Neutral Citation Number: [2012] IEHC 28

THE HIGH COURT

2000 1628 P

BETWEEN

MICHAEL McMULLEN

PLAINTIFF

AND

GILES J. KENNEDY, PRACTISING UNDER THE STYLE AND TITLE

OF GILES J. KENNEDY AND COMPANY SOLICITORS

DEFENDANTS

Judgment of Mr. Justice Birmingham delivered the 6th day of February 2012

1. This case has a long, protracted and unfortunate history. Indeed, the litigation saga that forms the backdrop to the present proceedings would not have been out of place in a Dickens' novel. Its starting point is 1972, when the plaintiff took a lease of a castle, then in a dilapidated state, and some five acres of land near Tullamore, County Offaly, owned by the Charleville Estate Company. The plaintiff's relationship with his landlords, which was initially amicable, deteriorated. Litigation ensued. That litigation, or off-shoots of it, has been before every court in the land, from the District Court to the Supreme Court.

2. In 1982, Mr. McMullen commenced an action (hereinafter "the nuisance action") against Charleville Estate Company. The plaintiff was represented in those proceedings by Kent Carty and Company, although they were not the solicitors who served the initial proceedings. Two eminent senior counsel, one of whom was subsequently appointed to the High Court and the other later served as attorney general, advised that the nuisance action was a very weak one and was likely to be lost. Mr. McMullen requested his then solicitors to brief a particular senior counsel, the late Mr. Noel Clancy S.C. Kent Carty were extremely reluctant to do so, partly, it seems because Mr. Clancy had not been instructed previously by them and partly because they believed that the area of law involved lay outside Mr. Clancy's area of expertise. Mr. McMullen insisted and a compromise was reached which was that two senior counsel would be briefed: Mr. Clancy, and another senior counsel nominated by Kent Carty who would act as leader. At a consultation that was held relatively shortly before the nuisance action was due to come to trial, the leading senior counsel expressed the view that Mr. McMullen had no case, that it would be dishonest to take his money, and returned his brief. Preparation for the case continued with Mr. Clancy now the sole senior counsel.

3. The matter came on for hearing before Costello J., as he then was, on 10th July 1985, and subsequent days. Mr. McMullen was represented by the late Mr. Clancy, and by Mr. Fergal Sweeney, Barrister-at-Law, subsequently appointed as a magistrate in Hong Kong. Ms. Pamela Madigan, at the time an assistant solicitor with Kent Carty, attended on each day that the case was listed. While Ms. Madigan subsequently became a partner in Kent Carty, at the time she was newly qualified having been admitted as a solicitor just a couple of months earlier. It appears that the case did not start well for the plaintiff but that fortunes improved somewhat when the defendant went into evidence on the second day. On the third day that the case was listed, settlement talks began and the judge was asked for time to allow these discussions to take place. The talks began around 10 a.m. and continued until lunch time. The settlement discussions were conducted between Mr. Clancy S.C., on behalf of Mr. McMullen, and Mr. Alan Mahon, Barrister-at-Law, as he then was, on behalf of the Charleville Estate. It is not now in dispute that at one stage Mr. McMullen asked whether, in the event that things went wrong and the settlement did not work, he could go back into court and that Ms. Madigan advised him that he could. However, the circumstances in which Ms. Madigan came to give that advice have been and indeed remain the subject of controversy.

4. It appears that Mr. McMullen was initially very happy at what was achieved by the settlement and saw it as a rare success for him in his disputes with his landlord. However, the settlement which had been entered into did not achieve what had been hoped for and Mr. McMullen was then anxious to return to court.

5. At this stage, I should pause to explain that Ms. Madigan's evidence is and consistently has been that when Mr. McMullen asked her whether it would be possible to return to court, she went to Mr. Noel Clancy S.C. and asked him whether this was possible. She was told that it was and she then went back and relayed to Mr. McMullen what she had been told by Mr. Clancy.

6. The plaintiff sought to re-enter the matter before Costello J. on 11th February 1987. Costello J. refused to permit that to be done. He took the view that what was being brought before him was not a difficulty in working out the terms of a consent. His view was that the consent had been worked out, the agreement had been complied with, and that there had been no breach of the agreement that the parties had entered into. Instead, he was of the view that what had happened was simply that the plaintiff now believed that the agreement he had entered into had proved ineffective. It is of some note that Ms. Madigan has said that, a week before the unsuccessful attempt to re-enter the matter, she had met Mr. Alan Mahon in the Four Courts. Mr. Mahon had informed her that the defendant would be challenging the entitlement of the plaintiff to re-enter the matter and would be contending that the plaintiff did not have any right to re-enter pursuant to the settlement but that the settlement made provision only for liberty to apply. It is indeed the case that the settlement speaks of liberty to apply and not liberty to re-enter. Mr. McMullen's response was to initiate an action for damages in which he alleged professional negligence against Kent Carty and Co. In these proceedings he was represented by Collins Crowley and Company, Solicitors and by Mr. Séamas O'Tuathail, Barrister-at-Law. Kent Carty and Co., were represented by Giles Kennedy and Company, Solicitors, instructing Mr. Andrew Bradley S.C. and Mr. James Gilhooly B.L.

7. The matter came on for hearing before Carroll J. on May 5th 1992, and subsequent days, and she delivered a reserved judgment dismissing the plaintiff's claim. Her decision to dismiss the plaintiff's claim was based on the view that she had formed that the solicitors relied on the advice of senior counsel and, having relied on senior counsel's advice, a senior counsel whom the plaintiff had insisted be briefed, that there was no negligence on the part of the defendant solicitors.

8. Of particular significance in the context of the matter now before the Court is that Mr. Clancy was called as a witness by the

defendants. In the course of his direct evidence, Mr. Clancy indicated that he had at one stage during the settlement negotiations taken Mr. McMullen outside the Four Courts and walked him along the side of the Liffey and explained the situation to him. He said that he explained to Mr. McMullen that the terms of the settlement were such that if the terms of the settlement were not implemented it could be brought back before the court again. He also expressed the view that it was not simply a question of the agreement failing, but that there had been a total breach of contract so that re-entry was not wrong. He went on to say that if he was wrong at that stage, he accepted responsibility for that but that it was his view that this was not just a breach of an agreement, but a total breakdown of everything that had been agreed. Given the allegations that are now made by Mr. McMullen about what he says was the nature of the relationship between Kent Carty and the late Mr. Clancy at the time of his negligence action against his former solicitors, it is of interest that when Mr. Clancy was asked in the course of cross-examination about the evidence of Ms. Pamela Madigan, i.e., that she had gone to Mr. Clancy and put questions to him, the witness said that he honestly could not remember whether this had occurred.

9. Having lost before Carroll J., Mr. McMullen appealed unsuccessfully to the Supreme Court. Mr. McMullen's response to his failed appeal was to commence proceedings against Mr. Clancy. Mr. McMullen complained that his counsel had acted unprofessionally in giving evidence during the course of the negligence action before Carroll J. He contended that his counsel had betrayed him and defected to the side of his solicitor. Those proceedings came on for hearing before McGuinness J. on July 22nd 1999, and subsequent days. McGuinness J. delivered a reserved judgment on the 3rd September 1999, dismissing the plaintiff's claim. Mr. Clancy appealed and on the 15th March 2005, his appeal was dismissed.

10. Before going on to discuss the present proceedings which were commenced by the issue of a plenary summons on the 10th February 2000, it is appropriate to refer to one matter that occurred during the course of the hearing before McGuinness J. It appears that during the course of that hearing in July 1999, a number of files and books of documents were handed into court by both sides. One of those was a booklet of documents which, on its face, appeared to be a brief to counsel. It appears that this booklet may have been handed into court by the late Mr. Rory Brady S.C. who had appeared as counsel for Mr. Clancy. It seems his purpose in doing so was to draw the court's attention to the terms of the pleadings in the earlier litigation. When she delivered judgment on 3rd September 1999, McGuinness J. returned all of the papers which she had held in connection with the case to the court registrar who returned them to the parties. It appears that the booklet of documents which had been handed into the court by Mr. Brady was not given back to him or to his solicitor but was handed in error to the plaintiff. The booklet contained a seven page letter dated 17th May 1989, from Mr. Giles Kennedy, Solicitor, to Admiral Underwriting Agencies in London who had instructed him in relation to the defence of Kent Carty and Co. On the last page of that letter, the following paragraph appeared:-

> "On Friday, the 28th April 1989, our Mr. Kennedy took the opportunity to have an unofficial without prejudice word with Mr. Clancy. He advised Mr. Clancy as to what was happening to assess Mr. Clancy's attitude. Mr. Clancy advised that as far as he was concerned, the claimant did quite well and he would be in a position to give evidence that the claimant was advised of the situation. We were aware, at the time of our discussion, that Mr. Clancy was acting for the claimant instructed by Messrs. O'Connors in respect of a rather serious motor accident. Accordingly, it would appear as if Mr. Clancy may still have some influence over the claimant. As a tactic, we indicated to Mr. Clancy that our client, the insured herein, wished to join him in the proceedings and we were not keen to do so. This "little chat" might provide an opportunity and incentive to Mr. Clancy to dissuade the claimant."

11. Mr. McMullen was greatly exercised when he became aware of the contents of the letter of 17th May 1989. He sought to re-open the proceedings before McGuinness J. but she refused this and the letter then figured very prominently indeed in the appeal that he brought to the Supreme Court against the judgment of McGuinness J.

12. The letter of 17th May 1989, has also featured prominently in the present proceedings. The language employed by Mr. McMullen in his pleadings is somewhat unorthodox and rather than summarise it is more convenient to quote the plenary summons in full. It is in these terms:-

> "The plaintiff's claim is that on or about the 28th day of April 1989, the defendant in the full knowledge of the implications and consequences of his actions did use and employ undue influence, improper incentives and coercion to induce Mr. Noel A. E. Clancy S.C. to collaborate and undertake to give evidence without reference to privilege in the action entitled Michael Colin Geoffrey McMullen, Plaintiff v. Hugh A. Carty and Others, Practicing as Kent Carty and Co. of 48, Parnell Square, Dublin 1, to the complete detriment of his lay client's position in general and particular; which conspiracy arranged by this defendant, Mr. Kennedy was successful in defeating a well set out and just complaint, but which subsequently resulted in Mr. Clancy's being found guilty of breaches of the codes of conduct for barristers and also negligent by the High Court by judgment of Ms. Justice Catherine McGuinness.

The plaintiff seeks a declaration and damages in relation to the above as set out in his statement of claim".

13. The reference to a finding of negligence by the High Court arises from the fact that the order that was drawn up in the aftermath of the judgment of McGuinness J. erroneously recorded that the Court had found the defendant, Mr. Clancy, negligent.

14. The concluding portion of the statement of claim is in these terms:-

"So the plaintiff seeks- a Declaration that contrary to law, natural justice and the right of access to the courts, the defendant acted improperly in putting to the plaintiff's counsel "incentives" to ensure by underhand, deceitful and coercive means that the said counsel, Mr. Clancy, complied in the giving of privileged testimony against his lay client, the plaintiff, herein (whether or not the said evidence is deemed to have been true)

And the plaintiff claims damages for:

> (a) Unlawful and improper interference in the just resolution of a well set out claim in negligence in a matter which in normal circumstances is well within the day to day knowledge of a qualified practitioner.
>
> (b) Damages and or punitive damages for engaging in improper manipulation of evidence which should not have been given in the manner in which it was or at all, to the complete detriment of the plaintiff and the due and apposite resolution of a Civil Claim in Negligence.
>
> (c) Damages for entering into a conspiracy which as an Officer of the Court and a Practitioner of Law and as an Agent for his Clients' Underwriters/Insurers (Admiral Ireland), the defendant would positively have been fully aware to be a dangerous and manipulative arrangement.

(d) Damage/costs and expenses incurred as a direct result of the said interference; these to include the costs of the plaintiff's own solicitors who brought the action against Kent Carty, namely Collins Crowley and Co. together with the Taxed Bills of Costs which the defendant is presently using as a threat of bankruptcy as against this plaintiff.

(e) Damages for the distress and shame heaped upon this plaintiff in his losing his action against his former lawyers in whom he had placed such trust, the extreme worry of being threatened daily with a Hearing in Bankruptcy by this defendant with his Bills, which this Defendant was at all times fully aware had been attained fraudulently and with the unfair advantage of the knowledge that as early as May 1989, the compliance of the plaintiff's former Counsel, Mr. Clancy had been achieved with "little chats", "incentives" and improper coercion.

(f) General damages for the complete disruption of the plaintiff's life and well being.

(g) Such further and other relief as the Court shall deem fit and proper.

(h) The costs of this action.

15. While the Statement of Claim, in the section where Mr. McMullen seeks declaratory relief, contains a reference to whether or not the evidence of Mr. Clancy is deemed to be true, it is abundantly clear that the real case that Mr. McMullen makes is that his claim against Kent Carty was defeated because Mr. Clancy gave false evidence, in the process committing perjury, by accepting responsibly for erroneous advice which he had not in fact given.

16. Indeed, it is clear that this has long been Mr. McMullen's contention. McGuinness J. in the course of her judgment of 3rd September 1999, having referred to the practice of Mr. McMullen to use unorthodox language in his pleadings, set out to summarise the case he was seeking to make. She did so under three headings as follows:-

(1) The defendant [Mr. Clancy] by giving evidence for the defence in the 1992 negligence action against Kent Carty and Company was in breach of his duty of confidentiality to his client and of his fiduciary duty to his client. Related to this was the defendant's breach of various aspects of the Code of Conduct of the Bar of Ireland.

(2) The plaintiff asserts that the defendant gave untrue evidence at the hearing of the negligence action before Carroll J. In addition he asserts that the defendant gave this evidence by prior arrangement with Kent Carty and Co. or with the solicitors then acting for them [Giles J. Kennedy and Co.] thus betraying his client and acting in a way directly opposed to his client's interests.

(3) The plaintiff claims that the defendant acted negligently in failing to advise him properly in regard to the nature of the settlement in 1985 and subsequently in regard to the possibility of re-entry of the proceedings in 1987. As a result he suffered loss and damage due to the ineffective settlement and due to the Order for costs made against him at the time of the attempted re-entry of the proceedings in 1987.

17. At this stage it is the second paragraph of the summary formulated by McGuinness J. that is of interest. The suggestion that by giving evidence Mr. Clancy had breached a duty of confidentiality that he owed to Mr. McMullen cannot survive the decision of the Supreme Court in the case of McMullen v. Carty (Unreported, Supreme Court, 27th January 1998). In that case the main submission made by Mr. McMullen, by that stage appearing in person, to the Supreme Court was that Mr. Clancy ought not to have given evidence having regard to his duty of confidentiality. In passing it may be noted that this argument was advanced, notwithstanding that no objection was taken in the trial court to Mr. Clancy giving evidence, at a time when Mr. McMullen was represented by solicitor and counsel. Lynch J. characterised the submission as misconceived. The Court made clear that Mr. McMullen, in suing his former solicitors, had impliedly waived privilege and that Mr. Clancy was accordingly bound to answer questions put to him in court. There is a further reason why it is clear that the focus has to be on whether Mr. Clancy gave false evidence in order to defeat Mr. McMullen's claim at the behest of Mr. Kennedy. The hearing before Carroll J. saw Mr. Clancy and Mr. Mr. Mullen in conflict on aspects of the evidence. Mr. Clancy for example, gave evidence that he had walked Mr. McMullen along the Liffey and explained the situation to him and counsel for the plaintiff put it to Mr. Clancy that that had not happened. If the evidence given by Mr. Clancy was true, then it must follow that the version put forward by Mr. McMullen was not, whether consciously and deliberately or as a result of failed memory. If the evidence of Mr. Clancy was actually true, then Mr. McMullen's complaint is that his prospects of persuading the Court to accept an untrue version were reduced by the decision of Mr. Clancy to give true evidence. The proposition only has to be stated for its absurdity to be evident.

18. Is there any evidence to support the suggestion that Mr. Clancy was induced, persuaded, coerced, manipulated or tricked into giving false evidence by Mr. Giles Kennedy? The obvious starting point for consideration of this issue is the letter of 17th May 1989, and in particular the paragraph on the last page which I have quoted above. On its face the document does not offer any support whatever for the suggestion that Mr. Kennedy was seeking to influence, or indeed dictate to Mr. Clancy what evidence he should give during the course of a pending negligence action. On the contrary, it seems clear that what Mr. Kennedy hoped to achieve was that Mr. Clancy would speak to Mr. McMullen and persuade him to discontinue the proceedings. That is clear from the paragraph I have already quoted but is made even clearer if one has regard to the contents of the last paragraph of the letter. It is in these terms:-

"As a last effort to prevent Underwriters incurring costs, we have written a without prejudice letter to the claimant's solicitor suggesting that Underwriters would be prepared to waive costs to date if the claimant discontinues the proceedings now. This might provide an incentive to the claimant to discontinue the proceedings if Mr. Clancy has spoken to him. If this tactic does not prove successful, and we doubt if it will, the case will simply have to go to trial".

19. What emerges from the letter is that the tactic that was being pursued by Mr. Kennedy, and he recognised its limited prospects of success, was one designed to persuade Mr. Clancy to discontinue the proceedings. In pursuit of the same tactic, it appears that at a later stage Mr. McMullen was offered the prospect of having costs orders that had been made against him, when he had sued a number of other solicitors at an earlier stage, waived. While the approach to Mr. Clancy would seem to have been designed to persuade him to speak to Mr. McMullen and urge that the proceedings against Kent Carty be discontinued, there is no suggestion whatsoever that this ever actually happened.

20. The plaintiff has secured access to two documents on foot of an order of the Supreme Court made in the context of a discovery application: a letter to Mr. Clancy from Mr. Kennedy dated the 14th May 1989, and a memorandum to his file dictated by Mr. Kennedy and dated 28th April 1989 which was prepared in the aftermath of his meeting with Mr. Clancy at the Four Courts. Neither of these documents offers any support whatever to the suggestion that Mr. Kennedy exercised influence over the nature or content of the evidence that Mr. Clancy would give. It is, though, of some interest that the memorandum prepared by Mr. Kennedy indicates that it

was at the Four Courts meeting that he learned for the first time that Mr. McMullen was pursuing a personal injuries action and that Mr. Clancy was acting for him in that regard. Mr. Kennedy has given evidence to that effect and I accept that was the position even if the contrary impression would be obtained from reading the letter of 17th May 1989.

21. In the course of the hearing Mr. McMullen has submitted extracts from transcripts of hearings in the Supreme Court on 17th December 2003 and 27th July 2005. It should be explained that on these days the Supreme Court was dealing with an appeal against the order of O'Caoimh J. striking out the present proceedings against Mr. Kennedy. In allowing the appeal the Supreme Court expressed the view that the jurisdiction to strike out proceedings, recognised by cases such as Barry v. Buckley [1981] IR 306, was one to be exercised sparingly. Of interest in the present context is that it is clear from exchanges between Fennelly J. and the plaintiff during the course of the hearing on 27th July 2005, that Mr. McMullen was indicating to the Court that if the case was permitted to proceed to trial he would be able to produce evidence of contacts and discussions between Mr. Kennedy and Mr. Clancy later in time to the discussion that took place in April 1989 and that this evidence would satisfy a court that other steps had been taken to influence the evidence that would be given by Mr. Clancy. No such evidence has been adduced and the only evidence on this point is the direct and emphatic denial of any such contact or efforts by Mr. Kennedy. In so far as it has been suggested at various stages that Kent Carty were party to such an arrangement that is denied in strong terms by Mr. Hugh Carty and by Ms. Pamela Madigan.

22. However, the absence of direct evidence is far from the end of the matter. The occasions when a party would be able to produce direct evidence of an attempt to suborn perjury are likely to very rare. In the nature of things if such conduct occurs, it is likely that only the individual making the approach and the target of the approach will be present. Unless the approach is instantly rebuffed, it is unlikely either party to the discussion would provide information to another.

23. It seems to me that it is necessary in these circumstances to consider in detail what is known about such contact as it has been established there was between Mr. Clancy and Mr. Kennedy, and to embark on an examination of the surrounding circumstances in order to see whether there is a basis for drawing an inference that the evidence given by Mr. Clancy was influenced by Mr. Kennedy. In the absence of some indication that the evidence of Mr. Clancy had been subjected to outside influence, there would appear to be little basis for drawing the inference that Mr. Clancy had been approached and his evidence discussed with him before he came to Court. As I have indicated, the obvious starting point for that exercise is the meeting in the Four Courts in late April 1989 in respect of which we have the memorandum created by Mr. Kennedy for his file and his subsequent report by way of letter to the underwriters.

24. Mr. Kennedy has stated that there was nothing untoward in the contact that took place. Regrettably, I cannot agree. Mr. Kennedy has suggested that with the benefit of hindsight some of the language of the letter and in particular the reference to "incentive" could have been improved upon. However, both the memorandum to file and the letter are written in clear and ordinary language and it is to this to which one has to have regard. It seems to me that the only interpretation of the letter that is open, is that Mr. Kennedy sought to enlist the support of Mr. Clancy and in particular sought to have him assist the defendants in the negligence action by encouraging Mr. McMullen to discontinue the proceedings. How was Mr. Clancy's assistance to be enlisted? That was to be achieved by drawing his attention to the fact that if the case proceeded there was at least a possibility that Mr. Clancy would find himself joined in the proceedings as a third party. If he brought such influence as he had over Mr. McMullen to bear and persuaded him to drop the case, then the prospect of being joined as a third party disappeared. The inducement to influence Mr. McMullen was that if Mr. Clancy succeeded he would be doing himself a favour by removing the threat that hung over him as long as the negligence proceedings remained in being. The reverse of that was of course that if Mr. McMullen did not discontinue the proceedings then the prospect of Mr. Clancy being joined as a third party remained live.

25. It has been suggested that the approach to Mr. Clancy might be seen as having been in ease of Mr. McMullen as it would save him from the risks associated with pursuing a negligence action which, as constituted, appeared very weak indeed, facing major, and very probably insurmountable, obstacles both in relation to liability and quantum. It has also been suggested that the contact that occurred might be seen as having been in the nature of a professional courtesy, one member of the legal profession informing another, as a matter of courtesy, that there was a possibility he would be instructed to sue his colleague.

26. I am quite unable to take such a benign view. I regard the contact as clearly improper and one which I would deprecate in strong terms. It was quite wrong for a solicitor to approach a counsel who had previously acted and offer him what was in effect a material advantage if he intervened in an action in respect of which he was not instructed and brought such influence as he had to bear. In my view, that impropriety was compounded when the strategy was pressed even after Mr. Kennedy became aware that there was a continuing professional relationship between Mr. Clancy and Mr. McMullen in the context of an ongoing personal injuries action.

27. In the absence of any direct evidence of further contact between Mr. Clancy and Mr. Kennedy, Mr. McMullen focuses on aspects of the evidence given by Mr. Clancy in the negligence action which he says are unusual and which therefore, raise the suspicion that in giving that evidence he must have been subjected to influence.

28. As I understand it, Mr. McMullen takes the view that it is unusual for someone against whom, until that point, there had been no allegation of wrongdoing to accept responsibility for what has gone wrong. Whether there is substance to that view depends on whether the person making the admission had in fact erred. I would certainly accept that it would be highly unusual for someone who had done nothing wrong to give evidence that he was in fact a wrongdoer. On the other hand, if the person called to give evidence was in fact responsible for the errors that had been made, one would hope and expect that he would admit this. Accepting responsibility for one's actions is what one would expect of a member of the Bar of Ireland.

29. Mr. McMullen points to two ways in which he says the evidence was surprising and inconsistent with what Mr. Clancy had said on previous occasions. He said that these inconsistencies give rise to an inference that something untoward had occurred.

30. He points first to what Mr. Clancy is recorded as having said by Mr. Kennedy in his letter to the underwriters. Mr. Kennedy records Mr. Clancy as saying that as far as he was concerned Mr. McMullen had done quite well and he would be in a position to give evidence that Mr. McMullen was advised of the situation. It is said there is a divergence between saying that Mr. McMullen had done quite well and then accepting responsibility for what had gone wrong. In my view, if one reads the evidence of Mr. Clancy in full, as I have done from the transcript submitted by Mr. McMullen, it does not appear that there was any real divergence at all. The sense one gets is of satisfaction; that in settling the case which was likely to be lost, he had achieved something in the nature of a heel against the head. That is consistent with the feeling of euphoria that apparently prevailed when the case settled and with the mood struck by him in his note to his instructing solicitors acknowledging the discharge of his fees when he commented that it would be idle to deny that the outcome of the Michael McMullen case gave him great satisfaction. It also seems to me, reading the evidence of Mr. Clancy, that even at that stage, Mr. Clancy did not have a full appreciation of the distinction others were drawing between liberty to apply and liberty to re-enter. So, while describing the walk he took along the Liffey, he said that he told Mr. McMullen that if the

terms of the settlement were not implemented the action could be brought back before the Court, without adverting to the fact that Costello J. took the view that the plaintiff was seeking to expand his rights by re-entering the proceedings as the settlement had not achieved what had been hoped. What emerges from the evidence of Mr. Clancy is that he felt, and he appeared to so feel even as he gave evidence, that re-entry was not wrong. As he put it he was the senior counsel in the case and "the buck stood (sic) with him". If he was incorrect in his belief that re-entry was not wrong he accepted responsibility for it, but in his view it was not just a breach of the agreement; this was a total breakdown of everything that had been agreed.

31. It seems to me that far from the remarks that were attributed to Mr. Clancy by Mr. Kennedy in his letter giving rise to disquiet, because these remarks were followed by a sudden unexpected change of position, the remarks in fact anticipated his subsequent evidence. The letter records Mr. Clancy as having said that he would be in a position to give evidence that Mr. McMullen was advised of the situation. That was the evidence that he subsequently gave during the hearing before Carroll J.

32. The other area that Mr. McMullen attached significance to is a telephone conversation that he had with Mr. Clancy when he rang him on the evening of Monday, 25th May, 1987. Mr. McMullen secretly recorded the conversation and has had a transcript prepared. I should preface my consideration of this issue by saying that I do not believe that it is at all to Mr. McMullen's credit that he would initiate a conversation with someone he regarded as a friend and then proceed secretly to record the conversation.

33. The transcript is not timed but as it runs to 27 pages the call would seem to have been a fairly lengthy one. Mr. McMullen has focused on one specific sentence which records Mr. Clancy as saying "I wasn't even shown the agreement – it was done by junior counsel". It certainly seems that in this abstract Mr. Clancy was distancing himself from the settlement. The remark cannot have been entirely accurate as the settlement, somewhat unusually in my experience, was actually signed by Mr. Clancy as a witness. Perhaps of greater significance is that at no stage does Mr. Clancy refer to walking along the Liffey and explaining the situation to Mr. McMullen. However, that may be explained by the fact that Mr. Clancy was clearly finding the conversation an awkward one; it began with him expressing doubts that they should be conversing when he had been led to understand by Mr. McMullen's solicitors that consideration was being given to suing him.

34. The phrase to which Mr. McMullen attaches such significance is not representative of the overall thrust of the conversation. At some stages Mr. Clancy is complaining about the unfairness of the criticisms that are being directed towards him, saying that he had won the case for Mr. McMullen after the latter had been told by seven senior counsel, three of them at that point judges of the High Court, that he had no case and at other stages Mr. Clancy was telling Mr. McMullen that nothing had been lost as it was open to him to bring the matter to court by way of an application for an injunction. I do nonetheless accept that the conversation certainly does not show Mr. Clancy accepting responsibility for what went wrong. However, I believe it would be an entirely unjustified leap in the dark to conclude that the subsequent acceptance of responsibility when answering questions that were posed to him in court was because he had been induced to do so or coerced into doing so by Mr. Kennedy. To so conclude would be to engage in the wildest speculation.

35. Quite simply, the plaintiff has failed to put any evidence whatever before the Court to support his theory that there was further contact between Mr. Kennedy and Mr. Clancy which resulted in Mr. Clancy giving the evidence that he did. That is Mr. McMullen's theory, but it is a theory that is entirely unsupported. Having regard to the onus of proof, which is of course on the plaintiff, that would be sufficient to dispose of the case. However, I propose to examine some further aspects of the evidence to see whether there is support for the alternative proposition which is that Mr. Clancy did not give false evidence.

36. At the outset it is worth pausing to reflect on the personalities present for the settlement discussions of July 1985. Mr. Clancy was a Senior Counsel, in terms of the litigation, he was captain of "Team McMullen". It is certainly to be expected that Senior Counsel, the leader in the case, would take a lead role when it came to any settlement negotiations. I believe I am entitled to take judicial notice of the fact that that is what happens day in, day out. If there are queries in relation to a settlement, it is to be expected that they would be directed to Senior Counsel, not just because of his status as a member of the Inner Bar, but because of his role as a lead negotiator. That general observation has a particular relevance to the settlement talks that took place on 12th July, 1985. Mr. Clancy was not just any Senior Counsel, he was Mr. McMullen's hand-picked Senior Counsel, who had been briefed at the insistence of Mr. McMullen despite the reservations expressed by his solicitors. The relationship between Mr. McMullen and the late Mr. Clancy went well beyond the normal relationship that exists between counsel and lay client. There was regular contact between them in the absence of the instructing solicitor to the extent that Mr. Clancy visited Charleville Castle. In these circumstances, it would be very surprising if Mr. Clancy was not at the forefront of the negotiations and if Mr. Clancy was not asked to explain and comment on the terms of the settlement.

37. I have referred to what might be expected to have happened both by reference to what generally happens and to the nature of the individual relationships. However, that is not the end of the matter because this is a topic on which direct evidence is available. Ms. Pamela Madigan, solicitor, has given evidence during the course of the hearing before me as indeed she gave evidence at the earlier hearings before Carroll J. and McGuinness J. She was understandably keen to stress that at this remove of 26.5 years her memory is not as clear as it once was. She nonetheless comes across as a very impressive careful witness as she recalled events that had occurred shortly after she was admitted to practice as a solicitor. I have no hesitation in accepting her evidence and in particular I accept her account that she was approached by Mr. McMullen who raised the issue of the entitlement to return to court, that her response, and this is what was to be expected of a newly qualified solicitor, was to go to Senior Counsel, tell him what she had been asked by the client and to then communicate counsel's response to her client. Her evidence before Carroll J. in May 1992 was to the same effect and this aspect was not the subject of any particular challenge when she was cross-examined. If Ms. Madigan's evidence, that she sought advice from Mr. Clancy, is correct then he would have had to acknowledge that he advised in relation to the settlement when questioned in Court unless he was prepared to commit perjury.

38. It is of considerable significance that the response of Kent Carty to the criticisms made of them in relation to the negotiation of the settlement of the nuisance action was to say that they acted throughout on the advice of Senior Counsel and that this was something that was well known to Mr. McMullen. Correspondence between Kent Carty and their insurance brokers which was put before the Court by Mr. McMullen contained a specific statement by Mr. John Carty, a partner in the firm that the settlement of Mr. McMullen's case was negotiated by Mr. Clancy and "advised to Mr. McMullen by Mr. Clancy" and that at all times they relied on Senior Counsel.

39. The defence filed by Giles Kennedy and Company on behalf of the defendants in the negligence action contained the following pleas at paragraphs 2 and 3:-

> "2. …the said settlement was negotiated on behalf of the plaintiff by Noel Clancy, Senior Counsel for the defendant in the said action.

> 3. The plaintiff was apprised of the proposed terms of settlement by his said Senior Counsel and not by the defendants or any of them."

40. There can be no question of Mr. McMullen having missed the significance of the pleas or not having adverted to the terms of the pleadings delivered in litigation at a time when he was represented because the evidence has established that the defence was delivered only after a successful application to set aside a judgment which had been obtained by default. The defence in draft form was exhibited in the affidavit to ground the application to set aside the judgment and there was unchallenged evidence that Mr. McMullen was present in court for the application to set aside.

41. There is a further aspect of the evidence of Pamela Madigan which requires consideration. She has given evidence that, following Costello J's refusal to permit the matter to be re-entered on 11th February 1987, after people left court she took Mr. Clancy aside and explained to him how serious the development was in the light of the instructions given by Mr. McMullen at the time of the settlement. Her evidence was that Mr. Clancy, Mr. McMullen and herself then moved towards the Law Library and at that stage Mr. Clancy said he was accepting responsibility for the matter not having been successful. Of particular note in the context of the present controversy is that Mr. McMullen put in evidence a two-page letter dated 9th June, 1987, addressed to him from Kent Carty which was written by Ms. Madigan. It included the following statement:-

> "We confirm that no liability is attached to ourselves in this. In fact, Mr. Noel Clancy, S.C., confirmed both to ourselves and to yourself that responsibility lay with him."

42. It does not appear that Mr. McMullen ever responded to this letter or that he ever took issue with the contention that he had been told by Mr. Clancy that responsibility lay with him. This is particularly significant given that it was Mr. McMullen's practice to prioritise his correspondence with Kent Carty. By way of example, on 23rd June, 1987, he wrote a letter to Mr. Hugh Carty which began:-

> "Thank you for your letter of June 18th which was awaiting my return from the High Court yesterday evening so I am replying by 1st available post."

Given the case that Mr. McMullen now seeks to make and the inferences that he asks the Court to draw from the nature of the evidence given by Mr. Clancy during the negligence action, I find it extraordinary that Mr. McMullen would not have challenged the assertion that Mr. Clancy had told him the responsibility rested with him, the Senior Counsel.

43. Nothing in the available evidence offers support for the suggestion that there was untoward contact between Mr. Kennedy and Mr. Clancy subsequent to the Four Courts meeting in April 1989. In particular, there is no basis for any suggestion that the evidence given by Mr. Clancy was so surprising or unexpected as to call for an explanation. On the contrary, the evidence given was very much along the lines of evidence which would be expected to be given by a truthful and conscientious witness. That that is so goes a considerable distance to undermine any suggestion that the evidence had been procured by improper means. Despite what had been indicated to the Supreme Court during the course of the appeal from the order of O'Caoimh J. striking out the present proceedings, no additional evidence of contacts involving threats or inducements in relation to the giving of evidence has been forthcoming.

44. The plaintiff's case has not moved beyond the Four Courts meeting of late April 1989. I have already made clear that, in my view, the letter of 17th May, 1989 offers no support for a suggestion that the evidence given by Mr. Clancy during the negligence action was procured or influenced by threats or inducements. I am reassured in that regard by the fact that my views would seem to accord with views expressed by Fennelly J. when giving judgment in the case of *Mullen v. McGinley representing the estate of the late Noel Clancy* [2005] 2 IR 445. In the course of the judgment, he commented:-

> "Whatever the Kennedy letter conveys, it is that Mr. Kennedy sought to persuade Mr. McMullen to withdraw his claim. Mr. McMullen has given no evidence at any stage and does not now suggest that any such approach was in fact made to him. To that extent, therefore, the "little chat" failed in its purpose. Furthermore, the letter does not suggest that Kent Carty and Co, Ms. Madigan or Mr. Hugh Carty played any part in this unattractive stratagem.
>
> What support does the Kennedy letter offer for the conspiracy theory: that Mr. Kennedy, together with Mr. Clancy and the two solicitors mentioned arranged that Mr. Clancy would accept (falsely or otherwise) that he would take responsibility for the settlement? The only sentence referable to the evidence to be given by Mr. Clancy was: *"Mr Clancy advised that as far as he was concerned, the claimant did quite well and he would be in a position to give evidence that the claimant was advised of the situation.'"* I cannot find any evidence whatsoever in this sentence to support Mr. McMullen's conspiracy theory. Firstly, Mr. McMullen was aware that his advisers considered the settlement to be a good one. In the transcribed telephone conversation of 25th May 1987, he acknowledged that Mr. Clancy had told him that the settlement had *been "the greatest moral victory of [his] career."* Secondly, there was never any doubt that the plaintiff *"was advised of the situation."* Given the context, it can be assumed that *"the situation"* was that the action could be re-entered. However, the transcribed telephone conversation of 25th May 1987 shows that Mr. McMullen was fully aware that Kent Carty and Co were placing the blame for the mistake on Mr. Clancy. Indeed, Mr. Clancy himself several times referred to his belief that Mr. McMullen was suing him. It is true that Mr. Clancy did not accept responsibility in that conversation. At one point he even claimed not to have been shown the agreement. Nonetheless, Mr. McMullen was in possession of all the information that would have been needed to sue Mr. Clancy, if he had wanted to. Most importantly, the Kennedy letter does not offer any support at all for the proposition that Kent Carty and Co were party or privy to any arrangement regarding Mr. Clancy's evidence. The evidence of Ms. Madigan and of Mr. Carty, given in the High Court remains undisturbed and there is nothing in the Kennedy letter to displace it. This is sufficient to dispose of the Kennedy letter."

Mr. McMullen, I have no doubt, would be quick to point out that Fennelly J. was speaking before access became available to the two documents ordered to be discovered by the Supreme Court. However, neither of these documents advances the plaintiff's theory in anyway whatsoever.

45. It remains the case that Mr. McMullen has advanced a theory and has failed to produce any evidence whatever in support of it. On the balance of probabilities there was no contact between Mr. Kennedy and the late Mr. Clancy in the course of which pressure was applied to Mr. Clancy to give evidence or to influence the contents of the evidence that he would give. The available evidence all tends to support the denials by Mr. Kennedy that there was any such contact. In these circumstances, I am left with no alternative but to dismiss the plaintiff's claim both for declaratory relief and damages.