on the same base of €75,000 and for the same period arrives at a figure of €1,682,258.00, a difference of approximately €400,000. While I prefer the basis of Mr. Grant's calculation I do, as I have previously indicated, accept the argument that his calculation does not reflect all the additional costs that would have been incurred by the business as a result of the increased turnover and doing the best I can in the circumstances I come to the conclusion that the appropriate figure to be awarded to the plaintiff company for loss of profits between October, 1996 and 31st December, 2004, is a sum of €1,500,000.00.

51. The second aspect of the claim relates to loss of opportunity by reason of the plaintiff company's inability to expand its business. Mr. Grant on the plaintiff's behalf asserts a 95% probability that the plaintiff company would have gone on to build a restaurant and hotel complex and would have acquired an additional licensed premises, but for the events arising following the death of Mr. Barron. Mr. Grant has given evidence of projected profits that could reasonably have been anticipated from the construction of a restaurant with rooms overhead and, if constructed and operational by the year 1998, would have generated profits of a sum in the region of €465,000, up to year end 2004.

52. Mr. Jackson adopts a totally contrary view referring to the lack of evidence by way of documentation that there was any real intention to develop a restaurant/hotel, to the fact that there was never an actual application for planning permission notwithstanding that a number of plans had been prepared between 1992 and 1997 and that no actual foundations were ever laid. Furthermore he views it as highly unlikely that any lending institution would have given a substantial loan for the type of development envisaged having regard to the company's trading figures and audited accounts and further he relies on the general evidence as given by Mr. Meagher from Bord Fáilte that generally in the period with which we are concerned, tourism figures for the north west, including east Donegal, were poor in comparison terms with the rest of the country. Mr. Meagher in evidence stated that the development of a hotel premises would create a challenging situation for the McBreartys having regard to the tourism figures.

53. Against this general background I am impressed with the evidence of Mr. McBrearty Snr and of his son Andrew McBrearty that it was always the intention of the plaintiff company to develop a restaurant and hotel premises and clearly there were discussions with professional advisors from 1992 onwards in this regard although the projects as discussed were never brought to fruition. In 1996 there were further discussions with Mr. Cullinane and plans were drawn up bringing a project for a restaurant to planning permission application stage but because of the deterioration of events in 1997 the project was shelved.

54. On the basis of the evidence of Frank McBrearty Snr. and his son Andrew McBrearty I am satisfied to accept that on the balance of probabilities the plaintiff company would have developed a restaurant with rooms overhead as an ancillary business to the existing licensed premises and nightclub. I do not accept however, that as a matter of probability, the plaintiff company would have gone on to develop what has been described as a wraparound substantial hotel premises and, on the basis that the plaintiff company would have developed the restaurant with rooms overhead, I would not be satisfied on the balance of probabilities that the company would have invested in any additional premises or purchased a second licensed premises. I take the view that the general conception of rooms overhead a restaurant or immediately adjacent thereto was clearly going to be of ancillary benefit to the plaintiff company's existing business and I am fortified in this view by the evidence of Mr. Stanley Robinson, who for many years, had been a patron of

the plaintiff company's nightclub in Raphoe as he had a particular interest in country and western music. He resided in Bangor, Co. Down and his home was 96 miles from Raphoe. He stated that he used to stay overnight by booking a room in the Central Hotel in Raphoe and at times he found that it could be difficult to book the accommodation at short notice and he normally had to book four weeks in advance. He was also in a position to state that other patrons of the plaintiff's business also stayed in the Central Hotel and other persons in local bed and breakfast premises. In general he stated that the accommodation was very limited.

55. Having regard to the level of turnover and profit achieved in year end 1996 I take the view that on the balance of probabilities the restaurant venture would have been constructed and operational by the beginning of 1998 and the additional rooms would probably have followed on and been constructed and operational for the year 2000. While I accept that Mr. Grant's figures are pure projections, by reason of the fact that the restaurant/rooms complex has never been built, his figures for the projected profit for the restaurant with rooms overhead project have to be reduced for the years 1998 and 1999 by reason of the fact that the restaurant only would have been operational and it appears Mr. Grant's revised figure, if the restaurant had been operational in 1998 and the rooms overhead had become operational in 2000, would be €430,000 in profit generated.

56. I see no need to differentiate between the end point of the plaintiff company's claim in respect of its loss of profits and that of the restaurant/rooms which results in this claim also running to year end 2004. However as the project has not yet commenced it necessarily follows that the building costs involved and professional fees will be more expensive than if the project had been completed as anticipated and furthermore the capital value of the overall premises clearly has to be lower than if an overall premises including a restaurant with rooms overhead comprised the basis of the valuation.

57. On this basis I take the view that fair and reasonable compensation to the plaintiff company for loss of opportunity to expand and develop its business by reason of the events which occurred following the death of Mr. Barron is the sum of €550,000.00.

58. The plaintiff company also claims compensation for loss of capital value by reason of the events following upon the death of Mr. Barron. Mr. Grant has given evidence that the valuation of a property used as a licensed premises/nightclub is substantially influenced by the turnover of the business and this is confirmed both by Mr. Campbell and Mr. Morrissey the respective valuers as retained by the parties herein. Mr. Grant takes the view that the current market value of the licensed premises complex would be substantially greater in the event that the business was achieving his projected turnover. To year end 2004 the actual turnover was €791,820 and to year end 2004 Mr. Grant's projected turnover is €1.341 million. The evidence of the two valuers does not significantly differ in methodology based on the actual figures and the difference in the valuation of the business based on the two turnover figures of €740,000.00 and €1.3 million is a sum in the region of €800,000. Allowing for the actual 2004 turnover figure of €791,820.00, this valuation would have to be subject to a slight reduction.

59. Mr. Jackson on the defendants' behalf does not accept that there is any loss or reduction in the capital value of the licensed premises. He takes the view that a loss of capital value is effectively compensation for future loss of profits and is in effect "double counting". He takes the view that by the end of the year 2004 the events in question were not, any longer, having any effect on the company's performance. He relies to some extent on the fact that it was necessary for the company to borrow some €476,000 in respect of the settlement as achieved with the Revenue Commissioners in respect of the off-shore account. However it is clear that this money was not borrowed until October, 2004 and thus any interest charges arising would not have had any material impact in that year.

60. Mr. Jackson further makes the point that Mr. Francis McBrearty Jnr had been officially cleared in all respects of any involvement in the death of Mr. Barron in 2004 and had received compensation and that this was widely publicised and he found it difficult to see how any losses would continue beyond 2004, into the future. Mr. Francis McBrearty Jnr and his cousin Mr. Mark McConnell were not officially cleared until 19th day of November, 2004 by way of a letter from the then Commissioner of An Garda Síochána which indicated that on the 13th day of February, 2002, the previous information on the Pulse system to the effect that Richard Barron was murdered was superseded by the redesignation of the offence involved as "dangerous driving causing death" in respect of which it was indicated that neither Frank McBrearty Jnr. or Mark McConnell were listed as suspects and that a user of the system doing a search against either of their names would not be brought to the Richard Barron case. Mr. Frank McBrearty Jnr was not compensated for the loss and damage as suffered in 2004 but subsequently legal proceedings as initiated by him were compromised by way of a financial settlement.

61. In any event I have taken the view that the plaintiff company's claim for the reasons as stated should end at year 2004 but it does appear to me to follow that if the plaintiff company is to be compensated for loss of profits to year end 2004 then the company's turnover has to be in a lesser amount than would have otherwise generated sufficient profits to merit no award. I do not accept however that the level of turnover at year end 2004 would have been in the region of €1.341 million as opposed to the actual €791,820. I have no exact figures in this regard other than that running off a base averaged figure for profit of €75,000 prior to the events occurring which give rise to the cause of action herein, and that the projected profit to year end 2004 would have been €143,848.00 as opposed to the actual profit of €21,728.00. I also bear in mind the ratio of profit to turnover as demonstrated by Mr. Grant's uplift of turnover on the figure of €103,512.00 to allow for disruption of the plaintiff's business in October, November and December, 1996 which showed that a 4% increase in the turnover of €879,696.00 generated an increase of slightly over 20% in the profit generated.

62. There is no doubt but that the predominant feature in valuing a business such as the plaintiff's is the level of turnover achieved, be it for the particular year of valuation or taken as an average for a number of years. I take the view that the particular circumstances of this case do give rise to an unusual situation because in my view the unfortunate events which followed the death of Mr. Barron could not have come at a more acute point in time for the plaintiff company because having expended almost €400,000 on a refurbishment and expansion of its existing business and having achieved to year end 1996 a profit in excess of €100,000 on a turnover of €879,696.00, the company went into a decline not again achieving profit until year end 2004 when it achieved a profit of €21,728.00 on a turnover of €791,820.00. I also take the view that in valuing the plaintiff's business one would have to have regard to the fact that the business was significantly damaged but yet as a result of these very proceedings has received compensation designed to put it back into the position it was in prior to the events complained of from the financial perspective. It is accordingly unlikely that the plaintiff's business can simply be valued by taking the turnover achieved in 2004 with an anticipated turnover had the events not occurred.

63. I take the view in all the circumstances that the plaintiff is entitled to compensation for a loss of capital value, the valuation to be effective as at year end 2004 and in this regard I measure the sum of €400,000 as being the loss of capital value.

64. A claim is made by the plaintiff company in respect of fees due to Stewart and MacLoughlainn, the company's accountant and auditors. The claim is in the sum of €52,506.00 and is made up in two parts. The first claim is for 114 hours at €285 per hour in respect of work done between November, 1997 and July, 1998 assisting a private investigator as retained by the plaintiff company. It

is clear that the work involved was secretarial/administrative by nature and was not the normal work of an auditor/accountant and this is accepted by Mr. Seamus Devine, Chartered Accountant, who indicates that the reason he became involved in performing the work the subject matter of this claim was because during that period of time Mr. McBrearty Snr. had no one else to turn to in the locality and as he trusted Mr. Devine, he asked him to liaise with the private investigator on his behalf and to carry out various secretarial/administrative duties. The amount of hours expended by Mr. Devine on the plaintiff company's behalf is not disputed but it would be unfair, in my view, to the defendants for them to have to pay for the 114 hours work on the basis of full chartered accountants fees and I consider in all the circumstances that a fee of €100 per hour is fair and reasonable and accordingly in respect of the secretarial/administrative work I would allow the sum of €11,400.00 together with VAT at 21% of €2,394 to a total of €13,794.00.

65. The second aspect of this claim is for 31 hours work carried out by Mr. Devine in connection with various correspondence with the company's bankers in order to obtain finance for the company and the preparation of projections and figures relating to same. It is alleged that the finance was required in order to allow the company continue despite the losses being incurred. The basis of Mr. Devine's claim and the nature of the work carried out is not disputed and in the circumstances it does appear to me that this is the reasonable work of an accountant on the company's behalf and accordingly I will allow the sum of €9,300.00 as claimed together with VAT of €1,953.00 to a total of €11,253.00.

66. Accordingly I will allow the claim in respect of Mr. Devine's fees in the sum of €25,047.00.

67. The remaining claim on the plaintiff's behalf relates to legal costs incurred by the plaintiff's former solicitor, Ken Smyth of Messrs Binchy & Co Solicitors, who acted on the plaintiff company's behalf in defending the 50 District Court summonses as brought against the plaintiff company and/or its licensee Frank McBrearty Snr resulting in some 156 charges. Sergeant White was responsible for 21 of the sets of summonses and Garda O'Dowd for 20. Further the plaintiff company is seeking the legal costs involved in maintaining four sets of High Court judicial review proceedings, three of which were unsuccessful in that in none of them was leave granted by the High Court to bring an application for judicial review and in the fourth case described as the "perjury judicial review application", the matter is still outstanding before this Court having been adjourned generally with liberty to re-enter.

68. The plaintiff company further seeks the legal costs involved in having Messrs Binchy & Company Solicitors handle some 60 complaint applications that were made to the Garda Complaints Board in respect of various members of An Garda Síochána all of which complaints were in due course withdrawn or declared inadmissible. In respect of these applications to the Garda Complaints Board Mr. McBrearty Snr has given evidence that he had no faith in the Garda Complaints Board or in its procedures and that it was for this reason that eventually, in respect of the remaining claims which had not been declared inadmissible, he withdrew them. There is no provision for costs to be awarded to a successful applicant in respect of a complaint against a member of An Garda Síochána before the Garda Complaints Board and I take the view that the procedures as adopted by the plaintiff company in this regard could not be adjudged to have been necessary to protect the business or the assets of the plaintiff company or in some way minimise its loss and I do not accept that there was any "commercial value" to the plaintiff company advancing such complaints and in the circumstances in this regard I disallow the plaintiff company's claim.

69. I place the claim in respect of the legal costs as incurred in defending the District Court summonses and the first three applications for judicial review in a different category.

70. For ease of reference as regards the fourth set of judicial review proceedings being the "perjury judicial review" bearing record number 2001 732 J.R. and entitled Frank McBrearty Snr Applicant and the Commissioner of An Garda Síochána Respondent, I take the view that these proceedings are still extant before this Court and having been adjourned generally by agreement of the parties with liberty to re-enter it is open to the plaintiff to re-enter the proceedings and either proceed ahead with them or alternatively if it be the case reach an agreement with the defendant in respect thereof. It is clear that this particular set of proceedings relates to a very distinct issue to be decided within the proceedings and I take the view that it would be inappropriate for this Court to get involved in any issue as to costs in the circumstances and accordingly I propose not to do so.

71. Mr. Ken Smyth, solicitor of Binchy & Co, Solicitors gave evidence of the background circumstances as to how he came to be instructed by the plaintiff company and the many phone calls and meetings he had with Mr. McBrearty Snr and the other extended members of the McBrearty family and other persons who were affected by the events following the death of Mr. Barron. Contact was initially made with Mr. Smyth on 5th day of February, 1997, and Mr. Smyth recalled Mr. McBrearty Snr and the other members of the McBrearty family being extremely emotional, "very put upon by the whole thing". Occasionally Mr. McBrearty Snr. was in tears. Mr. Smyth recalled that it was quite effecting as he did not normally have clients coming to him in tears.

72. The first set of High Court proceedings were by way of a plenary summons seeking injunctive relief to stop the harassment, the roadblocks and the multiple attendances by members of An Garda Síochána on the plaintiff's premises and the general doing down of the plaintiff's business. These proceedings focused heavily on the road blocks and as described by Mr. Smyth when taking instructions having sat through a number of very urgent meetings and hearing very detailed and very telling and similar and consistent accounts from everybody concerned, he took the view that he had no option to but to take the step of issuing the injunction proceedings against the State defendants. In fact this particular application and set of proceedings did not proceed any further and Mr. Smyth has indicated in evidence that the road blocks and the general attention to the premises stopped and there was a golden period of maybe three months where the plaintiff company could get on with its business but unfortunately on his instructions that situation did not last. The purpose of the proceedings was just to try and stop the harassment in its track. The order in respect of these proceedings reflects that they were withdrawn.

73. The second set of High Court proceedings related to the large number of District Court summonses. Mr. Smyth has given evidence that the summons were coming in very rapidly and were being served within the curtilage of the court and he had to ask for the court's protection. The District Court summonses were prosecuted by Superintendent Kevin Lennon representing the D.P.P. and in the second set of proceedings leave to seek judicial review was sought, Mr. Smyth indicated that he was professionally concerned with the manner in which the prosecution was being handled. The initial application to the High Court was unsuccessful and in regard to this application it is accepted by counsel for the plaintiff that the applicable jurisprudence was against the plaintiff in the particular circumstances that pertained.

74. There was then a third set of High Court proceedings arising in respect of a refusal by Superintendent Kevin Lennon to agree to an adjournment of the various District Court summonses and the adjournment application being backed by Assistant Commissioner Carty of An Garda Síochána who had been asked by the Garda Commissioner to investigate *inter alia* the circumstances surrounding the various District Court summonses against the plaintiff company and Mr. McBrearty Snr. Mr. Smyth in his capacity as the company's and Mr. McBrearty Snr's, solicitor received a telephone call from Assistant Commissioner Carty and there was an open and frank discussion. The major concern of Mr. Smyth at the time was that the full facts were not being disclosed in the District Court. In

any event the third application was made to the High Court and was unsuccessful but was appealed to the Supreme Court and in an ex tempore ruling Hamilton C.J. on 22nd day of November, 1999 in refusing to grant the application as made by way of an order for judicial review prohibiting Judge John O'Donnell from continuing to hear the charges against the applicant and miscellaneous summonses pending before Letterkenny District Court and certain other related summonses stated at p. 4 of the judgment:

"However, the Court is concerned by the unusual nature of the allegations and the extent of them contained in the affidavit of Mr. McBrearty and the fact that many of these allegations are subject to the ongoing inquiry being conducted by Assistant Commissioner Carty. It is fundamental to the whole concept of the administration of justice that justice has not only to be done but has to be seen to be done and the court is satisfied that the learned trial judge is fully conscious of the obligation on him in this regard and that in order to fulfil and discharge his responsibilities in this regard before proceeding with the case he should be satisfied that all the relevant facts, including the documents, should be before him in order to enable him to determine the issues involved in these prosecutions and in the defence raised on behalf of the accused so that not only justice should be administered but that any risk of injustice should be removed. I am satisfied that the learned trial judge will bear these remarks in mind."

75. Shortly thereafter the learned District Court judge having considered the judgment of the Supreme Court adjourned all the summonses concerned and subsequently in 2000 the summonses were all withdrawn on the direction of the Director of Public Prosecutions.

76. Mr. Smyth has stated in evidence that the judgment of the Supreme Court was certainly a turning point in the entire episode. It was, as he describes it, "a foot in the door".

77. Mr. Smyth gave further evidence to the effect that while obviously he was acting on behalf of his clients, he felt and hoped that he was also acting in the interests of justice.

78. In the two unsuccessful High Court applications which were not appealed, costs appear to have been reserved and in the application that was initially refused in the High Court and appealed to the Supreme Court no order was made as to costs.

79. Mr. Burns on the defendants' behalf contends that a very substantial number of the charges as laid against the plaintiff company and Mr. McBrearty in the District Court summonses relate to late trading on Saturday nights at a time when it was not possible to obtain the requisite licensing extension from the court. It appears that what occurred on the evidence of Mr. McBrearty was that the local Garda Síochána had an informal arrangement in place whereby licensed premises and nightclubs could, with Garda consent, have an informal extension. Mr. Burns contends that the fact that this may have been the situation and may have been connived at by certain members of An Garda Síochána does not render the activity lawful and that if there was no lawful extension in place and the plaintiff company was trading at a time when it was breaching the law' public policy dictates that the plaintiff company ought not to be entitled to the payment of any costs incurred arising out of such activities including the costs of defending proceedings arising out of such wrongdoing. The fact that some party may be turning a blind eye to what is going on and then decides to stop turning such a blind eye does not render the activity lawful. Mr. Burns relies on the maxim "*ex turpi causa non oritur actio*" and that if you have a cause which is tainted by some form of turpitude then you can not obtain relief arising out of such a situation. He contends that if you are breaking the law with the connivance of a third party you are still breaking the law.

80. Mr. Giblin on the plaintiff's behalf takes exception to the submission by Mr. Burns that the plaintiff company and/or Mr. McBrearty were in anyway "breaking the law". Mr. Giblin refers to the fact that the plaintiff has asserted at all stages, and this was part of the defence as raised in respect of the District Court summonses, that its trading on a Saturday night was not unlawful because of the exemption that was given to all publicans in the area. Mr. Giblin refers to the fact that a central aspect to the plaintiff's defence to the summonses was that the State was estopped from bringing the prosecutions in the District Court. In the circumstances that arose with the withdrawal of all summonses by the Director of Public Prosecutions, the District Court never got the opportunity to rule upon the matter and thus there has never been a determination at law against the plaintiff and/or Mr. McBrearty in this regard.

81. A large number of the summonses against the plaintiff company and Mr. McBrearty as licensee do relate to trading on Saturday nights and the allegation as made is that such trading was unlawful and clearly if found guilty of the offences such an outcome would have very serious repercussions for the plaintiff company and Mr. McBrearty as licensee.

82. This effectively is the same argument as Mr. Burns raised in respect of "unlawful profits" earned from "unlawful" Saturday night trading.

83. I take the view that for it to be necessary for this Court to consider an argument based on public policy, the Court would first of all have to be satisfied that the plaintiff company was guilty of unlawful trading and the standard of proof involved in a criminal prosecution in the District Court would be that of a reasonable doubt. Fifty summonses were issued against the plaintiff company and Mr. McBrearty in his capacity as licensee and these were vigorously contested over some sixty sitting days at Letterkenny District Court before Judge John O'Donnell. Clearly there is a very convoluted and complicated background to the factual and legal circumstances prevailing which initially resulted in the Commissioner of An Garda Síochána directing Assistant Commissioner Carty to carry out an investigation to include *inter alia* the situation pertaining to the summonses in the District Court. There is the issue of the concerns as raised by Mr. Ken Smith, a solicitor and an officer of the court, as regards the manner in which the prosecution was conducted. There is the fact of the application for an adjournment of the summonses which application was backed by Assistant Commissioner Carty, but rejected by Superintendent Lennon and, following the views as expressed by Hamilton C.J. in the Supreme Court judgment arising pursuant to the judicial review application, were eventually adjourned and eventually all withdrawn on the direction of the Director of Public Prosecutions. On the basis of the evidence adduced both on direct and cross examination from Mr. Francis McBrearty Snr and Andrew McBrearty and bearing in mind that no evidence was tendered on behalf of the defendants in relation to this aspect, I am not satisfied on the balance of probabilities that the defendants in the summonses would have been found guilty of "unlawful trading".

84. Accordingly I do not accept that an argument as to public policy arises in the manner as contended for by Mr. Burns.

85. I found Mr. Ken Smyth to be a most impressive witness and clearly in his capacity as a solicitor he accepted instructions in a highly contentious and complicated matter probably without precedent at that time and it is quite clear from his evidence that he took the view that not only was he acting on behalf of the plaintiff company but also in the interests of justice and he is to be commended in this regard. I have no doubt but that the three separate applications as made to the High Court, one of which was appealed to the Supreme Court, and the defence of the District Court proceedings which involved some 60 trips to Letterkenny District Court over a period of some two years was necessary legal work in the best commercial interest of the plaintiff company and in order to minimise the financial loss being sustained. The actions of the plaintiff company in retaining Mr. Smyth as solicitor and



junior and senior counsel in respect of the defence of the District Court summonses and the three sets of High Court proceedings as referred to were, in my view, entirely reasonable and appropriate steps to have taken in the best interest of the plaintiff company particularly against the now exposed background circumstances as detailed in the various reports of the Morris Tribunal which the State defendants accept. In the circumstances, as part of the plaintiff's claim for damages, I direct that the plaintiff company be entitled to recover the legal costs incurred in defending the 50 summonses totalling some 156 charges and the legal costs incurred in the High Court proceedings bearing record number 1997 No. 2852 P, the judicial review proceedings as brought in 1998 but not proceeded with wherein Frank McBrearty was the proposed applicant and Judge John O'Donnell and the Director of Public Prosecutions the proposed respondents and the High Court judicial review proceedings brought on 19th day of November, 1999, before O'Neill J. in the High Court and as dealt with on appeal by the Supreme Court on 22nd day of November, 1999.

86. I take the view that the plaintiff is entitled to the legal costs as reasonably incurred and furthermore for the avoidance of doubt was entitled to retain both junior and senior counsel both in the District Court and in the High Court proceedings and accordingly is entitled to such costs on a solicitor client basis. I understand from counsel that the parties have agreed that in the event that I come to a decision that the plaintiff is entitled to such costs that the matter will be referred to an agreed arbitrator to evaluate the appropriate costs as due by the defendants to the plaintiff and accordingly I direct that the plaintiff is to be entitled to such costs as are found by the arbitrator to be properly due to the plaintiff on a solicitor client basis. Such sum for costs will be in addition to the amount of €2,475,047.00 to which the plaintiff is entitled pursuant to this judgment.